

DIRECTORATE-GENERAL FOR EXTERNAL POLICIES
POLICY DEPARTMENT



**THE INVESTMENT
CHAPTERS OF THE EU'S
INTERNATIONAL TRADE
AND INVESTMENT
AGREEMENTS**

**IN A COMPARATIVE
PERSPECTIVE**

INTA



STUDY

The investment chapters of the EU's international trade and investment agreements in a comparative perspective

Investor-State Dispute Settlement (ISDS) clauses in international investment agreements have traditionally been based on an approach which may be termed 'light touch regulation' of investment protection. The avenue taken by the recently negotiated EU draft agreements, the Comprehensive Economic and Trade Agreement (CETA) and the EU-Singapore Free Trade Agreement (EUSFTA), can be described as 'more comprehensive regulation'. Likewise, EUSFTA and CETA provide a rather detailed body of law on substantive standards for the protection of foreign investment. While this may add to the clarity and predictability of the current regime of international investment law, it may also lead to a reduced standard of protection. Compared with other agreements, EUSFTA and CETA have attempted to rebalance the protection of private property and the host state's regulatory autonomy. In terms of the regulation of ISDS proceedings, EUSFTA and CETA preserve its principle characteristics but deliver moderate change in five areas: (1) consultation mechanisms, (2) the relationship between ISDS and domestic remedies, (3) the appointment and conduct of arbitrators, (4) cost allocation, and (5) transparency rules. This study proposes (1) further development regarding the coordination between effective domestic legal systems and ISDS and (2) the start of negotiations for the establishment of a permanent appeals mechanism in a regional or bilateral context.

This paper was requested by the European Parliament's Committee on International Trade.

English-language manuscript was completed on 29 September 2015.

Printed in Belgium.

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The authors would like to thank Dr. Roland Kläger and Barbara von Gayling-Westphal for helpful comments on earlier drafts of this study. Thanks are also due to Anna Dolejsia, Sonja Hilgert, and Daniel Ncube for their editorial support.

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This paper will be published on the European Parliament's online database, 'Think tank'.

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ISBN: 978-92-823-8005-5 (PDF)

ISBN: 978-92-823-8004-8 (print)

doi: 10.2861/520545 (PDF)

doi: 10.2861/727590 (print)

TABLE OF CONTENTS

1	Executive Summary	8
2	Introduction	12
3	Preliminary remarks	15
3.1	Investment treaties: ‘substantive standards’ and their enforcement by means of ‘investor-State dispute settlement’	15
3.2	The diversity of regulatory approaches and interpretation	16
3.3	The ‘right to regulate’	18
4	Investor-State Dispute Settlement (ISDS) Clauses	19
4.1	Introduction: Common features and appreciation of ISDS	19
4.2	Amicable settlement of a dispute and the consultation mechanisms	22
4.2.1	Objective and design of consultation mechanisms	22
4.2.2	Comparison of EUSFTA, CETA, ECT, Germany-Jordan BIT, and the USA-Lithuania BIT	23
4.2.2.1	Informal consultation: call for amicable settlement	23
4.2.2.2	‘Waiting clauses’ – setting up a time frame for more formalised consultations	23
4.2.2.3	Towards a proceduralization of the consultation process	24
4.2.2.3.1	Specifying time requirements of the process	24
4.2.2.3.2	Defining the dispute: specifying information to be provided	25
4.2.2.4	Other formalised mechanisms to facilitate amicable settlement	26
4.2.2.5	Success of consultation mechanism depends on the context of the case	26
4.2.3	Table: Amicable settlement of a dispute and the consultation mechanisms	27
4.3	Access to ISDS	32
4.3.1	Consent and its conditions	32
4.3.2	Comparison of EUSFTA, CETA, ECT, Germany-Jordan BIT, and the USA-Lithuania BIT	34
4.3.2.1	Limits on State’s consent with respect to the breach of certain substantive protections or measures effecting certain economic activity	34
4.3.2.2	Timeframe up to the submission of claims to arbitration	35
4.3.2.3	Formal requirements for the submission of a claim	36
4.3.2.4	Arbitration institutions and rules	36
4.3.2.5	The number of adjudicators	36
4.3.2.6	ISDS and its relation to other international dispute settlement mechanisms	37
4.3.3	Table: Access to ISDS	39
4.4	ISDS and its relation to domestic remedies	48

4.4.1	Different approaches to regulating a relationship: local remedies rule, fork in the road, and waiver	50
4.4.2	No appeals power over domestic courts – no overturn of domestic laws	51
4.4.3	Comparison of EUSFTA, CETA, ECT, Germany-Jordan BIT, and the USA-Lithuania BIT	52
4.4.3.1	‘Lax approach’ and ‘half fork’	52
4.4.3.2	The EU agreements’ half-hearted solutions	52
4.4.4	Alternative, more balanced approaches: elastic local remedies rule and others	53
4.4.5	Table: ISDS and its relation to domestic remedies	56
4.5	Appointment and qualification of arbitrators	58
4.5.1	The typical appointment regime and its criticism	58
4.5.2	Qualification of arbitrators	59
4.5.3	Comparison of EUSFTA, CETA, ECT, Germany-Jordan BIT, and the USA-Lithuania BIT	59
4.5.4	The question of appointment and qualification against the backdrop of expected reforms	60
4.5.5	Table: Appointment and qualification of arbitrators	61
4.6	Code of conduct for arbitrators	64
4.6.1	ECT, the Germany-Jordan BIT, and the USA-Lithuania BIT: Relying on arbitration institutions	64
4.6.2	EUSFTA: The Code of Conduct	64
4.6.3	CETA: The IBA Guidelines and a possible adoption of an own code of conduct	64
4.6.4	Table: Code of conduct for arbitrators	66
4.7	Transparency of and public access to arbitral proceedings	70
4.7.1	Transparency of investment arbitrations	70
4.7.2	Public access to investment arbitrations	71
4.7.3	Comparison of EUSFTA, CETA, ECT, Germany-Jordan BIT, and the USA-Lithuania BIT	72
4.7.3.1	Publication of documents	72
4.7.3.2	Public hearings	73
4.7.3.3	Third-party submissions	73
4.7.4	Table: Public access to arbitral proceedings	75
4.8	Preventing frivolous claims	87
4.8.1	ISDS increasingly a strategic device	87
4.8.2	Comparison of EUSFTA, CETA, ECT, Germany-Jordan BIT, and the USA-Lithuania BIT	87
4.8.2.1	Terminology	88
4.8.2.2	Relationship of provisions on ‘Claims Manifestly Without Legal Merit’ and ‘Claims Unfounded as a Matter of Law’	88
4.8.2.3	Effectiveness	89
4.8.3	Table: Preventing frivolous claims	90

4.9	Remedies	92
4.9.1	General public international law and international investment law – reversing the relationship of rule and exception	92
4.9.2	Comparison of EUSFTA, CETA, ECT, Germany-Jordan BIT, and the USA-Lithuania BIT	94
4.9.3	Table: Remedies	95
4.10	Costs	97
4.10.1	Origins of cost and current state of regulation	97
4.10.2	Comparison of EUSFTA, CETA, ECT, Germany-Jordan BIT, and the USA-Lithuania BIT	98
4.10.3	Working towards cost reduction and an SME-friendly access to justice	99
4.10.4	Table: Costs	100
4.11	Enforcement of awards and challenge of awards	101
4.11.1	Comparison of EUSFTA, CETA, ECT, Germany-Jordan BIT, and the USA-Lithuania BIT	102
4.11.2	Table: Enforcement of awards	103
4.12	Permanent court and appellate mechanism	105
4.12.1	Permanent investment court – multi-, pluri- or bilateral?	105
4.12.1.1	International (multilateral) investment court	106
4.12.1.2	Permanent court for individual agreements; bi- or plurilateral	107
4.12.2	Appellate mechanism	108
4.12.2.1	General vs. treaty based appellate mechanism	109
4.12.2.2	Ad-hoc vs. permanent appellate mechanism	109
4.12.3	Table: Appellate mechanism	111
4.13	Conclusions and outlook: Of cosmetic changes and ‘new’ systems	112
5	Substantive Protection Clauses	113
5.1	National Treatment	113
5.1.1	The parameters for comparison	114
5.1.2	The scope of protection: de facto discrimination, temporal dimension, list approaches	115
5.1.3	Grounds of justification for different treatment	115
5.1.4	Brief comparison of EUSFTA, CETA, ECT, Germany-Jordan BIT, and the USA-Lithuania BIT	116
5.1.4.1	Parameters for comparison: ‘like situations’ and sub-national level	116
5.1.4.2	Market access and exclusion of specific sectors	117
5.1.4.3	General and specific grounds of justification	118
5.1.5	Table: National Treatment	120

5.2	Most-favoured nation treatment	126
5.2.1	The parameters for comparison	126
5.2.2	The scope of protection: de facto discrimination, temporal dimension, list approaches	126
5.2.3	Grounds of justification for different treatment	127
5.2.4	Brief comparison of EUSFTA, CETA, ECT, Germany-Jordan BIT, and the USA-Lithuania BIT	128
5.2.4.1	Parameters for comparison: 'like situations' and sub-national level	128
5.2.4.2	Market access and other clarifications on the general scope of the MFN standard	128
5.2.4.3	General and specific grounds of justification	129
5.2.5	Table: Most-favoured nation treatment	130
5.3	Conclusion so far: A trend to more detailed exceptions within comparative standards	136
5.4	Fair and equitable treatment	136
5.4.1	Customary international law or autonomous standard	137
5.4.2	Contents of the FET standard	137
5.4.2.1	Legitimate expectations	138
5.4.2.2	Denial of justice	139
5.4.2.3	Due process	139
5.4.3	New approaches in drafting of FET	139
5.4.4	Brief comparison of EUSFTA, CETA, ECT, Germany-Jordan BIT, and the USA-Lithuania BIT	140
5.4.4.1	Minimum standard vs. independent standard	140
5.4.4.2	Protection of the 'establishment' phase	140
5.4.4.3	Closed vs. open ended content	141
5.4.5	Table: Fair and equitable treatment	143
5.5	Free transfer	145
5.5.1	Key elements	145
5.5.2	Brief comparison of EUSFTA, CETA, ECT, Germany-Jordan BIT, and the USA-Lithuania BIT	145
5.5.2.1	Intensity of protection and general scope	145
5.5.2.2	Exceptions	146
5.5.3	Table: Free transfer	147
5.6	Expropriation	153
5.6.1	Key elements	153
5.6.2	Brief comparison of EUSFTA, CETA, ECT, Germany-Jordan BIT, and the USA-Lithuania BIT	155
5.6.2.1	Requirements for a lawful expropriation	155
5.6.2.2	New approaches to the definition of indirect expropriation – securing more regulatory autonomy	155
5.6.3	Moving towards a proportionality test	156

5.6.4	Table: Expropriation	157
5.7	Umbrella clause	161
5.7.1	The scope of commitments ascending to the level of a treaty claim	161
5.7.2	The effect on jurisdiction	162
5.7.3	Brief comparison of EUSFTA, CETA, ECT, Germany-Jordan BIT, and the USA-Lithuania BIT	162
5.7.4	The future of umbrella clauses	163
5.7.5	Table: Umbrella clause	164
5.8	Conclusions and outlook: Of 'light touch' and 'more comprehensive' regulation	165
6	General Conclusions: Inseparability of Substantive Protection Standards and Dispute Settlement	166
7	Bibliography	167

1 Executive Summary

The European Parliament's resolution on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP) summoned the European Commission to ensure a non-discriminatory treatment of foreign investment and to come forward 'with a new system for resolving disputes between investors and states which is subject to democratic principles and scrutiny'¹.

With a view to better understanding and assessing *the EU's progress made in developing a balanced and forward-looking approach in its international investment policy*, this study provides a concise comparative perspective on selected substantive and procedural provisions found in five investment treaties: The 2014 draft investment chapters contained in the comprehensive free trade agreements negotiated with Singapore (EUSFTA) and Canada (CETA) are compared among each other and with investment-related clauses in the 1998 Energy Charter Treaty (ECT), the 2001 USA-Lithuania and the 2010 Germany-Jordan bilateral investment treaties (BIT).

Overall, while the ECT, the USA-Lithuania BIT, and the Germany-Jordan BIT follow a traditional approach which may be termed '*light touch regulation*' of investment protection, the avenue taken by the EU agreements can be sketched as '*more comprehensive regulation*'. In respect of both substantive standards of protection of foreign investment as well as dispute settlement provisions, EUSFTA and CETA provide a rather detailed body of law. Their regulatory approach may be said to add some clarity and predictability to the current regime of international investment law by reducing the leeway tribunals would enjoy when applying and interpreting broadly-drafted clauses. If compared to the other agreements, EUSFTA and CETA also attempt to rebalance the protection of private property and the host State's regulatory autonomy in order not to put at risk the legitimate pursuit of general welfare objectives by the State parties to the agreements.

What concerns substantive standards of protection of foreign investment, national treatment protection during the operation of a foreign investment is contained in all compared investment agreements. CETA even extends the national treatment standard to market access, i.e. the making of an investment: However, it is only enforceable in State-State arbitration. While the ECT, the USA-Lithuania BIT, and the Germany-Jordan BIT set only few conditions for the standard, EUSFTA and CETA specify the standard and explicitly provide for grounds of justification for what would otherwise be discriminatory treatment, aiming at preserving more comprehensively the State parties' 'right to regulate'. In the same vein, a significant number of economic sectors and activities have been excluded from the protective scope of these provisions in CETA and EUSFTA.

This regulatory pattern is broadly mirrored within the most-favoured-nation (MFN) treatment clauses: While CETA tries to narrow down the provision's scope and, in particular, limits the standard's application in relation to privileges granted to third countries under public international law, EUSFTA takes it even further and removes the MFN clause from the treaty text.

Furthermore, while the fair and equitable treatment (FET) standard in the ECT, the USA-Lithuania BIT, and the Germany-Jordan BIT is drafted as blanket clause, in CETA and EUSFTA it has been defined more elaborately, drawing on protection categories developed in arbitral practice. Here as well, the

¹ Cf. European Parliament, *Resolution containing the European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP)*, 08 July 2015, 2014/2228(INI), Paragraph xv); available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0252+0+DOC+XML+V0//EN> (visited 10 July 2015).

declared aim was to add clarity and to rebalance FET's protective scope in favour of the State parties' regulatory leeway by way of providing for an exhaustive list of protection categories and, even more, raising the bar for establishing a breach of these categories. While EUSFTA also wants to protect legitimate expectations of investors as an own category within the FET standard and further clarifies its application, CETA appears to renounce it, at least as an independent category. The interpretation of these comprehensive FET clauses in the future is, however, hard to predict.

The same may be argued for the attempt to more clearly define the scope of an 'indirect expropriation'. Also in regard to this standard, EUSFTA and CETA put forward more comprehensive approaches to define indirect expropriation and to delineate it from non-compensable State measures taken in the public interest. In doing so, both agreements move towards a test of arbitrariness, which reduces the protective scope of the provision.

So-called umbrella clauses – a rather problematic instrument from a State's perspective – are found in most compared treaties, with CETA being the notable exception. EUSFTA, in contrast, aims at a nuanced approach, cautiously re-constructing the scope of its umbrella clause to guarantee a reasonable level of protection.

ISDS serves as the 'mechanism of choice' in all agreements to enforce the aforementioned substantive standards. The multifaceted criticism on previous regulation of ISDS proceedings has, however, provoked a number of changes in the EU treaties. This may be taken as proof of the system's general ability to adapt. Nevertheless, there is considerable room for further improvement since EUSFTA and CETA preserve the principle characteristics of ISDS, to be found 'in their purity' in the ECT, the USA-Lithuania BIT, and the Germany-Jordan BIT. As for now, five areas of moderate change – if contrasted with the ECT, the USA-Lithuania BIT, and the Germany-Jordan BIT – can be detected. These areas concern the provisions regulating the consultation mechanism prior to the actual arbitration, the relationship of ISDS and domestic remedies, the appointment and conduct of arbitrators, the provisions addressing cost allocation in investment arbitration, and the rules addressing transparency and public access to ISDS proceedings.

First, EUSFTA and CETA aim at making consultations as a means of amicable settlement of an investment dispute more effective by 'proceduralizing' them. The agreements provide for a clear definition of formal steps and requirements, also with a view to pre-defining the dispute subsequently to be arbitrated.

Secondly, CETA flashes out in more detail the (still problematic) relationship of ISDS and domestic legal systems. It requires the investor to 'waive' domestic claims for damages if he wants to proceed to arbitration. Interestingly, this does not seem to apply to domestic court proceedings seeking revocation or amendment of a State measure which would actually allow parallel proceedings based on similar or even identical facts. EUSFTA appears to avoid parallel proceedings by compelling the investor to withdraw any pending claim and not to submit it to domestic courts before the tribunal has rendered a final decision. This would still allow for consecutive proceedings and even for 'U-turns'. In any event, none of the regulatory approaches in these two treaties explicitly encourage the use of domestic remedies; not even such which do function rather well. In fact, CETA and EUSFTA, as well as all other agreements under comparison, provide explicitly for an instrument to circumvent the primacy of primary legal protection – i.e. the revocation or amendment of an administrative act or a law – enshrined in advanced legal systems. This may defeat the purpose of judicial review, i.e. signalling illegality and forcing the respective government authority to remedy the illegal measure. In the end, it might promote an 'endure and cash in' attitude.

Thirdly, on principle, under all treaties to be compared, arbitrators will still be appointed by the disputing parties. However, in CETA and EUSFTA, this traditional approach is combined with a pre-established roster of arbitrators – designated by the State parties – from which the arbitrator or arbitrators not yet appointed by the parties are chosen by the Secretary General of ICSID. Furthermore, CETA and EUSFTA take steps to more closely regulate the conduct of arbitrators by State parties themselves instead of leaving this task to professional associations as well as formal and informal working groups of arbitration institutions, in which interests of the common good or specific EU regional interests might not always be satisfactorily represented.

Fourth, CETA and EUSFTA are the only agreements compared which explicitly tackle the issue of cost allocation in an investment arbitration. Whilst the clarification for the apportionment of costs is a welcome development, approaches to reduce the extensive costs of ISDS proceedings could have been explored in more depth. Especially with a view to making investment arbitration more accessible to small and medium-sized enterprises (SMEs) the issue deserves attention. For small claims, fees and expenses of arbitrators and party representatives could be fixed to the value of the dispute and proceedings tied to a strict time schedule.

Fifth, EUSFTA and CETA make tremendous progress on transparency of and public access to ISDS proceedings. Having identified these five areas of development, overall there are still gaps to fill and loose ends to connect. That involves especially the coordination of well-functioning domestic legal systems with ISDS for which the study puts forward some proposals.

More of a prospective nature is the question of whether a permanent investment court to handle investment cases and/or some kind of an appellate mechanism should be installed. It is hoped for that such institutions would reduce the lack of predictability associated with the current regime. None of the treaties compared establish either mechanism; CETA and EUSFTA foresee consultations between the State parties on the establishment of some kind of appellate mechanism. In any event, consistency effects flowing from an international investment court charged to adjudicate on a regional or global scale would currently be limited due to the fragmented state of substantive standards in international investment law consisting out of thousands of bilateral investment treaties. Therefore, only in the event of States concluding regional or multilateral agreements containing common substantive investment protection standards, consistency effects flowing from a permanent global or regional investment court would significantly increase. Instead of trying to set up an international investment court it could be more realistic to seek the establishment of a permanent court in the bilateral or regional context; as a pre-step, so to say, to an international institution.

A middle ground option could be to allow for ad-hoc tribunals on the 'entry stage' and establish a permanent appeals facility which guarantees some consistency of interpretation in respect of a given investment agreement. An appeals facility could be of a permanent or of an ad-hoc nature. While an ad-hoc appeals tribunal might be able to correct real or perceived errors or provide a second opinion, a permanent appeals facility would bring an institutional memory and contribute to some consistency in respect of the interpretation of a certain investment instrument. The establishment of a permanent appeals mechanism could be identified in the respective treaty as a medium to long-term target. A duty to start negotiations within three to five years after the entry-into-force of the respective treaties could help start the process. In the meanwhile, an ad-hoc mechanism for appeals could be installed and might provide a workable short-term solution. It may offer a useful testing ground for establishing a permanent appeals mechanism whereby allowing for the correction of manifest errors of law.

All the above strategies deserve a fair evaluation. However, no solution would be to forego any investor-State dispute settlement mechanism in future EU investment treaties. In particular, if an investor-

State dispute settlement mechanism – irrespective if ‘evolutionary’ or ‘revolutionary’ in nature – would not be included in a treaty of the size and significance of TTIP, this might waste a one-time opportunity to influence the future shape of the international investment law regime as a whole.

2 Introduction

A new player in foreign investment policy has warmed up; some hopes are pinned on his vigour to rock the boat bringing about much needed reform to a legal regime having entered rough seas: Since the entry into force of the Lisbon Treaty, foreign direct investment (FDI) falls under the exclusive competence of the European Union. The extension of its competence offers the EU the opportunity to integrate more comprehensive investment provisions in the EU's free trade agreements, going beyond the reduction of restrictions with regard to market access and including provisions on investment protection and dispute settlement. The European Union has made use widely of its competence. It embarked on the negotiation of several comprehensive free trade agreements which also include investment chapters. Some agreements, such as the 2014 Draft EU-Singapore Free Trade Agreement (EUSFTA)² and the 2014 Draft Comprehensive Economic and Trade Agreement (CETA)³ between the EU and Canada, have been successfully negotiated; no agreement, however, has yet been ratified. Other negotiations, such as those on the widely and controversially discussed Transatlantic Trade and Investment Partnership agreement (TTIP) between the EU and the USA⁴, have been slowed down somewhat. European⁵ and national parliaments⁶, governments across the EU⁷, experts⁸ and the general public have raised concerns.

Highly sensitive political issues might be adjudicated on the basis of these EU agreements. Based on *functionally* similar agreements, investor-State arbitral tribunals have been asked to rule on cigarette plain packaging in Australia and Uruguay, the nuclear power phase-out in Germany, or crisis-related financial austerity measures taken by Belgium in the course of the European financial crisis. In the

² EUSFTA investment chapter as of October 2014 (Note that the numbering of the Articles may change during legal revision), available at http://trade.ec.europa.eu/doclib/docs/2014/october/tradoc_152844.pdf (visited 30 May 2015). In the following, unless another Chapter is specifically mentioned, all Articles referred to from EUSFTA belong to Chapter 9.

³ Consolidated CETA Text, published on 26 September 2014, available at http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf (visited 30 May 2015). In the following, unless another Chapter is specifically mentioned, all Articles referred to from CETA belong to Chapter 10.

⁴ See European Commission, *Investment in TTIP and beyond – the path for reform*, Concept Paper, available at http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF (visited 30 May 2015). Also see the latest draft proposal by the European Commission for the Investment Chapter, available at http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf (visited 30 September 2015). It was published during finalisation of this study and, hence, could not be considered in its entirety. However, this study includes elaborate deliberations on topics also included in the proposal, such as the question of a permanent court (see below 4.12.1 (p. 104)) and an appellate mechanism (below 4.12.2 (p. 107)). Whether the far-reaching proposals by the Commission stand the test of negotiations with the U.S. remains to be seen.

⁵ European Parliament, *Resolution containing the European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP)*, 08 July 2015, 2014/2228(INI), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0252+0+DOC+XML+V0//EN> (visited 10 July 2015).

⁶ See e.g. a draft petition by the Green fraction in the German Parliament, BT-Drs. 18/1457, available at <http://dip21.bundestag.de/dip21/btd/18/014/1801457.pdf> (visited 1 August 2015).

⁷ See e.g. a proposal by the German Federal Ministry for Economic Affairs and Energy, *Modell-Investitionsschutzvertrag mit Investor-Staat-Schiedsverfahren für Industriestaaten unter Berücksichtigung der USA*, drafted by M. Krajewski, available at <http://www.bmwi.de/BMWi/Redaktion/PDF/M-O/modell-investitionsschutzvertrag-mit-investor-staat-schiedsverfahren-gutachten,property=pdf,bereich=bmwi2012,sprache=de,rwb=true.pdf> (visited 1 August 2015).

⁸ See e.g. A. Fischer-Lescano, *Rechtswidrig – Schiedsgerichte verstoßen gegen das Grundgesetz*, *Die ZEIT* 45/2014, 30 October 2014, available at <http://www.zeit.de/2014/45/ttip-ceta-freihandelsabkommen-grundgesetz-rechtswidrig> (visited 1 August 2015).

past, tribunals have repeatedly faced questions of whether they are willing and able to sufficiently take into account public interests. In legal terms, what has been criticised is that decisions of tribunals seem to not accurately reflect the ‘right balance’ which the State parties to the investment instrument meant to strike between private property protection and public interests in their investment treaties. Securing the ‘right balance’ between private and public interests will also be central for the European Union in its unfolding international investment policy. Striking the ‘right balance’ does not only mean securing an acceptable outcome in treaty negotiations with other states. The EU must also ensure that the balance struck will not subsequently be distorted in dispute settlement.

With a view to better understanding the EU’s progress made in developing a balanced approach in its international investment policy, this study provides a concise comparative perspective examining five investment agreements: i.e. the investment chapters of CETA and EUSFTA,⁹ the 1998 Energy Charter Treaty (ECT)¹⁰, the 2001 Treaty between the Government of the United States of America and the Government of the Republic of Lithuania for the Encouragement and Reciprocal Protection of Investment (USA-Lithuania BIT)¹¹, and the 2010 Agreement between the Federal Republic of Germany and the Hashemite Kingdom of Jordan concerning the Encouragement and Reciprocal Protection of Investments (Germany-Jordan BIT)¹².

The *European draft agreements*, EUSFTA and CETA, have triggered current public debates and, ultimately, also the commissioning of this study. Whilst they have been negotiated bilaterally, the sheer number of countries involved on the European side makes them ‘multilateral’; in a non-technical sense of course. Obviously, this can be a drag for decision making as Member States have very different policy traditions and experiences in the field in international investment law. While countries such as the United Kingdom, France, Germany, or the Netherlands can have an overall positive perspective on the performance of the current regime, effectively protecting ‘their’ investment abroad with a great number of bilateral agreements or, as in the case of the Netherlands, even turning investment treaties into a locational advantage. Others are less happy with the functioning of the system: It can be expected that Member States which have served as (not overly successful) respondents in numerous investment arbitrations, such as the Czech¹³ and Slovak¹⁴ Republics, will not shed any tears over the hopefully soon replacement of their old third country bilateral investment treaties with such of

⁹ Articles cited throughout this study, if not stated otherwise, refer to the provision in the respective investment chapter. The investment provisions in CETA are contained in Chapter 10, that one of EUSFTA in Chapter 9.

¹⁰ ECT signed 17 December 1991, entered into force April 1998, available at http://www.encharter.org/fileadmin/user_upload/document/EN.pdf (visited 30 May 2015).

¹¹ USA-Lithuania BIT signed 14 January 1998, entered into force 11 November 2001, amended 01 May 2004, available at http://tcc.export.gov/Trade_Agreements/Exporters_Guides/List_All_Guides/TOA_LithuaniaBIT.asp (visited 30 May 2015); note also the 2004 Additional Protocol between the Government of the United States of America and the Government of the Republic of Lithuania to the Treaty between the Government of the United States of America and the Government of the Republic of Lithuania for the Encouragement and Reciprocal Protection of Investment Senate Treaty, Treaty Document 108-21, available at <http://www.gpo.gov/fdsys/pkg/CDOC-108tdoc21/html/CDOC-108tdoc21.htm> (visited 15 June 2015), which did not change the treaty in a way relevant to this comparison.

¹² Germany-Jordan BIT signed 13 November 2007, entered into force 28 August 2010, available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1347> (visited 30 May 2015).

¹³ According to [http://www.italaw.com/browse/respondent-state?field_case_type_tid\[0\]=1090&field_respondent_state_tid=150](http://www.italaw.com/browse/respondent-state?field_case_type_tid[0]=1090&field_respondent_state_tid=150) (visited 01 September 2015) at least 18 cases against the Czech Republic are publicly known.

¹⁴ According to [http://www.italaw.com/browse/respondent-state?field_case_type_tid\[0\]=1090&field_respondent_state_tid=86](http://www.italaw.com/browse/respondent-state?field_case_type_tid[0]=1090&field_respondent_state_tid=86) (visited 01 September 2015) at least 10 cases against the Slovak Republic are publicly known.

the EU. Again other Member States, like Spain¹⁵, have just started to learn that investment law does not only protect its investment in Latin America, but also foreign investment in Spain. These diverse policy priorities resulting from different experience compel the European Commission not only to negotiate with its treaty partners, but also to balance the different interests of the Member States in the Council and to address the diverse political opinions represented in the European Parliament, whose members too occasionally mirror the diverse array of domestic policy priorities. On top of this, the European Commission has to address the popular opposition in parts of civil society carefully when formulating its policy approach.

The *ECT* is a truly multilateral investment agreement. Negotiations on the agreement began at the beginning of the 1990s and aimed at integrating the Eastern European and former Soviet energy sectors with the 'Western Part' of the world. The 2001 *USA-Lithuania BIT* can be seen in a similar context, with Western economies stretching out to Eastern Europe; in the case of this BIT, however, surprisingly late. It followed the 1994 North American Free Trade Agreement (NAFTA) and preceded the 2004 US Model BIT¹⁶; the latter already shows a more comprehensive approach to treaty drafting than the more 'traditional model' mirrored in the BIT under discussion. As a fifth treaty in the comparison and as another bilateral one, the *Germany-Jordan BIT* is covered. Its aim was, as with any investment treaty, to encourage investment and strengthen bilateral trade relations¹⁷. At the time of conclusion, countries from the Middle East region were a particular focus for investment treaty makers from Germany¹⁸. Generally speaking, the BIT followed the 'traditional' model of 'light touch regulation', which Germany had been embracing virtually unswervingly until competence was transferred to the European Union.

The analysis of the abovementioned treaties in this study is divided into two main parts: the first and primary focus lies on investor-State dispute settlement (ISDS) clauses (below 4. (p. 19)) and the second on selected substantive standards of access and treatment of foreign investors (below 5. (p. 113)) contained in these treaties. The study aims at highlighting communalities among the treaties and pointing out differences between the regulatory approaches taken. For this purpose, at the end of each chapter a table presenting the key passages from the treaties covered in this study can be found. The passages shown in bold are considered particularly significant in order to grasp the basic concepts underlying each category of provisions under review. Furthermore, to facilitate the reader's access to the different, occasionally lengthy-worded and, at times, difficult-to-read clauses of the treaties, comparable concepts or similar regulatory approaches in the different treaties are highlighted in the same colour.

¹⁵ According to <https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/AdvancedSearch.aspx?gE=s&rspndnt=Kingdom%20of%20Spain> (visited 01 September 2015) at least 22 cases against the Slovak Republic are publicly known.

¹⁶ It is based on the 1992 U.S. prototype BIT. Available at <http://www.state.gov/documents/organization/117601.pdf> (visited 10 July 2015).

¹⁷ See a joint German-Jordanian press statement of 14 November 2007, available at <http://www.g-8.de/Content/DE/Pressemitteilungen/BPA/2007/11/Anlagen/2007-11-14-gemeinsame-presseerklaerung-pdf-barrierefrei.property=publicationFile.pdf> (visited 10 July 2015).

¹⁸ See for example the agreements with Libya, Bahrain or Oman also concluded in 2010. All available at <http://investmentpolicyhub.unctad.org/IIA/CountryBits/78> (visited 10 July 2015).

3 Preliminary remarks

3.1 Investment treaties: ‘substantive standards’ and their enforcement by means of ‘investor-State dispute settlement’

International investment treaties establish international rules on the governance of foreign investment and investors. More specifically, they are agreements in public international law in which States take up reciprocal obligations. These obligations address the governance of investments undertaken by nationals of one contracting party (the home State) in the territory of another party (the host State)¹⁹. They serve the purpose of protecting foreign investment and investors and thereby contribute to the promotion of investment by mitigating political risk.

Since their inception in 1959²⁰, it has been a standard feature of these treaties to set out the ‘*treatment*’ to be accorded by a host State party to an investor and its investment of the other State party. The term ‘treatment’ is a technical term which circumscribes the obligations State parties owe to each other in respect of the manner of handling or dealing with the investor and the investment. Frequently, these obligations are also referred to as ‘*substantive standards*’. Among the standards most frequently found in investment treaties are the ones on national and most-favoured-nation treatment, fair and equitable treatment, free monetary transfer, expropriation, as well as the duty to honour certain obligations towards the investor that are governed by domestic law (‘umbrella clause’); all discussed below (5 (p. 113)).

These standards add to the protection of property afforded by the law of aliens in customary international law, to universal and regional human rights regimes as well as to guarantees contained in domestic law, in particular in constitutions. They are intended to fill in protection gaps and, together with the procedural rules in investment treaties, overcome enforcement problems sometimes more and sometimes less pronounced in the over legal regimes referred to.²¹

Substantive standards in investment treaties can be enforced by taking recourse to the procedures typically prescribed for in the investment treaty itself. The procedural clauses open up access to an *investor-State dispute settlement* (ISDS) mechanism which is characterised by the fact that individuals, i.e. investors, can enforce substantive standards independently from their home State on the international plane, i.e. in public international law (below 4.3 (p. 32)).

Before launching into the analysis of the substantive standards, two matters of general concern to this section are to be sketched out briefly. They, first, regard the limits to the possible conclusions one can prudently draw from a comparison of just a selection of treaty provisions considering the fragmentation and complexity of international investment law and this study’s limited mandate (below 3.2 (p. 16)). Second, in the recent debate on investment law reform, there is growing talk of ‘a gov-

¹⁹ J. Salacuse, *The Law of Investment Treaties*, Oxford University Press, Oxford, 2010, p. 126. Note, though, that Salacuse has a narrower understanding of the term ‘treatment standard’ as not including free transfer and umbrella clauses. The effect in substance of this different understanding is limited.

²⁰ Germany-Pakistan BIT of 1959, available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1387> (visited 18 May 2015).

²¹ Discussed in more detail in S. Hindelang, *Study on Investor-State Dispute Settlement (ISDS) and Alternatives of Dispute Resolution in International Investment Law*, Study for the European Parliament, September 2014, available at <http://ssrn.com/abstract=2525063> (visited 12 June 2015).

ernments' right to regulate'. The gist of the matter is a demand for (more) policy space within the substantive standards. In order to see more clearly, this 'slogan' is briefly revisited. (below 3.3 (p. 18)).

3.2 The diversity of regulatory approaches and interpretation

When it comes to describing, analysing, and comparing substantive standards and dispute settlement provisions in this study, some *limitations* should be made clear from the outset.

Firstly, because of the fragmentation of international investment law²², general observations which shall command some authority beyond an individual agreement are difficult to make and are to be treated with utmost caution. The wording of each investment treaty – while showing some similarity at first sight – is often at least somewhat different and, therefore, requires careful consideration on its own merits. The study at hand is limited to the comparison of the five treaties mentioned in the introduction. Wanting to predict future trends and developments in the broader field of international investment law on the basis of the interpretation of these agreements would not only certainly be methodologically challenging but also beyond the scope of this study. However, what can be observed is that these treaties are not negotiated in splendid isolation, but substantive (as well as procedural) standards diffuse from one agreement to another²³.

Secondly, not only do different treaties employ different language and resort to different regulatory approaches, in most treaties the substantive standards are framed as 'blanket clauses', i.e. they are broadly and openly worded standards²⁴. By their very nature, they allow for considerable room for adjudicators to interpret them in one way or another. Occasionally, due to a rather unorthodox approach taken by some tribunals towards the binding so-called Vienna rules²⁵ on interpretation of treaties in public international law²⁶ and the complexity of the interpretive task itself, anticipating even the range of possible meanings of a clause can become a challenge. This complicates comparison and calls again for a high degree of caution.

Thirdly, the task of interpreting and evaluating the five treaties chosen for this study is (further) complicated and necessarily speculative to some degree as there exists no practical experience with the operation of the ISDS mechanisms in several of the treaties under comparison. Arbitral practice based on *other*, similarly worded agreements is only of very limited value as in accordance with the Vienna rules on treaty interpretation, each treaty must be interpreted on its own merits. We do not choose to go down the same path as some tribunals which want to advance 'consistency' of the international investment law regime by way of '*de facto* precedent' and similar concepts, i.e. relying on previous rulings by arbitral tribunals made in another treaty context for interpreting an investment instrument.

²² There are 2926 Bilateral Investment Treaties as of May 2015, see <http://investmentpolicyhub.unctad.org/IIA> (visited 18 May 2015).

²³ S. Hindelang and S. Clarkson, The Intersection of Parallel Lines: How Foreign-Investment Protection Affects Regional Social-Justice Policy, in: Bianculli/Hoffmann (eds.), *Regional Organizations and Social Policy in Europe and Latin America: A Space for Social Citizenship?*, Palgrave Macmillan, Houndsmills, forthcoming 2015.

²⁴ Generally on the subject of investment and blanket clauses: R. Dolzer, Generalklauseln in Investitionsschutzverträgen, in: Frowein/Scharioth et al. (eds.), *Verhandeln für den Frieden – Negotiating for Peace, Festschrift für Tono Eitel*, Springer, Berlin, 2003, pp. 291 et seqq.

²⁵ Vienna Convention on the Law of Treaties, adopted 22 May 1969, entered into force 27 January 1980, available at <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf> (visited 21 August 2015).

²⁶ S. Hindelang, *Study on Investor-State Dispute Settlement (ISDS) and Alternatives of Dispute Resolution in International Investment Law*, Study for the European Parliament, September 2014, available at <http://ssrn.com/abstract=2525063> (visited 12 June 2015), pp. 66 et seqq. See also K. Berner, Reconciling Investment Protection and Sustainable Development: A Plea for an Interpretative U-Turn, in: Hindelang/Krajewski (eds.), *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified*, Oxford University Press, Oxford, forthcoming 2016.

Attractive as it may be at first glance, such concepts seem highly problematic when sidestepping the binding methodology of interpretation in public international law. Abandoning the methodology of interpretation enshrined in the Vienna rules, the tribunals would free themselves from the bonds of their masters: the State parties to an investment treaty. Moreover, even if there is practice with regard to a specific treaty, due to the ad-hoc nature of investment arbitration, consistency of interpretation is overall limited.²⁷

Fourth, the selection of the investment treaties to be compared is owed to the mandate of the study, as is the only *brief* overview and comparison of a *selection* of the ‘most common’ substantive clauses. In the same vein, the study’s rather broad object of study – comparing five treaties amongst each other – and limited length according to its mandate inevitably requires setting priorities; while the analysis ultimately turned out to be quite extensive and of some depth, a certain degree of generalisation and selection was still unavoidable. Not all issues relating to the different procedural and substantive clauses could be covered and, in respect of CETA and EUSFTA, not each and every exception to a principle could be included as these agreements are characterised by a mixture of a large number of general and specific exception clauses often scattered across the whole comprehensive free trade agreement. Furthermore, what this study is only able to achieve to a very limited extent is to evaluate and compare the overall protective scope of the agreements. As they are not examined in their entirety, interrelations of substantive standards amongst each other and with other clauses within an agreement are touched upon only in a cursory fashion²⁸. In particular, defining the terms ‘investment’ and ‘investor’, i.e. describing what asset and which national of a State party qualifies for protection, naturally exerts a great influence on the protective scope of the substantive standards as the example of the so-called ‘mailbox’ or ‘shell company’ and the related issue of ‘forum shopping’ shows. A mailbox company is a company which is established in the jurisdiction of a State party to the investment treaty without commanding significant assets or without undertaking meaningful operations itself. It serves the purpose of gaining access to the investment treaties of that State concluded with potential host States by qualifying as an ‘investor’ thereunder. It would even be conceivable to create a ‘cascade’ of mailbox companies in different States which have concluded investment treaties with a certain host country of an investment and may, when bringing an investment claim, chose the most suitable treaty (‘forum shopping’).²⁹ Not all State parties to investment treaties perceive such conduct as desirable. CETA³⁰, for example, aims at limiting its protective scope to such investors which have ‘real’ business operations and already committed some resources in either the EU or Canada. Whatever the case, as the terms ‘investment’ and ‘investor’ are not part of the mandate, this study will refer to them only for illustrative purposes.

The fifth and last limitation concerns the interplay between law and politics: In this respect it is worth stressing that in most cases the choice between two regulatory options is a political one. As a part of legal scholarship, this study is able to facilitate evaluating and weighing up the different options which may be connected with far-reaching consequences of a constitutional dimension. When drawing up substantive standards, the choice is between emphasising the protection of private property

²⁷ S. Hindelang, *Study on Investor-State Dispute Settlement (ISDS) and Alternatives of Dispute Resolution in International Investment Law*, Study for the European Parliament, September 2014, available at <http://ssrn.com/abstract=2525063> (visited 12 June 2015), pp. 66 et seqq.

²⁸ Since the protective scope of the different substantive clauses overlaps, interrelations would, for example, relate to the issue of whether and to what extent a narrowly defined fair and equitable treatment clause could be ‘offset’ by a broad-drafted definition of indirect expropriation or vice versa.

²⁹ This would presuppose that a given treaty also protects so-called indirect investment.

³⁰ Cf. Art. X.3. CETA.

on the one and safeguarding regulatory autonomy to pursue other legitimate public welfare interests on the other hand. The question of how detailed clauses are to be drafted translates into the question to which extent a tribunal shall functionally exercise powers of the treaty parties as the legitimate rule makers. When debating rules on dispute settlement, this invites Member State governments, businesses and civil society to discuss and answer another important question: How, and under which rules, should Europe's judicial power in respect of disputes involving foreign subjects be organised? If these are (some of) the questions lurking behind these technical, some may even say rather dull clauses in investment treaties, it might actually be worth any effort to better understand the consequences of the choices we are about to make.

3.3 The 'right to regulate'

Among the different recent approaches to refocus investment treaties is one which centres on the State's general ability to regulate in the public interest³¹. Proponents of this approach often call for an explicit recognition of a 'right to regulate' in international agreements even though a 'right' of the State to regulate has never been disputed. In fact, a 'right to regulate' does not need to be specifically recognised in international agreements, as such a right is inherent to State sovereignty. If anything, international law may confer a duty to regulate on a State, for example, to protect human rights and essential services. Therefore, what is behind this debate about the 'right to regulate' and international investment law is the question of permissible instruments through which the State regulates. In other words, the debate which has been labelled with the slogan of 'right to regulate' is actually about the impact of investment agreements and ISDS on the State's autonomy to use regulatory instruments³². The rising number of ISDS cases against developed States has made the issue more urgent³³.

Some governments may feel that real or perceived 'broad' interpretations of substantive standards in arbitral practice has shifted the balance thought to be enshrined in international investment law to their detriment, so much that the regime is increasingly associated with exercising a so-called 'chilling effect' on governments. The latter refrain from regulatory measures taken in the public interest allegedly due to the threat of investment arbitration. This 'regulatory chill' is said to exist because governments would face difficulties in assessing the precise content and scope of their obligations under international investment law³⁴. Recent empirical studies show that this may be true at least for developed countries capable to some reasonable degree of appreciating their international legal obligations with respect to foreign investments³⁵.

³¹ This paragraph draws on S. Hindelang and M. Krajewski, Conclusion and Outlook: Whither International Investment Law?, in: idem (eds.), *Shifting Paradigms in International Investment Law – More Balanced, Less Isolated, Increasingly Diversified*, Oxford University Press, Oxford, forthcoming 2016.

³² This paragraph draws on S. Hindelang and M. Krajewski, Conclusion and Outlook: Whither International Investment Law?, in: idem (eds.), *Shifting Paradigms in International Investment Law – More Balanced, Less Isolated, Increasingly Diversified*, Oxford University Press, Oxford, forthcoming 2016.

³³ UNCTAD, World Investment Report 2015 – Reforming International Investment Governance, available at <http://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=1245> (visited 1 August 2015), pp. 112 et seqq.

³⁴ S. Hindelang, *Study on Investor-State Dispute Settlement (ISDS) and Alternatives of Dispute Resolution in International Investment Law*, Study for the European Parliament, September 2014, available at <http://ssrn.com/abstract=2525063> (visited 12 June 2015), p. 74; I. Pernice, *Study on International Investment Protection Agreements and EU Law*, Study for the European Parliament, September 2014, available at <http://www.jura.fu-berlin.de/fachbereich/einrichtungen/oeffentliches-recht/lehrende/hindelangs/Studie-fuer-Europaeisches-Parlament/Volume-2-Studies.pdf> (visited 12 June 2015), pp. 139 et seqq.

³⁵ L. Poulsen, Bounded Rationality and the Diffusion of Modern Investment Treaties, *International Studies Quarterly*, Vol. 58 (2013), pp. 1 et seqq.

In any case, this debate has stimulated governments to clarify the significance of their ‘right to regulate’ not only through exceptions in the specific context of certain substantive standards and general exception clauses, but also by general reference to the ‘right to regulate’. Such can be found in CETA’s preamble³⁶ and in two chapters which deal with trade and labour³⁷ and trade and environmental³⁸ matters respectively. It is also found in a draft clause to the EUSFTA preamble (to be found after Annex 9-D to the Section on Investment Protection). Although preambles do not create binding commitments, they guide the interpretation of investment treaties³⁹. For future treaties such as the TTIP, the European Commission has proposed to even include operational provisions referring to the ‘right to regulate’ for governments⁴⁰. Providing explicitly for the ‘right to regulate’ and public objectives considered important to the State parties in the preamble or elsewhere in an investment treaty helps preserve the intended balance between private and public interests within a State as expressed by that State’s legal system, if such a balance can be regarded as reasonable. This way, tribunals do not have to engage in looking for such objectives beyond the investment instrument itself; a task in which they have not been overly successful as yet. However, encouraging tribunals to take certain public interests into consideration and to balance them with private interests does not in any way specify the weight to be given to each of them. This would require further clarification in an investment instrument if not intended to be left to tribunals⁴¹.

4 Investor-State Dispute Settlement (ISDS) Clauses

4.1 Introduction: Common features and appreciation of ISDS

Investor-State Dispute Settlement (ISDS) is not a hermetic, fixed legal concept. Rather, ISDS is a generic term than can be shaped in different ways. It is commonly used to describe a dispute settlement mechanism in public international law between a foreign investor and its host State. ISDS mechanisms vary in terms of access, procedure and consequences of a breach of a substantive standard – such as fair and equitable treatment – contained in an investment instrument⁴², as well as in respect of enforcement of an award. Nonetheless, they display features roughly common to all: The investor can – due to a general consent of the host State given in the relevant investment instrument and independent from its home State – initiate international arbitral proceedings against a host State. In doing so, the investor may challenge its host State’s measures on the grounds that they were incompat-

³⁶ ‘[...] RECOGNIZING that the provisions of this Agreement preserve the right to regulate within their territories and resolving to preserve their flexibility to achieve legitimate policy objectives, such as public health, safety, environment, public morals and the promotion and protection of cultural diversity; [...]’.

³⁷ Chapter 24 of CETA.

³⁸ Chapter 25 of CETA.

³⁹ Cf. Art. 31(1) and (2) VCLT reads ‘1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its *preamble* and annexes: [...]’ (emphasis added).

⁴⁰ European Commission, *Investment in TTIP and beyond – the path for reform*, Concept Paper, available at http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF (visited 30 May 2015), p. 6.

⁴¹ S. Hindelang, *Study on Investor-State Dispute Settlement (ISDS) and Alternatives of Dispute Resolution in International Investment Law*, Study for the European Parliament, September 2014, available at <http://ssrn.com/abstract=2525063> (visited 12 June 2015), p. 42.

⁴² For the purpose of this study, the term ‘investment instrument’ refers to treaties relating to the protection of foreign investment concluded by States or the EU with other States or international organisations in public international law, such as bilateral or regional investment (protection) treaties or investment chapters in so-called comprehensive free trade agreements.

ible with the substantive standards in the investment agreement. These measures typically accrue from the exercise of public authority of the host State and can be executive, legislative or judicial in nature. Usually, three ad-hoc arbitrators – two party-appointed, the third appointed in consensus or, in lieu thereof, by a third person – sit on a case. If a violation of a substantive standard can be established, an enforceable remedy – mainly pecuniary – is awarded. An arbitral tribunal's decision is binding on the host State and, in principle, final. It can be challenged only on exceptional grounds. An appeals facility is currently not provided for.

The appreciation of ISDS as a concept has changed over time. It was born with the expectation that it would facilitate attracting foreign investment, creating legal stability by overcoming deficiencies in domestic jurisdictions. Not surprisingly, most developing States have signed up to investment treaties providing for ISDS. Investors would be protected by substantive standards enshrined in public international law which cannot be altered unilaterally by the host State. The enforcement of these standards would be placed in the hands of the investor rather than be left to the discretion of the home State in the context of exercising diplomatic protection (State-State dispute settlement) on behalf of its own nationals. ISDS as a concept is therefore prescribed as one of the most effective tools to manage political risk in host States and to promote the international rule of law. That way, bilateral and regional investment protection treaties can be viewed as the extension of a century-old idea within public international law: that everyone is entitled to a minimum standard of treatment abroad at any given time. ISDS is a key mechanism to hold an investor's host State accountable for conduct falling short of certain standards without having (largely) to rely on domestic judicial relief, which might be unavailable precisely when it is desperately needed⁴³. By largely replacing State-driven enforcement mechanisms in public international law, ISDS renders substantive commitments in investment instruments more credible and contributes towards a de-politicization of investment disputes.

Critique of ISDS is as old as the system itself. Lately, though, criticism has also reached the middles of those societies which commonly supported robust investment protection backed up by strong ISDS mechanisms. Some of the sudden attention in Europe in particular can certainly be explained by the fact that the ISDS concept has quite possibly not been adapted to a new reality sufficiently⁴⁴: Investment treaties providing for ISDS are no longer predominantly concluded with developing countries, but they are becoming a more frequent feature also between developed countries with mature legal systems. It has been argued that ISDS was not designed to work in such contexts. Be that as it may, in any event, current political debate on the European Commission's readiness to include ISDS in its comprehensive trade agreements has allowed for a broader reflection in Europe on the concept and its practical operation in the context of investment protection agreements during the last five decades. Part of the current criticism might root in the rather vague formulations of broad-brushed substantive standards (see below 5 (p. 113)) in older investment agreements which may have granted adjudicators much, perhaps too much leeway. The other focal point of criticism, however, concerns the dispute settlement mechanism itself. It has been perceived to have shown structural shortcomings: inconsistent and unpredictable outputs, no appeals facility, challenging the role of the State parties as the masters of the treaty by creating an illegitimate system of '*de facto* precedents', lacking transparency, insufficient procedural integrity, no sufficient safeguards against misuse and no balanced re-

⁴³ Cf. on virtues of ISDS S. Hindelang, *Study on Investor-State Dispute Settlement (ISDS) and Alternatives of Dispute Resolution in International Investment Law*, Study for the European Parliament, September 2014, available at <http://ssrn.com/abstract=2525063> (visited 1 June 2015), pp. 40 et seqq.

⁴⁴ UNCTAD, *Investment Policy Framework for Sustainable Development*; UNCTAD, 2012, available at http://unctad.org/en/PublicationsLibrary/diaepcb2012d5_en.pdf (visited 1 June 2015), p. 43.

relationship between ISDS and the domestic legal systems, just to mention the main issues⁴⁵. The provisions of the treaties examined below must be held and measured against these issues. The study will show that there are indeed tangible differences – and possibly also some progressive developments – in the design of ISDS mechanisms found in the different treaties under comparison. The analysis of the individual clauses in the treaties to be compared will proceed roughly in the same order they appear in the agreements which again follow by and large the typical cause of an investor-State arbitration. Formal ISDS proceedings are usually preceded by a phase during which the disputing parties attempt to amicably settle the case (amicable settlement of a dispute and consultation, below 4.2 (p.22)). After these have failed, the claimant investor might decide to submit a claim for arbitration under any of the available arbitration rules (access to investor-State arbitration, below 4.3 (p. 32)). The claimant might however need to bring the case in front of domestic courts first (ISDS and its relation to domestic remedies, below 4.4 (p. 48)). The tribunal is operational once the parties have appointed the arbitrators (Appointment and qualification of arbitrators, below 4.5 (p. 58)). As a prerequisite for their appointment, in the course of the proceedings, and even afterwards, arbitrators might need to conform to a certain code of conduct (Code of conduct for arbitrators, below 4.6 (p. 64)). At an early stage of proceedings, a claim might be dismissed due to its legal or factual shortcomings (Preventing frivolous claims, below 4.8 (p. 87)). At the end of proceedings, a tribunal may typically issue an award on the merits which may provide for different types of remedies (Remedies, below 4.9 (p.92)). The tribunal will also have to decide on the costs of the proceedings (Costs, below 4.10 (p. 97)). Eventually, certain rules assure the enforcement of the award rendered (Enforcement of awards, below 4.11 (p. 101)). The current ISDS concept rests on ad-hoc tribunals whose awards can hardly be challenged. It provides neither for permanent courts nor an appellate mechanism. However, both might be part of a structural reform currently under way (Permanent court and appellate mechanism, below 4.12 (p. 105)).

⁴⁵ Cf. on the matter of perceived challenges of the ISDS concept S. Hindelang, *Study on Investor-State Dispute Settlement (ISDS) and Alternatives of Dispute Resolution in International Investment Law*, Study for the European Parliament, September 2014, available at <http://ssrn.com/abstract=2525063> (visited 1 June 2015), pp. 56 et seqq.

4.2 Amicable settlement of a dispute and the consultation mechanisms

4.2.1 Objective and design of consultation mechanisms

Arbitration proceedings are usually preceded by an attempt to settle the dispute amicably. In this fashion an adversarial legal procedure involving winners and losers and quite possibly the damage of long-term relationships might be avoided⁴⁶. Furthermore, it might spare costs and time usually involved in investor-State arbitration. Also, in comparison to arbitration, any consultation mechanism generally includes more flexible rules regarding evidence and allows stakeholders other than the parties to the case to take part more easily in the dispute resolution process⁴⁷.

Following this rationale, most investment instruments call for an amicable settlement of the dispute between investor and host State. The term ‘amicable settlement’ refers to the superordinate concept for any consultation or negotiation mechanism. Such a mechanism might come in the form of a non-binding suggestion for an amicable settlement, taking place before the beginning of any formal dispute proceedings (see below 4.2.2.1 (p. 23)). Greater weight is accorded to such a non-adversarial process when it is combined with a so-called ‘waiting clause’ that stipulates a fixed period of time scheduled for consultations before a claim can be submitted to binding investor-State arbitration (see below 4.2.2.2 (p. 23)). Going even further, an investment treaty can set out a formalised and structured consultation process (see below 4.2.2.3 (p. 24)). Such process is usually characterised by a differentiated ‘waiting clause’ that divides the consultation process into certain steps which have to be followed in accordance with a specific timetable as well as further formal requirements⁴⁸. In this context, the term ‘consultations’ is often used⁴⁹ to signal a certain degree of ‘enhanced proceduralization’ in contrast to other, less formalised concepts of amicable settlement.

