

DIRECTORATE-GENERAL FOR EXTERNAL POLICIES
POLICY DEPARTMENT



**In Pursuit of an
International
Investment Court :
Recently negotiated
investment chapters in
EU Comprehensive FTA
in comparative
perspective**

INTA

IN PURSUIT OF AN INTERNATIONAL INVESTMENT COURT

EN

2017



STUDY

In Pursuit of an International Investment Court

Recently Negotiated Investment Chapters in EU Comprehensive Free Trade Agreements in Comparative Perspective

ABSTRACT

The study compares the revised and signed text of the Comprehensive Economic and Trade Agreement (CETA) with the EU-Vietnam Free Trade Agreement (EUVFTA) and the EU-Singapore Free Trade Agreement (EUSFTA) in respect of important procedural aspects relating to investor-State dispute settlement. The findings are juxtaposed to the procedural rules governing the preliminary reference procedure and direct action (action for annulment) before the Court of Justice of the European Union as well as the individual application before the European Court of Human Rights. In doing so, it provides a tool and manual to evaluate the EU's today's and future progress in reforming the international investment law regime. By outlining key features of the procedural frameworks governing two international courts, some 'tried and tested' concepts as source of inspiration for the possible design of a 'multilateral investment court' might be found.

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1. Executive Summary

1.1 Introduction to the study

With the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union (EU) signed and (in part) applied provisionally, a highly controversial political debate on the directions of the European International Investment Policy has come to an end, at least for the moment. It is this temporary respite which presents us with the opportunity to take stock of the EU's progress in pushing for reform¹ of a heavily criticized legal regime. At the same time, the study shall glimpse at the future of the EU policy: Not only is the EU currently negotiating with several trading partners such as Japan, Mexico, or China², it has also just taken up the challenging task of creating consensus for the establishment of a 'multilateral investment court'³.

With the view to put forward both a *preliminary assessment* of the results achieved so far as well as providing a *manual for understanding and evaluating future progress* in treaty negotiations on any international ad hoc or permanent investor-State dispute settlement instrument, this study describes, systematizes, and juxtaposes key procedural concepts and mechanisms governing the process of administering justice by five dispute settlement bodies, i.e. the tribunals to be established on the basis of the 2014 EU-Singapore Free Trade Agreement (EUSFTA)⁴, the 2016 CETA⁵, and the agreed draft EU-Vietnam

¹ On Reform generally 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, 2016, pp. 377-397.

² For a comprehensive list see Commission, Overview of FTA and other Trade Negotiations (updated May 2017); available at http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf (visited 30 May 2017).

³ Cf. point 6 lit. i) of the 'Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States', OJ L 11, 14 January 2017, pp- 3-8; see the consultation of the Commission 'Questionnaire on options for a multilateral reform of investment dispute resolution', available at http://trade.ec.europa.eu/consultations/index.cfm?consul_id=233 (visited 8 May 2017); both the EU and Canada have started to endorse the idea of a multilateral investment court in such fora as, for instance, the World Economic Forum in Davos, Switzerland, OECD-hosted Investment-Treaty Dialogue in Paris, France, or UNCTAD's World Investment Forum in Nairobi, Kenya, see in detail <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608> (visited 8 May 2017).

⁴ EUSFTA investment chapter as of May 2015, available at <http://trade.ec.europa.eu/doclib/html/152844.htm> (visited 8 May 2017). In the following, unless another Chapter is specifically mentioned, all Articles referred to from EUSFTA belong to Chapter 9 ('Investment Protection'). It should be noted that the CoJ delivered its opinion in a procedure pursuant to Art. 218 (11) TFEU with regard to questions of competence for the conclusion of EUSFTA on 16 May 2017 (below 3.1 (p. 28); Opinion of 16 March 2017 in Opinion Procedure 2/15 [2017] ECLI:EU:C:2017:376; Court of Justice of the European Union, Press Release No. 52/17; available at https://curia.europa.eu/jcms/jcms/p1_350692/en/ (visited 22 May 2017)) (on possible consequences of the opinion see D. Kleimann and G. Kübek, The Signing, Provisional Application, and Conclusion of Trade and Investment Agreements in the EU. The Case of CETA and Opinion 2/15, Robert Schuman Centre for Advanced Studies Research Paper No. RSCAS 2016/58 (2016); available at SSRN: <https://ssrn.com/abstract=2869873> (visited 10 May 2017)).

⁵ OJ L 11, 14 January 2017, pp. 23–1079; available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2017.011.01.0023.01.ENG (visited 8 May 2017).

Free Trade Agreement of January 2016 (EUVFTA)⁶, as well as the Court of Justice of the European Union⁷ (CJEU) and the European Court of Human Rights⁸ (ECtHR).

By outlining some key features of the procedural frameworks governing two long-standing and successfully operating international courts, some 'tried and tested' concepts as source of inspiration for the possible design of a 'multilateral investment court' might be found.

Overall, the regulatory approaches taken on the design of the investor-State dispute settlement provisions in the three (comprehensive) free trade agreements (FTAs) is evolutionary rather than revolutionary in nature. All three FTAs preserve the 'traditional' basic approach displayed by thousands of bilateral investment treaties (BITs) since the late 1950s, i.e. the reliance on some sort of *arbitration* for investor-State dispute settlement. This particular form of arbitration has its historical roots in international *commercial* arbitration, a dispute settlement mechanism developed for conflicts between private entities. Its application to disputes between investors and sovereign States has increasingly been recognised as inappropriate. In a mixture of responding to popular criticism against investor-State arbitration, of catering to a wide range of political and economic interests in preserving the 'ancient regime', and of remedying clearly established rule-of-law deficits in investor-State arbitration practice, the 'traditional' approach is increasingly modified and supplemented by novel elements known from international adjudication or common to numerous well-developed domestic administrative or constitutional legal orders.

When it comes to the evaluation of the progress made by the EU in reforming the international investment law regime, it can generally be observed that EUSFTA exhibits more features of the 'traditional' approach found in the majority of the aforementioned BITs in force today. CETA and EUVFTA, on principle, stand for a more substantial reform of the said approach. In fact, many of the innovations found in the European Commission's reform proposals for the Transatlantic Trade and Investment Partnership

⁶ Available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437> (visited 8 May 2017; please note that the text is subject to legal review and the numbering may change). In the following, unless another Chapter is specifically mentioned, all Articles referred to from EUVFTA belong to its Chapter 8 ('Trade in Services, Investment and E-Commerce'; according to the chapter numbering on <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437>), therein Chapter II ('Investment'; please note that said Chapter 8 is divided into further Chapters I to VII, see <http://trade.ec.europa.eu/doclib/html/154210.htm>); for the sake of clarity, please also note that Chapter II is further divided into sections and that the dispute settlement provisions referred to in this study (unless specifically indicated otherwise) are contained in Section 3 ('Resolution of Investment Disputes'). For example, 'Art. 3 EUVFTA' refers to Chapter 8, Chapter II, Section 3, Art. 3 EUVFTA.

⁷ Art. 19 TFEU, Artt. 251 et seqq.; Protocol No. 3 on the Statute of the Court of Justice of the European Union, annexed to the Treaties, as amended by Regulation (EU, Euratom) No. 741/2012 of the European Parliament and of the Council of 11 August 2012 (OJ L 228, 23 August 2012, p. 1), by Article 9 of the Act concerning the conditions of accession to the European Union of the Republic of Croatia and the adjustments to the Treaty on European Union, the Treaty on the Functioning of the European Union and the Treaty establishing the European Atomic Energy Community (OJ L 112, 24 April 2012, p. 21), by Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council of 16 December 2015 (OJ L 341, 24 December 2015, p. 14) and by Regulation (EU, Euratom) 2016/1192 of the European Parliament and of the Council of 6 July 2016 on the transfer to the General Court of jurisdiction at first instance in disputes between the European Union and its servants (OJ L 200, 26 July 2016, p. 137) (CJEU Statute); Rules of Procedure of the Court of Justice of 25 September 2012 (OJ L 265, 29 September 2012), as amended on 18 June 2013 (OJ L 173, 26 June 2013, p. 65) and on 19 July 2016 (OJ L 217, 12 August 2016, p. 69) (RP CoJ); Rules of Procedure of the General Court of 4 March 2015 (OJ 2015 L 105, 23 April 2015, p. 1) as amended on 13 July 2016 (OJ 2016 L 217, 12 August 2016, p. 71), 13 July 2016 (OJ 2016 L 217, 12 August 2016, p. 72), and 13 July 2016 (OJ 2016 L 217, 12 August 2016, p. 73) (RP GC).

⁸ 213 U.N.T.S. 222, entered into force Sept. 3, 1953, as amended from time to time by numerous Protocols; available at http://www.echr.coe.int/Documents/Convention_ENG.pdf (visited 5 May 2017); Rules of Court of 14 November 2016; available at http://www.echr.coe.int/Documents/Rules_Court_ENG.pdf (visited 8 May 2017).

Agreement (TTIP)⁹ found their way into CETA and EUVFTA¹⁰. It can be expected that the European Commission will push for including similar language into agreements currently under negotiation, such as the EU-Mexico FTA¹¹, the comprehensive EU-China investment agreement¹², or the EU-Japan FTA¹³. What concerns the latter, it appears that Japan's general approach to investor-State dispute settlement is not in line with the EU's (new) standpoints¹⁴. The outcomes will not least be interesting also with regard to the phenomenon of Japanese 'non-litigiousness'¹⁵.

1.2 Course of the study

With the view to achieve this study's two-fold aim – taking stock and providing an instrument with which policy makers and others can monitor future EU treaty negotiations with a critical yet constructive eye, this study follows the typical order of rules on investor-State dispute settlement found in a chapter on investment in an EU FTA. Such order, in turn, reflects the genesis of an investment claim, from attempting to settle it amicably, to the actual arbitral proceedings, to the challenge or appeal of an award, to an award's enforcement. For each 'procedural step' the study explains the structure and functioning of the governing rules, highlights innovations in the EU FTAs compared to the 'traditional approach', and refers to functionally similar concepts in place under the regimes of the two permanent courts compared here, the CJEU and the ECtHR. Each section is followed by a table reproducing and juxtaposing the most important provisions governing a given 'procedural step' for each of the five legal regimes compared in this study.

Furthermore, this study ties in with and builds upon its 2015 predecessor European Parliament study entitled '*The Investment Chapters of the EU's International Trade and Investment Agreements in a Comparative Perspective*'¹⁶. This 2015 study may be consulted for both, a depiction of three investment protection agreements – the Energy Charter Treaty as well as a German and a US-American BIT – following orthodoxly a 'traditional' concept of investor-State arbitration as well as for an overview of substantive protection clauses such as fair and equitable treatment or protection against expropriation in investment protection agreements.

⁹ Especially the Commission Staff Working Document: Report on Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (13 January 2015), SWD (2015) 3 final. Available at: http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf (visited 22 May 2017).

¹⁰ K.D. Dickson-Smith, Does the European Union Have New Clothes? Understanding the EU's New Investment Treaty Model (2016), *Journal of World Investment & Trade*, Vol. 17, No. 5; available at <https://ssrn.com/abstract=2859412776> (visited 23 May 2017), p. 776.

¹¹ Commission, Report on the third round of negotiations for modernising the trade pillar of the EU-Mexico Global Agreement- Brussels, 3-7 April 2017 (2 May 2017); available at http://trade.ec.europa.eu/doclib/docs/2017/may/tradoc_155515.pdf (visited 30 May 2017); some EU proposals can be found at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1598> (visited 30 May 2017).

¹² See http://europa.eu/rapid/press-release_IP-14-33_en.htm and http://trade.ec.europa.eu/doclib/docs/2016/october/tradoc_155061.pdf (both visited 30 May 2017).

¹³ See http://ec.europa.eu/trade/policy/countries-and-regions/countries/japan/index_en.htm#more (visited 25 May 2017).

¹⁴ Commission, Report of the 17th EU-Japan FTA/EPA negotiating round - Brussels, 26-30 September 2016 (26 October 2016), available at <http://trade.ec.europa.eu/doclib/html/155060.htm> (visited 25 May 2017), pp. 4-5. The Report of the 18th negotiating round does not mention the topic, see Commission, Report of the 18th EU-Japan FTA/EPA negotiating round - Tokyo, Week of 3 April 2017 (28 April 2017), available at <http://trade.ec.europa.eu/doclib/html/155506.htm> (visited 25 May 2017).

¹⁵ Cf. T. Cole, Commercial Arbitration in Japan: Contributions to the Debate on Japanese Non-litigiousness, *New York University Journal of International Law & Politics*, Vol. 40 (2007), No. 1, available at <http://nyujilp.org/wp-content/uploads/2013/02/40.1-Cole.pdf> (visited 25 May 2017), pp. 29 et seqq.

¹⁶ S. Hindelang, and C. P. Sassenrath, *The Investment Chapters of the EU's International Trade and Investment Agreements in a Comparative Perspective*, European Union, Belgium, 2015; available at [http://www.europarl.europa.eu/Reg-Data/etudes/STUD/2015/534998/EXPO_STU\(2015\)534998_EN.pdf](http://www.europarl.europa.eu/Reg-Data/etudes/STUD/2015/534998/EXPO_STU(2015)534998_EN.pdf) (visited 4 May 2017).

1.3 Amicable settlement of a dispute and consultation mechanisms

With a view to avoid adversarial legal procedures between an investor and its host State, yielding winners and losers, which also bear the potential to damage long-term relationships, such adversarial proceedings are usually preceded by an attempt to settle the dispute amicably. This approach might spare costs and time usually incurred by adversarial proceedings. The term ‘amicable settlement’ refers to the superordinate concept for any consultation or negotiation mechanism intended to settle the dispute without the decision of a third party, such as a tribunal or court.

All FTAs under comparison in this study make use of such mechanisms. Firstly, they call upon the parties to a dispute to strive towards an amicable resolution (and allow for an amicable settlement at any stage of a dispute). This type of amicable resolution is also referred to as ‘informal consultation’ because the path leading to the settlement is not subject to specific formalities and rules.

Such rules and formalities come into play in the process of so-called ‘formalised consultations’. A key element of ‘formalised consultations’, which all FTAs also make use of, are so-called ‘waiting clauses’. Such ‘waiting clauses’ provide that a claim may not be submitted and a tribunal may not be established before a certain period of time has lapsed. This time period is designated to reach an amicable solution between the investor and the respondent State. While these waiting periods may prevent a precipitated submission of a claim and keep open viable options for settlements in suitable cases, the strict adherence to a formalised process with sequential steps of escalation appears artificial and deferring in such cases where an amicable settlement is not realistic due to the diametrically different positions of the disputing parties and their mutual consent to proceed to trial.

As a general observation applicable to all FTAs and in contrast to the ‘traditional approach’, the ‘formalised consultation’ process is found to be significantly ‘proceduralised’ in terms of time limits, deadlines and steps of escalation of the dispute. Said steps of escalation are on principle the same in all three FTAs: At first, the FTAs call upon (but do not formally require) the disputing parties to engage in amicable settlement talks (‘informal consultations’). After such talks or the refusal thereof, either party may request ‘formalised consultations’. These ‘formalised consultations’ may be initiated a certain time after being requested and usually have a minimum and maximum time period for being conducted. After the defined minimum time period for consultations has expired or within a certain time period upon their unsuccessful conclusion, a notification of intent to arbitrate may be lodged. Where the respondent is a Member State of the EU, a request for determination of the correct respondent has to be lodged as well. It is only then that the submission of a claim is permissible, marking the highest degree of escalation of the dispute.

Another noteworthy feature of the ‘formalised consultations’ process is that the FTAs require the claimant to ‘lay its cards on the table’ by disclosing certain information with regard to its claim. For instance, the investor has to disclose the provisions allegedly breached and the factual and legal basis for the claim. Although such disclosure might in some cases be harmful to the claimant’s arbitration strategy and, thus, could benefit the respondent State, which is under no comparable obligation, it also enables more transparent and, thus, more effective settlement talks.

Although not under scrutiny in this study, it should not be left unmentioned that all FTAs also open up an alternative way to settle the dispute amicably, namely by way of mediation. Mediation combines the flexibility of the consultations process with the intermediary and conciliatory involvement of a third party, i.e. the mediator.

If compared to the regimes of the CJEU and the ECtHR, it can be observed that the mechanisms designed to reach an amicable settlement under the FTAs are spelled out in far more detail while the CJEU's and the ECtHR's procedural frameworks do not address the process of reaching an amicable settlement in depth. Unsurprisingly, the unsuccessful attempt to settle the dispute out of court is not prerequisite to submitting a claim to the CJEU or to applying to the ECtHR. Due to the fact that amicable settlement is not really relevant with regard to the CJEU types of proceedings under comparison here, it is more fruitful to look at the comparably nuanced settlement mechanism of the ECtHR. One remarkable feature is that the ECtHR has substantial requirements for a settlement, which are quite demanding. These requirements take into account the weightiness of human rights infringements and the ECtHR's responsibility for their protection. This also explains why the ECtHR has to approve of a settlement in order for it to have effect. It is also noteworthy that the ECtHR can decide on the dismissal of a case upon request of the respondent if the applicant rejects an appropriate settlement offer meeting the substantial standards of the ECtHR. Finally, it should be noted that mediation is foreign both to the CJEU and to the ECtHR. For further details see below at 4.1 (p. 32).

1.4 Access to ISDS

Where an amicable settlement is not achieved with regard to the host State's measures negatively impacting a foreign investment, the foreign investor aims at gaining access to an adversarial dispute resolution mechanism. Investor-State dispute settlement – understood broadly in this study – can be conducted in different legal orders and fora, i.e. in the domestic, the supranational (EU), and the international ones. With regard to international law, it should be noted that legal remedies of an individual against a sovereign, i.e. State, are in fact the exception to the rule. Aside from investor-State arbitration provided for in FTAs (and BITs), the access of individuals to proceedings against States is quite limited in public international law. The individual application to the ECtHR is one of the rare exceptions. When it comes to disputes between foreign investors and their host States, however, the exception turns into the rule and States usually consent to investor-State arbitration mechanisms in BITs or FTAs.

What concerns the 'traditional' approach to investor-State arbitration, it should be recalled that there is no single institution with one set of procedural rules but multiple institutions are available which provide default procedural rules for and administer a dispute. This 'freedom of choice' of the disputing parties with regard to institution and (procedural) rules governing the dispute can be interpreted as a remnant of the commercial arbitration roots of investor-State arbitration. In commercial arbitration, the disputing parties are free to agree on whichever institution and rules suit their interests and preferences best. In sharp contrast, the CJEU and the ECtHR as permanent, standing supranational and international adjudicative bodies operate on their respective set of procedural rules from which derogation is not permitted.

The FTAs within the scope of this study confirm the abovementioned 'reversed rule-exception relationship' of an individual's access to legal remedies in public international law. In respect of disputes between foreign investors and their host States all State parties to the respective FTAs irrevocably consent to arbitrate disputes with an investor from another State party to the same agreement in the realm of public international law. As a side effect, the consenting States thereby grant such investor a *competing* remedy to those available in domestic (and EU) laws.

The State's consent to arbitrate is typically subject to certain terms and conditions set out in the respective agreement. These terms and conditions clarify, *inter alia*, the formal requirements relating to the submission of a claim and the applicable arbitration rules to the dispute.

All FTAs under comparison follow this logic by defining, for instance, the applicable arbitration rules and the number of arbitrators. In general three arbitrators sit on a case. If a small or medium-sized enterprise (SME) is claimant, the respondent is supposed to give due consideration to allowing for one arbitrator to decide – a rule of very uncertain efficacy. With regard to the applicable arbitration rules, the FTAs allow the claimant to submit its claim either under the International Centre for Settlement of Investment Disputes (ICSID Convention)¹⁷, the Rules on the Additional Facility for the Administration of Proceedings by the Secretariat of the ICSID (ICSID Additional Facility Rules)¹⁸, or the United Nations-sponsored UNCITRAL Arbitration Rules.¹⁹ The use of any other procedural rule requires disputing parties' consent. Administrative functions are vested in the ICSID Secretariat under CETA and EUSFTA whereas EUVFTA is not settled on this subject yet. Its negotiators consider the Secretariat of the Permanent Court of Arbitration as an alternative which – in contrast to the ICSID Secretariat – is seated in Europe.

In contrast, the CJEU and the ECtHR as permanent courts operate on the basis of 'fixed' procedural rules: In the case of the CJEU these are, among others, provisions from the Treaty on European Union (TEU) and from the Treaty on the Functioning of the European Union (TFEU), the Statute of the Court of Justice of the European Union (CJEU Statute)²⁰, the Rules of Procedure of the Court of Justice (RP CoJ)²¹ and the Rules of Procedure of the General Court (RP GC)²². In the case of the ECtHR, these rules can be found, among others, in the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)²³ itself as well as in the Rules of Court²⁴. Of course, 'contractual consent' of the State, as in arbitration, in respect of the individual is not required for disputes before these courts.

In comparison to the jurisdiction of arbitral tribunals established on the basis of the FTAs, the CJEU's and the ECtHR's jurisdiction is much broader in scope. As previously explained, claimants and applicants before the CJEU or the ECtHR are not offered a range of choices with regard to the rules governing the dispute but have to 'cope' with the rules of procedure established by the Member States. With

¹⁷ 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 20 April 2017).

¹⁸ ICSID Additional Facility Rules (as of April 2006), available at https://icsid.worldbank.org/en/Documents/icsid-docs/AFR_English-final.pdf (visited 20 April 2017).

¹⁹ 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 20 April 2017).

²⁰ Protocol No. 3 on the Statute of the Court of Justice of the European Union, annexed to the Treaties, as amended by Regulation (EU, Euratom) No. 741/2012 of the European Parliament and of the Council of 11 August 2012 (OJ L 228, 23 August 2012, p. 1), by Article 9 of the Act concerning the conditions of accession to the European Union of the Republic of Croatia and the adjustments to the Treaty on European Union, the Treaty on the Functioning of the European Union and the Treaty establishing the European Atomic Energy Community (OJ L 112, 24 April 2012, p. 21), by Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council of 16 December 2015 (OJ L 341, 24 December 2015, p. 14) and by Regulation (EU, Euratom) 2016/1192 of the European Parliament and of the Council of 6 July 2016 on the transfer to the General Court of jurisdiction at first instance in disputes between the European Union and its servants (OJ L 200, 26.7.2016, p. 137); available at http://curia.europa.eu/jcms/upload/docs/application/pdf/2016-08/tra-doc-en-div-c-0000-2016-201606984-05_00.pdf (visited 20 April 2017).

²¹ Rules of Procedure of the Court of Justice of 25 September 2012 (OJ L 265, 29 September 2012), as amended on 18 June 2013 (OJ L 173, 26 June 2013, p. 65) and on 19 July 2016 (OJ L 217, 12 August 2016, p. 69).

²² Rules of Procedure of the General Court of 4 March 2015 (OJ 2015 L 105, 23 April 2015, p. 1) as amended on 13 July 2016 (OJ 2016 L 217, 12 August 2016, p. 71), 13 July 2016 (OJ 2016 L 217, 12 August 2016, p. 72), and 13 July 2016 (OJ 2016 L 217, 12 August 2016, p. 73).

²³ 213 U.N.T.S. 222, entered into force Sept. 3, 1953, as amended from time to time by numerous Protocols; available at http://www.echr.coe.int/Documents/Convention_ENG.pdf (visited 5 May 2017).

²⁴ As of 14 November 2016, available at http://echr.coe.int/Documents/Rules_Court_ENG.pdf (visited 20 April 2017).

regard to the number of adjudicators, both courts sit in varying compositions, depending on the question at hand and the significance of the case. Usually, three or five judges at the CJEU and one, three, or seven judges at the ECtHR rule on a case. For further details see below at 4.2 (p. 48).

1.5 Investor-State arbitration, the CJEU, the ECtHR and their relation to domestic remedies

The opening up of a legal avenue for investors in public international law raises the question of how it relates to the legal actions available in domestic law of the host State. The shape of this relationship is rather contentious. Critics of the ‘traditional’ approach to investor-State arbitration have often expressed their concern about the allegedly preferential treatment of foreign investors, which have access to a two-tier judicial review by domestic courts *and* investment tribunals. Domestic investors in contrast can only resort to domestic courts. Also, commentators have voiced concerns that opening up a second, additional or alternative judicial review signals a lack of confidence in domestic courts and may create legitimacy problems.

The solutions implemented in the FTAs under comparison here can be read as response to such criticism – in the way, however, that the drafters largely ignored it. Not least for this reason the solutions are of particular interest here.

One feature that should be emphasised in this respect is that all FTAs contain provisions which aim at preventing *parallel* proceedings before an investor-State arbitral tribunal and a domestic court. By virtue of these rules, an investor has to withdraw pending claims and refrain from filing new suits before domestic courts in order to submit a claim to an arbitral tribunal. Also, an investor has to waive its right to file a suit before a domestic court during the proceedings before the tribunal, thereby preventing ‘U-turns’, i.e. switching from investor-State arbitration (back) to domestic litigation in an ongoing dispute. However, such ‘U-turns’ remain possible under CETA and EUVFTA in several cases: First, recourse to domestic courts is (again) possible where the tribunal dismisses the claim because it is obviously ill-founded. Second, a ‘U-turn’ remains possible where the claimant withdraws its claim within a certain time (CETA) or where the investor does not meet the nationality requirements to make use of investor-State arbitration (EUVFTA).

Another noteworthy point can be made with regard to interim measures (or ‘interim relief’). Omitting technical details, interim measures intend to secure that the main proceedings, in which the claim of the investor is decided, can be meaningfully conducted and completed or that rights of either party, which might be infringed until the main proceedings before the tribunal actually take place, are preserved. By way of example, interim relief could be granted to preserve evidence which might be lost by mere lapse of time (e.g. witnesses with a serious illness might pass away). All three FTAs allow for such measures to be taken by the respective tribunal. Pursuing interim measures before domestic courts is, on principle, also possible.

Access to the CJEU is not restrained by a *formal* requirement of ‘exhaustion of local remedies’. It should be noted though that the preliminary reference procedure can only be initiated by a Member State court, which can be seen as a *de facto* requirement to turn to domestic courts first before accessing the CJEU’s jurisdiction. Also with regard to the second course of action under examination in this study – the direct action for annulment – the absence of an ‘exhaustion of local remedies’ cannot be used as a case in point for an exception to the local remedies rule in public international law. Namely, this ‘absence’ can be explained with the unparalleled structure of EU law and its complex ‘intertwining’ with the Member States’ laws. On principle, there is no overlap between the jurisdictions of the CJEU and Member State courts and, thus, no requirement to address conflicting jurisdictions. The CJEU is,

very roughly speaking, 'in charge' of deciding whether a given EU measure is in accordance with EU law whereas the Member State courts are 'in charge' of holding domestic measures against the requirements of EU and domestic law. Where the pertinent domestic law relates to or is derived from EU law, the Member State courts are required to refer the dispute to the CJEU if the decision depends on questions of EU law.

The ECtHR as a 'typical' international court follows the 'traditional' concept in public international law, requiring an exhaustion of local remedies prior to an application. For further details see below at 4.3 (p. 74).

1.6 Appointment, qualification, and remuneration of judges and arbitrators

Disputes are decided by individuals. Thus, the question of *who* decides *which* dispute is of particular importance to the disputing parties and other stakeholders with an interest in the outcome of the dispute. It is not surprising that the issues of appointment, qualification, and remuneration of arbitrators were at the forefront and centre of discussion on the reform of the investment law regime. Naturally, the changes and modifications to the 'traditional' approach to investor-State arbitration by the revised CETA, EUVFTA, and EUSFTA in the said area have been scrutinised closely.

The solutions in CETA and EUVFTA in many ways reflect a compromise between a 'truly' permanent court with tenured judges and 'traditional' investor-State arbitration. In large parts the task of specifying and developing this hybrid form of investor-State dispute settlement has been handed over to the respective treaty committees established on the basis of the FTAs. They may choose to further institutionalise the respective dispute settlement system, eventually turning it into a permanent investment court with tenured judges. But as for now, it is fair to say that all FTAs under comparison here still draw on 'traditional' investor-State arbitration approaches to arbitrator appointment, qualification, and remuneration while, at the same time, introducing reforms especially as to appointment and (not quite as bold) as to remuneration.

CETA and EUVFTA can be said to carry the bulk of innovations with regard to these issues, once again affirming that they belong to a new generation of FTAs:

Looking at the appointment process of arbitrators, firstly, instead of letting the disputing parties choose the arbitrators, they are allocated to a case drawing from a roster compiled by the treaty parties to the respective FTA. The appointment process provides for an equal share of nationals of each treaty party as well as third State nationals. The arbitrators on the roster serve for a certain, once renewable term of four to five years. The individuals on the roster form the tribunal, whose 'president' and 'vice president' are third State nationals. The 'president' of the tribunal fulfils a decisive function with regard to the assignment of cases to divisions of the tribunal. Both CETA and EUVFTA require the cases be assigned to arbitrators in a random and unforeseeable fashion, thereby further eliminating the traditionally strong influence of the disputing parties on the deciders of the case. By contrast, EUSFTA remains faithful to the 'traditional' approach and lets the parties appoint the arbitrators. Only where the parties are unable to reach an agreement, the appointment is made from a pre-established list, compiled by the treaty parties.

With regard to the qualifications to be appointed as arbitrator, all agreements further develop and refine 'traditional' standards. They do not only require 'competence in the fields of law', as prescribed for example by Art. 14 (1) ICSID Convention, but demand eligibility for judicial offices, demonstrated expertise in public international law, particularly in international investment law, in international trade law and in the resolution of disputes arising under international investment or international trade

agreements. These requirements are intended to ensure a high level of competence and skill. The crucial question to be answered in the future is the one of whether these rules provide for sufficient openness for a diverse set of deciders and allow for the entry of young talent. If these rules were to mean that the present (very) small group of established arbitrators simply carry on, one may doubt that the change in the wording of legal provisions will also result in a change of reality.

Another issue which has been addressed but probably not fully resolved by the FTAs is that of compatibility of work as an arbitrator with other engagements, for example as counsel or arbitrator in other cases. Under CETA and EUVFTA, this type of side-line or parallel activity has been limited but not entirely eliminated. The agreements now only leave open the option of acting as an *arbitrator* under a different agreement whereas activity as counsel or expert witness is not permissible. In contrast, EUSFTA does not contain a comparably clear limitation of side-line activities.

What concerns remuneration, once again CETA and EUVFTA contain the innovations and EUSFTA, as the 'older' agreement among the three FTAs, opted for the 'traditional' approach. The (modest) innovation under CETA and EUVFTA is a retainer fee, which is paid additionally to the case-based pay. Its amount is not defined by the FTAs but will be set by the respective treaty committee. By contrast, EUSFTA relies entirely on the 'traditional' remuneration concept, which only consists of case-based pay of arbitrators.

If compared to the appointment procedure of judges to CJEU and ECtHR and the assignment of cases to judges or chambers, CETA and EUVFTA establish standards which are by and large equivalent to those of these courts. The appointment process of judges to the CJEU and the ECtHR is in the hands of the Member States. It should be recalled that also these appointment processes have been criticised as neither completely flawless nor entirely transparent. With regard to the assignment of cases, there is no clearly formalised procedure at the courts under comparison.

As to qualification requirements of deciders, it can be said that in respect of the CJEU and the ECtHR, albeit high, they are – due to the broader jurisdiction – not as narrow as those in the FTAs. Regarding remuneration, judges receive a monthly salary not dependant on the case load. It should also be noted that judges cannot serve in other judicial capacities and that both ECtHR and CJEU judges enjoy immunity and serve for nine years (non-renewable) and six years (renewable), respectively. All of these safeguards aim at ensuring utmost personal independence and impartiality of the judges. For further details see below at 4.4 (p. 84).

1.7 Code of conduct for judges and arbitrators

Closely related to the preceding subject of appointment, qualification, and remuneration is the question of which conduct is unacceptable for the individuals, i.e. judges or arbitrators, charged with adjudicative tasks. In general, two drafting approaches can be detected for the purpose of drawing the 'red line' for judges and arbitrators: One is the provision of a 'code of conduct' for the individual agreement. The other is the reference to an existing 'external' legal framework.

EUVFTA and EUSFTA pursue the first option and provide codes of conduct of their own, as do the ECtHR's and the CJEU's procedural frameworks. CETA, for now, pursues an approach closer to the 'traditional' one taken in investor-State arbitration and references the International Bar Association Guidelines on Conflicts of Interest in International Arbitration²⁵ (IBA Guidelines). CETA remains, however, open for the development of an own code of conduct by a treaty committee in the future.

²⁵ 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 21 April 2017).

All these frameworks and the codes of conduct for the CJEU and the ECtHR judges define conflicts of interest and strive to establish independence, impartiality, diligence, confidentiality, and disclosure obligations of deciders. While these dimensions are common, their realisation is varying in scope and content. For further details see below at 4.5 (p. 105).

1.8 Transparency of and public access to proceedings

The questions of transparency and public access stood at the centre of public and scholarly debate with regard to the ‘traditional’ approach to investor-State arbitration. The criticised, indeed comparably high level of confidentiality of ‘traditional’ investor-State arbitration can be traced back, at least in part, to commercial arbitration from which many rules and concepts were borrowed.

This study maps the progress made in this particular field and shows how far the new generation of FTAs, represented by CETA and EUVFTA, have dissociated from its ‘traditional’ roots. For this purpose the study distinguishes the terms ‘transparency’, i.e. the ability to access documents or hearings, and the term ‘public access’, i.e. the ability to intervene as third party through so-called *amicus curiae* briefs and comparable means.

In general, all FTAs have yielded, at least in part, to the criticism of a lack of transparency and public access in ‘traditional’ investor-State arbitration. All three FTAs exhibit a noticeably enhanced level of transparency and public access thus far unknown to ‘traditional’ investor-State arbitration, in some aspects even surpassing the standards of the CJEU (and of domestic courts). In terms of drafting approach, while EUSFTA regulates transparency and public access by virtue of its own set of rules, CETA and EUVFTA make reference to and modify the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration²⁶.

Looking at transparency, in essence, *all* FTAs provide for extensive duties to publish documents related to the dispute such as the submission of a claim, pleadings and memorials, transcripts of hearings (if any), as well as awards and decisions. Beyond that, even documents not listed can be made publicly available at the discretion of the tribunal. The boundary for public access to documents is drawn by all FTAs especially where national security or sphere of privacy issues are at stake. In these cases, if the tribunal so decides, documents may be kept secret. With regard to dissemination of documents by the disputing parties themselves, the FTAs are more reticent: Only CETA indicates that case-related information may be published if required by the national law of the respondent State and to certain persons, such as government officials, involved in the proceedings. Neither EUSFTA nor EUVFTA expressly allows such publication. With regard to hearings of tribunal sessions, these are public under all FTAs. Also, judgements (and other decisions) are publicly available.

Turning to third party involvement, submissions of third parties with an interest in the outcome of the dispute (*amicus curiae*) are entitled to make submissions, albeit the respective tribunal has to allow them, which is a decision at its discretion.

Interestingly, the CJEU cannot keep up with this new level of transparency in all aspects. For instance, not all submissions of the parties are published, only the names of the main parties, a summary of the pleas in law and the main supporting arguments. Also, access to court files is limited. By contrast, the ECtHR entertains an extremely liberal transparency policy. It makes *all* documents deposited with its

²⁶ 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 31 May 2017).

registrar publicly accessible. Hearings of both courts are open to the public, but not the deliberations of the chambers. Judgements (and other decisions) are generally read in open court and published.

Remarkably, third party submissions are not allowed at the CJEU. The ECtHR on the other hand allows such submissions although not expressly provided for its rules of procedure. For further details see below at 4.6 (p. 118).

1.9 Preventing frivolous claims

The prevention of frivolous claims – although no major issue on a global scale – serves the purpose of a resource-efficient and speedy resolution of a dispute.

To achieve these goals, a clear-cut definition of ‘frivolous claims’ would be desirable but is not simple to achieve. As a starting point, claims brought in bad faith merely to harass a respondent, mostly with the intention of gaining a better bargaining position and as a strategic device, can most possibly be referred to as ‘frivolous’. The FTAs under comparison in this study are, to some extent, inspired by the ‘traditional’ approach to investor-State arbitration. In this way they continue the known deficiencies thereof:

Frivolous claims are often divided into such ‘manifestly without legal merit’ and such ‘unfounded as a matter of law’. This dichotomy is accommodated in the three FTAs as well. However, none of the FTAs clarifies the term ‘manifestly without legal merit’. Hence, for now, its interpretation will be left to arbitral practice, which will probably find its inspiration in awards rendered pursuant to comparable rules on frivolous claims in the ICSID Rules of Procedure for Arbitration Proceedings²⁷. What concerns claims ‘unfounded as a matter of law’, these are claims, or any part thereof, for which an award in favour of the claimant may not be made, even if the facts alleged were assumed to be true. Here again, a further clarification would have been useful. As long as the precise conditions for the individual application of the two provisions remain somewhat blurry, a clear(er)-cut distinction of both might prove difficult. Procedurally, both cases are treated in the same way, i.e. the respondent may raise an objection within a certain time limit and the tribunal has to decide on the objection. It should be noted that only in the case of EUVFTA, however, the tribunal is held to render its decision with regard to the objection within a certain time limit.

Another ‘carry-on’ from ‘traditional’ investor-State arbitration that can be found in all three FTAs is that the submission of any such objection presupposes the installation of a fully working ad hoc tribunal. Thus, while these clauses might provide useful tools and powers for arbitrators to dismiss frivolous claims, due to a certain degree of vagueness, much of the provisions’ effectiveness also depends on the incentives of the tribunal members to eliminate frivolous claims as early as possible in arbitration proceedings. As a means in itself, these provisions do not restrict the access to investment arbitration.

In general, the CJEU is not overly prone to frivolous claims: Firstly, the CJEU remedies under examination in this study do not directly result in a judgement awarding monetary compensation. This alone should somewhat de-incentivise potential frivolous claimants in that respect. Secondly, the CJEU’s rules of procedure contain a number of admissibility criteria eliminating frivolous claims at an early stage of proceedings. In addition, the CJEU de-incentivises frivolous claims by denying legal aid or laying the burden of cost on the claimant.

At the ECtHR, individual applications incompatible with the ECHR (or protocols thereto), manifestly ill-founded applications or such applications constituting an abuse of the right of application may be

²⁷ Available at <https://icsid.worldbank.org/en/Documents/icsiddocs/ICSID%20Convention%20English.pdf> (visited 31 May 2017), pp. 99 et seqq.

quashed and be declared inadmissible. The ECtHR has developed an impressive body of case law on these categories for dismissal but in their application can be said to be torn between the huge numbers of applications and the aspiration to provide material justice in all of these cases. For further details see below at 4.7 (p. 135).

1.10 Remedies

If an arbitral tribunal established that the host State violated a substantive investment protection standard contained in a FTA, such as fair and equitable treatment and others, then the question arises in which way this wrong will be remedied. Traditionally, investor-State arbitration has most commonly resorted to (*pecuniary*) compensation whereas, on principle, the primary remedy in public international law (and in many developed domestic administrative law systems) is reparation by way of *restitution*. Restitution could take the form of an order to repeal a challenged act or law or in rare instances even the restitution of property. Compensation or simply ‘damages’ on the other hand typically take the form of a cash payment.

All three FTAs under examination in this study provide for *pecuniary damages* and, under certain conditions, restitution of property. *Punitive damages*, i.e. such damages not compensating an actual loss on the investor’s side but rather serving the purpose of sanctioning the respondent State’s behaviour and de-incentivising comparable behaviour in the future, are expressly *forbidden* in all three FTAs. Also and importantly, an annulment of (or order to annul) any wrongful act of a respondent State is not a permissible remedy. CETA, EUVFTA, and EUSFTA are, thus, very much in line with the ‘traditional’ approach in investor-State arbitration with regard to remedies.

The remedies awarded by CJEU which are within the scope of this study are very different from the remedies under the three FTAs. Essentially, they do not directly provide for (pecuniary) compensation: Firstly, the judgement rendered at the end of the preliminary reference procedure concerns the interpretation (or validity) of EU law. An *interpretation* has a binding effect on the parties in dispute before the Member State’s court which referred the case to the CJEU. A decision on validity declares the contested EU act void with an effect *erga omnes*. The actual remedies available to a claimant, however, depend on the case pending before the Member State’s court, which typically range from annulment of an act or even law to pecuniary compensation. In developed administrative law systems priority is given to restitution *in rem*. Secondly, a successful direct action (for annulment) leads to a decision declaring the contested act of an EU institution void; a concept common to developed domestic administrative law systems but alien to investor-State arbitration, irrespectively of whether following a ‘traditional’ or ‘reformed’ approach.

The ECtHR’s judgements, if they find that there has been a violation of the ECHR (or its protocols), *declare* that the contested act of the State is in violation of the ECHR, without voiding it. Such violating act can be of legislative, judicial or executive nature. In any case, the State has to abide by the judgement and strive to end the violation, albeit by means of its choice. The process of implementation of the judgement is monitored. However, in effect, the enforcement of judgements hinges on voluntary compliance of the State and the pressure of other governments and civil society. This shows that the question of remedies is closely related to the question of enforcement: Pecuniary damages are somewhat easier to enforce than restitution *in rem* – if need be even against assets outside the concerned State’s jurisdiction. For further details see below at 4.8 (p. 144).

1.11 Costs

The costs of investor-State dispute settlement can reach significant amounts. For instance, costs for ICSID arbitrations currently average at around USD 11.5 million – a figure which, for the most part, comprises of fees and expenses for party representatives and expert witnesses, followed by costs for arbitrators and cost of the arbitration institution. In spite of the significant amounts, the ‘traditional’ investor-State arbitration regime, for instance under ICSID and UNCITRAL rules, has left the decision of how to allocate these costs among the disputing parties largely at the discretion of the tribunal, offering broad guidance at best. Thus, it does not come as a surprise that the practice of arbitral tribunals with regard to costs has been described as difficult to predict.

By contrast, the rules of procedure of international adjudicative bodies such as the CJEU or the ECtHR usually determine the recoverable costs, sometimes cap these costs, and establish a clearer and more predictable rule of how to distribute costs among the disputing parties. It should also be noted that the procedure, i.e. the work of the judges and the courts, is free of charge. Finally, another noteworthy feature of the CJEU and the ECtHR is legal aid, which can be granted to those unable to meet the costs of the proceedings.

Examining the three FTAs, it can be shown that the two ‘approaches’ explained in the preceding paragraphs have converged to a certain extent, i.e. with regard to CETA and EUVFTA whereas EUSFTA remains more faithful to the ‘traditional’ approach to cost distribution. This convergence is meaningful since the level and distribution of costs of arbitration determines the financial risk and thereby the accessibility especially for investors with limited financial means, for instance many SMEs.

All three FTAs establish the ‘loser pays all’ principle. That means that the unsuccessful party bears the recoverable costs or, in case of partial success, a proportionate share thereof. Just like the rules of procedure of the CJEU and the ECtHR, all three FTAs define closer which costs are recoverable. However, all agreements fail to address the special situation of SMEs and investors with comparably limited financial resources in a sufficient manner. With regard to this issue, CETA and EUVFTA at least task a treaty committee with the formulation of cost rules apt for the special situation and financial constraint of SMEs. The agreements also refrain from defining maximum recoverable costs. However, under EUVFTA, a treaty committee is expressly empowered to set such supplementary rules.

Albeit this reform is certainly not revolutionary, it can be seen as an advancement from the ‘traditional approach’. For further details see below at 4.9 (p. 152).

1.12 Enforcement

Where a final (i.e. non-appealable) award is rendered, its realisation is dependent on compliance and – in absence of such – enforcement. The enforceability of decisions is, thus, the litmus test for the substantive law underlying a decision.

Where annulment actions were unsuccessful, unavailable, or not pursued and the respondent State is unwilling to comply with the award, the claimant will seek enforcement, which has to be sought through domestic courts. The procedure before these courts will depend on the chosen arbitration rules. The two most common rules in this regard are to be found in the ICSID Convention and the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)²⁸. According to Artt. 53 and 54 of the ICSID Convention, arbitral awards shall be binding and must

²⁸ 330 U.N.T.S. 38.

be treated as if they were a final judgement of a court of any party to the ICSID Convention. Awards outside this regime are recognized and enforced in accordance with the New York Convention which allows for limited remedies against enforcement²⁹.

Following this rationale, all FTAs within the scope of this study – independently from the chosen set of arbitration rules governing the particular dispute – provide that an award issued by a tribunal is binding on the disputing parties in respect of the particular case.

EUSFTA, CETA, and EUVFTA attempt to secure the enforceability of a final award rendered on their basis in third countries.

Turning to the CJEU, the remedies within the scope of this study do not require enforcement. What concerns the enforcement of ECtHR decisions, in practice enforcement is reliant on a complex interplay of voluntary compliance of the State, peer and civil society pressure and the Committee of Ministers, which supervises the implementation of judgements and may – in collaboration with the ECtHR – consider measures to be taken against the non-compliant State. For further details see below at 4.10 (p. 163).

1.13 Challenge and appeals (overview)

Allowing for a challenge or appeal of a decision always involves a trade-off: The finality of judgement in general and the permanent legal certainty (*Rechtsfrieden*) associated therewith is ‘postponed’ in favour of correcting an erroneous decision and, thus, serving ‘material justice’. With the introduction of an appeals mechanism in CETA and EUVFTA, the treaty parties break with the ‘ancient’ investor-State arbitration regime, which traditionally restricted challenges of awards to annulment or to setting aside proceedings. The latter can only lead to the invalidation of an individual decision or refusal of its enforcement on very narrow grounds. The new regulatory approach allowing for correction of errors in law (and sometimes also in fact) by the first instance aims at addressing one of the main criticisms in respect of the ‘traditional’ investor-State arbitration system: The unpredictability of its outcomes coupled with one-sided emphasis on the finality of its decisions.

Of the three ideas discussed to remedy these and other flaws of ‘traditional’ investor-State arbitration, the treaty parties resorted to a compromise between an ad hoc appellate tribunal, a permanent appellate mechanism (for one particular agreement), and a permanent appellate mechanism for numerous (or possibly all) BITs and comprehensive FTAs. The compromise was struck by providing for ad hoc appellate tribunals in CETA and EUVFTA and by kicking off political processes to move on to the other options mentioned below at 1.14 (p. 22).

The institutional issues, such as the roster of arbitrators, distribution of cases, qualification, remuneration etc., to be addressed in respect of the appellate tribunals in CETA and EUVFTA are substantially the same as for the tribunal ‘of first instance’.

Comparing these significant changes to the ‘traditional’ approach to investor-State arbitration to what can already be found at the CJEU and the ECtHR, it should be noted that the ECtHR does not have a formal appellate mechanism and only allows revision of judgements on the basis of new, decisive facts unknown to the ECtHR at the time of the judgement. This leaves the CJEU, consisting, *inter alia*, of the General Court and the Court of Justice, as object of comparison. The General Court’s judgements are, on principle, subject to review by the Court of Justice. For further details see below at 4.11 (p. 172).

²⁹ 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 8 May 2017).

1.14 Conclusions and outlook: Of cosmetic changes, modifications to the 'ancient regime', and 'new systems'

In conclusion, the analysis shows that the European International Investment Policy in general and the examined FTAs specifically strike out in new directions, most prominently in regard to CETA and EUVFTA. At the same time, CETA and EUVFTA stop short of establishing permanent (appellate) courts for the settlement of investment disputes.

The new regulatory approach to investor-State dispute settlement which can be found in CETA and EUVFTA does not always match with the ambitious language of reform employed by the European Commission to celebrate the negotiation outcomes. However, the 'glass of reform' seems to be half full-rather than half-empty.

Thus, as of now, all agreements in essence are (still) formally committed to the 'traditional' model of investor-State dispute settlement by the way of arbitration. However, they modify it to a larger (CETA, EUVFTA) or lesser (EUSFTA) extent. All FTAs continue to use ad hoc tribunals and remain suspicious towards domestic courts. At the same time, the introduction of government-only selected adjudicators, the randomised distribution of cases, the dramatic increase in transparency and public access, and the establishment of an appeals mechanism in CETA and EUVFTA can be laid to the credit of Europe's efforts to reform the 'ancient system'. Supplemented by further, though less grave changes, such as the 'proceduralisation' of the consultation process, the rules on allocation of costs, and the attempts to avoid parallel proceedings, the 'big picture' of reform takes shape, which is one – as said earlier – of evolution rather than revolution.

Furthermore, the current state of play will possibly not be the end of Europe's reform efforts. The European Commission has articulated its mid- and long-term goals and further steps towards consolidation and reform of the 'traditional' investor-State arbitration system can be expected. While the establishment of a (permanent) multilateral investment court of some sort will likely prove to be a long-term struggle, another issue could be addressed more readily: i.e. the specific situation and constraints of SMEs active in international (trade and) investment. In fact, the three FTAs under comparison are largely blind to the real world heterogeneity of firms. It may well be that especially SMEs do not benefit from the present investor-State dispute settlement mechanism in these FTAs in the same way as larger corporations do. For further details see below at 4.12 (p. 198).

2. Introduction

On 30 October 2016, the Comprehensive Economic and Trade Agreement (CETA) between the European Union (EU) and its Member States, of the one part, and Canada, of the other part was finally signed³⁰. The decision³¹ to provisionally apply part of the agreement – though not the bulk of substantive rules on investment protection and not the rules governing investment disputes between investors and States³² – draws a preliminary line under the recent debates on reforming the international investment law regime³³. It is likely to be some time before all treaty parties will have ratified the agreement and it can finally enter into force. In the meanwhile, the EU, its Member States, and Canada do not stand idle. They have just embarked on a political mission: i.e. creating consensus for the establishment of a ‘multilateral investment court’³⁴. This mission is not without ambition recalling the failure to create such institution through the OECD-led Multilateral Agreement on Investment (MAI) between 1994 and 1998, which failed due to disagreement of developed States on market access questions and the resistance of developing states and non-governmental organisations³⁵. Similar efforts to pursue a multilateral agreement on investment under the auspices of the WTO share the deadlock affecting the negotiations of the 2001 Doha Declaration’s³⁶ work programme which lead authors to the conclusion that ‘a comprehensive WTO investment agreement appears to be impossible to a large extent’³⁷. Hence, now is an ideal moment not just to look back and take stock of the progress made in the EU’s effort³⁸ to bring about a reform of the international investment law regime³⁹, but also to look to the future. By outlining some key features of the procedural frameworks governing two long-standing and successfully operating international courts some ‘tried and tested’ inspiration for the possible design

³⁰ OJ L 11, 14 January 2017, pp. 23–1079; see additionally the ‘Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States’, OJ L 11, 14 January 2017, pp. 3–8.

³¹ Cf. ‘Council Decision (EU) 2017/38 of 28 October 2016 on the provisional application of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part’, OJ L 11, 14 January 2017, p. 1080–1081. The provisions on investor-State dispute settlement are not provisionally applied.

³² With regard to Chapter Eight (Investment Protection), only Artt. 8.1 (Definitions), 8.2 (Scope), 8.3 (Relation to other chapters), 8.4 (Market access), 8.5 (Performance requirements), 8.6 (National treatment), 8.7 (Most-favoured-nation treatment), 8.8 (Senior management and boards of directors), 8.13 (Transfers), 8.15 with the exception of paragraph 3 thereof (Reservations and Exceptions), and Art. 8.16 (Denial of benefits) shall apply provisionally, *ibid.*, Art. 1 (a).

³³ Cf. S. Hindelang, Repellent Forces: The CJEU and Investor-State Dispute Settlement, *Archiv des Völkerrechts* Vol. 53 (2015), No. 1, pp. 68–89; S. Hindelang and S. Wernicke, Realpolitik statt Pseudo-Revolution: Aktuelle Reformvorschläge im Investitionsschutzrecht, *Europäische Zeitschrift für Wirtschaftsrecht* (2015), pp. 809–810.

³⁴ Cf. Point 6 lit. i) of the ‘Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States’, OJ L 11, 14 January 2017, pp. 3–8; see the consultation of the Commission ‘Questionnaire on options for a multilateral reform of investment dispute resolution’, available at http://trade.ec.europa.eu/consultations/index.cfm?consul_id=233 (visited 8 May 2017); both the EU and Canada have started to endorse the idea of a multilateral investment court in such fora as, for instance, the World Economic Forum in Davos, Switzerland, OECD-hosted Investment-Treaty Dialogue in Paris, France, or UNCTAD’s World Investment Forum in Nairobi, Kenya, see in detail <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608> (visited 8 May 2017).