Although not to be further discussed in this study, it should be noted that besides a consultation mechanism, investment agreements may also provide for mediation and conciliation. The borders between the individual concepts are somewhat blurred. Mediation commonly refers to a technique of amicable dispute resolution with the assistance of a neutral third person. The mediator may either evaluate the legal merits of the dispute or assist the parties in defining the issue⁵⁰. Conciliation would describe situations in which the neutral third person suggests possible solutions of the conflict to the parties. In all concepts binding decisions are left to the disputing parties.

⁴⁶ Cf also R. Ehandi and P. Kher, Can International Investor–State Disputes be Prevented? - Empirical Evidence from Settlements in ICSID Arbitration, *ICSID Review*, Vol. 29 (2014), pp. 41 et seqq. Note also the initiatives taken by the Pacific Alliance (Chile, Colombia, Mexico, and Peru) on dispute prevention. Instead of abandoning ISDS, they set up projects which aim to communicate host State investment commitments to stakeholders and provide training for government agencies in order to secure compliance. Cf. S. Clarkson et al., *Looking South While Looking North: Mexico's Ambivalent Engagement with Overlapping Regionalism*, Paper presented to Kolleg-Forschergruppe on ‘The Transformative Power of Europe’ conference on ‘Dealing with Overlapping Regionalism: Complementary or Competitive Strategies?’, Freie Universität Berlin, 16 May 2014.

⁴⁷ Consultations can also be more institutionalised by providing an *ombudsman* for foreign investors. Cf. S. Constain, Mediation in Investor–State Dispute Settlement - Government Policy and the Changing Landscape, *ICSID Review*, Vol. 29 (2014), pp. 25 et seqq., 30 et seqq.

⁴⁸ On the issue of formalised, *compulsory* mediation or conciliation cf. N. Welsh and A. Schneider, The Thoughtful Integration of Mediation into Bilateral Investment Arbitration, *Harvard Negotiation Law Review*, Vol. 18 (2013), pp. 71 et seqq.

⁴⁹ See the text passages highlighted in **green** in the table following this chapter.

⁵⁰ On mediation generally in investment disputes cf. S. Franck, Using Investor–State Mediation Rules to Promote Conflict Management - An Introductory Guide, *ICSID Review*, Vol. 29 (2014), pp. 66 et seqq.; S. Constain, Mediation in Investor–State Dispute Settlement - Government Policy and the Changing Landscape, *ICSID Review*, Vol. 29 (2014), pp. 25 et seqq.

4.2.2 Comparison of EUSFTA, CETA, ECT, Germany-Jordan BIT, and the USA-Lithuania BIT

4.2.2.1 Informal consultation: call for amicable settlement

Generally, all treaties call upon the parties of a dispute to strive towards an amicable resolution. EUSFTA and CETA explicitly clarify that a case can be settled amicably at any time, including after arbitration has commenced. This ties in with current practice in which 30 per cent of all cases registered at ICSID are settled at some point during the proceedings through negotiations⁵¹. It is worth noting that EUSFTA, CETA and the Germany-Jordan BIT emphasise particularly vigorously that disputes should be resolved through an amicable settlement by including the phrase ‘as far as possible’. This phrase might be read as calling upon the disputing parties to intensify their efforts and possibly even to divide the dispute into parts which can be settled amicably and others where recourse to ISDS is necessary for resolution. However, it appears doubtful that such a clause forms hard law (‘should’) or would, in any event, go beyond a best-effort obligation. Given the costs and risks involved in investment arbitration as well as the potential political implications for future business activities in the host State, in most cases it should be in the self-interest of a prudent investor to facilitate an amicable settlement.

4.2.2.2 ‘Waiting clauses’ – setting up a time frame for more formalised consultations

All treaties at hand apply the concept of ‘waiting clauses’: consultations can and should be held within three (ECT, EUSFTA⁵²) or six months (CETA, Germany-Jordan, USA-Lithuania) respectively after raising the dispute⁵³. The submission of a claim for arbitration is hence admissible only after the respective period has elapsed⁵⁴.

Yet, differences exist between the treaties concerning the commencement of the waiting period. In Art. 26 ECT, Art. 11 Germany-Jordan BIT, and Art. VI (3) USA-Lithuania BIT, the starting point of the time period seems to be somewhat vague. The USA-Lithuania BIT simply refers to the ‘date on which the dispute arose’, which might be difficult to determine. The Germany-Jordan BIT refers to the date when the dispute ‘has been raised’ which is hardly more precise. The same holds true for the ECT which uses ‘the date on which either party requested amicable settlement’. Such insufficient specifications of the date present a problem because the disputing parties (especially the claimant) might be tempted to prepone as much as possible the point in time when the dispute was allegedly raised or arose in order to access ISDS arbitration⁵⁵.

Furthermore, not specifying certain requirements in the three treaties on how to define the actual dispute under discussion may later invite the presentation of arguments to the tribunal asserting that

⁵¹ J. Salacuse, *The Law of Investment Treaties*, Oxford University Press, Oxford, 2010, p. 364.

⁵² EUSFTA calls for consultations within three months after the request for consultations. However, after this period of time, the notice of the intent to arbitrate has to be delivered (Art. 9.18 (1)) and only after another period of three months may the claim for arbitration be submitted (Art. 9.19 (1)). Theoretically, consultations can be continued during the second period of three months, making it a total of six months for consultations. Also see below 4.2.2.3 (p.21).

⁵³ See the text passages highlighted in yellow in the table following this chapter.

⁵⁴ Note though that the respondent might acquiesce in non-compliance. Cf. *Hochtief AG v. The Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, para. 96, available at <http://www.italaw.com/sites/default/files/case-documents/ita0565.pdf> (visited 15 June 2015); Z. Douglas, *The International Law of Investment Claims*, Cambridge University Press, Cambridge, 2009, paras. 332 et seqq.

⁵⁵ C. Dugan et al., *Investor-State Arbitration*, Oxford University Press, Oxford, 2008, p. 118.

the waiting period was or was not observed in respect of the dispute, or part of it.⁵⁶ This uncertainty might drive costs of the proceedings unnecessarily and prolongs the resolution of the conflict. Therefore, the ECT, the Germany-Jordan BIT, and the USA-Lithuania BIT lack a sufficiently defined, legally binding framework that contributes to the effectiveness of the consultation mechanism.

Overall, it can be expected that prudent disputing parties at the beginning of any dispute are generally interested in an amicable settlement. A 'simple' waiting clause operates under the assumption: 'if only they sit together long enough'. However, once a dispute has escalated and negotiations have failed, which is typically in the moment in which the host State is formally notified of the dispute, it can be doubted that a mere waiting period leads the parties to return to the negotiation table. Only after the parties have received some appraisal of the strength of their arguments supporting their respective case by a neutral third party – typically the tribunal – might they be tempted to return to the negotiation table. Hence, in the end, simple 'waiting clauses' are likely more of a 'time of faineance' (or, indeed, a make-ready time for arbitration) rather than engaging work towards an amicable settlement⁵⁷.

4.2.2.3 Towards a proceduralization of the consultation process

Providing for a clear definition of formal steps and requirements, the consultation process could be given a structure that increases its effectiveness and the potential of a positive outcome of such negotiations. On the other hand, prolonging and complicating the consultation process by providing for certain steps and expanding formal requirements could increase the financial strain on the disputing parties, especially on the part of small and medium-sized undertakings as claimants.

The ECT and the Germany-Jordan BIT do not further explain by which means the postulated amicable settlement might be reached. The USA-Lithuania BIT mentions 'consultation and negotiation'. Yet, it is not further defined whether these consultations have to meet any requirements.

EUSFTA and CETA seem to offer new approaches to the design of the consultation mechanism. The two European agreements also employ the terminology of 'consultations', however, here it is to be understood in a more narrow sense, i.e. that consultations are more proceduralized, stipulating conditions beyond the (mere) lapse of a certain period of time, and pre-structuring subsequent arbitration.

4.2.2.3.1 Specifying time requirements of the process

These specific requirements refer, firstly, to the period for consultations including their starting point. As illustrated above, all treaties tie the submission of a claim to arbitration to a waiting period designed to be used for consultations. In this sense, CETA and EUSFTA are not different: Art. 9.18 (1) EUSFTA requires the passing of six months after the request for consultations. Art. X.21 (1) (b) CETA demands at least 180 days to elapse.

Beyond that, the CETA timetable is divided into different steps. The schedule determines that the consultations shall on principle be held within 60 days of the submission of the request for consultations, Art. X.18 (1) CETA. It therefore seems that the first consultations indeed have to take place with-

⁵⁶ Cf. in general for a dispute on the interpretation of a waiting clause *ICS Inspection and Control Services Limited (United Kingdom) v. The Republic of Argentina*, UNCITRAL, PCA Case No. 2010-9, Award on Jurisdiction, para. 250, available at <http://www.italaw.com/sites/default/files/case-documents/ita0416.pdf> (visited 15 June 2015).

⁵⁷ Cf. J. VanDuzer et al., *Integrating Sustainable Development into International Investment Agreements – A Guide for Developing Countries*, Commonwealth Secretariat, August 2012, available at http://www.iisd.org/pdf/2012/6th_annual_forum_commonwealth_guide.pdf (visited 1 June 2015), p. 440.

in 60 days of the request, after which another 30 days are left within which the consultations might successfully lead to an amicable settlement. This evidences the greater significance accorded to the consultation process in CETA. If the EU or the EU Member States are alleged of a breach of the substantive standards, a notice requesting the determination of the respondent may be submitted 90 days after the request for consultation and unsuccessful settlement so far, Art. X.20 (1) CETA. This would not only step up pressure to reach amicable settlement but also aims at not losing time in subsequent arbitration for the determination of the respondent. Another 90 days are left for further attempts to settle amicably after the request for the determination of the respondent (making it at least 180 days after the request for consultations) until the claim may be submitted to arbitration, Art. X.21 (1) CETA.

On the whole, EUSFTA is drafted in a similar way. A request for consultations initiates the process, Art. 9.18 (1) EUSFTA. Consultations have to last at least three months before the notice of an intent to arbitrate may be delivered. Following this, the parties potentially have another three months to negotiate because three months after said notice, the claimant may submit the claim, Art. 9.19 (1) EUSFTA. However, only the first period of three months can be seen as an obligatory call to consult.

EUSFTA and CETA also provide for clear timetables in terms of the commencement and maximum length of consultations. Consultations have to be initiated three years after the particular treatment or one year (EUSFTA)/two years (CETA) after the exhaustion of local remedies (Art. 9.16 (3) EUSFTA and Art. X.18 (5) CETA). Consultations have to be brought to an end within 18 months after the request for consultations and a claim to arbitration has to be submitted, otherwise a claim becomes inadmissible (Art. 9.16 (4) EUSFTA and Art. X.18 (7) CETA). Thereby, the consultation process in CETA and EUSFTA is very much geared towards establishing permanent legal certainty ('Rechtsfrieden') in respect of a certain dispute as early as possible.

Finally a specific rule in Art. 9.16 (5) EUSFTA should be noted. It specifically protects the claimant with regard to the stipulated deadlines, if delays are the result of deliberate actions by the respondent. The existence of this rule confirms that while proceduralization of the consultation process could contribute to the amicable settlement of a dispute, it also carries with it the danger of abuse.

4.2.2.3.2 Defining the dispute: specifying information to be provided

A second main feature of the consultation mechanisms in CETA and EUSFTA is that the treaties provide for specifications of the information to be included in the request for consultations, Art. 9.16 (2) EUSFTA and Art. X.18 (3) CETA. Information to be provided must include, inter alia, the claimant, the substantive provisions of the investment treaty allegedly breached, the legal and factual basis of the claim and the estimated amount of damages claimed⁵⁸. This information ensures not only that the consultations can be conducted in a more focused and effective manner but also facilitate the subsequent arbitral proceedings in the way that tribunals can deal more efficiently with admissibility objections on the grounds that a certain dispute was not part of the consultation process (Cf. Art. 21 (1) (e) CETA, Art. 9.20 (1) (d) EUSFTA).

In respect of the information to be provided, CETA stipulates in Art. X.18 (4) an additional criterion compared to EUSFTA. While EUSFTA in Art. 9.16 (5) shows concerns that the respondent State might obstruct consultations and hence protects the claimant, CETA is more worried by obstructions from the claimant side protecting the respondent against the possibility of information overload (or any comparable behaviour by the claimant) that affects the ability of the respondent to effectively en-

⁵⁸ A minor difference can be observed: A provision similar to Art. X. 18 (3) (a) (ii) is not included in EUSFTA.

gage in consultations and subsequent arbitration. To a certain extent, this provision evidences rather different, opposing concerns of the State parties to these agreements with regard to the process of consultations.

4.2.2.4 Other formalised mechanisms to facilitate amicable settlement

EUSFTA and CETA also provide for voluntary mediation which would not preclude access to arbitration, Art. 9.17 EUSFTA and Art. X.19 CETA. The ECT, the Germany-Jordan BIT, and the USA-Lithuania BIT, while not explicitly providing for it, would on principle not rule it out.

4.2.2.5 Success of consultation mechanism depends on the context of the case

Overall, CETA and EUSFTA provide for a far more detailed, nuanced, and focused programme for the consultation process and therefore – under the assumption that consultations are a meaningful feature of ISDS – represent an advancement from previous investment treaties. However, it must be kept in mind that any successful consultation requires an agreement of the disputing parties. If there is no room for such or incentives are not set correctly – for example because bargaining power would dramatically increase for one side in arbitral proceedings – even the best structured consultation process would be to no avail⁵⁹. Therefore, the consultation process must always be viewed in context of the case at hand and the structure of the subsequent arbitral process.

⁵⁹ Cf. J. VanDuzer et al., *Integrating Sustainable Development into International Investment Agreements – A Guide for Developing Countries*, Commonwealth Secretariat, August 2012, available at http://www.iisd.org/pdf/2012/6th_annual_forum_commonwealth_guide.pdf (visited 1 June 2015), p. 440.

4.2.3 Table: Amicable settlement of a dispute and the consultation mechanisms

bold = important passages
green = key terms describing amicable settlement
yellow = timetable for consultations

EUSFTA ⁶⁰	CETA	ECT	Germany-Jordan	USA-Lithuania
<p>Art. 9.15</p> <p>Any dispute should as far as possible be resolved amicably through negotiations and, where possible, before the submission of a request for consultations pursuant to Article 9.16 (Consultations). An amicable resolution may be agreed at any time, including after arbitration has been commenced.</p> <p>Art. 9.16</p> <p>1. Where a dispute cannot be resolved as provided for under Article 9.15 (Amicable Resolution), a claimant of a Party alleging a breach of the provisions of Section A (Investment Protection) may submit a request for consultations to the other Party.</p> <p>2. The request for consultations shall contain the following information:</p> <p>(a) the name and address of the claimant and, where such request is submitted on behalf of a locally established company, the name,</p>	<p>Art. X.18</p> <p>1. Any dispute should as far as possible be settled amicably. Such a settlement may be agreed at any time, including after the arbitration has been commenced. Unless the disputing parties agree to a longer period, consultations shall be held within 60 days of the submission of the request for consultations pursuant to paragraph 3.</p> <p>2. Unless the disputing parties agree otherwise, the place of consultation shall be:</p> <p>(a) Ottawa, where the measures challenged are measures of Canada;</p> <p>(b) Brussels, where the measures challenged include a measure of the European Union; or</p> <p>(c) the capital of the Member State of the European Union, where the measures challenged are exclusively measures of that</p>	<p>Art. 26</p> <p>(1) Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.</p> <p>(2) If such disputes can not be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution:</p> <p>(a) to the courts or administrative tribunals of the Contracting Party party to the dispute;</p> <p>(b) in accordance with any applicable, previously agreed dispute settlement procedure; or</p> <p>(c) in accordance with the follow-</p>	<p>Art. 11</p> <p>(1) Disputes concerning investments between a Contracting Party and an investor of the other Contracting Party should as far as possible be settled amicably between the parties in dispute.</p> <p>(2) If the dispute cannot be settled within six months of the date when it has been raised by one of the parties in dispute, it shall be submitted at the request of the investor of the other Contracting Party alternatively or consecutively to:</p> <p>(a) the competent court of the Contracting Party in whose territory the investment has been made;</p> <p>(b) international arbitration under either:</p> <p>[...]</p>	<p>Art. VI</p> <p>[...]</p> <p>2. In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute for resolution:</p> <p>(a) to the courts or administrative tribunals of the Party that is a Party to the dispute; or</p> <p>(b) in accordance with any applicable, previously agreed dispute-settlement procedures; or</p> <p>(c) in accordance with the terms of paragraph 3.</p> <p>3. (a) Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b) and that six months have elapsed from the date on which</p>

⁶⁰ Numbering according to the October 2014 text version predating legal revision; numbering of the articles may change.

<p>address, and place of incorporation of the locally established company;</p> <p>(b) the provisions of Section A (Investment Protection) alleged to have been breached;</p> <p>(c) the legal and factual basis for the dispute, including the treatment alleged to breach the provisions of Section A (Investment Protection); and</p> <p>(d) the relief sought and the estimated loss or damage allegedly caused to the claimant or its locally established company by reason of that breach.</p> <p>3. The request for consultations shall be submitted:</p> <p>(a) within three years of the date on which the claimant becomes or should have become aware of the treatment alleged to breach the provisions of Section A (Investment Protection); or</p> <p>(b) in the event that the time period referred to in subparagraph (a) has already elapsed, and if local remedies are pursued, within one year of the date of exhaustion of local remedies.</p> <p>4. In the event that the claimant has not submitted a claim to arbitration pursuant to Article 9.19 (Submission of Claim to Arbitration) within eighteen months</p>	<p>Member State.</p> <p>3. The investor shall submit to the other Party a request for consultations containing:</p> <p>(a) the following information:</p> <p>(i) the name and address of the investor and, where such request is submitted on behalf of a locally established enterprise, the name, address and place of incorporation of the locally established enterprise;</p> <p>(ii) where there is more than one investor, the name and address of each investor and, where there is more than one locally established enterprise, the name, address and place of incorporation of each locally established enterprise;</p> <p>(iii) the provisions of this Agreement alleged to have been breached;</p> <p>(iv) the legal and the factual basis for the claim, including the measures at issue; and</p> <p>(v) the relief sought and the estimated amount of damages claimed; and</p> <p>(b) evidence establishing that the investor is an investor of the other Party and that it owns or controls the investment, including the locally established enterprise</p>	<p>ing paragraphs of this Article.</p> <p>[...]</p>		<p>the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration:</p> <p>[...]</p>
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<p>of submitting the request for consultations, the claimant shall be deemed to have withdrawn its request for consultations, any notice of intent to arbitrate and to have waived its rights to bring such a claim. This period may be extended by agreement between the parties involved in the consultations.</p> <p>5. The time periods referred to in paragraphs 3 and 4 shall not render a claim inadmissible where the claimant can demonstrate that the failure to request consultations or submit a claim to arbitration is due to the claimant's inability to act as a result of actions deliberately taken by the respondent, provided that the claimant acts as soon as it is reasonably able to act.</p> <p>6. In the event that the request for consultations concerns an alleged breach of this Agreement by the Union, or by any Member State of the Union, it shall be sent to the Union.</p> <p>Art. 9.18</p> <p>1. If the dispute cannot be settled within three months of the submission of the request for consultations, the claimant may deliver a notice of intent to arbitrate which shall specify in writing the claimant's intention to submit the claim to arbitration, and contain the following infor-</p>	<p>where applicable, in respect of which it has submitted a request.</p> <p>4. The requirements of the request for consultations set out in paragraph 3 shall be met in a manner that does not materially affect the ability of the respondent to effectively engage in consultations or to prepare its defence.</p> <p>5. A request for consultations must be submitted within:</p> <p>(a) 3 years after the date on which the investor or, as applicable, the locally established enterprise, first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor or, as applicable, the locally established enterprise, has incurred loss or damage thereby; or</p> <p>(b) two years after the investor or, as applicable, the locally established enterprise, exhausts or ceases to pursue claims or proceedings before a tribunal or court under the law of a Party and, in any event, no later than 10 years after the date on which the investor or, as applicable, the locally established enterprise, first acquired, or should have first acquired knowledge of the alleged breach and knowledge that the investor has incurred loss or</p>			
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<p>mation:</p> <p>[...]</p> <p>Art. 9.19</p> <p>1. No earlier than three months from the date of the notice of intent delivered pursuant to Article 9.18 (Notice of Intent to Arbitrate), the claimant may submit the claim to one of the following dispute settlement mechanisms:</p> <p>[...]</p>	<p>damage thereby</p> <p>6. In the event that the request for consultations concerns an alleged breach by the European Union, or a Member State of the European Union, it shall be sent to the European Union.</p> <p>7. In the event that the investor has not submitted a claim to arbitration pursuant to Article X.22 (Submission of a claim to arbitration) within 18 months of submitting the request for consultations, the investor shall be deemed to have withdrawn its request for consultations and any notice requesting a determination of the respondent and may not submit a claim under this Section. This period may be extended by agreement between the disputing parties.</p> <p>Art. X.20</p> <p>1. If the dispute cannot be settled within 90 days of the submission of the request for consultations, the request concerns an alleged breach of the Agreement by the European Union or a Member State of the European Union and the investor intends to initiate arbitration proceedings pursuant to Article X.22 (Submission of a claim to arbitration), the investor shall deliver to the European Union a notice requesting a</p>			
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	<p>determination of the respondent. [...]</p> <p>Art. X. 21</p> <p>1. An investor may submit a claim to arbitration under Article X.22 (Submission of a Claim to Arbitration) only if the investor:</p> <p>(a) delivers to the respondent, with the submission of a claim to arbitration, its consent to arbitration in accordance with the procedures set out in this Chapter;</p> <p>(b) allows at least 180 days to elapse from the submission of the request for consultations and, where applicable, at least 90 days to elapse from the submission of the notice requesting a determination of the respondent; [...]</p>			
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4.3 Access to ISDS

4.3.1 Consent and its conditions

On principle, individuals, including foreign investors, cannot just initiate legal proceedings against their host State, a sovereign, in the realm of public international law if they feel that they are not treated in accordance with the substantive provisions in an investment treaty. The access for them to international arbitration must specifically be provided for by the prospective respondent State. Besides from the typical arbitration clause in international investment agreements, such access could theoretically also be granted on a case-by-case basis. However, needless to say, States would usually not provide their consent once a dispute has already arisen. In lieu of such, foreign investors could approach a host State with a view to concluding an investment *contract*⁶¹ providing for international arbitration. Host States may also choose to offer foreign investors access to international arbitration through national legislation.

If eventually all these ways to investor-State arbitration are barred, an investor is left with two possible mechanisms to remedy violations of its property interests in the host State: A foreign investor can turn to domestic courts of the host State – the ‘natural forum’, so to say – in whose territorial jurisdiction the dispute arose. Also, if foreign investors feel mistreated by the host State government they could lobby their home State to take up ‘their case’ in State-State arbitrations for which investment treaties usually provide⁶².

Today, however, most investment treaties allow for access of foreign investors to international arbitration against ‘their’ host State; usually in alternative to the dispute settlement mechanisms referred to above. They frequently contain a unilateral unequivocal consent of the host State to arbitrate disputes with a foreign investor⁶³. However, the States’ consent in an investment treaty is usually not unconditional but pre-structures and regulates the arbitral process. If the investor commences arbitration he takes up the State’s offer according to the conditions laid out in the investment treaty’s arbitration clause and arbitral jurisdiction is established by agreement of both disputing parties. These conditions include determining a certain time period in which a claim has to be brought and afterwards would not be admissible, working effectively like a statute of limitations⁶⁴. Prior to arbitration, other procedural requirements might have to be fulfilled, such as the submission of an intent to arbitrate or, especially if the EU is involved, a request for identification of the right respondent⁶⁵. The wait-

⁶¹ Which, in contrast to State-State investment agreements, are not legally international but underlie domestic law.

⁶² For more details see S. Hindelang, *Study on Investor-State Dispute Settlement (ISDS) and Alternatives of Dispute Resolution in International Investment Law*, Study for the European Parliament, September 2014, available at <http://ssrn.com/abstract=2525063> (visited 1 June 2015), p. 75 ff.

⁶³ See the text passages highlighted in red in the table following this chapter.

⁶⁴ For example, one could fix a maximum period of time to elapse after the alleged host State’s mistreatment of the investor, a maximum period of time to elapse after the request for consultations, or a maximum period of time to elapse after the exhaustion of local remedies which the investor pursued before resorting to arbitration.

⁶⁵ Clauses demanding the submission of an ‘Intent to arbitrate’ can serve different purposes. For treaties not expressly requesting the submission of such intent, it may be seen as the point in time at which the dispute has arisen, which is necessary for calculating waiting periods due to ‘waiting clauses’ contained in provisions on amicable settlement and consultations; J. VanDuzer et al., *Integrating Sustainable Development into International Investment Agreements – A Guide for Developing Countries*, Commonwealth Secretariat, August 2012, available at http://www.iisd.org/pdf/2012/6th_annual_forum_commonwealth_guide.pdf (visited 1 June 2015), p. 411. Besides, the submission of such intent may have a disciplining effect on the host State’s behavior, if one assumes that the host State will want to prevent the beginning of legal action; C. Dugan et al., *Investor-State Arbitration*, Oxford University Press, Oxford, 2008, p. 121.

ing period for conducting consultations, as discussed separately above⁶⁶, also belongs to this category. Furthermore, consent to the jurisdiction of an investor-State arbitral tribunal might be limited to certain violations of substantive standards embodied in the treaty. For example, while the State parties consent to claims arising out of the maltreatment of an established investment, they might exclude, as the EU agreements do, the making of investment from their consent. Furthermore, the relation of ISDS to other types of litigation (e.g. in domestic courts) and arbitration (such as State-State arbitration or commercial arbitration) might be clarified. In addition, the question of which set of arbitration rules and institutions are available is usually addressed in a State's consent. Aside from the possibility for claimants and respondents to agree on a set of rules for the individual case, there are different 'ready-to-use' arbitration rules and institutions available that might be referenced in an investment agreement. Primarily, these are the World Bank-sponsored Convention of the International Centre for Settlement of Investment Disputes (ICSID Convention)⁶⁷, the Rules on the Additional Facility for the Administration of Proceedings by the Secretariat of the ICSID (ICSID Additional Facility Rules)⁶⁸ and the United Nation-sponsored UNCITRAL Arbitration Rules⁶⁹. Others include the arbitration rules of the International Chamber of Commerce (ICC)⁷⁰, the Arbitration Institute of the Stockholm Chamber of Commerce (SCC)⁷¹, the London Court of International Arbitration (LCIA)⁷², or the German Institution of Arbitration (DIS)⁷³; all these sets of arbitration rules have their roots (at least to some extent) in commercial arbitration. Although all these arbitration rules still provide a rather loose procedural framework as compared to domestic courts' codes of procedure⁷⁴, they offer some sort of fixed framework⁷⁵. Most basic issues, such as the composition of tribunals, applicable law, remedies and allocation of costs have frequently not been addressed in the investment treaties themselves but in more (or rather less) detail in arbitration rules⁷⁶.

Against this background it is important to keep in mind that, when it comes to ISDS, there is neither a single legal basis for a claim, nor is there a single global adjudicative mechanism: Arbitral tribunals – always just constituted for an individual case and subsequently dissolved – render decisions on the

⁶⁶ See above 4.2.2.2 (p. 23).

⁶⁷ Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID-Convention, adopted 18 March 1965, entered into force 14 October 1966), available at https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf (visited 1 June 2015).

⁶⁸ ICSID Additional Facility Rules (as of April 2006), available at https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Documents/AFR_English-final.pdf (visited 9 June 2015).

⁶⁹ UNCITRAL Arbitration Rules (as revised in 2010), available at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf> (visited 1 June 2015).

⁷⁰ ICC Arbitration Rules (as of 2012), available at <http://www.iccwbo.org/Data/Documents/Buisness-Services/Dispute-Resolution-Services/Mediation/Rules/2012-Arbitration-Rules-and-2014-Mediation-Rules-ENGLISH-version/> (visited 9 June 2015).

⁷¹ SCC Arbitration Rules (as of 2010), available at http://www.sccinstitute.com/media/40120/arbitrationrules_eng_webbversion.pdf (visited 9 June 2015).

⁷² LCIA Arbitration Rules (effective 1 October 2014), available at <http://www.lcia.org/media/download.aspx?MediaId=379> (visited 9 June 2015).

⁷³ DIS-Arbitration Rules (as of July 1998); available at <http://www.dis-arb.de/en/16/rules/dis-arbitration-rules-98-id10> (visited 11 June 2015).

⁷⁴ S. Hindelang, *Study on Investor-State Dispute Settlement (ISDS) and Alternatives of Dispute Resolution in International Investment Law*, Study for the European Parliament, September 2014, available at <http://ssrn.com/abstract=2525063> (visited 1 June 2015), pp. 48 et seq.

⁷⁵ J. Griebel, *Internationales Investitionsrecht*, C.H. Beck, München, 2008, p. 114.

⁷⁶ J. Pohl et al., *Dispute settlement provisions in international investment agreements: A large sample survey*, OECD Working Papers on International Investment No. 2012/2, available at http://www.oecd.org/daf/inv/investment-policy/WP-2012_2.pdf (visited 4 June 2015).

basis of over 3.000, by and large, similar but rarely identically worded investment treaties. Arbitral proceedings are governed by a variety of procedural norms from which the claimant can choose⁷⁷. Taken together, these points should make it reasonably clear that investment disputes are hardly ever governed by ‘the same set of rules’; neither in substantive nor in procedural terms⁷⁸.

4.3.2 Comparison of EUSFTA, CETA, ECT, Germany-Jordan BIT, and the USA-Lithuania BIT

4.3.2.1 Limits on State’s consent with respect to the breach of certain substantive protections or measures effecting certain economic activity

The Germany-Jordan BIT in Art. 11 provides very broad consent to subject any ‘[d]isputes concerning investments between a Contracting Party and an investor of the other Contracting Party’ to arbitration. Art. VI (1) USA-Lithuania BITs specifies the scope somewhat by referring to disputes relating to investment contracts, investment authorizations, and alleged breaches of substantive commitments in the treaty. In both cases the jurisdiction of the tribunal goes beyond an alleged breach of substantive commitments in the BITs.

Art. 9.14 EUSFTA limits access to ISDS to breaches of substantive commitments in EUSFTA’s investment chapter. Art. 17 (4) CETA adds further limitations as it restricts the access to arbitration in case a State restructures its sovereign debts by negotiation⁷⁹. Also, Art. XV.1 (4) in connection with Art. XV.20

⁷⁷ Of the 42 newly initiated ISDS claims in 2014, 33 were filed with the ICSID, six under UNCITRAL rules, two under the SCC and one under the ICC. UNCTAD, *Recent Trends in IIAs and ISDS*, IIA Issues Note 2015/1, available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf (visited 30 May 2015), p. 7; these numbers also roughly correspond with overall historical statistics.

⁷⁸ A notable exception are, for example, the Argentina cases on the basis of the US-Argentina BIT: *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, available at <http://www.italaw.com/sites/default/files/case-documents/ita0184.pdf> (visited 8 May 2015); *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Annulment Decision, available at <http://www.italaw.com/sites/default/files/case-documents/ita0184.pdf> (visited 8 May 2015); *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3 (also known as: *Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v. The Argentine Republic*), documents available at <http://www.italaw.com/cases/401> (visited 8 May 2015); *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3 (also known as: *Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v. The Argentine Republic*), Award, available at <http://www.italaw.com/sites/default/files/case-documents/ita0293.pdf> (visited 8 May 2015); *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3 (also known as: *Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v. The Argentine Republic*), Annulment Decision, available at <http://www.italaw.com/sites/default/files/case-documents/ita0299.pdf> (visited 8 May 2015); *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, available at <http://italaw.com/sites/default/files/case-documents/ita0460.pdf> (visited 8 May 2015); *Sempra Energy Int’l v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, available at <http://www.italaw.com/sites/default/files/case-documents/ita0770.pdf> (visited 8 May 2015); *Sempra Energy Int’l v. Argentine Republic*, ICSID Case No. ARB/02/16, Annulment Decision, available at <http://www.italaw.com/sites/default/files/case-documents/ita0776.pdf> (visited 8 May 2015); *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Annulment Decision, available at <http://www.italaw.com/sites/default/files/case-documents/ita0231.pdf> (visited 8 May 2015).

⁷⁹ Annex X: Public Debts reads in its section 1: ‘No claim that a restructuring of debt issued by a Party breaches an obligation under Sections [Non-Discriminatory Treatment, Investment Protection] may be submitted to, or if already submitted continue in, arbitration under Section 6 [Investor-State Dispute Settlement] if the restructuring is a negotiated restructuring at the time of submission, or becomes a negotiated restructuring after such submission, except for a claim that the restructuring violates Article X.6 [National Treatment] or Article X.7 [Most-Favoured Nation].’ It is worth noting that the provision only exempts negotiated restructuring of public debt and, furthermore, does, in contrast to, e.g. the 1953 London Agreement on German External Debts, certain debt restructurings negotiated within the Paris Club (Club de Paris) and the London Club, not allow for any discrimination. Cf. J. Benninghofen, *Die Staatsumschuldung*, Nomos, Baden-Baden, 2014, pp. 72, 112-115,

in the Financial Services Chapter establish a special regime for ISDS in that economic sector. Art. X.17 (3) CETA furthermore very broadly excludes claims 'where the investment has been made through fraudulent misrepresentation, concealment, corruption, or conduct amounting to an abuse of process.' Thereby, rather than only considering such conduct on the merits stage, the access to ISDS is denied in case of an illegal conduct of the investor in respect of the investment. This particular clause might increase motivation to comply with local laws and can therefore be seen as a step towards the establishment of investor obligations⁸⁰. Whether such an approach is prudent, however, especially when subsequently incorporated also in treaties with EU trade partners not enjoying the same good governance standards as Canada or the USA, remains to be seen. Art. 9.20 (6) EUSFTA contains a partly similar clause, tackling the general issue of abuse. However, in comparison to the CETA provision the EUSFTA clause only targets such conduct of a claimant that specifically aims at investing for the purposes of submitting an ISDS claim.

As will be discussed in more detail below (see 5.1.4.2 (p. 117)), CETA generally extends its substantive protection to the phase of the establishment of an investment. EUSFTA in contrast does not contain any market access obligations. However, Art. 17 (1) and (2) CETA restricts the jurisdiction of a tribunal to the breach of substantive standards in respect of an *established* investment and thus excludes market access issues. Hence, this provision effectively places both EU agreements on par, the access to a market of a State party not being enforceable by an investor.

Another restrictive provision can be found in Art. X.43 CETA in conjunction with Annex X.43.1 for decisions by Canada following a review under the Investment in Canada Act.

Turning to the other agreements under comparison, only the ECT provides for some (modest) restrictions of access in 'matters of substance'. Art. 26 (1) limits access to ISDS to breaches of substantive commitments in its investment protection part. Access is, furthermore, due to the limited overall scope of the ECT, restricted to energy related disputes.

4.3.2.2 Timeframe up to the submission of claims to arbitration

All treaties include a mandatory time period of three (ECT⁸¹) or six months (all other treaties⁸²) between the request of consultation or of amicable settlement and the submission of a claim. EUSFTA and CETA more closely determine the steps to be taken before the submission if EU or Member State measures are allegedly in breach of the substantive commitments⁸³. With regard to EUSFTA, within three months of the request for consultation the investor may deliver a notice of intent to arbitrate (Art. 9.18 (1) EUSFTA) and after another three months may submit the claim for dispute settlement (Art. 9.19 (1) EUSFTA). CETA proposes a similar procedure (calculated in days in Art. X.20 (1) and X.21 (1) (b) CETA). The intermediate steps in both cases serve the need to determine the correct respondent.

93 respectively; see also M. Waibel, *Sovereign Defaults before International Courts and Tribunals*, Cambridge University Press, Cambridge, 2011.

⁸⁰ As has been demanded by many, including for example J. VanDuzer et al., *Integrating Sustainable Development into International Investment Agreements – A Guide for Developing Countries*, Commonwealth Secretariat, August 2012, available at http://www.iisd.org/pdf/2012/6th_annual_forum_commonwealth_guide.pdf (visited 1 June 2015), pp. 287 et seqq.; UNCTAD, *Investment Policy Framework for Sustainable Development*, UNCTAD, 2012, available at http://unctad.org/en/PublicationsLibrary/diaepcb2012d5_en.pdf (visited 1 June 2015), p. 45.

⁸¹ Art. 26 (2) ECT.

⁸² Art. 9.20 (1) (b) EUSFTA, see also above fn. 52; Art. X.21 (1) (b) CETA; Art. 11 (2) Germany-Jordan BIT; Art. VI (3) (a) USA-Lithuania BIT.

⁸³ See already above at 4.2.2.3 (p. 21).

4.3.2.3 Formal requirements for the submission of a claim

In addition to the requirements already discussed in connection with the consultations prior to the submission of a claim (see above 4.2 (p. 22)), Art. 9.19 (2) EUSFTA and Art. X.22 (4) CETA stipulate further formal conditions for the claimant's consent to arbitrate by explicitly referencing certain provisions in the arbitration rules. CETA even defines the moment in time when a claim is to be regarded as submitted, Art. 22 (7) CETA. The other treaties do not include such explicit references.

4.3.2.4 Arbitration institutions and rules

It should be stressed again here that speaking of an 'arbitration institution' must not be confused with a standing court or similar institutional arrangements. Rather, all tribunals are of an ad-hoc nature, specifically established for the respective case and subsequently dissolved. The arbitration institutions – while certainly important if not indispensable for an effective dispute resolution process – provide a largely organisational and secretarial framework⁸⁴, i.e. in particular administering cases, appointing arbitrators, deciding challenges, and providing facilities. Frequently but not necessarily, the choice of arbitration rules is accompanied with selecting the respective arbitration institution to administer the proceedings.

All treaties at hand refer to the International Centre for the Settlement of Investment Disputes, which was established on the basis of the ICSID Convention⁸⁵. All but the Germany-Jordan BIT also explicitly mention the ICSID Additional Facility Rules⁸⁶; the Germany-Jordan BIT arguably implicitly incorporate them⁸⁷. The ECT and the Germany-Jordan BIT refer to the ICC and its arbitration rules. Only the ECT explicitly mentions the SCC and the respective arbitration rules. Under any of the other treaties, submitting a dispute to the ICC or SCC, or indeed any other arbitration institution or rules, would be admissible if the disputing parties agree so⁸⁸. All treaties refer to the UNCITRAL Arbitration Rules⁸⁹ that are not linked to a specific arbitration institution set to administer a case on the basis of these rules but provide for enormous flexibility in terms of choosing an arbitration institution by the disputing parties themselves with residual functions vested in the Secretary-General of the Permanent Court of Arbitration.

4.3.2.5 The number of adjudicators

Typically, an investor-State arbitral tribunal consists of three arbitrators. Alternatively, having a sole arbitrator is an option available under all treaties. The only difference among the treaties is whether the 'sole arbitrator option' can be chosen by agreement of the disputing parties or by the claimant itself. The ECT provides in Art. 26 (4) (b) for a choice of the claimant. Under the Germany-Jordan BIT and the USA-Lithuania BIT the disputing parties must agree on the sole arbitrator option. This follows from the arbitration rules available under these two treaties. EUSFTA and CETA give special considera-

⁸⁴ J. Griebel, *Internationales Investitionsrecht*, C.H. Beck, München, 2008, p. 117.

⁸⁵ Art. 9.19 (1) (a) EUSFTA; Art. X.22 (2) (a) CETA; Art. 26 (3) (4) (a) ECT; Art. 11 (2) (b) Germany-Jordan BIT; Art. VI (3) (a) (1) USA-Lithuania BIT; see the text passages highlighted in yellow in the table following this chapter.

⁸⁶ See the text passages highlighted in green in the table following this chapter.

⁸⁷ Art. 11 Germany-Jordan BIT references not only the Centre or the Additional Facility Rules but the ICSID-Convention as a whole upon which the decision of the Administrative Council of the Centre is based to adopt Additional Facility Rules authorizing the Secretariat of ICSID to administer certain other categories of disputes. However, this would require a broad reading of the phrase 'arbitration under ... the Convention'.

⁸⁸ See the text passages highlighted in pink in the table following this chapter. A difference between EUSFTA and CETA is to be noted. Whilst EUSFTA is investor-friendly in demanding the respondents' express objection to the proposal (Art. 9.19 (1) (d)), CETA requires the exact opposite: an express acceptance (Art. X.22 (3)).

⁸⁹ See the text passages highlighted in turquoise in the table following this chapter.

tion to the option of a sole arbitrator, Art. 9.19 (3) and Art. X.22 (5) respectively. While the disputing parties ultimately have to agree on it, the 'respondent shall give sympathetic consideration to such a request, in particular where the investor is a small or medium-sized enterprise or the compensation or damages claimed are relatively low'. On principle, the option to choose or agree on a sole arbitrator serves the purpose of containing costs. This might make ISDS also a more easily accessible tool for small and medium sized enterprises (SMEs). However, as long as agreement is required, out of procedural tactics it is rather unlikely that the respondent will opt for a sole arbitrator. In doing so it were to give up the chance to have someone in the tribunal who is hoped to be more sympathetic to one's own positions and might be able to convince the other member of the tribunal of that position. Therefore, other measures such as providing for a fee cap in case of small claims might be more effective in allowing SMEs to access international justice.⁹⁰

4.3.2.6 ISDS and its relation to other international dispute settlement mechanisms

While beyond the scope of this study, brief reference shall be made to the relationship of ISDS to other international dispute settlement mechanisms that include State-State proceedings, dispute settlement on the basis of investment contracts and other international agreements.

Firstly, all treaties provide for some sort of formalised State-State dispute settlement⁹¹. EUSFTA and CETA establish additional treaty committees to deal with questions of treaty interpretation and possible changes to the treaties with a view to creating 'living agreements' more easily adaptable to new challenges⁹². The treaty committees are generally designed not to get involved in specific cases or claims, although they arguably may issue interpretations binding tribunals even in ongoing cases.

The relation of ISDS proceedings to State-State dispute settlement is clarified in Art. 9.31 EUSFTA and X.40 CETA, whereby access to State-State arbitration is generally barred once investor-State arbitration has commenced. Other treaties do not contain similarly specific provisions. However, for all arbitration governed by the ICSID-Convention, this gap is filled by Art. 27 which provides that '[n]o Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention'. In any other case, the question of whether home and host State may initiate a dispute settlement proceedings vis-à-vis each other in such situation is left to general public international law.

Secondly, to avoid parallel proceedings, contradictory results, or even overcompensation, only EUSFTA and CETA expressly address the relationship to proceedings under other international agreements and contract-based claims. All other treaties leave the issue of governing the relationship and resolving possible conflicts of the relationship to general rules which might not be ideally suited.

Thirdly, Art. 19.20 (1) (g) EUSFTA obliges the claimant when submitting a claim under EUSFTA to withdraw any pending claim concerning the same treatment submitted to another international tribunal and to declare that the investor will not submit such a claim in the future. Furthermore, it is required that no final award concerning the same treatment as alleged to breach EUSFTA has been rendered in a claim submitted by the claimant to another international tribunal. A functionally similar, albeit not identical mechanism, can be found in CETA in Art. X.21 (1) (f) and (g). If parallel proceedings of any sort are already in place, CETA makes provision in Art. X.23 for the situation where proceedings

⁹⁰ Cf. on such a proposal S. Hindelang and S. Wernicke (eds.), *Grundzüge eines modernen Investitionsschutzes - Harnack-Haus Reflections*, 2015, available at <http://tinyurl.com/ofzq7k3> (visited 9 September 2015), pp. 23 et seqq.

⁹¹ See Art. 27 ECT; Art. 10 Germany-Jordan BIT; Art. VII USA-Lithuania BIT, Chapters 15 EUSFTA and 33 CETA.

⁹² See Art. 9.33 EUSFTA; Art. X.42 CETA.

under a different international agreement could have a potential for overlapping compensation or significant impact on the proceedings under CETA. In this case the proceedings under CETA shall either be stayed or the tribunal shall take the other proceedings into account in its decisions, order, or award. Besides, CETA in Art. X.41 and EUSFTA in Art. 19.32 also contain provisions for consolidating claims which were separately submitted to arbitration but are governed by one agreement and have a question of law or fact in common and arise out of the same events or circumstances.

4.3.3 Table: Access to ISDS

bold = important passages

yellow = ICSID

turquoise = UNCITRAL

red = consent

green = ICSID Additional Facility

pink = other forms of dispute settlement

EUSFTA ⁹³	CETA	ECT	Germany-Jordan	USA-Lithuania
<p>Art. 9.14 Scope and Definitions</p> <p>1. This Section shall apply to a dispute between a claimant of one Party and the other Party concerning treatment alleged to breach the provisions of Section A (Investment Protection) which breach allegedly causes loss or damage to the claimant or its locally established company.</p> <p>[...]</p>	<p>Art. X.17 Scope of a Claim to Arbitration</p> <p>1. Without prejudice to the rights and obligations of the Parties under Chapter [XY](Dispute Settlement), an investor of a Party may submit to arbitration under this Section a claim that the respondent has breached an obligation under:</p> <p>(a) Section 3 (Non-Discriminatory Treatment) of this Chapter, with respect to the expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of its covered investment; or</p> <p>(b) Section 4 (Investment Protection) of this Chapter; and</p> <p>where the investor claims to have suffered loss or damage as a result of the alleged breach.</p> <p>2. Claims under subparagraph 1(a) with respect to the expansion of a covered investment may be submitted only to the extent the measure relates to the existing</p>	<p>Art. 26</p> <p>(1) Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.</p> <p>(2) If such disputes cannot be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution:</p> <p>(a) to the courts or administrative tribunals of the Contracting Party party to the dispute;</p> <p>(b) in accordance with any applicable, previously agreed dispute settlement procedure; or</p> <p>(c) in accordance with the follow-</p>	<p>Art. 11</p> <p>(1) Disputes concerning investments between a Contracting Party and an investor of the other Contracting Party should as far as possible be settled amicably between the parties in dispute.</p> <p>(2) If the dispute cannot be settled within six months of the date when it has been raised by one of the parties in dispute, it shall be submitted at the request of the investor of the other Contracting Party alternatively or consecutively to:</p> <p>(a) the competent court of the Contracting Party in whose territory the investment has been made;</p> <p>(b) international arbitration under either:</p> <p>– the Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of Other States</p>	<p>Art. VI</p> <p>1. For the purposes of this Article, an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to:</p> <p>(a) an investment agreement between that Party and such national or company;</p> <p>(b) an investment authorization granted by that Party's foreign investment authority to such national or company; or</p> <p>(c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.</p> <p>[...]</p> <p>3. (a) Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b) and that six months have elapsed from the date on which the dispute arose, the national or company concerned may choose to</p>

⁹³ Numbering according to the October 2014 text version predating legal revision; numbering of the articles may change.

<p>Art. 9.19 Submission of Claim to Arbitration</p> <p>1. No earlier than three months from the date of the notice of intent delivered pursuant to Article 9.18 (Notice of Intent to Arbitrate), the claimant may submit the claim to one of the following dispute settlement mechanisms:</p> <p>(a) arbitration under the auspices of the International Centre for Settlement of Investment Disputes (hereinafter referred to as "ICSID") pursuant to the Convention on the</p>	<p>business operations of a covered investment and the investor has, as a result, incurred loss or damage with respect to the covered investment.</p> <p>3. For greater certainty, an investor may not submit a claim to arbitration under this Section where the investment has been made through fraudulent misrepresentation, concealment, corruption, or conduct amounting to an abuse of process.</p> <p>4. This Section shall apply to the restructuring of debt issued by a Party in accordance with Annex X (Public Debt).</p> <p>5. A tribunal constituted under this Section may not decide claims that fall outside of the scope of this Article.</p> <p>Art. X.22 Submission of a Claim to Arbitration</p> <p>1. If a dispute has not been resolved through consultations, a claim may be submitted to arbitration under this Section by:</p> <p>(a) an investor of the other Party on its own behalf; or</p> <p>(b) an investor of the other Party, on behalf of a locally established enterprise which it owns or controls directly or indirectly.</p>	<p>ing paragraphs of this Article.</p> <p>(3) (a) Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article.</p> <p>(b) (i) The Contracting Parties listed in Annex ID do not give such unconditional consent where the Investor has previously submitted the dispute under subparagraph (2)(a) or (b).</p> <p>[...]</p> <p>(c) A Contracting Party listed in Annex IA does not give such unconditional consent with respect to a dispute arising under the last sentence of Article 10(1).</p> <p>(4) In the event that an Investor chooses to submit the dispute for resolution under subparagraph (2)(c), the Investor shall further provide its consent in writing for the dispute to be submitted to:</p> <p>(a) (i) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington, 18 March 1965 (here-</p>	<p>(ICSID), or</p> <p>– the rules of arbitration of the United Nations Commission on International Trade Law (UNCITRAL), or</p> <p>– the rules of arbitration of the International Chamber of Commerce (ICC), or</p> <p>– any other form of dispute settlement agreed upon by the parties to the dispute. Each Contracting Party herewith declares its acceptance of such international arbitral procedures.</p> <p>Each Contracting Party herewith declares its acceptance of such international arbitral procedures.</p>	<p>consent in writing to the submission of the dispute for settlement by binding arbitration:</p> <p>(i) to the International Centre for the Settlement of Investment Disputes ("Centre") established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington, March 18, 1965 ("ICSID Convention"), provided that the Party is a party to such Convention; or</p> <p>(ii) to the Additional Facility of the Centre, if the Centre is not available; or</p> <p>(iii) in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL); or</p> <p>(iv) to any other arbitration institution, or in accordance with any other arbitration rules, as may be mutually agreed between the parties to the dispute.</p> <p>(b) Once the national or company concerned has so consented, either Party to the dispute may initiate arbitration in accordance with the choice so specified in the consent.</p> <p>4. Each Party hereby consents to the submission of any investment dispute for settlement by binding arbitration in accord-</p>
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<p>Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 (hereinafter referred to as the "ICSID Convention");</p> <p>(b) arbitration under the auspices of ICSID pursuant to the ICSID Convention in accordance with the Rules on the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes (hereinafter referred to as "ICSID Additional Facility Rules"), where the conditions for proceedings pursuant to subparagraph (a) do not apply;</p> <p>(c) an arbitral tribunal established in accordance with the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL); or</p> <p>(d) any other arbitral institutions or under any other arbitration rules if the disputing parties so agree. For this purpose, the respondent shall be deemed to have agreed to the institutions or rules proposed by the claimant unless it objects, in writing, within thirty days of the respondent's receipt of notification of the claimant's submission of the dispute, in which case the claimant may submit a claim under one of the dispute settlement mecha-</p>	<p>2. A claim may be submitted under the following arbitration rules:</p> <p>(a) the ICSID Convention;</p> <p>(b) the ICSID Additional Facility Rules where the conditions for proceedings pursuant to paragraph (a) do not apply;</p> <p>(c) the UNCITRAL Arbitration Rules; or</p> <p>(d) any other arbitration rules on agreement of the disputing parties.</p> <p>3. In the event that the investor proposes arbitration rules pursuant to sub-paragraph 2(d), the respondent shall reply to the investor's proposal within 20 days of receipt. If the disputing parties have not agreed on such arbitration rules within 30 days of receipt, the investor may submit a claim under the arbitration rules provided for in subparagraphs 2(a), (b) or (c).</p> <p>4. For greater certainty, a claim submitted under subparagraph 1(b) shall satisfy the requirements of Article 25(1) of the ICSID Convention.</p> <p>5. The investor may, when submitting its claim, propose that a sole arbitrator should hear the claim. The respondent shall give sympathetic consideration to such a request, in particular where the in-</p>	<p>inafter referred to as the "ICSID Convention"), if the Contracting Party of the</p> <p>Investor and the Contracting Party party to the dispute are both parties to the ICSID Convention; or</p> <p>(ii) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention referred to in subparagraph (a)(i), under the rules governing the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre (hereinafter referred to as the "Additional Facility Rules"), if the Contracting Party of the Investor or the Contracting Party to the dispute, but not both, is a party to the ICSID Convention;</p> <p>(b) a sole arbitrator or ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (hereinafter referred to as "UNCITRAL"); or</p> <p>(c) an arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce.</p>		<p>ance with the choice specified in the written consent of the national or company under paragraph 3, Such</p> <p>consent, together with the written consent of the nationals or company when given under paragraph 3, shall satisfy the</p> <p>requirement for:</p> <p>(a) Written consent of the parties to the dispute for purposes of Chapter II of the ICSID Convention (Jurisdiction of the Centre) and for purposes of the Additional Facility Rules; and</p> <p>(b) an "agreement in writing" for purposes of II of the United Nations Convention on the and Enforcement of Foreign Arbitral Awards, done at New York June 10, 1958 (New York Convention).</p>
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<p>nisms provided for in subparagraphs (a), (b) or (c).</p> <p>2. Paragraph 1 of this Article shall constitute the consent of the respondent to the submission of a claim to arbitration under this Section. The consent under paragraph 1 and the submission of a claim to arbitration under this Section shall satisfy the requirements of:</p> <p>(a) Chapter II of the ICSID Convention, and the ICSID Additional Facility Rules; and</p> <p>(b) Article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958 (hereinafter referred to as “New York Convention”) for an “agreement in writing”.</p> <p>3. The claimant may, when submitting its claim, propose that a sole arbitrator should hear the case. The respondent shall give sympathetic consideration to such a request, in particular where the claimant is, or is claiming on behalf of, a small or medium-sized enterprise or the compensation or damages claimed are relatively low.</p>	<p>vestor is a small or medium-sized enterprise or the compensation or damages claimed are relatively low.</p> <p>6. The arbitration is governed by the arbitration rules applicable under paragraph 2 that are in effect on the date that the claim or claims are submitted to arbitration under this Section, subject to the specific rules set out in this Section and supplemented by rules adopted pursuant to Article X.42(3)(b) (Committee).</p> <p>7. A claim is submitted to arbitration under this Section when:</p> <p>(a) the request for arbitration under Article 36(1) of the ICSID Convention is received by the Secretary-General of ICSID;</p> <p>(b) the request for arbitration under Article 2 of Schedule C of the ICSID Additional Facility Rules is received by the Secretariat of ICSID;</p> <p>(c) the notice of arbitration under Article 3 of the UNCITRAL Arbitration Rules is received by the respondent; or</p> <p>(d) the request or notice of arbitration pursuant to other arbitration rules is received by the respondent in accordance with subparagraph 2(d).</p> <p>8. Each Party shall notify the other</p>			
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<p>Art. 9.20 Conditions to the Submission of Claim to Arbitration</p> <p>1. A claim may be submitted to arbitration under this Section only if:</p> <p>(a) the submission of the claim is accompanied by the claimant's consent in writing to arbitration in accordance with the procedures</p>	<p>Party of the place of delivery of notices and other documents by the investors relating to this Section. Each Party shall ensure this information is made publicly available.</p> <p>Article X.24: Consent to Arbitration</p> <p>1. The respondent consents to the submission of a claim to arbitration under this Section in accordance with the procedures set out under this Agreement.</p> <p>2. The consent under paragraph 1 and the submission of a claim to arbitration under this Chapter shall satisfy the requirements of:</p> <p>(a) Article 25 of the ICSID Convention and Chapter II (Institution of Proceedings) of the ICSID Additional Facility Rules for written consent of the disputing parties; and,</p> <p>(b) Article II of the New York Convention for an agreement in writing.</p> <p>Art. X.21: Procedural and Other Requirements for the Submission of a Claim to Arbitration</p> <p>1. An investor may submit a claim to arbitration under Article X.22 (Submission of a Claim to Arbitration) only if the investor:</p> <p>(a) delivers to the respondent,</p>			
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<p>set out in this Section and the claimant’s designation of one of the fora referred to in paragraph 1 of Article 9.19 (Submission of Claim to Arbitration) as the forum for dispute settlement;</p> <p>(b) at least six months have elapsed since the submission of the request for consultations under Article 9.16 (Consultations) and at least three months have elapsed from the submission of the notice of intent to arbitrate under Article 9.18 (Notice of Intent to Arbitrate);</p> <p>(c) the request for consultations and the notice of intent to arbitrate submitted by the claimant fulfilled the requirements set out in paragraph 2 of Article 9.16 (Consultations) and paragraph 1 of Article 9.18 (Notice of Intent to Arbitrate) respectively;</p> <p>(d) the legal and factual basis of the dispute was subject to prior consultation pursuant to Article 9.16 (Consultations);</p> <p>(e) all the claims identified in the submission of the claim to arbitration made pursuant to Article 9.19 (Submission of Claim to Arbitration) are based on treatment identified in the notice of intent to arbitrate made pursuant to Article 9.18 (Notice of Intent to Arbitrate);</p>	<p>with the submission of a claim to arbitration, its consent to arbitration in accordance with the procedures set out in this Chapter;</p> <p>(b) allows at least 180 days to elapse from the submission of the request for consultations and, where applicable, at least 90 days to elapse from the submission of the notice requesting a determination of the respondent;</p> <p>(c) fulfils the requirements of the notice requesting a determination of the respondent;</p> <p>(d) fulfils the requirements related to the request for consultations;</p> <p>(e) does not identify measures in its claim to arbitration that were not identified in its request for consultations;</p> <p>(f) where it has initiated a claim or proceeding seeking compensation or damages before a tribunal or court under domestic or international law with respect to any measure alleged to constitute a breach referred to in its claim to arbitration, provides a declaration that:</p> <p>(i) a final award, judgment or decision has been made; or</p> <p>(ii) it has withdrawn any such</p>			
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<p>(f) the claimant:</p> <p>(i) withdraws any pending claim submitted to a domestic court or tribunal concerning the same treatment as alleged to breach the provisions of Section A (Investment Protection); and</p> <p>(ii) declares that it will not submit such a claim before a final award has been rendered pursuant to this Section;</p> <p>(g) the claimant:</p> <p>(i) withdraws any pending claim concerning the same treatment as alleged to breach the provisions of Section A (Investment Protection) submitted to another international tribunal established pursuant to this Section, or any other treaty or contract; and</p> <p>(ii) declares that it will not submit such a claim in the future; and</p> <p>(h) no final award concerning the same treatment as alleged to breach the provisions of Section A (Investment Protection) has been rendered in a claim submitted by the claimant to another international tribunal established pursuant to this Section, or any other treaty or contract.</p> <p>2. For the purposes of subparagraphs 1(f), 1(g) and 1(h), the term "claimant" refers to the</p>	<p>claim or proceeding;</p> <p>The declaration shall contain, as applicable, proof that a final award, judgment or decision has been made or proof of the withdrawal of any such claim or proceeding; and</p> <p>(g) waives its right to initiate any claim or proceeding seeking compensation or damages before a tribunal or court under domestic or international law with respect to any measure alleged to constitute a breach referred to in its claim to arbitration.</p> <p>2. Where the submission of a claim to arbitration is for loss or damage to a locally established enterprise or to an interest in a locally established enterprise that the investor owns or controls directly or indirectly, both the investor and the locally established enterprise shall provide a declaration pursuant to subparagraph 1(f) and a waiver pursuant to subparagraph 1(g).</p> <p>3. The requirements of subparagraphs 1(f), (g) and paragraph 2 do not apply in respect of a locally established enterprise where the respondent or the investor's host State has deprived an investor of control of the locally established enterprise, or has otherwise prevented the locally established enterprise from fulfilling such re-</p>			
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<p>investor and, where applicable, to the locally established company. In addition, for the purposes of subparagraphs 1(f)(i), 1(g)(i), and 1(h), the term “claimant” includes all persons who directly or indirectly have an ownership interest in, or who are controlled by the investor or, where applicable, the locally established company.</p> <p>3. Upon request of the respondent, the tribunal shall decline jurisdiction where the claimant fails to respect any of the requirements or declarations referred to in paragraphs 1 and 2.</p> <p>4. Subparagraphs 1(f), 1(g) and 1(h) shall not prevent the claimant from seeking interim measures of protection before the courts or administrative tribunals of the respondent prior to the institution or during the pendency of proceedings before any of the dispute settlement fora referred to in Article 9.19 (Submission of Claim to Arbitration. For the purposes of this Article, interim measures of protection shall be for the sole purpose of preservation of the claimant’s rights and interests and shall not involve the payment of damages or the resolution of the substance of the matter in dispute.</p> <p>5. This Article is without prejudice to other jurisdictional requirements applicable to the relevant</p>	<p>quirements.</p> <p>4. Upon request of the respondent, the Tribunal shall decline jurisdiction where the investor or, as applicable, the locally established enterprise fails to fulfil any of the requirements of paragraphs 1 and 2.</p> <p>5. The waiver provided pursuant to subparagraph 1(g) or paragraph 2 as applicable shall cease to apply:</p> <p>(a) where the Tribunal rejects the claim on the basis of a failure to meet the requirements of paragraphs 1 or 2 or on any other procedural or jurisdictional grounds;</p> <p>(b) where the Tribunal dismisses the claim pursuant to Article X.29 (Claim manifestly without legal merit) or Article X.30 (Claims Unfounded as a Matter of Law); or</p> <p>(c) where the investor withdraws its claim, in conformity with applicable arbitration rules, within 12 months of the constitution of the tribunal.</p>			
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<p>dispute settlement mechanism and arising from the applicable arbitration rules.</p> <p>6. For greater certainty, a tribunal shall decline jurisdiction where the dispute had arisen, or was very likely to arise, at the time when the claimant acquired ownership or control of the investment subject to the dispute, and the tribunal determines based on the facts that the claimant has acquired ownership or control of the investment for the main purpose of submitting the claim to arbitration under this Section. This is without prejudice to other jurisdictional objections which could be entertained by the tribunal.</p>				
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4.4 ISDS and its relation to domestic remedies

Principally, by investing abroad the investor voluntarily subjects itself to the jurisdiction of its host State. If an investment dispute arises, the foreign investor shall turn to domestic courts. However, the courts of the host State could fail to dispense justice due to being biased in favour of their own government or due to a lack of independence from the same⁹⁴. Courts may be corrupt or simply lacking the competence or adequate capacities to render a decision in respectable quality and reasonable time⁹⁵. Therefore, ISDS was installed as a safety net in case the primary means available in a host State fail to prevent or remedy abuses of sovereign power⁹⁶.

At the same time domestic courts, at least in advanced systems, offer a consistent and predictable legal environment and erroneous decisions can be corrected by appeals mechanisms. Domestic courts are experienced in considering an investment case against the background of the whole domestic legal system. This system mirrors the elaborate, complex and refined balance of private and public interests agreed to in the host State.

In contrast to other areas of public international law⁹⁷, in international investment law an investor is hardly required to exhaust local remedies before resorting to ISDS ('local remedies rule')⁹⁸. This is due

⁹⁴ C. Schreuer, Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration, *The Law & Practice of International Courts and Tribunals*, Vol. 4 (2005), pp. 1 et seqq.; very critical M. Sornarajah, *The International Law on Foreign Investment*, 3rd edition, Cambridge University Press, Cambridge, 2010, p. 219 with reference to the case of Elettronica Sicula S.p.A. (ELSI), *United States of America v. Italy* before the ICL, Judgement, available at <http://www.icj-cij.org/docket/index.php?sum=395&p1=3&p2=3&case=76&p3=5> (visited 1 June 2015).

⁹⁵ J. VanDuzer et al., *Integrating Sustainable Development into International Investment Agreements – A Guide for Developing Countries*, Commonwealth Secretariat, August 2012, available at http://www.iisd.org/pdf/2012/6th_annual_forum_commonwealth_guide.pdf (visited 2 June 2015), p. 400; A. Guzman, Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties, *Virginia Journal of International Law*, Vol. 38 (1998), pp. 639 et seqq., pp. 658 et seqq.; S. Hindelang, Bilateral Investment Treaties, Custom and a Healthy Investment Climate - The Question of Whether BITs Influence Customary International Law Revisited, *The Journal of World Investment and Trade*, Vol. 5 (2004), pp. 789 et seqq.

⁹⁶ S. Hindelang, *Study on Investor-State Dispute Settlement (ISDS) and Alternatives of Dispute Resolution in International Investment Law*, Study for the European Parliament, September 2014, available at <http://ssrn.com/abstract=2525063> (visited 1 June 2015), p. 53. Certainly, from the perspective of an investor also 'practical considerations' might support ISDS as it allows the investor to circumvent perceived burdens connected to a lawsuit in a different country, such as the foreign language and the foreign legal culture.

⁹⁷ Cf. in respect of the requirement of exhaustion of local remedies in other fields A. Bjorklund, Waiver and the Exhaustion of Local Remedies Rule in NAFTA Jurisprudence, in: Weiler (ed.), *NAFTA Investment Law and Arbitration*, Transnational Publishers, Ardsley, 2004, pp. 253 et seqq., p. 258 et seqq. See also Article 35(1) European Convention on Human Rights (ECHR).

⁹⁸ Certain 'variations' of the local remedies rule have surfaced in ISDS practice in situations in which investor-State contracts contained exclusive jurisdiction clauses pointing to local courts or as a substantive requirement to be met within protection standards in investment instruments such as indirect expropriation or fair and equitable treatment. Cf. C. Schreuer, Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration, *The Law & Practice of International Courts and Tribunals*, Vol. 4 (2005), pp. 1 et seqq.; G. Foster, Striking a Balance between Investor Protections and National Sovereignty - The Relevance of Local Remedies in Investment Treaty Arbitration, *Columbia Journal of Transnational Law*, Vol. 49 (2011), pp. 201 et seqq., available at <http://ssrn.com/abstract=1865489> (visited 4 May 2015); W. Dodge, *Local Remedies under NAFTA Chapter 11*, 2011, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2217059 (visited 4 May 2015). For a discussion of the current interplay of investment tribunals and domestic courts cf. H. Bubrowski, *Internationale Investitionsschiedsverfahren und nationale Gerichte*, Mohr Siebeck, Tübingen, 2013.

to the silence of most investment instruments on this point which was read – in conjunction with other evidence⁹⁹ – by tribunals as a ‘waiver’ of the local remedies rule¹⁰⁰.

Apart from textual considerations, eminent commentators justify the dropping of the local remedies rule in ISDS, as a choice of principle, with arguments such as the following: host States’ courts are perceived as lacking objectivity, are often bound to apply domestic law only even though this falls short of international investment protection standards and domestic litigations would mean additional costs and delay for the foreign investor¹⁰¹.

However, such or similar justifications tend not only to blind out the virtues of resorting to local courts before initiating international arbitration but also seem to operate on the assumption that all domestic legal systems are more or less the same: biased, inefficient and incapable of guaranteeing a sufficient level of protection for foreign investment¹⁰².

Advantages of resorting to domestic courts were already pointed out above. These may, however, not be the only advantages of prior involvement of domestic courts: when States are worried that investment tribunals do not pay sufficient attention to public interests in the process of balancing them with private property interests, domestic courts might be better suited to take a first shot. Domestic courts are experienced in considering investment cases against the background of the whole domestic legal system. This system mirrors the elaborate, complex and refined balance of private and public interests agreed to in the host State. Domestic courts might be in a better position to comprehensively appreciate this balance than arbitral tribunals; the latter operating in a comparatively loosely defined, ‘minimalistic’ legal environment not always highly sensitive to legitimate policy choices made in a host State¹⁰³. Furthermore, domestic judges are less prone to allegations of conflicts of interests in comparison to arbitrators, the former holding a tenured office, the latter switching between the roles of arbitrators and party representatives (on this topic see below 4.5.1 (p. 58)).

⁹⁹ For example, in respect of ICSID arbitration such a reading is, inter alia, supported by Article 26 ICSID-Convention which stipulates that States are required to expressly state that they do not dispense with the requirement of exhausting local remedies.

¹⁰⁰ E.g. *Yaung Chi Oo Trading Pte. Ltd. v. Government of the Union of Myanmar*, ASEAN I.D. Case No. ARB/01/1, Award, para. 40, available at <http://www.italaw.com/sites/default/files/case-documents/ita0909.pdf> (visited 9 May 2015); *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, paras. 142 et seq., available at <http://www.italaw.com/sites/default/files/case-documents/ita0470.pdf> (visited 9 May 2015); *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction, paras. 35 et seq., available at <http://www.italaw.com/sites/default/files/case-documents/ita0779.pdf> (visited 9 May 2015). Cf. Articles 1117 and 1121 NAFTA require the claimant to waive their right to initiate or continue before any administrative tribunal or court under the law of any party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing party that is alleged to be in breach with the substantive standards in NAFTA. This was taken by arbitral tribunals as an implicit waiver of the local remedies rule by the State parties. Cf. A. Bjorklund, Waiver and the Exhaustion of Local Remedies Rule in NAFTA Jurisprudence, in: Weiler (ed.), *NAFTA Investment Law and Arbitration*, Transnational Publishers, Ardsley, 2004, pp. 253 et seqq., pp. 260 et seqq.; G. Van Harten, *Investment Treaty Arbitration and Public International Law*, Oxford University Press, Oxford, 2007, pp. 110 et seqq.

¹⁰¹ C. Schreuer, Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration, *The Law & Practice of International Courts and Tribunals*, Vol. 4 (2005), pp. 1 et seqq.; very critical M. Sornarajah, *The International Law on Foreign Investment*, 3rd edition, Cambridge University Press, Cambridge, 2010, p. 219 with reference to the case of *Elettronica Sicula S.p.A. (ELSI), United States of America v. Italy* before the ICL, Judgement, available at <http://www.icj-cij.org/docket/index.php?sum=395&p1=3&p2=3&case=76&p3=5> (visited 5 May 2015).

¹⁰² Also ideas of creating ‘competition’ between developed domestic systems and ISDS are rather ill-fitting when it comes to reviewing the exercise of public authority, as ‘competition’ might not only encourage working more efficiently but could also initiate a race to the bottom in terms of quality of control if competition conditions are not comparable.

¹⁰³ Note also the in-depth analysis of consequences of disregarding domestic legal systems in ISDS practice by S. Montt, *State Liability in Investment Treaty Arbitration*, Hart Publishing, Oxford, 2009, pp. 293 et seqq.; esp. pp. 366 et seqq.

If the domestic court fails to resolve the dispute to the satisfaction of the investor, i.e. falling below the international standard – which could happen even in jurisdictions which regard themselves as most advanced¹⁰⁴ – and the latter would initiate investment arbitrations, a tribunal may benefit from the ‘pre-processing’ of facts and the (domestic) law. Especially the domestic court’s treatment of its domestic law, echoing a societal consensus between private and public interests, can inspire the tribunal’s holdings to the extent that it conforms to the investment instrument. Overall, such arbitral awards might be closer to the consensus present in the host State and, hence, may be more easily accepted and perceived as legitimate by the public in that State. In the end, it would render ISDS what it was actually meant to be: a safety net in case of a failure of the domestic system, not an alternative to it¹⁰⁵. Concerns that an arbitral award deviating from a final court decision in a host State might face resistance as it would not be possible to pass it off politically can easily be dispelled. Longstanding experience with the jurisprudence of the European Court of Human Rights (ECtHR), the Court of Justice of the European Union (CJEU), the European Free Trade Association (EFTA) Court or even the International Court of Justice (ICJ) demonstrates that the unsuccessful State party generally implements an international ruling without further ado despite the fact that its domestic courts initially held differently.¹⁰⁶

Therefore, what appears to be needed is not a one-size fits all approach but a solution which responds to varying capacities of domestic courts¹⁰⁷. In any event, when addressing the relationship of domestic courts and ISDS, the State parties have to answer several questions, in particular: Is a certain remedy to be entered first; can ISDS and domestic courts be called upon simultaneously or only alternatively; and finally, what shall be the available options for an investor after having pursued domestic remedies for some time or even exhausted a certain remedy?

4.4.1 Different approaches to regulating a relationship: local remedies rule, fork in the road, and waiver

The relationship of ISDS and domestic courts can be structured in different ways. Pertaining to the question of preferring either the domestic or the international remedy, treaty partners could require an investor to exhaust local remedies before resorting to international jurisdiction¹⁰⁸. That would be

¹⁰⁴ Cf. *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, documents available at <http://www.italaw.com/cases/632> (visited 8 May 2012); see also European Commission, *The 2014 EU Justice Scoreboard, Speech Viviane Reding*, available at http://europa.eu/rapid/press-release_SPEECH-14-225_en.htm (visited 4 May 2015).

¹⁰⁵ Also in this direction W. Burke-White and A. von Staden, *Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations*, *Yale Journal of International Law*, Vol. 35 (2010), pp. 283 et seqq. pp. 332-333; N. Hachez and J. Wouters, *International Investment Dispute Settlement in the 21st Century: Does the Preservation of the Public Interest Require an Alternative to the Arbitral Model?*, Leuven Centre for Global Governance Studies Working Paper No. 81, pp. 20 et seqq., available at <http://ssrn.com/abstract=2009327> or <http://dx.doi.org/10.2139/ssrn.2009327> (both visited 4 May 2015). Cf. also S. Montt, *State Liability in Investment Treaty Arbitration*, Hart Publishing, Oxford, 2009, pp. 153 et seqq.

¹⁰⁶ S. Hindelang, *Study on Investor-State Dispute Settlement (ISDS) and Alternatives of Dispute Resolution in International Investment Law*, Study for the European Parliament, September 2014, available at <http://ssrn.com/abstract=2525063> (visited 1 June 2015), p. 92.

¹⁰⁷ S. Hindelang, *Study on Investor-State Dispute Settlement (ISDS) and Alternatives of Dispute Resolution in International Investment Law*, Study for the European Parliament, September 2014, available at <http://ssrn.com/abstract=2525063> (visited 1 June 2015), p. 90.

¹⁰⁸ Certain ‘variations’ of the local remedies rule have surfaced in ISDS practice, cf. C. Schreuer, *Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration*, *The Law & Practice of International Courts and Tribunals*, Vol. 4 (2005), pp. 1 et seqq.; G. Foster, *Striking a Balance between Investor Protections and National Sovereignty - The Relevance of Local Remedies in Investment Treaty Arbitration*, *Columbia Journal of Transnational Law*, Vol. 49 (2011), available at <http://ssrn.com/abstract=1865489> (visited 1 June 2015), pp. 201 et seqq.; W. Dodge, *Local Remedies under NAFTA Chapter 11*, 2011, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2217059 (visited 1 June 2015). For a discussion of the

the prevailing approach in public international law where remedies are provided for individuals¹⁰⁹. Such a 'local remedies rule' can take different forms and may contain certain qualifications, for example: the requirement of exhausting local remedies could be waived only where the domestic courts and domestic legal systems generally fail to meet international standards. One could also require a minimum period for which the investor has to pursue domestic remedies. An elastic time period for pursuing local remedies appears more flexible to adapting to different (and changing) situations in host States. This time period would be attached to a third-party index measuring the potential of domestic courts to produce effective solutions to claims of (foreign) investors¹¹⁰.

If international arbitration shall be available 'right from the start' of a dispute between host State and investor, the concern would be to avoid parallel proceedings and contradictory outcomes. For example, by employing a so-called 'fork-in-the-road-clause', a treaty could bar or rather eliminate alternative legal avenues once a claim has been submitted to either domestic courts or arbitration. Typically, a 'fork-in-the-road' provision prevents that a dispute is litigated consecutively, first in domestic courts and then before ISDS tribunals. It aims at contributing to a swift resolution of a dispute and at avoiding the additional costs of litigation. An alternative approach would be to require a claimant's waiver of other remedies before it can initiate investment arbitration¹¹¹. Such a regulation would allow exhausting local remedies before resorting to arbitration and aims primarily at preventing parallel proceedings and 'u-turns', i.e. switching back from ISDS to domestic proceedings.

4.4.2 No appeals power over domestic courts – no overturn of domestic laws

Any solution encouraging the investor to first approach or even exhaust local remedies supposedly would lead to a problem: 'the investment tribunal will then adjudicate a case after the (highest) courts of the host State have already decided on the matter. This might lead to a situation that could easily be *misunderstood* as giving investment tribunals the power to rule over national supreme and constitutional courts. However, it should be stressed that international courts (and tribunals) usually do not exercise appeals power over domestic courts. In the same vein, they regularly may not overturn domestic laws. Instead, they decide about a possible violation of the international legal obligations of the State only; a mode already well known and widely accepted in the human rights context'.¹¹²

current interplay of investment tribunals and domestic courts cf. H. Bubrowski, *Internationale Investitionsschiedsverfahren und nationale Gerichte*, Mohr Siebeck, Tübingen, 2013.

¹⁰⁹ Cf. in respect of the requirement of exhaustion of local remedies in other fields A. Bjorklund, Waiver and the Exhaustion of Local Remedies Rule in NAFTA Jurisprudence, in: Weiler (ed.), *NAFTA Investment Law and Arbitration*, Transnational Publishers, Ardsley, 2004, pp. 253 et seqq., p. 258 et seqq. See also Article 35(1) European Convention on Human Rights (ECHR).

¹¹⁰ S. Hindelang, *Study on Investor-State Dispute Settlement (ISDS) and Alternatives of Dispute Resolution in International Investment Law*, Study for the European Parliament, September 2014, available at <http://ssrn.com/abstract=2525063> (visited 1 June 2015), pp. 90 et seqq.

¹¹¹ While a fork-in-the-road-clause would automatically eliminate the remaining options of solving a dispute once the investor opts for an available forum, a waiver clause (e.g. Article 1121 NAFTA) would require the investor to expressly refrain from initiating or continuing dispute resolution in any other forum in order to be permitted to commence with ISDS.

¹¹² S. Hindelang and M. Krajewski, Conclusion and Outlook: Whither International Investment Law?, in idem (eds.), *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified*, Oxford University Press, Oxford, forthcoming 2016.

4.4.3 Comparison of EUSFTA, CETA, ECT, Germany-Jordan BIT, and the USA-Lithuania BIT

4.4.3.1 'Lax approach' and 'half fork'

The Germany-Jordan BIT contains in Art. 11 (2) a rather 'lax approach' as it explicitly states that claims can be submitted to domestic and arbitration courts 'consecutively or alternatively'. Taken literally, this would even allow for the rather unconventional option of seeking an arbitral award first and approaching domestic courts afterwards¹¹³. The only option that is excluded is that both avenues are followed simultaneously.

The USA-Lithuania BIT in Art. VI (2) and (3) offers the same general remedial options to an investor, but discourages the investor to approach domestic courts first. Only if it has not submitted the dispute to a domestic court previously may the investor consent to arbitration. This may be called a 'half fork in the road clause'; the investor may still first employ arbitration and afterwards turn to domestic courts¹¹⁴.

The ECT provides a more nuanced regulatory model. For those States listed in Annex ID¹¹⁵ the ECT follows the USA-Lithuania BIT regulatory model by preventing access to ISDS if a claim has been submitted to national courts first (Art. 26 (3) (b) (i) ECT). For that situation, States listed in Annex ID have not provided their unconditional consent – those not listed have made no reservations in this regard – to submit the dispute to arbitration. Still, this would leave the rather theoretical possibility for these States to consent to arbitration on a case-by-case basis.

4.4.3.2 The EU agreements' half-hearted solutions

CETA and EUSFTA contain more detailed provisions. EUSFTA in Art. 9.20 (1) (f) appears to avoid parallel proceedings by compelling the investor to withdraw any pending claim and not to submit it to domestic courts before the tribunal has rendered a final decision. This would still allow for consecutive proceedings and even for 'u-turns'.

CETA in Art. X.21 (1) (f) follows to some extent the approach taken in EUSFTA. On principle, parallel proceedings in which the investor seeks damages are not desired. However, it goes further insofar as it wants to prevent 'u-turns' in some situations. According to Art. X.21 (1) (g) CETA the claimant in an investment arbitration is compelled to waive its right to submit claims to domestic courts. This waiver, though, would cease in accordance with Art. X.21 (5) CETA, inter alia, when the investor's claim is dismissed by the tribunal because it does not even come close to having some merit or the investor simply withdraws its claim within a certain period of time. In such situations, the investor may take a 'u-turn' and have a 'second shot' by approaching domestic courts. While this does not necessarily facilitate settling disputes swiftly, it allows for a role to domestic courts; whether this role is meaningful has to be seen.

¹¹³ The concept of *res judicata* would probably not help in that particular course of action as it traditionally prescribes for three elements to be present, i.e. identity of *persona* (parties), *petitum* (object or claimed remedy), and *causa petendi* (cause or legal basis).

¹¹⁴ Cf. above Fn. 113.

¹¹⁵ 1. Australia, Azerbaijan, Bulgaria, (Canada), Croatia, Cyprus, The Czech Republic, European Communities, Finland, Greece, Hungary, Ireland, Italy, Japan, Kazakhstan, Mongolia, Norway, Poland, Portugal, Romania, (The Russian Federation), Slovenia, Spain, Sweden, Turkey, (United States of America).

The most interesting aspect of CETA is that – in contrast to EUSFTA – it does not actually fully bar parallel proceedings. The abovementioned rules apply only to claims for damages or compensation. If the investor seeks, however, the annulment of a host State's measure, it may proceed in parallel. According to the European Commission, this regulatory approach has the advantage of not discouraging investors from seeking redress before domestic courts and, hence, might reduce the number of potential ISDS claims¹¹⁶. Whether this claim is sustainable and, furthermore, whether it is the appropriate regulatory approach simply 'not to discourage' foreign investors from taking recourse to functioning domestic courts in the most advanced domestic legal orders is open to question¹¹⁷.

In any event, none of the regulatory approaches in the treaties explicitly encourage the use of domestic remedies. CETA and EUSFTA, as well as all other agreements under comparison, provide explicitly for an instrument to circumvent the primacy of primary legal protection – i.e. the revocation or amendment of an administrative act or a law – enshrined in advanced legal systems. This may defeat the purpose of judicial review, i.e. signalling illegality and forcing the respective government authority to remedy the illegal measure. In the end, it might promote an 'endure and cash in' attitude.

4.4.4 Alternative, more balanced approaches: elastic local remedies rule and others

Certainly, possible virtues of taking recourse to domestic courts before resorting to investment arbitration may vary significantly across national jurisdictions and would hold true generally only for advanced legal systems. The EU in its international investment protection policy should make concessions to the fact that domestic jurisdictions exhibit different levels of development.

Balanced solutions could, for example, take into account at the merits and cost level of an arbitration if a claimant did not seize a functioning domestic court before commencing arbitration¹¹⁸, or include

¹¹⁶ European Commission, *Investment in TTIP and beyond – the path for reform*, Concept Paper, available at http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF (visited 30 May 2015), p. 11.

¹¹⁷ Principally only compensation and damages (secondary legal protection) may be claimed for in the context of arbitration based on CETA. Primary legal protection – i.e. the revocation or amendment of an administrative act or a law – may not be claimed by an investor. A partial exception is made for the return of property in cases of expropriation, see Art. X.36 para. 1 CETA. Should an investor opt for the commencement of arbitral proceedings, he is barred from taking recourse to domestic courts to assert claims to compensation or damages. Seeking primary legal protection in domestic courts parallel to arbitral proceedings seems to remain possible, however. To what extent parallel procedures before a domestic court (primary legal protection) and an arbitral tribunal (secondary protection) are feasible at all depends on the specific case and the financial resources of the investor. If the investor has no interest in the revocation of the primary act – particularly in proceedings responding to administrative action – the investor will opt for the cheaper and faster option, which is probably such before an arbitral tribunal. With a view to the German legal system, the investor would have to take action against the administrative act itself before an administrative court first due to the primacy of primary legal protection (see § 839 para. 3 German Civil Code (BGB)) before being able to sue for damages in civil courts.

¹¹⁸ For a draft provision 'Encouraging the use of effective domestic remedies' see S. Hindelang and S. Wernicke (eds.), *Grundzüge eines modernen Investitionsschutzes - Harnack-Haus Reflections*, 2015, available at <http://tinyurl.com/ofzq7k3> (visited 9 September 2015), pp. 11 et seqq.:

'(1) With a view to encourage the use of effective domestic remedies, if the claimant omitted to seize domestic courts of the respondent or to take other domestic legal remedies readily available in the jurisdiction of the respondent prior to submitting a claim to arbitration and the respondent can establish that in all probability the measure would have been annulled in reasonable time if domestic remedied had been sought, the tribunal shall take this into account, when calculating damages and by allocating costs of the proceedings.

(2) The tribunal shall, when establishing in a summary review whether the measure would have been annulled in domestic jurisdiction of the respondent, take into account:

(a) the overall degree of development of the domestic legal system;

an elastic local remedies rule dependent on the independence and competence of the respective national legal system in a given case¹¹⁹. The extent of this obligation to exhaust local remedies can be determined by the tribunal on the basis of a rule of law index and adjusted flexibly¹²⁰. A 'low-ranking' domestic legal system would lead to a waiver of the local remedies rule. Significant improvements in the rule of law in a State would result in an increasing involvement of local courts and vice versa. This approach would signal that no formal distinction is made between developed and developing States and, hence, tribute is paid to the notion of formal equality of States. At the same time, an elastic local remedies rule would also recognise that there are factual differences between States. Thereby it

(b) the availability of a domestic remedy in the individual case; availability means that a domestic remedy must exist within the domestic legal system and can be pursued without difficulties or impediments by the investor;
(c) the effectiveness of a domestic remedy in the individual case; effectiveness means that a domestic remedy must offer a reasonable prospect of success.'

¹¹⁹ For a draft provision proposing alterations regarding the submission of a claim see S. Hindelang and S. Wernicke (eds.), *Grundzüge eines modernen Investitionsschutzes - Harnack-Haus Reflections*, 2015, available at <http://tinyurl.com/ofzq7k3> (visited 9 September 2015), pp. 10 et seqq.:

'[(1)] An investor may submit a claim to arbitration under Article X.22 (Submission of a Claim to Arbitration) only if the investor:

[...]

[(f1)] where it has initiated a claim or proceeding seeking compensation or damages before a tribunal or court under domestic or international law with respect to any measure alleged to constitute a breach referred to in its claim to arbitration, provides a declaration that a final award, judgment or decision has been made;

[(f2)] where it has not initiated a claim or proceeding before a tribunal or court under domestic law with respect to any measure alleged to constitute a breach referred to in its claim to arbitration provides a declaration that domestic remedies are unavailable or ineffective;

(f3) where it has withdrawn any such claim or proceeding a declaration that domestic remedies are unavailable or ineffective and a declaration of withdrawal of any such claim or proceeding;

[(g)] waives its right to initiate any claim or proceeding seeking compensation or damages before a tribunal or court under domestic or international law with respect to any measure alleged to constitute a breach referred to in its claim to arbitration.

The declaration in accordance with lit. f-g shall contain, as applicable, proof that a final award, judgment or decision has been made, proof of the withdrawal of any such claim or proceeding, and the circumstances substantiating that local remedies are unavailable or ineffective.

[...]

[(4)] Upon request of the respondent, the Tribunal shall decline jurisdiction where the investor [...] fails to fulfil any of the requirements of paragraphs 1 and 2.

In case the investor provides a declaration under subparagraph [(1) lit. (g)], the tribunal shall, when establishing whether the investor has fulfilled the said requirements, take into account:

[(a)] the overall degree of development of the domestic legal system in terms of the rule of law as evidenced in the most recent United Nations Rule of Law Indicators, EU Justice Scoreboard, the World Justice Project (WJP) Rule of Law Index, and the Bertelsmann Transformation Index [choice of indexes for illustrative purposes only];

[(b)] the availability of a domestic remedy in the individual case, i.e. a domestic remedy must exist within the domestic legal system and can be pursued without difficulties or impediments by the investor;

[(c)] the effectiveness of a domestic remedy in the individual case, i.e. a local remedy must offer a reasonable prospect of success. A domestic legal system shall be assumed making available effective domestic remedies when ranked among the top ten percent [choice of percentage for illustrative purposes only] on an average calculated from all Indexes referred to in subparagraph (4) (a), except in the rare circumstance where the investor can establish facts from which may be assumed that the investor was treated in a way which may amount to denial of justice. [...].'

¹²⁰ Cf. S. Hindelang, *Study on Investor-State Dispute Settlement (ISDS) and Alternatives of Dispute Resolution in International Investment Law*, Study for the European Parliament, September 2014, available at <http://ssrn.com/abstract=2525063> (visited 1 June 2015), pp. 91 et seqq.

would even allow for flexibility within one agreement without having to compromise the idea that all State parties to a treaty are bound by the same rules¹²¹.

¹²¹ S. Hindelang, *Study on Investor-State Dispute Settlement (ISDS) and Alternatives of Dispute Resolution in International Investment Law*, Study for the European Parliament, September 2014, available at <http://ssrn.com/abstract=2525063> (visited 1 June 2015), pp. 91 et seqq.

4.4.5 Table: ISDS and its relation to domestic remedies

EUSFTA ¹²²	CETA	ECT	Germany-Jordan	USA-Lithuania
<p>Art. 9.20</p> <p>1. A claim may be submitted to arbitration under this Section only if:</p> <p>[...]</p> <p>(f) the claimant:</p> <p>(i) withdraws any pending claim submitted to a domestic court or tribunal concerning the same treatment as alleged to breach the provisions of Section A (Investment Protection); and</p> <p>(ii) declares that it will not submit such a claim before a final award has been rendered pursuant to this Section;</p> <p>[...]</p> <p>3. Upon request of the respondent, the tribunal shall decline jurisdiction where the claimant fails to respect any of the requirements or declarations referred to in paragraphs 1 and 2.</p> <p>4. Subparagraphs 1(f), 1(g) and 1(h) shall not prevent the claimant from seeking interim measures of protection before the courts or</p>	<p>Art. X.21</p> <p>1. An investor may submit a claim to arbitration under Article X.22 (Submission of a Claim to Arbitration) only if the investor:</p> <p>[...]</p> <p>(f) where it has initiated a claim or proceeding seeking compensation or damages before a tribunal or court under domestic or international law with respect to any measure alleged to constitute a breach referred to in its claim to arbitration, provides a declaration that:</p> <p>(i) a final award, judgment or decision has been made; or</p> <p>(ii) it has withdrawn any such claim or proceeding;</p> <p>The declaration shall contain, as applicable, proof that a final award, judgment or decision has been made or proof of the withdrawal of any such claim or proceeding; and</p> <p>(g) waives its right to initiate any claim or proceeding seeking</p>	<p>Art. 26</p> <p>(2) If such disputes can not be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution:</p> <p>(a) to the courts or administrative tribunals of the Contracting Party to the dispute;</p> <p>(b) in accordance with any applicable, previously agreed dispute settlement procedure; or</p> <p>(c) in accordance with the following paragraphs of this Article.</p> <p>(3) (a) Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article.</p> <p>(b) (i) The Contracting Parties listed in Annex ID do not give such un-</p>	<p>Art. 11</p> <p>(2) If the dispute cannot be settled within six months of the date when it has been raised by one of the parties in dispute, it shall be submitted at the request of the investor of the other Contracting Party alternatively or consecutively to:</p> <p>(a) the competent court of the Contracting Party in whose territory the investment has been made;</p> <p>(b) international arbitration under either:</p> <ul style="list-style-type: none"> – the Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID), or – the rules of arbitration of the United Nations Commission on International Trade Law (UNCITRAL), or – the rules of arbitration of the International Chamber of Commerce (ICC), or – any other form of dispute settlement agreed upon by the parties to the dis- 	<p>Art. VI</p> <p>[...]</p> <p>2. In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute for resolution:</p> <p>(a) to the courts or administrative tribunals of the Party that is a Party to the dispute; or</p> <p>(b) in accordance with any applicable, previously agreed dispute-settlement procedures; or</p> <p>(c) in accordance with the terms of paragraph 3.</p> <p>3. (a) Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b) and that six months have elapsed from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the</p>

¹²² Numbering according to the October 2014 text version predating legal revision; numbering of the articles may change.

<p>administrative tribunals of the respondent prior to the institution or during the pendency of proceedings before any of the dispute settlement fora referred to in Article 9.19 (Submission of Claim to Arbitration. For the purposes of this Article, interim measures of protection shall be for the sole purpose of preservation of the claimant's rights and interests and shall not involve the payment of damages or the resolution of the substance of the matter in dispute.</p>	<p>compensation or damages before a tribunal or court under domestic or international law with respect to any measure alleged to constitute a breach referred to in its claim to arbitration.</p> <p>[...]</p> <p>4. Upon request of the respondent, the Tribunal shall decline jurisdiction where the investor or, as applicable, the locally established enterprise fails to fulfil any of the requirements of paragraphs 1 and 2.</p> <p>5. The waiver provided pursuant to subparagraph 1(g) or paragraph 2 as applicable shall cease to apply:</p> <p>(a) where the Tribunal rejects the claim on the basis of a failure to meet the requirements of paragraphs 1 or 2 or on any other procedural or jurisdictional grounds;</p> <p>(b) where the Tribunal dismisses the claim pursuant to Article X.29 (Claim manifestly without legal merit) or Article X.30 (Claims Unfounded as a Matter of Law); or</p> <p>(c) where the investor withdraws its claim, in conformity with applicable arbitration rules, within 12 months of the constitution of the tribunal.</p>	<p>conditional consent where the Investor has previously submitted the dispute under subparagraph (2)(a) or (b).</p> <p>[...]</p> <p>(4) In the event that an Investor chooses to submit the dispute for resolution under subparagraph (2)(c), the Investor shall further provide its consent in writing for the dispute to be submitted to:</p> <p>[...]</p>	<p>pute. Each Contracting Party herewith declares its acceptance of such international arbitral procedures.</p>	<p>dispute for settlement by binding arbitration:</p> <p>(i) to the International Centre for the Settlement of Investment Disputes ("Centre") established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington, March 18, 1965 ("ICSID Convention"), provided that the Party is a party to such Convention; or</p> <p>(ii) to the Additional Facility of the Centre, if the Centre is not available; or</p> <p>(iii) in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL); or</p> <p>(iv) to any other arbitration institution, or in accordance with any other arbitration rules, as may be mutually agreed between the parties to the dispute.</p>
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4.5 Appointment and qualification of arbitrators

Often, as in the case of the ECT, the Germany-Jordan BIT, and the USA-Lithuania BIT, investment treaties do not regulate the fundamental question of how to appoint arbitrators. Rather, the rules of the respective arbitration institution the parties call upon for settling a certain dispute govern the appointment process. In this respect, EUSFTA and CETA provide a new quality as they include rules of their own on the appointment.

4.5.1 The typical appointment regime and its criticism

Typically, as for example under the ICSID Convention¹²³, a tribunal consists of three ad-hoc arbitrators, two party-appointed, the third appointed either in consensus or by a third person. They are subject to only relatively few and usually broadly drafted qualification, transparency, disclosure and impartiality rules frequently contained in the respective arbitration rules¹²⁴, sometimes also found in an investment instrument itself¹²⁵ and/or in a specific code of conduct¹²⁶.

This system has, inter alia, attracted criticism on two points. Firstly, ad-hoc arbitrators may appear as party representatives in other cases¹²⁷. It is argued that they could be perceived by the general public as having an interest in interpreting an investment instrument in a way that might later suit them in the context of another case in which they might act in a different role. Also, they allegedly would have an interest in encouraging more and more investment claims (which are usually brought by investors but not host States) and, thereby, advancing their business model, hoping for re-appointment as an arbitrator or party representative¹²⁸.

Secondly, if the disputing parties disagree on the third arbitrator, which they frequently do, institutions such as ICSID appoint the presiding arbitrator. The appointment of the third arbitrator can be crucial, as it can be assumed that each disputing party appoints an arbitrator that best suits its goals¹²⁹. ICSID appointments are often sketched as appointments 'through the political process of an

¹²³ Cf. Art. 37 (2) (b), 38 ICSID-Convention.

¹²⁴ Cf. for a comparison of DC Bar International Law Section – International Dispute Resolution Committee, Working Group on Practical Aspects of Transparency and Accountability in International Treaty Arbitration, *Comparison Chart on Arbitrators' Standards of Conduct*, available at http://www.dccbar.org/sections/international-law/upload/for_lawyers-sections-international-law-conductChart.pdf (visited 2 June 2015); see by way of comparison The World Trade Organization Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes, available at http://www.wto.org/english/tratop_e/dispu_e/rc_e.htm (visited 2 June 2015).

¹²⁵ Cf., e.g., Article 29(2) of the 2004 Canadian model Foreign Investment Promotion and Protection Agreement, available at <http://italaw.com/documents/Canadian2004-FIPA-model-en.pdf> (visited 2 June 2015); Article 23(2) of the 2009 ASEAN-Australia-New Zealand Free Trade Agreement, available at <http://www.asean.fta.govt.nz/chapter-11-investment/> (visited 2 June 2015).

¹²⁶ Cf., e.g., Code of Conduct for Dispute Settlement Procedures under Chapters 19 and 20 of NAFTA (state-state arbitration), available at www.worldtradelaw.net/nafta/19-20code.pdf (visited 2 June 2015).

¹²⁷ Critically on the dual hat role: T. Buergethal, *The Proliferation of Disputes, Dispute Settlement Procedures and Respect for the Rule of Law*, *Arbitration International*, Vol. 22 (2006), pp. 495 et seqq., p. 498; F. Marshall, *Defining New Institutional Options for Investor-State Dispute Settlement*, IISD, 2009, available at http://www.iisd.org/pdf/2009/defining_new_institutional_options.pdf (visited 2 June 2015), pp. 8-14.

¹²⁸ G. Van Harten, *Investment Treaty Arbitration and Public International Law*, Oxford University Press, Oxford, 2007, pp. 172 et seqq.

¹²⁹ D. Gaukrodger and K. Gordon, *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community*, OECD Working Papers on International Investment No. 2012/03, available at <http://dx.doi.org/10.1787/5k46b1r85j6f-en> (visited 20 May 2015), pp. 89 et seqq. on selection of presiding arbitrators. Furthermore, arbitration institutions decide on arbitrator challenges on grounds of conflict of interests and name ad-hoc arbitrators sitting on an annulment tribunal.

international organisation' in which certain States exercise a dominant role¹³⁰. The possibility that appointing institutions might develop a life of their own has always been viewed critically in arbitration, commercial and investment alike, leading to the system of party appointments in the first place¹³¹.

4.5.2 Qualification of arbitrators

The quality of reasoning and reaching the correct legal result, it is recalled, might prove to be an important source of legitimacy of an arbitral decision. Therefore, securing high standards with regard to arbitrators which are legible to serve on an investment tribunal would be an essential – but surely not the only condition – to decrease the error rate. It would not only be necessary to prescribe for sufficient *expertise* in public international law, in particular international investment law¹³², but also to ensure that *sufficient time* and other resources are devoted to an individual case.

While in well-functioning legal orders institutionalised selection processes usually exist which signal to the public that those sitting in court are capable of resolving a legal dispute in a sufficient minimum quality and hereby increase trust in the judicial body, selecting ad-hoc arbitrators in ISDS is currently a highly non-transparent process. Whether government-sponsored rosters of arbitrators always follow the logic of expertise is also open to debate¹³³. If one would like to stick with the notion of party-appointed arbitrators which ideally would also contain some elements of competition, State parties should specify in greater detail qualifications, experience and other prerequisites to be met by arbitrators and police arbitrators' nominations more rigorously, e.g. by treaty committees. The award is not only as good as the law on which a dispute is decided but the outcome also significantly depends on the qualifications of arbitrators.

4.5.3 Comparison of EUSFTA, CETA, ECT, Germany-Jordan BIT, and the USA-Lithuania BIT

Out of the five treaties, only EUSFTA and CETA explicitly define the process of arbitrator appointment¹³⁴; the other treaties rely on the instructions contained in the arbitration rules. In furnishing the appointment process, EUSFTA and CETA borrow from the ICSID Convention and rely largely on ICSID infrastructure: Each party appoints one arbitrator and they are free to agree on the third, who is also the chairperson, Art. 9.21 (1) EUSFTA and Art. X.25 (1) CETA. In case the parties fail to appoint the chairperson (or any other arbitrator), both treaties deviate, however, from the ICSID-Convention. In such situation the presiding arbitrator is nominated by the Secretary General of ICSID, who is bound to a *pre-established roster of at least 15 arbitrators* compiled and maintained by the respective treaty committee, Art. 9.21 (2) and (3) EUSFTA, Art. X.25 (2) and (3) CETA. While such a solution is far from the institutional safeguards of a permanent institution with tenured judges, creating a roster allows

¹³⁰ J. Paulsson, Arbitration Without Privity, *ICSID Review*, Vol. 10 (1995), pp. 232 et seqq., p. 244.

¹³¹ S. Hindelang, *Study on Investor-State Dispute Settlement (ISDS) and Alternatives of Dispute Resolution in International Investment Law*, Study for the European Parliament, September 2014, available at <http://ssrn.com/abstract=2525063> (visited 1 June 2015), p. 101.

¹³² Cf. Article x-10(5) CETA draft of 4 February 2014 = Article x-25(5) of CETA draft of 3 April 2014: 'Arbitrators appointed pursuant to this section shall have expertise or experience in public international law, in particular international investment law. It is desirable that they have expertise or experience in international trade law, and the resolution of disputes arising under international investment or international trade agreements'.

¹³³ The problems encountered nominating suitable judges for the ECtHR in Strasbourg can serve as a telling example. Cf. H. Bubrowski, Qualifikation ist auch nur ein Wort, *Frankfurter Allgemeine Zeitung*, 10 March 2014, p. 4; N. Engel, More Transparency and Governmental Loyalty for Maintaining Professional Quality in the Election of Judges to the European Court of Human Rights, *Human Rights Law Journal*, Vol. 32 (2012), p. 448.

¹³⁴ See the text passages highlighted in yellow in the table following this chapter.

States to exert greater control over the choice of arbitrators, being able to take into account their expertise and other desired characteristics¹³⁵. Yet, it remains doubtful whether this procedure ‘will [fully] eliminate the risk of vested interests’ described above, as the Commission claims¹³⁶. Moreover, considering the envisaged rather small target number of names on the list, the system might be especially prone to suspicions of political misuse. To counter allegations of patronage and non-transparent nomination processes, the decisive criterion should rather be expertise and qualification of the arbitrators coupled with an element of competition.¹³⁷

In this regard, the two treaties contain – like the ICSID-Convention in Art. 14 (1) – some rather general rules on the professional expertise and independence of the arbitrators¹³⁸ to be appointed in Art. 9.21 (7) and (8) EUSFTA and Art. X.25 (5) and (6) CETA, which are further developed in code of conducts for arbitrators (see below 4.6 (p. 64)). Both treaties, however, do not tackle *on a principled basis* the issue that arbitrators may continue to work also as party representatives in other cases. As for the expertise of arbitrators, EUSFTA and CETA make again explicit reference to the knowledge and expertise potential arbitrators should possess (Art. 9.21 (7) EUSFTA and Art. X.25 (5) CETA) and place a focus on international investment law and on general international law. The other treaties rely on the standards stipulated in the arbitration rules. The ICSID-Convention in Art. 14 (1) is somewhat broader calling for competence in the fields of law in particular.

4.5.4 The question of appointment and qualification against the backdrop of expected reforms

The issues of appointment and qualification of arbitrators are at the forefront and centre of the current discussion on the reform the investment law regime. They could, however, lose significance immediately if the reform process switches from ‘evolution’ to ‘revolution’: If a permanent investment court will be created (on this topic see below 4.12 (p. 105)), different questions have to be asked. Clearly, with a shift towards permanent investment courts with tenured judges, the questions of appointment and qualification of adjudicators in the current form would be beside the point. While the EU draft agreements have shown an increased awareness for the problems involved in appointing adjudicators, they may still be characterised as only ‘hesitantly evolutionary’ in that respect. With a view to making the current concept of dispute settlement more sustainable and less vulnerable to criticism, EU agreements should take bolder steps, e.g. by establishing a clear distinction between the roles of arbitrators and party representatives.

¹³⁵ J. VanDuzer et al., *Integrating Sustainable Development into International Investment Agreements – A Guide for Developing Countries*, Commonwealth Secretariat, August 2012, available at

http://www.iisd.org/pdf/2012/6th_annual_forum_commonwealth_guide.pdf (visited 1 June 2015), pp. 423 and 433.

¹³⁶ European Commission, *Fact sheet - Investment Protection and Investor-to-State Dispute Settlement in EU agreements*, 26 November 2013, available at http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151916.pdf (visited 2 June 2015), p. 9.

¹³⁷ For a draft provision regarding the nomination process (as a Modification of Article X.25 CETA: Constitution of the Tribunal) see S. Hindelang and S. Wernicke (eds.), *Grundzüge eines modernen Investitionsschutzes - Harnack-Haus Reflections*, 2015, available at <http://tinyurl.com/ofzq7k3> (visited 9 September 2015), pp. 14 et seqq.:

(...) 4. Pursuant to Article X.42(2)(a), the Committee on Services and Investment shall establish, and thereafter maintain, a list of individuals who are willing and able to serve as arbitrators and who meet the qualifications set out in paragraph 5. It shall ensure that the list includes at least 90 individuals. Individuals may apply to the Committee on Services and Investment to be included in this list. The Committee on Services and Investment shall include the individual if he or she qualifies as arbitrator in accordance with paragraph 5. The list shall be composed of three sub-lists each comprising at least thirty individuals: one sub-list for each Party, and one sub-list of individuals who are neither nationals of Canada nor the Member States of the European Union to act as presiding arbitrators.

¹³⁸ See the text passages highlighted in green in the table following this chapter.

4.5.5 Table: Appointment and qualification of arbitrators

bold = important passages**yellow** = pre-established list of arbitrators**green** = competence and independence of arbitrators

EUSFTA ¹³⁹	CETA	ICSID Convention
<p>Art. 9.21</p> <p>1. Unless the disputing parties otherwise agree, such as to a tribunal composed of a sole arbitrator, the tribunal shall be composed of three arbitrators, one appointed by each of the disputing parties and the third, who shall be the chairperson, appointed by agreement of the disputing parties.</p> <p>2. If the tribunal has not been constituted within ninety days from the date on which the claim was submitted to arbitration pursuant to Article 9.19 (Submission of Claim to Arbitration), the Secretary General of ICSID shall, upon request of a disputing party, appoint the arbitrator or arbitrators not yet appointed from the list established pursuant to paragraph 3. In the event that such list has not been established on the date a claim is submitted to arbitration, the Secretary General of ICSID shall appoint the arbitrator or arbitrators not yet appointed at his or her own discretion, in consultation with the disputing parties, and:</p> <p>(a) in the event that the arbitrator not yet appointed is neither a chairperson nor a sole arbitrator, taking into account the individuals proposed by the relevant Party pursuant to subparagraph 4(a), and</p> <p>(b) in the event that the arbitrator not yet appointed is the chairperson or a sole arbitrator, taking into account any individuals whose names appear on both lists proposed by the Parties pursuant to subparagraph 4(b).</p>	<p>Art. X.25</p> <p>1. Unless the disputing parties have agreed to appoint a sole arbitrator, the Tribunal shall comprise three arbitrators. One arbitrator shall be appointed by each of the disputing parties and the third, who will be the presiding arbitrator, shall be appointed by agreement of the disputing parties. If the disputing parties agree to appoint a sole arbitrator, the disputing parties shall seek to agree on the sole arbitrator.</p> <p>2. If a Tribunal has not been constituted within 90 days from the date that a claim is submitted to arbitration, or where the disputing parties have agreed to appoint a sole arbitrator and have failed to do so within 90 days from the date the respondent agreed to submit the dispute to a sole arbitrator, the Secretary-General of ICSID shall appoint the arbitrator or arbitrators not yet appointed in accordance with paragraph 3.</p> <p>3. The Secretary-General of ICSID shall, upon request of a disputing party, appoint the remaining arbitrators from the list established pursuant to paragraph 4. In the event that such list has not been established on the date a claim is submitted to arbitration, the Secretary-General of ICSID shall make the appointment at his or her discretion taking into consideration nominations made by either Party and, to the extent practicable, in consultation with the disputing parties. The Secretary-General of ICSID may not appoint as presiding arbitrator a national of either Canada or a Member State of the European Union unless all disputing parties agree otherwise.</p> <p>4. Pursuant to Article X.42(2)(a), the Committee on Services and Investment shall establish, and thereafter maintain, a</p>	<p>Art. 14 (1)</p> <p>(1) Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.</p> <p>Art. 37</p> <p>(1) The Arbitral Tribunal (hereinafter called the Tribunal) shall be constituted as soon as possible after registration of a request pursuant to Article 36.</p> <p>(2) (a) The Tribunal shall consist of a sole arbitrator or any uneven number of arbitrators appointed as the parties shall agree.</p> <p>(b) Where the parties do not agree upon the number of arbitrators and the method of their appointment, the Tribunal shall consist of three arbitrators, one arbitrator appointed by each party and the third, who shall be the president of the Tribunal, appointed by agreement of the parties.</p> <p>Art. 38</p> <p>If the Tribunal shall not have been constituted within 90 days after notice of registration of the request has been dispatched by the Secretary-General in accordance with paragraph (3) of Article 36, or such other pe-</p>

¹³⁹ Numbering according to the October 2014 text version predating legal revision; numbering of the articles may change.

3. The Trade Committee will, pursuant to subparagraph 2(a) of Article 9.33 (Role of Committees), no later than one year after the entry into force of this Agreement, **establish a list of individuals who are willing and able to serve as arbitrators**, ensuring that the list, once established, includes at least fifteen individuals thereafter.

4. For the purpose of establishing the list referred to in paragraph 3:

(a) each Party shall propose five individuals to serve as arbitrators who may not act as chairpersons or sole arbitrators; an

(b) each Party shall propose a list of individuals who are not nationals of either Party who may act as chairpersons or sole arbitrators, for the Trade Committee to thereafter agree on at least five individuals who may act as chairpersons or sole arbitrators.

In case one Party wishes to propose more than five individuals pursuant to subparagraph (a), the other Party may propose the same number of additional arbitrators, and the Trade Committee may agree to increase the number of individuals who may act as chairpersons or sole arbitrators accordingly.

5. For the purposes of Article 39 of the ICSID Convention and Article 7 of Schedule C to the ICSID Additional Facility Rules, and without prejudice to an objection to an arbitrator on a ground other than nationality:

(a) the respondent agrees to the appointment of each individual member of a tribunal established under the ICSID Convention or the ICSID Additional Facility Rules;

(b) a claimant acting on its own behalf may submit a claim to arbitration under this Section, or continue a claim, under the ICSID Convention or the ICSID Additional Facility Rules, only on condition that the claimant agrees in writing to the appointment of each individual member of the tribunal; and

(c) a claimant acting on behalf of a locally established

list of individuals who are willing and able to serve as arbitrators and who meet the qualifications set out in paragraph 5. It shall ensure that the list includes at least 15 individuals but may agree to increase the number of individuals. The list shall be composed of three sub-lists each comprising at least five individuals: one sub-list for each Party, and one sub-list of individuals who are neither nationals of Canada nor the Member States of the European Union to act as presiding arbitrators.