³⁵ C. Brown, International Investment Agreements – History, Approaches, Schools, in: M. Bungenberg et al., *International Investment Law*, C.H. Beck, Hart Publishing, Nomos, Munich, Oxford and Baden-Baden, 2015, pp. 181–182 (para 70).

³⁶ Ministerial Declaration of 20 November 2001, WT/MIN(01)/DEC/1; available at https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm (visited 9 May 2017); on investment cf. paras 20–22.

³⁷ S. Wolf, The Regulation of Foreign Direct Investment under Selected WTO Agreements – Is there still a Case for a Multilateral Agreement on Investment, in: C. Tietje (ed.), *International Investment, Protection and Arbitration*, BWV, Berlin, 2008, p. 73.

³⁸ Commission, Communication ‘Towards a comprehensive European international investment policy’ of 7 July 2010, available at http://trade.ec.europa.eu/doclib/docs/2010/july/tradoc_146307.pdf (visited 8 May 2017).

³⁹ On Reform generally 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, 2016, pp. 377–397.

of a ‘multilateral investment court’ might be found. It is this Janus-faced task to which this study provides a contribution in describing, systematizing, and juxtaposing key procedural concepts and mechanisms governing the process of administering justice by five dispute settlement bodies, i.e. the tribunals to be established on the basis of the 2014 EU-Singapore Free Trade Agreement (EUSFTA)⁴⁰, the 2016 CETA⁴¹, and the agreed draft EU-Vietnam Free Trade Agreement of January 2016 (EUVFTA)⁴², as well as the Court of Justice of the European Union⁴³ (CJEU) and the European Court of Human Rights⁴⁴ (ECtHR).

The following analysis of the abovementioned procedural frameworks is divided into 11 parts. It will proceed roughly in the same order key procedural concepts and mechanisms appear in the three free trade agreements (FTAs) under comparison. They (still) follow by and large the typical cause of a ‘traditional’ investor-State arbitration. However, in terms of substance, they modify this cause significantly. One key characteristic which has not changed though is that all tribunals derive their authority from ‘consent’ between the disputing parties, i.e. they are all still *arbitration*⁴⁵. This puts them in contrast to the CJEU and the ECtHR which entertain *litigation* and *adjudication* by nature. Their authority rests on an act of *foundational submission* to their jurisdiction which is created by the *exercise* of sovereign powers (to adjudicate) vested in the State⁴⁶. This rather fundamental difference explains also that not all key procedural concepts and mechanisms which can be found in the procedural rules of the tribunals

⁴⁰ EUSFTA investment chapter as of May 2015, available at <http://trade.ec.europa.eu/doclib/html/152844.htm> (visited 8 May 2017). In the following, unless another Chapter is specifically mentioned, all Articles referred to from EUSFTA belong to Chapter 9 (‘Investment Protection’). It should be noted that the CoJ delivered its opinion in a procedure pursuant to Art. 218 (11) TFEU with regard to questions of competence for the conclusion of EUSFTA on 16 May 2017 (below 3.1 (p. 28); Opinion of 16 March 2017 in Opinion Procedure 2/15 [2017] ECLI:EU:C:2017:376; Court of Justice of the European Union, Press Release No. 52/17; available at https://curia.europa.eu/jcms/jcms/p1_350692/en/ (visited 22 May 2017)) (on possible consequences on the opinion see D. Kleimann and G. Kübek, The Signing, Provisional Application, and Conclusion of Trade and Investment Agreements in the EU. The Case of CETA and Opinion 2/15, Robert Schuman Centre for Advanced Studies Research Paper No. RSCAS 2016/58 (2016); available at SSRN: <https://ssrn.com/abstract=2869873> (visited 10 May 2017)).

⁴¹ OJ L 11, 14 January 2017, pp. 23–1079; available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2017.011.01.0023.01.ENG (8 May 8, 2017).

⁴² Available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437> (visited 8 May 2017; please note that the text is subject to legal review and the numbering may change). In the following, unless another Chapter is specifically mentioned, all Articles referred to from EUVFTA belong to its Chapter 8 (‘Trade in Services, Investment and E-Commerce’; according to the chapter numbering on <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437>), therein Chapter II (‘Investment’; please note that said Chapter 8 is divided into further Chapters I to VII, see <http://trade.ec.europa.eu/doclib/html/154210.htm>); for the sake of clarity, please also note that Chapter II is further divided into sections and that the dispute settlement provisions referred to in this study (unless specifically indicated otherwise) are contained in Section 3 (‘Resolution of Investment Disputes’). For example, ‘Art. 3 EUVFTA’ refers to Chapter 8, Chapter II, Section 3, Art. 3 EUVFTA.

⁴³ Art. 19 TFEU, Artt. 251 et seqq.; Protocol No. 3 on the Statute of the Court of Justice of the European Union, annexed to the Treaties, as amended by Regulation (EU, Euratom) No. 741/2012 of the European Parliament and of the Council of 11 August 2012 (OJ L 228, 23 August 2012, p. 1), by Article 9 of the Act concerning the conditions of accession to the European Union of the Republic of Croatia and the adjustments to the Treaty on European Union, the Treaty on the Functioning of the European Union and the Treaty establishing the European Atomic Energy Community (OJ L 112, 24 April 2012, p. 21), by Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council of 16 December 2015 (OJ L 341, 24 December 2015, p. 14) and by Regulation (EU, Euratom) 2016/1192 of the European Parliament and of the Council of 6 July 2016 on the transfer to the General Court of jurisdiction at first instance in disputes between the European Union and its servants (OJ L 200, 26 July 2016, p. 137) (CJEU Statute); Rules of Procedure of the Court of Justice of 25 September 2012 (OJ L 265, 29 September 2012), as amended on 18 June 2013 (OJ L 173, 26 June 2013, p. 65) and on 19 July 2016 (OJ L 217, 12 August 2016, p. 69) (RP CoJ); Rules of Procedure of the General Court of 4 March 2015 (OJ 2015 L 105, 23 April 2015, p. 1) as amended on 13 July 2016 (OJ 2016 L 217, 12 August 2016, p. 71), 13 July 2016 (OJ 2016 L 217, 12 August 2016, p. 72), and 13 July 2016 (OJ 2016 L 217, 12 August 2016, p. 73) (RP GC).

⁴⁴ 213 U.N.T.S. 222, entered into force Sept. 3, 1953, as amended from time to time by numerous Protocols; available at http://www.echr.coe.int/Documents/Convention_ENG.pdf (visited 5 May 2017); Rules of Court of 14 November 2016; available at http://www.echr.coe.int/Documents/Rules_Court_ENG.pdf (visited 8 May 2017).

⁴⁵ In this sense, by allowing for arbitration a State waives or renounces to exercise its sovereign power to adjudicate a dispute in its territory.

⁴⁶ Cf. Y. Shany, Jurisdiction and Admissibility, in: C. Romano, K. Alter, and Y. Shany (eds.), *The Oxford Handbook of International Adjudication*, Oxford University Press, Oxford, 2014, p. 782.

also exist in the respective rule sets of the two courts under comparison; this study was looking for functional equivalents instead.

'Formal' investor-State arbitral proceedings are usually preceded by a phase during which the disputing parties attempt to amicably settle the case (below 4.1 (p. 32)). After such attempt has failed, the claimant investor might decide to submit a claim for settlement under any of the available arbitration rules (below 4.2 (p. 48)). Occasionally, however, the claimant has to bring the case before another forum first before approaching the respective tribunal (below 4.3 (p. 74)). The tribunal is operational once the arbitrators are appointed (below 4.4 (p. 84)). 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 (below 4.5 (p. 105)). Documents produced by the court or submitted by the parties may become of public interest or the public may seek access to the proceedings (below 4.6 (p. 118)). At an early stage of the proceedings, a claim might be dismissed due to its legal or factual shortcomings (below 4.7 (p. 135)). At the end of proceedings, a tribunal may typically issue an award on the merits which, on principle, may provide for a variety types of remedies, applied jointly or exclusively (below 4.8(p. 144)). The tribunal will also have to decide on the costs of the proceedings (below 4.9 (p. 152)). Eventually, certain rules assure that the award rendered can also be enforced (below 4.10 (p. 163)). While 'traditional' investor-State arbitration rests on the idea of 'finality', i.e. awards – even erroneous ones – can hardly be challenged, two of the three FTAs under comparison deviate from this concept by providing for an appellate mechanism (below 4.11 (p. 172)).

After having analysed the different procedural mechanisms and concepts and on the basis of the summary of findings the study will conclude by providing some initial observations on the progress of the EU's treaty practice in the area of investor-State dispute settlement as well as an outlook on the making of a 'multilateral investment court' (below 4.12 (p. 198)).

As this study aims at highlighting commonalities among the key procedural concepts and mechanisms and pointing out differences between the regulatory approaches taken, at the end of each chapter a table presenting the key passages from the procedural frameworks covered in this study can be found. The passages shown in bold are considered particularly significant in order to grasp the basic ideas 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, comparable conceptual ideas or similar regulatory approaches found in the different procedural frameworks are highlighted in the same colour.

This study builds on, updates, and, to some degree, also continues previous work conducted for the European Parliament. In 2015, *Hindelang* and *Sassenrath* authored a study under the title 'The Investment Chapters in EU's International Trade and Investment Agreements in a Comparative Perspective'⁴⁷. This study examined five investment agreements: i.e. the investment chapters of the 2014 CETA-draft text⁴⁸ and of the 2014 EUSFTA-text⁴⁹, the 1998 Energy Charter Treaty (ECT)⁵⁰, the 2001 Treaty between the Government of the United States of America and the Government of the Republic of Lithuania for

⁴⁷ S. Hindelang, and C. P. Sassenrath, *The Investment Chapters of the EU's International Trade and Investment Agreements in a Comparative Perspective*, European Union, Belgium, 2015; available at [http://www.europarl.europa.eu/Reg-DATA/etudes/STUD/2015/534998/EXPO_STU\(2015\)534998_EN.pdf](http://www.europarl.europa.eu/Reg-DATA/etudes/STUD/2015/534998/EXPO_STU(2015)534998_EN.pdf) (visited 4 May 2017).

⁴⁸ Consolidated CETA Text, published on 26 September 2014, available at http://trade.ec.europa.eu/doclib/docs/2014/sep-tember/tradoc_152806.pdf (visited 4 May 2017).

⁴⁹ EUSFTA investment chapter as of October 2014 (Note that the numbering of the Articles has changed during legal revision), available at http://trade.ec.europa.eu/doclib/docs/2014/october/tradoc_152844.pdf (visited 8 May 2017).

⁵⁰ ECT signed 17 December 1991, entered into force April 1998, available at <http://www.energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/> (visited 4 May 2017).

the Encouragement and Reciprocal Protection of Investment (USA-Lithuania BIT)⁵¹, 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)⁵².

The study at hand brings an update on CETA's procedural framework, significantly altered during the process of so-called 'legal scrubbing'. It, furthermore, adds the investor-State arbitration rules found in EUVFTA to the analysis, and contrasts them with the procedural framework governing adjudication in the CJEU and the ECtHR. EUSFTA serves as a reminder of the (more) 'traditional' regulatory approach to investor-State arbitration.

Building on the 2015 study 'The Investment Chapters in EU's International Trade and Investment Agreements in a Comparative Perspective' also brings along some of its limits:

Firstly, the wording of each procedural framework – 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 procedural frameworks mentioned above. Predicting future trends and developments in the broader field of international investment law on the basis of these procedural frameworks would not only be methodologically challenging but also lie beyond the scope of this study. However, what can be observed is that these procedural frameworks are not negotiated in splendid isolation, but substantive (as well as procedural) standards diffuse from one agreement to another⁵³. Hence, the procedural concepts and mechanisms can well function as a source of inspiration for law makers.

Secondly, the task of interpreting and evaluating investor-State arbitration mechanisms in EUSFTA, CETA, and EUVFTA is (further) complicated and necessarily speculative to some degree as there exists no practical experience with the operation of *these* mechanisms. Arbitral practice based on *other*, similarly worded agreements is only of very limited value as in accordance with the Vienna rules on treaty interpretation⁵⁴, each treaty must be interpreted on its own merits. This study does 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. 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 on treaty interpretation, the tribunals would free themselves from the boundaries set by their creators: The State parties to an investment treaty. Moreover, even if there

⁵¹ 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 8 May 2017); 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 4 May 2017), which did not change the treaty in a way relevant to this comparison.

⁵² Germany-Jordan BIT signed 13 November 2007, entered into force 28 August 2010, available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1347> (visited 4 May 2017).

⁵³ S. Hindelang and S. Clarkson, The Intersection of Parallel Lines: How Foreign-Investment Protection Affects Regional Social-Justice Policy, in: A. Bianculli and A. Hoffmann (eds.), *Regional Organizations and Social Policy in Europe and Latin America: A Space for Social Citizenship?*, Palgrave Macmillan, Houndsmills, 2016, pp. 25-45.

⁵⁴ Cf. Art. 31 Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331.

is practice with regard to a specific treaty, due to the ad hoc nature of investment arbitration, consistency of interpretation is overall limited⁵⁵.

Thirdly, the compared three FTAs and adjudication bodies are owed to the mandate of the study. In the same vein, the study's rather broad object of study – juxtaposing five procedural frameworks – and its space constraints according to its mandate inevitably require 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.

Fourth, *substantive standards* of protection are also beyond the scope of this study. However, the EU's regulatory approach in this respect also evolved; essentially by emphasizing a government's so-called 'right to regulate' even more strongly⁵⁶. The respective passage in the 2016 'Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States' may serve as a case in point worth to be reproduced here:

*'CETA preserves the ability of the European Union and its Member States and Canada to adopt and apply their own laws and regulations that regulate economic activity in the public interest, to achieve legitimate public policy objectives such as the protection and promotion of public health, social services, public education, safety, the environment, public morals, social or consumer protection, privacy and data protection and the promotion and protection of cultural diversity. [...] CETA includes modern rules on investment that preserve the right of governments to regulate in the public interest including when such regulations affect a foreign investment, while ensuring a high level of protection for investments and providing for fair and transparent dispute resolution. CETA will not result in foreign investors being treated more favourably than domestic investors. [...] CETA clarifies that governments may change their laws, regardless of whether this may negatively affect an investment or investor's expectations of profits. [...] CETA includes clearly defined investment protection standards, including on fair and equitable treatment and expropriation and provides clear guidance to dispute resolution Tribunals on how these standards should be applied.'*⁵⁷

It remains to be seen whether CETA will meet these ambitious goals in practice without unduly compromising a meaningful protection of private property abroad. In any event, 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 them⁵⁸.

⁵⁵ 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 7 May 2017), pp. 66 et seqq.

⁵⁶ On the issue see further C. Titi, *Embedded Liberalism and IIAs: The Future of the Right to Regulate, with Reflections on WTO Law*, in: G. Moon and L. Toohey, (eds), *20 Years of Domestic Policy Under WTO Law: The Embedded Liberalism Compromise Revisited*, Cambridge University Press, 2017 (forthcoming); available at SSRN: <https://ssrn.com/abstract=2865840> (visited 9 May 2017); Dickson-Smith, K. D., *Does the European Union Have New Clothes?: Understanding the EU's New Investment Treaty Model*, *Journal of World Investment & Trade* Vol. 17, No. 5, pp. 773–822 (2016); available at SSRN: <https://ssrn.com/abstract=2859412> (visited 9 May 2017).

⁵⁷ 'Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States', OJ L 11, 14 January 2017, pp. 3-8.

⁵⁸ 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 7 May 2017), p. 42.

3. Preliminary remarks

3.1 Investor-State Dispute Settlement (ISDS) mechanisms in public international, supranational, and domestic law

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. In this study, it is used *in a very broad fashion* to describe any dispute settlement mechanism between a foreign investor and its host State. ISDS mechanisms can, thus, be found in public international law, supranational law, and domestic law.

In public international law, the ‘traditional’ remedy investors resort to when a host State allegedly encroached upon his investment is *investor-State arbitration* (below 4.2.2 (p. 51)). This dispute settlement mechanism is typically provided for in international investment treaties and, increasingly, also in (comprehensive) FTAs such as EUSFTA, CETA, and EUVFTA.⁵⁹ Another remedy available in public international law is an application to the ECtHR alleging a violation of, for example, Art. 1 of Protocol No. 1 of the ECHR which guarantees the right to property (below 3.3 (p. 30)). Last but not least, when individual rights guaranteed by EU law are inflicted with different remedies before the CJEU are available (below 3.3 (p. 30)).

3.2 Investment protection agreements: ‘substantive standards’ and their enforcement by means of ‘investor-State arbitration’

International investment (protection) agreements 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

⁵⁹ On a side note, the CoJ has recently examined EUSFTA in an opinion pursuant to Art. 218 (11) TFEU and found that the competence (cf. Art. 207 TFEU among others) for the conclusion of international agreements containing (*inter alia*) the type of investor-State arbitration clause found in the said agreement is generally of shared nature between the EU and its Member States [Opinion of 16 March 2017 in Opinion Procedure 2/15 [2017] ECLI:EU:C:2017:376, paras 290 et seqq., see also paras 78 et seqq., 225 et seqq., 305 (omissions and additions in square brackets and emphasis added by the authors)]. The CoJ stated: ‘[T]he Court has the task of ruling on the nature of the competence to establish such a dispute settlement regime. In that regard, whilst it is true that, as is clear from Article 9.17 [EUSFTA], the envisaged agreement does not rule out the possibility of a dispute between a Singapore investor and a Member State being brought before the courts of that Member State, the fact remains that *that is merely a possibility in the discretion of the claimant investor*. The claimant investor may indeed decide, pursuant to Article 9.16 [EUSFTA], to submit the dispute to arbitration, without that Member State being able to oppose this, as its consent in this regard is deemed to be obtained under Article 9.16.2 [EUSFTA]. Such *a regime, which removes disputes from the jurisdiction of the courts of the Member States, cannot be of a purely ancillary nature* [...] and cannot, therefore, be established without the Member States’ consent. It follows that approval of Section B of Chapter 9 of the [EUSFTA] falls not within the exclusive competence of the European Union, but within a competence shared between the European Union and the Member States.’ [Emphasis added by the authors] This opinion possibly strengthens the position of the Member States (and, if domestic law so requires, even regional entities thereof, as evidenced by the so-called ‘Wallonian CETA-drama’ [cf. D. Kleimann and G. Kübek, *The Signing, Provisional Application, and Conclusion of Trade and Investment Agreements in the EU. The Case of CETA and Opinion 2/15*, Robert Schuman Centre for Advanced Studies Research Paper No. RSCAS 2016/58 (2016); available at SSRN: <https://ssrn.com/abstract=2869873> (visited 10 May 2017), p. 2.], and will have an impact on the negotiation of future FTAs by the Commission if it wants to stick to the design of the relationship of domestic remedies and ISDS found in EUSFTA. See also below 4.3 (p. 70).

host State)⁶⁰. 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 1959⁶¹, 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 mutual obligations of State parties 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*’).

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, to supranational law such as of the EU, as well as to guarantees contained in domestic law, in particular in constitutions. Investment agreements are intended to fill in protection gaps and, together with the procedural rules in investment agreements, overcome enforcement problems sometimes more and sometimes less manifest in the legal regimes referred to above⁶².

Substantive standards in investment agreements can be enforced by taking recourse to the procedures typically prescribed in the investment agreement itself. The procedural clauses open up access to an *investor-State arbitration* mechanism which is characterised by the distinctive feature that individuals, i.e. investors, can enforce substantive standards independently from their home State on the international plane, i.e. in public international law.

Investor-State arbitration 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 instrument⁶³, 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 incompatible 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 of executive, legislative or judicial nature. Usually, three ad hoc arbitrators – two party-appointed, the third appointed in consensus or, in lieu thereof, by a third person – preside over 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 traditionally not provided for. However, recently, some

⁶⁰ 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.

⁶¹ Germany-Pakistan BIT of 1959, available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1387> (visited 7 May 2017).

⁶² 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 7 May 2017).

⁶³ 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.

agreements such as CETA and EUVFTA, institute an appeals tribunal. At the same time, recently negotiated agreements by the EU call for the establishment of a multilateral investment court of some sort which shall eventually replace investor-State arbitration.

3.3 The CJEU and the ECtHR

The CJEU (and the ECtHR) are permanent courts not specifically concerned with investment disputes. The CJEU 'shall ensure that in the interpretation and application of the [EU] Treaties [and the rules enacted on their basis] the law is observed'⁶⁴, cf. Art. 19 (1) TFEU. The CJEU is, thus, mandated to guarantee the uniform interpretation and equal application of EU law throughout the Union by authoritatively determining its content and meaning and controlling its lawful application. There are several actions available at the CJEU. Within the scope and mandate of this study, however, only access of individuals to the CJEU is of interest which reduces the number of actions essentially to two: i.e. the 'direct action' (cf. Art. 263 (4) TFEU) and – providing a rather indirect access – the 'preliminary reference procedure' (cf. Art. 267 TFEU)⁶⁵.

The ECtHR on the other hand is an international court created on the basis of Art. 19 of the ECHR. It is charged to rule on individual (or State) applications alleging violations of the civil and political rights contained in the ECHR and its Protocols. Since 1998, it is a full-time court and individuals can apply to it directly⁶⁶. The most important and for the purpose of this study only examined remedy in the ECHR-created legal order is the 'individual application' according to Art. 34 ECHR.

That being said, hardly surprising, neither the CJEU nor the ECtHR display the 'traditional' features and functions commonly attached to investment agreement- or free trade agreement-based investor-State arbitral tribunals. The courts' jurisdiction is not based on consent between the disputing parties but rests on the exercise of sovereign powers to adjudicate⁶⁷. This fundamental difference in nature affects the design of their procedural rules. For example, the disputing parties resorting to the dispute settlement mechanisms contained in the three FTAs under comparison here have a choice in regard to the set of procedural rules which, in addition to the FTAs themselves, govern their dispute. However, when it comes to the CJEU and the ECtHR, who is subject to their jurisdiction has to live with the single set of procedural rules provided for adjudication⁶⁸.

The substantial rules applied by the CJEU are the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) as well as secondary EU law such as regulations and directives (cf. Art. 288 TFEU) enacted by the EU institutions. What regards the protection of foreign investors and investments, in particular the fundamental freedoms (cf. esp. Artt. 49 et seqq., 63 et seqq. TFEU) and the general non-discrimination obligation (cf. 18 TFEU) together with the right to property in Art. 17 of the Charter of Fundamental Rights of the European Union (CFREU) grant comprehensive protection⁶⁹. The ECtHR – compared to the CJEU – exercises a narrower jurisdiction which is confined

⁶⁴ Square brackets added.

⁶⁵ The action for damages according to Art. 268 TFEU will be touched upon below 4.8.1 (p. 144).

⁶⁶ W. Schabas, *The European Convention on Human Rights*, Oxford University Press, Oxford, 2015, pp. 632-633.

⁶⁷ Y. Shany, *Jurisdiction and Admissibility*, in: C. Romano, K. Alter, and Y. Shany (eds.), *The Oxford Handbook of International Adjudication*, Oxford University Press, Oxford, 2014, p. 782.

⁶⁸ *In extenso* Knust Rassekh Afshar, M., *International Courts and Tribunals, Rules and Practice Directions* (ECJ, CFI, ECtHR, IACtHR, ICSID, ITLOS, WTO Panels and Appellate Body), in: R. Wolfrum, (ed.), *Max Planck Encyclopedia of Public International Law*, Oxford University Press, Oxford, 2008, opil.ouplaw.com/home/EPIL.

⁶⁹ Cf. in detail S. Hindelang, *Free Movement of Capital*, Oxford University Press, Oxford, 2009; Schill, *Der Schutz von Auslandsinvestitionen in Deutschland im Mehrebenensystem: deutsches, europäisches und internationales Recht*, Archiv des öffentlichen Rechts (2010), pp. 498, 522.

to the rights contained in the ECHR and its protocol. For the purpose of this study, Art. 1 of Protocol No. 1 of the ECHR is of particular importance as it guarantees the right to property. Due to its character as a fundamental right in public international law, the standard of protection is – at least compared to the recent substantive protection standards – a minimum guarantee only⁷⁰.

⁷⁰ A. Grgić, Z. Mataga, M. Longar and A. Vilfan, *The right to property under the European Convention on Human Rights, A guide to the implementation of the European Convention on Human Rights and its protocols*, Human rights handbooks, No. 10, available at <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007ff55> (visited 7 May 2017). Some commentators described the protection as 'deficient' compared to traditional investment protection instruments mainly for three reasons: indirect damages are, on principle, not protected; local remedies have to be exhausted, and there is the possibility of being awarded less compensation than suffered damages. Cf. U. Kriebaum, *Is the European Court of Human Rights an Alternative to Investor-State Arbitration?*, in P. M. Dupuy, E. U. Petersmann, and F. Francioni, (eds.), *Human Rights in International Investment Law and Arbitration*, Oxford University Press, Oxford 2009, pp. 228-244.

4. Investor-State Dispute Settlement (ISDS) Clauses

4.1 Amicable settlement of a dispute and consultation mechanisms

4.1.1 Objective and design of consultation mechanisms

With a view to avoid adversarial legal procedures yielding winners and losers, which also bear the potential to damage long-term relationships, such proceedings are usually preceded by an attempt to settle the dispute amicably⁷¹. This approach might spare costs and time usually incurred by formalised proceedings. Also, in comparison to adversarial legal procedures, a 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 process⁷².

Following this rationale, most investment agreements and (comprehensive) FTAs call for an amicable settlement of the dispute between investor and host State. The same holds true for the rules governing the procedure before international courts such as the CJEU and the ECtHR. 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 suggestion or best-effort obligation for an amicable settlement, typically taking place before the beginning of any formal dispute proceedings (but may also be initiated anytime during the procedure) (below 4.1.2.1 (p. 33)). Greater weight is accorded to such non-adversarial processes when 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 (below 4.1.2.1 (p. 33)). Going even further, the rules governing the dispute resolution can set out a formalised and structured consultation process (below 4.1.2.2 (p. 35)). 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 requirements⁷³. In this context, the term ‘consultations’ is often used⁷⁴ to signal a certain degree of ‘enhanced proceduralisation’ 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 and (comprehensive) FTAs may also provide for mediation and conciliation. The borders between the two latter concepts are somewhat blurred. Mediation commonly refers

⁷¹ 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-Forscherguppe on ‘The Transformative Power of Europe’ conference on ‘Dealing with Overlapping Regionalism: Complementary or Competitive Strategies?’, Freie Universität Berlin, 16 May 2014.