5. Arbitrators appointed pursuant to this Section **shall have expertise or experience** in **public international law, in particular international investment law**. It is desirable that they have expertise or experience in international trade law and the resolution of disputes arising under international investment or international trade agreements.

6. **Arbitrators shall be independent** of, and not be affiliated with or take instructions from, a disputing party or the government of a Party with regard to trade and investment matters. Arbitrators shall not take instructions from any organisation, government or disputing party with regard to matters related to the dispute. Arbitrators shall comply with the **International Bar Association Guidelines on Conflicts of Interest** in International Arbitration or any supplemental rules adopted pursuant to Article X.42(2)(b) (Committee on Services and Investment). Arbitrators who serve on the list established pursuant to paragraph 3 shall not, for that reason alone, be deemed to be affiliated with the government of a Party.

7. If a disputing party considers that an arbitrator does not meet the requirements set out in paragraph 6, it shall send a notice of its intent to challenge the arbitrator within 15 days after:

(a) the appointment of the arbitrator has been notified to the challenging party; or,

(b) the disputing party became aware of the facts giving rise to the alleged failure to meet such requirements.

8. The notice of an intention to challenge shall be promptly communicated to the other disputing party, to the arbitrator or

riod as the parties may agree, the **Chairman shall**, at the request of either party and after consulting both parties as far as possible, **appoint the arbitrator or arbitrators not yet appointed**. Arbitrators appointed by the Chairman pursuant to this Article **shall not be nationals of the Contracting State party to the dispute or of the Contracting State whose national is a party to the dispute**.

Art. 39

The **majority of the arbitrators shall be nationals of States other than the Contracting State party to the dispute and the Contracting State whose national is a party to the dispute**; provided, however, that the foregoing provisions of this Article shall not apply if the sole arbitrator or each individual member of the Tribunal has been appointed by agreement of the parties.

Art. 40

(1) **Arbitrators may be appointed from outside the Panel of Arbitrators**, except in the case of appointments by the Chairman pursuant to Article 38.

(2) Arbitrators appointed from outside the Panel of Arbitrators shall possess the qualities stated in paragraph (1) of Article 14.

company may submit a claim to arbitration under this Section, or continue a claim, under the ICSID Convention or the ICSID Additional Facility Rules, only on condition that both the claimant and the locally established company agree in writing to the appointment of each individual member of the tribunal.

6. All arbitrators shall have **specialised knowledge of or experience** in public international law and international investment law, or in the settlement of disputes under international investment agreements.

7. All arbitrators shall be independent, serve in their individual capacities and not be affiliated with the government of either of the Parties, and shall comply with Annex 9- B. Arbitrators who serve on the list established pursuant to paragraph 3 or who have been proposed pursuant to paragraph 4 shall not, for that reason alone, be deemed to be affiliated with the government of any Party.

8. If a disputing party considers that an arbitrator does not meet the requirements set out in paragraph 7, it shall send a notice of challenge to the appointment of the arbitrator within forty-five days of the date on which:

- (a) the disputing party was notified of the appointment of the arbitrator; or
- (b) the disputing party first became aware of the arbitrator's alleged failure to meet such requirements.

The notice of challenge shall be sent to the other disputing party, to all arbitrators and to the Secretary General of ICSID, and it shall state the reasons for the challenge.

9. When the appointment of an arbitrator has been challenged by a disputing party, the disputing parties may agree to the challenge and request the challenged arbitrator to resign. The arbitrator may also, after the challenge, elect to resign. Either way, this does not imply acceptance of the validity of the grounds for the challenge.

arbitrators, as applicable, and to the Secretary-General of ICSID. The notice of challenge shall state the reasons for the challenge.

9. When an arbitrator has been challenged by a disputing party, the disputing parties may agree to the challenge, in which case the disputing parties may request the challenged arbitrator to resign. The arbitrator may, after the challenge, elect to resign. A decision to resign does not imply acceptance of the validity of the grounds for the challenge.

10. If, within 15 days from the date of the notice of challenge, the challenged arbitrator has elected not to resign, the Secretary-General of ICSID shall, after hearing the disputing parties and after providing the arbitrator an opportunity to submit any observations, issue a decision within 45 days of receipt of the notice of challenge and forthwith notify the disputing parties and other arbitrators, as applicable.

11. A vacancy resulting from the disqualification or resignation of an arbitrator shall be filled promptly pursuant to the procedure provided for in this Article.

Art X.42 (2)

2. The Committee shall, on agreement of the Parties, and after completion of the respective legal requirements and procedures of the Parties:

- (a) establish and maintain the list of arbitrators pursuant to Article X.25(3)(Constitution of the Tribunal);

[...]

The Parties shall make best efforts to ensure that the list of arbitrators is established and the code of conduct adopted no later than the entry into force of the Agreement, and in any event no later than two years after the entry into force of the Agreement.

[...]

4.6 Code of conduct for arbitrators

The conduct of the arbitrators is critical in securing the integrity of the adjudicative process. As already briefly described above, the ISDS system has often been criticized for the role of adjudicators therein in particular¹⁴⁰. The issue can be addressed to some extent by establishing specific codes of conduct for the chosen arbitrator. Currently, only few treaties explicitly provide for such standards. In lieu thereof, the codes of conduct of the respective arbitration institution may provide guidance.

4.6.1 ECT, the Germany-Jordan BIT, and the USA-Lithuania BIT: Relying on arbitration institutions

The ECT, the Germany-Jordan BIT, and the USA-Lithuania BIT do not provide rules on conduct of their own but rely merely on the rules of the arbitration institution which the claimant may choose. By way of example, if the arbitration is conducted in accordance with the ICSID-Convention, the ICSID Rules of Procedure for Arbitration Proceedings require a potential arbitrator to sign a form in which he accepts disclosure¹⁴¹ and confidentiality¹⁴² obligations and pledges to conduct proceedings independently¹⁴³ and impartially (Rule 1(4)) and Rule 6(2)). CETA and EUSFTA, on the other side, explicitly provide rules on their own to address the issue.

4.6.2 EUSFTA: The Code of Conduct

Art. 9.21 (8) EUSFTA states that arbitrators shall comply with the regulations of Annex 9-B, which contains a code of conduct specifically drawn up for the treaty. The code addresses, inter alia, disclosure of conflicts, a pledge of independence and impartiality, and confidentiality obligations. In terms of disclosure, the arbitrators have to communicate actual or potential breaches of the code at any time to the parties (Annex 9-B (4)). Not only prior to confirmation as an arbitrator but even if already selected, an arbitrator has to remain vigilant regarding possible direct and indirect conflicts of interest (Annex 9-B (5)). An arbitrator is obliged to fairness and diligence (Annex 9-B (6)) and must be independent and impartial and avoid creating an appearance of bias (Annex 9-B (10)). Annex 9-B (15) clarifies that even former arbitrators are not free from obligations: Annex 9-B (16)-(18) deal with the confidentiality of proceedings, according to which arbitrators shall not disclose or use any non-public information.

4.6.3 CETA: The IBA Guidelines and a possible adoption of an own code of conduct

CETA, for the time being, does not yet have its own set of rules for the conduct of arbitrators. According to Art. X. 42 (2) (b) CETA the treaty committee shall be responsible for adopting a comprehensive code of conduct that may address topics such as disclosure obligations, the independence and impartiality of arbitrators and confidentiality issues.

¹⁴⁰ Critically especially on the dual hat role of adjudicators as arbitrators in one and representative in another case: T. Buerghenthal, *The Proliferation of Disputes, Dispute Settlement Procedures and Respect for the Rule of Law, Arbitration International*, Vol. 22 (2006), pp. 495 et seqq., p. 498; F. Marshall, *Defining New Institutional Options for Investor-State Dispute Settlement*, IISD, 2009, available at http://www.iisd.org/pdf/2009/defining_new_institutional_options.pdf (visited 2 June 2015), pp. 8-14.

¹⁴¹ See the text passages highlighted in yellow in the table following this chapter.

¹⁴² See the text passages highlighted in green in the table following this chapter.

¹⁴³ See the text passages highlighted in turquoise in the table following this chapter.

The only rule specifically regulating the conduct of arbitrators already contained in CETA can be found in Art. X.25 (6). It states that arbitrators shall not take instructions from any party (similar to EUSFTA Annex 9-B (2)).

Beyond that, CETA refers in the same Article to the International Bar Association Guidelines on Conflicts of Interest in International Arbitration¹⁴⁴. Although they do not specifically refer to ISDS, they address key issues that arise in all arbitrations, commercial and investment alike. They have already been applied in ISDS proceedings and are understood to represent ‘international best practices’¹⁴⁵. They set general standards for arbitrators falling into three broad categories (red, orange, and green lists) of conflicts as well as specific regulations for certain situations that may arise. The referral of CETA to the rules makes them mandatory for arbitrators acting in CETA cases.

Overall, the attempts taken in the EU agreements to more closely regulate the conduct of arbitrators *by State parties* themselves instead of leaving this task to professional associations and formal and informal working groups of arbitration institutions, in which interests of the common good or specific EU regional interests might not always be satisfactorily represented, evidences a general tendency of a stronger governmental grip on procedural law which appears adequate considering the public law nature of the disputes adjudicated in investment arbitration.

¹⁴⁴ International Bar Association Guidelines on Conflicts of Interest in International Arbitration, available at http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx (viewed 3 June 2015).

¹⁴⁵ J. VanDuzer et al., *Integrating Sustainable Development into International Investment Agreements – A Guide for Developing Countries*, Commonwealth Secretariat, August 2012, available at http://www.iisd.org/pdf/2012/6th_annual_forum_commonwealth_guide.pdf (visited 1 June 2015), p. 423.

4.6.4 Table: Code of conduct for arbitrators

bold = important passages
yellow = disclosure obligations
green = confidentiality
turquoise = independence and impartiality

EUSFTA ¹⁴⁶	CETA	ICSID Rules of Procedure for Arbitration Proceeding
<p>Art. 9.21 (7)</p> <p>All arbitrators shall be independent, serve in their individual capacities and not be affiliated with the government of either of the Parties, and shall comply with Annex 9- B. Arbitrators who serve on the list established pursuant to paragraph 3 or who have been proposed pursuant to paragraph 4 shall not, for that reason alone, be deemed to be affiliated with the government of any Party.</p> <p>Annex 9-B</p> <p><i>Definitions</i></p> <p>1. In this Code of Conduct:</p> <p>"arbitrator" means a member of a tribunal established pursuant to Section B (Investor- State Dispute Settlement) of Chapter Nine (Investment Protection); "mediator" means a person who conducts mediation in accordance with Section B (Investor-State Dispute Settlement) of Chapter Nine (Investment Protection); "candidate" means an individual who is under consideration for selection as an arbitrator; "assistant" means a person who, under the terms of appointment of an arbitrator, conducts, researches or provides assistance to the arbitrator; "staff", in respect of an arbitrator, means persons under the direction and control of the arbitrator, other than assistants.</p> <p><i>Responsibilities to the process</i></p> <p>2. Throughout the proceedings, every candidate and arbitrator shall avoid impropriety and the appearance of</p>	<p>Art X.42 (2)</p> <p>2. The Committee shall, on agreement of the Parties, and after completion of the respective legal requirements and procedures of the Parties:</p> <p>[...]</p> <p>(b) adopt a code of conduct for arbitrators to be applied in disputes arising out of this Chapter, which may replace or supplement the rules in application, and that may address topics including:</p> <p>(i) disclosure obligations;</p> <p>(ii) the independence and impartiality of arbitrators; and</p> <p>(iii) confidentiality.</p> <p>The Parties shall make best efforts to ensure that the list of arbitrators is established and the code of conduct adopted no later than the entry into force of the Agreement, and in any event no later than two years after the entry into force of the Agreement.</p> <p>[...]</p> <p>Art. X.25 (6)</p> <p>6. Arbitrators shall be independent of, and not be affiliated with or take instructions from, a disputing party or the government of a Party with regard to trade and investment matters. Arbitrators shall not take instructions from any organisa-</p>	<p>Rule 1(4)</p> <p>No person who had previously acted as a conciliator or arbitrator in any proceeding for the settlement of the dispute may be appointed as a member of the Tribunal.</p> <p>Rule 6(2)</p> <p>(2) Before or at the first session of the Tribunal, each arbitrator shall sign a declaration in the following form:</p> <p>"To the best of my knowledge there is no reason why I should not serve on the Arbitral Tribunal constituted by the International Centre for Settlement of Investment Disputes with respect to a dispute between _____ and _____.</p> <p>"I shall keep confidential all information coming to my knowledge as a result of my participation in this proceeding, as well as the contents of any award made by the Tribunal.</p> <p>"I shall judge fairly as between the parties, according to the applicable law, and shall not accept any instruction or compensation with regard to the proceeding from any source except as provided in the Convention on the Settlement of Investment Disputes between States and Nationals of Other States and in the Regulations and Rules made pursuant thereto.</p> <p>"Attached is a statement of (a) my past and present professional, business and other relationships (if any) with the</p>

¹⁴⁶ Numbering according to the October 2014 text version predating legal revision; numbering of the articles may change.

impropriety, shall be **independent and impartial**, shall **avoid direct and indirect conflicts** of interests and shall observe high standards of conduct so that the integrity and impartiality of the dispute settlement mechanism is preserved. Arbitrators **shall not take instructions** from any organisation or government with regard to matters before a tribunal. Former arbitrators must comply with the obligations established in paragraphs 15, 16, 17 and 18 of this Code of Conduct.

Disclosure obligations

3. Prior to confirmation of his or her selection as an arbitrator under Section B (Investor- State Dispute Settlement) of Chapter Nine (Investment Protection), a **candidate shall disclose any past or present interest, relationship or matter** that is likely to affect his or her independence or impartiality or that might reasonably create an appearance of impropriety or bias in the proceeding. To this end, a candidate shall make all reasonable efforts to become aware of any such interests, relationships and matters.

4. A candidate or arbitrator shall communicate matters concerning actual or potential violations of this Code of Conduct to the disputing parties and the non-disputing Party only.

5. Once selected, an arbitrator **shall continue to make all reasonable efforts** to become aware of any interests, relationships or matters referred to in paragraph 3 of this Code of Conduct and shall disclose them. The disclosure obligation is a continuing duty which requires an arbitrator to disclose any such interests, relationships or matters that may arise during any stage of the proceeding at the earliest time the arbitrator becomes aware of it. The arbitrator shall disclose such interests, relationships or matters by informing the disputing parties and the non-disputing Party, in writing, for their consideration.

tion, government or disputing party with regard to matters related to the dispute. Arbitrators shall comply with the **International Bar Association Guidelines on Conflicts of Interest in International Arbitration** [¹⁴⁷] or any supplemental rules adopted pursuant to Article X.42(2)(b) (Committee on Services and Investment). Arbitrators who serve on the list established pursuant to paragraph 3 shall not, for that reason alone, be deemed to be affiliated with the government of a Party.

parties and (b) any other circumstance that might cause my reliability for **independent judgment** to be questioned by a party. I acknowledge that by signing this declaration, I assume a **continuing obligation** promptly to notify the Secretary-General of the Centre of any such relationship or circumstance that subsequently arises during this proceeding.”

Any arbitrator failing to sign a declaration by the end of the first session of the Tribunal shall be deemed to have resigned.

¹⁴⁷ For the International Bar Association Guidelines on Conflicts of Interest in International Arbitration see http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx (viewed 1 August 2015).

Duties of arbitrators

6. Upon selection, an arbitrator shall perform his or her duties thoroughly and expeditiously throughout the course of the proceeding and with fairness and diligence.

7. An arbitrator shall consider only those issues raised in the proceeding and necessary for a ruling and shall not delegate this duty to any other person.

8. An arbitrator shall take all appropriate steps to ensure that his or her assistants and staff are aware of, and comply with paragraphs 2, 3, 4, 5, 16, 17 and 18 of this Code of Conduct.

9. An arbitrator shall not engage in ex parte contacts concerning the proceeding.

Independence and impartiality of arbitrators

10. An arbitrator must be **independent and impartial and avoid creating an appearance of bias or impropriety** and shall not be influenced by self-interest, outside pressure, political considerations, public clamour, loyalty to a disputing party or a non-disputing Party or fear of criticism.

11. An arbitrator shall not, directly or indirectly, incur any obligation or accept any benefit that would in any way interfere or appear to interfere, with the proper performance of his or her duties.

12. An arbitrator may not use his or her position on the tribunal to advance any personal or private interests and shall avoid actions that may create the impression that others are in a special position to influence him or her.

13. An arbitrator may not allow financial, business, professional, family or social relationships or responsibilities to influence his or her conduct or judgement.

14. An arbitrator must avoid entering into any relationship or acquiring any financial interest that is likely to affect him or her impartiality or that might reasonably create an appearance of impropriety or bias.

Obligations of former arbitrators

15. All former arbitrators must avoid actions that may create the appearance that they were biased in carrying out their duties or derived any advantage from the decision or ruling of the tribunal.

Confidentiality

16. No arbitrator or former arbitrator shall at any time disclose or use any **non-public information** concerning a proceeding or acquired during a proceeding, except for the purposes of that proceeding, and shall not, in particular, disclose or use any such information to a personal advantage or an advantage for others or to affect the interest of others.

17. An arbitrator shall not disclose an arbitration ruling or parts thereof prior to its publication in accordance with Annex 9-C.

18. An arbitrator or former arbitrator shall not at any time disclose the deliberations of a tribunal, or any arbitrator's view regarding the deliberations.

Expenses

19. Each arbitrator shall keep a record and render a final account of the time devoted to the procedure and of the expenses incurred.

Mediators

20. The disciplines described in this Code of Conduct applying to arbitrators or former arbitrators shall apply, *mutatis mutandis*, to mediators.

4.7 Transparency of and public access to arbitral proceedings

One of the main points of criticism on the ISDS system in the current debate is the perceived severe lack of opportunities for ‘passive’ and ‘active’ involvement of the wider general public in investment arbitration. ‘Passive’ involvement can be described as the ability to access documents or hearings (‘transparency’) while ‘active’ involvement is the ability to intervene as a third party through so-called *amicus curiae* briefs and other means (‘public access’).

4.7.1 Transparency of investment arbitrations

The lack of transparency might be owed in part to ISDS’ roots in commercial arbitration, which, although not a compulsory requirement, is in general practice characterised by secrecy. However, transparency in ISDS has steadily been improving over the last years¹⁴⁸. Whether it has reached a satisfactory level is debatable. In any event, transparency of arbitral proceedings would allow parliament and the public not only to better scrutinise whether their government has honoured its international commitments and whether it does not compromise essential public interests in bargaining with the investor in the course of the arbitration proceedings. It might also allow for scrutinising investors’ claims. Public attention could deter investors from bringing claims with little chance of succeeding if investors have to fear consumers’ choices to substitute one product by another.

Those who champion (more) transparency in ISDS proceedings and the publicity of documents (e.g. awards) mainly base their claim on the nature of the conflict adjudicated, i.e. the review of exercise of public authority towards an individual¹⁴⁹, and are influenced by domestic perceptions of democracy¹⁵⁰. Resorting to current public international law as the basis for a claim that investment arbitration proceedings have to be conducted more openly would by any means be challenging¹⁵¹. From a legal perspective it is the domestic laws of the contracting State parties which essentially control the degree of openness or secrecy of ISDS to which they can lawfully subscribe in an international treaty¹⁵². National governments traditionally enjoy a wide margin of appreciation in external affairs¹⁵³. This hav-

¹⁴⁸ Cf. e.g. Article 1137(4) NAFTA and Annex 1137.4; Article 28 Canada-China BIT, 2006 amendment to Article 37(2) ICSID Rules, 2014 UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration. See also J. Maupin, Transparency in International Investment Law: The Good, the Bad, and the Murky, in: Bianchi/Peters (eds.), *Transparency in International Law*, Cambridge University Press, Cambridge, 2013, pp. 142 et seqq.

¹⁴⁹ E.g. G. van Harten, *Investment Treaty Arbitration and Public International Law*, Oxford University Press, Oxford, 2007, p. 161; T. Wälde, Transparency, Amicus Curiae Briefs and Third Party Rights, *The Journal of World Investment and Trade*, Vol. 5 (2004), pp. 337 et seqq.; N. Blackaby, Public Interest and Investment Treaty Arbitration, in: van den Berg (ed.), *International Commercial Arbitration: Important Contemporary Questions*, ICCA Congress Series, Vol. 11 (2003), Kluwer Law International, The Hague, 2003, pp. 355 et seqq., p. 358; D. Magraw and N. Amerasinghe, American Branch ILA/American Society of International Law Joint Study on the Implementation of Transparency Norms in International Commercial Arbitration – Part I, *ILSA Journal of International & Comparative Law*, Vol. 15 (2008-2009), pp. 337 et seqq., pp. 338 et seq.

¹⁵⁰ States are accountable to their people who must be in the position to control the exercise of public authority. A different question is whether these domestic concepts can easily be transferred to the international realm. See for an attempt in respect of the WTO dispute settlement mechanism R. Reusch, *Die Legitimation des WTO-Streitbeilegungsverfahrens*, Duncker & Humblot, Berlin, 2007.

¹⁵¹ J. Sackmann, *Transparenz im völkerrechtlichen Investitionsschiedsverfahren*, Nomos, Baden-Baden, 2012, pp. 132 et seqq.; see also B. Kingsbury, M. Donaldson, Global Administrative Law, in: Wolfrum (ed.) *Max Planck Encyclopedia of Public International Law*, Oxford University Press, Oxford, para. 21; S. Chesterman, Rule of Law, in: Wolfrum (ed.) *Max Planck Encyclopedia of Public International Law*, Oxford University Press, Oxford, 2007, para. 20.

¹⁵² In respect of constitutional limits in Germany cf. J. Wolff, Nicht-öffentliche Schiedsverfahren mit Beteiligung der öffentlichen Hand am Maßstab des Verfassungsrechts, *Neue Zeitschrift für Verwaltungsrecht*, 2012, pp. 205 et seqq.

¹⁵³ Cf. for a discussion of EU law obligations to provide access to arbitration-related documents J. Sackmann, *Transparenz im völkerrechtlichen Investitionsschiedsverfahren*, Nomos, Baden-Baden, 2012, pp. 209 et seqq.

ing been said, the degree of transparency of ISDS proceedings on the basis of a given investment instrument is thus to a large extent a political discretionary decision of the State parties influenced by their internal legal conditions and political situations and the result of bargaining in the treaty negotiations.

4.7.2 Public access to investment arbitrations

Amici curiae – a concept more widely used in common law but also in public international law¹⁵⁴ – usually intervene in proceedings without the request of an investment tribunal¹⁵⁵. Often they believe to have an interest in the outcome of the proceedings or claim to advocate public interests. *Amici curiae* – these can be public interest groups such as environmental activists, affected local communities, business associations but also supranational organisations such as the EU – may function as sources of information and/or expert advice for a tribunal¹⁵⁶; often, the *amici* aim at influencing the decision¹⁵⁷. While *amicus curiae* interventions can certainly create additional legitimacy of an arbitral decision due to the submission and possible appreciation of additional information or public interest considerations, it is difficult to find evidence¹⁵⁸ of a contribution to transparency of arbitral proceedings, although often claimed¹⁵⁹. While in ISDS practice tribunals have in principle accommodated for the submission of *amicus curiae* briefs, though largely at their discretion¹⁶⁰, access to documents and par-

¹⁵⁴ Cf. Article 36 ECHR in connection with Rule 44 of the 2014 ‘Rules of Court’, available

http://www.echr.coe.int/Documents/Rules_Court_ENG.pdf (visited 8 May 2015); Rule 103 International Criminal Court Rules of Evidence and Procedure, available at http://www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/official%20journal/Documents/RulesProcedureEvidenceEng.pdf (visited 8 May 2015).

For the ICJ’s approach cf. D. Shelton, The Participation of Non-government Organizations in. International Judicial Proceedings, *American Journal of International Law*, Vol. 88 (1994), pp. 611 et seqq., pp. 617, 619 et seqq. For the WTO cf. United States of America – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, 12 October 1998, paras. 104-109; United States of America – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products, WT/DS138/AB/R, 10 May 2000, paras. 39-42; European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/AB/R, 12 March 2001, paras. 39 et seqq.

¹⁵⁵ For a concise depiction of recent trends cf. L. Bastin, *Amici Curiae in Investor-State Arbitration - Eight Recent Trends*, *Arbitration International*, Vol. 30 (2014), pp. 125 et seqq.

¹⁵⁶ L. Bartholomeusz, The Amicus Curiae before International Courts and Tribunals, *Non-State-Actors and International Law*, Vol. 5 (2005), pp. 209 et seqq., pp. 278 et seqq.

¹⁵⁷ P. Ala’i, Judicial Lobbying at the WTO: The Debate over the Use of Amicus Curiae Briefs and the U.S. Experience, *Fordham International Law Journal*, Vol. 24 (2000), pp. 62 et seqq.; G. Umbricht, An ‘Amicus Curiae Brief’ on Amicus Curiae Briefs at the WTO, *Journal of International Economic Law*, Vol. 4 (2001), pp. 773 et seqq., p. 778.

¹⁵⁸ Convincing J. Sackmann, *Transparenz im völkerrechtlichen Investitionsschiedsverfahren*, Nomos, Baden-Baden, 2012, pp. 173, 176 et seqq., 189, 195 et seqq., see also I. Maxwell, Transparency in Investment Arbitration – Are Amici Curiae the Solution?, *Asian International Arbitration Journal*, Vol. 3 (2007), pp. 176 et seqq., p. 183.

¹⁵⁹ *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19 (formerly *Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*), Order in Response to a Petition for Transparency and Participation as Amicus Curiae, para. 22, available at <http://italaw.com/sites/default/files/case-documents/ita0815.pdf> (visited 8 May 2015); *Methanex Corporation v. United States of America*, NAFTA/Uncitral Arbitration Rules, Decision on Petition from Third Persons to Intervene as ‘Amici Curiae’, para. 22, available at http://italaw.com/sites/default/files/case-documents/ita0517_0.pdf (visited 8 May 2015); *Biwater Gauff (Tanzania) Ltd. v. Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 5, para. 54, available at http://www.italaw.com/sites/default/files/case-documents/ita0091_0.pdf (visited 8 May 2015).

¹⁶⁰ Cf. *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19 (formerly *Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*), Order in Response to a Petition for Transparency and Participation as Amicus Curiae, where amici curiae were allowed to submit briefs for the first time. For a full discussion of arbitral practice in relation to UNCITRAL and ICSID arbitration cf. J. Sackmann, *Transparenz im völkerrechtlichen Investitionsschiedsverfahren*, Nomos, Baden-Baden, 2012, pp. 139 et seqq.; for the first time on the basis of Article 37(2) ICSID Rules of procedure *Biwater Gauff (Tanzania) Ltd. v. Tanzania*, ICSID

ticipation in the proceedings was frequently denied¹⁶¹. Arguments against greater participation basically rested on the concept of secrecy of proceedings still dominant in some of the arbitration rules of the different arbitration institutions. If one wants to strengthen the role of *amici curiae* in this respect, one would have to provide explicitly for transparency of proceedings – e.g. by way of access to the hearings and documents – in the investment instruments first. In this way they could subsequently render better informed submissions.

4.7.3 Comparison of EUSFTA, CETA, ECT, Germany-Jordan BIT, and the USA-Lithuania BIT

Only EUSFTA in Annex 9-C and – to a lesser extent – CETA provide for their own public access rules. CETA refers to and slightly adapts the UNCITRAL Rules on Transparency in Treaty-based investor-State Arbitration (UNCITRAL Rules on Transparency)¹⁶² by including additional documents into the list of documents that must be published or by allowing for the publication of document even before the constitution of the tribunal. Public access to proceedings based on the ECT, the Germany-Jordan BIT, and the USA-Lithuania BIT depends on the arbitration rules chosen which makes it essentially bound to the consent of disputing parties. However, the UNCITRAL Rules on Transparency could also apply in the context of arbitrations based on these treaties, inter alia, if the respondent State Party and the home State of the claimant are party to UN Convention on Transparency in Treaty-based investor-State Arbitration (so-called ‘Mauritius Convention’)¹⁶³. Irrespective of that, proceedings under ICSID rules are to some (very modest) degree ‘transparent’ by default.

The study was assigned with the specific task to compare the transparency rules provided for by ICSID, UNCITRAL and ICC. Thus, alongside EUSFTA with its own set of transparency rules, the UNCITRAL Rules on Transparency, the provisions relating to transparency within the ICSID Rules of Procedure for Arbitration proceedings¹⁶⁴, and those of the ICC Arbitration rules¹⁶⁵ are covered. An evaluation of CETA is only warranted to the extent that it amends the UNCITRAL rules.

4.7.3.1 Publication of documents

EUSFTA and the UNCITRAL Rules on Transparency make a significant number of documents, listed in Art. 1 (1) EUSFTA ANNEX 9-C, Art. 3 (1) UNCITRAL Rules on Transparency, publically available by default¹⁶⁶. Documents included relate to the consultation process, the submission of a claim, pleadings and memorials, transcripts of hearings if available, as well as awards and decisions¹⁶⁷. Documents not listed can be made publicly available by discretion of the tribunal, Art. 1 (2) EUSFTA Annex 9-C, Art. 3

Case No. ARB/05/22, Procedural Order No. 5, (submission of brief, but no participation in the hearings, no document access). See also the brief case study on *Glamis Gold Ltd. v. United States of America* in the Annex.

¹⁶¹ Cf. L. Bastin, *Amici Curiae in Investor-State Arbitration - Eight Recent Trends*, *Arbitration International*, Vol. 30 (2014), pp. 125 et seqq., p. 142.

¹⁶² UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (effective 1 April 2014), available at <http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf> (visited 10 June 2015).

¹⁶³ United Nations Convention on Transparency in Treaty-based investor-State Arbitration (adopted 10 December 2014), available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention.html (visited 10 June 2015).

¹⁶⁴ ICSID Rules of Procedure for Arbitration proceedings, available at https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf (visited 10 June 2015), pp. 99 et seqq.

¹⁶⁵ ICC Arbitration rules, available at <http://www.iccwbo.org/Data/Documents/Buisness-Services/Dispute-Resolution-Services/Mediation/Rules/2012-Arbitration-Rules-and-2014-Mediation-Rules-ENGLISH-version/> (visited 10 June 2015)

¹⁶⁶ Documents are also made available to the non-disputing treaty party, cf. Art. 1 (1) EUSFTA ANNEX 9-C, Art. X.35 (1) CETA.

¹⁶⁷ Note the modification in Art. 33 (2) and (3) CETA.

(3) UNCITRAL Rules on Transparency. As a rule of exception, in order to protect certain legitimate interests, specific information (Art. 4 EUSFTA Annex 9-C, Art. 7 UNCITRAL Rules on Transparency), for example confidential business information, is kept secret. Overall, the UNCITRAL Rules on Transparency go beyond the standard of transparency usually found in developed domestic legal systems.

The ICSID rules in general do not provide for the publication of documents. They are confidential by default. Only with regard to awards, Rule 48 (4) ICSID Rules of Procedure for Arbitration Proceedings provides that, while the award is not to be published without the consent of both parties, an excerpt of the legal reasoning shall be included in the publication of the ICSID centre. The disputing parties may however diverge from these rules and make documents publicly available if they agree so, Rule 20 (2) ICSID Rules of Procedure for Arbitration Proceedings.

Except for the general provision in Art. 6, which states that the work of the tribunal is of a confidential nature, the ICC rules specifically address the question of publication of documents only insofar as copies of the award should not be made available (by the ICC) to anyone else but the parties, Art. 34 (2). However, the disputing parties always may agree otherwise. Furthermore, the ICC publishes 'sanitised extracts' of awards on a voluntary basis in its regular periodical bulletin¹⁶⁸ and law journals. However, allowing for 'discretionary' publication can hardly be seen as a substantial advancement towards more transparency.

4.7.3.2 Public hearings

A similar picture is presented in respect of public access to hearings. According to Art. 2 EUSFTA Annex 9-C and Art. 6 UNCITRAL Rules on Transparency¹⁶⁹, hearings shall be held in public, while access can be restricted to preserve the confidentiality of certain information. ICSID and ICC rules, on principle, exclude public access to hearings. Only under the exception that both parties agree (ICC) or that one of the parties does not object (ICSID) may the tribunal allow 'other persons' – it would be even questionable whether this corresponds with what is typically understood by 'public access' – to attend hearings (Rule 32 (2) ICSID Rules of Procedure for Arbitration Proceedings; Art. 26 (3) ICC).

4.7.3.3 Third-party submissions

There are two types of submissions by 'non-disputing parties' to the dispute: so-called *amici curiae* briefs by groups or organisations outside the dispute that have an interest in its outcome (third parties)¹⁷⁰; and submissions by non-disputing treaty parties (non-disputing parties) that might in particular be concerned with interpretations of the treaty in the respective case having a broader impact on the general application of the treaty¹⁷¹. The latter submissions do not concern the public in a strict sense and are therefore not considered here.

¹⁶⁸ International Court of Arbitration, Bulletin, available at <http://store.iccwbo.org/icc-court-bulletin-individual-issues> (visited 14 May 2015).

¹⁶⁹ Note Art. X.33 (5) CETA.

¹⁷⁰ For a concise depiction of recent trends cf. L. Bastin, *Amici Curiae in Investor-State Arbitration - Eight Recent Trends*, *Arbitration International*, Vol. 30 (2014), pp. 125 et seqq.; P. Ala'i, *Judicial Lobbying at the WTO: The Debate over the Use of Amicus Curiae Briefs and the U.S. Experience*, *Fordham International Law Journal*, Vol. 24 (2000), pp. 62 et seqq.; G. Umbricht, *An 'Amicus Curiae Brief' on Amicus Curiae Briefs at the WTO*, *Journal of International Economic Law*, Vol. 4 (2001), pp. 773 et seqq., p. 778.

¹⁷¹ Art. 5 of the UNCITRAL Rules on Transparency provides for the submissions by non-disputing parties; such on treaty interpretation shall be accepted, submissions on further matters may be accepted. CETA confines this in Art. X.35 (2) to submissions on treaty interpretation. In EUSFTA submissions by the non-disputing party are also confined to treaty interpretation, Art. 9.26.

Corresponding to Art. 4 UNCITRAL Rules on Transparency, Art. 3 (2) EUSFTA Annex 9-C allows for third parties to apply if they wish to make a submission. The disputing parties shall be consulted on the question of allowing such submissions. The decision to allow submissions is ultimately left to the tribunal. This broadly equals the concept found within Rule 37 (2) ICSID Rules of Procedure for Arbitration Proceedings. Under the ICC rules *amicus curiae* briefs can only be submitted under the general procedural discretion provided by Art. 19(1) ICC under the condition that both disputing parties agreed¹⁷².

Overall, the provisions in EUSFTA Annex 9-C and UNCITRAL Rules on Transparency set out prerequisites – directed at disclosing vested interests and possible dependencies – submissions must conform to and guide more closely the exercise of discretion by the tribunal when making a decision on allowing such third party submissions. The ICSID Rules of Procedure for Arbitration Proceedings provide also for such guidance, but do not formulate prerequisites for the submission itself. Overall, with improved rules on hearings and publication of information, *amici curiae* gain a greater chance of meaningfully contributing to ISDS cases, provided the tribunal accepts their submission. For future treaties the European Commission has proposed to ‘confer a right to intervene to third parties with a direct and existing interest in the outcome of a dispute’¹⁷³.

Overall, even ISDS critics from civil society concede that the EU’s intensified efforts in respect of transparency and *amicus curia* participation are ‘a very welcome development’¹⁷⁴. In fact, partly – for example in respect of publication of submissions¹⁷⁵ and third party access to proceedings – they go beyond the level of transparency and public access that can be found in developed domestic legal orders.

¹⁷² J.E. Kalicki, The Prospects for Amicus Submissions, Outside the ICSID Rules, *Kluwer Arbitration Blog*, 14 September 2012, available at <http://kluwerarbitrationblog.com/blog/2012/09/14/the-prospects-for-amicus-submissions-outside-the-icsid-rules/> (visited 14 June 2015).

¹⁷³ European Commission, ‘Investment in TTIP and beyond – the path for reform’, Concept Paper, available at http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF (visited 30 May 2015), p. 8.

¹⁷⁴ N. Bernasconi-Osterwalder and H. Mann, *A Response to the European Commission’s December 2013 Document ‘Investment Provisions in the EU-Canada Free Trade Agreement (CETA)’*, IISD Report, February 2014, p. 20.

¹⁷⁵ Cf., e.g. §§ 169, 171a - 175 Gerichtsverfassungsgesetz (German code on court constitution), Bundesgesetzblatt I 1975, p. 1077; § 1(1) Informationsfreiheitsgesetz (German Freedom of Information Act), Bundesgesetzblatt I 2005, p. 2722; see also Article 15(3), subsection 3 TFEU.

4.7.4 Table: Public access to arbitral proceedings

bold = important passages
yellow = public access to hearing
green = publication of documents
turquoise = third person submissions

EUSFTA ¹⁷⁶	CETA	UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration	ICSID Rules of Procedure for Arbitration Proceedings	ICC Arbitration rules
<p>Article 9.25: Transparency of Proceedings</p> <p>Annex 9-C shall apply to disputes under this Section.</p> <p>Annex 9-C, Rules on Public Access to Documents, Hearings and the Possibility of Third Persons To Make Submissions</p> <p>Article 1</p> <p>1. Subject to Articles 2 and 4 of this Annex, the respondent shall, after receiving the following documents, promptly transmit them to the non-disputing Party and to the repository referred to in Article 5 of this Annex, who shall make them available to the public:</p> <p>(a) the request for consultations referred to in paragraph 1 of Article 9.16 (Consultations);</p> <p>(b) the notice of intent to arbitrate</p>	<p>Art. X.33</p> <p>1. The UNCITRAL Transparency Rules shall apply to the disclosure of information to the public concerning disputes under this Section as modified by this Chapter.</p> <p>2. The request for consultations, the notice requesting a determination of the respondent, the notice of determination of the respondent, the agreement to mediate, the notice of intent to challenge, the decision on an arbitrator challenge and the request for consolidation shall be included in the list of documents referred to in Article 3(1) of the UNCITRAL Transparency Rules.</p> <p>3. Exhibits shall be included in the list of documents mentioned in Article 3(2) of the UNCITRAL Transparency Rules.</p> <p>4. Notwithstanding Article 2 of the UNCITRAL Transparency Rules, prior to the constitution of the tribunal, Canada or the European Union</p>	<p>Article 1. Scope of application, Applicability of the Rules</p> <p>[...]</p> <p><i>Discretion and authority of the arbitral tribunal</i></p> <p>4. Where the Rules on Transparency provide for the arbitral tribunal to exercise discretion, the arbitral tribunal in exercising such discretion shall take into account:</p> <p>(a) The public interest in transparency in treaty-based investor-State arbitration and in the particular arbitral proceedings; and</p> <p>(b) The disputing parties' interest in a fair and efficient resolution of their dispute.</p> <p>5. These Rules shall not affect any authority that the arbitral tribunal may otherwise have under the UNCITRAL Arbitration Rules to conduct the arbitration in such a manner as to promote transparency, for example by accepting sub-</p>	<p>Rule 15 Deliberations of the Tribunal</p> <p>(1) The deliberations of the Tribunal shall take place in private and remain secret.</p> <p>(2) Only members of the Tribunal shall take part in its deliberations. No other person shall be admitted unless the Tribunal decides otherwise.</p> <p>Rule 19 Procedural Orders</p> <p>The Tribunal shall make the orders required for the conduct of the proceeding.</p> <p>Rule 20 Preliminary Procedural Consultation</p> <p>(1) As early as possible after the constitution of a Tribunal, its President shall endeavor to ascertain the views of the parties regarding questions of procedure. For this</p>	<p>Article 6 Confidentiality</p> <p>The work of the Court is of a confidential nature which must be respected by everyone who participates in that work in whatever capacity. The Court lays down the rules regarding the persons who can attend the meetings of the Court and its Committees and who are entitled to have access to materials related to the work of the Court and its Secretariat.</p> <p>Article 19: Rules Governing the Proceedings</p> <p>The proceedings before the arbitral tribunal shall be governed by the Rules and, where the Rules are silent, by any rules which the parties or, failing them, the arbitral tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitra-</p>

¹⁷⁶ Numbering according to the October 2014 text version predating legal revision; numbering of the articles may change.

<p>referred to in paragraph 1 of Article 9.18 (Notice of Intent to Arbitrate);</p> <p>(c) the determination of the respondent referred to in paragraph 2 of Article 9.18 (Notice of Intent to Arbitrate);</p> <p>(d) the submission of a claim to arbitration referred to in Article 9.19 (Submission of Claim to Arbitration);</p> <p>(e) pleadings, memorials, and briefs submitted to the tribunal by a disputing party, expert reports, and any written submissions submitted pursuant to Article 9.26 (The non-disputing Party to the Agreement) and Article 3 of this Annex;</p> <p>(f) minutes or transcripts of hearings of the tribunal, where available; and</p> <p>(g) orders, awards, and decisions of the tribunal or, where applicable, of the appointing authority.</p> <p>2. Subject to the exceptions set out in Article 4 of this Annex, the tribunal may decide, on its own initiative or upon request from any person, and after consultation with the disputing parties, whether and how to make available any other documents provided to, or issued by, the tribunal not falling within paragraph 1. This may in-</p>	<p>as the case may be shall make publicly available in a timely manner relevant documents pursuant to paragraph 2, subject to the redaction of confidential or protected information. Such documents may be made publicly available by communication to the repository.</p> <p>5. Hearings shall be open to the public. The tribunal shall determine, in consultation with the disputing parties, the appropriate logistical arrangements to facilitate public access to such hearings. Where the tribunal determines that there is a need to protect confidential or protected information, it shall make the appropriate arrangements to hold in private that part of the hearing requiring such protection.</p> <p>6. Nothing in this Chapter requires a respondent to withhold from the public information required to be disclosed by its laws. The respondent should endeavour to apply such laws in a manner sensitive to protecting from disclosure information that has been designated as confidential or protected information.</p>	<p>missions from third persons.</p> <p>6. In the presence of any conduct, measure or other action having the effect of wholly undermining the transparency objectives of these Rules, the arbitral tribunal shall ensure that those objectives prevail.</p> <p>[...]</p> <p>Article 2. Publication of information at the commencement of arbitral proceedings</p> <p>Once the notice of arbitration has been received by the respondent, each of the disputing parties shall promptly communicate a copy of the notice of arbitration to the repository referred to under article 8. Upon receipt of the notice of arbitration from the respondent, or upon receipt of the notice of arbitration and a record of its transmission to the respondent, the repository shall promptly make available to the public information regarding the name of the disputing parties, the economic sector involved and the treaty under which the claim is being made.</p> <p>Article 3. Publication of documents</p> <p>1. Subject to article 7, the following documents shall be made available to the public: the notice of arbitration, the response to the</p>	<p>purpose he may request the parties to meet him. He shall, in particular, seek their views on the following matters:</p> <p>[...].</p> <p>(2) In the conduct of the proceeding the Tribunal shall apply any agreement between the parties on procedural matters, except as otherwise provided in the Convention or the Administrative and Financial Regulations.</p> <p>Rule 32 The Oral Procedure</p> <p>(1) The oral procedure shall consist of the hearing by the Tribunal of the parties, their agents, counsel and advocates, and of witnesses and experts.</p> <p>(2) Unless either party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements. The Tribunal shall for such cases establish procedures for the protection of proprietary or privileged information.</p> <p>[...]</p> <p>Rule 37 Visits and Inquiries; Submissions of Non-disputing</p>	<p>tion.</p> <p>Article 25 Establishing the Facts of the Case</p> <p>1. The arbitral tribunal shall proceed within as short a time as possible to establish the facts of the case by all appropriate means.</p> <p>[...]</p> <p>3. The arbitral tribunal may decide to hear witnesses, experts appointed by the parties or any other person, in the presence of the parties, or in their absence provided they have been duly summoned.</p> <p>[...]</p> <p>Article 26 Hearings</p> <p>[...]</p> <p>3. The arbitral tribunal shall be in full charge of the hearings, at which all the parties shall be entitled to be present. Save with the approval of the arbitral tribunal and the parties, persons not involved in the proceedings shall not be admitted.</p> <p>[...].</p> <p>Article 34 Notification, Deposit and Enforceability of the Award</p> <p>1. Once an award has been made, the Secretariat shall notify to the</p>
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clude, for example, making such documents available at a specified site or through the repository referred to in Article 5 of this Annex.

Article 2

1. The tribunal **shall conduct hearings open to the public** and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements. However, any disputing party that **intends to use information designated as protected information in a hearing shall so advise the tribunal**. The tribunal shall make appropriate arrangements to protect this information from disclosure.

Article 3

1. The tribunal may, after consultations with the disputing parties, allow a person that is not a disputing party and not a non-disputing Party to the Agreement (hereinafter referred to as **“third person”**) **to file a written submission with the tribunal** regarding a matter within the scope of the dispute.

2. A third person wishing to make a submission shall apply to the tribunal, **and shall provide the following written information** in a language of the arbitration, in a concise manner, and within such page limits as may be set by the

notice of arbitration, the statement of claim, the statement of defence and any further written statements or written submissions by any disputing party; a table listing all exhibits to the aforesaid documents and to expert reports and witness statements, if such table has been prepared for the proceedings, but not the exhibits themselves; any written submissions by the non-disputing Party (or Parties) to the treaty and by third persons, transcripts of hearings, where available; and orders, decisions and awards of the arbitral tribunal.

2. Subject to article 7, expert reports and witness statements, exclusive of the exhibits thereto, shall be made available to the public, upon request by any person to the arbitral tribunal.

3. Subject to article 7, the arbitral **tribunal may decide**, on its own initiative or upon request from any person, and after consultation with the disputing parties, **whether and how to make available exhibits and any other documents provided to, or issued by, the arbitral tribunal not falling within paragraphs 1 or 2 above**. This may include, for example, making such documents available at a specified site

4. The documents to be made available to the public pursuant to

Parties

(1) If the Tribunal considers it necessary to visit any place connected with the dispute or to conduct an inquiry there, it shall make an order to this effect. The order shall define the scope of the visit or the subject of the inquiry, the time limit, the procedure to be followed and other particulars. The parties may participate in any visit or inquiry.

(2) **After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the “non-disputing party”) to file a written submission with the Tribunal** regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which:

(a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;

(b) the non-disputing party submission would address a matter within the scope of the dispute;

(c) the non-disputing party has a

parties the text signed by the arbitral tribunal, provided always that the costs of the arbitration have been fully paid to the ICC by the parties or by one of them.

2. Additional copies certified true by the Secretary General **shall be made available on request and at any time to the parties, but to no one else**.

[...]

<p>tribunal:</p> <p>(a) description of the third person, including, where relevant, its membership and legal status (e.g. trade association or other non-governmental organisation), its general objectives, the nature of its activities, and any parent organisation, including any organisation that directly or indirectly controls the third person;</p> <p>(b) disclosure of any connection, direct or indirect, which the third person has with any disputing party;</p> <p>(c) information on any government, person or organisation that has provided any financial or other assistance in preparing the submission or has provided substantial assistance to the third person in either of the two years preceding the application by the third person under this Article (e.g. funding around 20 per cent of its overall operations annually);</p> <p>(d) description of the nature of the interest that the third person has in the arbitration; and</p> <p>(e) identification of the specific issues of fact or law in the arbitration that the third person wishes to address in its written submission.</p> <p>3. In determining whether to allow</p>		<p>paragraphs 1 and 2 shall be communicated by the arbitral tribunal to the repository referred to under article 8 as soon as possible, subject to any relevant arrangements or time limits for the protection of confidential or protected information prescribed under article 7. The documents to be made available pursuant to paragraph 3 may be communicated by the arbitral tribunal to the repository referred to under article 8 as they become available and, if applicable, in a redacted form in accordance with article 7. The repository shall make all documents available in a timely manner, in the form and in the language in which it receives them.</p> <p>5. A person granted access to documents under paragraph 3 shall bear any administrative costs of making those documents available to that person, such as the costs of photocopying or shipping documents to that person, but not the costs of making those documents available to the public through the repository.</p> <p>Article 4. Submission by a third person</p> <p>1. After consultation with the disputing parties, the arbitral tribunal may allow a person that is not a disputing party, and not a non-disputing Party to the treaty</p>	<p>significant interest in the proceeding.</p> <p>The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission.</p> <p>[...]</p> <p>Rule 48 Rendering of the Award</p> <p>[...]</p> <p>(4) The Centre shall not publish the award without the consent of the parties. The Centre shall, however, promptly include in its publications excerpts of the legal reasoning of the Tribunal.</p>	
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<p>such a submission, the tribunal shall take into consideration, among other things</p> <p>(a) whether the third person has a significant interest in the arbitral proceedings; and</p> <p>(b) the extent to which the submission would assist the tribunal in the determination of a factual or legal issue related to the arbitral proceedings by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties.</p> <p>4. The submission filed by the third person shall:</p> <p>(a) be dated and signed by the person filing the submission on behalf of the third person;</p> <p>(b) be concise, and in no case longer than as authorised by the tribunal;</p> <p>(c) set out a precise statement of the third person's position on issues; and</p> <p>(d) only address matters within the scope of the dispute.</p> <p>5. The tribunal shall ensure that such submissions do not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party. The tribunal may adopt any appropriate procedures where necessary to manage</p>		<p>("third person(s)"), to file a written submission with the arbitral tribunal regarding a matter within the scope of the dispute.</p> <p>2. A third person wishing to make a submission shall apply to the arbitral tribunal, and shall, in a concise written statement, which is in a language of the arbitration and complies with any page limits set by the arbitral tribunal:</p> <p>(a) Describe the third person, including, where relevant, its membership and legal status (e.g., trade association or other non-governmental organization), its general objectives, the nature of its activities and any parent organization (including any organization that directly or indirectly controls the third person);</p> <p>(b) Disclose any connection, direct or indirect, which the third person has with any disputing party;</p> <p>(c) Provide information on any government, person or organization that has provided to the third person (i) any financial or other assistance in preparing the submission; or (ii) substantial assistance in either of the two years preceding the application by the third person under this article (e.g. funding around 20 per cent of its overall operations annually);</p> <p>(d) Describe the nature of the in-</p>		
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<p>multiple submissions.</p> <p>6. The tribunal shall ensure that the disputing parties are given a reasonable opportunity to present their observations on any submission by a third person.</p> <p>Article 4</p> <p>1. Confidential or protected information, as defined in paragraph 2 and as identified pursuant to paragraphs 3 to 9, shall not be made available to the public.</p> <p>2. Confidential or protected information consists of:</p> <p>(a) confidential business information;</p> <p>(b) information which is protected against being made available to the public under this Agreement;</p> <p>(c) information which is protected against being made available to the public, in the case of information of the respondent, under the law of the respondent and in the case of other information, under any law or rules determined to be applicable to the disclosure of such information by the tribunal.</p> <p>3. When a document other than an order or decision of the tribunal is to be made available to the public pursuant to paragraph 1 of Article 1 of this Annex, the disputing party, non-disputing Party or third person who submits the docu-</p>		<p>terest that the third person has in the arbitration; and</p> <p>(e) Identify the specific issues of fact or law in the arbitration that the third person wishes to address in its written submission.</p> <p>3. In determining whether to allow such a submission, the arbitral tribunal shall take into consideration, among other factors it determines to be relevant:</p> <p>(a) Whether the third person has a significant interest in the arbitral proceedings; and</p> <p>(b) The extent to which the submission would assist the arbitral tribunal in the determination of a factual or legal issue related to the arbitral proceedings by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties.</p> <p>4. The submission filed by the third person shall:</p> <p>(a) Be dated and signed by the person filing the submission on behalf of the third person;</p> <p>(b) Be concise, and in no case longer than as authorized by the arbitral tribunal;</p> <p>(c) Set out a precise statement of the third person's position on issues; and</p>		
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<p>ment shall, at the time of submission of the document:</p> <p>(a) indicate whether it contends that the document contains information which must be protected from publication;</p> <p>(b) clearly designate the information at the time it is submitted to the tribunal; and</p> <p>(c) promptly or within the time set by the tribunal, submit a redacted version of the document that does not contain the said information.</p> <p>4. When a document other than an order or decision of the tribunal is to be made available to the public pursuant to a decision of the tribunal under paragraph 2 of Article 1 of this Annex, the disputing party, non-disputing Party or third person who has submitted the document shall, within thirty days of the tribunal's decision that the document is to be made available to the public, indicate whether it contends that the document contains information which must be protected from disclosure and submit a redacted version of the document that does not contain the said information.</p> <p>5. Where a redaction is proposed under paragraph 3 or 4, any disputing party other than the person who submitted the document in question may object to the pro-</p>		<p>(d) Address only matters within the scope of the dispute.</p> <p>5. The arbitral tribunal shall ensure that any submission does not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party.</p> <p>6. The arbitral tribunal shall ensure that the disputing parties are given a reasonable opportunity to present their observations on any submission by the third person.</p> <p>Article 5. Submission by a non-disputing Party to the treaty</p> <p>1. The arbitral tribunal shall, subject to paragraph 4, allow, or, after consultation with the disputing parties, may invite, submissions on issues of treaty interpretation from a non-disputing Party to the treaty.</p> <p>2. The arbitral tribunal, after consultation with the disputing parties, may allow submissions on further matters within the scope of the dispute from a non-disputing Party to the treaty. In determining whether to allow such submissions, the arbitral tribunal shall take into consideration, among other factors it determines to be relevant, the factors referred to in article 4, paragraph 3, and, for greater certainty, the need to avoid submissions which would support the claim of the investor in a manner tantamount to diplomat-</p>		
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<p>posed redaction and/or propose that the document be redacted differently. Any such objection or counter-proposal shall be made within thirty days of receipt of the proposed redacted document.</p> <p>6. When an order, decision or award of the tribunal is to be made available to the public pursuant to paragraph 1 of Article 1 of this Annex, the tribunal shall give all disputing parties an opportunity to make submissions as to the extent to which the document contains information which must be protected from publication and to propose redaction of the document to prevent the publication of the said information.</p> <p>7. The tribunal shall rule on all questions relating to the proposed redaction of documents under paragraphs 3 to 6, and shall determine, in the exercise of its discretion, the extent to which any information contained in documents which are to be made available to the public, should be redacted.</p> <p>8. If the tribunal determines that information should not be redacted from a document pursuant to paragraphs 3 to 6 or that a document should not be prevented from being made available to the public, any disputing party, non-disputing Party or third person that voluntarily submitted the</p>		<p>ic protection.</p> <p>3. The arbitral tribunal shall not draw any inference from the absence of any submission or response to any invitation pursuant to paragraphs 1 or 2.</p> <p>4. The arbitral tribunal shall ensure that any submission does not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party.</p> <p>5. The arbitral tribunal shall ensure that the disputing parties are given a reasonable opportunity to present their observations on any submission by a non-disputing Party to the treaty.</p> <p>Article 6. Hearings</p> <p>1. Subject to article 6, paragraphs 2 and 3, hearings for the presentation of evidence or for oral argument (“hearings”) shall be public.</p> <p>2. Where there is a need to protect confidential information or the integrity of the arbitral process pursuant to article 7, the arbitral tribunal shall make arrangements to hold in private that part of the hearing requiring such protection.</p> <p>3. The arbitral tribunal shall make logistical arrangements to facilitate the public access to hearings (including where appropriate by organizing attendance through</p>		
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<p>document into the record may, within thirty days of the tribunal's determination:</p> <p>(a) withdraw all or part of the document containing such information from the record of the arbitral proceedings; or</p> <p>(b) resubmit the document in a form which complies with the tribunal's determination.</p> <p>9. Any disputing party that intends to use information which it contends to be confidential or protected information in a hearing shall so advise the tribunal. The tribunal shall, after consultation with the disputing parties, decide whether that information should be protected and shall make arrangements to prevent any protected information from becoming public in accordance with Article 2 of this Annex.</p> <p>10. Information shall not be made available to the public where the information, if made available to the public, would jeopardise the integrity of the arbitral process as determined pursuant to paragraph 11.</p> <p>11. The tribunal may, on its own initiative or upon the application of a disputing party, after consultation with the disputing parties where practicable, take appropriate measures to restrain or delay</p>		<p>video links or such other means as it deems appropriate). However, the arbitral tribunal may, after consultation with the disputing parties, decide to hold all or part of the hearings in private where this becomes necessary for logistical reasons, such as when the circumstances render any original arrangement for public access to a hearing infeasible.</p> <p>Article 7. Exceptions to transparency</p> <p><i>Confidential or protected information</i></p> <p>1. Confidential or protected information, as defined in paragraph 2 and as identified pursuant to the arrangements referred to in paragraphs 3 and 4, shall not be made available to the public pursuant to articles 2 to 6.</p> <p>2. Confidential or protected information consists of:</p> <p>(a) Confidential business information;</p> <p>(b) Information that is protected against being made available to the public under the treaty;</p> <p>(c) Information that is protected against being made available to the public, in the case of the information of the respondent State, under the law of the respondent State, and in the case of other in-</p>		
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<p>the publication of information where such publication would jeopardise the integrity of the arbitral process:</p> <p>(a) because it could hamper the collection or production of evidence; or</p> <p>(b) because it could lead to the intimidation of witnesses, lawyers acting for disputing parties, or members of the tribunal; or</p> <p>(c) in comparably exceptional circumstances.</p> <p>Article 5</p> <p>The Secretary-General of the United Nations, through the UNCITRAL Secretariat, shall act as repository and shall make available to the public information pursuant to this Annex.</p> <p>Article 6</p> <p>Where this Annex provides for the tribunal to exercise discretion, the tribunal shall exercise that discretion, taking into account:</p> <p>(a) the public interest in transparency in treaty-based Investor-State arbitration and of the particular arbitral proceedings; and</p> <p>(b) the disputing parties' interest in a fair and efficient resolution of their dispute.</p>		<p>formation, under any law or rules determined by the arbitral tribunal to be applicable to the disclosure of such information; or</p> <p>(d) Information the disclosure of which would impede law enforcement.</p> <p>3. The arbitral tribunal, after consultation with the disputing parties, shall make arrangements to prevent any confidential or protected information from being made available to the public, including by putting in place, as appropriate:</p> <p>(a) Time limits in which a disputing party, non-disputing Party to the treaty or third person shall give notice that it seeks protection for such information in documents;</p> <p>(b) Procedures for the prompt designation and redaction of the particular confidential or protected information in such documents; and</p> <p>(c) Procedures for holding hearings in private to the extent required by article 6, paragraph 2.</p> <p>Any determination as to whether information is confidential or protected shall be made by the arbitral tribunal after consultation with the disputing parties.</p> <p>4. Where the arbitral tribunal determines that information should not be redacted from a document,</p>		
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		<p>or that a document should not be prevented from being made available to the public, any disputing party, non-disputing Party to the treaty or third person that voluntarily introduced the document into the record shall be permitted to withdraw all or part of the document from the record of the arbitral proceedings.</p> <p>5. Nothing in these Rules requires a respondent State to make available to the public information the disclosure of which it considers to be contrary to its essential security interests.</p> <p><i>Integrity of the arbitral process</i></p> <p>6. Information shall not be made available to the public pursuant to articles 2 to 6 where the information, if made available to the public, would jeopardize the integrity of the arbitral process as determined pursuant to paragraph 7.</p> <p>7. The arbitral tribunal may, on its own initiative or upon the application of a disputing party, after consultation with the disputing parties where practicable, take appropriate measures to restrain or delay the publication of information where such publication would jeopardize the integrity of the arbitral process because it could hamper the collection or production of evidence, lead to the intimidation</p>		
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		of witnesses, lawyers acting for disputing parties or members of the arbitral tribunal, or in comparably exceptional circumstances. [...]		
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4.8 Preventing frivolous claims

4.8.1 ISDS increasingly a strategic device

Frivolous investment claims have not been a major issue on a global scale. However, NAFTA experience has shown a significant number of claims filed by US investors against Canada that were later withdrawn or became inactive¹⁷⁷. Occasionally, such claims are brought in bad faith merely to harass a respondent, mostly with the intention of gaining a better bargaining position and as a strategic device¹⁷⁸. These types of claims are to be prevented or eliminated at an early stage of the proceedings in order to control arbitration costs and to save other host State resources otherwise bound by responding to investment claims¹⁷⁹.

4.8.2 Comparison of EUSFTA, CETA, ECT, Germany-Jordan BIT, and the USA-Lithuania BIT

Out of the five treaties to be compared, only EUSFTA and CETA explicitly address the issue. The treaties distinguish between 'Claims Manifestly Without Legal Merit' (Art. 9.23 EUSFTA and Art. X.29 CETA) and 'Claims Unfounded as a Matter of Law' (9.24 EUSFTA and Art. X.30 CETA). While the former has to be raised 'in any event before the first session', the latter may be raised as an objection 'no later than date the tribunal fixes for the respondent to submit its counter memorial'.

Respondents in arbitrations based on the ECT, the Germany-Jordan BIT, and the USA-Lithuania BIT which are conducted on the basis of the ICSID Rules of Procedure for Arbitration Proceedings will have also access to a preliminary objection based on a manifest lack of legal merit. This is provided for by Rule 41 (5) ICSID Rules of Procedure for Arbitration Proceedings¹⁸⁰; that Rule most likely inspired the provision found in EUSFTA and CETA.¹⁸¹ Non-ICSID rules frequently lack an explicit provision on weeding out frivolous claims but tribunals may nonetheless possibly exercise such authority under the rules circumscribing their general authority to conduct and direct arbitral proceedings. For example, Art. 17(1) UNCITRAL Arbitration Rules¹⁸² reads in part: 'The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute'.¹⁸³

¹⁷⁷ L. Poulsen et al., *Costs and Benefits of an EU-USA Investment Protection Treaty*, 2013, available at <http://www.italaw.com/sites/default/files/archive/costs-and-benefits-of-an-eu-usa-investment-protection-treaty.pdf> (visited 1 May 2015).

¹⁷⁸ UKTI Trade Services, *Establishing a business presence in the USA*, London, 2013, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/301343/Establishing_a_Business_Presence_in_the_USA.pdf (visited 2 June 2015).

¹⁷⁹ S. Hindelang, *Study on Investor-State Dispute Settlement (ISDS) and Alternatives of Dispute Resolution in International Investment Law*, Study for the European Parliament, September 2014, available at <http://ssrn.com/abstract=2525063> (visited 1 June 2015), p. 107.

¹⁸⁰ J. R. Crook, Four Tribunals Apply ICSID Rule for Early Ouster of Unmeritorious Claims, *ASIL insights*, Vol. 15 (2011), available at http://www.asil.org/insights/volume/15/issue/10/four-tribunals-apply-icsid-rule-early-ouster-unmeritorious-claims#_edn20 (visited 14 June 2015).

¹⁸¹ See on Rule 41 (5) ICSID Rules of Procedure for Arbitration Proceedings 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, *Journal of International Dispute Settlement*, Vol. 3 (2012), pp. 137-168.

¹⁸² J. Paulsson and G. Petrochilos, Revision of the UNCITRAL Arbitration Rules, Report available at http://www.uncitral.org/pdf/english/news/arbrules_report.pdf (visited 4 September 2015), p. 65, fn. 130.

¹⁸³ Note though that a detailed discussion of the regimes under the different arbitration rules is beyond the scope of this study.

4.8.2.1 Terminology

To begin with, neither EUSFTA nor CETA clarify the term ‘manifestly without legal merit’¹⁸⁴. Hence, for now its interpretation will be left to arbitral practice, which will probably find its inspiration in awards rendered in pursuance of Rule 41 (5) ICSID Rules of Procedure for Arbitration Proceedings¹⁸⁵. One tribunal has found that ‘the ordinary meaning of the word [‘manifest’] requires the respondent to establish its objection clearly and obviously, with relative ease and despatch. The standard is thus set high’¹⁸⁶. Another held that, despite the wording of Rule 41 (5), the objection is not limited to challenges on the merits. It can be extended to objections based on a lack of jurisdiction¹⁸⁷. The rule has been used, for example, to bring those arbitrations to an early end where there was obviously no investment within the meaning of Art. 25 ICSID-Convention¹⁸⁸, or where the respondent wanted to re-arbitrate a case already decided elsewhere¹⁸⁹. Not subject to the preliminary objection are factual disputes. As the examples show, the interpretation of the phrase ‘manifestly without legal merit’ is not without any uncertainty. Against this background it is regrettable that the State parties to EUSFTA and CETA have missed the opportunity to clarify its requirements.

A claim is ‘unfounded as a matter of law’, if it, or any part thereof, is not a claim for which an award in favour of the claimant may be made¹⁹⁰, even if the facts alleged were assumed to be true. Here again, a further clarification would have been useful.

4.8.2.2 Relationship of provisions on ‘Claims Manifestly Without Legal Merit’ and ‘Claims Unfounded as a Matter of Law’

As long as the precise conditions for the individual application of the two provisions remain somewhat blurry, clear-cut distinction of both might prove difficult.

From a procedural point of view, Art. X.29 (2) CETA states that the objection under Art. X.29 CETA (‘Claims Manifestly Without Legal Merit’) is not admissible if an objection pursuant to Art. X.30 CETA (‘Claims Unfounded as a Matter of Law’) has been filed. Conversely, if an objection pursuant to Art. X.29 CETA is filed earlier than that of Art. X.30 CETA, the latter is *not* automatically inadmissible. Rather, the tribunal may in this case decline to address an objection pursuant to Art. X.30 (3) CETA. EUSFTA goes a different way: it merely states that an objection according to Art. 9.24 (‘Claims Unfounded as a Matter of Law’) cannot be submitted as long as proceedings under Art. 9.23 (‘Claims Manifestly Without Legal Merit’) are pending.

¹⁸⁴ See the text passages highlighted in yellow in the table following this chapter.

¹⁸⁵ J. R. Crook, Four Tribunals Apply ICSID Rule for Early Ouster of Unmeritorious Claims, *ASIL insights*, Vol. 15, (2011), pp. available at http://www.asil.org/insights/volume/15/issue/10/four-tribunals-apply-icsid-rule-early-ouster-unmeritorious-claims#_edn20 (visited 14 June 2015).

¹⁸⁶ *Trans-Global Petroleum, Inc. v. Jordan*, ICSID Case No. ARB/07/25, Decision on the Respondent’s Objection under Rule 41(5) of the ICSID Arbitration Rules, para. 88, available at <http://www.italaw.com/sites/default/files/case-documents/ita0872.pdf> (visited 15 June 2015).

¹⁸⁷ *Brandes Inv. Partners, LP v. Venezuela*, ICSID Case No. ARB/08/3, Decision on the Respondent’s Objection under Rule 41(5) of the ICSID Arbitration Rules, paras. 52-55, available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1170_En&caseId=C266 (visited 15 June 2015).

¹⁸⁸ *Global Trading Resource Corp. v. Ukraine*, ICSID Case No. ARB/09/11, Award, para. 56, available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1771_En&caseId=C660 (visited 15 June 2015).

¹⁸⁹ *RSM Prod. Corp. v. Grenada*, ICSID Case No. ARB/10/6, para. 7.3.6, available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1792_En&caseId=C980 (visited 15 June 2015).

¹⁹⁰ See the text passages highlighted in green in the table following this chapter.

Substantively, the decision on Art. X.29 CETA ('Claims Manifestly Without Legal Merit') is in any case without prejudice (see Art. X.29 (6) CETA) for other objections at a late stage of the proceedings. The same goes for EUSFTA where Art. 9.23 (4) states that the objection of Art. 9.23 ('Claims Manifestly Without Legal Merit') is without prejudice to other objections.

4.8.2.3 Effectiveness

Overall, the submission of any such objection presupposes the installation of a fully working tribunal. While these clauses might provide useful tools for arbitrators to dismiss frivolous claims, due to a certain degree of vagueness, much of the provisions' effectiveness depends on the incentive structure present in the tribunal to eliminate frivolous claims as early as possible in arbitration proceedings. In itself, these provisions do not restrict the access to investment arbitration or broaden regulatory space of the host State¹⁹¹.

¹⁹¹ See S. Hindelang, *Study on Investor-State Dispute Settlement (ISDS) and Alternatives of Dispute Resolution in International Investment Law*, Study for the European Parliament, September 2014, available at <http://ssrn.com/abstract=2525063> (visited 1 June 2015), p. 107.

4.8.3 Table: Preventing frivolous claims

bold = important passages
yellow = 'Claims manifestly without legal merit'
green = 'Claims unfounded as a matter of law'

EUSFTA ¹⁹²	CETA	ICSID Rules of Procedure for Arbitration Proceedings
<p>Art. 9.23</p> <p>1. The respondent may, either no later than thirty days after the constitution of a tribunal pursuant to Article 9.21 (Constitution of the Tribunal) and in any event before the first session of the tribunal, file an objection that a claim is manifestly without legal merit.</p> <p>2. The respondent shall specify as precisely as possible the basis for the objection.</p> <p>3. The tribunal, after giving the disputing parties an opportunity to present their observations on the objection, shall, at its first session or promptly thereafter, issue a decision or award on the objection.</p> <p>4. This procedure and any decision of the tribunal shall be without prejudice to the right of a respondent to object, pursuant to Article 9.24 (Claims Unfounded as a Matter of Law) or in the course of the proceeding, to the legal merits of a claim and without prejudice to the tribunal's authority to address other objections as a preliminary question.</p> <p>Art. 9.24</p> <p>1. Without prejudice to the tribunal's authority to address other objections as a preliminary question or to a respondent's right to raise any such objections at any appropriate time, the tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim, or any part thereof, submitted under this Section is not a claim for which an award in favour of the claimant may be made under Article 9.19 (Submission</p>	<p>Art. X.29</p> <p>1. The respondent may, no later than 30 days after the constitution of the tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is manifestly without legal merit.</p> <p>2. An objection may not be submitted under paragraph 1 if the respondent has filed an objection pursuant to Article X.30 (Claims Unfounded as a Matter of Law).</p> <p>3. The respondent shall specify as precisely as possible the basis for the objection.</p> <p>4. On receipt of an objection pursuant to this Article, the Tribunal shall suspend the proceedings on the merits and establish a schedule for considering any objections consistent with its schedule for considering any other preliminary question.</p> <p>5. The Tribunal, after giving the disputing parties an opportunity to present their observations, shall at its first session or promptly thereafter, issue a decision or award, stating the grounds therefor. In doing so, the Tribunal shall assume the alleged facts to be true.</p> <p>6. This Article shall be without prejudice to the Tribunal's authority to address other objections as a preliminary question or to the right of the respondent to object, in the course of the proceeding, that a claim lacks legal merit.</p> <p>Art. X.30</p>	<p>Rule 41 (5)</p> <p>(5) Unless the parties have agreed to another expedited procedure for making preliminary objections, a party may, no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is manifestly without legal merit. The party shall specify as precisely as possible the basis for the objection. The Tribunal, after giving the parties the opportunity to present their observations on the objection, shall, at its first session or promptly thereafter, notify the parties of its decision on the objection. The decision of the Tribunal shall be without prejudice to the right of a party to file an objection pursuant to paragraph (1) or to object, in the course of the proceeding, that a claim lacks legal merit.</p>

¹⁹² Numbering according to the October 2014 text version predating legal revision; numbering of the articles may change.

of Claim to Arbitration), even if the facts alleged were assumed to be true. The tribunal may also consider any other relevant facts not in dispute.

2. An objection under paragraph 1 shall be submitted to the tribunal as soon as possible after the tribunal is constituted, and in **no event later than the date the tribunal fixes for the respondent to submit its counter-memorial** or statement of defence or, in the case of an amendment to the notice of arbitration, the date the tribunal fixes for the respondent to submit its response to the amendment. An objection **may not be submitted** under paragraph 1 **as long as proceedings under Article 9.23** (Claims Manifestly without Legal Merit) are pending, unless the tribunal grants leave to file an objection under this Article, after having taken due account of the circumstances of the case.

3. Upon receipt of an objection under paragraph 1, and unless it considers the objection manifestly unfounded, the tribunal shall suspend any proceedings on the merits, establish a schedule for considering the objection **consistent with any schedule it has established for considering any other preliminary question**, and issue a decision or award on the objection, stating the grounds therefor.

1. **Without prejudice** to a tribunal's authority to address other objections as a preliminary question or to a respondent's right to raise any such objections at any appropriate time, the Tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim, or any part thereof, submitted pursuant to Article X.22 (Submission of a Claim to Arbitration) **is not a claim for which an award in favour of the claimant may be made under this Section**, even if the facts alleged were assumed to be true.

2. An objection under paragraph 1 shall be submitted to the Tribunal **no later than the date the Tribunal fixes for the respondent to submit its counter-memorial**.

3. **If an objection has been submitted pursuant to Article X.29** (Claims Manifestly Without Legal Merit), the **Tribunal may**, taking into account the circumstances of that objection, **decline to address**, under the procedures set out in this Article, an objection submitted pursuant to paragraph 1.

4. On receipt of an objection under paragraph 1, and, where appropriate, after having taken a decision pursuant to paragraph 3, the Tribunal shall suspend any proceedings on the merits, **establish a schedule for considering the objection consistent with any schedule it has established for considering any other preliminary question**, and issue a decision or award on the objection, stating the grounds therefor.

4.9 Remedies

4.9.1 General public international law and international investment law – reversing the relationship of rule and exception

In today's investor-State arbitration practice, the most commonly awarded form of reparation is (pecuniary) compensation. Restitution, i.e., for example, the *order*¹⁹³ of repeal of a challenged administrative act or law or the restitution of property previously taken is rare¹⁹⁴, although investment instruments only occasionally explicitly prohibit non-compensatory relief¹⁹⁵. In most cases they are silent on this question which would arguably call for application of the rules in general public international law where restitution is the primary form of reparation¹⁹⁶. Nonetheless, the preference granted to a pecuniary remedy is often explained in the way that it would suit, in most cases, the interest of the investor and, furthermore, preserve regulatory space for the host State which would not have to repeal a certain measure but to 'just' pay compensation¹⁹⁷. From the perspective of tribunals, the choice of compensation appears more 'flexible' compared to a 'black-or-white decision' on restitution. For example, they may reduce the amount of compensation in case they perceive an investor's conduct 'questionably' in terms of legality.

¹⁹³ A court or a tribunal cannot annul the wrongful act itself.

¹⁹⁴ This section draws on S. Hindelang, *Study on Investor-State Dispute Settlement (ISDS) and Alternatives of Dispute Resolution in International Investment Law*, Study for the European Parliament, September 2014, available at <http://ssrn.com/abstract=2525063> (visited 1 June 2015), p. 113.; S. Hindelang, Restitution and Compensation – Reconstructing the Relationship in International Investment Law, in: Hofmann/Tams (eds.), *International Investment Law and General International Law: From Clinical Isolation to Systemic Integration*, Nomos, Baden-Baden, 2011, pp. 161 et seqq.; also available as S. Hindelang, *Restitution and Compensation – Reconstructing the Relationship in International Investment Law*, WHI-Paper 02/11, 2011, http://www.whi-berlin.eu/tl_files/documents/whi-paper0211.pdf (visited 1 May 2015); For non-pecuniary provisional remedies cf. Article 47 ICSID-Convention, ICSID Arbitration Rule 39, note also Article 1134 NAFTA; see also D. Gaukrodger and K. Gordon, *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community*, OECD Working Papers on International Investment No. 2012/03, available at <http://dx.doi.org/10.1787/5k46b1r85j6f-en> (visited 20 May 2015), pp. 28 et seqq.; L. Malintoppi, Provisional Measures in Recent ICSID Proceedings: What Parties Request and what Tribunals Order, in: Binder/Kriebaum/Reinisch/Wittich (eds.), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer*, Oxford University Press, Oxford, 2009, pp. 157 et seqq.

¹⁹⁵ Articles 1135 et seqq. NAFTA.

¹⁹⁶ Cf. Articles 34-39 of Articles on State responsibility. Restitution is said to conform 'most closely to the general principle of the law on responsibility according to which the author State is bound to 'wipe out' all the legal and material consequences of its wrongful act by re-establishing the situation that would exist if the wrongful act had not been committed'. Cf. G. Arangio-Ruiz, Preliminary Report on State Responsibility, in: International Law Commission (ed.), *Yearbook of the International Law Commission*, Vol. II, United Nations Publications, Geneva, 1988; UN Document No. A/CN.4/416 & Corr. 1 & 2 and Add.1 & Corr.1, para. 114. In fact, the question of whether investment tribunals are or should be allowed to order *restitutio in rem* is contentious. Cf. S. Hindelang, Restitution and Compensation – Reconstructing the Relationship in International Investment Law, in: Hofmann/Tams (eds.), *International Investment Law and General International Law: From Clinical Isolation to Systemic Integration*, Nomos, Baden-Baden, 2011, pp. 161 et seqq.; also available as S. Hindelang, *Restitution and Compensation – Reconstructing the Relationship in International Investment Law*, WHI-Paper 02/11, 2011, http://www.whi-berlin.eu/tl_files/documents/whi-paper0211.pdf (visited 1 May 2015); possibly of a different view J. Crawford, The ILC's Articles on Responsibility of States for Internationally Wrongful Acts – A Retrospective, *American Journal of International Law*, Vol. 96 (2002), pp. 874 et seqq., p. 881; see also I. Marboe, State responsibility and Comparative state liability for administrative and legislative harm to economic interest, in: Schill (ed.), *International Investment Law and Comparative Public Law*, Oxford University Press, Oxford, 2010, pp. 377 et seqq.

¹⁹⁷ 'The judicial restitution required in this case would imply modification of the current legal situation by annulling or enacting legislative and administrative measures that make over the effect of the legislation in breach. The Tribunal cannot compel Argentina to do so without a sentiment of undue interference with its sovereignty'. *LG&E Energy Corp., LG&E Capital Corp., and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Award, para. 87, available at <http://italaw.com/sites/default/files/case-documents/ita0462.pdf> (visited 8 May 2015).

However, it appears that this is just one perspective on the question of whether arbitral tribunals should be able to order restitution – separately or in combination with a pecuniary remedy – or even give priority to it. To begin with, the threat of a substantial final monetary award can have effects similar to a restitution order. This is particularly true when the contested measure is of a general nature, such as a law, and affects more than just one foreign investor. Copy-cat cases are not unknown to international investment arbitration¹⁹⁸. Especially for developing countries with considerable budgetary constraints, it might be preferable to repeal a certain measure instead of paying substantial compensation and thereby possibly putting at risk vital governmental activities such as providing basic medical healthcare, education and so forth.

Broadening the picture, restitution of, e.g., unlawfully taken property could mean continued presence and perhaps retention of business activities in a host State. Compensation often opens up the possibility to seek new investment opportunities beyond the borders of the host State. Restitution or compensation, remaining invested or leaving the country – perhaps in this, admittedly simplified, way one could sketch the choice to be made when deciding between the two forms of reparation in investment arbitration. Viewed against this background, prioritising restitution may better contribute to the overall aim of the State parties to the investment instrument to establish and maintain *long-term* and *stable* investment relations on the basis of the rule of law. Among others, this is because it may – to some extent – render it less attractive for a host State to employ (internationally) wrongful means to rid itself of a ‘disliked’ foreign investor. The possibility of ‘buying oneself out’ of the investment relationship by way of paying compensation would be restricted. Seen positively, prioritising restitution would give the host State a second chance to present itself as being committed to establishing and maintaining long term and stable investment relations on the basis of the rule of law. Already by knowing that it might see the foreign investor ‘again’, the host State has an increased interest in constantly working on the relationship. Of course, absent an express statement in the investment instrument to the contrary, restitution must not be ruled out by the claimant in the arbitral proceedings, still be possible and not constitute an excessive onerousness¹⁹⁹. Furthermore, if an investment instrument would provide for restitution as the primary remedy, it would also have to specifically address compliance and enforcement questions²⁰⁰.

¹⁹⁸ Two examples are highly illustrative in this respect: in the wake of the Argentine economic crisis at the turn of the century, several US investors took recourse to ISDS, modelling their cases along similar lines; see above at footnote 78. Similarly, an erratic change in its energy policy led to a wave of ISDS arbitrations against Turkey in various arbitration fora; see S. Hindelang et al., Turkey – Soon to Face a Wave of International Investment Arbitrations?, *Journal of International Arbitration*, Vol. 26 (2009), pp. 701 et seqq.

¹⁹⁹ S. Hindelang, Restitution and Compensation – Reconstructing the Relationship in International Investment Law, in: Hofmann/Tams (eds.), *International Investment Law and General International Law: From Clinical Isolation to Systemic Integration*, Nomos, Baden-Baden, 2011, pp. 161 et seqq., p. 167, also available as S. Hindelang, *Restitution and Compensation – Reconstructing the Relationship in International Investment Law*, WHI-Paper 02/11, 2011, http://www.whi-berlin.eu/tl_files/documents/whi-paper0211.pdf (visited 5 May 2015), p. 5.

²⁰⁰ D. Gaukrodger and K. Gordon, *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community*, OECD Working Papers on International Investment No. 2012/03, available at <http://dx.doi.org/10.1787/5k46b1r85j6f-en> (visited 20 May 2015), pp. 98 et seqq.

4.9.2 Comparison of EUSFTA, CETA, ECT, Germany-Jordan BIT, and the USA-Lithuania BIT

EUSFTA and CETA in Art. 9.27 (1) and Art. X.36 (1) respectively provide that a tribunal may only award pecuniary damages²⁰¹ (and interest) as well as restitution of property²⁰². Both treaties, furthermore, specify the method of calculating pecuniary damages. These damages shall not be greater than the loss suffered by the claimant, reduced by any prior damages or compensation already provided, Art. 9.27 (2) EUSFTA and Art. X.36 (3) CETA. CETA additionally states that for the calculation of pecuniary damages, a tribunal shall also reduce the damages by taking into account any restitution of property or repeal or modification of the measure. Tribunals shall not award punitive damages, Art. 9.27 (2) and Art. X.36 (4)²⁰³. Lost profit appears not to be excluded from a possible damages award following the two treaties²⁰⁴. Besides the award of restitution of property, the treaties have missed the opportunity to explore further advantages associated with non-pecuniary remedies, such as an order to repeal a law or court or administrative decision²⁰⁵.

The other agreements do not include any provision specifically addressing remedies. Only the ECT provides a rule in Art. 26 (8) ECT for the particular case of an award concerning a measure of a sub-national authority. In this case, the award may authorise the host State to pay monetary damages in lieu of any other remedy. Thereby, the central government may discharge its obligation to comply with the award by a pecuniary payment. This can be significant in cases where it lacks the authority to ensure compliance by a sub-national entity²⁰⁶.

²⁰¹ See the text passages highlighted in yellow in the table following this chapter.

²⁰² See the text passages highlighted in green in the table following this chapter.

²⁰³ See the text passages highlighted in turquoise in the table following this chapter.

²⁰⁴ See S. Hindelang, *Study on Investor-State Dispute Settlement (ISDS) and Alternatives of Dispute Resolution in International Investment Law*, Study for the European Parliament, September 2014, available at <http://ssrn.com/abstract=2525063> (visited 1 June 2015), p. 113.

²⁰⁵ See S. Hindelang, *Study on Investor-State Dispute Settlement (ISDS) and Alternatives of Dispute Resolution in International Investment Law*, Study for the European Parliament, September 2014, available at <http://ssrn.com/abstract=2525063> (visited 1 June 2015), p. 95.

²⁰⁶ Energy Charter Secretariat, *The Energy Charter Treaty – A Reader's Guide*, available at http://www.encharter.org/fileadmin/user_upload/Publications/ECT_Guide_ENG.pdf (visited 4 June 2015), p. 54.

4.9.3 Table: Remedies

bold = important passages
yellow = monetary damages
green = restitution of property
turquoise = (no) punitive damages

EUSFTA ²⁰⁷	CETA	ECT
<p>Art. X.39</p> <p>1. Where the tribunal makes a final award finding a breach of the provisions of this Chapter, the tribunal may award, separately or in combination, only:</p> <p>(a) monetary damages and any applicable interest; and</p> <p>(b) restitution of property, provided that the respondent may pay monetary damages and any applicable interest, as determined by the tribunal in accordance with Section A (Investment Protection), in lieu of restitution.</p> <p>2. Monetary damages shall not be greater than the loss suffered by the claimant or, as applicable, its locally established company, as a result of the breach of the relevant provisions of Section A (Investment Protection), reduced by any prior damages or compensation already provided by the Party concerned. The tribunal shall not award punitive damages.</p> <p>3. Where a claim is submitted on behalf of a locally established company, the arbitral award shall be made to the locally established company.</p>	<p>Art X.36</p> <p>1. Where a Tribunal makes a final award against the respondent the Tribunal may award, separately or in combination, only:</p> <p>(a) monetary damages and any applicable interest;</p> <p>(b) restitution of property, in which case the award shall provide that the respondent may pay monetary damages representing the fair market value of the property at the time immediately before the expropriation, or impending expropriation became known, whichever is earlier and any applicable interest in lieu of restitution, determined in a manner consistent with Article X.11 (Expropriation).</p> <p>2. Subject to paragraphs 1 and 5, where a claim is made under paragraph 1(b) of Article X.22 (Submission of a Claim to Arbitration):</p> <p>(a) an award of monetary damages and any applicable interest shall provide that the sum be paid to the locally established enterprise;</p> <p>(b) an award of restitution of property shall provide that restitution be made to the locally established enterprise;</p> <p>(c) an award of costs in favour of the investor shall provide that it is to be made to the investor; and</p> <p>(d) the award shall provide that it is made without prejudice to a right that a person, other than a person which has provided a waiver pursuant to Article X.21 (Procedural and Oth-</p>	<p>Art. 26 (8)</p> <p>(8) The awards of arbitration, which may include an award of interest, shall be final and binding upon the parties to the dispute. An award of arbitration concerning a measure of a sub-national government or authority of the disputing Contracting Party shall provide that the Contracting Party may pay monetary damages in lieu of any other remedy granted. Each Contracting Party shall carry out without delay any such award and shall make provision for the effective enforcement in its Area of such awards.</p>

²⁰⁷ Numbering according to the October 2014 text version predating legal revision; numbering of the articles may change.

	<p>er Requirements for the Submission of a Claim to Arbitration), may have in monetary damages or property awarded under a Party's domestic law.</p> <p>3. Monetary damages shall not be greater than the loss suffered by the investor or, as applicable, the locally established enterprise, reduced by any prior damages or compensation already provided. For the calculation of monetary damages, the Tribunal shall also reduce the damages to take into account any restitution of property or repeal or modification of the measure.</p> <p>4. A Tribunal may not award punitive damages.</p> <p>[...]</p>	
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4.10 Costs

4.10.1 Origins of cost and current state of regulation

According to the OECD, average costs for both parties participating in investor-State arbitration amount to US\$ eight million²⁰⁸, but also have exceeded US\$ 30 million in some cases. Eighty-two percent of the total costs are fees and expenses for party representatives and expert witnesses, sixteen percent relate to arbitrators and two percent are payable to the arbitration institution administering a case²⁰⁹.

Currently, most investment agreements do not contain their own specific rules for costs and their attribution. This also holds true for the ECT, the Germany-Jordan BIT and the USA-Lithuania BIT, although they do include rules on costs in State-State arbitration²¹⁰. Rather, ISDS proceedings rely on the (somewhat hesitant) guidance of the respective arbitration rules used in the proceedings. For example, Art. 61 (2) ICSID-Convention requires a final award to address the issue. It makes no statement on the allocation of costs. UNCITRAL Rules 42 (1) and 40 (2) provide for costs to be borne in principle by the unsuccessful party, but the tribunal may decide otherwise. Hence, there are only broad guidelines in investment law and arbitral tribunals enjoy a great degree of discretion. Hardly surprising, there is no consensus on the attribution question²¹¹. Some tribunals resorted to the rule generally used in public international law, whereby each party has to bear its own costs and arbitrators and institutional costs are split²¹². Yet, some tribunals have opted to shift a greater part of the costs to the unsuccessful party²¹³. One is therefore left with the general observation that the outcome of cost awards is difficult to predict²¹⁴.

On a principled level, possible models addressing the question of cost allocation include the equal split of costs at one end of the spectrum and a 'loser pays all' principle at the other end. Shifting all costs generally on the claimant party appears no option as it is hardly consistent with the idea of the rule of law.

²⁰⁸ OECD, *Investor-State Dispute Settlement, Public Consultation: 16 May–23 July 2012*, available at: http://www.oecd.org/daf/inv/investment-policy/ISDSconsultationcomments_web.pdf (visited 5 June 2015) p. 19; S. Franck, Rationalizing Costs in Investment Arbitration, *Washington University Law Review*, Vol. 88 (2011), pp. 769 et seqq.

²⁰⁹ D. Gaukrodger and K. Gordon, *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community*, OECD Working Papers on International Investment No. 2012/03, available at <http://dx.doi.org/10.1787/5k46b1r85j6f-en> (visited 3 June 2015), p. 19.

²¹⁰ Cf. Art. 27 (3) (j) ECT; Art. 10 (5) Germany-Jordan; Art. VII (4) USA-Lithuania.

²¹¹ For a discussion cf. S. Franck, Rationalizing Costs in Investment Arbitration, *Washington University Law Review*, Vol. 88 (2011), pp. 769 et seqq.; D. Smith, Shifting Sands: Cost-and-Fee Allocation in International Investment Arbitration, *Virginia Journal of International Law*, Vol. 51 (2011), pp. 749 et seqq.; L. Reed, More on Corporate Criticism of International Arbitration, *Kluwer Arbitration Blog*, 16 July 2010, available at <http://kluwerarbitrationblog.com/blog/2010/07/16/more-on-corporate-criticism-of-international-arbitration/> (visited 3 June 2015); N. Ulmer, The Cost Conundrum, *Arbitration International*, Vol. 26 (2010), pp. 221 et seqq.; P. Lalive, *Dérives arbitrales (II)*, *ASA Bulletin 1/2006*, available at http://www.lalive.ch/data/publications/pla_derives_arbitrales_2.pdf (visited 3 June 2015).

²¹² See S. Hindelang, *Study on Investor-State Dispute Settlement (ISDS) and Alternatives of Dispute Resolution in International Investment Law*, Study for the European Parliament, September 2014, available at <http://ssrn.com/abstract=2525063> (visited 1 June 2015), p. 110 et seqq.

²¹³ D. Smith, Shifting Sands: Cost-and-Fee Allocation in International Investment Arbitration, *Virginia Journal of International Law*, Vol. 51 (2011), pp. 749 et seqq., p. 753.

²¹⁴ Cf. C. Schreuer et al., *The ICSID Convention: A Commentary*, 2nd edition, Cambridge University Press, Cambridge, 2009, p. 1229 ('the practice of ICSID tribunals in apportioning costs is neither clear nor uniform'). In respect of UNCITRAL or SCC ISDS cases cf. D. Smith, Shifting Sands: Cost-and-Fee Allocation in International Investment Arbitration, *Virginia Journal of International Law*, Vol. 51 (2011), pp. 749 et seqq., pp. 775, 780.

When discussing the issue of cost attribution, a set of arguments and interests concerning the different stakeholders has to be kept in mind. On the one hand, the access to ISDS must not be prevented by a threat of extraordinary high costs in the case the investor loses. This applies especially to small and medium sized enterprises, which are less able to take such risks²¹⁵. On the other hand, the threat of potentially high costs can serve as a deterrent against frivolous claims. Governments also have to consider the question of allocation of costs very carefully in order to shield themselves from being forced into compromise by the threat of high arbitration costs²¹⁶.

4.10.2 Comparison of EUSFTA, CETA, ECT, Germany-Jordan BIT, and the USA-Lithuania BIT

While the ECT, the Germany-Jordan BIT, and the USA-Lithuania BIT rely on the very vague general rules on costs contained in the respective arbitration rules and general public international law which is hardly more detailed, EUSFTA and CETA provide for guidance in Art. 9.29 EUSFTA and Art. X.36 CETA. According to the European Commission, they are the first of its kind in ISDS agreements²¹⁷. Both, the costs of arbitration²¹⁸ (including the fees and expenses of the arbitrators²¹⁹) as well as other reasonable costs²²⁰ (defined as including costs of legal representation and assistance) shall be borne by the unsuccessful party.

This ‘loser pays all’ principle can be helpful in containing costs on both the claimant’s as well as the respondent’s side. The European Commission supports this approach specifically with the view that it might lead to cost relief for governments²²¹. Yet, this principle does not assure that financially robust claimants are deterred from resorting to arbitration if it serves their strategic interests²²². At the same time, it is possible that SMEs might shy away from ISDS if a loss of the case bears too big a financial risk for them.

CETA and EUSFTA grant the tribunal some discretion to allocate the costs differently if it determines that to be appropriate in light of the circumstances of the case. It is not further defined what such circumstances might be. If only parts of a claim were successful the costs shall be borne proportionately

²¹⁵ D. Gaukrodger and K. Gordon, *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community*, OECD Working Papers on International Investment No. 2012/03, available at <http://dx.doi.org/10.1787/5k46b1r85j6f-en> (visited 3 June 2015), p. 23. Small- and medium-sized undertakings could benefit from a small ‘small claims center’ with simplified procedures and lower costs in order to allow for access to ISDS.

²¹⁶ The access of less-developed countries to high-quality legal defense at a reasonable price could be afforded through technical assistance and at a bilateral or multilateral level. Cf. UNCTAD, *Reform of Investor-State Dispute Settlement: In Search of a Roadmap*, IIA Issues Note 2013/2, available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf (visited 19 May 2015), p. 7; see also D. Gaukrodger and K. Gordon, *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community*, OECD Working Papers on International Investment No. 2012/03, available at <http://dx.doi.org/10.1787/5k46b1r85j6f-en> (visited 3 June 2015), p. 23.

²¹⁷ European Commission, *Investment Provisions in the EU-Canada Free Trade Agreement (CETA)*, Factsheet, September 2014, available at http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151918.pdf (visited 8 June 2015), p. 6.

²¹⁸ See the text passages highlighted in yellow in the table following this chapter.

²¹⁹ Arbitrators under CETA- or EUSFTA-regime shall always be compensated pursuant to ICSID conditions irrespective of what arbitration rules the claimant chose in the individual case.

²²⁰ See the text passages highlighted in green in the table following this chapter.

²²¹ European Commission, *Investment Provisions in the EU-Canada Free Trade Agreement (CETA)*, Factsheet, September 2014, available at http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151918.pdf (visited 8 June 2015), p. 6.

²²² See S. Hindelang, *Study on Investor-State Dispute Settlement (ISDS) and Alternatives of Dispute Resolution in International Investment Law*, Study for the European Parliament, September 2014, available at <http://ssrn.com/abstract=2525063> (visited 1 June 2015), p. 110.

by the parties²²³. The provisions differentiate between arbitration costs and other reasonable costs. This way, the treaties allow to differently apportion arbitration costs and other costs, because the circumstances relevant for each apportionment might not necessarily be the same.

4.10.3 Working towards cost reduction and an SME-friendly access to justice

CETA and EUSFTA are the only agreements compared which explicitly tackle the issue of cost allocation. Whilst the clarification on the apportionment of costs is a welcome development, approaches to reduce the extensive costs of ISDS proceedings could have been explored in more depth. Especially with a view to making investment arbitration more accessible to SMEs, the issue deserves attention. For small claims, the fees and expenses of arbitrators and party representatives could be fixed to the value of the dispute²²⁴. On the national or European level, this could be aided by schemes for legal financial aid. Compared to private third party funding²²⁵, this has the same positive effects for SMEs whilst the risk that 'legal aid' is only provided out of economic rationale whereby case numbers would unreasonably soar is excluded. Also, the length of proceedings increases the costs. A stricter time regime for proceedings initiated by SMEs could be installed.²²⁶

²²³ See the text passages highlighted in **turquoise** in the table following this chapter.

²²⁴ For a draft provision regarding the establishment of special schedules for SMEs (as a modification of CETA Art. X.42: Committee) see S. Hindelang and S. Wernicke (eds.), *Grundzüge eines modernen Investitionsschutzes - Harnack-Haus Reflections*, 2015, available at <http://tinyurl.com/ofzq7k3> (visited 9 September 2015), pp. 23-24:

'[1.] The Committee on Services and Investment shall provide a forum for the Parties to consult on issues related to this Section, including:

[...]

[(d)] the establishment of a special schedule of fees for party representatives and arbitrators and the establishment of a special dispute settlement schedule setting out fixed dates for the completion of the different procedural phases for disputes with a value of not more than 10 Million Euros ("small claims") with a view to accelerating the proceedings and, thereby, to facilitate access to dispute settlement also for small or medium-sized enterprises.

The Committee on Services and Investment shall present its final proposals on the establishment of a special schedule of fees for party representatives and arbitrators and a special dispute settlement schedule for small claims three years after entry into force of this agreement at the latest for the further consideration of the Parties.

Until a special schedule of fees for party representatives and arbitrators is established by the Parties for small claims, the fees have to be fixed as follows:

The fee of an arbitrator or presiding arbitrator respectively, including any expenses may not exceed: 15,000 or 22,000 Euros if the value of the dispute equals 500,000 Euros or less; 25,000 or 35,000 Euros if the value of the dispute equals 1,000,000 Euros or less; 5,000 or 45,000 Euros if the value of the dispute equals 5,000,000 Euros or less; 40,000 Euros or 50,000 Euros if the value of the dispute exceeds 5,000,000 Euros.

The total fees of party representatives or a disputing party may not exceed: 50,000 Euros if the value of the dispute equals 500,000 Euros or less, 85,000 Euros if the value of the dispute equals 1,000,000 Euros or less, 150,000 Euros if the value of the dispute equals 2,000,000 Euros or less, 200,000 Euros if the value of the dispute equals 3,000,000 Euros or less, 300,000 Euros if the value of the dispute equals 4,000,000 Euros or less, 400,000 Euros if the value of the dispute equals 6,000,000 Euros or less, 500,000 Euros if the value of the dispute exceeds 6,000,000 Euros. If the value of the dispute exceeds 10,000,000 Euros this provision does not apply.

Until a special dispute settlement schedule for small claims is established by the Parties, a claim submitted follows, to the extent applicable, the schedule provided for panel proceedings under the 1994 WTO Dispute Settlement Understanding.'

²²⁵ Cf. on this issue A. Joubin-Bret, Spotlight on Third-Party Funding in Investor-State Arbitration, *The Journal of World Investment and Trade*, Vol. 16 (2015), pp. 727–733.

²²⁶ See the proposal in Fn. 216 as presented in S. Hindelang and S. Wernicke (eds.), *Grundzüge eines modernen Investitionsschutzes - Harnack-Haus Reflections*, 2015, available at <http://tinyurl.com/ofzq7k3> (visited 9 September 2015), pp. 23-24.

4.10.4 Table: Costs

bold = important passages
yellow = costs of arbitration
green = other reasonable costs
turquoise = apportionment in case of partial success of claims

EUSFTA ²²⁷	CETA
<p>Art. 9.29</p> <p>1. The tribunal shall order that the costs of the arbitration shall be borne by the unsuccessful disputing party. In exceptional circumstances the tribunal may apportion costs between the disputing parties if it determines that apportionment is appropriate in the circumstances of the case.</p> <p>2. Other reasonable costs, including costs of legal representation and assistance, shall be borne by the unsuccessful party, unless the tribunal determines that such apportionment of costs is not appropriate in the circumstances of the case.</p> <p>3. Where only some parts of the claims have been successful, the costs awarded shall be adjusted, proportionately, to the number or extent of the successful parts of the claims.</p> <p>4. Where a claim or parts of a claim are dismissed on application of Article 9.23 (Claims Manifestly without Legal Merits) or Article 9.24 (Claims Unfounded as a Matter of Law), the tribunal shall order that all costs relating to such a claim or parts thereof, including the costs of arbitration and other reasonable costs, including costs of legal representation and assistance, shall be borne by the unsuccessful disputing party.</p> <p>5. The fees and expenses of the arbitrators shall be those determined pursuant to Regulation 14(1) of the Administrative and Financial Regulations of the ICSID Convention in force on the date of the initiation of the arbitration.</p>	<p>Art. X.36 (5)</p> <p>5. A tribunal shall order that the costs of arbitration be borne by the unsuccessful disputing party. In exceptional circumstances, a tribunal may apportion costs between the disputing parties if it determines that apportionment is appropriate in the circumstances of the claim. Other reasonable costs, including costs of legal representation and assistance, shall be borne by the unsuccessful disputing party, unless the tribunal determines that such apportionment is unreasonable in the circumstances of the claim. Where only parts of the claims have been successful the costs shall be adjusted, proportionately, to the number or extent of the successful parts of the claims.</p> <p>Art. X.38</p> <p>The fees and expenses of the arbitrators pursuant to Regulation 14(1) of the Administrative and Financial Regulations of the ICSID Convention in force on the date of initiation of the arbitration shall apply.</p>

²²⁷ Numbering according to the October 2014 text version predating legal revision; numbering of the articles may change.

4.11 Enforcement of awards and challenge of awards

Once the investor has obtained an award, he will most likely insist on compliance. This might be met with opposition of the unsuccessful respondent State, although experience shows that most States regularly comply with the awards. If the unsuccessful respondent State does not comply with the award, the claimant will seek enforcement, most likely into assets located outside the respondent State. Conversely, the unsuccessful State respondent might consider challenging the award.

Depending on the chosen arbitration rules, the unsuccessful respondent State may seek annulment of the award in accordance with Art. 52 ICSID-Convention²²⁸, or could apply for annulment in the courts of the State where the arbitration was seated.²²⁹ The latter case relates for example to ad-hoc arbitrations under the UNCITRAL Arbitration Rules or the ICSID Additional Facility Rules.

Most likely, however, it will be the successful claimant who seeks enforcement, which has to be sought through domestic courts. Again, depending on the chosen arbitration rules, the competence of domestic courts to review the award before enforcement varies. According to Art. 53 and 54 of the ICSID-Convention, arbitral awards shall be binding and must be treated as if they were a final judgment of a court of any party to the ICSID-Convention. Awards outside this regime are recognized and enforced in accordance with the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)²³⁰. The New York Convention provides for an obligation to recognize and enforce foreign arbitral awards. An award must be of an international or non-domestic

²²⁸ On principle, both disputing parties may seek annulment. Art. 52(1) ICSID reads 'Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:

- (a) that the Tribunal was not properly constituted;
- (b) that the Tribunal has manifestly exceeded its powers;
- (c) that there was corruption on the part of a member of the Tribunal;
- (d) that there has been a serious departure from a fundamental rule of procedure; or
- (e) that the award has failed to state the reasons on which it is based.'

²²⁹ For example, if the seat of arbitration was Germany, inter alia, § 1059 Code of Civil Procedure applies which reads 'An arbitration award may be reversed only if:

1. The petitioner asserts, and provides reasons for his assertion, that:
 - a) One of the parties concluding an arbitration agreement pursuant to sections 1029 and 1031 did not have the capacity to do so pursuant to the laws that are relevant to such party personally, or that the arbitration agreement is invalid under the laws to which the parties to the dispute have subjected it, or, if the parties to the dispute have not made any determinations in this regard, that it is invalid under German law; or that
 - b) He has not been properly notified of the appointment of an arbitral judge, or of the arbitration proceedings, or that he was unable to assert the means of challenge or defence available to him for other reasons; or that
 - c) The arbitration award concerns a dispute not mentioned in the agreement as to arbitration, or not subject to the provisions of the arbitration clause, or that it contains decisions that are above and beyond the limits of the arbitration agreement; however, where that part of the arbitration award referring to points at issue that were subject to the arbitration proceedings can be separated from the part concerning points at issue that were not subject to the arbitration proceedings, only the latter part of the arbitration award may be reversed; or where the petitioner asserts, and provides reasons for his assertion, that
 - d) The formation of the arbitral tribunal or the arbitration proceedings did not correspond to a provision of this Book or to an admissible agreement between the parties, and that it is to be assumed that this has had an effect on the arbitration award; or if
2. The court determines that
 - a) the subject matter of the dispute is not eligible for arbitration under German law; or
 - b) The recognition or enforcement of the arbitration award will lead to a result contrary to public order.

²³⁰ A list of all State parties to the New York Convention is available at <http://www.newyorkconvention.org/contracting-states/list-of-contracting-states> (visited 4 June 2015).

nature and conform to certain other formal requirements. Art. 5 of the New York Convention provides for an exhaustive list of possible grounds for judicial review by domestic courts.

4.11.1 Comparison of EUSFTA, CETA, ECT, Germany-Jordan BIT, and the USA-Lithuania BIT

All treaties²³¹ – independently from the chosen set of arbitration rules – provide that an award issued by a tribunal is binding on the disputing parties and its enforcement shall be ensured within the domestic jurisdictions of the State parties to the treaties²³². Thus, if not wanting to breach an international commitment, all organs of the host State shall observe and carry out the arbitral award. Domestic courts of the respondent State cannot overturn decisions by arbitral tribunals established on the basis of the treaties²³³. This mechanism is mirrored in the ICSID-Convention in Art. 53 for awards covered by this provision.

Art. 9.30 (4) EUSFTA, Art. X.39 (5) CETA, and Art. 26 (5) (b) ECT²³⁴ put beyond dispute that ISDS awards qualify for enforcement under the New York Convention²³⁵. The Germany-Jordan BIT and the USA-Lithuania BITs do not expressly refer to the New York Convention, which does however not have an impact on its applicability.

EUSFTA and CETA contain specific provisions for the situation that enforcement is stayed, Art. 9.30 (2) EUSFTA, Art. X.39 (3) (a) (ii) and (b) (ii) CETA²³⁶. CETA establishes additional waiting periods before an award can be enforced, Art. X.39 (3) (i) and (b) (i) CETA. Awards under the ICSID-Convention cannot be enforced before 120 days after the rendering of the award have elapsed. This concurs with the time period up to which a claimant might request an annulment according to Art. 52 (2) ICSID Convention. For proceedings under other arbitration rules (including ICSID Additional Facilities rules), enforcement can be sought after 90 days.

²³¹ Art. 9.30 (1) and (3) EUSFTA, Art. X.39 (1) and (4) CETA, Art. 26 (8) ECT, Art. 11 (3) Germany-Jordan BIT, Art. VI (6) USA-Lithuania BIT.

²³² See the text passages highlighted in yellow in the table following this chapter.

²³³ J. Griebel, *Internationales Investitionsrecht*, C.H. Beck, München, 2008, p. 142.

²³⁴ Energy Charter Secretariat, *The Energy Charter Treaty – A Reader's Guide*, available at http://www.encharter.org/fileadmin/user_upload/Publications/ECT_Guide_ENG.pdf (visited 4 June 2015), pp. 54 et seq.

²³⁵ See the text passages highlighted in green in the table following this chapter.

²³⁶ See the text passages highlighted in turquoise in the table following this chapter.

4.11.2 Table: Enforcement of awards

bold = important passages
yellow = binding force of awards
green = reference to New York Convention
turquoise = no enforcement if award has been stayed

EUSFTA ²³⁷	CETA	ECT	Germany-Jordan	USA-Lithuania
<p>Art. 9.30</p> <p>1. An award issued pursuant to this Section shall be binding on the disputing parties.</p> <p>2. Each disputing party shall abide by and comply with the terms of the award except to the extent that enforcement has been stayed in accordance with this Agreement or the relevant provisions of the dispute settlement mechanism to which the claim was submitted in accordance with Article 9.19 (Submission of Claim to Arbitration).</p> <p>3. Each Party shall ensure the recognition and enforcement of the award in accordance with its international obligations and relevant laws and regulations.</p> <p>4. A claim that is submitted to arbitration under this Section shall be deemed to arise out of a commercial relationship or transaction for the purposes of Article 1 of the New York Convention.</p>	<p>Art. X.39</p> <p>1. An award issued by a Tribunal pursuant to this Section shall be binding between the disputing parties and in respect of that particular case.</p> <p>2. Subject to paragraph 3 and the applicable review procedure for an interim award, a disputing party shall recognize and comply with an award without delay.</p> <p>3. A disputing party may not seek enforcement of a final award until:</p> <p>(a) in the case of a final award made under the ICSID Convention:</p> <p>(i) 120 days have elapsed from the date the award was rendered and no disputing party has requested revision or annulment of the award, or</p> <p>(ii) enforcement of the award has been stayed and revision or annulment proceedings have been completed; and</p> <p>(b) in the case of a final award un-</p>	<p>Art. 26</p> <p>[...]</p> <p>(5) (a) The consent given in paragraph (3) together with the written consent of the Investor given pursuant to paragraph (4) shall be considered to satisfy the requirement for:</p> <p>(i) written consent of the parties to a dispute for purposes of Chapter II of the ICSID Convention and for purposes of the Additional Facility Rules;</p> <p>(ii) an “agreement in writing” for purposes of article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958 (hereinafter referred to as the “New York Convention”); and</p> <p>(iii) “the parties to a contract [to] have agreed in writing” for the purposes of article 1 of the UNCITRAL Arbitration Rules.</p> <p>(b) Any arbitration under this Arti-</p>	<p>Art. 11 (3)</p> <p>(3) The award shall be binding and shall not be subject to any appeal or remedy other than those provided for in the said instruments. The award shall be enforced in accordance with domestic law.</p>	<p>Art. VI (6)</p> <p>6. Any arbitral award rendered pursuant to this Article shall be final and binding on the parties to the dispute. Each Party undertakes to carry out without delay the provisions of any such award and to provide in its territory for its enforcement.</p>

²³⁷ Numbering according to the October 2014 text version predating legal revision; numbering of the articles may change.