⁷² 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.

⁷³ 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.

⁷⁴ See the text passages highlighted in green in the table following this chapter.

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 issue⁷⁵. 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.

4.1.2 Comparison of EUSFTA, CETA, and EUVFTA; juxtaposition to the CJEU and the ECtHR

4.1.2.1 Informal consultation: call for amicable settlement

Generally, all three FTAs call upon the parties of a dispute to strive towards an amicable resolution. EUSFTA, EUVFTA, 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, for example, 30 per cent of all cases registered at ICSID are settled at some point during the proceedings through negotiations⁷⁶. It is worth noting that EUSFTA, CETA, and EUVFTA 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 investment arbitration 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-efforts 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.

The rules of procedure for the CJEU and the ECtHR also include provisions promoting amicable settlement⁷⁷, in the case of CJEU albeit in a far less inviting wording⁷⁸. Moreover, what concerns the CJEU, the amicable settlement mechanism does not apply to the two types of legal actions discussed in this study. The preliminary reference procedure pursuant to Art. 267 TFEU is not adversary. Rather, the interlocutory proceedings provide an avenue to seek answers on interpretation and validity of EU law⁷⁹. Hence, the only relevant place for an amicable settlement of a dispute would be before the domestic court referring a question for preliminary ruling to the CJEU. Regulating such settlement is a matter of the concerned Member State’s law⁸⁰. Furthermore, direct actions pursuant to Art. 263 TFEU⁸¹ are expressly exempted from amicable settlements (Art. 147 (2) Rules of Procedure of the Court of Justice (RP CoJ)⁸² and Art. 124 (2) Rules of Procedure of the General Court (RP GC)⁸³). The logic behind these rules may be said to be that no ‘compromise’ can be struck on the legality of an EU measure between the

⁷⁵ 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.

⁷⁶ J. Salacuse, *The Law of Investment Treaties*, Oxford University Press, Oxford, 2010, p. 364.

⁷⁷ Cf. Art. 39 ECHR

⁷⁸ Cf. Art. Art. 147 RP CoJ and Art. 124 RP GC imply the possibility in general, albeit not for proceedings under Art. 263 TFEU.

⁷⁹ B. Wägenbaur, *Court of Justice of the EU – Commentary on Statute and Rules of Procedure*, C.H. Beck, Hart Publishing and Nomos, Munich, Oxford and Baden-Baden 2013, Art. 147 RP ECJ, para 3.

⁸⁰ B. Wägenbaur, *Court of Justice of the EU – Commentary on Statute and Rules of Procedure*, C.H. Beck, Hart Publishing and Nomos, Munich, Oxford and Baden-Baden, 2013, Art. 147 RP ECJ, para 3.

⁸¹ Commonly also referred to as ‘action for annulment’.

⁸² Rules of Procedure of the Court of Justice of 25 September 2012 (OJ L 265, 29 September 2012), as amended on 18 June 2013 (OJ L 173, 26 June 2013, p. 65) and on 19 July 2016 (OJ L 217, 12 August 2016, p. 69).

⁸³ Rules of Procedure of the General Court of 4 March 2015 (OJ 2015 L 105, 23 April 2015, p. 1) as amended on 13 July 2016 (OJ 2016 L 217, 12 August 2016, p. 71), 13 July 2016 (OJ 2016 L 217, 12 August 2016, p. 72), and 13 July 2016 (OJ 2016 L 217, 12 August 2016, p. 73).

individual bringing the claim and the EU institution which enacted the challenged measure⁸⁴. Once a claim has been brought, it is the CJEU which ultimately decides on the legality of an EU measure, cf. Art. 19 (1) TEU.

The ECHR in Art. 39 makes direct reference to ‘friendly settlements’⁸⁵. Such settlements, concluded while an application is pending, are not possible without consent of the ECtHR, which bears responsibility for the appropriateness of the settlement⁸⁶. Importantly, there is no formal requirement to reach a settlement prior to the application. This is evidenced by the fact that the ECtHR gets involved in settlement negotiations only after an application has been declared admissible (Rule 62 (1) Rules of Court). Before that, the parties are invited to include in their observations any submissions concerning any proposals for a friendly settlement (Rule 54A (1) Rules of Court). Where a friendly settlement meeting the ECtHR’s standards⁸⁷ is concluded, the case is struck from the ECtHR’s list of cases by means of a decision (Art. 39 (3) ECHR). Further on, the instrument of ‘unilateral declaration’ allows the respondent State to request striking the case from the ECtHR’s list of cases if its friendly settlement proposal has been rejected by the applicant (Art. 37 (1) (c) ECHR, Rule 62A (1) (a) Rules of Court). However, such request will only be successful where the ECtHR deems such proposal acceptable, i.e. the request has to be accompanied by a declaration acknowledging a violation of the ECHR in the applicant’s case and an obligation to remedy this violation⁸⁸. Because on principle all case-related documents are publicly accessible (Art. 40 (2) ECHR), the ‘unilateral declaration’ will in practice end the confidentiality (Art. 39 (2) ECHR) of settlement negotiations.

Where permissible, the termination of proceedings by amicable settlements play a negligible role in the reality of the CJEU⁸⁹, differently from the ECtHR (where number are on the rise⁹⁰)⁹¹.

⁸⁴ Cf. B. Wägenbaur, *Court of Justice of the EU – Commentary on Statute and Rules of Procedure*, C.H. Beck, Hart Publishing and Nomos, Munich, Oxford and Baden-Baden, 2013, Art. 147 RP ECJ, para 3.

⁸⁵ In great detail H. Keller, M. Forowicz, and L. Engi, *Friendly Settlements before the European Court of Human Rights: Theory and Practice*, Oxford University Press, Oxford, 2010.

⁸⁶ H. Keller, M. Forowicz, and L. Engi, *Friendly Settlements before the European Court of Human Rights: Theory and Practice*, Oxford University Press, Oxford 2010, p. 38.

⁸⁷ Cf. Rule 62 (3) Rules of Court.

⁸⁸ W. Schabas, *The European Convention on Human Rights*, Oxford University Press, Oxford, 2015, p. 823.

⁸⁹ Cf. CJEU, *Annual Report 2016: The Year in Review*, p. 31, EU 2017, available at http://curia.europa.eu/jcms/upload/docs/application/pdf/2017-03/ragp-2016_final_en.pdf (visited 23 April 2017) reporting only 8 of 169 cases (5 %) before the Civil Service Tribunal resolved by amicable settlement. The Court of Justice and General Court do not report such settlements at all.

⁹⁰ W. Schabas, *The European Convention on Human Rights*, Oxford University Press, Oxford, 2015, p. 821 reports a steady increase of amicable settlements; H. Keller, M. Forowicz, and L. Engi, *Friendly Settlements before the European Court of Human Rights: Theory and Practice*, Oxford University Press, Oxford, 2010, pp. 110-111.

⁹¹ ECtHR, *Annual Report 2015*, Strasbourg 2016, available at http://www.echr.coe.int/Documents/Annual_report_2015_ENG.pdf (visited 23 April 2017), p. 197: 8 of 823 cases (< 1 %) are reported settled or struck out. This is, however, probably result of the practice to settle amicably before the cases enter the statistics, see W. Schabas, *The European Convention on Human Rights*, Oxford University Press, Oxford, 2015, p. 821. See also H. Keller, M. Forowicz, and L. Engi, *Friendly Settlements before the European Court of Human Rights: Theory and Practice*, Oxford University Press, Oxford, 2010, p. 203.

4.1.2.2 'Waiting clauses': setting up a time frame for more formalised consultations

All FTAs at hand apply the concept of 'waiting clauses': consultations can and should be held within three (EUSFTA⁹²) or six months (CETA, EUVFTA⁹³) respectively after raising the dispute⁹⁴. The submission of a claim for arbitration is hence admissible only after the respective period has elapsed⁹⁵. The rules of procedure of CJEU and ECtHR do not contain 'waiting clauses'.

The commencement of the waiting period is defined more clearly than in 'traditional' investment treaties, for instance, in Art. 26 ECT, Art. 11 Germany-Jordan BIT, and Art. VI (3) USA-Lithuania BIT⁹⁶. The FTAs refer to the submission of the request for consultations, which is a certain point in time. This precise definition prevents the problem which may arise out of an insufficient specification of the date 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 arbitration⁹⁷.

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 settlement⁹⁸.

4.1.2.3 'Proceduralisation' 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 SMEs as claimants.

⁹² EUSFTA calls for a settlement of the dispute by way of consultations within three months after the request for consultations. After this period of time, the notice of the intent to arbitrate may be delivered (Art. 9.15 (1) EUSFTA) and only after another period of three months may the claim for arbitration be submitted (Art. 9.16 (1) EUSFTA). Theoretically, consultations can be continued during the second period of three months, making a total of six months available for consultations.

⁹³ EUVFTA calls for consultations to be conducted within two months after the request for consultations (Art. 4 (4) EUVFTA). If the dispute cannot be settled within 3 months of the submission of the request for consultations, the notice of the intent to arbitrate may be delivered (Art. 6 (1) EUVFTA) and only after another period of three months may the claim for arbitration be submitted (Art. 9 (1) (b) EUVFTA). Theoretically, consultations can be continued during the second period of three months, making it a total of six months for consultations.

⁹⁴ See the text passages highlighted in yellow in the table following this chapter.

⁹⁵ 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 23 April 2017); Z. Douglas, *The International Law of Investment Claims*, Cambridge University Press, Cambridge, 2009, paras. 332 et seqq.

⁹⁶ Cf. S. Hindelang and C. P. Sassenrath, *The Investment Chapters in EU's International Trade and Investment Agreements in a Comparative Perspective*, European Union, Belgium, 2015, p. 23; available at [http://www.europarl.europa.eu/Reg-Data/etudes/STUD/2015/534998/EXPO_STU\(2015\)534998_EN.pdf](http://www.europarl.europa.eu/Reg-Data/etudes/STUD/2015/534998/EXPO_STU(2015)534998_EN.pdf) (visited 4 May 2017).

⁹⁷ C. Dugan et al., *Investor-State Arbitration*, Oxford University Press, Oxford, 2008, p. 118.

⁹⁸ 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 7 May 2017), p. 440.

The procedural rules of the ECtHR and the CJEU do not further explain by which means and within what timeline the postulated amicable settlement may be reached. The respective court may consider amicable settlements and the Judge–Rapporteur (CJEU) or Chamber or its President (ECtHR)⁹⁹ may propose solutions to end the dispute amicably. Yet, the approach and practice of this possibility is not further defined. The ‘unilateral declaration’ mechanism allowing the ECtHR (upon request of the respondent) to dismiss applications if applicants reject settlement offers deemed ‘adequate’ by the ECtHR (above 4.1.2.1 (p. 33)), is somewhat noteworthy though, since it introduces an element of pressure on the applicant to sincerely consider a settlement.

In contrast, EUSFTA, CETA, and EUVFTA put forward a rather elaborated design of the consultation process. While the three FTAs stick to the generic notion of ‘consultations’, here it is to be understood in a qualified sense. ‘Consultations’ within the meaning of the three aforesaid agreements are ‘proceduralised’. With the view to conduct consultations as effectively as possible, they stipulate conditions beyond the (mere) lapse of a certain period of time before commencing arbitration and, furthermore, pre-structure the subsequent arbitration in case no amicable settlement can be reached.

4.1.2.3.1 Specifying time requirements of the consultation process

The basic development of a dispute is common to all FTAs within the scope of this study, although the details in terms of deadlines and decisive points in time vary. The common steps are: First, a period of amicable settlement talks after or during which the ‘request for consultations’ is lodged. Second, after submission of such request, a (maximum) period of time until the actual consultations should begin is defined. Third is the consultations period, commonly also confined by both a minimum and maximum period of time during which consultations should take place. Only after expiry of the minimum consultations period (and, where applicable, an additional period of time), the ‘intent to arbitrate’ or, if the potential respondent is a Member State of the EU or the EU itself, the ‘request for determination of the respondent’ may be lodged. Finally, the claim may be submitted, usually after a certain period of time in relation to the request for consultations, determination of the respondent (where applicable) and/or the intent to arbitrate has expired.

Before looking into the steps of the process in the three FTAs it should be noted that, as illustrated above, commonly investment agreements tie the submission of a claim to arbitration to a waiting period designated for consultations. In this sense, CETA, EUSFTA, and EUVFTA are not different: Art. 9.16 (1) in conjunction with Art. 9.15 (1) EUSFTA requires the passing of six months after the request for consultations. Art. 8.22 (1) (b) CETA demands at least 180 days to elapse from the submission of the request for consultations to the submission of a claim and, if applicable, at least 90 days to elapse from the submission of the notice requesting a determination of the respondent. Art. 9 (1) (b) EUVFTA requires 6 months to elapse after the submission of the request for consultations (and at least 3 months since the submission of the notice of intent to arbitrate).

Turning to the details of the specific agreements, the comparison starts with the *period for consultations*, including their actual starting point. EUSFTA’s period for consultation begins with the request for consultations (Art. 9.13 (1) EUSFTA). There is, however, no timeframe prescribed as to when consultations shall begin after submission of a request for consultations. CETA and EUVFTA define such timeframe: Consultations shall on principle be held within 60 days of the submission of the request for consultations, Art. 8.19 (1) CETA; Art. 4 (4) EUVFTA. The parties may nonetheless agree to a longer period of time before commencement of the consultations.

⁹⁹ Acting through the Registrar, Rule 62 (1) Rules of Court.

Technically, the ‘minimum period’ of time designated for the actual conduct of consultations is consistent among all analysed FTAs: 90 days have to expire after the request for consultations before an ‘intent to arbitrate’ or ‘request to determine the respondent’ may be submitted (Art. 9.15 (1) EUSFTA, Art. 8.21 (1) CETA, and Art. 6 (1) EUVFTA). And 180 days have to pass after the request for consultations before the actual submission of the claim (Art. 9.16 (1) in conjunction with Art. 9.15 (1) EUSFTA, Art. 8.22 (1) (b) CETA and Art. 9 (1) (b) EUVFTA).

The intermediate step of determining the respondent becomes necessary where the EU or an EU Member State is the respondent. On a technical level, the FTAs have taken slightly different approaches to address this issue which all lead to the same material result: Under CETA, a notice *requesting the determination of the respondent* may be submitted 90 days after the request for consultation and fruitless negotiations of a settlement thus far, Art. 8.21 (1) CETA. Under EUVFTA, the claimant may deliver a *notice of intent to arbitrate* 90 days after the request for consultations, which *automatically* triggers the determination of the respondent within 60 days of receipt of the notice of intent (Art. 6 (1) and (2) EUVFTA). EUSFTA’s mechanism is quite similar to EUVFTA’s: The notice of intent to arbitrate triggers an obligation of the EU to make a determination of the respondent within two months (Art. 9.15 (2) EUSFTA). If the EU or one of its Member States acts as respondent it therefore seems that, if the first consultations indeed takes place within 60 days of the request for consultation, at least another 30 days are left within which the consultations might successfully lead to an amicable settlement before further procedural steps can be taken.

EUSFTA, CETA, and EUVFTA also provide for *preclusion or cut-off periods* and stipulate the *maximum length* of consultations. Thus, the consultation process does not only serve the amicable settlement of a dispute but is also geared towards establishing permanent legal certainty (*‘Rechtsfrieden’*) in respect of a certain dispute as early as possible. Under all three FTAs, consultations have to be initiated three years after becoming aware of the particular treatment alleged to breach the pertinent provisions or one year (EUSFTA) or two years (CETA, EUVFTA) after the investor ceases to pursue local remedies (Art. 9.13 (3) EUSFTA, Art. 8.19 (6) CETA and Art. 4 (2) EUVFTA). CETA and EUVFTA in any case bar the initiation of consultations 10 years (CETA) and 7 years (EUVFTA) respectively, after the investor acquired or should have acquired knowledge of the alleged breach and knowledge of the incurred loss or damage thereby.

Under all FTAs, consultations have to be brought to an end within 18 months after the request for consultations. Otherwise, if a claim has not been submitted within these 18 months, the request for consultations will be deemed to be withdrawn and, importantly, the right to bring a claim will be deemed waived (Art. 9.13 (4) EUSFTA, Art. 8.19 (8) CETA and Art. 4 (5) EUVFTA).

Finally, a specific rule in Art. 9.13 (5) EUSFTA and, equivalently, in Art. 4 (6) EUVFTA should be noted. These provisions specifically protect the claimant with regard to the deadlines stipulated in the said agreements, if delays are the result of deliberate actions by the respondent. The existence of these rules confirms that, while ‘proceduralisation’ of the consultation process could contribute to the amicable settlement of a dispute, it also entails the danger of abuse.

4.1.2.3.2 Defining the dispute: specifying information to be provided

Another main feature of the consultation mechanisms in CETA, EUSFTA, and EUVFTA is that the agreements specify the information to be included in the request for consultations, Art. 9.13 (2) EUSFTA, Art. 8.19 (4) CETA, and Art. 4 (1) EUVFTA. 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 claimed¹⁰⁰. 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. 9.17 (1) (d) EUSFTA, Art. 8.22 (1) (e) CETA, and Art. 9 (1) (d) EUVFTA).

In respect of the information to be provided, CETA stipulates in Art. 8.19 (5) an additional duty compared to EUSFTA and EUVFTA. CETA seems to protect the respondent against the possibility of information overload (or any comparable behaviour by the claimant) that affects its ability to effectively engage in consultations and subsequent arbitration. EUSFTA in Art. 9.13 (5) and EUVFTA in Art. 4 (6) – allowing for the extension of certain deadlines in favour of the claimant – evidence different concerns. While EUSFTA and EUVFTA seem to be concerned that the respondent State might obstruct consultations and, hence, protect the claimant, CETA is more worried by obstructions from the claimant side.

4.1.2.4 Other formalised mechanisms to facilitate amicable settlement: mediation

All FTAs, but not the procedural rules of the CJEU and the ECtHR, also provide for voluntary *mediation* which would not preclude access to arbitration, Art. 9.14 EUSFTA, Art. 8.20 CETA and Art. 5 in conjunction with Annex I EUVFTA. By far the most detailed provisions on the process of mediation is included in Annex I to Chapter II of EUVFTA ('Mediation Mechanism for investment disputes').

4.1.2.5 Success of consultations depend on the context of the case

In sum, in contrast to the procedural rules of the CJEU and the ECtHR, all three FTAs provide for a 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 compared to 'traditional' investment agreements¹⁰¹. 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 an optimally structured consultation process would be to no avail¹⁰². Therefore, the consultation process must always be viewed in context of the case at hand and the structure of the subsequent arbitral process.

¹⁰⁰ Minor differences can be observed: Under CETA and EUVFTA, evidence for the qualification as investor under the agreement 'shall' be contained in the request for consultations whereas EUSFTA does not contain a comparable provision.

¹⁰¹ S. Hindelang, and C. P. Sassenrath, *The Investment Chapters in EU's International Trade and Investment Agreements in a Comparative Perspective*, European Union, Belgium, 2015, p. 26; available at [http://www.europarl.europa.eu/Reg-Data/etudes/STUD/2015/534998/EXPO_STU\(2015\)534998_EN.pdf](http://www.europarl.europa.eu/Reg-Data/etudes/STUD/2015/534998/EXPO_STU(2015)534998_EN.pdf) (visited 4 May 2017).

¹⁰² 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 7 May 2017), p. 440.

4.1.3 Table: Amicable settlement of a dispute and consultation mechanisms¹⁰³

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

EUSFTA ¹⁰⁴	CETA	EUVFTA ¹⁰⁵	CJEU	ECtHR
<p>Art. 9.12</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 9.13 (Consultations). An amicable resolution may be agreed at any time, including after arbitration has been commenced</p> <p>Art. 9.13</p> <p>1. Where a dispute cannot be resolved as provided for under Article 9.12 (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>Art. 8.19</p> <p>1. A dispute should as far as possible be settled amicably. Such a settlement may be agreed at any time, including after the claim has been submitted pursuant to Article 8.23. 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 4.</p> <p>2. Unless the disputing parties agree otherwise, the place of consultation shall be:</p> <p>(a) Ottawa, if the measures challenged are measures of Canada;</p> <p>(b) Brussels, if the measures challenged include a measure of the European Union; or</p> <p>(c) the capital of the Member State of the European Union, if the</p>	<p>Art. 3</p> <p>Any dispute should as far as possible be settled amicably through negotiations or mediation and, where possible, before the submission of a request for consultations pursuant to Article 4. Such settlement may be agreed at any time, including after proceedings under this Section have been commenced.</p> <p>Art. 4</p> <p>1. Where a dispute cannot be resolved as provided for in Article 3 (Amicable Resolution), a claimant of one Party alleging a breach of the provisions referred to in Article 1(1) (Scope) shall submit a request for consultations to the other Party. The request shall contain the following information:</p> <p>(a) the name and address of the claimant and, where such request</p>	<p>Art. 147 RP CoJ</p> <p>1. If, before the Court has given its decision, the parties reach a settlement of their dispute and inform the Court of the abandonment of their claims, the President shall order the case to be removed from the register and shall give a decision as to costs in accordance with Article 141, having regard to any proposals made by the parties on the matter.</p> <p>2. This provision shall not apply to proceedings under Articles 263 TFEU and 265 TFEU.</p> <p>Art. 124 RP GC</p> <p>1. If, before the General Court has given its decision, the main parties reach an out-of-court settlement of their dispute and inform the General Court of the abandonment of their claims, the President shall order the case to be removed from the register and shall give a</p>	<p>Art. 39 ECHR</p> <p>1. At any stage of the proceedings, the Court may place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for human rights as defined in the Convention and the Protocols thereto.</p> <p>2. Proceedings conducted under paragraph 1 shall be confidential.</p> <p>3. If a friendly settlement is effected, the Court shall strike the case out of its list by means of a decision which shall be confined to a brief statement of the facts and of the solution reached.</p> <p>4. This decision shall be transmitted to the Committee of Ministers, which shall supervise the execution of the terms of the friendly settlement as set out in the decision</p> <p>Rules of Court</p>

¹⁰³ Footnotes and section headings omitted.

¹⁰⁴ Numbering according to the May 2015 authentic text.

¹⁰⁵ Numbering according to the January 2016 agreed text (might be subject to change).

<p>(a) the name and address of the claimant and, where such request is submitted on behalf of a locally established company, the name, 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 or withdrawal from local remedies.</p>	<p>measures challenged are exclusively measures of that Member State.</p> <p>3. The disputing parties may hold the consultations through videoconference or other means where appropriate, such as in the case where the investor is a small or medium-sized enterprise.</p> <p>4. The investor shall submit to the other Party a request for consultations setting out:</p> <p>(a) the name and address of the investor and, if 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>(b) if there is more than one investor, the name and address of each investor and, if there is more than one locally established enterprise, the name, address and place of incorporation of each locally established enterprise;</p> <p>(c) the provisions of this Agreement alleged to have been breached;</p> <p>(d) the legal and the factual basis for the claim, including the measures at issue; and</p> <p>(e) the relief sought and the estimated amount of damages</p>	<p>is submitted on behalf of a locally established company, the name, address and place of incorporation of the locally established company;</p> <p>(b) the provisions referred to in Article 1(1) (Scope) alleged to have been breached; (c) the legal and factual basis of the claim, including the measures alleged to breach the provisions referred to in Article 1(1) (Scope).</p> <p>(d) the relief sought and the estimated amount of damages claimed, and</p> <p>(e) evidence establishing that the claimant is an investor of the other Party and that it owns or controls the investment including the locally established company where applicable, in respect of which it has submitted a request for consultations.</p> <p>Where a request for consultations is submitted by more than one claimant or on behalf of more than one locally established company, the information in (a) and (e) above shall be submitted for each claimant or locally established company, as the case may be.</p> <p>2. A request for consultations must be submitted within:</p>	<p>decision as to costs in accordance with Articles 136 and 138, having regard to any proposals made by the parties on the matter.</p> <p>2. This provision shall not apply to proceedings under Articles 263 TFEU and 265 TFEU.</p>	<p>Rule 54A</p> <p>1. When giving notice of the application to the respondent Contracting Party pursuant to Rule 54 § 2 (b), the Chamber may also decide to examine the admissibility and merits at the same time in accordance with Article 29 § 1 of the Convention. The parties shall be invited to include in their observations any submissions concerning just satisfaction and any proposals for a friendly settlement. The conditions laid down in Rules 60 and 62 shall apply, mutatis mutandis. The Court may, however, decide at any stage, if necessary, to take a separate decision on admissibility.</p> <p>2. If no friendly settlement or other solution is reached and the Chamber is satisfied, in the light of the parties' arguments, that the case is admissible and ready for a determination on the merits, it shall immediately adopt a judgment including the Chamber's decision on admissibility, save in cases where it decides to take such a decision separately.</p> <p>Rule 62</p> <p>1. Once an application has been declared admissible, the Registrar, acting on the instructions of the Chamber or its President, shall</p>
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<p>4. In the event that the claimant has not submitted a claim to arbitration pursuant to Article 9.16 (Submission of Claim to Arbitration) within eighteen months 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 other Party, 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. 9.14</p> <p>1. The disputing parties may at any time, including prior to the</p>	<p>claimed. The request for consultations shall contain evidence establishing that the investor is an investor of the other Party and that it owns or controls the investment including, if applicable, that it owns or controls the locally established enterprise on whose behalf the request is submitted.</p> <p>5. The requirements of the request for consultations set out in paragraph 4 shall be met with sufficient specificity to allow the respondent to effectively engage in consultations and to prepare its defence.</p> <p>6. A request for consultations must be submitted within:</p> <p>(a) three 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 an investor or, as applicable, the locally established enterprise, ceases to pursue claims or proceedings before a tribunal or court under the law of a Party, or when such proceedings have otherwise ended and, in any event, no later</p>	<p>(a) 3 years after the date on which the claimant or, as applicable, the locally established company, first acquired, or should have first acquired, knowledge of the measure alleged to be inconsistent with the provisions referred to in Article 1(1) (Scope) and knowledge that the claimant (for claims brought by an investor acting on its own behalf) or the locally established company (for claims brought by an investor acting on behalf of a locally established company) has incurred loss or damage thereby; or</p> <p>(b) two years after the date on which the claimant or, as applicable, the locally established company, ceases to pursue claims or proceedings before a tribunal or court under domestic law and, in any event, no later than seven years after the date on which the claimant first acquired, or should have first acquired knowledge of the measure alleged to be inconsistent with the provisions referred to in Article 1(1) (Scope) and knowledge that the claimant (for claims brought by an investor acting on its own behalf) or the locally established company (for claims brought by an investor act-</p>		<p>enter into contact with the parties with a view to securing a friendly settlement of the matter in accordance with Article 39 § 1 of the Convention. The Chamber shall take any steps that appear appropriate to facilitate such a settlement.</p> <p>2. In accordance with Article 39 § 2 of the Convention, the friendly-settlement negotiations shall be confidential and without prejudice to the parties' arguments in the contentious proceedings. No written or oral communication and no offer or concession made in the framework of the attempt to secure a friendly settlement may be referred to or relied on in the contentious proceedings.</p> <p>3. If the Chamber is informed by the Registrar that the parties have agreed to a friendly settlement, it shall, after verifying that the settlement has been reached on the basis of respect for human rights as defined in the Convention and the Protocols thereto, strike the case out of the Court's list in accordance with Rule 43 § 3.</p> <p>4. Paragraphs 2 and 3 apply, mutatis mutandis, to the procedure under Rule 54A.</p> <p>Rule 62A</p> <p>1. (a) Where an applicant has refused the terms of a friendly-</p>
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<p>delivery of a notice of intent to arbitrate, agree to have recourse to mediation.</p> <p>2. Recourse to mediation is voluntary and without prejudice to the legal position of either disputing party.</p> <p>3. Recourse to mediation may be governed by the rules set out in Annex 9-E or such other rules as the disputing parties may agree. Any time limit mentioned in Annex 9-E may be modified by mutual agreement between the disputing parties.</p> <p>4. The mediator shall be appointed by agreement of the disputing parties or in accordance with Article 3 (Selection of the Mediator) of Annex 9-E. Mediators shall comply with Annex 9-F.</p> <p>5. The disputing parties shall endeavour to reach a mutually agreed solution within sixty days from the appointment of the mediator.</p> <p>6. Once the disputing parties agree to have recourse to mediation, paragraphs 3 and 4 of Article 9.13 (Consultations) shall not apply between the date on which it was agreed to have recourse to mediation, and thirty days after the date on which either party to the dispute decides to put an end</p>	<p>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 damage thereby.</p> <p>7. A request for consultations concerning an alleged breach by the European Union or a Member State of the European Union shall be sent to the European Union.</p> <p>8. In the event that the investor has not submitted a claim pursuant to Article 8.23 within 18 months of submitting the request for consultations, the investor is deemed to have withdrawn its request for consultations and, if applicable, its notice requesting a determination of the respondent, and shall not submit a claim under this Section with respect to the same measures. This period may be extended by agreement of the disputing parties.</p> <p>Art. 8.20</p> <p>1. The disputing parties may at any time agree to have recourse to mediation.</p> <p>2. Recourse to mediation is without prejudice to the legal position or rights of either disputing party</p>	<p>ing on behalf of a locally established company) has incurred loss or damage thereby.</p> <p>3. Unless the disputing parties agree otherwise, the place of consultation shall be:</p> <p>a. Hanoi where the consultations concern measures of Viet Nam; or</p> <p>b. Brussels where the consultations concern measures of the European Union; or</p> <p>c. the capital of the Member State of the European Union concerned, where the request for consultations concerns exclusively measures of that Member State.</p> <p>Consultations may also take place by videoconference or other means, particularly where a small or medium sized enterprise is involved.</p> <p>4. Unless the disputing parties agree to a longer period, consultations shall be held within 60 days of the submission of the request for consultations.</p> <p>5. In the event that the claimant has not submitted a claim pursuant to Article 7 within 18 months of submitting the request for consultations, the claimant shall be deemed to have withdrawn from proceedings under this Section and may</p>		<p>settlement proposal made pursuant to Rule 62, the Contracting Party concerned may file with the Court a request to strike the application out of the list in accordance with Article 37 § 1 of the Convention.</p> <p>(b) Such request shall be accompanied by a declaration clearly acknowledging that there has been a violation of the Convention in the applicant's case together with an undertaking to provide adequate redress and, as appropriate, to take necessary remedial measures.</p> <p>(c) The filing of a declaration under paragraph 1 (b) of this Rule must be made in public and adversarial proceedings conducted separately from and with due respect for the confidentiality of any friendly-settlement proceedings referred to in Article 39 § 2 of the Convention and Rule 62 § 2.</p> <p>2. Where exceptional circumstances so justify, a request and accompanying declaration may be filed with the Court even in the absence of a prior attempt to reach a friendly settlement.</p> <p>3. If it is satisfied that the declaration offers a sufficient basis for finding that respect for human rights as defined in the Convention and the Protocols thereto</p>
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<p>to the mediation, by way of a letter to the mediator and the other disputing party.</p> <p>7. Nothing in this Article shall preclude the disputing parties from having recourse to other forms of alternative dispute resolution.</p> <p>Art. 9.15</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 information:</p> <p>[...]</p> <p>2. Where a notice of intent to arbitrate has been sent to the Union, the Union shall make a determination of the respondent within two months from the date of receipt of the notice. The Union shall inform the claimant of this determination immediately, on the basis of which the claimant may submit a notice of arbitration pursuant to Article 9.16 (Submission of Claim to Arbitration).</p> <p>Art. 9.16</p> <p>1. No earlier than three months from the date of the notice of in-</p>	<p>under this Chapter and is governed by the rules agreed to by the disputing parties including, if available, the rules for mediation adopted by the Committee on Services and Investment pursuant to Article 8.44.3(c).</p> <p>3. The mediator is appointed by agreement of the disputing parties. The disputing parties may also request that the Secretary-General of ICSID appoint the mediator.</p> <p>4. The disputing parties shall endeavour to reach a resolution of the dispute within 60 days from the appointment of the mediator.</p> <p>5. If the disputing parties agree to have recourse to mediation, Articles 8.19.6 and 8.19.8 shall not apply from the date on which the disputing parties agreed to have recourse to mediation to the date on which either disputing party decides to terminate the mediation. A decision by a disputing party to terminate the mediation shall be transmitted by way of a letter to the mediator and the other disputing party.</p> <p>Art. 8.21</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</p>	<p>not submit a claim under this Section. This period may be extended by agreement between the parties involved in the consultations.</p> <p>6. The time periods in paragraphs 2 and 5 shall not render claims inadmissible where the claimant can demonstrate that the failure to request consultations or submit a claim is due to the claimant's inability to act as a result of actions deliberately taken by the Party concerned, provided that the claimant acts as soon as reasonably possible after it is able to act.</p> <p>7. In the event that the request for consultations concerns an alleged breach of the agreement by the European Union, or by a Member State of the European Union, it shall be sent to the European Union. Where measures of a Member State of the European Union are identified, it shall also be sent to the Member State concerned.</p> <p>Art. 5</p> <p>1. The disputing parties may at any time agree to have recourse to mediation.</p> <p>2. Recourse to mediation is voluntary and without prejudice to the legal position of either disputing party.</p>		<p>does not require it to continue its examination of the application, the Court may strike it out of the list, either in whole or in part, even if the applicant wishes the examination of the application to be continued.</p> <p>4. This Rule applies, mutatis mutandis, to the procedure under Rule 54A.</p>
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<p>tent delivered pursuant to Article 9.15 (Notice of Intent to Arbitrate), the claimant may submit the claim to one of the following dispute settlement mechanisms:</p> <p>[...]</p> <p>Art. 9.17</p> <p>1. A claim may be submitted to arbitration under this Section only if:</p> <p>[...]</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 9.13 (Consultations) and paragraph 1 of Article 9.15 (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 9.13 (Consultations);</p> <p>[...]</p>	<p>breach of the Agreement by the European Union or a Member State of the European Union and the investor intends to submit a claim pursuant to Article 8.23, the investor shall deliver to the European Union a notice requesting a determination of the respondent.</p> <p>[...]</p> <p>Art. 8.22</p> <p>1. An investor may only submit a claim pursuant to Article 8.23 if the investor:</p> <p>(a) delivers to the respondent, with the submission of a claim, its consent to the settlement of the dispute by the Tribunal in accordance with the procedures set out in this Section;</p> <p>(b) allows at least 180 days to elapse from the submission of the request for consultations and, if applicable, at least 90 days to elapse from the submission of the notice requesting a determination of the respondent;</p> <p>(c) has fulfilled the requirements of the notice requesting a determination of the respondent;</p> <p>(d) has fulfilled the requirements related to the request for consultations;</p>	<p>3. Recourse to mediation may be governed by the rules set out in Annex I. Any time limit mentioned in Annex I may be modified by mutual agreement between the disputing parties.</p> <p>4. The mediator is appointed by agreement of the disputing parties. Such appointment may include appointing a mediator from among the Members of the Tribunal appointed pursuant to Article 12(2) (Tribunal) or the Members of the Appeal Tribunal appointed pursuant to Article 13(3) (Appeal Tribunal). The disputing parties may also request the President of the Tribunal to appoint a mediator from among the Members of the Tribunal which are neither nationals of the European Union, nor of Vietnam.</p> <p>5. Once the disputing parties agree to have recourse to mediation, the time limits set out in Article 4(2), 4(5), 27(6) and 28(5) shall be suspended between the date on which it was agreed to have recourse to mediation and the date on which either party to the dispute decides to terminate the mediation, by way of a letter to the mediator and the other disputing party.</p> <p>Upon request of both disputing parties, where a division of the Tri-</p>		
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	<p>(e) does not identify a measure in its claim that was not identified in its request for consultations;</p> <p>(f) withdraws or discontinues any existing proceeding before a tribunal or court under domestic or international law with respect to a measure alleged to constitute a breach referred to in its claim; and</p> <p>(g) waives its right to initiate any claim or proceeding before a tribunal or court under domestic or international law with respect to a measure alleged to constitute a breach referred to in its claim.</p> <p>2. If the claim submitted pursuant to Article 8.23 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, the requirements in subparagraphs 1(f) and (g) apply both to the investor and the locally established enterprise).</p> <p>3. The requirements of subparagraphs 1(f) and (g) and paragraph 2 do not apply in respect of a locally established enterprise if the respondent or the investor's host state has deprived the investor of control of the locally established enterprise, or has otherwise prevented the locally established enterprise from fulfilling those requirements.</p>	<p>bunal has been established pursuant to Article 12 (Tribunal), the division shall stay its proceedings until the date on which either party to the dispute decides to terminate the mediation, by way of a letter to the mediator and the other disputing party.</p> <p>Art. 6</p> <p>1. If the dispute cannot be settled within 90 days of the submission of the request for consultations, the claimant may deliver a notice of intent which shall specify in writing the claimant's intention to submit the claim to dispute settlement under this Section and contain the following information:</p> <p>[...]</p> <p>2. Where a notice of intent has been sent to the European Union, the European Union shall make a determination of the respondent and, after having made such a determination, inform the claimant within 60 days of the receipt of the notice of intent as to whether the European Union or a Member State of the European Union shall be the respondent.</p> <p>[...]</p> <p>Art. 9</p>		
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	<p>4. Upon request of the respondent, the Tribunal shall decline jurisdiction if 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>Procedural and Other Requirements for the Submission of a Claim</p> <p>1. A claim may be submitted to the Tribunal under this Section only if:</p> <p>[...]</p> <p>(b) At least 6 months have elapsed since the submission of the Request for Consultations under Article 4 (Consultations) and at least 3 months have elapsed since the submission of the Notice of Intent to Submit a Claim under Article 6 (Notice of Intent to submit a claim);</p> <p>(c) The Request for Consultations and the Notice of Intent fulfilled the requirements set out in Article 4 (Consultations) paragraphs 1 and 2, and Article 6 (Notice of Intent to submit a claim) paragraph 1, respectively;</p> <p>(d) The legal and factual basis of the dispute was subject to prior consultations pursuant to Article 4 (Consultations);</p> <p>[...]</p> <p>Annex I, Art. 2</p> <p>1. Either disputing party may request, at any time, the commencement of a mediation pro-</p>		
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		cedure. Such request shall be addressed to the other party in writing. [...]		
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4.2 Access to ISDS

4.2.1 CJEU and ECHR

The CJEU and the ECtHR are permanent courts not specifically concerned with investment disputes. In this sense, neither the ECtHR nor the CJEU display the ‘traditional’ features and functions commonly attached to investment treaty- or free trade agreement-based investor-State arbitral tribunals as ‘single purpose’ tribunals.

For example, in contrast to the dispute settlement mechanisms contained in the three FTAs under comparison, claimants have no choice of the set of procedural rules which, in addition to the free trade agreement, govern their dispute. For the CJEU, which, *inter alia*¹⁰⁶, comprises of the Court of Justice (‘CoJ’) and the General Court (‘GC’), the procedural rules are primarily the Statute of the Court of Justice of the European Union (‘CJEU Statute’)¹⁰⁷, the Rules of Procedure of the Court of Justice (‘RP CoJ’)¹⁰⁸, and the Rules of Procedure of the General Court (‘RP GC’)¹⁰⁹. They specify the basic rules laid out in the EU treaties, i.e. are Art. 19 TEU, Artt. 251 TFEU et seqq.

The substantial rules applied by the CJEU are the Treaty on European Union (‘TEU’) and the Treaty on the Functioning of the European Union (‘TFEU’) as well as secondary EU law such as regulations and directives (cf. Art. 288 TFEU) enacted by the EU institutions. Its role within the EU and relationship to domestic courts is a highly complex subject beyond the scope of this study¹¹⁰. Here, it suffices to quote one of its own pronouncements on its function and role within the multi-level constitutional order of the European Union¹¹¹:

[...] the Court observes that the European Economic Community is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty, which established a

¹⁰⁶ Thus far, the only specialised court established in accordance with Art. 257 TFEU is the European Union Civil Service Tribunal.

¹⁰⁷ Protocol No. 3 on the Statute of the Court of Justice of the European Union, annexed to the Treaties, as amended by Regulation (EU, Euratom) No. 741/2012 of the European Parliament and of the Council of 11 August 2012 (OJ L 228, 23 August 2012, p. 1), by Article 9 of the Act concerning the conditions of accession to the European Union of the Republic of Croatia and the adjustments to the Treaty on European Union, the Treaty on the Functioning of the European Union and the Treaty establishing the European Atomic Energy Community (OJ L 112, 24 April 2012, p. 21), by Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council of 16 December 2015 (OJ L 341, 24 December 2015, p. 14) and by Regulation (EU, Euratom) 2016/1192 of the European Parliament and of the Council of 6 July 2016 on the transfer to the General Court of jurisdiction at first instance in disputes between the European Union and its servants (OJ L 200, 26.7.2016, p. 137); available at http://curia.europa.eu/jcms/upload/docs/application/pdf/2016-08/tra-doc-en-div-c-0000-2016-201606984-05_00.pdf (visited 20 April 2017).

¹⁰⁸ Rules of Procedure of the Court of Justice of 25 September 2012 (OJ L 265, 29 September 2012), as amended on 18 June 2013 (OJ L 173, 26 June 2013, p. 65) and on 19 July 2016 (OJ L 217, 12 August 2016, p. 69); available at http://curia.europa.eu/jcms/upload/docs/application/pdf/2012-10/rp_en.pdf (visited 20 April 2017).

¹⁰⁹ Rules of Procedure of the General Court of 4 March 2015 (OJ 2015 L 105, 23 April 2015, p. 1) as amended on 13 July 2016 (OJ 2016 L 217, 12 August 2016, p. 71), 13 July 2016 (OJ 2016 L 217, 12 August 2016, p. 72), and 13 July 2016 (OJ 2016 L 217, 12 August 2016, p. 73); available at http://curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/txt7_2008-09-25_14-08-6_431.pdf (visited 20 April 2017).

¹¹⁰ In more detail K. Lenaerts, *The Rule of Law and the Coherence of the Judicial System of the European Union*, *Common Market Law Review*, Vol. 44 (2007), No. 6, pp. 1625–1659.

¹¹¹ On multi-level constitutionalism cf. 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 7 May 2017)

*complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions [...]*¹¹².

The jurisdiction of the CJEU, thus, spans over a wide range of subject matters and it has many different roles to play within the EU legal order, among others that of constitutional and administrative judicial review body. Consequently, there are several different types of actions available at the CJEU. Within the scope of this study, however, only access of individuals to the CJEU is of interest which reduces the number of actions essentially to two: the so-called direct action and the preliminary reference procedure. The 'preliminary reference procedure' is laid down in Art. 267 TFEU. As of now, the preliminary reference procedure falls exclusively within the jurisdiction of the CoJ¹¹³. The preliminary reference procedure is not *directly* available to individuals. National courts dealing, for instance, with rights granted to individuals by EU law can (or sometimes have to) resort to this procedure to clarify the reading of these rights by the way of 'entering into a dialogue' with CJEU. The CJEU's task is to '*ensure that in the interpretation and application of the Treaties the law is observed*'¹¹⁴. (cf. Art. 19 (1) TEU). Without dwelling on the (procedural) details, the basic functioning of the preliminary reference procedure is the following: When the decision of a (criminal, administrative or civil) legal dispute is dependent on undecided questions relating to (the interpretation or application of) EU law, the national court will suspend its proceedings and refer the question related to EU law to the CJEU (cf. Art. 267 TFEU; Art. 23 (1) CJEU Statute). In 2016, about 65 percent of the cases brought to and completed by the CJEU were preliminary reference procedures¹¹⁵. These figures are evidence for the significance of the preliminary reference procedure in the judicial activity of the CJEU.

'Direct action' for the purpose of this study means actions according to Art. 263 (4) TFEU¹¹⁶. The provision contains a cassatory remedy (also referred to as 'action for annulment'¹¹⁷) which renders the appealed act void. Such appealable acts may be legislative acts, acts of the Council, of the European Commission and of the European Central Bank other than recommendations and opinions, and acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties (Art. 263 (1) TFEU). In general, direct actions at first instance fall within the jurisdiction of the GC (Art. 256 (1) TFEU), except for the types of cases in Art. 51 CJEU Statute, which fall—save for some 'counter' exceptions in Art. 51 (1) (a) CJEU Statute—within the jurisdiction of the CoJ¹¹⁸. Individuals (i.e. natural or legal persons) are entitled to make use of this remedy against '*act[s] addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures*'¹¹⁹. According to the seminal case law in this matter, an act is considered of direct and individual concern '*if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other per-*

¹¹² Judgement of 23 March 1993 in Case C-314/91: *Weber v Parliament* [1993] ECR I-1093, para 8.

¹¹³ B. Wägenbaur, *Court of Justice of the EU – Commentary on Statute and Rules of Procedure*, C.H. Beck, Hart Publishing and Nomos, Munich, Oxford and Baden-Baden, 2013, Art. 51 Stat, para 8.

¹¹⁴ Omissions and square brackets inserted by authors.

¹¹⁵ Court of Justice of the European Union, *Annual Report 2016 – The Year in Review*, European Union, Luxembourg, 2017, pp. 27-28; available at http://curia.europa.eu/jcms/upload/docs/application/pdf/2017-04/ragp-2016_final_en_web.pdf (visited 4 May 2017).

¹¹⁶ Other 'direct actions' can be found *inter alia* in Artt. 258, 259, 265, 268, 270, 271 and 273 TFEU.

¹¹⁷ A. Arnulf, Private Applicants and the Action for Annulment under Article 173 of the EC, *Common Market Law Review* Vol. 32 (2001), No. 1, pp. 7, 12.

¹¹⁸ B. Wägenbaur, *Court of Justice of the EU – Commentary on Statute and Rules of Procedure*, C.H. Beck, Hart Publishing and Nomos, Munich, Oxford and Baden-Baden, 2013, Art. 51 Stat, para 1.

¹¹⁹ Art. 263 (4) TFEU; square brackets added by authors. In greater detail see A. Arnulf, Private Applicants and the Action for Annulment under Article 173 of the EC, *Common Market Law Review* Vol. 32 (2001), No. 1, pp. 7-49.

sons and by virtue of these factors distinguishes them individually just as in the case of the person addressed'¹²⁰. In 2016, around five percent of the new cases brought to and around seven percent of the cases completed by the CoJ were direct actions¹²¹. The figures are significantly higher for the GC, whose completed cases in 2016 were around 85 percent direct actions with the same figure of new direct actions of all cases brought in 2016¹²².

The ECtHR—much narrower in its jurisdiction than the CJEU—operates according to the Convention for the Protection of Human Rights and Fundamental Freedoms (also 'The European Convention', 'Convention' or 'ECHR')¹²³, which contains both procedural as well as substantial provisions, and the Rules of Court¹²⁴, which stipulate the procedural 'details' and which are supplemented by Resolutions of the Plenary Court¹²⁵ and Practice Decisions¹²⁶ by the President of the Court¹²⁷.

The most important and for the purpose of this study solely examined remedy in the ECHR-created legal order is the individual application according to Art. 34 ECHR, which stipulates: '*The Court may receive applications from any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. [...]'*. Apart from investor-State arbitration, this is one of the rare incidences in public international law where remedies are made available directly (without further implementation in domestic law) to individuals¹²⁸. The primary aim of individual applications is individual legal protection of the rights enshrined in the ECHR and the protocols thereto. Access to the ECtHR is restrained, *inter alia*, by Art. 35 ECHR, which requires the exhaustion of local remedies prior to an application and a 'significant disadvantage' suffered by the applying individual. Judgements by the ECtHR have a declaratory effect only, pronouncing that a violation of the ECHR was inflicted by the Member State (cf.

¹²⁰ Judgement of 15 July 1963 in Case 25/62: *Plauman & Co. v Commission of the European Economic Community* [1963] ECR (English special edition), p. 95.

¹²¹ Court of Justice of the European Union, *Annual Report 2016 – The Year in Review*, European Union, Luxembourg, 2017, pp. 27-28; available at http://curia.europa.eu/jcms/upload/docs/application/pdf/2017-04/ragp-2016_final_en_web.pdf (visited 4 May 2017).

¹²² Court of Justice of the European Union, *Annual Report 2016 – The Year in Review*, European Union, Luxembourg, 2017, pp. 29-30; available at http://curia.europa.eu/jcms/upload/docs/application/pdf/2017-04/ragp-2016_final_en_web.pdf (visited 4 May 2017).

¹²³ 213 U.N.T.S. 222, entered into force Sept. 3, 1953, as amended from time to time by numerous Protocols; available at http://www.echr.coe.int/Documents/Convention_ENG.pdf (visited 5 May 2017).

¹²⁴ As of 14 November 2016, available at http://echr.coe.int/Documents/Rules_Court_ENG.pdf (visited 20 April 2017).

¹²⁵ Cf., for instance, the Resolution on Judicial Ethics, available at http://echr.coe.int/Documents/Resolution_Judicial_Ethics_ENG.pdf (visited 20 April 2017).

¹²⁶ On the functions and character of such practice decisions in general see M. Knust Rassekh Afshar, *International Courts and Tribunals, Rules and Practice Directions* (ECJ, CFI, ECtHR, IACTHR, ICSID, ITLOS, WTO Panels and Appellate Body), in: R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, Oxford University Press, Oxford, 2008, opil.ou-plaw.com/home/EPIL, paras 32 et seqq.

¹²⁷ Available here: http://echr.coe.int/Pages/home.aspx?p=basictexts/rules&c=#n1347877334990_pointer (visited 20 April 2017).

¹²⁸ W. Schabas, *The European Convention on Human Rights*, Oxford University Press, Oxford 2015, S. 731. Note that the EU legal order has its roots in public international law but has developed into a legal order in its own right, displaying elements of a federal constitutional and international legal order and, thus, being of multi-faced nature.

Artt. 41, 46 (1) ECHR)¹²⁹. Monetary compensation may be awarded as ‘just satisfaction’ under Art. 41 ECHR¹³⁰. The ECHR received 53 500 new applications in 2016¹³¹.

4.2.2 Investor-State arbitration on the basis of EUSFTA, CETA, and EUVFTA: 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. Aside 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 this, foreign investors could approach a host State with a view to conclude an investment *contract*¹³² 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 and FTAs usually provide¹³³.

Today, however, most investment treaties and more and more (comprehensive) FTAs 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 investor¹³⁴. 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 limitations¹³⁵. 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 determination of

¹²⁹ In detail J. Frowein, The Binding Force of ECHR Judgments and its Limits, in: S. Breitenmoser et al. (eds.), *Human rights, democracy and the rule of law – Menschenrechte, Demokratie und Rechtsstaat – Droits de l’homme, démocratie et Etat de droit: liber amicorum Luzius Wildhaber*, Dike and Nomos, Zürich and Baden-Baden, 2007, pp. 261-270.

¹³⁰ In detail C. Gray, Remedies, in: C. Romano, K. Alter, and Y. Shany (eds.), *The Oxford Handbook of International Adjudication*, Oxford University Press, Oxford, 2014, pp. 890-893.

¹³¹ EHtHR, *Analysis of Statistics 2016*, http://www.echr.coe.int/Documents/Stats_analysis_2016_ENG.pdf (visited 5 May 2017), Council of Europe, 2017, p. 4.

¹³² Which, in contrast to State-State investment *agreements*, are not legally international but underlie domestic law.

¹³³ 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 7 May 2017), pp. 75 ff.

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

¹³⁵ 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.

the right respondent¹³⁶. The waiting period for conducting consultations, as discussed above¹³⁷, also falls into 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 an investment', i.e. 'market access', from their consent. Furthermore, the relation of investor-State arbitration to other types of litigation (e.g. in domestic and international 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)¹³⁸, the Rules on the Additional Facility for the Administration of Proceedings by the Secretariat of the ICSID (ICSID Additional Facility Rules)¹³⁹ and the United Nation-sponsored UNCITRAL Arbitration Rules¹⁴⁰. Others include the arbitration rules of the International Chamber of Commerce (ICC)¹⁴¹, the Arbitration Institute of the Stockholm Chamber of Commerce (SCC)¹⁴², the London Court of International Arbitration (LCIA)¹⁴³, or the German Institution of Arbitration (DIS)¹⁴⁴; 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', the CJEU's or the ECtHR's rules of procedure¹⁴⁵, they offer some sort of fixed framework. Most basic issues, such as the composition of tribunals, applicable law, remedies and allocation of costs have traditionally not been addressed in the investment treaties themselves but in more (or rather less)

¹³⁶ 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 7 May 2017), p. 411. Besides, the submission of such intent may have a disciplining effect on the host State's behaviour, 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.