	<p>der the ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules, or any other rules applicable pursuant to Article X. 22(2)(d) (Submission of a Claim to Arbitration):</p> <p>(i) 90 days have elapsed from the date the award was rendered and no disputing party has commenced a proceeding to revise, set aside or annul the award, or</p> <p>(ii) enforcement of the award has been stayed and a court has dismissed or allowed an application to revise, set aside or annul the award and there is no further appeal.</p> <p>4. Execution of the award shall be governed by the laws concerning the execution of judgments in force where such execution is sought.</p> <p>5. A claim that is submitted to arbitration under this Chapter shall be deemed to arise out of a commercial relationship or transaction for the purposes of Article I of the New York Convention.</p>	<p>cle shall at the request of any party to the dispute be held in a state that is a party to the New York Convention. Claims submitted to arbitration hereunder shall be considered to arise out of a commercial relationship or transaction for the purposes of article I of that Convention.</p> <p>[...]</p> <p>(8) The awards of arbitration, which may include an award of interest, shall be final and binding upon the parties to the dispute. [...] Each Contracting Party shall carry out without delay any such award and shall make provision for the effective enforcement in its Area of such awards.</p>		
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4.12 Permanent court and appellate mechanism

One of the main criticisms of the ISDS system has been the unpredictability of outcomes. The origin of this problem is often seen in the use of ad-hoc tribunals in dispute settlement. Two ideas currently discussed to remedy this and other flaws of the dispute settlement practice are that of a permanent investment court to handle investment cases (below 4.12.1 (p. 105)) as well as the installation of some kind of an appellate mechanism (below 4.12.2 (p. 108)).

4.12.1 Permanent investment court – multi-, pluri- or bilateral?

So far, the investment law landscape does not offer functioning examples or points of reference for a permanent court.²³⁸ Introducing a standing investment court with tenured judges²³⁹ has for long been rejected on the grounds that standing courts, compared to ad-hoc tribunals, supposedly show a stronger tendency of construing their own jurisdiction expansively and developing it in directions not desired by States²⁴⁰. However, as experience with NAFTA has demonstrated, it can be doubted that ad-hoc tribunals effectively perform the claimed role of a guardian of the State parties' intentions. Rather, they are losing their grip more and more as the ad-hoc-system also shows, among other flaws, power-grabbing tendencies²⁴¹.

In the name of equality, predictability and credibility²⁴², such a court, endowed with an institutional memory, would in tendency better ensure that like cases are indeed treated alike. If many cases are potentially decided on the basis of one and the same investment instrument, the establishment of a permanent court would probably contribute to more consistency. For example, if a standing court had adjudicated the claims of US-American investors against Argentina in the aftermath of its financial crisis, it would probably have avoided the conflicting decisions of the different ad-hoc tribunals²⁴³.

²³⁸ Some inspiration though could be drawn from the Iran-United States Claims Tribunal. 'The Tribunal consists of nine Members, three appointed by each Government and three (third-country) Members appointed by the six Government-appointed Members. (...) In accordance with the Algiers Declarations, the Tribunal has jurisdiction to decide claims of United States nationals against Iran and of Iranian nationals against the United States, which arise out of debts, contracts, expropriations or other measures affecting property rights; certain "official claims" between the two Governments relating to the purchase and sale of goods and services; disputes between the two Governments concerning the interpretation or performance of the Algiers Declarations; and certain claims between United States and Iranian banking institutions.' Cf. Iran-United States Claims Tribunal, Website, <https://www.iusct.net/Pages/Public/A-About.aspx> (visited 1 September 2015).

²³⁹ The idea of 'arbitrator rosters', as included in CETA in Art. X.25(4), can be presented as a (very modest) step towards a greater 'institutionalization' of the dispute settlement system still based on ad-hoc arbitral tribunals. However, arbitrators present on the list would still be able to partake in other arbitrations, either as an arbitrator or in a different role. Hence, the problem of conflicts of interest would not be resolved by rosters.

²⁴⁰ S. Montt, *State Liability in Investment Treaty Arbitration*, Hart Publishing, Oxford, 2009, pp. 155 et seqq.

²⁴¹ In particular, the so-called *de facto* precedent system effectively diminishes the State parties' role as masters of the investment treaties. Cf. S. Hindelang, *Study on Investor-State Dispute Settlement (ISDS) and Alternatives of Dispute Resolution in International Investment Law*, Study for the European Parliament, September 2014, available at <http://ssrn.com/abstract=2525063> (visited 1 June 2015), pp. 66-69.

²⁴² Note also the differently tailored argument in favour of a permanent court, which suggests that it is the nature of the legal question dealt with in ISDS, i.e. to review the legality of the use of sovereign authority towards an individual, which renders private models of adjudication inadequate. Cf. G. van Harten, *A Case for International Investment Court*, *Inaugural Conference of the Society for International Economic Law*, 16 July 2008, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1153424 (visited 1 May 2015).

²⁴³ Cf. for a more detailed discussion of the Argentina cases which were adjudicated on the basis of the same investment instruments and departed in particular on the question of the relationship between host State defences under the instrument and under customary international law: I. Ten Cate, *International Arbitration and the Ends of Appellate Review*, *New York University Journal of International Law and Politics*, Vol. 44 (2012), pp. 1109 et seqq., p. 1180; I. Ten Cate, *The Costs of Consistency: Precedent in Investment Treaty Arbitration*, *Columbia Journal of Transnational Law*, Vol. 51 (2013), pp. 418 et seqq.

Overall, there are some good arguments for installing a permanent investment court with tenured judges. These might have led the European Parliament to explicitly touch upon the aspect of dispute settlement, albeit somewhat vaguely, in its Resolution on TTIP of 8 July 2015²⁴⁴. While making reference to ‘publicly appointed, independent professional judges’ and the term ‘judge’ usually used for describing a person serving in a (permanent) court instead of an ad-hoc tribunal with arbitrators, the said Resolution avoids referring to ‘permanency’. If indeed implemented by way of establishing any kind of a permanent court, then this would be much more than just ‘cosmetics’ but a systemic shift. In such a case the alleged mind games²⁴⁵ to re-name ISDS ‘Investment Court System (ICS)’ would not only portray an ingenious publicity stunt. A permanent court would undoubtedly be the starting point for a ‘new’ system as many of the current issues associated with ISDS could be wiped off the table.²⁴⁶ However, there is obviously no guarantee, and experience with the existing international courts confirms this, that no ‘new’ problems would arise. As always, irrespective of the possible political resistance on the side of some EU treaty partners which is to be overcome, success or defeat of such a ‘new’ system would depend on the concrete substance, i.e. the implementation of the idea of a permanent court.

For the time being, the European Parliament’s Resolution has been rather vague on many questions, including the basic one in which context such a permanent court should be established: as an international (multilateral) investment court, as a bilateral permanent court for individual (EU) agreements, or a plurilateral court, set up in the context of one bilateral agreement but open to be used as a dispute settlement mechanism also by reference in relation to other agreements.

4.12.1.1 International (multilateral) investment court

Consistency effects flowing from an international investment court charged to adjudicate on a regional or global scale would currently be limited due to the fragmented state of substantive standards in international investment law consisting of thousands of bilateral investment treaties. Such a court would have to rule on the basis of many (yet still) different bilateral or regional investment instruments. As mentioned above, bilateral or regional investment treaties might be roughly similar but not necessarily identical. Even if they might be identical, when interpreting a certain bilateral investment treaty, other bilateral legal obligations on matters such as the environment, labour, or security between the State parties to the investment treaty would have to be taken into account (cf. Art. 31 VCLT). The bundle of bilateral rights and duties between two States hardly ever resembles the bundle of bilateral rights and duties of two other States. Hence, provisions are interpreted and cases are adjudicated in different bilateral legal contexts²⁴⁷. Therefore, only in the event of States concluding regional or multilateral agreements containing common substantive investment protection standards, consistency effects flowing from a permanent global or regional investment court would significantly

²⁴⁴ ‘...and to replace the ISDS system with a new system for resolving disputes between investors and states which is subject to democratic principles and scrutiny, where potential cases are treated in a transparent manner by publicly appointed, independent professional judges in public hearings and which includes an appellate mechanism, where consistency of judicial decisions is ensured...’ Cf. European Parliament, Resolution containing the European Parliament’s recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP), 08 July 2015, 2014/2228(INI), Paragraph xv); available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0252+0+DOC+XML+V0//EN> (visited 10 July 2015).

²⁴⁵ See <http://www.vieuws.eu/eutradeinsights/eu-on-the-look-for-new-acronyms-to-replace-isds/> (viewed 23 July 2015).

²⁴⁶ This is not to say that a significantly reformed investor-State arbitration mechanism would not qualify as a ‘new’ system.

²⁴⁷ Cf. S. Hindelang, *Study on Investor-State Dispute Settlement (ISDS) and Alternatives of Dispute Resolution in International Investment Law*, Study for the European Parliament, September 2014, available at <http://ssrn.com/abstract=2525063> (visited 1 June 2015), p. 63.

increase²⁴⁸. This, however, would require another major policy shift in regulating international investment by a large number of States that would not only have to agree on a common set of procedural but also of substantive rules²⁴⁹. Put in the words of the EU Commission: '[...] it will require a level of international consensus that will need to be built'²⁵⁰.

4.12.1.2 Permanent court for individual agreements; bi- or plurilateral

Instead of trying to set up an international investment court it could be more realistic to seek the establishment of a permanent mechanism in the bilateral or regional context; as a pre-step, so to say, to an international institution. However, even then, the European Commission is obviously sceptical towards such effort, stating that '(p)ursuing such an investment court for each individual EU agreement that includes ISDS presents obvious, technical and organizational challenges'²⁵¹. However, depending on the number of claims expected²⁵², establishing a bilateral permanent court could make sense in the EU-US or EU-Canada relations.²⁵³ To save costs, one could even consider opening up such a court as a dispute settlement mechanism for other investment agreements with third parties, turning it into a plurilateral institution. In the specific case of TTIP, again, considerable obstacles would probably have to be overcome on the side of the USA, keeping in mind its rather hesitant position towards international institutions. Hence, for the time being, it might be constructive to include in TTIP at least an obligation for the parties to negotiate in good faith on the establishment of a permanent court within a certain time period.

²⁴⁸ In such situations, interpretation would not be scattered by binary relations as only such other treaties have to be taken into account to which all parties to the multilateral investment treaty are also party to. Cf. C. McLachlan, *The Principle of Systematic Integration and Article 31 (3) (C) of the Vienna Convention*, *International and Comparative Law Quarterly*, Vol. 54 (2005), pp. 279 et seq., p. 315; see also ILC, *Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, 2006, para. 21.

²⁴⁹ UNCTAD, *Reform of Investor-State Dispute Settlement: In Search of a Roadmap*, IIA Issues Note 2013/2, available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf (visited 1 June 2015), p. 10.

²⁵⁰ European Commission, *Investment in TTIP and beyond – the path for reform*, Concept Paper, available at http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF (visited 30 May 2015), p. 4.

²⁵¹ European Commission, *Investment in TTIP and beyond – the path for reform*, Concept Paper, available at http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF (visited 30 May 2015), p. 11.

²⁵² Cf. L. Poulsen et al., *Costs and Benefits of an EU-USA Investment Protection Treaty*, 2013, available at <http://www.italaw.com/sites/default/files/archive/costs-and-benefits-of-an-eu-usa-investment-protection-treaty.pdf> (visited 1 May 2015), pp. 21 et seq. who, with regard to the UK, predict a higher number of cases brought by US investors on the basis of TTIP than, in the NAFTA context, initiated by US investors against Canada. In respect of the EU one could make the following rough calculations which are certainly statistically inadequate but nevertheless may provide some initial indication on the possible number of claims: Canada – home of about 7.8 percent of US FDI stock in 2012 – had to respond to 33 claims (notice of intent filed) by US investors within the period of 20 years. In 2012, the EU was home of 50 percent of US FDI stock. Hence, if a NAFTA-like agreement between the USA and the EU would enter into force today, the EU could have to respond to about 211 claims by US investors in 20 years or about ten claims per year. Cf. for the numbers on FDI stock UNCTAD, *Bilateral FDI Statistics*, 2014, available at <http://unctad.org/en/Pages/DIAE/FDI%20Statistics/FDI-Statistics-Bilateral.aspx> (visited 5 May 2015). It would be interesting to see a study on the expected caseload for the whole of the EU. See also UNCTAD, *Investor-State Dispute Settlement: An Information Note on the United States and the European Union*, IIA Issues Note 2014/2, available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d4_en.pdf (visited 22 July 2015).

²⁵³ However, in such an institutional setting consistency is also bought at the expense of a 'dialogue' among different ad-hoc tribunals on what is the 'right' interpretation of the investment instrument.

4.12.2 Appellate mechanism

A middle course option could be to allow for ad-hoc tribunals on the ‘entry stage’ and establish a permanent appeals facility which guarantees some consistency of interpretation in respect of given investment agreement. In the current state of the ISDS system, challenging awards is restricted to annulment or setting aside proceedings, which can only lead to the invalidation of an individual decision or refusal of its enforcement.²⁵⁴ Introducing an appeals facility in ISDS may allow for *correcting* (i.e. altering the initial) erroneous decision and, thus, would not only save time and money compared to the current situation in which the whole arbitration has to be retried after annulment of the original arbitral award. It would also contribute to more consistency and predictability in investment law decision making as a certain term in the treaty would have to be interpreted in the same fashion by each tribunal if it does not want to risk being overturned²⁵⁵. Summarizing the aforesaid in the words of the European Commission: an appellate mechanism might ‘increase legitimacy both in substance and through institutional design by strengthening independence, impartiality and predictability’²⁵⁶.

WTO experience demonstrates that establishing a (permanent) appeals facility must not necessarily be related to a significant increase in costs and time²⁵⁷. Some may nevertheless want to argue that the finality of arbitration proceedings – i.e. only very limited or no appeals mechanisms – was one of the advantages of investment arbitration over domestic court systems as it puts an end to a dispute. This might in turn contribute to a de-politicisation of an investment conflict as it is quickly taken off the public agenda. However, since investment arbitration involves considerable public interests such as product safety, environmental protection, labour standards, public health or nuclear power phase-outs accepting the – not just theoretical – risk of inconsistent and/or poorly reasoned or erroneous decisions appears hardly justifiable in the name of finality of arbitration.

In Art. 9.33 (1) (c) and Art. X.42 (1) (c) respectively, EUSFTA and CETA contain a commitment to consult within their respective treaty committees on the establishment of an appeals facility or the subjection of decisions rendered on the basis of EUSFTA and CETA to an appeals facility pursuant to other institutional arrangements outside these treaties. Absent the actual establishment of an appeals facility, the commitment to consult might exercise some (very modest) disciplining effect on ad-hoc tribunals not to depart too significantly from the original balance between private and public interests struck

²⁵⁴ Note that, currently, in particular errors of law in respect of substantive provisions of an investment agreement can hardly be corrected.

²⁵⁵ W. Burke-White and A. von Staden, *Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations*, *Yale Journal of International Law*, Vol. 35 (2010), pp. 283 et seqq., p. 299; N. Blackaby, *Public Interest and Investment Treaty Arbitration*, in: van den Berg (ed.), *International Commercial Arbitration: Important Contemporary Questions*, Kluwer Law International, The Hague, 2003, pp. 355 et seqq., p. 364. Cf. also for a general account K. Sauvart, (ed.), *Appeals Mechanism in International Investment Disputes*, Oxford University Press, New York, 2008; see for a summary of a discussion among OECD countries OECD, *Improving the System of Investor-State Dispute Settlement: An Overview*, OECD Working Papers on International Investment No. 2006/1, available at <http://www.oecd.org/daf/inv/internationalinvestmentagreements/36052284.pdf> (visited 1 June 2015); for an optimistic view see also UNCTAD, *Reform of Investor-State Dispute Settlement: In Search of a Roadmap*, IIA Issues Note 2013/2, available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf (visited 1 June 2015), p. 9.

²⁵⁶ European Commission, *Investment in TTIP and beyond – the path for reform*, Concept Paper, available at http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF (visited 30 May 2015), p. 9.

²⁵⁷ D. Gaukrodger and K. Gordon, *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community*, OECD Working Papers on International Investment No. 2012/03, available at <http://dx.doi.org/10.1787/5k46b1r85j6f-en> (visited 20 May 2015), p. 59. Max. 90 days are reserved for the appeals procedure at the WTO. Cf. Article 17(5) DSU.

by the State parties in their investment treaties. The treaties, however, do not hold ready specific proposals for an institutional layout²⁵⁸.

4.12.2.1 General vs. treaty based appellate mechanism

The current fragmented regulatory environment is anything but ideal to actually realise the potential for more consistency inherent to a general appeals facility²⁵⁹. As long as international investment law consists predominantly of binary relations, consistency can be achieved (lawfully) only with regard to the awards rendered on the basis of one and the same investment instrument, because the specific balance between public and private interests established in each investment instrument must be respected. By importing standards from one investment instrument into another one at the discretion of an appeals facility, this facility would turn into a powerful self-styled and unchecked lawmaker²⁶⁰.

Therefore, as with the issue of whether to establish a permanent court, it appears politically more feasible and, from a legal point, more stringent to restrict the competence of an appeals facility to the individual investment agreement.

4.12.2.2 Ad-hoc vs. permanent appellate mechanism

An appeals facility could be of a permanent or of an ad-hoc nature. While an ad-hoc appeals tribunal might be able to correct real or perceived errors or provide a second opinion, a permanent appeals facility would bring an institutional memory and contribute to some consistency in respect of the interpretation of a certain investment instrument.²⁶¹ In the long run, a permanent appeals facility including tenured judges could be of value to predictability and consistency of awards rendered on the basis of investment treaties and thereby provide greater legitimacy to the arbitration process.

The establishment of a permanent appeals mechanism could be identified in the respective treaty as a medium to long term target. A duty to start negotiations within three to five years after the entry-into-force of the respective treaties may be included in the agreement, whereas an ad-hoc mechanism²⁶² could be installed from the outset. It might provide a workable short-term solution and may

²⁵⁸ Only CETA Art. 42 (1) (c) provides for a list of issues to be taken into account.

²⁵⁹ I. Ten Cate, *International Arbitration and the Ends of Appellate Review*, *New York University Journal of International Law and Politics*, Vol. 44 (2012), pp. 1109 et seq., p. 1188; note also D. McRae, *The WTO Appellate Body: A Model for an ICSID Appeals Facility?*, *Journal of International Dispute Settlement*, Vol. 1 (2010), pp. 371 et seq., p. 387; C. Tams, *An Appealing Option? The Debate about an ICSID Appellate Structure*, in: Tietje, et al. (eds.), *Essays in Transnational Economic Law*, No. 57/June 2006, available at <http://telc.jura.uni-halle.de/sites/default/files/altbestand/Heft57.pdf> (visited 1 June 2015). Very sceptical from a practitioner's perspective B. Legum, *Options to Establish an Appellate Mechanism for Investment Disputes*, in: Sauvart/Chiswick-Patterson (eds.), *Appeals Mechanism in Investment Disputes*, Oxford University Press, New York, 2008, pp. 231 et seqq.

²⁶⁰ S. Hindelang, *Study on Investor-State Dispute Settlement (ISDS) and Alternatives of Dispute Resolution in International Investment Law*, Study for the European Parliament, September 2014, available at <http://ssrn.com/abstract=2525063> (visited 1 June 2015), pp. 64 et seq.

²⁶¹ S. Hindelang, *Study on Investor-State Dispute Settlement (ISDS) and Alternatives of Dispute Resolution in International Investment Law*, Study for the European Parliament, September 2014, available at <http://ssrn.com/abstract=2525063> (visited 1 June 2015), p. 64, fn. 116.

²⁶² For a draft provision regarding the appeals mechanism (as a modification to CETA Art. X.42) see S. Hindelang and S. Wernicke (eds.), *Grundzüge eines modernen Investitionsschutzes - Harnack-Haus Reflections*, 2015, available at <http://tinyurl.com/ofzq7k3> (visited 9 September 2015), pp. 17 et seqq.:

'[2.] The Committee on Services and Investment shall provide a forum for the Parties to consult on issues related to this Section, including:

[(c)] whether, and if so, under what conditions, a permanent appellate mechanism ("Investment Appeals Court") between [the other contracting party] and the EU with judges appointed by [the other contracting party] and the EU could be created under the Agreement to review, on points of law, awards rendered by a tribunal under this Section, or whether awards ren-

offer a useful testing ground for establishing a permanent appeals mechanism whereby allowing for the correction of manifest errors of law.

dered under this Section could be subject to such an appellate mechanism developed pursuant to other institutional arrangements. Such consultations shall take into account the following issues, among others:

- [(i)] the establishment, the nature, and composition of an appellate mechanism;
- [(ii)] the applicable scope and standard of review;
- [(iii)] the establishment of an admissibility procedure allowing for the admission of an appeal only in cases of arbitrary or abusive decisions or manifest errors of law by a tribunal;
- [(iv)] transparency of proceedings of an appellate mechanism;
- [(v)] the effect of decisions by an appellate mechanism;
- [(vi)] the relationship of review by an appellate mechanism to the arbitration rules that may be selected under Article X.22 (Submission of a Claim to Arbitration); and
- [(vii)] the relationship of review by an appellate mechanism to domestic laws and international law on the enforcement of arbitral awards.

The Committee on Services and Investment shall present its final proposals on the establishment of an appellate mechanism three years after entry into force of this agreement at the latest for the further consideration of the Parties.

Until a permanent appellate mechanism has been established and is functioning, a disputing party may appeal a partial or final award which amounts to an outrage, to bad faith, or to willful neglect of duty, on grounds of manifest errors of law which, if corrected, alter the ultimate result of the award.

Upon receipt of the appeal, the [President of the International Court of Justice] shall appoint three arbitrators ("ad hoc appellate tribunal"). Two members may hold the respective nationality of the disputing parties. The third presiding member may not hold the nationality of either disputing party. The members of the ad hoc appellate tribunal shall comprise persons of highest moral character and have demonstrated a high level of professional independence and impartiality. They shall be recognized and respected experts of public international law, in particular international investment law. They shall be available at all times and on short notice during their appointment. They shall serve in their individual capacity and decide on a neutral basis.

The appeal shall be filed by a disputing party within four weeks of an award of the tribunal and must be admitted or rejected as inadmissible for review by the ad hoc appellate tribunal within four weeks upon its constitution on the basis of a summary evaluation. The final decision of the ad hoc appellate tribunal on an appeal shall be rendered within twelve weeks.

The arbitration rules selected for the governance of an arbitration on the basis of this agreement are applicable to the appeals arbitration to the extent deemed possible by the ad hoc appellate tribunal and not altered or amended by provisions of this agreement.

A final decision of the ad hoc appellate tribunal is binding and enforceable in the same way as an award of a tribunal constituted on the basis of this agreement is binding and enforceable. An award of a tribunal which (1) can be appealed, or (2) has been appealed and the appeal has neither been rejected nor finally decided is not binding and enforceable during this period.'

4.12.3 Table: Appellate mechanism

bold = important passages

yellow = appellate mechanism under the respective agreement

green = appellate mechanism pursuant to other institutional arrangements

EUSFTA	CETA
<p>Art. 9.33 (1)</p> <p>1. The Committee on Trade in Services, Investment and Government Procurement established pursuant to Article 17.2 (Specialised Committees) shall examine:</p> <p>(a) difficulties which may arise in the implementation of this Section;</p> <p>(b) possible improvements of this Section, in particular in the light of experience and developments in other international fora; and,</p> <p>(c) whether, and if so, under what conditions, an appellate mechanism to review, on points of law, awards rendered under this Section could be created under this Agreement or whether awards rendered under this Section could be subject to such an appellate mechanism developed pursuant to other institutional arrangements.</p>	<p>Art X.42 (1)</p> <p>1. The Committee on Services and Investment shall provide a forum for the Parties to consult on issues related to this Section, including:</p> <p>(a) difficulties which may arise in the implementation of this Chapter;</p> <p>(b) possible improvements of this Chapter, in particular in the light of experience and developments in other international fora; and,</p> <p>(c) whether, and if so, under what conditions, an appellate mechanism could be created under the Agreement to review, on points of law, awards rendered by a tribunal under this Section, or whether awards rendered under this Section could be subject to such an appellate mechanism developed pursuant to other institutional arrangements. Such consultations shall take into account the following issues, among others:</p> <p>(i) the nature and composition of an appellate mechanism;</p> <p>(ii) the applicable scope and standard of review;</p> <p>(iii) transparency of proceedings of an appellate mechanism;</p> <p>(iv) the effect of decisions by an appellate mechanism;</p> <p>(v) the relationship of review by an appellate mechanism to the arbitration rules that may be selected under Article X.22 (Submission of a Claim to Arbitration); and</p> <p>(vi) the relationship of review by an appellate mechanism to domestic laws and international law on the enforcement of arbitral awards.</p>

4.13 Conclusions and outlook: Of cosmetic changes and ‘new’ systems

Having analysed key elements of the ISDS concept as it currently stands, the thesis of a need for change – as already and often stated by others – has proven itself right. In response to that, the EU agreements, EUSFTA and CETA, strike out in new directions; at least to some extent. In essence, however, they follow a rather traditional path of dispute settlement in the context of foreign investment. It includes the use of ad-hoc tribunals, a suspicion towards domestic courts, even if generally well-functioning, a rather sketchy selection process for arbitrators, and no appeals mechanism to be established immediately. One may wonder whether this is already what was meant by the European Parliament’s call for establishing a ‘new’ system²⁶³ of investor-State dispute settlement.

Further efforts should be undertaken in reforming the dispute settlement mechanism in international investment law in order to make it sustainable for the years to come. This will inevitably involve entering into new territory in one form or another. One way would be to proceed in an evolutionary fashion. But even then, one might eventually end up with a ‘grand reform’ sufficiently addressing the identified deficits as changing many pieces in the puzzle might lead to a new picture overall. The second way would be more ‘revolutionary’, i.e. to change the basic elements constituting the current dispute settlement mechanism. This relates in essence to the replacement of ad-hoc tribunals by a permanent investment court system, consisting either of several permanent courts, one in each case competent for disputes arising out of an individual agreement, or of an international investment court competent to act on the basis of several investment treaties.

Both strategies deserve a fair evaluation. However, no solution would be to forego any investor-State dispute settlement mechanism in future EU investment treaties. In particular, if an investor-State dispute settlement mechanism – irrespective of evolutionary or revolutionary in nature – would not be included in a treaty of the size and significance of TTIP, this might waste a one-time opportunity to influence the future shape of the international investment law regime as a whole.

²⁶³ Cf. European Parliament, *Resolution containing the European Parliament’s recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP)*, 08 July 2015, 2014/2228(INI), Paragraph xv); available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0252+0+DOC+XML+V0//EN> (visited 10 July 2015).

5 Substantive Protection Clauses

This section briefly examines the most frequently found substantive standards in investment treaties, i.e. the ones on national and most-favoured-nation treatment (below 5.1 (p. 113) and below 5.2 (p. 126)), fair and equitable treatment (below 5.4 (p. 136)), free monetary transfer (below 5.5 (p. 145)), expropriation (below 5.6 (p. 153)), as well as the duty to honour certain obligations towards the investor that are governed by domestic law ('umbrella clause'; below 5.7 (p. 161)).

5.1 National Treatment

National treatment clauses are one of the cornerstones of international investment law²⁶⁴. They intend to ensure that foreign investors are not placed in competitive disadvantage compared to domestic ones²⁶⁵. National treatment, hence, helps to counter in particular protectionist intentions of a host State to favour domestic over foreign businesses. Although customary international law provides for a minimum protection of aliens it is burdened with uncertainties and leaves certain gaps when it comes to ensuring a level-playing field of aliens compared to nationals, in particular with respect to economic activities²⁶⁶. National treatment clauses in investment treaties aim at closing these gaps. Also, domestic legislation will usually not provide for protection against discrimination as the favourable treatment of domestic businesses is in such situations not infrequently the declared or disguised intention of the national law. However, the foreign investor may be protected by non-discrimination clauses in domestic constitutions or may resort to primary EU law, in particular to the fundamental freedoms and the general non-discrimination clause in Art. 18 TFEU.

National treatment is a so-called 'comparative standard'²⁶⁷. It ties the standard accorded to foreign investors to that afforded to domestic investors. The standard of treatment of a foreign investor depends on the standard afforded to the domestic one and changes accordingly when standard for the domestic investor changes.²⁶⁸ Thus, the national treatment standard invites to compare the treatment afforded to a domestic and foreign investor. Any national treatment provision will therefore have to outline the parameters for this comparison and further define the extent of the protection afforded.

²⁶⁴ P. J. Kuijper, *Investment Protection Agreements as Instruments of International Economic Law*, Study for the European Parliament, September 2014, available at <http://www.jura.fu-berlin.de/fachbereich/einrichtungen/oeffentliches-recht/lehrende/hindelangs/Studie-fuer-Europaeisches-Parlament/Volume-2-Studies.pdf> (visited 1 June 2015), p. 15.

²⁶⁵ A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, Kluwer Law International, The Hague, 2009, p. 151.

²⁶⁶ Customary international law allows for some degree of discrimination, see C. McLachlan et al., *International Investment Arbitration: Substantive Principles*, Oxford University Press, Oxford, 2007, paras 7.152 and 7.38.

²⁶⁷ P. J. Kuijper, *Investment Protection Agreements as Instruments of International Economic Law*, Study for the European Parliament, September 2014, available at <http://www.jura.fu-berlin.de/fachbereich/einrichtungen/oeffentliches-recht/lehrende/hindelangs/Studie-fuer-Europaeisches-Parlament/Volume-2-Studies.pdf> (visited 1 June 2015), p. 16.

²⁶⁸ The link between the treatment of domestic and foreign investors can however become problematic in terms of protection if the general standard decreases dramatically due to political unrest or similar dramatic events. Cf. J. VanDuzer et al., *Integrating Sustainable Development into International Investment Agreements – A Guide for Developing Countries*, Commonwealth Secretariat, August 2012, available at http://www.iisd.org/pdf/2012/6th_annual_forum_commonwealth_guide.pdf (visited 1 June 2015), p. 113.

5.1.1 The parameters for comparison

Typically, national treatment clauses stipulate that foreign investors and investments be treated no less favourable than domestic investors or investments. While the phrase ‘no less favourable’ obviously invites to engage in a comparative exercise, the phrase in itself does not stipulate criteria for that comparison. This has caused some dispute whether – without express mention of any specific comparator – foreign and domestic investors or investments will at least have to be comparable insofar as they are competitors in the same business or economic sector²⁶⁹. The uncertainty regarding this issue has led States to the attempt to somewhat narrow down the criteria for comparison by adding the phrase ‘in like circumstances’²⁷⁰ to their national treatment clauses – with some even specifying which individual factors should be taken into account²⁷¹.

When establishing a breach of the national treatment standard provision, one should bear in mind that the common phrase treatment ‘no less favourable’ leads to a different level of protection²⁷² as in the case of an obligation to grant foreign investors the *exact* same treatment accorded to domestic businesses²⁷³. Needless to say that the national treatment standard does not require that foreign investors are given a better treatment than afforded to any domestic investor. ‘Reasonable’ governmental policies that have a greater effect on foreign investors than on domestic investors but do not distinguish, neither openly nor de facto, between foreign and domestic investors do not violate the NT standard²⁷⁴.

As a matter of general international law, the national treatment provision is binding on the State as a whole, irrespective of whether such treatment is afforded by national or sub-national authorities²⁷⁵; a divergence from this rule must be expressly stated in the treaty. Hence, treatment by sub-national authorities also has to conform to the national treatment standard of protection. However, with the motive of strengthening the competitiveness of regionally based businesses, sub-national authorities may grant those businesses certain advantages in comparison to other domestic businesses originating from outside the region. Thus, a special treatment is established for regionally based businesses. The question arises whether any sub-national authority granting such special treatment to regional businesses would have to extend the same special treatment to foreign businesses. Alternatively,

²⁶⁹ Generally some kind of comparator – and hence comparability – is assumed to be necessary, see J. Griebel, *Internationales Investitionsrecht*, C.H. Beck, München, 2008, p. 82; arguing pro: *Pope & Talbot*, Award on the Merits of Phase 2, para. 78; arguing against: *Occidental*, Final Award, para. 173 (much broader comparator). See also *Total v. Argentina*, Decision on Liability, 27 December 2010, para. 213 arguing that discrimination can inherently only be based on a more narrow comparison.

²⁷⁰ See for example Art. 3 (1) of the 2012 U.S. Model BIT: ‘Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to [...]’, available at <http://www.state.gov/documents/organization/188371.pdf> (viewed 12 June 2015).

²⁷¹ C. McLachlan et al., *International Investment Arbitration: Substantive Principles*, Oxford University Press, Oxford, 2007, at para. 7.153 for further specifications concerning the right comparator.

²⁷² However, the phrase ‘no less favourable’ opens up the possibility to review host State measures that may already be in practice more favourable to foreign investors than to certain domestic ones. Cf. UNCTAD, *National Treatment*, United Nations, New York and Geneva, 1999, p. 37

²⁷³ P. J. Kuijper, *Investment Protection Agreements as Instruments of International Economic Law*, Study for the European Parliament, September 2014, available at <http://ssrn.com/abstract=2525063> (visited 1 June 2015), p. 15.

²⁷⁴ *Pope & Talbot*, Award on Merits, para. 78; C. McLachlan et al., *International Investment Arbitration: Substantive Principles*, Oxford University Press, Oxford, 2007, at para. 7.154; A. Newcombe, A. and L. Paradell, *Law and practice of Investment Treaties: Standards of Treatment*, Kluwer Law International, The Hague, 2009, p. 151.

²⁷⁵ Cf. Vienna Convention on the Law of Treaties, Art. 27; International Law Commission, Draft Articles on State Responsibility for Internationally Wrongful Acts, Art. 3.

sub-national authorities could be obligated to grant foreign investors only the general treatment also given to other domestic businesses originating from outside the region. If not explicitly stated otherwise, the national treatment standard may be interpreted as securing foreign investors a treatment 'no less favourable' than given to those regional businesses profiting from the particular advantages granted to them by a sub-national authority²⁷⁶.

5.1.2 The scope of protection: *de facto* discrimination, temporal dimension, list approaches

Most international investment agreements include a national treatment provision of some sort, yet their formulation varies resulting in different levels of protection²⁷⁷. However, what they typically have in common is that the national treatment standard does not only cover express discrimination (*de jure* discrimination) but also extends to State measures which are not expressly discriminatory but result in a different treatment all the same (*de facto* discrimination)²⁷⁸.

A primary issue to be addressed in national treatment provisions concerns the *temporal dimension* of protection. The national treatment standard can either be restricted to treatment afforded to an investment *after its actual establishment* in the respective State party or be extended to *market access*, i.e. covering the establishment of the investment itself.

Furthermore, the national treatment standard can be more specifically defined (and restricted) by making use of *so-called positive or negative list approaches*. Such lists identify certain categories of investment and/or activities to be included (positive list approach) in or excluded (negative list approach) from the national treatment standard²⁷⁹. More frequently, agreements explicitly exclude specific sectors from the national treatment standard that are of particular significance to the national economy.

5.1.3 Grounds of justification for different treatment

Governmental measures actually treating domestic and foreign investors or investment differently can, in principle, be justified on the basis of public welfare objectives, such as health, safety or environmental grounds²⁸⁰. However, the terms and conditions when measures differentiating between foreign and domestic investors can be saved are, absent special provisions, rather nebulous²⁸¹. While tribunals have considered public welfare objectives even though they were not explicitly mentioned in the agreement, some treaties do not want to leave the issue to the arbitrators. Therefore they include general exceptions provisions or fall back on a reference to the general grounds of justification

²⁷⁶ J. VanDuzer et al., *Integrating Sustainable Development into International Investment Agreements – A Guide for Developing Countries*, Commonwealth Secretariat, August 2012, available at http://www.iisd.org/pdf/2012/6th_annual_forum_commonwealth_guide.pdf (visited 1 June 2015), p. 119.

²⁷⁷ J. Salacuse, *The Law of Investment Treaties*, Oxford University Press, Oxford, 2010, p. 246.

²⁷⁸ J. VanDuzer et al., *Integrating Sustainable Development into International Investment Agreements – A Guide for Developing Countries*, Commonwealth Secretariat, August 2012, available at http://www.iisd.org/pdf/2012/6th_annual_forum_commonwealth_guide.pdf (visited 1 June 2015), p. 112.

²⁷⁹ A. Reinisch, *Standards of Investment Protection*, Oxford University Press, Oxford, 2008, p. 13.

²⁸⁰ J. VanDuzer et al., *Integrating Sustainable Development into International Investment Agreements – A Guide for Developing Countries*, Commonwealth Secretariat, August 2012, available at http://www.iisd.org/pdf/2012/6th_annual_forum_commonwealth_guide.pdf (visited 1 June 2015), p. 112.

²⁸¹ J. Salacuse, *The Law of Investment Treaties*, Oxford University Press, Oxford, 2010, p. 251.

incorporated in trade law in Art. XX GATT²⁸². Agreements might also provide for specific grounds of justifications to the national treatment standard.

Furthermore, the determination of whether the foreign investor is placed 'in like circumstances' provides some room for discretion and thereby can become a gateway for considering public interests²⁸³.

5.1.4 Brief comparison of EUSFTA, CETA, ECT, Germany-Jordan BIT, and the USA-Lithuania BIT

5.1.4.1 Parameters for comparison: 'like situations' and sub-national level

All agreements of the comparison provide for a national treatment standard. In order to establish the treatment standard to be accorded by the host State to foreign investors, all clauses use the common phrase of 'treatment no less favourable' than domestic investors. EUSFTA, CETA and the USA-Lithuania BIT clarify the parameters for the comparison of foreign and domestic businesses by stating that they have to be in 'like situations'²⁸⁴. Whether this degree of specification – lacking any further definition of the term 'situations' – will actually lead to any difference in application of the respective agreements may be doubted.

In terms of the right basis of comparison of treatment afforded at the sub-national level²⁸⁵, Art. II (9) USA-Lithuania BIT provides a clear declaration: The national treatment standard is based on the general treatment of any domestic investor originating from *outside* the regional sub-division affording the treatment. This applies, however, to the USA only. Therefore Lithuanian investors active in the US

²⁸² Art. XX GATT reads as follows: Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (a) necessary to protect public morals; (b) necessary to protect human, animal or plant life or health; (c) relating to the importations or exportations of gold or silver; (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices; (e) relating to the products of prison labour; (f) imposed for the protection of national treasures of artistic, historic or archaeological value; (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption; (h) undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the CONTRACTING PARTIES and not disapproved by them or which is itself so submitted and not so disapproved; (i) involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; Provided that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination; (j) essential to the acquisition or distribution of products in general or local short supply; Provided that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of the Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist. The CONTRACTING PARTIES shall review the need for this sub-paragraph not later than 30 June 1960.

²⁸³ P. J. Kuijper, *Investment Protection Agreements as Instruments of International Economic Law*, Study for the European Parliament, September 2014, available at <http://www.jura.fu-berlin.de/fachbereich/einrichtungen/oeffentliches-recht/lehrende/hindelangs/Studie-fuer-Europaeisches-Parlament/Volume-2-Studies.pdf> (visited 1 June 2015), pp. 15 et seqq.

²⁸⁴ See the text passages highlighted in red in the table following this chapter.

²⁸⁵ See the text passages highlighted in turquoise in the table following this chapter.

do not profit from the special and advantageous treatment regionally based domestic businesses might be granted by the respective sub-national authority.²⁸⁶

Art. X.6 (2) CETA follows the opposite approach. Treatment of the foreign investor or investment afforded by governments other than that of the federal level in Canada has to correspond to the *most favourable treatment* accorded to any of the domestic investors within the respective 'sub-federal' region. The same goes for treatment afforded by government of and within EU Member States. Hence, the treatment of the Canadian investor must not be less favourable than the potentially more advantageous treatment given to any domestic investor, i.e. such from within the EU, within the respective 'local'²⁸⁷ area. Due to the peculiarities of the EU multi-level constitutional order, this appears to translate in respect of the EU into the following: Art. X.6 (2) CETA affords to Canadian investors' investments in a certain EU Member State not just the treatment accorded to domestic investors from that Member State but, under certain circumstances, also such treatment accorded to investors from another EU Member State. Due to obligations contained in the EU Treaties – esp. in the fundamental freedoms of establishment and capital movements – it can occur that an EU Member State has to accord more favourable treatment to an investor from another EU Member State compared to its own domestic investors. The treatment of the former has to be extended to the Canadian investor.

Art. 23 (1) ECT confirms that the State parties have to ensure that all provisions including the national treatment standard are also followed by sub-national authorities. EUSFTA and the Germany-Jordan BIT make no specific statement on treatment afforded at the sub-national level, which makes an interpretation allowing for broad protection and an extension of specific regional treatment to foreign investors likely. Like CETA, all three treaties therefore provide for a treatment accorded to the foreign investor that is no less favourable than the specific treatment of a domestic regional investor within the respective region.

Overall, it appears to be sensible to subject also sub-national governmental conduct to the national treatment standard as it ensures a 'more complete' level playing field; not allowing for regional or local loopholes.²⁸⁸ Subjecting, however, all economic and social policy measures taken by regional governments to the national treatment also requires sufficient resources on the regional level to evaluate a measure's conformity with the commitments contained in an investment treaty.

5.1.4.2 Market access and exclusion of specific sectors

Regarding the question of market access²⁸⁹, both the Germany-Jordan BIT²⁹⁰ as well as EUSFTA do not extend protection to activities before operation of an investor's business, i.e. its establishment. The ECT only holds for a non-legally binding best efforts clause ('shall endeavour') regarding the 'making

²⁸⁶ Note also the general provision of Art. XI USA-Lithuania BIT which reads 'This Treaty shall apply to the political and administrative subdivisions of the Parties.'

²⁸⁷ 'Local' authority means here in respect of Canada sub-national authority and in respect of the EU it refers to EU Member States and sub-EU Member States authority.

²⁸⁸ Cf. also Art. 3(3) OECD Declaration on International Investment and Multinational Enterprises, available at <http://www.oecd.org/daf/inv/investmentpolicy/oecddeclarationoninternationalinvestmentandmultinationalenterprises.htm> (visited 30.8.2015) which reads 'That adhering governments will endeavour to ensure that their territorial subdivisions apply "National Treatment";'.

²⁸⁹ See the text passages highlighted in yellow in the table following this chapter.

²⁹⁰ Cf. Art 3 in connection with the Protocol clause (3).

of investments', Art. 10 (2) ECT²⁹¹. A supplementary agreement for creating a stronger commitment, as stipulated by Art. 10 (4) ECT, has not yet been reached.

In contrast, Art X.6 CETA includes the establishment of the investment into the protective scope of the national treatment standard. Seen from a European perspective on investment treaty making, this is a major extension of the protective scope of such an agreement and it is in line with a general trend in investment treaty making²⁹². However, claims based on discrimination during the 'establishment and acquisition' of an investment are excluded from the ISDS mechanism, Art. X.1 (4), CETA, Art. X.17 (1) (a) CETA. Therefore, respective substantive commitments can only be enforced on a State-State level, which qualifies protection for foreign investors during the establishment phase as they depend on their governments to bring a claim.

The scope of the USA-Lithuania BIT extends national treatment to establishment of an investment (cf. 'permit' in Art. II (1)) and does not exclude ISDS claims in this regard. However, following a negative list approach, the USA-Lithuania BIT in Annex (1) specifies sectors and matters that are excluded from national treatment.

As for the other agreements, they also rely – to a varying degree – on lists approaches or provide for certain exceptions in order to shape the scope of the national treatment standard. While CETA and EUSFTA make extensive use of the list approach, the ECT and the Germany-Jordan BIT hardly do. The latter two treaties therefore afford stronger investment protection. The USA-Lithuania takes a middle ground. Negative lists concerning specific sectors and matters appear in EUSFTA in Art. 9.2 (2) and (3) and in a separate Understanding (to be found after Annex 9-D of the Investment Protection Chapter of EUSFTA) and in CETA in Art. X.1 (2)-(4), Art. X.14 and Annex I and II. Commonly excluded areas in both treaties are audio-visual services or certain governmental activities. It is also a frequent practice in international investment treaty law to exclude taxation matters from any non-discrimination obligation (cf. Art. 21 (3) ECT; Germany-Jordan BIT, Protocol, clause (3) b); Art. 20 (2) USA-Lithuania; Art. XXXII.06 CETA; Art. 17.6 EUSFTA).

A very specific positive list approach can be found in Art. 9.3 (2) EUSFTA: a measure does not constitute a violation of the national treatment standard if not inconsistent with the commitments inscribed in the Schedule of Specific Commitments and certain additional criteria are met, most importantly that the measure in question was adopted before the entry into force of the agreement.

5.1.4.3 General and specific grounds of justification

While 'list approaches' exempt certain economic activities fully from the national treatment standard and, thus, relieve host States completely from any burden to justify discriminatory measures, grounds of justification work differently. While on principle the obligation to treat domestic and foreign investors in like circumstances alike is not touched upon, in the individual case and only by reference to the grounds of justification in an investment treaty, host States may derogate from the national treatment standard.

EUSFTA and CETA contain specific and rather detailed provisions on grounds of justification. Art. 9.3 (3) EUSFTA and Chapter 32 Art. X.02 (2) CETA correspond by and large in their listed content and provide in particular for exceptions on grounds of the protection of public security or morals, of human,

²⁹¹ Energy Charter Secretariat, *The Energy Charter Treaty – A Reader's Guide*, available at http://www.encharter.org/fileadmin/user_upload/Publications/ECT_Guide_ENG.pdf (visited 11 May 2015), p. 23.

²⁹² UNCTAD, *World Investment Report 2015 – Reforming International Investment Governance*, available at <http://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=1245> (visited 1 August 2015), p. 110.

animal or plant life or of exhaustible natural resources²⁹³. While CETA's exception clause is of a very general nature, i.e. applies to various chapters and non-discrimination standards in the agreement, Art. 9.3 (3) EUSFTA constitutes a justification clause specific to the national treatment provision. CETA chooses to incorporate Art. XX GATT and further specifies it whereas EUSFTA spells out grounds of justification within the agreement. Either way, there are some doubts that the general exceptions clause of Art. XX GATT suits perfectly well in the context of investment law and the national treatment standard specifically²⁹⁴.

The ECT holds a general exception clause in Art. 24 that also applies to the national treatment standard. It contains grounds of justification modelled to the special scope of the ECT, i.e. the energy sector. In addition, very broadly speaking, it provides for similar grounds of justification as CETA and EUSFTA.

The Germany-Jordan BIT, Protocol, clause (3) a) (last sentence) and the USA-Lithuania BIT in Art. IX provide for generally worded exceptions applicable to the non-discrimination provisions and the treaty as a whole respectively. Both allow for measures taken – inter alia – for reasons of public order.

²⁹³ See the text passages highlighted in green in the table following this chapter.

²⁹⁴ B. Legum and I. Petculescu, GATT Article XX and international investment law, in: R. Ehandi and P. Sauvé, *Prospects in International Investment Law and Policy*, Cambridge University Press, Cambridge, 2013, pp. 340 et seqq.

5.1.5 Table: National Treatment

bold = important passages
yellow = protection of market access
red = 'in like situations'
turquoise = protection at sub-national level
green = exception for reasons of public order etc.

EUSFTA	CETA	ECT	Germany-Jordan	USA-Lithuania
<p>Art. 9.3²⁹⁵</p> <p>1. Each Party shall accord to investors of the other Party and to their investments, treatment in its territory no less favourable than the treatment it accords, in like situations, to its own investors and their investments with respect to the operation, management, conduct, maintenance, use, enjoyment and sale or other disposal of their investments.</p> <p>2. Notwithstanding paragraph 1, a Party may adopt or maintain any measure with respect to the operation, management, conduct, maintenance, use, enjoyment and sale or other disposal of an establishment that is not inconsistent with the commitments inscribed in its Schedule of Specific</p>	<p>Art. X.6²⁹⁶</p> <p>1. Each Party shall accord to investors of the other Party and to covered investments, treatment no less favourable than the treatment it accords, in like situations to its own investors and to their investments with respect to the establishment, acquisition, expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of their investments in its territory.</p> <p>2. The treatment accorded by a Party under paragraph 1 means, with respect to a government in Canada other than at the federal level, or, with respect to a government of or in a European Member State, treatment no less favourable than the most</p>	<p>Art. 10²⁹⁸</p> <p>[...]</p> <p>(2) Each Contracting Party shall endeavour to accord to Investors of other Contracting Parties, as regards the Making of Investments in its Area, the Treatment described in paragraph (3).</p> <p>(3) For the purposes of this Article, "Treatment" means treatment accorded by a Contracting Party which is no less favourable than that which it accords to its own Investors or to Investors of any other Contracting Party or any third state, whichever is the most favourable.</p> <p>(4) A supplementary treaty shall, subject to conditions to be laid down therein, oblige each party thereto to accord to Investors of</p>	<p>Art. 3</p> <p>(1) Neither Contracting Party shall in its territory subject investments owned or controlled by investors of the other Contracting Party, to treatment less favourable than it accords to investments of its own investors or to investments of investors of any third State.</p> <p>(2) Neither Contracting Party shall in its territory subject investors of the other Contracting Party, as regards their activity in connection with investments, to treatment less favourable than it accords to its own investors or to investors of any third State.</p> <p>Protocol to the Agreement</p> <p>(3) Ad Article 3</p> <p>a) The following shall more particularly, though not exclusively, be deemed "activity"</p>	<p>Art. II</p> <p>1. Each Party shall permit and treat investment, and activities associated therewith, on a basis no less favorable than that accorded in like situations to investment or associated activities of its own nationals or companies, or of nationals or companies of any third country, whichever is most favorable, subject to the right of each Party to make or maintain exceptions falling within one of the sectors or matters listed in the Annex to this Treaty. Each Party agrees to notify the other Party before or on the date of entry into force of this Treaty of all such laws and regulations of which it is aware concerning the sectors or matters listed in the Annex. Moreover, each Party agrees to notify the other of any future exception with</p>

²⁹⁵ EUSFTA: Special exceptions to the NT provision can also be found in Art. 9.2 (no application to goods and services purchased for government purposes and to audio-visual services) and in the Understanding after Annex 9-D (no application to supply of potable water and to public housing schemes).

²⁹⁶ CETA: Further exceptions are to be found in e.g.: Art. X.1 (2) (a) (air services); Art. X.1 (2) (b) (governmental activities); Art. X.1 (3) CETA (EU audio-visual services and Canada cultural industry); Art. X.14 (5) (goods and services purchased for government purposes and subsidies); Art. X.14 (1) and Annex I (so-called 'existing non-conforming measures'); Art. X.14 (2) and Annex II (future constraints for non-discrimination); Annex X.43.1 (exception under the Investment Canada Act).

<p>Commitments in Annex [8], where such measure is:</p> <p>(a) a measure that is adopted on or before the entry into force of this Agreement;</p> <p>(b) a measure referred to in sub-paragraph (a) that is being continued, replaced or amended after the entry into force of this Agreement, provided the measure is no less consistent with paragraph 1 after being continued, replaced or amended prior to its continuation, replacement or amendment; or</p> <p>(c) a measure not falling within sub-paragraph (a) or (b), provided it is not applied in respect of, or in a way that causes loss or damage to, investments made in the territory of the Party before the entry into force of such measure.</p> <p>3. Notwithstanding paragraphs 1 and 2, a Party may adopt or enforce measures that accord investors and investments of the other Party less favourable</p>	<p>favourable treatment accorded, in like situations, by that government to investors of that Party in its territory and to investments of such investors.</p> <p>Notable Exceptions in:</p> <p>Art. X.1 (4)²⁹⁷</p> <p>4. Claims may be submitted by an investor under this Chapter only in accordance with Section 6 Article 17 (Scope of a Claim to Arbitration), and in compliance with the procedures otherwise set out in that Section. Claims in respect of Section 2 (Establishment of Investments) are excluded from the scope of Section 6. Claims in respect of the establishment or acquisition of a covered investment under Section 3 (Non-Discriminatory Treatment) are excluded from the scope of Section 6 [ISDS section]. Section 4 (Investment Protection) applies only to covered investments and to investors in respect of their covered investments.</p>	<p>other parties, as regards the Making of Investments in its Area, the Treatment described in paragraph (3). That treaty shall be open for signature by the states and Regional Economic Integration Organizations which have signed or acceded to this Treaty. Negotiations towards the supplementary treaty shall commence not later than 1 January 1995, with a view to concluding it by 1 January 1998.</p> <p>[...]</p> <p>(7) Each Contracting Party shall accord to Investments in its Area of Investors of other Contracting Parties, and their related activities including management, maintenance, use, enjoyment or disposal, treatment no less favourable than that which it accords to Investments of its own Investors or of the Investors of any other Contracting Party or any third state and their related activities including management, maintenance, use, enjoyment or disposal, whichever is the most</p>	<p>within the meaning of paragraph 2 of Article 3: the management, maintenance, use, and enjoyment of an investment. The following shall, in particular, be deemed “treatment less favourable” within the meaning of paragraph 2 of Article 3: unequal treatment in the case of restricting the purchase of raw or auxiliary materials, of power or fuel or of means of production or operation of any kind, impeding the marketing of products inside or outside the country, as well as any other measures having similar effects. Measures that have to be taken for reasons of public security and order, public health or morality shall not be deemed “treatment less favourable” within the meaning of Article 3.</p> <p>b) The provisions of Article 3 do not oblige a Contracting Party to extend to investors resident in the territory of the other Contracting Party tax privileges, tax exemptions and tax reductions which according to its tax laws are</p>	<p>respect to sectors or matters listed in the Annex, and to limit such exceptions to a minimum. Any future exception by either Party shall not apply to investment existing in that sector or matter at the time the exception became effective. The treatment accorded pursuant to any exceptions shall unless specified otherwise in the Annex, be not less favorable than that accorded in like situations to investment and associated activities of nationals or companies of any third country.</p> <p>2. (a) Nothing in this Treaty shall be construed to prevent a Party from maintaining or establishing a state enterprise.</p> <p>(b) Each Party shall ensure that any state enterprise that it maintains or establishes acts in a manner that is not inconsistent with the Party's obligations under this Treaty wherever such enterprise exercises any regulatory, administrative or other governmental authority that the Party has delegated to it, such as the power to expropriate, grant licenses, approve</p>
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²⁹⁸ ECT: Exception regarding taxation matters can be found in Art. 21 (3) ECT.

²⁹⁷ CETA: the content of this provision is also repeated in **Art. X.17 (1) (a)**: 1. Without prejudice to the rights and obligations of the Parties under Chapter [XY](Dispute Settlement), **an investor of a Party may submit to arbitration** under this Section a claim that the respondent has breached an obligation under: (a) Section 3 (Non-Discriminatory Treatment) of this Chapter, **with respect to the expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal** of its covered investment; or [...].

<p>treatment than that accorded to its own investors and their investments, in like situations, subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination against the investors or investments of the other Party in the territory of a Party, or is a disguised restriction on investments, where the measures are:</p> <p>(a) necessary to protect public security, public morals or to maintain public order;</p> <p>(b) necessary to protect human, animal or plant life or health;</p> <p>(c) relating to the conservation of exhaustible natural resources if such measures are applied in conjunction with restrictions on domestic investors or investments;</p> <p>(d) necessary for the protection of national treasures of artistic, historic or archaeological value;</p> <p>(e) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Chapter including those relating to:</p> <p>(i) the prevention of deceptive or</p>	<p>[...]</p> <p>Chapter 32, Art. X.02</p> <p>1. For the purposes of Chapters X through Y and Chapter Z (National Treatment and Market Access for Goods, Rules of Origin, Origin Procedures, Customs and Trade Facilitation, Wines and Spirits, Sanitary and Phytosanitary Measures, Investment Section 2 (Establishment of Investments) and Investment Section 3 (Non-discriminatory Treatment)), GATT 1994 Article XX is incorporated into and made part of this Agreement. The Parties understand that the measures referred to in GATT 1994 Article XX (b) include environmental measures necessary to protect human, animal or plant life or health. The Parties further understand that GATT 1994 Article XX (g) applies to measures for the conservation of living and non-living exhaustible natural resources.</p> <p>2. For the purposes of Chapters X, Y, and Z (Cross-Border Trade in Services, Telecommunications, and Temporary Entry and Stay of Natural Persons for Business Purposes, Investment Section 2 (Establishment of Investments) and Investment Section 3 (Non-Discriminatory Treatment), a</p>	<p>favourable.</p> <p>(8) The modalities of application of paragraph (7) in relation to programmes under which a Contracting Party provides grants or other financial assistance, or enters into contracts, for energy technology research and development, shall be reserved for the supplementary treaty described in paragraph (4). Each Contracting Party shall through the Secretariat keep the Charter Conference informed of the modalities it applies to the programmes described in this paragraph.</p> <p>[...]</p> <p>Art. 23 (1)</p> <p>(1) Each Contracting Party is fully responsible under this Treaty for the observance of all provisions of the Treaty, and shall take such reasonable measures as may be available to it to ensure such observance by regional and local governments and authorities within its Area.</p> <p>Art. 24</p> <p>(1) This Article shall not apply to Articles 12, 13 and 29.</p> <p>(2) The provisions of this Treaty other than</p> <p>(a) those referred to in paragraph</p>	<p>granted only to investors resident in its territory.</p> <p>c) The Contracting Parties shall within the framework of their national legislation give sympathetic consideration to applications for the entry and sojourn of persons of either Contracting Party who wish to enter the territory of the other Contracting Party in connection with an investment; the same shall apply to employed persons of either Contracting Party who in connection with an investment wish to enter the territory of the other Contracting Party and sojourn there to take up employment. Applications for work permits shall also be given sympathetic consideration.</p>	<p>commercial transactions or impose quotas, fees or other charges.</p> <p>(c) Each Party shall ensure that any state enterprise that it maintains or establishes accords the better of national or most favored nation treatment in the sale of its goods or services in the Party's territory.</p> <p>[...]</p> <p>9. The treatment accorded by the United States of America to investment and associated activities of nationals and companies of the Republic of Lithuania under the provisions of this Article shall in any State, Territory or possession of the United States of America be no less favorable than the treatment accorded therein to investments and associated activities of nationals of the United States of America resident in, and companies legally constituted under the law and regulations of other States, Territories or possessions of the United States of America.</p> <p>Art. IX</p> <p>1. This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfilment of its obligations with respect to the maintenance or res-</p>
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<p>fraudulent practices or to deal with the effects of a default on a contract;</p> <p>(ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidential of individual records and accounts;</p> <p>(iii) safety.</p> <p>(f) aimed at ensuring the effective or equitable imposition or collection of direct taxes in respect of investors or investments of the other Party.</p>	<p>Party may adopt or enforce a measure necessary:</p> <p>(a) to protect public security or public morals or to maintain public order (x);</p> <p>(b) to protect human, animal or plant life or health;</p> <p>(c) to secure compliance with laws or regulations which are not inconsistent with the provisions of this Chapter including those relating to:</p> <p>(i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on contracts;</p> <p>(ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;</p> <p>(iii) safety;</p> <p>(x) The public security and public order exceptions may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.</p>	<p>(1); and</p> <p>(b) with respect to subparagraph (i), Part III of the Treaty shall not preclude any Contracting Party from adopting or enforcing any measure</p> <p>(i) necessary to protect human, animal or plant life or health;</p> <p>(ii) essential to the acquisition or distribution of Energy Materials and Products in conditions of short supply arising from causes outside the control of that Contracting Party, provided that any such measure shall be consistent with the principles that</p> <p>(A) all other Contracting Parties are entitled to an equitable share of the international supply of such Energy Materials and Products; and</p> <p>(B) any such measure that is inconsistent with this Treaty shall be discontinued as soon as the conditions giving rise to it have ceased to exist; or</p> <p>(iii) designed to benefit Investors who are aboriginal people or socially or economically disadvantaged individuals or groups or their Investments and notified to the Secretariat as such, provided that such measure</p> <p>(A) has no significant impact on that Contracting Party's economy;</p>		<p>toration of international peace or security, or the protection of its own essential security interests.</p> <p>2. This Treaty shall not preclude either Party from prescribing special formalities in connection with the establishment of investments, but such formalities shall not impair the substance of any of the rights set forth in this Treaty.</p> <p>Art. XI</p> <p>This Treaty shall apply to the political and administrative subdivisions of the Parties.</p> <p>Annex</p> <p>1. The Government of the United States of America reserves the right to make or maintain limited exceptions to national treatment, as provided in Article II, paragraph 1, in the sectors or matters it has indicated below:</p> <p>air transportation, ocean and coastal shipping banking, insurance, securities and other financial services; government grants; government insurance and loan programs; energy and power production; customer house brokers; ownership of real property; ownership and operation of broadcast or common carrier radio and television stations; ownership of shares in COMSAT; the provision</p>
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		<p>and</p> <p>(B) does not discriminate between Investors of any other Contracting Party and Investors of that Contracting Party not included among those for whom the measure is intended, provided that no such measure shall constitute a disguised restriction on Economic Activity in the Energy Sector, or arbitrary or unjustifiable discrimination between Contracting Parties or between Investors or other interested persons of Contracting Parties. Such measures shall be duly</p> <p>motivated and shall not nullify or impair any benefit one or more other Contracting Parties may reasonably expect under this Treaty to an extent greater than is strictly necessary to the stated end.</p> <p>(3) The provisions of this Treaty other than those referred to in paragraph (1) shall not be construed to prevent any Contracting Party from taking any measure which it considers necessary:</p> <p>(a) for the protection of its essential security interests including those</p> <p>(i) relating to the supply of Energy Materials and Products to a military establishment; or</p>		<p>of common carrier telephone and telegraph services; the provisions of submarine cable services; use of land and natural resources; mining on the public domain; maritime services and maritime-related services, and primary dealership in United States government securities.</p>
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		<p>(ii) taken in time of war, armed conflict or other emergency in international relations;</p> <p>(b) relating to the implementation of national policies respecting the non-proliferation of nuclear weapons or other nuclear explosive devices or needed to fulfil its obligations under the Treaty on the Non-Proliferation of Nuclear Weapons, the Nuclear Suppliers Guidelines, and other international nuclear non-proliferation obligations or understandings; or</p> <p>(c) for the maintenance of public order. Such measure shall not constitute a disguised restriction on Transit.</p>		
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5.2 Most-favoured nation treatment

Alongside national treatment and other non-discrimination clauses, the most-favoured nation (MFN) treatment standard establishes another comparative standard²⁹⁹. MFN treatment clauses tackle discrimination between foreign investors from different countries³⁰⁰. They accord foreign investors a treatment 'no less favourable' than treatment granted to any other foreign investor. It typically prohibits *de jure* and *de facto* discrimination between investors and sets up a level playing field among foreign investors³⁰¹.

MFN treatment does not only apply to treatment afforded in domestic law, but extends to such in public international law, i.e. other investment agreements. It assures a certain common standard of protection if one investment treaty is – for whatever reason – more limited in its protective scope than another one³⁰². The MFN treatment standard can be a key provision for investors from smaller countries with less bargaining power³⁰³.

5.2.1 The parameters for comparison

As holds true for national treatment, the challenge regarding MFN treatment is to identify the suitable comparator for a foreign investor complaining of a different treatment afforded to him and/or his investment by the host State in comparison to the same State's treatment of another foreign investor. Here again, States frequently seek to clarify that question by referring to treatment 'in like circumstances'. This, however, hardly facilitates the comparison. Some treaties therefore define more specifically what instances have to be considered for the purpose of establishing 'like circumstances'³⁰⁴.

5.2.2 The scope of protection: de facto discrimination, temporal dimension, list approaches

MFN protection can be tailored to the specific needs of the State parties to an investment treaty. The first question in this regard is from which moment onwards an investment shall be protected. Protection can be limited to the operation and management of investments (post-establishment) but could also be extended to their establishment, i.e. the making of an investment.

²⁹⁹ The characteristics of any comparative standard are by nature similar. Therefore many general comments on national treatment can be transferred to the topic of MFN protection. The similarities also often lead to an integrated provision, including both elements of NT and MFN.

³⁰⁰ P. J. Kuijper, *Investment Protection Agreements as Instruments of International Economic Law*, Study for the European Parliament, September 2014, available at <http://www.jura.fu-berlin.de/fachbereich/einrichtungen/oeffentliches-recht/lehrende/hindelangs/Studie-fuer-Europaeisches-Parlament/Volume-2-Studies.pdf> (visited 1 June 2015), p. 16.

³⁰¹ J. VanDuzer et al., *Integrating Sustainable Development into International Investment Agreements – A Guide for Developing Countries*, Commonwealth Secretariat, August 2012, available at http://www.iisd.org/pdf/2012/6th_annual_forum_commonwealth_guide.pdf (visited 1 June 2015), p. 126.

³⁰² A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, Kluwer Law International, The Hague, 2009, p. 195. Note though that what is required is that the actual treatment is discriminatory. Treatment that is only different is not always less favourable. Therefore it is the actual impact of the treatment, not the potential protection incorporated in abstract provisions that has to be compared. Cf. J. VanDuzer et al., *Integrating Sustainable Development into International Investment Agreements – A Guide for Developing Countries*, Commonwealth Secretariat, August 2012, available at http://www.iisd.org/pdf/2012/6th_annual_forum_commonwealth_guide.pdf (visited 1 June 2015), p. 127.

³⁰³ J. VanDuzer, J. et al., *Integrating Sustainable Development into International Investment Agreements – A Guide for Developing Countries*, Commonwealth Secretariat, August 2012, available at http://www.iisd.org/pdf/2012/6th_annual_forum_commonwealth_guide.pdf (visited 1 June 2015), p. 126.

³⁰⁴ See Art. 5 (E) of the IISD model treaty, available at https://www.iisd.org/pdf/2005/investment_model_int_agreement.pdf (viewed 20 May 2015).

An MFN provision can entertain a positive or negative list approach in order to clarify its scope and the sectors and matters subject to the standard³⁰⁵. Typically, a negative list excludes a number of specific sectors of the economy from MFN treatment. Other common exceptions concern the special protection granted under an economic union, common market or free trade area. The issue of taxation is also frequently excluded.

Considerable uncertainty exists in respect of the extent to which provisions from third party treaties can be ‘incorporated’ into the basic treaty by means of a MFN clause. ISDS practice is again inconsistent on this point and often lacks more detailed doctrinal reasoning on either of two potential interpretations: some tribunals argue in favour of a broad reading allowing for incorporating substantive as well as procedural standards that are not present in the basic treaty. Others want to restrict incorporation to substantive standards³⁰⁶. There might be a general consensus that provisions in a third party BIT cannot in any case be incorporated by a MFN clause if this undermines the carefully negotiated balance of the BIT containing the MFN clause³⁰⁷. However, establishing this ‘balance’ and drawing a dividing line between distorting and non-distorting incorporations is challenging. In fact, it is a highly complex interpretative exercise to determine whether a certain specific design of a clause or its absence is a sign of the intention of the State parties involved to not allow for alteration by incorporating standards originating from other agreements³⁰⁸. Due to the uncertainty and unpredictability involved in the interpretation of investment treaties on that particular issue, an express stipulation on the scope of the MFN clause – especially on whether it extends to ISDS provisions – is advisable³⁰⁹.

5.2.3 Grounds of justification for different treatment

As for the national treatment standard, provisions can hold general or specific exceptions as grounds for justification of unequal treatment.

³⁰⁵ J. VanDuzer et al., *Integrating Sustainable Development into International Investment Agreements – A Guide for Developing Countries*, Commonwealth Secretariat, August 2012, available at http://www.iisd.org/pdf/2012/6th_annual_forum_commonwealth_guide.pdf (visited 1 June 2015), p. 130.

³⁰⁶ J. Griebel, *Internationales Investitionsrecht*, C.H. Beck, München, 2008, p. 80; arguing pro, for example: *Emilio Agustín Mafezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, paras. 62 et seqq., available at <http://www.italaw.com/sites/default/files/case-documents/ita0479.pdf> (visited 15 June 2015); *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, paras. 94 et seqq., available at <http://www.italaw.com/sites/default/files/case-documents/ita0788.pdf> (visited 15 June 2015); *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction, paras. 55 et seqq., available at <http://www.italaw.com/sites/default/files/case-documents/ita0807.pdf> (visited 15 June 2015); arguing against: *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, paras. 183 et seqq., available at <http://www.italaw.com/sites/default/files/case-documents/ita0669.pdf> (visited 15 June 2015); *Telenor Mobile Communications A.S. v. The Republic of Hungary*, ICSID Case No. ARB/04/15, Decision on Jurisdiction, paras. 81 et seqq.; *Vladimir Berschader and Moïse Berschader v. The Russian Federation*, SCC Case No. 080/2004, Award, paras. 175 et seqq.

³⁰⁷ C. McLachlan et al., *International Investment Arbitration: Substantive Principles*, Oxford University Press, Oxford, 2007, para. 7.162.

³⁰⁸ J. VanDuzer et al., *Integrating Sustainable Development into International Investment Agreements – A Guide for Developing Countries*, Commonwealth Secretariat, August 2012, available at http://www.iisd.org/pdf/2012/6th_annual_forum_commonwealth_guide.pdf (visited 1 June 2015), pp. 131 et seqq.

³⁰⁹ C. McLachlan et al., *International Investment Arbitration: Substantive Principles*, Oxford University Press, Oxford, 2007, para. 7.167.

5.2.4 Brief comparison of EUSFTA, CETA, ECT, Germany-Jordan BIT, and the USA-Lithuania BIT

EUSFTA is the notable exception of the treaties chosen for comparison as it does not contain a general MFN treatment clause; all others provide for such. In terms of the design of the MFN treatment clauses, only CETA contains a stand-alone MFN clause, whilst the ECT, the Germany-Jordan BIT, and the USA-Lithuania BIT provide a combined clause containing both national treatment and MFN. A separation of the two protection standards in itself holds no value, as long as they are not subsequently subject to different specifications and exceptions. In that regard, a separation of the national treatment and MFN standard would allow for designing and interpreting exception clauses differently within the context of the respective protection standard.

5.2.4.1 Parameters for comparison: 'like situations' and sub-national level

CETA and the USA-Lithuania BIT refer to 'like situations' as a guiding element for the comparison³¹⁰. No treaty clarifies which factors are to be considered when determining 'like situations'.

Just like the clause on national treatment, Art. X.7 (2) CETA includes a special provision regulating treatment on the sub-national level. Here, a foreign investor is to be compared to a foreign investor that is given the specific regional treatment rather than the general treatment of any foreign investor nationwide. The Germany-Jordan BIT, the USA-Lithuania BIT, and the ECT follow this approach either implicitly (due to general international law) or explicitly (cf. Art. 23 (1) ECT).

5.2.4.2 Market access and other clarifications on the general scope of the MFN standard

Art. X.7 (1) CETA includes MFN protection with regard to the establishment³¹¹ of investments. It thereby runs parallel with the scope of the national treatment standard. This is also true for the USA-Lithuania BIT. The ECT holds a combined clause for national treatment and MFN protection, hence the non-discrimination of establishment, i.e. the making of an investment, is only part of a best-effort commitment, Art. 10 (2) ECT. Non-discrimination in the course of establishing an investments is not part of the MFN clause contained in the Germany-Jordan BIT (Art. 3 in connection with Protocol clause (3) a)).

Beyond that, a certain number of other clarifications with regard to the scope of the MFN standard can be found. For example, Art. X.7 (4) sentence 2 CETA clarifies that the mere existence of apparently more advantageous substantive standards in other treaties in itself does not amount to a discrimination of foreign investors. Not the existence of standards in itself but their application is decisive for the question of discrimination.

Attention also has to be paid to Art. X.7 (4) sentence 1 CETA. It clearly rules out the incorporation of ISDS rules contained in third party treaties and thereby tackles the uncertainties surrounding the applicability of the MFN treatment standard to procedural rules.

Exemptions from MFN treatment in the form of a negative list can be found in Art. X.1 (2)-(4), Art. X.14 and Chapter 35 Annex I and II CETA. They are general exemptions that also apply to the national treatment standard. Art. 24 (4) ECT, Art. 3 (3)-(5) Germany-Jordan BIT and Art. II (10) USA-Lithuania BIT

³¹⁰ See the text passages highlighted in yellow in the table following this chapter.

³¹¹ See the text passages highlighted in green in the table following this chapter.

contain specific exemptions to the MFN standard; typically found in such context and already discussed in relation to the national treatment standard³¹².

5.2.4.3 General and specific grounds of justification

Chapter 32 Art. X.02 (2) CETA provides for general grounds of justification listing, inter alia, the protection of public security or morals or the protection of human, animal or plant life as possible grounds of justification. The referral of Chapter 32 Art. X.02 (1) CETA to Art. XX GATT also applies to the MFN treatment standard, allowing for a different treatment if it serves the protection of public goods and interests, e.g. the protection of public morals, human, animal or plant life and health or the conservation of exhaustible natural resources. Apparently, there is some overlap between section (1) and (2).

The general grounds of justification of Art. 24 (3) ECT, serving, inter alia, the protection of security interests, non-proliferation and the maintenance of public order, also apply to MFN treatment. Broadly similar in their content are the general grounds of justification in the Germany-Jordan BIT and USA-Lithuania BIT (Clause (3) lit a) Protocol and Art. IX respectively). They apply to both national treatment as well as MFN treatment.

³¹² See above 5.1.4.3 (p. 118).

5.2.5 Table: Most-favoured nation treatment

bold = important passages
yellow = 'in like situations'
green = protection of market access

CETA	ECT	Germany-Jordan	USA-Lithuania
<p>Art. X.7³¹³</p> <p>1. Each Party shall accord to investors of the other Party and to covered investments, treatment no less favourable than the treatment it accords in like situations, to investors and to their investments of any third country with respect to the establishment acquisition, expansion, conduct, the operation, management, maintenance, use, enjoyment and sale or disposal of their investments in its territory.</p> <p>2. For greater certainty, the treatment accorded by a Party under paragraph 1 means, with respect to a government in Canada other than at the federal level, or, with respect to a government of or in a European Member State, treatment accorded, in like situations, by that government to investors in its territory, and to investments of such investors, of any third country.</p> <p>3. Paragraph 1 shall not apply to treatment accorded by a Party providing for recognition, including through arrangements or agreements with third parties recognising accreditation of testing and analysis ser-</p>	<p>Art. 10</p> <p>(1) Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.</p> <p>(2) Each Contracting Party shall endeavour to accord to Investors of other Contracting Parties, as regards the Making of Invest-</p>	<p>Art. 3</p> <p>(1) Neither Contracting Party shall in its territory subject investments owned or controlled by investors of the other Contracting Party, to treatment less favourable than it accords to investments of its own investors or to investments of investors of any third State.</p> <p>(2) Neither Contracting Party shall in its territory subject investors of the other Contracting Party, as regards their activity in connection with investments, to treatment less favourable than it accords to its own investors or to investors of any third State.</p> <p>(3) Such treatment shall not relate to privileges which either Contracting Party accords to investors of third States on account of its membership of, or association with, a customs or economic union, a common market or a free trade area.</p> <p>(4) The treatment granted under this Article shall not relate to advantages which either Contracting Party accords to investors of third States by virtue of a double taxation</p>	<p>Art. II</p> <p>1. Each Party shall permit and treat investment, and activities associated therewith, on a basis no less favorable than that accorded in like situations to investment or associated activities of its own nationals or companies, or of nationals or companies of any third country, whichever is most favorable, subject to the right of each Party to make or maintain exceptions falling within one of the sectors or matters listed in the Annex to this Treaty. Each Party agrees to notify the other Party before or on the date of entry into force of this Treaty of all such laws and regulations of which it is aware concerning the sectors or matters listed in the Annex. Moreover, each Party agrees to notify the other of any future exception with respect to sectors or matters listed in the Annex, and to limit such exceptions to a minimum. Any future exception by either Party shall not apply to investment existing in that sector or matter at the time the exception became effective. The treatment accorded pursuant to any exceptions shall unless specified otherwise in the</p>

³¹³ CETA: Exceptions can be found in e.g.: Art. X.1 (2) (a) (air services); Art. X.1 (2) (b) (governmental activities); Art. X.1 (3) CETA (EU audio-visual services and Canada cultural industry); Art. X.14 (5) (goods and services purchased for government purposes and subsidies); Art. X.14 (1) and Annex I (so-called 'existing non-conforming measures'); Art. X.14 (2) and Annex II (future constraints for non-discrimination); Annex X.43.1 (exception under the Investment Canada Act); Chapter 32 Art. X.02 (protection of public goods and interest, such as public security, public morals, conservation of exhaustible natural resources)

<p>VICES and service suppliers or repair and maintenance services and service suppliers, as well as the certification of the qualifications of or the results or work done by such accredited services and service suppliers.</p> <p>4. For greater certainty, the “treatment” referred to in Paragraph 1 and 2 does not include investor-to-state dispute settlement procedures provided for in other international investment treaties and other trade agreements. Substantive obligations in other international investment treaties and other trade agreements do not in themselves constitute “treatment”, and thus cannot give rise to a breach of this article, absent measures adopted by a Party pursuant to such obligations.</p> <p>Art. X.1³¹⁴</p> <p>[...]</p> <p>2. The Section on Establishment of Investments, and the Section on Non-Discriminatory Treatment with regard to the establishment or acquisition of a covered investment, do not apply to measures relating to:</p> <p>(a) air services, related services in support of air services and other services supplied by means of air transport other than:</p>	<p>ments in its Area, the Treatment described in paragraph (3).</p> <p>(3) For the purposes of this Article, “Treatment” means treatment accorded by a Contracting Party which is no less favourable than that which it accords to its own Investors or to Investors of any other Contracting Party or any third state, whichever is the most favourable.</p> <p>(4) A supplementary treaty shall, subject to conditions to be laid down therein, oblige each party thereto to accord to Investors of other parties, as regards the Making of Investments in its Area, the Treatment described in paragraph (3). That treaty shall be open for signature by the states and Regional Economic Integration Organizations which have signed or acceded to this Treaty. Negotiations towards the supplementary treaty shall commence not later than 1 January 1995, with a view to concluding it by 1 January 1998.</p> <p>[...]</p> <p>(7) Each Contracting Party shall accord to Investments in its Area of Investors of other Contracting Parties, and their related activities including management, maintenance, use, enjoyment or disposal, treatment no less favourable than that which it accords to Investments of its own Investors</p>	<p>agreement or other agreements regarding matters of taxation.</p> <p>(5) This treatment shall not apply to privileges in a special economic zone granted without distinction to domestic and foreign investors by a Contracting Party.</p> <p>Protocol to the Agreement</p> <p>(3) Ad Article 3</p> <p>a) The following shall more particularly, though not exclusively, be deemed “activity” within the meaning of paragraph 2 of Article 3: the management, maintenance, use, and enjoyment of an investment. The following shall, in particular, be deemed “treatment less favourable” within the meaning of paragraph 2 of Article 3: unequal treatment in the case of restricting the purchase of raw or auxiliary materials, of power or fuel or of means of production or operation of any kind, impeding the marketing of products inside or outside the country, as well as any other measures having similar effects. Measures that have to be taken for reasons of public security and order, public health or morality shall not be deemed “treatment less favourable” within the meaning of Article 3.</p> <p>b) The provisions of Article 3 do not oblige a Contracting Party to extend to investors resident in the territory of the other Con-</p>	<p>Annex, be not less favorable than that accorded in like situations to investment and associated activities of nationals or companies of any third country.</p> <p>[...]</p> <p>10. The most favored nation provisions of this Treaty shall not apply to advantages accorded by either Party to nationals or companies of any third country by virtue of:</p> <p>(a) that Party's binding obligations that derive from full membership in a free trade area or customs union; or</p> <p>(b) that Party's binding obligations under any multilateral international agreement under the framework of the General Agreement on Tariffs and Trade that enters into force subsequent to the signature of this Treaty.</p> <p>Art. XI</p> <p>This Treaty shall apply to the political and administrative subdivisions of the Parties.</p>
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³¹⁴ CETA: the content of this provision is also repeated in **Art. X.17 (1) (a)**: 1. Without prejudice to the rights and obligations of the Parties under Chapter [XY](Dispute Settlement), **an investor of a Party may submit to arbitration** under this Section a claim that the respondent has breached an obligation under: (a) Section 3 (Non-Discriminatory Treatment) of this Chapter, **with respect to the expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal** of its covered investment; or [...].

<p>(i) Aircraft repair and maintenance services;</p> <p>(ii) The selling and marketing of air transport services;</p> <p>(iii) Computer reservation system (CRS) services;</p> <p>(iv) Ground handling services;</p> <p>(v) Airport operation services.</p> <p>(b) Activities carried out in the exercise of governmental authority.</p> <p>3. For the EU, the Section on Establishment of Investments and Section on Non-Discriminatory Treatment do not apply to measures with respect to Audiovisual services.</p> <p>For Canada, the Section on Establishment of Investments and Section on Non-Discriminatory Treatment do not apply to measures with respect to cultural industries.</p> <p>4. Claims may be submitted by an investor under this Chapter only in accordance with Section 6 Article 17 (Scope of a Claim to Arbitration), and in compliance with the procedures otherwise set out in that Section. Claims in respect of Section 2 (Establishment of Investments) are excluded from the scope of Section 6.</p> <p>Claims in respect of the establishment or acquisition of a covered investment under Section 3 (Non-Discriminatory Treatment) are excluded from the scope of Section 6 [ISDS section]. Section 4 (Investment Protection) applies only to covered investments and to investors in</p>	<p>or of the Investors of any other Contracting Party or any third state and their related activities including management, maintenance, use, enjoyment or disposal, whichever is the most favourable.</p> <p>(8) The modalities of application of paragraph (7) in relation to programmes under which a Contracting Party provides grants or other financial assistance, or enters into contracts, for energy technology research and development, shall be reserved for the supplementary treaty described in paragraph (4). Each Contracting Party shall through the Secretariat keep the Charter Conference informed of the modalities it applies to the programmes described in this paragraph.</p> <p>[...]</p> <p>Art. 23 (1)</p> <p>(1) Each Contracting Party is fully responsible under this Treaty for the observance of all provisions of the Treaty, and shall take such reasonable measures as may be available to it to ensure such observance by regional and local governments and authorities within its Area.</p> <p>Art. 24</p> <p>(1) This Article shall not apply to Articles 12, 13 and 29.</p> <p>(2) The provisions of this Treaty other than</p> <p>(a) those referred to in paragraph (1); and</p> <p>(b) with respect to subparagraph (i), Part III of the Treaty shall not preclude any Con-</p>	<p>tracting Party tax privileges, tax exemptions and tax reductions which according to its tax laws are granted only to investors resident in its territory.</p> <p>c) The Contracting Parties shall within the framework of their national legislation give sympathetic consideration to applications for the entry and sojourn of persons of either Contracting Party who wish to enter the territory of the other Contracting Party in connection with an investment; the same shall apply to employed persons of either Contracting Party who in connection with an investment wish to enter the territory of the other Contracting Party and sojourn there to take up employment. Applications for work permits shall also be given sympathetic consideration.</p>	
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<p>respect of their covered investments. [...]</p> <p>Chapter 32, Art. X.02</p> <p>1. For the purposes of Chapters X through Y and Chapter Z (National Treatment and Market Access for Goods, Rules of Origin, Origin Procedures, Customs and Trade Facilitation, Wines and Spirits, Sanitary and Phytosanitary Measures, Investment Section 2 (Establishment of Investments) and Investment Section 3 (Non-discriminatory Treatment)), GATT 1994 Article XX is incorporated into and made part of this Agreement. The Parties understand that the measures referred to in GATT 1994 Article XX (b) include environmental measures necessary to protect human, animal or plant life or health. The Parties further understand that GATT 1994 Article XX (g) applies to measures for the conservation of living and non-living exhaustible natural resources.</p> <p>2. For the purposes of Chapters X, Y, and Z (Cross-Border Trade in Services, Telecommunications, and Temporary Entry and Stay of Natural Persons for Business Purposes, Investment Section 2 (Establishment of Investments) and Investment Section 3 (Non-Discriminatory Treatment)), a Party may adopt or enforce a measure necessary:</p> <p>(a) to protect public security or public morals or to maintain public order (x);</p> <p>(b) to protect human, animal or plant life or</p>	<p>tracting Party from adopting or enforcing any measure</p> <p>(i) necessary to protect human, animal or plant life or health;</p> <p>(ii) essential to the acquisition or distribution of Energy Materials and Products in conditions of short supply arising from causes outside the control of that Contracting Party, provided that any such measure shall be consistent with the principles that</p> <p>(A) all other Contracting Parties are entitled to an equitable share of the international supply of such Energy Materials and Products; and</p> <p>(B) any such measure that is inconsistent with this Treaty shall be discontinued as soon as the conditions giving rise to it have ceased</p> <p>to exist; or</p> <p>(iii) designed to benefit Investors who are aboriginal people or socially or economically disadvantaged individuals or groups or their Investments and notified to the Secretariat as such, provided that such measure</p> <p>(A) has no significant impact on that Contracting Party's economy; and</p> <p>(B) does not discriminate between Investors of any other Contracting Party and Investors of that Contracting Party not included among those for whom the measure is intended, provided that no such measure shall constitute a disguised restriction on Economic Activity in the Energy Sector, or</p>		
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<p>health;</p> <p>(c) to secure compliance with laws or regulations which are not inconsistent with the provisions of this Chapter including those relating to:</p> <p>(i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on contracts;</p> <p>(ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;</p> <p>(iii) safety;</p> <p>(x) The public security and public order exceptions may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.</p>	<p>arbitrary or unjustifiable discrimination between Contracting Parties or between Investors or other interested persons of Contracting Parties. Such measures shall be duly motivated and shall not nullify or impair any benefit one or more other Contracting Parties may reasonably expect under this Treaty to an extent greater than is strictly necessary to the stated end.</p> <p>(3) The provisions of this Treaty other than those referred to in paragraph (1) shall not be construed to prevent any Contracting Party from taking any measure which it considers necessary:</p> <p>(a) for the protection of its essential security interests including those</p> <p>(i) relating to the supply of Energy Materials and Products to a military establishment; or</p> <p>(ii) taken in time of war, armed conflict or other emergency in international relations;</p> <p>(b) relating to the implementation of national policies respecting the non-proliferation of nuclear weapons or other nuclear explosive devices or needed to fulfil its obligations under the Treaty on the Non-Proliferation of Nuclear Weapons, the Nuclear Suppliers Guidelines, and other international nuclear non-proliferation obligations or understandings; or</p> <p>(c) for the maintenance of public order. Such measure shall not constitute a disguised restriction on Transit.</p> <p>(4) The provisions of this Treaty which ac-</p>		
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	<p>cord most favoured nation treatment shall not oblige any Contracting Party to extend to the Investors of any other Contracting Party any preferential treatment:</p> <p>(a) resulting from its membership of a free-trade area or customs union; or</p> <p>(b) which is accorded by a bilateral or multi-lateral agreement concerning economic cooperation between states that were constituent parts of the former Union of Soviet Socialist Republics pending the establishment of their mutual economic relations on a definitive basis.</p>		
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5.3 Conclusion so far: A trend to more detailed exceptions within comparative standards

The analysis of the provisions for the national treatment and MFN standard contained in the different treaties has evinced a broad range of regulatory approaches. A certain trend can though be observed: whilst the design of the core mechanism of these standards (esp. the main phrases of 'no less favourable' and 'in like situations') has remained very much untouched and has not been further specified over time, the number of exceptions – in terms of complete carve-outs by using negative and positive list approaches as well as by including explicit grounds of justification – increases. Arbitral practice has not yet been able to develop a stringent approach to the issue of exceptions to the non-discrimination standards in investment law. The explicit and extensive referencing, esp. in CETA and EUSFTA can, at least in part, be seen as an answer to this 'state of uncertainty' and possibly also to an increasingly felt threat to the State parties' 'right to regulate' (see above 3.3 (p. 18)). The same intentions might be behind the exclusion of an MFN clause in EUSFTA. At the same time, the quantity and scope of these exceptions to a comprehensive prohibition of discrimination found in particular in CETA and EUSFTA bears the risk of lessening the protection level.

To the extent that the more detailed provisions are a reply to problems at the level of enforcement by means of ISDS proceedings, it is questionable whether changes at the level of substantive protection clauses can and should serve to compensate procedural deficits. Would the dispute settlement system be developed further with a view to improving the quality and consistency of awards, it might not be necessary to qualify the scope of the national treatment standard to such an extent.

A word of caution seems to be appropriate: the effectiveness of changes made to the comparative standards depends also on the design of the absolute standards, especially the fair and equitable treatment standard (to be covered next). If comparative standards provide for exceptions absent in the context of the fair and equitable treatment standard, the declared State parties' aim in CETA and EUSFTA to strengthen the government's 'right to regulate' could be undermined.

5.4 Fair and equitable treatment

In contrast to national and MFN treatment clauses, 'fair and equitable treatment' (FET) establishes an absolute standard of protection.³¹⁵ Its substance does not depend on the relation of treatment towards domestic or third-State investors. It therefore provides an 'important fixed reference point'³¹⁶ for an investor that will not vary over time. While national and MFN treatment provide for a level playing field, the FET standard ensures that general treatment does not drop below a certain minimum level.

The FET standard, with varying formulations, is contained in virtually any investment treaty. Due to its broadness, it has also been the most frequently used standard in investment arbitration. It is open to a great variety of readings which assigns a tremendous responsibility to arbitral tribunals not to exceed the limits of treaty interpretation and to decide the case at hand in a spirit of judicial self-restraint. It appears, however, that some States have come to conclude in recent years that arbitral

³¹⁵ This should however not distract from the fact that also within the MFN standard questions of discriminatory conduct can or even have to be addressed. Cf. R. Kläger, *Fair and Equitable Treatment' in International Investment Law*, Cambridge University Press, Cambridge, 2011, pp. 187 et seqq.

³¹⁶ J. Salacuse, *The Law of Investment Treaties*, Oxford University Press, Oxford, 2010, p. 221.

practice has not been overly successful in discharging this task, as they adopt more narrowly defined FET clauses.

5.4.1 Customary international law or autonomous standard

It is commonly held that the FET standard roots in the so-called customary international law minimum standard of treatment³¹⁷. Customary international law, as part of the law of aliens, contains a minimum standard of protection of aliens, which also extends to foreign investors³¹⁸. Broadly speaking, a host State has to protect foreign subjects against grave abusive and discriminatory governmental actions; i.e. exercising some degree of due diligence. However, the international minimum standard largely lacks precise contours and is in its existence and substance highly disputed³¹⁹.

Investment treaties only occasionally refer to the international minimum standard *expressis verbis* but employ the phrase 'fair and equitable treatment'³²⁰. It is mostly formulated as a blanket clause, leaving considerable room for interpretation. This lack of precision triggers several questions which have not been answered in a consistent manner in arbitral practice: First, does a FET clause, in the absence of any more defining element, merely reference the level of protection incorporated in customary international law or does it establish an autonomous (possibly elevated) standard³²¹? Second, depending on the answer given to the previous question, what is that current level of protection in customary international law or what is the content of an autonomous FET standard³²²?

5.4.2 Contents of the FET standard

Only some FET clauses define more clearly the contents of the standard. In arbitration practice, a number of broad characteristics and elements of the FET standard have emerged which are frequently referred to by tribunals³²³.

FET has been held to place obligations on all three branches of government. The obligations fall broadly in three categories: (1) legitimate expectations, (2) denial of justice, and (3) due process³²⁴.

³¹⁷ R. Dolzer, and C. Schreuer, *Principles of International Investment Law*, 2nd edition, Oxford University Press, Oxford, 2012, pp. 149 et seq.

³¹⁸ A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, Kluwer Law International, The Hague, 2009, p. 234.

³¹⁹ J. VanDuzer et al., *Integrating Sustainable Development into International Investment Agreements – A Guide for Developing Countries*, Commonwealth Secretariat, August 2012, available at http://www.iisd.org/pdf/2012/6th_annual_forum_commonwealth_guide.pdf (visited 1 June 2015), p. 142 ff.

³²⁰ J. VanDuzer et al., *Integrating Sustainable Development into International Investment Agreements – A Guide for Developing Countries*, Commonwealth Secretariat, August 2012, available at http://www.iisd.org/pdf/2012/6th_annual_forum_commonwealth_guide.pdf (visited 1 June 2015), p. 140.

³²¹ see *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, para. 264, available at <http://www.italaw.com/sites/default/files/case-documents/ita0747.pdf> (visited 15 June 2015); *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Award on Merit, paras. 105 et seqq. The decision *Glamis Gold v United States of America*, Award, June 2009, para. 599 links customary international law to a minimum standard, while *Merril & Ring Forestry v Canada*, March 2010, para. 210 states that indeed the elevated FET standard has already become part of customary international law.

³²² J. Griebel, *Internationales Investitionsrecht*, C.H. Beck, München, 2008, p. 70; C. Schreuer, Fair and Equitable Treatment in Arbitral Practice, *The Journal of World Investment and Trade*, Vol. 6 (2005), pp. 363 et seq.

³²³ For the problems involved in such interpretative practice see S. Hindelang, *Study on Investor-State Dispute Settlement (ISDS) and Alternatives of Dispute Resolution in International Investment Law*, Study for the European Parliament, September 2014, available at <http://ssrn.com/abstract=2525063> (visited 12 June 2015), pp. 66 et seqq.

³²⁴ C. McLachlan et al., *International Investment Arbitration: Substantive Principles*, Oxford University Press, Oxford, 2007, paras. 7.76 et seqq.

Any breach of the FET is determined through an all-embracing analysis of the facts of an individual case, taking into account all circumstances and motifs³²⁵.

5.4.2.1 Legitimate expectations

Investors make an investment decision based on certain expectations with regard to risks and profits involved at a certain moment in time. Part of the array of expectations investors consider before committing (or continuing to commit) capital to a certain undertaking are the political and regulatory conditions in the prospective (or actual) host State. The more stable³²⁶ these conditions are, the more likely investors are willing to invest (or to stay invested). International investment law's main purpose is to make conditions more calculable as it is not subject to unilateral change on part of the host State. However, international investment law does not want to prevent any change of domestic law and policy. Host States need to be able to adapt to the different societal challenges over time. The pursuit of legitimate public interests in a bona fide, transparent and non-discriminatory fashion by the host State should not fall foul of the FET standard as it is not thought to be an insurance against bad business practice.

Generally, expectations of an investor are likely to be legitimate if an objective observer would have relied on them³²⁷. The expectations of an investor in relation to host States depend on the legal and business framework that the host State creates and might also include specific assurances which an investor may have received³²⁸.

In arbitral practice, FET provisions were occasionally interpreted in an overly broad manner, placing emphasis just on stability and predictability, despite the fact that the host State pursued legitimate regulatory goals in a bona fide attitude, making regulatory adjustments difficult³²⁹. Responding to criticism, this led partially to the understanding of tribunals that, in the context of the FET standard, legitimate expectations of investors on the one hand and legitimate public welfare objectives on the other have to be balanced³³⁰. To put it differently: the investor must expect that the regulatory regime may change to some degree over time³³¹. Furthermore, the investor must take the domestic legal environment as he finds it at the time of the establishment of the investment³³². Not any violation of na-

³²⁵ J. Griebel, *Internationales Investitionsrecht*, C.H. Beck, München, 2008, p. 70; *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, para. 182, available at <http://www.italaw.com/sites/default/files/case-documents/ita0565.pdf> (visited 1 June 2015); C. Schreuer, Fair and Equitable Treatment in Arbitral Practice, *The Journal of World Investment and Trade*, Vol. 6 (2005), pp. 363-364.

³²⁶ i.e. the expectations of gain are not just a mere hope but predictable to a certain extent.

³²⁷ J. Griebel, *Internationales Investitionsrecht*, C.H. Beck, München, 2008, p. 72.

³²⁸ C. McLachlan et al., *International Investment Arbitration: Substantive Principles*, Oxford University Press, Oxford, 2007, para. 7.99.

³²⁹ J. VanDuzer et al., *Integrating Sustainable Development into International Investment Agreements – A Guide for Developing Countries*, Commonwealth Secretariat, August 2012, available at http://www.iisd.org/pdf/2012/6th_annual_forum_commonwealth_guide.pdf (visited 1 June 2015), p. 145.

³³⁰ J. Griebel, *Internationales Investitionsrecht*, C.H. Beck, München, 2008, p. 73; *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award, para. 305, available at <http://www.italaw.com/sites/default/files/case-documents/ita0740.pdf> (visited 15 June 2015).

³³¹ J. VanDuzer et al., *Integrating Sustainable Development into International Investment Agreements – A Guide for Developing Countries*, Commonwealth Secretariat, August 2012, available at http://www.iisd.org/pdf/2012/6th_annual_forum_commonwealth_guide.pdf (visited 1 June 2015), p. 145 et seqq.

³³² C. McLachlan et al., *International Investment Arbitration: Substantive Principles*, Oxford University Press, Oxford, 2007, para. 7.105.

tional law amounts to a breach of the FET standard but only those that are of a systematic character³³³.

These limitations to the recognition of an investor's expectations have led to a greater significance of specific representations made by the government to the investor. However, one should be mindful not to construe each and any statement or act attributed to the government as a specific representation in the context of an investment treaty. Otherwise, this would turn the FET standard into a disguised umbrella clause covering any 'commitment' outside the investment treaty³³⁴.

5.4.2.2 Denial of justice

Denial of justice concerns the mistreatment of an investor by those involved in discharging justice. More frequently it is used in the context of the treatment of an investor in domestic courts, either with regard to substantive decisions or the procedural treatment of a case, for example by a refusal to admit a claim, undue procedural delays, or in case of malicious applications of the law³³⁵.

5.4.2.3 Due process

The notion of due process is typically said to concern the administrative decision-making process but may also be applied to judicial measures³³⁶. It includes elements such as discrimination, non-transparency, inconsistency, harassment or bad faith³³⁷. Finding a violation of due process involves, again, a detailed appreciation of the facts of the individual case. For example, not every unequal treatment amounts to discrimination³³⁸. It must have a disproportionate impact on the foreign investor and the situation in which the investor is rendered must not merely be the result of bad business judgements or non-compliance with domestic law³³⁹.

5.4.3 New approaches in drafting of FET

The immense room given for interpretation³⁴⁰ granted by the FET clause's vague wording has turned the standard into the most frequently relied upon and most successful basis for investor claims³⁴¹. Presumably triggered by some ISDS awards based on an overly expansive interpretation of the FET standard, some governments have increasingly felt that an openly-worded FET standard might excessively curtail their legitimate regulatory activities. For some time now we have therefore witnessed new multifaceted attempts in drafting FET provisions to more clearly define their scope³⁴². Efforts at

³³³ J. Griebel, *Internationales Investitionsrecht*, C.H. Beck, München, 2008, p. 72.

³³⁴ J. Griebel, *Internationales Investitionsrecht*, C.H. Beck, München, 2008, p. 72.

³³⁵ C. McLachlan et al., *International Investment Arbitration: Substantive Principles*, Oxford University Press, Oxford, 2007, para. 7.79.

³³⁶ J. Salacuse, *The Law of Investment Treaties*, Oxford University Press, Oxford, 2010, p. 242.

³³⁷ C. McLachlan et al., *International Investment Arbitration: Substantive Principles*, Oxford University Press, Oxford, 2007, para. 7.115.

³³⁸ see *Methanex Corporation v. United States of America*, UNCITRAL, documents available at <http://www.state.gov/s/l/c5818.htm> (visited 15 June 2015).

³³⁹ C. McLachlan et al., *International Investment Arbitration: Substantive Principles*, Oxford University Press, Oxford, 2007, para. 7.140.

³⁴⁰ J. Griebel, *Internationales Investitionsrecht*, C.H. Beck, München, 2008, p. 70.

³⁴¹ Of the 10 decisions in 2014 that found States liable, six established a violation of the FET provision; see UNCTAD, *Recent Trends in IIAs and ISDS*, IIA Issues Note 2015/1, available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf (visited 30 May 2015), p. 7.

³⁴² P. J. Kuijper, *Investment Protection Agreements as Instruments of International Economic Law*, Study for the European Parliament, September 2014, available at <http://www.jura.fu-berlin.de/fachbereich/einrichtungen/oeffentliches-recht/lehrende/hindelangs/Studie-fuer-Europaeisches-Parlament/Volume-2-Studies.pdf> (visited 1 June 2015), p. 17; J.

VanDuzer et al., *Integrating Sustainable Development into International Investment Agreements – A Guide for Developing Coun-*

more clearly circumscribing and defining the content of FET in investment treaties usually aim at ‘codifying’ and ‘modifying’ the (broad) strands of the standard developed in arbitral practice. For example, more recent FET provisions refer to the prohibition of manifest arbitrariness, of denial of justice, of targeted discrimination on wrongful grounds, and of abusive treatment. The protection of legitimate expectations of investors is also mentioned regularly³⁴³. These and further specifications are included with the view to leaving sufficient room for regulating in the public interest³⁴⁴. It is yet to be seen whether the attempt of more closely defining the standard will lead to a change in arbitral practice. Some fear that the level of protection for investors might thereby be cut back disproportionately³⁴⁵, whilst others may doubt the development of a restricting effect on the tribunals’ practice of interpretation. The latter view is supported by the observation that the more detailed definitions of FET in investment treaties would only be copied from arbitral practice. This codification would therefore not initiate substantial changes.

5.4.4 Brief comparison of EUSFTA, CETA, ECT, Germany-Jordan BIT, and the USA-Lithuania BIT

5.4.4.1 Minimum standard vs. independent standard

None of the agreements to be compared link FET explicitly to the standard in customary international law. The ECT in Art. 10 (1) and the USA-Lithuania BIT in Art. II (3) (a) include a reference to ‘international law’ in general, which includes customary law, treaties³⁴⁶ and general principles. Both provisions, however, clarify that the ‘international law standard’ just forms the floor (‘in no case... less favourable’) which leaves room for more comprehensive protection of investors by the host State. The reference to ‘international law’ invites to speculate on the vague and highly disputed standard contained therein which may not necessarily contribute to predictable outcomes in investment arbitration.

The Germany-Jordan BIT appears to establish FET as a standard independent of customary international law, so do EUSFTA and CETA. While the Germany-Jordan BIT does not provide any further guidance on the content of the concept, the EU agreements operate with a closed list approach (below 5.4.4.3 (p. 141)).

5.4.4.2 Protection of the ‘establishment’ phase

While the ECT and the Germany-Jordan BIT include a (non-enforceable) obligation to encourage and create and to promote respectively certain conditions for the ‘making’ of a foreign investment, the FET standard itself appears to apply to the ‘operation’ of an investment only. The ECT may be read as somewhat clarifying the content of the standard by referring to ‘stable, equitable, favourable, and

tries, Commonwealth Secretariat, August 2012, available at

http://www.iisd.org/pdf/2012/6th_annual_forum_commonwealth_guide.pdf (visited 1 June 2015), p. 141.

³⁴³ UNCTAD, *A Review of Fair and Equitable Treatment: A Sequel*, UNCTAD, 2012, New York and Geneva, pp. 62-63 et seqq.

³⁴⁴ J. Griebel, *Internationales Investitionsrecht*, C.H. Beck, München, 2008, p. 73; *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award, para. 305, available at <http://www.italaw.com/sites/default/files/case-documents/ita0740.pdf> (visited 15 June 2015).

³⁴⁵ S. Schill, *Auswirkungen der Bestimmungen zum Investitionsschutz in CETA*, Study for the German Federal Ministry of Economic Affairs and Energy, 2014, available at <http://www.bmwi.de/BMWi/Redaktion/PDF/C-D/ceta-gutachten-investitionsschutz,property=pdf,bereich=bmwi2012,sprache=de,rwb=true.pdf> (viewed 1 June 2015), p. 14; S. Hindelang, *Study on Investor-State Dispute Settlement (ISDS) and Alternatives of Dispute Resolution in International Investment Law*, Study for the European Parliament, September 2014, available at <http://ssrn.com/abstract=2525063> (visited 1 June 2015), p. 71.

³⁴⁶ The inclusion of treaties is specifically mentioned in Art. 10 (1) ECT. Such reference is lacking in Art. II USA-Lithuania BIT, which should, however, not make a difference in practice. Cf. Art. 38 of the Statute of the International Court of Justice.

transparent conditions'. Art. 9.4 EUSFTA and Art. X.9 CETA are clear to the extent that they apply FET to the operation of the investment only, but not to the establishment phase.

5.4.4.3 Closed vs. open ended content

While the ECT, the Germany-Jordan and the USA-Lithuania BIT do not further provide guidance on the content of the FET standard, EUSFTA and CETA establish a closed list of measures constituting a breach of the standard. Broadly speaking, the elements in the lists originate from arbitral practice: denial of justice, arbitrary and discriminatory conduct, abusive treatment, and breaches of due process and of legitimate expectations. There are nevertheless some notable differences between the lists.

CETA specifically mentions 'transparency' in the due process provision. It also makes explicit that due process extends not just to administrative but also to judicial proceedings. Moreover, CETA includes a specific clause on 'targeted discrimination on manifestly wrongful grounds'. It is usually held that this is part of any due process requirement. The effect of specifically singling it out is unclear and may give rise to uncertainty in respect of the protective scope. It may even lead tribunals to attribute greater significance to this element, as the State parties, by making explicit reference, seem to have assigned some importance to it.

Both agreements employ qualifying adjectives such as 'targeted' discrimination, 'fundamental' breach of due process, and 'manifest' arbitrariness. These arguably limit an investor's protection if compared to an openly worded FET standard clause. However, in the past tribunals responded flexibly to attempts by governments to restrict the scope of protection, as experience with the North American Free Trade Agreement (NAFTA)³⁴⁷ evidences³⁴⁸. EUSFTA refers to 'similar bad faith conduct' in connection with harassment and coercion whilst CETA uses the generic term 'abusive treatment'. Whether these differences in wording will lead to different interpretations remains to be seen.

EUSFTA and CETA both include a specific provision on the issue of legitimate expectations in Art. 9.4 (2) (e) and Art. X.9 (4) respectively. The EUSFTA provision clearly states that a breach of legitimate expectations constitutes a breach of the FET standard. In CETA, legitimate expectations seem to play a less significant role. It is unclear whether Art. X.9 (4) CETA can only be relied on provided that a measure simultaneously touches upon a category of the closed list within paragraph (2). A reading of Art. X.9 (4) CETA ('When applying the above fair and equitable treatment obligations [i.e. the ones referred to in sections (1) and (2)] ... 'may take into account') as well as a comparison³⁴⁹ with the wording of the EUSFTA provision suggest that a breach of legitimate expectations is not an independent category within the FET standard. Rather, it seems to be an additional factor to be taken into account when determining a breach of any such category in the closed list. Recalling the importance traditionally attributed in advanced legal systems to the protection of legitimate expectations as a basic expression of the rule of law, this move might appear somewhat surprising.

³⁴⁷ NAFTA was signed by Canada, Mexico, and the United States of America. It created a trilateral rules-based trade bloc in North America. In Chapter 11 it contains substantive as well procedural rules on foreign investment; text available at <https://www.nafta-sec-alena.org/Default.aspx?tabid=97&ctl=SectionView&mid=1588&sid=539c50ef-51c1-489b-808b-9e20c9872d25&language=en-US> (visited 5 May 2015).

³⁴⁸ S. Hindelang, *Study on Investor-State Dispute Settlement (ISDS) and Alternatives of Dispute Resolution in International Investment Law*, Study for the European Parliament, September 2014, available at <http://ssrn.com/abstract=2525063> (visited 1 June 2015), p. 84.

³⁴⁹ The latter argument should however not be given too much attention when it comes to the rules of interpretation of treaties of public international law.

In terms of what kind of expectations are protected, both EUSFTA and CETA refer to legitimate expectations stemming from specific representations. Beyond that there are differences. EUSFTA is narrower in that it also requires 'unambiguous' representations. Then again, it defines that a representation has to be 'reasonably relied upon by the investor'.

As it stands, the closed lists in CETA and EUSFTA not only specified the content of FET, but the provisions do not appear to cover all significant circumstances in which the application of the FET standard would be desirable. However, according to Art. 9.4 (3) EUSFTA and Art. X.9 (3) CETA the closed lists could potentially be changed or even be extended by the treaty parties acting through a respective treaty committee (see also Art. 9.33 EUSFTA and Art. X.42 CETA). In this way, at least formally, the parties to the agreement will remain in the driver's seat on the development of the law.

The alternative to the approach taken in CETA und EUSFTA would have been to entertain an open list, thereby leaving the further evolution of the FET standard to arbitrators to some extent. Such an open-end list approach could be combined and, at the same time, 'controlled' with the introduction of a proportionality test³⁵⁰ for assessing the breach of the FET obligation by balancing the conflicting interests of the host State and the investor in the individual case. The proportionality test would serve as a confining element for the tribunals' interpretations and add structure to the sometimes intransparent process of appreciation of the facts undertaken by tribunals. In any case, States should be granted a wide margin of appreciation in determining the legitimacy of a measure's objective, the appropriateness and the necessity of a measure to achieve this objective. Finally, the introduction of an appeals mechanism (see above 4.12.2 (p. 108)) could serve as another safeguard against extensive interpretations by tribunals.

In sum, the attempt to further define the FET standard in CETA and EUSFTA might on the one hand create more legal certainty if the categories listed are faithfully applied. On the other hand, such faithful application could possibly lead to reduced protection for investors if compared to the open-ended wording in the ECT, the Germany-Jordan and the USA-Lithuania BITs³⁵¹. This 'risk' – in the sense of a hoped-for more nuanced balance between private and public interests – has apparently been accepted by the State parties, willing to protect their ability to regulate in the public interest in a non-discriminatory manner and bona fide attitude. In this respect and for now, EUSFTA and CETA mark a step forward in the development of the FET principle³⁵². However, alternative regulatory ways, by which the State parties' aims could possibly also be reached without overstepping the mark could have been explored with some more vigour. Eventually, assessing whether State parties ultimately succeeded in more clearly defining the FET standard and reasonably balancing public and private interests depends on the interpretation in arbitral practice.

³⁵⁰ For a draft provision of a proportionality test in the context of FET see S. Hindelang and S. Wernicke (eds.), *Grundzüge eines modernen Investitionsschutzes - Harnack-Haus Reflections*, 2015, available at <http://tinyurl.com/ofzq7k3> (visited 9 September 2015), pp. 4 et seqq.:

'(3) In assessing a breach of the obligation of fair and equitable treatment and full protection and security, a tribunal shall take into account whether the measure is appropriate for attaining the legitimate policy objectives pursued by that measure and must not go beyond what is necessary to achieve them. Each Party enjoys a wide margin of appreciation in determining the legitimacy of a measure's objective, the appropriateness and the necessity of a measure to achieve this objective.'

³⁵¹ See S. Schill, *Auswirkungen der Bestimmungen zum Investitionsschutz in CETA*, Study for the German Federal Ministry of Economic Affairs and Energy, 2014, available at <http://www.bmwi.de/BMWi/Redaktion/PDF/C-D/ceta-gutachten-investitionsschutz,property=pdf,bereich=bmwi2012,sprache=de,rwb=true.pdf> (visited 1 June 2015), p. 14.