¹³⁷ See above 4.1.2.2 (p. 35).

¹³⁸ 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 20 April 2017).

¹³⁹ ICSID Additional Facility Rules (as of April 2006), available at https://icsid.worldbank.org/en/Documents/icsid-docs/AFR_English-final.pdf (visited 20 April 2017).

¹⁴⁰ 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 20 April 2017).

¹⁴¹ ICC Arbitration Rules (as of 1 March 2017), available at <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/> (visited 20 April 2017).

¹⁴² SCC Arbitration Rules (as of 2017), available at http://www.sccinstitute.com/media/169838/arbitration_rules_eng_17_web.pdf (visited 20 April 2017).

¹⁴³ LCIA Arbitration Rules (effective 1 October 2014), available at <http://www.lcia.org/media/download.aspx?MediaId=379> (visited 20 April 2017).

¹⁴⁴ DIS-Arbitration Rules (as of July 1998); available at <http://www.dis-arb.de/en/16/rules/dis-arbitration-rules-98-id10> (visited 20 April 2017).

¹⁴⁵ 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 2 May 2017), pp. 48 et seq.

detail in arbitration rules¹⁴⁶. However, the three FTAs under comparison, evidencing a denser regulatory approach, touch upon these questions.

The CJEU and the ECtHR, as already explained above, do not display a comparable openness in terms of procedural framework. Their respective rules of procedure are autonomously set and firmly embedded in the respective underlying agreements.

Against this background it is important to keep in mind that, when it comes to investor-State arbitration in a traditional sense, 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 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 choose¹⁴⁷. 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 terms¹⁴⁸. EUSFTA, CETA, and EUVFTA try to emancipate themselves to some extent from this model. On principle, however, they are still in the tradition of investor-State arbitration. This is yet another difference compared to proceedings before the CJEU and the ECtHR which are permanent courts¹⁴⁹ operating on one single set of procedural and substantial rules

¹⁴⁶ 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 7 May 2017).

¹⁴⁷ Of the 42 newly initiated investment arbitration 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 7 May 2017), p. 7; these numbers also roughly correspond with overall historical statistics.

¹⁴⁸ 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 2 May 2017); *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 2 May 2017); *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 2 May 2017); *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 2 May 2017); *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 2 May 2017); *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 2 May 2017); *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 2 May 2017); *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 2 May 2017); *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 2 May 2017).

¹⁴⁹ Cf. Art. 15 CJEU Statute; Art. 19 ECHR.

4.2.3 Comparison of EUSFTA, CETA, and EUVFTA; juxtaposition to the CJEU and the ECtHR

4.2.3.1 Conditions of and limits on access to ISDS

4.2.3.1.1 Limits on State's consent with respect to the breach of certain substantive protection standards or to measures effecting certain economic activity in EUSFTA, CETA, and EUVFTA

Art. 9.11 (1) EUSFTA limits access to investor-State arbitration to breaches of substantive commitments in EUSFTA's investment chapter. Art. 8.18 (4) CETA adds *further* limitations as it restricts the access to arbitration in case a State restructures its sovereign debts by negotiation¹⁵⁰. Additionally, Art. 13.21 CETA establishes a special regime for investor-State arbitration in the financial services sector. Art. 8.18 (3) CETA furthermore very broadly excludes claims 'if 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 at the merits stage, the access to investor-State arbitration altogether 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 obligations¹⁵¹. 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 for instance Canada or the USA, remains to be seen. For now, an inclusion can be found also in Art. 1 (2) EUVFTA. Art. 9.17 (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 investor-State arbitration claim.

CETA generally extends its *substantive* protection to the phase of the establishment of an investment ('market access'). EUSFTA in contrast does not contain any market access obligations. However, Art. 8.18 (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 restricting provision can be found in Art. 8.45 CETA in conjunction with Annex 8-C for decisions by Canada following a review under the Investment Canada Act.

¹⁵⁰ Annex 8-B: Public Debts reads in its section 2: 'No claim that a restructuring of debt of a Party breaches an obligation under Sections C and D may be submitted to, or if already submitted continue under Section F 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 8.6 or 8.7.' It is worth noting that the provision only exempts negotiated restructuring of public debt and, in contrast to the 1953 London Agreement on German External Debts, not certain debt restructurings negotiated within the Paris Club (Club de Paris) and the London Club. Cf. J. Benninghofen, *Die Staatsumschuldung*, Nomos, Baden-Baden, 2014, pp. 72, 112-115, 93 respectively; see also M. Waibel, *Sovereign Defaults before International Courts and Tribunals*, Cambridge University Press, Cambridge, 2011.

¹⁵¹ 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 7 May 2017), pp. 287 et seqq.; UNCTAD, *Investment Policy Framework for Sustainable Development*, UNCTAD, 2012, available at http://unctad.org/en/PublicationsLibrary/diaepcb2012d5_en.pdf (visited 7 May 2017), p. 45.

4.2.3.1.2 Conditions of and limits on access to the CJEU and the ECtHR

The jurisdiction of the CJEU and the ECtHR is clearly stipulated in Art. 19 (3) TEU and Art. 32 ECHR, respectively. As is common in domestic law orders, access to the courts is restricted by a number of admissibility criteria set forth, in the case of the CJEU, in the CJEU Statute, the RP CoJ and the RP GC, and, in the case of the ECtHR, in the ECHR and the Rules of Court. The preliminary reference procedure, for instance, is only available to a 'court or tribunal of a Member State', only if such court or tribunal 'considers that a decision on the question is necessary to enable it to give judgment' and only with regard to questions concerning 'the interpretation of the Treaties' or 'the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union' (Art. 267 TFEU). In practice, access is further confined by detailed requirements on the formulation of the questions and the relevance of the referred questions to the dispute before the domestic court; also, cases in which the correct application of EU law is obvious cannot be referred ('acte claire doctrine')¹⁵². The access to direct actions pursuant to Art. 263 TFEU is also not unlimited: For instance, only certain acts can be declared void. Also, individuals qualify as 'non-privileged' claimants which means they have to be affected by the contested act directly and individually or the act has to be addressed to them. Finally, the direct action may only be based on the grounds mentioned in Art. 263 TFEU, i.e. 'lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers' and only within the two-month time limit stipulated in the last paragraph of Art. 263 TFEU.

The individual application pursuant to Art. 34 ECHR is also subject to a number of admissibility criteria such as the requirement of exhaustion of local remedies, the six-month time limit¹⁵³, the inadmissibility of anonymous or 'substantially same' applications, the abuse of the right of application or incompatibility in terms of personal, geographical, temporal or material jurisdiction of the ECtHR (Artt. 32 and 35 ECHR)¹⁵⁴.

4.2.3.2 Timeframe up to the submission of claims

All FTAs include a mandatory time period of six months¹⁵⁵ between the request for consultations and the submission of a claim. All treaties closely determine the steps to be taken before the submission of a claim if EU or Member State measures are allegedly in breach of the substantive commitments¹⁵⁶. With regard to EUSFTA, if the dispute cannot be settled after three months of the request for consultations, the investor may deliver a notice of intent to arbitrate (Art. 9.15 (1) EUSFTA) and another three months thereafter may submit the claim for dispute settlement (Art. 9.16 (1) EUSFTA). EUVFTA functions similarly, except for different terminology ('notice of intent to submit a claim'), Artt. 6 (1), 7 (1), and 9 (1) (b) EUVFTA, and stipulates days instead of months (just like CETA, cf. Art. 8.22 (1) (b) CETA). The intermediate steps in all three cases also serve the need to determine the correct respondent on the side of the EU.

Lacking a formalised consultations or amicable settlements procedure prior to formal proceedings, no timetable for such is stipulated by the rules of procedure of CJEU and the ECHR. The six-months and

¹⁵² Judgement of 6 October 1982 in Case C-283/81: *CILFIT and Lanificio di Gavardo SpA v Ministero della Sanità* [1982] ECR I-3415, para 16.

¹⁵³ To be limited to a four month time limit by virtue of Art. 4 of the Protocol No. 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms, Council of Europe Treaty Series - No. 213 of 24 June 2013 upon ratification thereof by all State parties to the ECHR; available at http://www.echr.coe.int/Documents/Protocol_15_ENG.pdf (visited 5 May 2017).

¹⁵⁴ ECtHR, *Practical Guide on Admissibility Criteria*, Council of Europe and European Court of Human Rights, 2014, pp. 22 et seqq.; available at http://www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf (visited 5 May 2017).

¹⁵⁵ Art. 9.16 (1) EUSFTA, Art. 8.22 (1) (b) CETA and Art. 9 (1) (b) EUVFTA.

¹⁵⁶ See already above at 4.1.2.3 (p. 35).

two-months time limits for individual applications and direct actions respectively should be noted, however (Art. 35 (1) ECHR and Art. 263 (6) TFEU, above 4.2.3.1.2 (p. 55)).

4.2.3.3 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 (above 4.1 (p. 32)), Art. 9.16 (2) EUSFTA and Art. 8.25 (2) CETA stipulate further formal conditions for the claimant's consent to arbitrate by explicitly referencing certain provisions in the arbitration rules. The same holds true for EUVFTA, Art. 7 (4) EUVFTA. CETA and EUVFTA even define the moment in time when a claim is to be regarded as submitted, Art. 8.23 (7) CETA; Art. 6 (5) EUVFTA. Although clarity in this regard can be helpful to determine the exact moment of the application of the statute of limitations if necessary, EUSFTA does not include such explicit references.

The formalities regarding the submission of claims to CJEU are governed by Artt. 20 et seq. CJEU Statute and – depending on the competent court and pursued legal remedy – Artt. 57 et seq., Artt. 120 et seqq. RP CoJ and Artt. 76 et seqq. RP GC. In addition, these statutory rules are supplemented by recommendations¹⁵⁷ practice decisions¹⁵⁸ further specifying the formal requirements to a claim. To give only one example of the requirements therein, on principle, written observations submitted to the court should not exceed 20 pages for preliminary rulings and 30 pages for direct actions¹⁵⁹. Where parties fail to comply herewith, at least before the GC, they may be ordered to bear the costs in exceptional circumstances¹⁶⁰.

Perhaps the highest degree of formalisation can be observed for applications to the ECtHR. Where applicants fail to provide any of the detailed information and documents pursuant to Rule 47 (1) and (2) Rules of Court, complaints will not be examined by the ECHR, Rule 47 (5.1) Rules of Court. The ECtHR provides a standard form¹⁶¹, which, on principle, has to be used in order to file a valid application.

The aim of such formalisation is achieving higher efficiency with regard to a high caseload of the respective courts¹⁶². On the other side of the coin, strict standardisation carries the peril of injustice where formally insufficient but substantially valid claims are brought.

4.2.3.4 Number of adjudicators and arbitrators

Typically, an investor-State arbitral tribunal consists of three arbitrators. EUSFTA, CETA, and EUVFTA are no exception to this practice. Alternatively, having a sole arbitrator is an option commonly available. All three FTAs have in common that the 'sole arbitrator option' can only be chosen by agreement of the disputing parties, not by the claimant itself. All treaties give special consideration to the option of a sole arbitrator, Art. 9.16 (3) EUSFTA, Art. 8.23 (5) CETA and Art. 12 (9) EUVFTA 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. It appears that this type of provision aims to make

¹⁵⁷ For instance, 'Recommendations to national courts and tribunals, in relation to the initiation of preliminary ruling proceedings', OJ C 439, 25 November 2016, p. 1.

¹⁵⁸ For instance, 'Practice directions to parties concerning cases brought before the Court', OJ L 31, 31 January 2014, p. 1.

¹⁵⁹ 'Practice directions to parties concerning cases brought before the Court', OJ L 31, 31 January 2014 paras 11, 12.

¹⁶⁰ Judgement of 30 September 2003, Joined Cases T-191/98 and T-212/98 to T-214/98: *Atlantic Container Line AB et al. v Commission* [2003] ECR II-3275, paras 1645-1647.

¹⁶¹ http://echr.coe.int/Documents/Application_Form_ENG.pdf (visited 21 April 2017).

¹⁶² B. Wägenbaur, *Court of Justice of the EU – Commentary on Statute and Rules of Procedure*, C.H. Beck, Hart Publishing and Nomos, Munich, Oxford and Baden-Baden 2013, Art. 58 RP ECJ, para 1.

investor-State arbitration a more easily accessible tool for SMEs. It is not defined, however, what qualifies as SME¹⁶³. Given the vagueness of the concept, this leaves considerable room for interpretation. However, as long as agreement among the disputing parties is required, out of procedural tactics it is rather unlikely that the disputing parties 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 justice¹⁶⁴.

At the CoJ, cases are decided by chambers, the Grand Chamber or, exceptionally, full Court (Art. 251 TFEU). The regular composition for decisions is chambers; the Grand Chamber¹⁶⁵ or the full Court¹⁶⁶ only presides in exceptional cases (cf. Art. 16 (3) and Art. 16 (4) CJEU Statute respectively). The currently ten chambers are staffed with three or five judges (Art. 11 (1) RP CoJ). The majority of cases is reportedly decided by five judges ('extended chambers')¹⁶⁷. Nonetheless, in practice, the general meeting of the Court, which decides on the distribution of cases and formation to decide them, strives to assign suitable cases to 'small' chambers of three judges¹⁶⁸. By contrast, cases before the GC will normally be handled by 'small' chambers¹⁶⁹. Sole judges do not decide at the CoJ¹⁷⁰.

The ECtHR decides on individual applications in up to four different compositions (cf. Art. 26 ECHR)¹⁷¹: A single judge is competent to rule on (clear) inadmissibility (Art. 27 (1) ECHR). Where the single judge does not find the application inadmissible, he forwards it to a committee comprised of three judges, which, after further examination, may decide on (clear) inadmissibility or render a judgement on admissibility and the (clear) merits, Artt. 26 (3), 28 (1) ECHR. Where no such decision or judgement is made, committee cases are referred to a Chamber of seven judges, who have full competence to rule on the application (Art. 29 ECHR) but may also, under exceptional circumstances, relinquish the case to the Grand Chamber staffed with 17 judges (Artt. 30, 31 ECHR).

4.2.3.5 Reference to arbitration institutions and arbitration rules in EUSFTA, CETA, and EUVFTA

As already explained above, in absence of a standing court, investor-State arbitration allows for a choice of the procedural rules together with the body administering the case, i.e. the arbitration institution. The idea of choice is a remnant—an ill-fitting relic in a public law dispute one may say—of the origins of investor-State arbitration which are to be found in commercial arbitration, the latter being based on the idea of party autonomy.

¹⁶³ Cf. C. Nicholas and C. Müller, SME Participation in Government Procurement Markets. Legal and Policy Considerations under the WTO Agreement on Government Procurement and the UNCITRAL Model Law on Public Procurement, in: T. Rensmann (ed.), *Small and Medium-Sized Enterprises in International Economic Law*, Oxford University Press, Oxford 2017 (forthcoming).

¹⁶⁴ 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 7 May 2017), pp. 23 et seqq.

¹⁶⁵ Presides when a Member State so requests, Art. 16 (3) CJEU Statute.

¹⁶⁶ Cf. Art. 16 (4) CJEU Statute in conjunction with Artt. 228 (2), 245 (2), 247 and 286 (6) TFEU.

¹⁶⁷ B. Wägenbaur, *Court of Justice of the EU – Commentary on Statute and Rules of Procedure*, C.H. Beck, Hart Publishing and Nomos, Munich, Oxford and Baden-Baden 2013, Art. 16 CJEU Statute, para 14.

¹⁶⁸ W. Dausies, in: *Handbuch des Europäischen Wirtschaftsrechts*, 2016 (loose-leaf), A II, para 352.

¹⁶⁹ K. Lenaerts, I. Maselis and K. Gutman, *EU Procedural Law*, Oxford University Press, Oxford, 2015, para 23.56.

¹⁷⁰ B. Wägenbaur, *Court of Justice of the EU – Commentary on Statute and Rules of Procedure*, C.H. Beck, Hart Publishing and Nomos, Munich, Oxford and Baden-Baden 2013, Art. 16 CJEU Statute, para 6.

¹⁷¹ The life of an application is well described by H. Keller, M. Forowicz, and L. Engi, *Friendly Settlements before the European Court of Human Rights: Theory and Practice*, Oxford University Press 2010, pp. 32 et seqq.

Since all arbitral tribunals established on the basis of EUSFTA, CETA, and EUVFTA are of an ad hoc nature, specifically established for the respective case and subsequently dissolved, arbitration institutions—while certainly important if not indispensable for an effective dispute resolution process absent a standing court—provide a largely organisational and secretarial framework¹⁷², i.e. in particular administering cases, appointing arbitrators¹⁷³, 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 FTAs at hand refer to the International Centre for the Settlement of Investment Disputes, which was established on the basis of the ICSID Convention¹⁷⁴. All also explicitly mention the ICSID Additional Facility Rules¹⁷⁵ and refer to the UNCITRAL Arbitration Rules¹⁷⁶ that are not linked to a specific arbitration institution. Under CETA, the ICSID Secretariat acts as secretariat for the tribunal and provides it with appropriate support (Art. 8.27 (16) CETA). The negotiators of EUVFTA have not yet decided whether the ICSID Secretariat or the Permanent Court of Arbitration will be tasked with the administration of disputes; this decision will be made during ‘legal scrubbing’ (cf. Art. 12 (15) and (18) EUVFTA, see also below 4.11.3 (p. 175)).

4.2.3.6 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 investor-State arbitration 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 settlement¹⁷⁷. EUSFTA, CETA, and EUVFTA 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 challenges¹⁷⁸. 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 investor-State arbitration proceedings to State-State dispute settlement is clarified in Art. 9.28 EUSFTA, 8.42 CETA and Art. 32 EUVFTA, whereby access to State-State arbitration is generally¹⁷⁹ barred once investor-State arbitration has commenced. The wording of the provisions resembles the ICSID Convention, specifically its Art. 27 (1) 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 [...]’.

¹⁷² J. Griebel, *Internationales Investitionsrecht*, C.H. Beck, München, 2008, p. 117.

¹⁷³ While traditionally these functions were delegated to these institutions by the parties to an investment treaty, the latter may of course provide for their own rules.

¹⁷⁴ Art. 9.16 (1) (a) EUSFTA; Art. 8.23 (2) (a) CETA, and Art. 7 (2) (a) EUVFTA; see the text passages highlighted in yellow in the table following this chapter.

¹⁷⁵ See the text passages highlighted in green in the table following this chapter.

¹⁷⁶ See the text passages highlighted in turquoise in the table following this chapter.

¹⁷⁷ See Chapters 15 EUSFTA, 29 CETA, Chapter 13 EUVFTA.

¹⁷⁸ See Art. 9.30 EUSFTA; Art. 8.44 CETA, and Art. 34 EUVFTA.

¹⁷⁹ With an exception or clarification provided in the respective paragraph two, see for instance, Art. 9.28 (2) EUSFTA: ‘For greater certainty, paragraph 1 shall not exclude the possibility of a Party having recourse to dispute settlement procedures under Chapter 15 (Dispute Settlement) in respect of a measure of general application even if that measure is alleged to have breached the Agreement as regards a specific investment in respect of which a claim has been submitted pursuant to Article 9.16 (Submission of Claim to Arbitration) and is without prejudice to Article 9.23 (The Non-disputing Party to the Agreement).’

Secondly, to avoid parallel proceedings, contradictory results, or even overcompensation, EUSFTA, CETA, and EUVFTA expressly address the relationship to proceedings under other international agreements and contract-based claims (Art. 9.17 (1) (g), (h) EUSFTA, Art. 8.24 CETA, and Art. 8 EUVFTA).

Thirdly, Art. 9.17 (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 (cf., in the same vein, Art. 8 (2) and (4) EUVFTA). Furthermore, it is required that no final award concerning the same treatment alleged to breach EUSFTA has been rendered in a claim submitted by the claimant to another international tribunal (Art. 9.17 (1) (h) EUSFTA). A functionally similar, albeit not identical mechanism, can be found in CETA in Art. 8.22 (1) (f) and (g). If parallel proceedings of any sort are already in place, CETA makes provision in Art. 8.24 for the situation where proceedings 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. EUVFTA operates according to a similar mechanism laid down in its Art. 8 (8). Besides, CETA in Art. 8.43, EUSFTA in Art. 9.29 and EUVFTA in Art. 33 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.

4.2.4 Table: Access to ISDS¹⁸⁰

bold = important passages

yellow = ICSID

turquoise = UNCITRAL

red = consent

green = ICSID Additional Facility

pink = other forms of dispute settlement

EUSFTA ¹⁸¹	CETA	EUVFTA ¹⁸²	CJEU	ECtHR
<p>Art. 9.11</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. 8.18</p> <p>1. Without prejudice to the rights and obligations of the Parties under Chapter Twenty-Nine (Dispute Settlement), an investor of a Party may submit to the Tribunal constituted under this Section a claim that the other Party has breached an obligation under:</p> <p>(a) Section C, with respect to the expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of its covered investment; or</p> <p>(b) Section D: where the investor claims to have suffered loss or damage as a result of the alleged breach. 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 business operations of a covered investment and the investor has, as a result, incurred loss or</p>	<p>Art. 1</p> <p>1. This Section shall apply to a dispute between, on the one hand, a claimant of one Party and, on the other hand, the other Party concerning any measure alleged to breach the provisions of:</p> <p>(a) Section 2 (Investment protection),</p> <p>(b) Article 3 paragraph 2 (national treatment as regards the operation of investments) and Article 4 paragraph 2 (most favoured nation treatment as regards the operation of investments) of Section 1 with respect to the operation of investments as referred to in Article 13(1)(i) (Scope) of Section 2 (Investment Protection), which allegedly causes loss or damage to the claimant or, where the claim is brought on behalf of a locally established company owned or controlled by the claimant, to the locally established company.</p>	<p>Art. 19 TEU</p> <p>1. The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.</p> <p>Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.</p> <p>[...]</p> <p>3. The Court of Justice of the European Union shall, in accordance with the Treaties:</p> <p>(a) rule on actions brought by a Member State, an institution or a natural or legal person;</p> <p>(b) give preliminary rulings, at the request of courts or tribunals of the Member States, on the inter-</p>	<p>ECHR</p> <p>Art. 13</p> <p>Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.</p> <p>Art. 32</p> <p>1. The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto which are referred to it as provided in Articles 33, 34, 46 and 47.</p> <p>2. In the event of dispute as to whether the Court has jurisdiction, the Court shall decide.</p> <p>The Court may receive applications from any person, nongovernment-</p>

¹⁸⁰ Footnotes and section headings omitted.

¹⁸¹ Numbering according to the May 2015 authentic text.

¹⁸² Numbering according to the January 2016 agreed text (might be subject to change).

	<p>damage with respect to the covered investment.</p> <p>3. For greater certainty, an investor may not submit a claim under this Section if the investment has been made through fraudulent misrepresentation, concealment, corruption, or conduct amounting to an abuse of process.</p> <p>4. A claim with respect to restructuring of debt issued by a Party may only be submitted under this Section in accordance with Annex 8-B.</p> <p>5. A Tribunal constituted under this Section shall not decide claims that fall outside of the scope of this Article.</p>	<p>2. For greater certainty, a claimant may not submit a claim under this Section if its investment has been made through fraudulent misrepresentation, concealment, corruption or conduct amounting to an abuse of process.</p> <p>3. The Tribunal may not decide claims that fall outside of the scope of this Article.</p> <p>Art. 6</p> <p>1. If the dispute cannot be settled within 90 days of the submission of the request for consultations, the claimant may deliver a notice of intent which shall specify in writing the claimant’s intention to submit the claim to dispute settlement under this Section and 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, address and place of incorporation of the locally established company;</p> <p>(b) the provisions referred to in Article 1(1) (Scope) alleged to have been breached;</p> <p>(c) the legal and factual basis of the claim, including the measures alleged to breach the provisions referred to in Article 1(1) (Scope);</p>	<p>pretation of Union law or the validity of acts adopted by the institutions;</p> <p>(c) rule in other cases provided for in the Treaties.</p> <p>TFEU</p> <p>Art. 253</p> <p>[...]</p> <p>The Court of Justice shall establish its Rules of Procedure. Those Rules shall require the approval of the Council.</p> <p>Art. 253</p> <p>[...]</p> <p>The General Court shall establish its Rules of Procedure in agreement with the Court of Justice. Those Rules shall require the approval of the Council.</p> <p>[...]</p> <p>Art. 281</p> <p>The Statute of the Court of Justice of the European Union shall be laid down in a separate Protocol.</p> <p>[...]</p> <p>CJEU Statute</p> <p>Art. 21</p> <p>The Court of Justice shall form chambers consisting of three and five Judges. The Judges shall elect the Presidents of the chambers</p>	<p>tal organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.</p> <p>Art. 35</p> <p>1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.</p> <p>2. The Court shall not deal with any application submitted under Article 34 that</p> <p>(a) is anonymous; or</p> <p>(b) is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information.</p> <p>3. The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:</p>
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		<p>(d) the relief sought and the estimated amount of damages claimed.</p> <p>The notice of intent shall be sent to the EU or to Viet Nam, as the case may be. Where a measure of a Member State of the European Union is identified, it shall also be sent to the Member State concerned.</p> <p>2. Where a notice of intent has been sent to the European Union, the European Union shall make a determination of the respondent and, after having made such a determination, inform the claimant within 60 days of the receipt of the notice of intent as to whether the European Union or a Member State of the European Union shall be the respondent.</p> <p>3. The claimant may submit a claim pursuant to Article 7 on the basis of such determination.</p> <p>4. Where either the European Union or the Member State is respondent following a determination made pursuant to paragraph 2, neither the European Union, nor the Member State concerned may assert the inadmissibility of the claim, lack of jurisdiction of the Tribunal or otherwise assert that the claim or award is unfounded or invalid on the ground that the proper</p>	<p>from among their number. The Presidents of the chambers of five Judges shall be elected for three years. They may be re-elected once.</p> <p>The Grand Chamber shall consist of 13 Judges. It shall be presided over by the President of the Court. The Presidents of the chambers of five Judges and other Judges appointed in accordance with the conditions laid down in the Rules of Procedure shall also form part of the Grand Chamber.</p> <p>The Court shall sit in a Grand Chamber when a Member State or an institution of the Union that is party to the proceedings so requests.</p> <p>The Court shall sit as a full Court where cases are brought before it pursuant to Article 228(2), Article 245(2), Article 247 or Article 286(6) of the Treaty on the Functioning of the European Union.</p> <p>Moreover, where it considers that a case before it is of exceptional importance, the Court may decide, after hearing the Advocate-General, to refer the case to the full Court.</p> <p>Art. 21</p>	<p>(a) the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application; or</p> <p>(b) the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.</p> <p>4. The Court shall reject any application which it considers inadmissible under this Article. It may do so at any stage of the proceedings.</p> <p>Rules of Court</p> <p>Rule 45</p> <p>1. Any application made under Articles 33 or 34 of the Convention shall be submitted in writing and shall be signed by the applicant or by the applicant's representative.</p> <p>2. Where an application is made by a non-governmental organisation or by a group of individuals, it shall be signed by those persons competent to represent that organisation or group. The Chamber or Committee concerned shall determine any question as to whether</p>
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<p>Art. 9.16</p> <p>1. No earlier than three months from the date of the notice of intent delivered pursuant to Article 9.15 (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 Settlement of Investment Disputes</p>	<p>Art. 8.23</p> <p>1. If a dispute has not been resolved through consultations, a claim may be submitted under this Section by:</p> <p>(a) an investor of a Party on its own behalf; or</p> <p>(b) an investor of a Party, on behalf of a locally established enterprise which it owns or controls directly or indirectly.</p> <p>2. A claim may be submitted under the following rules:</p>	<p>respondent should be the European Union rather than the Member State or vice versa.</p> <p>5. The Tribunal and the Appeal Tribunal shall be bound by the determination made pursuant to paragraph 2.</p> <p>6. Nothing in this Agreement or the applicable rules on dispute settlement shall prevent the exchange of all information relating to a dispute between the European Union and the Member State concerned.</p> <p>Art. 7</p> <p>1. If the dispute cannot be settled within 6 months from the submission of the request for consultations and at least 3 months have elapsed from the submission of the notice of intent to submit a claim pursuant to Article 6 (Notice of intent to submit a claim) the claimant, provided that it satisfies the requirements set out in Article 9 (Procedural and Other Requirements for the Submission of a Claim), may submit a claim to the Tribunal established pursuant to Article 12.</p> <p>2. A claim may be submitted to the Tribunal under one of the following sets of rules on dispute settlement:</p>	<p>A case shall be brought before the Court of Justice by a written application addressed to the Registrar. The application shall contain the applicant’s name and permanent address and the description of the signatory, the name of the party or names of the parties against whom the application is made, the subject-matter of the dispute, the form of order sought and a brief statement of the pleas in law on which the application is based.</p> <p>The application shall be accompanied, where appropriate, by the measure the annulment of which is sought or, in the circumstances referred to in Article 265 of the Treaty on the Functioning of the European Union, by documentary evidence of the date on which an institution was, in accordance with those Articles, requested to act. If the documents are not submitted with the application, the Registrar shall ask the party concerned to produce them within a reasonable period, but in that event the rights of the party shall not lapse even if such documents are produced after the time limit for bringing proceedings.</p> <p>Art. 50</p> <p>The General Court shall sit in chambers of three or five Judges. The Judges shall elect the</p>	<p>the persons who have signed an application are competent to do so.</p> <p>3. Where applicants are represented in accordance with Rule 36, a power of attorney or written authority to act shall be supplied by their representative or representatives.</p> <p>Rule 47</p> <p>1. An application under Article 34 of the Convention shall be made on the application form provided by the Registry, unless the Court decides otherwise. It shall contain all of the information requested in the relevant parts of the application form and set out</p> <p>(a) the name, date of birth, nationality and address of the applicant and, where the applicant is a legal person, the full name, date of incorporation or registration, the official registration number (if any) and the official address;</p> <p>(b) the name, address, telephone and fax numbers and e-mail address of the representative, if any;</p> <p>(c) where the applicant is represented, the dated and original signature of the applicant on the authority section of the application form; the original signature of the representative showing that he or</p>
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<p>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 institution 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 institution 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 mechanisms provided for in subparagraphs (a), (b) or (c).</p>	<p>(a) the ICSID Convention and Rules of Procedure for Arbitration Proceedings;</p> <p>(b) the ICSID Additional Facility Rules if the conditions for proceedings pursuant to paragraph (a) do not apply;</p> <p>(c) the UNCITRAL Arbitration Rules; or</p> <p>(d) any other rules on agreement of the disputing parties.</p> <p>3. In the event that the investor proposes rules pursuant to subparagraph 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 rules within 30 days of receipt, the investor may submit a claim under the rules provided for in subparagraph 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 Member of the Tribunal should hear the claim. The respondent shall give sympathetic consideration to that request, in particular if the investor is a small or medium-sized enterprise or the compensation or damages claimed are relatively low.</p>	<p>(a) the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 (ICSID);</p> <p>(b) the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 (ICSID) in accordance with the Rules on the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre, where the conditions for proceedings pursuant to paragraph (a) do not apply;</p> <p>(c) the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL); or,</p> <p>(d) any other rules on agreement of the disputing parties. In the event that the claimant proposes a specific set of dispute settlement rules and if, within 30 days of receipt of the proposal, the disputing parties have not agreed in writing on such rules, or the respondent has not replied to the claimant, the claimant may submit a claim under the rules provided for in subparagraphs (a), (b) and (c).</p> <p>3. All the claims identified by the claimant in the submission of its claim pursuant to this Article must be based on measures identified in</p>	<p>Presidents of the chambers from among their number. The Presidents of the chambers of five</p> <p>Judges shall be elected for three years. They may be re-elected once.</p> <p>The composition of the chambers and the assignment of cases to them shall be governed by the</p> <p>Rules of Procedure. In certain cases governed by the Rules of Procedure, the General Court</p> <p>may sit as a full court or be constituted by a single Judge.</p> <p>The Rules of Procedure may also provide that the General Court may sit in a Grand Chamber in</p> <p>cases and under the conditions specified therein.</p>	<p>she has agreed to act for the applicant must also be on the authority section of the application form;</p> <p>(d) the name of the Contracting Party or Parties against which the application is made;</p> <p>(e) a concise and legible statement of the facts;</p> <p>(f) a concise and legible statement of the alleged violation(s) of the Convention and the relevant arguments; and</p> <p>(g) a concise and legible statement confirming the applicant’s compliance with the admissibility criteria laid down in Article 35 § 1 of the Convention.</p> <p>2. (a) All of the information referred to in paragraph 1 (e) to (g) above that is set out in the relevant part of the application form should be sufficient to enable the Court to determine the nature and scope of the application without recourse to any other document.</p> <p>(b) The applicant may however supplement the information by appending to the application form further details on the facts, alleged violations of the Convention and the relevant arguments. Such information shall not exceed 20 pages.</p>
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<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 be deemed to 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>6. The rules applicable under paragraph 2 that are in effect on the date that the claim or claims are submitted to the Tribunal under this Section, subject to the specific rules set out in this Section and supplemented by rules adopted pursuant to Article 8.44.3(b).</p> <p>7. A claim is submitted for dispute settlement under this Section when</p> <p>(a) the request under Article 36(1) of the ICSID Convention is received by the Secretary-General of ICSID;</p> <p>(b) the request under Article 2 of Schedule C of the ICSID Additional Facility Rules is received by the Secretariat of ICSID;</p> <p>(c) the notice under Article 3 of the UNCITRAL Arbitration Rules is received by the respondent; or</p> <p>(d) the request or notice initiating proceedings is received by the respondent in accordance with the rules agreed upon pursuant to subparagraph 2(d).</p> <p>8. Each Party shall notify the other Party of the place of delivery of notices and other documents by the investors pursuant to this Section. Each Party shall ensure this information is made publicly available.</p> <p>Art. 8.25</p>	<p>its request for consultations pursuant to Article 4(1)(c).</p> <p>4. The rules on dispute settlement referred to in paragraph 2 shall apply subject to the rules set out in this Chapter, as supplemented by any rules adopted by the Trade Committee, by the Tribunal or by the Appeal Tribunal.</p> <p>5. A claim shall be deemed submitted under this Article when the claimant has initiated proceedings under the applicable rules on dispute settlement.</p> <p>6. Claims submitted in the name of a class composed of a number of unidentified claimants, or submitted by a representative intending to conduct the proceedings in the interests of a number of identified or unidentified claimants that delegate all decisions relating to the proceedings on their behalf, shall not be admissible.</p> <p>Art. 7</p> <p>1. The Respondent consents to the submission of a claim under this Section.</p> <p>2. The claimant shall deliver its consent in accordance with the procedures provided for in this</p>		<p>3.1. The application form shall be signed by the applicant or the applicant's representative and shall be accompanied by</p> <p>(a) copies of documents relating to the decisions or measures complained of, judicial or otherwise;</p> <p>(b) copies of documents and decisions showing that the applicant has complied with the exhaustion of domestic remedies requirement and the time-limit contained in Article 35 § 1 of the Convention;</p> <p>(c) where appropriate, copies of documents relating to any other procedure of international investigation or settlement;</p> <p>(d) where the applicant is a legal person as referred to in Rule 47 § 1 (a), a document or documents showing that the individual who lodged the application has the standing or authority to represent the applicant.</p> <p>3.2. Documents submitted in support of the application shall be listed in order by date, numbered consecutively and be identified clearly.</p> <p>4. Applicants who do not wish their identity to be disclosed to the public shall so indicate and shall submit a statement of the reasons justifying such a departure from the nor-</p>
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	<p>1. The respondent consents to the settlement of the dispute by the Tribunal in accordance with the procedures set out in this Section.</p> <p>2. The consent under paragraph 1 and the submission of a claim to the Tribunal under this Section shall satisfy the requirements of:</p> <p>(a) Article 25 of the ICSID Convention and Chapter II of the ICSID Additional Facility Rules regarding written consent of the disputing parties; and,</p> <p>(b) Article II of the New York Convention for an agreement in writing.</p>	<p>Section at the time of submitting a claim pursuant to Article 7.</p> <p>3. The consent under paragraphs 1 and 2 implies:</p> <p>(a) the disputing parties shall refrain from enforcing an award rendered pursuant to this Section before such award has become final pursuant to Article 29; and</p> <p>(b) the disputing parties shall refrain from seeking to appeal, review, set aside, annul, revise or initiate any other similar procedure before an international or domestic court or tribunal, as regards an award pursuant to this Section.</p> <p>4. The consent under paragraph 1 and the submission of a claim under this Section shall satisfy the requirements of:</p> <p>(a) Article 25 of the ICSID Convention and the ICSID Additional Facility Rules for written consent of the disputing parties; and,</p> <p>(b) Article II of the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards for an “agreement in writing”.</p> <p>Art. 8</p> <p>1. A claimant may not submit a claim to the Tribunal if the claimant has a pending claim before any other domestic or international</p>		<p>mal rule of public access to information in proceedings before the Court. The Court may authorise anonymity or grant it of its own motion.</p> <p>5.1. Failure to comply with the requirements set out in paragraphs 1 to 3 of this Rule will result in the application not being examined by the Court, unless</p> <p>(a) the applicant has provided an adequate explanation for the failure to comply;</p> <p>(b) the application concerns a request for an interim measure;</p> <p>(c) the Court otherwise directs of its own motion or at the request of an applicant.</p> <p>5.2. The Court may in any case request an applicant to provide information or documents in any form or manner which may be appropriate within a fixed time-limit.</p> <p>6. (a) The date of introduction of the application for the purposes of Article 35 § 1 of the Convention shall be the date on which an application form satisfying the requirements of this Rule is sent to the Court. The date of dispatch shall be the date of the postmark.</p> <p>(b) Where it finds it justified, the Court may nevertheless decide</p>
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		<p>court or tribunal concerning the same measure as that alleged to be inconsistent with the provisions referred to in Article 1(1) (Scope) and the same loss or damage, unless the claimant withdraws such pending claim.</p> <p>2. A claimant acting on its own behalf may not submit a claim to the Tribunal if any person who, directly or indirectly, has an ownership interest in or is controlled by the claimant has a pending claim before this Tribunal or any other domestic or international court or tribunal concerning the same measure as that alleged to be inconsistent with the provisions referred to in Article 1(1) (Scope) and the same loss or damage, unless that person withdraws such pending claim.</p> <p>3. A claimant acting on behalf of a locally established company may not submit a claim to the Tribunal if any person who, directly or indirectly, has an ownership interest in or is controlled by the locally established company has a pending claim before this Tribunal or any other domestic or international court or tribunal concerning the same measure as that alleged to be inconsistent with the provisions referred to in Article 1(1) (Scope) and the same loss or damage, unless</p>		<p>that a different date shall be considered to be the date of introduction.</p> <p>7. Applicants shall keep the Court informed of any change of address and of all circumstances relevant to the application.</p>
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		<p>that person withdraws such pending claim.</p> <p>4. Before submitting a claim the claimant shall provide: (a) evidence that it and, where relevant pursuant to paragraphs 2 and 3, any person who, directly or indirectly, has an ownership interest in or is controlled by the claimant or the locally established company, has withdrawn any pending claim referred to in paragraphs 1, 2, and 3.</p> <p>(b) a waiver of its right, and where applicable, of the locally established company, to initiate any claim referred to in paragraph 1.</p> <p>5. This Article shall apply in conjunction with Annex III.</p> <p>6. The waiver provided pursuant to paragraph 4(b) shall cease to apply where the claim is rejected on the basis of a failure to meet the nationality requirements to bring an action under this Agreement.</p> <p>7. Paragraphs 1 to 4 of this Article, including Annex III, shall not apply where claims submitted to a domestic court or tribunal are initiated for the sole purpose of seeking interim injunctive or declaratory relief and do not involve the payment of monetary damages.</p> <p>8. Where claims are brought both pursuant to this Section and Sec-</p>		
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		<p>tion XX [State to State dispute settlement] or another international agreement concerning the same treatment as that alleged to be inconsistent with the provisions referred to in Article 1(1) (Scope), a division of the Tribunal constituted under this Section shall, as soon as possible after hearing the disputing parties, take into account proceedings pursuant to Section X [State to State dispute settlement] or another international agreement in its decision, order or award. To this end, it may also, if it considers necessary, stay its proceedings. In acting pursuant to this provision the Tribunal shall respect Article 27(6) (Provisional award).</p> <p>Art. 9</p> <p>1. A claim may be submitted to the Tribunal under this Section only if:</p> <p>(a) The submission of the claim is accompanied by claimant's consent in writing to the settlement of the dispute by the Tribunal in accordance with the procedures set out in this Section and the claimant's designation of one of the set of rules on dispute settlement referred to in Article 7(2) (Submission of a Claim) as the applicable dispute settlement rules;</p> <p>(b) At least 6 months have elapsed since the submission of the Request for Consultations</p>		
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<p>Art. 9.17</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 set out in this Section and the claimant’s designation of one of the fora referred to in paragraph 1 of Article 9.16 (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 9.13 (Consultations) and at least three months have elapsed from the submission of the notice of intent to arbitrate under Article 9.15 (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 9.13 (Consultations) and paragraph 1 of Article 9.15 (Notice of Intent to Arbitrate) respectively;</p> <p>(d) the legal and factual basis of the dispute was subject to prior</p>	<p>Art. 8.22</p> <p>1. An investor may only submit a claim pursuant to Article 8.23 if the investor:</p> <p>(a) delivers to the respondent, with the submission of a claim, its consent to the settlement of the dispute by the Tribunal in accordance with the procedures set out in this Section;</p> <p>(b) allows at least 180 days to elapse from the submission of the request for consultations and, if applicable, at least 90 days to elapse from the submission of the notice requesting a determination of the respondent;</p> <p>(c) has fulfilled the requirements of the notice requesting a determination of the respondent;</p> <p>(d) has fulfilled the requirements related to the request for consultations;</p> <p>(e) does not identify a measure in its claim that was not identified in its request for consultations;</p> <p>(f) withdraws or discontinues any existing proceeding before a tribunal or court under domestic or international law with respect to a</p>	<p>under Article 4 (Consultations) and at least 3 months have elapsed since the submission of the Notice of Intent to Submit a Claim under Article 6 (Notice of Intent to submit a claim);</p> <p>(c) The Request for Consultations and the Notice of Intent fulfilled the requirements set out in Article 4 (Consultations) paragraphs 1 and 2, and Article 6 (Notice of Intent to submit a claim) paragraph 1, respectively;</p> <p>(d) The legal and factual basis of the dispute was subject to prior consultations pursuant to Article 4 (Consultations);</p> <p>(e) All the claims identified in the submission of the claim to the Tribunal made pursuant to Article 7 (Submission of a claim) are based on the measure or measures identified in the Notice of intent to submit a claim made pursuant to Article 6 (Notice of Intent to submit a claim);</p> <p>(f) The conditions foreseen in Article 8 (Other claims) are fulfilled.</p> <p>2. This Article is without prejudice to other jurisdictional requirements arising from the relevant dispute settlement rules.</p> <p>Art. 12</p> <p>[...]</p>		
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<p>consultation pursuant to Article 9.13 (Consultations);</p> <p>(e) all the claims identified in the submission of the claim to arbitration made pursuant to Article 9.16 (Submission of Claim to Arbitration) are based on treatment identified in the notice of intent to arbitrate made pursuant to Article 9.15 (Notice of Intent to Arbitrate);</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>(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</p>	<p>measure alleged to constitute a breach referred to in its claim; and</p> <p>(g) waives its right to initiate any claim or proceeding before a tribunal or court under domestic or international law with respect to a measure alleged to constitute a breach referred to in its claim. 2. If the claim submitted pursuant to Article 8.23 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, the requirements in subparagraphs 1(f) and (g) apply both to the investor and the locally established enterprise).</p> <p>3. The requirements of subparagraphs 1(f) and (g) and paragraph 2 do not apply in respect of a locally established enterprise if the respondent or the investor's host state has deprived the investor of control of the locally established enterprise, or has otherwise prevented the locally established enterprise from fulfilling those requirements.</p> <p>4. Upon request of the respondent, the Tribunal shall decline jurisdiction if the investor or, as applicable, the locally established enterprise fails to fulfil any of the requirements of paragraphs 1 and 2.</p>	<p>9. Notwithstanding paragraph 6, the disputing parties may agree that a case be heard by a sole Member who is a national of a third country, to be selected by the President of the Tribunal. The respondent shall give sympathetic consideration to such a request from the claimant, in particular where the claimant is a small or medium-sized enterprise or the compensation or damages claimed are relatively low. Such a request should be made at the same time as the filing of the claim pursuant to Article 7.</p> <p>[...]</p>		
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<p>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 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 9.16 (Submission of Claim to Arbitra-</p>	<p>5. The waiver provided pursuant to subparagraph 1(g) or paragraph 2 as applicable shall cease to apply:</p> <p>(a) if the Tribunal rejects the claim on the basis of a failure to meet the requirements of paragraph 1 or 2 or on any other procedural or jurisdictional grounds;</p> <p>(b) if the Tribunal dismisses the claim pursuant to Article 8.32 or Article 8.33; or</p> <p>(c) if the investor withdraws its claim, in conformity with the applicable rules under Article 8.23.2, within 12 months of the constitution of the division of the Tribunal.</p>			
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<p>tion). 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 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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4.3 Investor-State arbitration, the CJEU and the ECtHR and their relation to domestic remedies

4.3.1 The CJEU and the ECtHR

Neither the direct action (Art. 263 (4) TFEU) nor the preliminary reference procedure (Art. 267 TFEU) formally requires an ‘exhaustion of local remedies’ in a way typically found in public international law contexts. However, this does not mean that the delicate relationship between domestic and EU judiciary¹⁸³ has not been addressed and carefully balanced in the treaties. Due to the distinct nature of the EU legal order, the public international law concept of ‘exhaustion of local remedies’ has been modified and adapted to a collaborative exercise of judicial authority by European and Member State courts.

What regards the direct action, the subject-matter of these procedure can only be acts of an EU institution or body. Such acts cannot be challenged before courts of the EU Member States. The latter lack jurisdiction over such acts¹⁸⁴, unless national authorities have transposed such act into domestic law¹⁸⁵. Accordingly, it is not relevant to the admissibility of a direct action whether the challenged act has been contested before a national court¹⁸⁶. In fact, it may violate the EU treaties if a domestic court assumes jurisdiction over the question of lawfulness of an EU act directed at individuals. EU and Member State jurisdictions are not ‘competing’ with each other. Furthermore, it should be noted that EU acts addressed directly to individuals are relatively rare as EU law is executed mainly by the Member States. Hence, while direct access of individuals to the CJEU may be viewed as an exception to the ‘local remedies rule’, it is a narrow one as most cases in which questions of EU law arise start and terminate before Member States courts. The EU judiciary is then involved by the way of preliminary reference procedure.

The preliminary reference, as interlocutory proceeding, requires a dispute before a national court. Only if a question of interpretation or validity of EU law arises before a domestic court ‘against whose decisions there is no judicial remedy under national law’ (Art. 267 (3) TFEU), the question has to be referred; in any other case it may be referred¹⁸⁷. Hence, while the claimant need not appeal an act until it receives a final (denying) domestic judgement, a dominant role of ‘local remedies’ is secured by the fact that proceedings start and finish in domestic courts and (the access of parties to) the preliminary reference procedure is, to a very large extent, controlled by domestic courts¹⁸⁸.

¹⁸³ See in detail K. Lenaerts, I. Maselis and K. Gutman, *EU Procedural Law*, Oxford University Press, Oxford, 2015, Chapter 4.

¹⁸⁴ The question of jurisdiction for ‘ultra vires’ acts of EU institutions and bodies is highly disputed. For Germany cf. C. Tomuschat, Lisbon – Terminal of the European Integration Process? - The Judgment of the German Constitutional Court of 30 June 2009, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2010), pp. 251, 279 et seqq.; *Bundesverfassungsgericht* (German Constitutional Court), Order of 7 December 2016, Joined Cases 2 BvR 1444/16, 2 BvE 3/16, 2 BvR 1823/16, 2 BvR 1482/16 (on the provisional application of CETA); Judgement of 21 June 2016, Joined Cases 2 BvR 2728/13, 2 BvR 2729/13, 2 BvR 2730/13, 2 BvR 2731/13, 2 BvE 13/13 and Order of 17 December 2013, Joined Cases 2 BvR 1390/12, 2 BvR 1421/12, 2 BvR 1438/12, 2 BvR 1439/12, 2 BvR 1440/12, 2 BvR 1824/12, 2 BvE 6/12 (both on the OMT programme of the European Central Bank).

¹⁸⁵ Cf. Judgement of 25 October 1972 in Case 96/71: *Haegemann v Commission* [1972] ECR 1972, 1005, paras 15-16.

¹⁸⁶ Judgement of 5 November 1997 in Case T-149/95: *Ducros v Commission* [not published], ECLI:EU:T:1997:165, para 30.

¹⁸⁷ Under certain circumstances it also has to be referred by a court which is not the last instance, see in detail K. Lenaerts, I. Maselis and K. Gutman, *EU Procedural Law*, Oxford University Press, Oxford, 2015, paras 3.44 and 3.59.

¹⁸⁸ If a domestic court does not refer a case to the CJEU contrary to its obligation under EU law, it is (primarily) the Commission which has to initiate (EU law) infringement proceedings against the respective Member States in accordance with Art. 258 TFEU. An individual being denied its rights under EU law may, on its own motion and independent from any action of the Commission, seek damages from the respective Member State in domestic courts, Judgement of 30 September 2003 in Case C-224/01: *Köbler* [2003] ECR I-10239, paras 30 et seqq.

In contrast to the ‘peculiar’ design of the local remedies rule in the EU legal order, and in accord with the ‘traditional’ understanding of the local remedies rule in public international law¹⁸⁹, ‘[t]he [ECtHR] may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken’¹⁹⁰ (Art. 35 (1) ECHR). The purpose of ‘subsidiarity’ is ‘to channel states into guaranteeing basic rights rather than simply to allow immediate access to the Convention system.’¹⁹¹ But it can also be interpreted as means to reduce the caseload of the ECtHR¹⁹².

4.3.2 Investor-State arbitration

4.3.2.1 ‘Exceptionalism’

Investor-State arbitration was installed as a safety net in case the remedies available in a host State fail to prevent or compensate abuses of sovereign power¹⁹³. In principal, the investor voluntarily subjects itself to the jurisdiction of its host State by investing abroad. 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 same¹⁹⁴. Courts may be corrupt or simply lacking the competence or adequate capacities to render a decision in respectable quality and reasonable time¹⁹⁵.

At the same time, domestic courts, at least in advanced legal 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 prevalent in the host State.

¹⁸⁹ Decision on admissibility delivered by the Grand Chamber, *Takis Demopoulos and Others v. Turkey* (dec.) [GC], nos. 46113/99, 3843/02, 13751/02, 13466/03, 10200/04, 14163/04, 19993/04, 21819/04, ECHR 10-I, paras 69, 99.

¹⁹⁰ Square brackets added.

¹⁹¹ A. Solomou, ‘Demopoulos & Others V. Turkey (Admissibility). App. Nos. 46113/99, 3843/02, 13751/02, 13466/03, 14163/04, 10200/04, 19993/04, 21819/04’, *The American Journal of International Law*, Vol. 104 (2010), No. 4, p. 632.

¹⁹² A. Solomou, ‘Demopoulos & Others V. Turkey (Admissibility). App. Nos. 46113/99, 3843/02, 13751/02, 13466/03, 14163/04, 10200/04, 19993/04, 21819/04’, *The American Journal of International Law*, Vol. 104 (2010), No. 4, p. 636.

¹⁹³ 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 7 May 2017), p. 53. Certainly, from the perspective of an investor also ‘practical considerations’ might support investor-State arbitration 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.

¹⁹⁴ 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 seq.; 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 8 May 2017).

¹⁹⁵ 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 7 May 2017), 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 seq., pp. 658 et seq.; 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 seq.

In contrast to other areas of public international law¹⁹⁶ and EU law, an investor is hardly required to exhaust local remedies before resorting to investor-State arbitration ('local remedies rule') in international investment law¹⁹⁷. This is due to the silence of most investment instruments on this point which was read – in conjunction with other evidence¹⁹⁸ – by tribunals as a 'waiver' of the local remedies rule¹⁹⁹.

Apart from textual considerations, eminent commentators justify the dropping of the local remedies rule in investor-State arbitration, 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 investor²⁰⁰.

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 under 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 investment²⁰¹.