³⁵² P. J. Kuijper, *Investment Protection Agreements as Instruments of International Economic Law*, Study for the European Parliament, September 2014, available at <http://www.jura.fu-berlin.de/fachbereich/einrichtungen/oeffentliches-recht/lehrende/hindelangs/Studie-fuer-Europaeisches-Parlament/Volume-2-Studies.pdf> (visited 1 June 2015), p. 17.

5.4.5 Table: Fair and equitable treatment

EUSFTA	CETA	ECT	Germany-Jordan	USA-Lithuania
<p>Art. 9.4</p> <p>1. Each Party shall accord in its territory to investments of the other Party fair and equitable treatment and full protection and security.</p> <p>2. To comply with the obligation to provide fair and equitable treatment set out in paragraph 1, neither Party shall adopt measures that constitute:</p> <p>(a) Denial of justice in criminal, civil and administrative proceedings;</p> <p>(b) A fundamental breach of due process;</p> <p>(c) Manifestly arbitrary conduct;</p> <p>(d) Harassment, coercion, abuse of power or similar bad faith conduct; or</p> <p>(e) A breach of the legitimate expectations of an investor arising from specific or unambiguous representations from a Party so as to induce the investment and which are reasonably relied upon by the investor.</p> <p>3. Treatment not listed in paragraph 2 can also constitute a breach of fair and equitable treatment where the Parties have so agreed in accordance with the</p>	<p>Art. X.9</p> <p>1. Each Party shall accord in its territory to covered investments of the other Party and to investors with respect to their covered investments fair and equitable treatment and full protection and security in accordance with paragraphs 2 to 6.</p> <p>2. A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 where a measure or series of measures constitutes:</p> <p>(a) Denial of justice in criminal, civil or administrative proceedings;</p> <p>(b) Fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings.</p> <p>(c) Manifest arbitrariness;</p> <p>(d) Targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;</p> <p>(e) Abusive treatment of investors, such as coercion, duress and harassment; or</p> <p>(f) A breach of any further elements of the fair and equitable treatment obligation adopted by the Par-</p>	<p>Art. 10 (1)</p> <p>Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. [...] In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. [...]</p>	<p>Art. 2</p> <p>Each Contracting Party shall in its territory promote as far as possible the investment by investors of the other Contracting Party and admit such investments in accordance with its legislation. It shall in any case accord such investments fair and equitable treatment. Neither Contracting Party shall in any way impair by arbitrary or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Contracting Party.</p>	<p>Art. II (3) (a)</p> <p>3. (a) Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less favorable than required by international law.</p>

<p>procedures provided in [Article 17.1 (4)(c)].</p> <p>[...]</p>	<p>ties in accordance with paragraph 3 of this Article.</p> <p>3. The Parties shall regularly, or upon request of a Party, review the content of the obligation to provide fair and equitable treatment. The Committee on Services and Investment may develop recommendations in this regard and submit them to the Trade Committee for decision.</p> <p>4. When applying the above fair and equitable treatment obligation, a tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated.</p> <p>[...]</p>			
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5.5 Free transfer

The ability to move monetary payments freely in and out of the host State is a key component for an investor in its decision to invest abroad³⁵³. It is not just that the investor might need monetary funds to purchase raw materials for production, he also may want to repatriate profits or even choose to de-invest completely. Host States, however, may feel the need to control or even restrict the transfer of funds, for example in case of a currency crisis³⁵⁴. Customary international law does not contain a right of free transfer³⁵⁵. Therefore, in an attempt to encourage foreign investment, most investment agreements include a free transfer clause. However, in arbitral practice these clauses have not yet become highly relevant³⁵⁶. Accordingly, the discussion in the context of this study will be kept brief.

5.5.1 Key elements

Free transfer clauses are – compared to other substantive provisions – usually rather specific and commonly contain the following elements³⁵⁷: They clarify the general scope of a transfer clause, i.e. whether funds can only be moved from host to home State of the investor or from the host State to any other State; they specify which types of funds can be transferred; they define the nature of the currency (e.g. freely convertible) and the applicable exchange rate for such a transfer; and they determine the time period within which the host State may block transfers. A transfer clause might also provide for free transfer of any compensation the investor was granted by the host State, for example in the course of an expropriation. Usually a broad guarantee for the free transfer of payments is accompanied by a list of exceptions to allow States to manage macroeconomic difficulties or to ensure the application of their laws and prevent abuse³⁵⁸.

5.5.2 Brief comparison of EUSFTA, CETA, ECT, Germany-Jordan BIT, and the USA-Lithuania BIT

5.5.2.1 Intensity of protection and general scope

All agreements compared contain a transfer clause. As a general observation, while EUSFTA, the ECT, and the Germany-Jordan BIT stipulate that the State parties to these agreements ‘shall guarantee’ free transfer, CETA and USA-Lithuania BIT employ the language of ‘shall permit’³⁵⁹. The former terminology seems to demand a more pro-active approach, including the adoption of ‘precautionary’ measures serving the protection of the right of free transfer.

As for the type of funds protected, generally the agreements extend to the transfer of contributions to capital, returns, payments made under contract, proceeds from the sale or liquidation of the in-

³⁵³ A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, Kluwer Law International, The Hague, 2009, p. 399.

³⁵⁴ J. Salacuse, *The Law of Investment Treaties*, Oxford University Press, Oxford, 2010, p. 259; J. VanDuzer et al., *Integrating Sustainable Development into International Investment Agreements – A Guide for Developing Countries*, Commonwealth Secretariat, August 2012, available at http://www.iisd.org/pdf/2012/6th_annual_forum_commonwealth_guide.pdf (visited 1 June 2015), p. 183.

³⁵⁵ J. Griebel, *Internationales Investitionsrecht*, C.H. Beck, München, 2008, p. 91.

³⁵⁶ J. Griebel, *Internationales Investitionsrecht*, C.H. Beck, München, 2008, p. 92.

³⁵⁷ P. J. Kuijper, *Investment Protection Agreements as Instruments of International Economic Law*, Study for the European Parliament, September 2014, available at <http://www.jura.fu-berlin.de/fachbereich/einrichtungen/oeffentliches-recht/lehrende/hindelangs/Studie-fuer-Europaeisches-Parlament/Volume-2-Studies.pdf> (visited 1 June 2015), pp. 18 et seq.

³⁵⁸ UNCTAD, *Investment Policy Framework for Sustainable Development*, UNCTAD, 2012, available at http://unctad.org/en/PublicationsLibrary/diaepcb2012d5_en.pdf (visited 29 May 2015), p. 53.

³⁵⁹ See the text passages highlighted in yellow in the table following this chapter.

vestment and payments of compensation. Besides, there are minor differences between the treaties. For example, EUSFTA and CETA clarify the term 'returns' to include profits, dividends and capital gains. These differences are, however, of no real practical relevance as all lists of funds are not exhaustive but for illustrative purposes only ('include', 'including', 'in particular').

All treaties provide for a right of free transfer at market rate and in a freely convertible currency.

5.5.2.2 Exceptions

All but one free transfer clause are tagged with multiple exceptions, serving the host States 'right to regulate'³⁶⁰ by securing the application and enforcement of certain laws³⁶¹ and allowing for restrictions in case of currency crises. The Germany-Jordan BIT is the notable exception that does not provide for exceptions to free transfer but only permits for a delay due to transfer formalities, cf. Clause (4) of the Protocol.

The categories of laws that are typically included in the list of exceptions are such that relate to the rights of creditors and the enforcement of judgements. EUSFTA in Art. 9.7 (2) and CETA in Art. X.12 (4) contain the most comprehensive lists mentioning bankruptcy and insolvency; issuing, trading, or dealing in securities; financial reporting of transfers for purposes of law enforcement, among others. In any case, all measures covered by the types of laws included in the lists should only be enforced through the equitable, non-discriminatory, and good faith application of the respective law.

Furthermore, while the ECT and the USA-Lithuania BIT use the term 'may protect' (Art. 14 (4) and Art. IV (3) respectively), the language of the EU agreements is a lot more straightforward: 'nothing ... shall be construed to prevent ... applying laws.' The latter phrase appears to carry an assumption in favour of the relevant State activity prevailing over the right of free transfer.

Possibly influenced by the current public debt, banking, and currency crisis in Europe, Chapter 32 Art. X.03 and X.04 CETA and Art. 9.7 (3) EUSFTA provide for detailed safeguards in case that 'capital movements cause or threaten to cause serious difficulties for the operation of monetary policy or exchange rate policy'³⁶².

Overall, the EU agreements evince significant changes in drafting free transfer clauses. Extending exception clauses and thereby securing the 'right to regulate' follows the general trend in investment treaty drafting.

³⁶⁰ See above 3.3 (p. 15).

³⁶¹ See the text passages highlighted in green in the table following this chapter.

³⁶² See the text passages highlighted in turquoise in the table following this chapter.

bold = important passages**yellow** = intensity of protection **green** = exceptions for application of laws**turquoise** = exceptions regarding monetary and economic policy

5.5.3 Table: Free transfer

EUSFTA	CETA	ECT	Germany-Jordan	USA-Lithuania
<p>Art. 9.7</p> <p>1. Each Party shall guarantee to investors of the other Party the free transfer relating to an investment. The transfer shall be made in a freely convertible currency without restriction or delay. Such transfers include:</p> <p>(a) contributions to capital such as principal and additional funds to maintain, develop or increase the investment;</p> <p>(b) profits, dividends, capital gains and other returns, proceeds from the sale of all or any part of the investment or from the partial or complete liquidation of the investment;</p> <p>(c) interest, royalty payments, management fees, and technical assistance and other fees;</p> <p>(d) payments made under a contract entered into by the investor, or its investment, including payments made pursuant to a loan agreement;</p> <p>(e) earnings and other remuneration of personnel engaged from abroad and working in connection with an investment;</p>	<p>Art. X.12</p> <p>1. Each Party shall permit all transfers relating to a covered investment to be made without restriction or delay and in a freely convertible currency. Such transfers <i>include</i>:</p> <p>(a) contributions to capital, such as principal and additional funds to maintain, develop or increase the investment;</p> <p>(b) profits, dividends, interest, capital gains, royalty payments, management fees, technical assistance and other fees, or other forms of returns or amounts derived from the covered investment;</p> <p>(c) proceeds from the sale or liquidation of the whole or any part of the covered investment;</p> <p>(d) payments made under a contract entered into by the investor or the covered investment, including payments made pursuant to a loan agreement;</p> <p>(e) payments made pursuant to Articles X.10 (Compensation for Losses) and X.11 (Expropriation);</p> <p>(f) earnings and other remuneration of foreign personnel and</p>	<p>Art. 14</p> <p>(1) Each Contracting Party shall with respect to Investments in its Area of Investors of any other Contracting Party guarantee the freedom of transfer into and out of its Area, including the transfer of:</p> <p>(a) the initial capital plus any additional capital for the maintenance and development of an Investment;</p> <p>(b) Returns;</p> <p>(c) payments under a contract, including amortization of principal and accrued interest payments pursuant to a loan agreement;</p> <p>(d) unspent earnings and other remuneration of personnel engaged from abroad in connection with that Investment;</p> <p>(e) proceeds from the sale or liquidation of all or any part of an Investment;</p> <p>(f) payments arising out of the settlement of a dispute;</p> <p>(g) payments of compensation pursuant to Articles 12 and 13.</p> <p>(2) Transfers under paragraph (1)</p>	<p>Art. 5</p> <p>Each Contracting Party shall guarantee to investors of the other Contracting Party the free transfer of payments in connection with an investment, in particular</p> <p>(a) the principal and additional amounts to maintain or increase the investment;</p> <p>(b) the returns;</p> <p>(c) the repayment of loans;</p> <p>(d) the proceeds from the liquidation or the sale of the whole or any part of the investment;</p> <p>(e) the compensation provided for in Article 4.</p> <p>Art. 7</p> <p>(1) Transfers under paragraph 2 or 3 of Article 4, under Article 5 or Article 6 shall be made without delay at the market rate of exchange applicable on the day of the transfer.</p> <p>(2) Should there be no foreign exchange market the cross rate obtained from those rates which would be applied by the International Monetary Fund on the date of payment for conversions of the</p>	<p>Art. IV</p> <p>1. Each Party shall permit all transfers related to an investment to be made freely and without delay into and out of its territory. Such transfers include:</p> <p>(a) returns;</p> <p>(b) compensation pursuant to Article III;</p> <p>(c) payments arising out of an investment dispute;</p> <p>(d) payments made under contract, including amortization of principal and accrued interest payments made pursuant to a loan agreement;</p> <p>(e) proceeds from the sale or liquidation of all or any part of an investment; and</p> <p>(f) additional contributions to capital for the maintenance of development of an investment.</p> <p>2. Transfers shall be made in a freely usable currency at the prevailing market rate of exchange on the date of transfer with respect to spot transactions in the currency to be transferred.</p> <p>3. Notwithstanding the provisions</p>

<p>(f) payments made pursuant to Article 9.6 [Expropriation] and 9.5 [Compensation for Losses];</p> <p>(g) payments arising under Article 9.27 [Final award, Section B Investor-to-State Dispute Settlement].</p> <p>2. Nothing in this article shall be construed to prevent a Party from applying in an equitable and non-discriminatory manner its laws relating to:</p> <p>(a) bankruptcy, insolvency, or the protection of the rights of creditors;</p> <p>(b) issuing, trading, or dealing in securities, futures, options, or derivatives;</p> <p>(c) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities;</p> <p>(d) criminal or penal offenses;</p> <p>(e) ensuring compliance with orders or judgments in judicial or administrative proceedings;</p> <p>(f) social security, public retirement or compulsory savings schemes; or</p> <p>(g) taxation.</p> <p>3. When in exceptional circumstances, capital movements cause or threaten to cause serious difficulties for the operation of monetary policy or exchange rate pol-</p>	<p>working in connection with an investment;</p> <p>(g) payments of damages pursuant to an award issued by a tribunal under Section 6 (Investor to State Dispute Settlement).</p> <p>2. Transfers shall be made at the market rate of exchange applicable on the date of transfer.</p> <p>3. Neither Party may require its investors to transfer, or penalize its investors for failing to transfer, the income, earnings, profits or other amounts derived from, or attributable to, investments in the territory of the other Party.</p> <p>4. Notwithstanding paragraphs 1, 2 or 3, nothing in this article shall be construed to prevent a Party from applying in an equitable and non-discriminatory manner and not in a way that would constitute a disguised restriction on transfers, its laws relating to:</p> <p>(a) bankruptcy, insolvency or the protection of the rights of creditors;</p> <p>(b) issuing, trading or dealing in securities;</p> <p>(c) criminal or penal offences;</p> <p>(d) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities;</p>	<p>shall be effected without delay and (except in case of a Return in kind) in a Freely Convertible Currency.</p> <p>(3) Transfers shall be made at the market rate of exchange existing on the date of transfer with respect to spot transactions in the currency to be transferred. In the absence of a market for foreign exchange, the rate to be used will be the most recent rate applied to inward investments or the most recent exchange rate for conversion of currencies into Special Drawing Rights, whichever is more favourable to the Investor.</p> <p>(4) Notwithstanding paragraphs (1) to (3), a Contracting Party may protect the rights of creditors, or ensure compliance with laws on the issuing, trading and dealing in securities and the satisfaction of judgements in civil, administrative and criminal adjudicatory proceedings, through the equitable, non-discriminatory, and good faith application of its laws and regulations.</p> <p>(5) Notwithstanding paragraph (2), Contracting Parties which are states that were constituent parts of the former Union of Soviet Socialist Republics may provide in agreements concluded between them that transfers of payments shall be made in the currencies of</p>	<p>currencies concerned into Special Drawing Rights shall apply.</p> <p>Protocol to the Agreement, Clause No (4), Ad Article 7</p> <p>A transfer shall be deemed to have been made “without delay” within the meaning of paragraph 1 of Article 7 if made within such period as is normally required for the completion of transfer formalities. The said period shall commence on the day on which the relevant request has been submitted and may on no account exceed two months.</p>	<p>of paragraphs 1 and 2, either Party may maintain laws and regulations (a) requiring reports of currency transfer; and (b) imposing income taxes by such means as a withholding tax applicable to dividends or other transfers. Furthermore, either Party may protect the rights of creditors, or ensure the satisfaction of judgments in adjudicatory proceedings, through the equitable, nondiscriminatory and good faith application of its law.</p>
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<p>icy in either Party, safeguard measures affecting transfers may temporarily be taken by the Party concerned, provided that these measures shall be strictly necessary and shall not exceed in any case a period of six months.</p> <p>The Party adopting the safeguard measures shall inform the other Party forthwith and present, as soon as possible, a time schedule for their removal.</p>	<p>(e) ensuring the satisfaction of judgments in adjudicatory proceedings.</p> <p>Exceptions in Chapter 32</p> <p>Art. X.03</p> <p>Where, in exceptional circumstances, capital movements and payments, including transfers, cause or threaten to cause serious difficulties for the operation of the economic and monetary union of the European Union, safeguard measures that are strictly necessary and do not constitute a means of arbitrary or unjustified discrimination between a Party and a non-Party may be taken by the European Union with regard to capital movements and payments, including transfers, for a period not exceeding six months. The European Union shall inform Canada forthwith and present, as soon as possible, a time schedule for the removal of such measures.</p> <p>Art. X.04</p> <p>1. Where Canada or a Member State of the European Union that is not a member of the European Monetary Union experiences serious balance-of-payments or external financial difficulties, or threat thereof, it may adopt or maintain restrictive measures with regard to capital movements or payments,</p>	<p>such Contracting Parties, provided that such agreements do not treat Investments in their Areas of Investors of other Contracting Parties less favourably than either Investments of Investors of the Contracting Parties which have entered into such agreements or Investments of Investors of any third state.</p> <p>(6) Notwithstanding subparagraph (1)(b), a Contracting Party may restrict the transfer of a Return in kind in circumstances where the Contracting Party is permitted under Article 29(2)(a) or the GATT and Related Instruments to restrict or prohibit the exportation or the sale for export of the product constituting the Return in kind; provided that a Contracting Party shall permit transfers of Returns in kind to be effected as authorized or specified in an investment agreement, investment authorization, or other written agreement between the Contracting Party and either an Investor of another Contracting Party or its Investment.</p>		
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	<p>including transfers.</p> <p>2. Measures referred to in paragraph 1 shall:</p> <ul style="list-style-type: none"> a) not treat a Party less favourably than a non-Party in like situations; b) be consistent with the Articles of the Agreement of the International Monetary Fund, as applicable; c) avoid unnecessary damage to the commercial, economic and financial interests of any other Party; d) be temporary and phased out progressively as the situation specified in paragraph 1 improves and not exceed six months; however, if extremely exceptional circumstances arise such that a Party seeks to extend such measures beyond a period of six months, it will consult in advance with the other Party concerning the implementation of any proposed extension. <p>3. In the case of trade in goods, a Party may adopt restrictive measures in order to safeguard its balance-of-payments or external financial position. Such measures shall be in accordance with the General Agreement on Tariffs and Trade (GATT) and the Understanding on Balance of Payment Provisions of the GATT 1994.</p> <p>4. In the case of trade in services, a Party may adopt restrictive</p>			
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	<p>measures in order to safeguard its balance-of-payments or external financial position. Such measures shall be in accordance with the General Agreement on Trade in Services (GATS).</p> <p>5. Any Party maintaining or having adopted measures referred to in paragraph 1 or 2 shall promptly notify the other Party of them and present, as soon as possible, a time schedule for their removal.</p> <p>6. Where the restrictions are adopted or maintained under this Article, consultations shall be held promptly in the Trade Committee, if such consultations are not otherwise taking place outside of this Agreement. The consultations shall assess the balance-of-payments or external financial difficulty that led to the respective measures, taking into account, <i>inter alia</i>, such factors as:</p> <p>(a) the nature and extent of the difficulties;</p> <p>(b) the external economic and trading environment; or</p> <p>(c) alternative corrective measures which may be available.</p> <p>The consultations shall address the compliance of any restrictive measures with paragraphs 1 to 4. All findings of statistical and other facts presented by the IMF relating</p>			
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	<p>to foreign exchange, monetary reserves and balance-of-payments shall be accepted and conclusions shall be based on the assessment by the IMF of the balance-of-payments and the external financial situation of the Party concerned.</p>			
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5.6 Expropriation

As soon as an investor is established in a foreign country, he is subject to the respective jurisdiction. Making investments abroad does not only involve subjecting assets to a foreign jurisdiction but these assets will often be committed for many years. A common concern of foreign investors is that their investment, over its life span, might be expropriated or nationalised³⁶³ by the host State due to changing policy priorities.

In principle, domestic laws allow for expropriation if certain requirements are met and some kind of compensation is paid. However, foreign investors are often suspicious of whether these rules grant a sufficient standard of protection and worry about their proper application and enforcement. Additionally, customary international law has provided for some minimum standard of protection; although always subject to challenge and controversy³⁶⁴. International investment agreements have built upon the existing domestic and international regimes and specified the standard of protection in case of an expropriation.

5.6.1 Key elements

Investment treaties, like customary international and domestic law, do not prohibit expropriating investments³⁶⁵. Rather, they typically stipulate a number of conditions for a lawful expropriation, i.e. the taking serves a public purpose; it occurs in a non-discriminatory manner and in accordance with due process of law; and a certain compensation is paid³⁶⁶.

Typically, investment treaties differentiate between direct and indirect expropriation³⁶⁷. In a nutshell, direct expropriation is the compulsory transfer of a legal title or the outright seizure of property by the State. In contrast, indirect expropriation refers to the situation in which the investor formally remains the legal owner. The expropriation is not explicit, meaning that there is no formal transfer of title or an outright seizure³⁶⁸, but the investor will be significantly hindered in enjoying his property. In recent years, direct expropriation has rarely been seen. States wishing to import capital do not like to be associated with posing a permanent, non-calculable threat to foreign-owned property but prefer to present themselves as places with a very stable, reliable and orderly regulatory environment³⁶⁹.

Expropriation, however, has by no means vanished; its execution has just become more subtle. Ambiguous or generously worded laws are 'interpreted' in the way that suits certain groups in the gov-

³⁶³ Nationalisation is the expropriation of a whole business sector of a national economy. If, for some reason, a host State decides to nationalise a sector of its economy and does not distinguish between domestic or foreign businesses, the national treatment standard does not provide protection for foreign investors. Cf. J. Salacuse, *The Law of Investment Treaties*, Oxford University Press, Oxford, 2010, p. 286.

³⁶⁴ A. Newcombe and L. Paradell *Law and Practice of Investment Treaties: Standards of Treatment*, Kluwer Law International, The Hague, 2009, p. 322.

³⁶⁵ J. Salacuse, *The Law of Investment Treaties*, Oxford University Press, Oxford, 2010, p. 291.

³⁶⁶ J. VanDuzer et al., *Integrating Sustainable Development into International Investment Agreements – A Guide for Developing Countries*, Commonwealth Secretariat, August 2012, available at

http://www.iisd.org/pdf/2012/6th_annual_forum_commonwealth_guide.pdf (visited 1 June 2015), p. 154.

³⁶⁷ This section draws on M. Gutbrod and S. Hindelang, Externalization of Effective Legal Protection against Indirect Expropriation – Can the Legal Order of Developing Countries Live up to the Standards Required by International Investment Agreements? A Disenchanted Comparative Analysis, *The Journal of World Investment and Trade*, Vol. 7 (2006), pp. 59 et seq.

³⁶⁸ See M. Sornarajah, *The International Law on Foreign Investment*, 3rd edition, Cambridge University Press, Cambridge, 2010, pp. 367 et seq., with further references.

³⁶⁹ M. Reisman and R. Sloane, Indirect Expropriation and its Valuation in the BIT Generation, *British Yearbook of International Law*, Vol. 74 (2003), p. 118.

ernment or only enforced when it suits a particular interest; administrative discretion is influenced by factors unrelated to the matter at issue, or administrations fail to conduct their processes in a transparent and comprehensible way. All these measures, turned against a foreign investor, can easily drive him out of business. Virtually any investment treaty therefore reflects this development and also covers State acts which may expropriate indirectly through measures tantamount to expropriation or nationalisation³⁷⁰.

While there is little dispute that investors must also be protected against indirect expropriations, it is more difficult to establish consensus on the question of what amounts to an indirect expropriation. Not every governmental adjustment of the normative framework or change in the application of this framework, or even mistake in application that adversely affects the economies where a foreign investment is made constitutes an expropriating act (or a violation of treatment standards). In other words, doing business means taking advantage of opportunities while accepting certain risks. Opportunities, or, in other words, 'favourable business conditions and good will[,] are transient circumstances, subject to inevitable change'³⁷¹. Thus, the materialisation of a risk ordinarily related to a business venture does not amount to an expropriation. It is necessary to distinguish between the legitimate interest in adjusting and executing national policies and the abuse of sovereign powers through illegitimate interferences in foreign investment activities which are tantamount to expropriation³⁷².

Indirect expropriation clearly must possess an equivalent effect to direct expropriation³⁷³. However, it is not clear how the effect is measured. It usually requires an overall assessment of the character and economic impact of a State measure. There is controversy as to whether solely the effects of a measure are significant³⁷⁴ or whether possible justifications based on legitimate regulatory interests should be taken into account when determining a breach³⁷⁵. Because of these ambiguities, treaties should further define the characteristics of an indirect expropriation. For example, with a view to balancing private property rights and public interests, an expropriation clause could identify legitimate public

³⁷⁰ From an analytical point of view, one can distinguish between 'creeping' and 'consequential expropriation'. 'Creeping' expropriation is comprised of a number of elements, none of which can—separately—constitute the international wrong. M. Reisman and R. Sloane, Indirect Expropriation and its Valuation in the BIT Generation, *British Yearbook of International Law*, Vol. 74 (2003), pp. 123, 125 et seq. Intention to harm the investment or the investor or an intention to expropriate is not necessary but helps to prove a creeping expropriation; M. Reisman and R. Sloane, Indirect Expropriation and its Valuation in the BIT Generation, *British Yearbook of International Law*, Vol. 74 (2003), pp. 124, 128. See also C. Schachter, The Concept of Expropriation under the ECT and other Investment Protection Treaties, *Transnational Dispute Management*, Vol. 2 (2005), available at www.transnational-dispute-management.com (visited 6 September 2005). 'Consequential expropriation' refers to the situation in which the host State fails to properly create, maintain and manage 'the legal, administrative, and regulatory normative framework contemplated by the relevant BIT, an indispensable feature of the 'favourable conditions' for investment'. M. Reisman and R. Sloane, Indirect Expropriation and its Valuation in the BIT Generation, *British Yearbook of International Law*, Vol. 74 (2003), pp. 129 et seq. Here, also, an intention on the part of the host State is not required. M. Reisman and R. Sloane, Indirect Expropriation and its Valuation in the BIT Generation, *British Yearbook of International Law*, Vol. 74 (2003), p. 129.

³⁷¹ S. Hassan, What Level of Host State Interference Amounts to a Taking under Contemporary International Law? *Journal of World Investment*, Vol. 2 (2001), p. 646.

³⁷² M. Reisman and R. Sloane, Indirect Expropriation and its Valuation in the BIT Generation, *British Yearbook of International Law*, Vol. 74 (2003) p. 117.

³⁷³ J. VanDuzer et al., *Integrating Sustainable Development into International Investment Agreements – A Guide for Developing Countries*, Commonwealth Secretariat, August 2012, available at http://www.iisd.org/pdf/2012/6th_annual_forum_commonwealth_guide.pdf (visited 1 June 2015), p. 155.

³⁷⁴ J. Griebel, *Internationales Investitionsrecht*, C.H. Beck, München, 2008, p. 78.

³⁷⁵ *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award, paras. 255 and 262, available at <http://www.italaw.com/sites/default/files/case-documents/ita0740.pdf> (visited 15 June 2015).

welfare objectives, that, if pursued in a proportionate and non-discriminatory manner and in a bona fide attitude, would not amount to an expropriation.

An additional point should be addressed in that regard. If administrative malfeasance, misfeasance and nonfeasance may affect the investment adversely without amounting to 'indirect expropriation', being a rather less intense interference with the property, this does not mean it is unprotected. In such situations, other treatment standards might provide cover. Indeed, there are arbitral awards which, while not accepting a claim based on 'indirect expropriation', established a compensable violation of the FET standard embodied in investment treaties³⁷⁶.

Finally, the expropriation clauses typically define the standard of compensation following expropriation. A compensation clause commonly calls for 'prompt, full and effective' compensation³⁷⁷. Compensation therefore has to occur without delay, be granted in a freely convertible currency and mirror the market value of the expropriated property.

5.6.2 Brief comparison of EUSFTA, CETA, ECT, Germany-Jordan BIT, and the USA-Lithuania BIT

5.6.2.1 Requirements for a lawful expropriation

All expropriation clauses at hand principally follow a general pattern that consists of four elements. First, a general prohibition of direct and indirect expropriation is stipulated³⁷⁸, which is followed, second, by a four-leg test determining preconditions for a lawful expropriation which is styled in the fashion of an exception to the general prohibition: State measures effecting expropriation must be for a public purpose, conducted under due process of law, on a non-discriminatory basis³⁷⁹, and against the payment of compensation. Only the Germany-Jordan BIT somewhat deviates from this norm, not referring to 'due process' and restricting the non-discrimination requirement to MFN treatment. Third, all treaties guarantee the right of a prompt (domestic) judicial review of a measure and of the valuation of the investment for determining the amount of compensation³⁸⁰. Fourth, compensation has to be 'prompt, adequate, and effective'³⁸¹. The amount is usually fixed to the fair market value, except for the Germany-Jordan BIT which does not specify this point. Compensation includes interest and has to be paid without delay, must be effectively realisable and freely transferable.

5.6.2.2 New approaches to the definition of indirect expropriation – securing more regulatory autonomy

The stumbling block for discussion about expropriation provisions has mostly been the question of indirect expropriations. Regularly the interpretation of indirect expropriations is left to tribunals. Here, EUSFTA and CETA strike a new path by attempting to more clearly define indirect expropriation in Annex 9-A (2) and Annex X.11 (1) (b) respectively³⁸². According to these provisions, indirect expropriations presuppose an effect equivalent to direct expropriation substantially depriving property of its fundamental attributes. For the purpose of determination, both provisions include a non-exhaustive

³⁷⁶ See above 5.4.2.3 (p. 135).

³⁷⁷ J. Griebel, *Internationales Investitionsrecht*, C.H. Beck, München, 2008, pp. 18 and 77; so-called Hull-formula.

³⁷⁸ See the text passages highlighted in yellow in the table following this chapter.

³⁷⁹ See the text passages highlighted in red in the table following this chapter.

³⁸⁰ See the text passages highlighted in green in the table following this chapter.

³⁸¹ See the text passages highlighted in turquoise in the table following this chapter.

³⁸² Similar to the 2004 US and Canadian Model BITs.

list of factors ('among other') to be taken into account, referring to elements already known from arbitral practice including, inter alia, the economic impact and the character of a State measure.

In an attempt to probably strike a 'new' balance between compensable measures and non-compensable measures interfering with private property interests, Annex 9-A (3) EUSFTA and Annex X.11 (3) CETA aim at securing more regulatory autonomy for the host State. As expressed by the phrase 'manifestly excessive', the treaties thereby allow for a greater policy space on part of the government. The consequences of this 'new' approach are yet unknown, they could however, if applied faithfully by tribunals, possibly lead to a decreased level of protection. While such an approach might be appropriate with regard to highly developed legal systems which bear less the risk of exploiting such autonomy, it should carefully be evaluated whether this regulatory approach can also serve as a blueprint for future investment agreements of the EU with all of its other actual or potential treaty partners.

5.6.3 Moving towards a proportionality test

Instead of a mere test of arbitrariness, prescribing for a proportionality test – however granting authorities wide discretion for the determination of the legitimacy and necessity of a measure – could be considered. This would allow for the comprehensive assessment of public and private interests in the context of indirect expropriations. Such a test could at least be applied to administrative measures as they are more likely to lead to indirect expropriations. For general legislative measures it could be acceptable to reduce the test to arbitrariness. This solution would offer a compromise that allows for a steady level of protection whilst preserving a State party's 'right to regulate'³⁸³.

³⁸³ For a draft provision of such a proportionality test in the context of indirect expropriations see S. Hindelang and S. Wernicke (eds.), *Grundzüge eines modernen Investitionsschutzes - Harnack-Haus Reflections*, 2015, available at <http://tinyurl.com/ofzq7k3> (visited 9 September 2015), p. 8:

'3. A non-discriminatory measure of a Party does not constitute indirect expropriation if it is appropriate for attaining legitimate policy objectives, such as health, safety and the environment, and if it does not go beyond what is necessary to achieve them. Each Party enjoys a wide margin of appreciation in determining the legitimacy of a measure's objective, the appropriateness and the necessity of a measure to achieve this objective.

4. If the measure of a Party controlling the use of property is of a general legislative nature it does not constitute indirect expropriation if it is non-discriminatory and designed to protect legitimate public welfare objectives, such as health, safety and the environment, except in the rare circumstance where the impact of the legislative measure or series of measures is so severe that it appears manifestly excessive.'

5.6.4 Table: Expropriation

bold = important passages**yellow** = general prohibition**turquoise** = compensation**red** = conditions for lawful expropriation**green** = judicial review

EUSFTA	CETA	ECT	Germany-Jordan	USA-Lithuania
<p>Art. 9.6</p> <p>1. Neither Party shall directly or indirectly nationalise, expropriate or subject to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as 'expropriation') the investments of investors of the other Party except:</p> <p>(a) for a public purpose; (b) under due process of law; (c) on a non-discriminatory basis; and</p> <p>(d) against payment of prompt, adequate and effective compensation in accordance with paragraph 2.</p> <p>2. Compensation shall amount to the fair market value of the investment immediately before its expropriation or impending expropriation became public knowledge plus interest at a commercially reasonable rate, established on a market basis taking into account the length of time from the time of expropriation until the time of payment. Such compensation shall be effectively realisable, freely transferable in accordance with Article 9.7 [Transfer] and</p>	<p>Art. X.11</p> <p>1. Neither Party may nationalize or expropriate a covered investment either directly, or indirectly through measures having an effect equivalent to nationalization or expropriation (hereinafter referred to as "expropriation"), except:</p> <p>(a) for a public purpose; (b) under due process of law; (c) in a non-discriminatory manner; and</p> <p>(d) against payment of prompt, adequate and effective compensation.</p> <p>For greater certainty, this paragraph shall be interpreted in accordance with Annex X.11 on the clarification of expropriation.</p> <p>2. Such compensation shall amount to the fair market value of the investment at the time immediately before the expropriation or the impending expropriation became known, whichever is earlier. Valuation criteria shall include going concern value, asset value including the declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.</p>	<p>Art. 13</p> <p>(1) Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalized, expropriated or subjected to a measure or measures having effect equivalent to nationalization or expropriation (hereinafter referred to as "Expropriation") except where such Expropriation is:</p> <p>(a) for a purpose which is in the public interest; (b) not discriminatory; (c) carried out under due process of law; and</p> <p>(d) accompanied by the payment of prompt, adequate and effective compensation.</p> <p>Such compensation shall amount to the fair market value of the investment expropriated at the time immediately before the Expropriation or impending Expropriation became known in such a way as to affect the value of the Investment (hereinafter referred to as the "Valuation Date").</p> <p>Such fair market value shall at the request of the Investor be expressed in a Freely Convertible</p>	<p>Art. 4</p> <p>[...]</p> <p>(2) Investments by investors of either Contracting Party shall not directly or indirectly be expropriated, nationalized or subjected to any other measure the effects of which would be tantamount to expropriation or nationalization in the territory of the other Contracting Party except for the public benefit and against compensation. Such compensation shall be equivalent to the value of the expropriated investment immediately before the date on which the actual or threatened expropriation, nationalization or comparable measure has become publicly known. The compensation shall be paid without delay and shall carry the usual bank interest until the time of payment; it shall be effectively realizable and freely transferable. Provisions shall have been made in an appropriate manner at or prior to the time of expropriation for the determination and the giving of such compensation. The legality of any such expropriation and the amount of compensation shall be subject to review by due process</p>	<p>Art. III</p> <p>1. Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization ("expropriation") except: for a public purpose; in a nondiscriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article II(3). Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known, whichever is earlier; be calculated in a freely usable currency on the basis of the prevailing market rate of exchange at that time; be paid without delay; include interest at a commercially reasonable rate, such as LIBOR plus an appropriate margin from the date of expropriation; be fully realizable; and be freely transferable.</p> <p>2. A national or company of either Party that asserts that or all or part of its investment has been expropriated shall have a rights to</p>

<p>made without delay.</p> <p>3. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights, to the extent that such issuance is consistent with the Agreement on Trade-Related Aspects of Intellectual Property Rights in Annex 1C to the WTO Agreement ("TRIPS Agreement").</p> <p>4. Any measure of expropriation or valuation shall, at the request of the investors affected, be reviewed by a judicial or other independent authority of the Party taking the measure.</p> <p>Annex 9-A to the Investment Protection Section</p> <p>EXPROPRIATION</p> <p>The Parties confirm their shared understanding that:</p> <p>1. Article 9.6 [Expropriation] addresses two situations. The first is direct expropriation, where an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure. The second is indirect expropriation, where a measure or series of measures by a Party has an effect equivalent to direct expropriation in that it substantially deprives the investor of the fundamental attributes of property in its investment, including the right</p>	<p>3. The compensation shall also include interest at a normal commercial rate from the date of expropriation until the date of payment and shall, in order to be effective for the investor, be paid and made transferable, without delay, to the country designated by the investor and in the currency of the country of which the investor is a national or in any freely convertible currency accepted by the investor.</p> <p>4. The investor affected shall have a right, under the law of the expropriating Party, to prompt review of its claim and of the valuation of its investment, by a judicial or other independent authority of that Party, in accordance with the principles set out in this Article.</p> <p>5. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights, to the extent that such issuance is consistent with the Agreement on Trade-Related Aspects of Intellectual Property Rights in Annex 1C to the WTO Agreements ('TRIPS Agreement').</p> <p>6. For greater certainty, the revocation, limitation or creation of intellectual property rights to the extent that these measures are consistent with TRIPS and Chapter X (Intellectual Property) of this</p>	<p>Currency on the basis of the market rate of exchange existing for that currency on the Valuation Date. Compensation shall also include interest at a commercial rate established on a market basis from the date of Expropriation until the date of payment.</p> <p>(2) The Investor affected shall have a right to prompt review, under the law of the Contracting Party making the Expropriation, by a judicial or other competent and independent authority of that Contracting Party, of its case, of the valuation of its Investment, and of the payment of compensation, in accordance with the principles set out in paragraph (1).</p> <p>(3) For the avoidance of doubt, Expropriation shall include situations where a Contracting Party expropriates the assets of a company or enterprise in its Area in which an Investor of any other Contracting Party has an Investment, including through the ownership of shares.</p>	<p>of law.</p> <p>[...]</p> <p>(4) Investors of either Contracting Party shall enjoy most-favoured-nation treatment in the territory of the other Contracting Party in respect of the matters provided for in the pre- sent Article.</p> <p>Art. 7</p> <p>(1) Transfers under paragraph 2 or 3 of Article 4, under Article 5 or Article 6 shall be made without delay at the market rate of exchange applicable on the day of the transfer.</p> <p>(2) Should there be no foreign exchange market the cross rate obtained from those rates which would be applied by the International Monetary Fund on the date of payment for conversions of the currencies concerned into Special Drawing Rights shall apply.</p>	<p>prompt review by the appropriate judicial or administrative authorities of the other Party to determine whether such expropriation has occurred and, if so, whether any such appropriation, and associated compensation, conforms to the principles of international law.</p> <p>[...]</p>
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<p>to use, enjoy and dispose of its investment, without formal transfer of title or outright seizure.</p> <p>2. The determination of whether a measure or series of measures by a Party, in a specific fact situation, constitutes an indirect expropriation requires a case-by-case, fact-based inquiry that considers, among other factors:</p> <p>(a) the economic impact of the measure or series of measures and its duration, although the fact that a measure or a series of measures by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;</p> <p>(b) the extent to which the measure or series of measures interferes with the possibility to use, enjoy or dispose of the property and</p> <p>(c) the character of the measure or series of measures, notably its object, context and intent.</p> <p>3. For greater certainty, except in the rare in the circumstance where the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measure or series of measures by a Party that are designed and applied to protect legitimate</p>	<p>Agreement, do not constitute expropriation. Moreover, a determination that these actions are inconsistent with the TRIPS Agreement or Chapter X (Intellectual Property) of this Agreement does not establish that there has been an expropriation.</p> <p>Annex X.11</p> <p>The Parties confirm their shared understanding that:</p> <p>1. Expropriation may be either direct or indirect:</p> <p>(a) direct expropriation occurs when an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure; and</p> <p>(b) indirect expropriation occurs where a measure or series of measures of a Party has an effect equivalent to direct expropriation, in that it substantially deprives the investor of the fundamental attributes of property in its investment, including the right to use, enjoy and dispose of its investment, without formal transfer of title or outright seizure.</p> <p>2. The determination of whether a measure or series of measures of a Party, in a specific fact situation, constitutes an indirect expropriation requires a case-by-case, fact-based inquiry that consid-</p>			
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<p>public policy objectives such as public health, safety and the environment, do not constitute indirect expropriation.</p>	<p>ers, among other factors:</p> <p>(a) the economic impact of the measure or series of measures, although the sole fact that a measure or series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred;</p> <p>(b) the duration of the measure or series of measures by a Party;</p> <p>(c) the extent to which the measure or series of measures interferes with distinct, reasonable investment-backed expectations; and</p> <p>(d) the character of the measure or series of measures, notably their object, context and intent.</p> <p>3. For greater certainty, except in the rare circumstance where the impact of the measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations.</p>			
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5.7 Umbrella clause

Through an umbrella clause, legal relations between an individual investor and a host State can fall under the protective scope of an international investment treaty. Such legal relations, all rooted in the domestic legal order, can consist of either contractual arrangements or even unilateral acts of the host State, such as legislation, licences, or permissions. Umbrella clauses shall hinder States from (ab)using their authority to dispose freely over their domestic jurisdictions. A host State could easily disrespect individual commitments it previously entered into towards the investor and therewith illegitimately reshape the relationship between itself and the investor in the way it suits the present political situation. The host State may, for example, alter domestic laws or regulations or re-interpret contracts and other acts. The risk is even higher if domestic courts are unlikely to step up to protect investors. By means of an umbrella clause a breach of, for example, an investor-State-contract might amount to a breach of the investment treaty, 'promoting' a so-called 'contract claim' to a 'treaty claim'³⁸⁴. The same may hold true for other covered commitments such as e.g. licenses or permissions. A treaty claim may more effectively provide protection for investors, if they can draw on the instruments provided in the investment treaties, especially access to ISDS.

Although umbrella clauses have been included in around 40 per cent of all investment agreements³⁸⁵, it has to be pointed out that they also contain certain 'risks' for States, in particular possible heavy constraints on its autonomy to regulate in internal affairs as well as multiple proceedings in respect of contract claims. Hence, in order to include an umbrella clause in an investment treaty provision should be made for enough room to regulate in the public interest, in a bona fide attitude with a view to responding to changing policy priorities over time. Furthermore, the issue of multiple proceedings on different legal basis should be addressed.

5.7.1 The scope of commitments ascending to the level of a treaty claim

Umbrella clauses feature different wordings in different investment treaties and hence differ with regard to their scope. Often they are drafted broadly, leading to controversies about their interpretation in particular on the crucial question of whether each and every commitment is subjected to the clause and thereby elevated to the level of a treaty claim³⁸⁶. Occasionally in arbitral practice indeed any contractual commitment of a State was perceived as falling within the scope of an umbrella clause. Some tribunals considered only those contractual commitments that hold certain characteristics as being included by an umbrella clause³⁸⁷. For example, in some cases tribunals differentiated between governmental measures that classified as 'commercial act' and such that would constitute a 'sovereign act'³⁸⁸. Others held that an umbrella clause 'internationalises' only contractual obligations

³⁸⁴ J. Griebel, *Internationales Investitionsrecht*, C.H. Beck, München, 2008, p. 85.

³⁸⁵ UNCTAD, *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking*, UNCTAD, New York and Geneva, 2007, pp. 73 et seqq.

³⁸⁶ P. J. Kuijper, *Investment Protection Agreements as Instruments of International Economic Law*, Study for the European Parliament, September 2014, available at <http://www.jura.fu-berlin.de/fachbereich/einrichtungen/oeffentliches-recht/lehrende/hindelangs/Studie-fuer-Europaeisches-Parlament/Volume-2-Studies.pdf> (visited 1 June 2015), p. 18; see also R. Dolzer and C. Schreuer, *Principles of International Investment Law*, 2nd edition, Oxford University Press, Oxford, 2012, pp. 153 - 162.

³⁸⁷ J. Griebel, *Internationales Investitionsrecht*, C.H. Beck, München, 2008, p. 85.

³⁸⁸ *El Paso Energy International v Argentina*, Award, available at <http://www.italaw.com/sites/default/files/case-documents/ita0270.pdf> (visited 1 August 2015), paras. 531 et seqq.

that are systematic or of a certain 'intensity'³⁸⁹. Elevating contractual claims to the treaty level has also been perceived as dependent on the investor fulfilling his contractual obligations towards the host State³⁹⁰.

5.7.2 The effect on jurisdiction

A significant consequence of 'internationalising' contractual commitments is the possibility of multiple claims based on similar or identical facts, i.e. to claim a 'breach of contract', to be precise, a breach of the umbrella clause by breach of contract using the ISDS mechanism provided for in the investment agreement and the dispute settlement mechanism, usually commercial arbitration, found in the contract itself. Frequently in arbitral practice the challenging question arises whether the contract established an exclusive and a supplementary jurisdiction³⁹¹.

5.7.3 Brief comparison of EUSFTA, CETA, ECT, Germany-Jordan BIT, and the USA-Lithuania BIT

With CETA completely leaving out an umbrella clause³⁹², the other treaties at hand provide two different models. Firstly, a broad unqualified umbrella clause without any further specifications is found in the ECT, the Germany-Jordan BIT, and the USA-Lithuania BIT³⁹³. This type of an umbrella clause would leave a great part of its application to arbitral practice, which is still burdened with considerable uncertainty and could potentially lead to a broader rather than a narrower interpretation of the clause. The mere existence of a broad umbrella clause could be taken as evidence that at least all contractual agreements are covered, meaning every contractual breach turns into a breach of the treaty.

The second approach can be found in EUSFTA. It takes a more nuanced approach in respect of the umbrella clause. It defines its scope more clearly by including only 'contractual written obligations' (in contrast, for example, to 'any other obligation' in the Germany-Jordan BIT) between an individual investor and a State. The broad phrase 'shall observe' in the Germany-Jordan BIT is replaced in EUSFTA by a clear definition of the nature ('through the exercise of its governmental authority') and specification of the type of host State conduct. Further, it requires for a breach of contract either a certain intention ('deliberately') or a certain impact ('substantially alters the balance of rights and obligations') in order to be of relevance for the umbrella clause. The former alternative introduces a subjective element, whereas the latter requires for a frustration of a commitment to be established on the basis of an assessment of the impacts on the contractual arrangement as a whole.

³⁸⁹ *CMS v Argentina*, Award, <http://www.italaw.com/sites/default/files/case-documents/ita0184.pdf> (visited 1 August 2015), paras. 296 et seqq.

³⁹⁰ UNCTAD, *Investment Policy Framework for Sustainable Development*, UNCTAD, 2012, available at http://unctad.org/en/PublicationsLibrary/diaepcb2012d5_en.pdf (visited 29 May 2015), p. 54.

³⁹¹ J. VanDuzer et al., *Integrating Sustainable Development into International Investment Agreements – A Guide for Developing Countries*, Commonwealth Secretariat, August 2012, available at http://www.iisd.org/pdf/2012/6th_annual_forum_commonwealth_guide.pdf (visited 1 June 2015), pp. 408 et seq.

³⁹² Apparently, Canada did not want to include an umbrella clause, whilst the EU proposed a classical umbrella clause, according to P. J. Kuijper, *Investment Protection Agreements as Instruments of International Economic Law*, Study for the European Parliament, September 2014, available at <http://www.jura.fu-berlin.de/fachbereich/einrichtungen/oeffentliches-recht/lehrende/hindelangs/Studie-fuer-Europaeisches-Parlament/Volume-2-Studies.pdf> (visited 1 June 2015), p. 18.

³⁹³ Art. VI (1) of the USA-Lithuania BIT leaves no room for misinterpretations by explicitly stating that any breach of an investment contract in domestic law or even a unilateral act of an investment authorization would permit access to the ISDS mechanism. That clause can be described as a 'hidden umbrella clause' – backing up the explicit one in Art. II (2) (c) by providing for broad jurisdiction of arbitral tribunals.

5.7.4 The future of umbrella clauses

Umbrella clauses give weight to individual commitments of the host States towards the investor – under the premise that they include access to ISDS for such contractual or other breaches. A host State may enter into individual commitments in order to attract certain investors. Hence, an investor should be able to hold the host State accountable for such specific commitments in the same way as for breaches of the minimum protection standards contained in international investment treaties. Otherwise, individual arrangements might be little more than mere declarations of good will.

However, even if the path to ISDS for such elevated treaty claims should generally be opened up, there is a need to clarify the relation between ISDS, commercial arbitration, and domestic remedies. This is not a specific issue of umbrella clauses. The malfunctions observed in the context of umbrella clauses are only a consequence of this underlying problem. Furthermore, the scope of umbrella clauses should be restricted to (explicit) contractual commitments; leaving ‘commitments’ in laws and ordinances or oral statements outside its scope. The same holds true for disputes of commercial nature, i.e. such in which the host State does not resort to its ‘sovereign powers’. They should be kept outside the protective scope. If the issue of multiple proceedings can be solved and the scope of an umbrella clause can be meaningfully restricted, these clauses pose less of a risk for host States and should be included in investment treaties.

Finally, umbrella clauses can especially play a positive role for SMEs. In contrast to large companies, they might not have the negotiation power to include ISDS clauses in their individual arrangements with the host State.

5.7.5 Table: Umbrella clause

EUSFTA	CETA	ECT	Germany-Jordan	USA-Lithuania
<p>Art. 9.5 (5)</p> <p>5. Where a Party, itself or through any entity mentioned in article 1 paragraph 5, had given any specific and clearly spelt out commitment in a contractual written obligation towards an investor of the other Party with respect to the investor’s investment or towards such an investment, that Party shall not frustrate or undermine the said commitment through the exercise of its governmental authority either:</p> <p>(a) deliberately; or</p> <p>(b) in a way which substantially alters the balance of rights and obligation in the contractual written obligation unless the Party provides reasonable compensation to restore the investor or investment to a position which it would have been in had the frustration or undermining not occurred.</p>		<p>Art. 10 (1)</p> <p>(1) Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.</p>	<p>Art. 8 (2)</p> <p>(2) Either Contracting Party shall observe any other obligation it may have entered into with regard to investments in its territory by investors of the other Contracting Party.</p>	<p>Art. II (3) (c)</p> <p>(c) Each Party shall observe any obligation it may have entered into with regard to investments.</p> <p>Art. VI (1)</p> <p>1. For the purpose of this Article, an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to:</p> <p>(a) an investment agreement between that Party and such national or company;</p> <p>(b) an investment authorization granted by that Party's foreign investment authority to such national or company; or</p> <p>(c) an alleged breach of any right conferred or created by this Treaty with respect to an investment</p>

5.8 Conclusions and outlook: Of 'light touch' and 'more comprehensive' regulation

The analysis of substantive protection clauses in the five treaties at hand allows for the conclusion that investment agreements in this regard can generally be assigned one of two labels: While the ECT, the USA-Lithuania BIT, and the Germany-Jordan BIT follow a traditional approach which may be termed 'light touch regulation' of investment protection, the avenue taken by the EU agreements can be sketched as 'more comprehensive regulation'.

The potential and danger of 'light touch regulation' is well documented. In disregard of the rules on the interpretation of treaties, tribunals may apply a system of quasi-precedent and choose interpretations that diverge from the original intention of the treaty parties. It is perceived that this often goes to the disadvantage of States, favouring the likes of investors. Positively speaking, the protection level is comparatively high.

As a 'late-comer' to the field of international investment law making, the EU has tried to avoid the broad and general language of many prior investment agreements³⁹⁴. This has resulted in 'more comprehensive regulation', which aims at tackling the issue of expansive interpretations but it is yet unclear whether it will succeed. Only time and arbitral practice will tell. At the same time, it is feared that 'more comprehensive regulation' goes too far in one direction, eventually excessively reducing the overall level of investor protection.

³⁹⁴ S. Hindelang and M. Krajewski, Conclusion and Outlook: Whither International Investment Law?, in idem (eds.), *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified*, Oxford University Press, Oxford, forthcoming 2016.

6 General Conclusions: Inseparability of Substantive Protection Standards and Dispute Settlement

The effectiveness of investment protection flowing from an international treaty and the impact of such regimes on a government's 'right to regulate' is defined by both the design of the dispute settlement system itself and that of the substantive protection clauses applied therein. These two areas of law are so closely interlinked that their separation into two parts for the purposes of analysis might convey a false picture. While useful conclusions for reform and helpful standards to measure the EU's progress in that respect may be drawn from such separate analysis, the eventual effect from any adaptation of individual clauses cannot be fully understood without taking into consideration the bigger picture.

Accordingly, any change in the design of either regulatory part requires an evaluation of the consequences for the respective other one. For example, a systemic change from ad-hoc tribunals to a permanent investment court would beg the question of whether, at the same time, a turn towards a 'more comprehensive regulation' approach in respect of the substantive protection clauses is necessary to the same extent. And *vice versa*, would 'more comprehensive regulation' on part of the substantive standards really solve the problems currently evident in the 'traditional' ISDS concept; a concept only gradually modified in CETA and EUSFTA?

To answer such queries, this study hopes to offer some helpful tools and orientation but has to leave an overall appreciation of the EU's reform agenda to further scrutiny. In any event, without a clear *political* statement by the competent institutions on the *desired balance* of private and public interests to be reflected in the European international investment policy, any evaluation of changes adopted by CETA and EUSFTA remains necessarily prone to the authors' subjective perception of the current investment law regime. To some extent, the current broad public debate on rather technical matters such as the design of an investor-State dispute settlement mechanism or the drafting of a FET clauses blurs the vision on more fundamental questions worth stabling a consensus: i.e. the balance struck between private property interests and public welfare as well as the design of a European judiciary. Without having at least some answers to such questions, the current debate in the realm of international investment law might be somewhat in a state of limbo. In that respect, one feels reminded of a remark of Seneca: If one does not know to which port one is sailing, no wind is favourable.³⁹⁵

³⁹⁵ 'Ignoranti quem portum petat nullus suus ventus est.' Seneca, L. A., Epistulae morales ad Lucilium, VIII, LXXI, 3.

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PHOTO CREDIT: iStock International, Inc.

ISBN 978-92-823-8004-8 (print)

ISBN 978-92-823-8005-5 (pdf)

doi:10.2861/520545 (print)

doi:10.2861/727590 (pdf)



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