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

¹⁹⁶ 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: T. 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).

¹⁹⁷ Certain 'variations' of the local remedies rule have surfaced in investor-State arbitration 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 8 May 2017); W. Dodge, *Local Remedies under NAFTA Chapter 11*, 2011, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2217059 (visited 8 May 2017). 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.

¹⁹⁸ 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.

¹⁹⁹ 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 8 May 2017); *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 8 May 2017); *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 8 May 2017). 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: T. 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.

²⁰⁰ 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 7 May 2017).

²⁰¹ Also ideas of creating 'competition' between developed domestic systems and investor-State arbitration 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.

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 State²⁰². Furthermore, domestic judges are less prone to allegations of conflicts of interests in comparison to arbitrators, the former holding a tenured office, the latter hardly enjoying similar privileges (below 4.4.1 (p. 84)).

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 among the most advanced²⁰³ – 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 said consensus 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 investor-State arbitration what it was actually meant to be: A safety net in case of a failure of the domestic legal system, not an alternative to it²⁰⁴. 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 ECtHR, the 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 differently²⁰⁵.

Therefore, what appears to be needed is not a one-size-fits-all approach but a solution which responds to varying capacities of domestic courts²⁰⁶. In any event, when addressing the relationship of domestic courts and investor-State arbitration, the State parties have to answer several questions, in particular: Is a certain domestic remedy to be pursued first; can investor-State arbitration 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?

²⁰² 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.

²⁰³ 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 2017); 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 7 May 2017).

²⁰⁴ 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 8 May 2017). Cf. also S. Montt, *State Liability in Investment Treaty Arbitration*, Hart Publishing, Oxford, 2009, pp. 153 et seqq.

²⁰⁵ 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 8 May 2017), p. 92.

²⁰⁶ 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 8 May 2017), p. 90.

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

The relationship of investor-State arbitration and domestic courts can be structured in different ways. Treaty parties can require an investor to exhaust local remedies before resorting to international with regard to the sequence of domestic and international remedy²⁰⁷. This is the prevailing approach in public international law, at least where it – exceptionally – provides remedies for individuals²⁰⁸. Such ‘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) investors²⁰⁹.

If international arbitration shall be available ‘right from the start’ of a dispute between host State and investor, the issue 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 and arbitrated consecutively, first in domestic courts and then before investor-State tribunals. It aims at contributing to a swift resolution of a dispute and at avoiding the additional costs of two proceedings. An alternative approach would be to require a claimant’s waiver of other remedies before it can initiate investment arbitration²¹⁰. 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 investor-State arbitration to domestic proceedings.

4.3.2.3 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

²⁰⁷ Certain ‘variations’ of the local remedies rule have surfaced in arbitral 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 8 May 2017), 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 8 May 2017). 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.

²⁰⁸ 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: T. 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).

²⁰⁹ 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 8 May 2017), pp. 90 et seqq.

²¹⁰ 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 investor-State arbitration.

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 context²¹¹.

To be sure, the ECtHR does not have the capacity to overturn judgements of national courts. Nonetheless, the concerned State is bound by the judgement (Art. 46 (1) ECHR). The violation of the ECHR has to be ended, be it by means of the legislative, administrative or judiciary body. The approach to end the violation differs from case to case and from State to State. In some cases, the interpretation of national legislation changes, in other cases, legislation itself²¹².

Neither does the CJEU have the formal competence to overturn judgements of national courts. It cannot be disputed, however, that CJEU judgements have significant influence on national jurisprudence in terms of interpretation of such law that is determined by EU law.

4.3.3 Comparison of EUSFTA, CETA, and EUVFTA; juxtaposition to the CJEU and the ECtHR

4.3.3.1 Main proceedings

All FTAs within the scope of this study contain detailed provisions on the relationship of local remedies to investor-State arbitration under the respective agreement.

EUSFTA in Art. 9.17 (1) (f) avoids parallel proceedings by compelling the investor to (i) withdraw any pending claim and (ii) declare not to submit such claim to domestic courts before the tribunal has rendered a final decision. CETA in Art. 8.22 (1) (f) and (g), (5) follows the approach taken in EUSFTA. Art. 8 (1) and (4) (a) EUVFTA follow the same logic. On principle, parallel proceedings are thus not permitted.

All FTAs have adopted an approach to prevent 'U-turns': The claimant in an investment arbitration is compelled to waive its right to submit claims to domestic courts (Art. 9.17 (1) (f) (ii) EUSFTA²¹³, Art. 8.22 (1) (g) CETA and Art. 8 (4) (b) EUVFTA). Such waiver, though, would cease in accordance with Art. 8.22 (5) CETA, *inter alia*, when the investor's claim is dismissed by the arbitral 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. Under EUVFTA, which is more restrictive on providing the investor with a 'second shot', the waiver ceases to apply where the claim is dismissed by the tribunal on the grounds of a failure to meet the nationality requirements under the agreement (Art. 8 (6) EUVFTA). In such situations, the investor may take a 'U-turn' 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. EUSFTA, by contrast, does not curtail the waiver comparably.

Interestingly, the final version of CETA now *fully* bars parallel proceedings. In earlier drafts²¹⁴, this applied only to claims for damages or compensation. For other remedies, such as the annulment of a host State's measure, parallel proceedings remained possible. According to the European Commission, this

²¹¹ 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, 2016, pp. 377-397.

²¹² Comprehensive account for Member States: R. Blackburn and J. Polakiewicz (eds.), *Fundamental Rights in Europe*, Oxford University Press, Oxford, 2001, pp. 103 et seqq.

²¹³ EUSFTA does not use the word waiver in this context; it requires the claimant to 'declare'.

²¹⁴ S. Hindelang and C. P. Sassenrath, *The Investment Chapters in EU's International Trade and Investment Agreements in a Comparative Perspective*, European Union, Belgium, 2015, pp. 56-57. Available at [http://www.europarl.europa.eu/Reg-Data/etudes/STUD/2015/534998/EXPO_STU\(2015\)534998_EN.pdf](http://www.europarl.europa.eu/Reg-Data/etudes/STUD/2015/534998/EXPO_STU(2015)534998_EN.pdf) (visited 7 May 2017).

regulatory approach was thought to have the advantage of not discouraging investors from seeking redress before domestic courts and, hence, might reduce the number of potential investor-State arbitral claims²¹⁵. Due to the recent changes in the CETA text, the question of whether and to what degree such argument has any merit does not need to be addressed here anymore.

All in all, the regulatory approaches in the FTAs at least do not explicitly discourage the use of domestic remedies by foreclosing the way to arbitration after domestic proceedings. Save for the possibilities of 'U-turns' mentioned above, all treaties also aim to avoid parallel proceedings.

4.3.3.2 Interim Measures

CETA and EUVFTA, differently from EUSFTA, explicitly provide for interim reliefs and injunctions by the respective tribunal. Thus, interim measures do not *have to* be pursued at the domestic level (Art. 8.34 CETA, Art. 21 EUVFTA). While it is not entirely clear whether CETA²¹⁶ bars interim measures before domestic courts, EUVFTA allows for such (cf. Art. 8 (7) EUVFTA). Under EUSFTA, it is possible to seek preliminary injunctions before domestic courts while the principal proceedings are pending before an arbitral tribunal or prior to the submission of a claim (Art. 9.17 (4) EUSFTA). The EUSFTA text is silent on whether such proceedings can also be brought before the tribunal. However, Art. 47 ICSID Convention (in connection with Rule 39 (6) of the ICSID Arbitration Rules), Art. 46 ICSID Additional Facility Rules, and Art. 26 UNCITRAL Arbitration Rules empower a tribunal to order provisional measures.

Before the CJEU, interim relief is possible with regard to the direct action (Art. 279 TFEU) but not with regard to the preliminary reference procedure for which the domestic courts bear responsibility²¹⁷. The ECtHR is authorised to issue interim measures in accordance with Rule 39 Rules of Court and will do so if 'having reviewed all the relevant information, it considers that the applicant faces a real risk of serious, irreversible harm if the measure is not applied.'²¹⁸

²¹⁵ 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 7 May 2017), p. 11.

²¹⁶ Cf. CETA differentiates in respect of waivers between 'proceedings' prior to the initiation of arbitration (Art. 8.22 (1) (f) CETA) and 'claims' (Art. 8.22 (1) (f) CETA), which may not be brought during arbitration. One could argue that interim measures may not be a 'claim'.

²¹⁷ K. Lenaerts, I. Maselis and K. Gutman, *EU Procedural Law*, Oxford University Press, Oxford, 2015, paras 13.09, 13.13.

²¹⁸ Practice direction on the request for interim measures issued by the President of the Court in accordance with Rule 32 of the Rules of Court on 5 March 2003 and amended on 16 October 2009 and on 7 July 2011.

4.3.4 Table: ISDS and its relation to domestic remedies²¹⁹

EUSFTA ²²⁰	CETA	EUVFTA ²²¹	ECtHR
<p>Art. 9.17</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>(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)</p>	<p>Art. 8.22</p> <p>1. An investor may only submit a claim pursuant to Article 8.23 if the investor:</p> <p>[...]</p> <p>(f) withdraws or discontinues any existing proceeding before a tribunal or court under domestic or international law with respect to a measure alleged to constitute a breach referred to in its claim; and</p> <p>(g) waives its right to initiate any claim or proceeding before a tribunal or court under domestic or international law with respect to a measure alleged to constitute a breach referred to in its claim.</p> <p>2. If the claim submitted pursuant to Article 8.23 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, the requirements in subparagraphs 1(f) and (g) apply both to the investor and the locally established enterprise).</p> <p>3. The requirements of subparagraphs 1(f) and (g) and paragraph 2 do not apply in respect of a locally established enterprise if the respondent or the investor's host state</p>	<p>Art. 8</p> <p>1. A claimant may not submit a claim to the Tribunal if the claimant has a pending claim before any other domestic or international court or tribunal concerning the same measure as that alleged to be inconsistent with the provisions referred to in Article 1(1) (Scope) and the same loss or damage, unless the claimant withdraws such pending claim.</p> <p>2. A claimant acting on its own behalf may not submit a claim to the Tribunal if any person who, directly or indirectly, has an ownership interest in or is controlled by the claimant has a pending claim before this Tribunal or any other domestic or international court or tribunal concerning the same measure as that alleged to be inconsistent with the provisions referred to in Article 1(1) (Scope) and the same loss or damage, unless that person withdraws such pending claim.</p> <p>3. A claimant acting on behalf of a locally established company may not submit a claim to the Tribunal if any person who, directly or indirectly, has an ownership interest in or is controlled by the locally established company has a pending claim before this Tribunal or any other domestic or international</p>	<p>Art. 35 ECHR</p> <p>1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.</p> <p>[...]</p> <p>4. The Court shall reject any application which it considers inadmissible under this Article. It may do so at any stage of the proceedings.</p> <p>Rules of Court</p> <p>Rule 39</p> <p>1. The Chamber or, where appropriate, the President of the Section or a duty judge appointed pursuant to paragraph 4 of this Rule may, at the request of a party or of any other person concerned, or of their own motion, indicate to the parties any interim measure which they consider should be adopted in the interests of the parties or of the proper conduct of the proceedings.</p> <p>2. Where it is considered appropriate, immediate notice of the measure adopted in a</p>

²¹⁹ Footnotes and section headings omitted.

²²⁰ Numbering according to the May 2015 authentic text; numbering of the articles may change.

²²¹ Numbering according to the January 2016 agreed text (might be subject to change).

<p>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 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 9.16 (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</p>	<p>has deprived the investor of control of the locally established enterprise, or has otherwise prevented the locally established enterprise from fulfilling those requirements.</p> <p>4. Upon request of the respondent, the Tribunal shall decline jurisdiction if 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) if the Tribunal rejects the claim on the basis of a failure to meet the requirements of paragraph 1 or 2 or on any other procedural or jurisdictional grounds;</p> <p>(b) if the Tribunal dismisses the claim pursuant to Article 8.32 or Article 8.33; or</p> <p>(c) if the investor withdraws its claim, in conformity with the applicable rules under Article 8.23.2, within 12 months of the constitution of the division of the Tribunal.</p> <p>Art. 8.34</p> <p>A Tribunal may order an interim measure of protection to preserve the rights of a disputing party or to ensure that the Tribunal’s jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the Tribunal’s jurisdiction. A Tribunal shall not order attachment or enjoin the application of the measure alleged to constitute a breach referred to in Article 8.23. For</p>	<p>court or tribunal concerning the same measure as that alleged to be inconsistent with the provisions referred to in Article 1(1) (Scope) and the same loss or damage, unless that person withdraws such pending claim.</p> <p>4. Before submitting a claim the claimant shall provide:</p> <p>(a) evidence that it and, where relevant pursuant to paragraphs 2 and 3, any person who, directly or indirectly, has an ownership interest in or is controlled by the claimant or the locally established company, has withdrawn any pending claim referred to in paragraphs 1, 2, and 3.</p> <p>(b) a waiver of its right, and where applicable, of the locally established company, to initiate any claim referred to in paragraph 1.</p> <p>5. This Article shall apply in conjunction with Annex III.</p> <p>6. The waiver provided pursuant to paragraph 4(b) shall cease to apply where the claim is rejected on the basis of a failure to meet the nationality requirements to bring an action under this Agreement.</p> <p>7. Paragraphs 1 to 4 of this Article, including Annex III, shall not apply where claims submitted to a domestic court or tribunal are initiated for the sole purpose of seeking interim injunctive or declaratory relief and do not involve the payment of monetary damages.</p> <p>8. Where claims are brought both pursuant to this Section and Section XX [State to State</p>	<p>particular case may be given to the Committee of Ministers.</p> <p>3. The Chamber or, where appropriate, the President of the Section or a duty judge appointed pursuant to paragraph 4 of this Rule may request information from the parties on any matter connected with the implementation of any interim measure indicated.</p> <p>4. The President of the Court may appoint Vice-Presidents of Sections as duty judges to decide on requests for interim measures</p> <p>Rule 47</p> <p>1. An application under Article 34 of the Convention shall be made on the application form provided by the Registry, unless the Court decides otherwise. It shall contain all of the information requested in the relevant parts of the application form and set out</p> <p>[...]</p> <p>(g) a concise and legible statement confirming the applicant’s compliance with the admissibility criteria laid down in Article 35 § 1 of the Convention.</p> <p>[...]</p>
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<p>relevant 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>	<p>the purposes of this Article, an order includes a recommendation.</p>	<p>dispute settlement] or another international agreement concerning the same treatment as that alleged to be inconsistent with the provisions referred to in Article 1(1) (Scope), a division of the Tribunal constituted under this Section shall, as soon as possible after hearing the disputing parties, take into account proceedings pursuant to Section X [State to State dispute settlement] or another international agreement in its decision, order or award. To this end, it may also, if it considers necessary, stay its proceedings. In acting pursuant to this provision the Tribunal shall respect Article 27(6) (Provisional award).</p> <p>[...]</p> <p>Art. 21</p> <p>The Tribunal may order an interim measure of protection to preserve the rights of a disputing party or to ensure that the Tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the Tribunal's jurisdiction. The Tribunal may not order the seizure of assets nor may it prevent the application of the treatment alleged to constitute a breach. For the purpose of this paragraph, an order includes a recommendation.</p>	
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4.4 Appointment, qualification, and remuneration of judges and arbitrators

CJEU and ECtHR as standing courts have detailed rules for appointment, qualification, and remuneration of judges. In contrast to earlier investment treaties, EUSFTA, CETA, and EUVFTA now regulate the fundamental question of how to appoint qualified arbitrators, modifying the rules of the arbitration institutions the parties call upon for administering their dispute. With regard to remuneration, for now, the FTAs still rely heavily on the 'traditional' set of rules but the course has been set to adopt separate remuneration regimes.

4.4.1 Appointment regime of the CJEU and the ECHR

Since the CJEU and the ECtHR are permanent courts (cf. Art. 15 CJEU Statute; Art. 18 ECHR), in contrast to ad hoc tribunals, two steps of the appointment process should be kept apart: First, how individuals are appointed judge at the respective court. And second, how the formation of judges to preside over a particular case is determined.

4.4.1.1 CJEU

4.4.1.1.1 Formal appointment

The total number of judges at the CJEU (specifically, CoJ²²²) is determined by the number of Member States, Art. 19 (2) TEU. This serves the traditional (public international law) idea of sovereign equality and representation²²³. The judges are usually citizens of the Member State appointing him or her, although this is no formal criterion²²⁴. After the respective national appointment procedure, the nominated judge is examined by a seven-person panel in accordance with Art. 255 TFEU²²⁵. The panel renders a (non-binding²²⁶) recommendation on the basis of which, 'by common accord of the governments of the Member States for a term of six years' (Art. 253 TFEU), the judge is finally appointed (but not by a formal decision of the Council). The term is renewable²²⁷ and reappointment can be observed frequently²²⁸. Judges are attributed to a chamber every year in September²²⁹.

²²² At the GC, there shall be 'at least' one judge per Member State, Art. 19 (2) TEU; Art. 254 TFEU.

²²³ C. Tomuschat, National Representation of Judges and Legitimacy of International Jurisdictions: Lessons from ICJ to ECJ?, in: I. Pernice, J. Kokott, and C. Saunders (eds.), *The Future of the European Judicial System in a Comparative Perspective*, Nomos, Baden-Baden, 2006, pp. 183 et seqq. points out the practical limits to these concepts.

²²⁴ A. Martins, Size and Composition of Highest Courts. Selection of Judges, in: I. Pernice, J. Kokott and C. Saunders (eds.), *The Future of the European Judicial System in a Comparative Perspective*, Nomos, Baden-Baden, 2006, pp. 203, pp. 203, 209; W. Dausen, in: *idem.* (ed.), *Handbuch des Europäischen Wirtschaftsrechts*, C.H. Beck, Munich, 2016 (loose-leaf), A II, para 330.

²²⁵ Lord Mance, *The Composition of the European Court of Justice*, 2011, https://www.supremecourt.uk/docs/speech_111019.pdf (visited 23 April 2017), paras 8 23 et seqq.

²²⁶ A. Martins, Size and Composition of Highest Courts. Selection of Judges, in: I. Pernice, J. Kokott and C. Saunders (eds.), *The Future of the European Judicial System in a Comparative Perspective*, Nomos, Baden-Baden, 2006, pp. 203, pp. 203, 209.

²²⁷ D. Ritleng, The Independence and Legitimacy of the European Court of Justice, in: *idem.* (ed.), *Independence and Legitimacy in the Institutional System of the European Union*, Oxford University Press, Oxford, 2016, p. 98.

²²⁸ A. Martins, Size and Composition of Highest Courts. Selection of Judges, in: I. Pernice, J. Kokott and C. Saunders (eds.), *The Future of the European Judicial System in a Comparative Perspective*, Nomos, Baden-Baden, 2006, pp. 203, pp. 203, 209.

²²⁹ B. Wägenbaur, *Court of Justice of the European Union. Commentary on Statute and Rules of Procedure*, C.H. Beck, Hart Publishing and Nomos, Munich, Oxford and Baden-Baden, 2013, Art. 16 Stat, para 1.

4.4.1.1.2 Assignment to a particular case

With regard to the question of how the case is assigned to a chamber, there exists no formalised system at the CJEU (specifically, at the CoJ²³⁰). The *attribution* to a particular chamber is *not predictable*. Each case filed at the CoJ is, in a first step, assigned to a Judge-Rapporteur at the discretion of the President of the Court (Art. 15 (1) RP CoJ). Hereby, the deciding chamber is in some cases *de facto* pre-determined since the Judge-Rapporteur is member of a chamber, which is not unlikely to be assigned the case in practice²³¹. After the written part of the procedure, the Judge-Rapporteur delivers a preliminary report of the case to the general meeting²³² of the GC or CoJ (as the case may be) which, taking into account the Judge-Rapporteur's proposals, then decides on how to proceed with the case, especially to which formation (i.e. in particular to which chamber) of the GC or CoJ it will be assigned (for the CoJ see Artt. 59, 60 RP CoJ)²³³. The absence of an abstract scheme of how cases are assigned at the CoJ is, at least from a German law perspective²³⁴, unusual. In Germany, there is a constitutional right to a 'Legal Judge', meaning the presiding judge (or chamber) must be determined by abstract criteria and in advance to the submission of a claim (cf. Art. 101 (1) of the German *Grundgesetz*)²³⁵.

4.4.1.2 ECtHR

4.4.1.2.1 Formal appointment

The total number of judges at the ECtHR is also determined by the number of States party to the Convention, Art. 20 ECHR. At the ECtHR, the first step of the appointment process is quite similar to CJEU's: Each Party to the ECHR nominates three candidates according to the respective domestic procedures²³⁶. They need not hold the nominating State's citizenship. Since the establishment of a seven-person selection panel in 2010²³⁷, the nominees are evaluated by said panel which approves the list of nominees if it finds the criteria in Art. 21 ECHR are satisfied²³⁸. Special regard is given to gender

²³⁰ For the GC, certain rules as to how the distribution of cases takes place exists due to the requirement of such in Art. 25 RP GC, see GC of 11 May 2016, Criteria for the assignment of cases to Chambers (2016/C 296/04), OJ C 296, 16 August 2016, pp. 2-3; available at <https://publications.europa.eu/en/publication-detail/-/publication/26b3b7f4-637e-11e6-9b08-01aa75ed71a1/language-en> (visited 9 May 2017).

²³¹ B. Wägenbaur, *Court of Justice of the European Union. Commentary on Statute and Rules of Procedure*, C.H. Beck, Hart Publishing and Nomos, Munich, Oxford and Baden-Baden, 2013, Art. 15 RP ECJ, para 1; K. Lenaerts, I. Maselis and K. Gutman, *EU Procedural Law*, Oxford University Press, Oxford, 2015, para 23.56 only report this practice for the GC.

²³² I.e. of all judges.

²³³ K. Lenaerts, I. Maselis and K. Gutman, *EU Procedural Law*, Oxford University Press, Oxford, 2015, para 23.56.

²³⁴ For case assignment in other European countries (Italy, France, The Netherlands, Denmark, and England and Wales) see M. Fabri, P. M. Langbroek, Is There a Right Judge for Each Case? A Comparative Study of Case Assignment in Six European Countries, *European Journal of Legal Studies* Vol. 1, No. 2 (2007) pp. 292, 313.

²³⁵ B. Wägenbaur, *Court of Justice of the European Union. Commentary on Statute and Rules of Procedure*, C.H. Beck, Hart Publishing and Nomos, Munich, Oxford and Baden-Baden, 2013, Art. 16 Stat, para 4 does not find the rule in place in conflict with the rule of law. The German method of case distribution could be a country-specific peculiarity owing to the nation's history.

²³⁶ In greater detail see R. McKenzie, The Selection of International Judges, in: C. Romano, K. Alter, and Y. Shany (eds.), *The Oxford Handbook of International Adjudication*, Oxford University Press, Oxford, 2014, pp. 749-751.

²³⁷ Committee of Ministers, Resolution CM/Res (2010) 26 of 10th November 2010.

²³⁸ Lord Mance, *The Composition of the European Court of Justice*, 2011, https://www.supremecourt.uk/docs/speech_111019.pdf (visited 23 April 2017), paras 46 et seqq.

equality²³⁹. The panel forwards the list to the Parliamentary Assembly, which, after another (oral) examination of the candidates by a committee²⁴⁰, elects the judges by a majority of votes (Art. 22 ECHR) for a (non-renewable) term of nine years (Art. 23 (1) ECHR).

4.4.1.2.2 Assignment to a particular case

The second step, i.e. assigning a case to a judge, is also at the discretion of the President of the Court, who 'shall endeavour to ensure a fair distribution of cases between the Sections'²⁴¹ (Rule 52 (1) Rules of Court).

4.4.1.3 Criticism

Frequently, both the appointment process of the CJEU and of the ECtHR are criticised for lack of transparency, especially with regard to the *in camera* work of the selection panels²⁴². The relatively short, renewable term of CJEU judges is also viewed critical: It is argued that such short term appointments may impede their independence²⁴³ and that relatively long, non-renewable terms would enable judges to work more efficiently with a rising level of experience²⁴⁴.

4.4.2 'Traditional' appointment regime in investor-State arbitration and its criticism

In investor-State arbitration typically, as for example under the ICSID Convention²⁴⁵, 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 rules²⁴⁶, sometimes also found in an investment instrument itself²⁴⁷ and/or in a specific code of conduct²⁴⁸.

²³⁹ Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights of 25 February 2016, *Second activity report for the attention of the Committee of Ministers*, Advisory Panel (2016)1, para 47.

²⁴⁰ Resolution 2002 (2014) of 24 June 2014 on the Evaluation of the implementation of the reform of the Parliamentary Assembly, Parliamentary Assembly, Z 9.

²⁴¹ 'Section' means a chamber set up by the plenary Court for a fixed period in pursuance of Art. 25 (b) ECHR, Rule 1 (d) Rules of Court.

²⁴² Cf A. Alemanno, How Transparent is Transparent Enough? Balancing Access to Information Against Privacy in European Judicial Selections, in: M. Bobek (ed.), *Selecting Europe's Judges: A Critical Review of the Appointment Procedures to the European Courts*, Oxford University Press, Oxford, 2015, pp. 202, 217 et seqq.

²⁴³ D. Ritleng, The Independence and Legitimacy of the European Court of Justice, in: D. idem (ed.), *Independence and Legitimacy in the Institutional System of the European Union*, Oxford University Press, Oxford, 2016, pp. 98-100.

²⁴⁴ R. McKenzie, The Selection of International Judges, in: C. Romano, K. Alter, and Y. Shany (eds.), *The Oxford Handbook of International Adjudication*, Oxford University Press, Oxford, 2014, pp. 753-754.

²⁴⁵ Cf. Art. 37 (2) (b), 38 ICSID Convention.

²⁴⁶ 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.dcbar.org/sections/international-law/upload/for_lawyers-sections-international-law-conductChart.pdf (visited 7 May 2017); 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 8 May 2017).

²⁴⁷ Cf., e.g., Article 29(2) of the 2004 Canadian model Foreign Investment Promotion and Protection Agreement, available at www.itlaw.com/documents/Canadian2004-FIPA-model-en.pdf (visited 7 May 2017); Article 23(2) of the 2009 ASEAN-Australia-New Zealand Free Trade Agreement, available at <http://dfat.gov.au/trade/agreements/aanzfta/official-documents/Pages/agreement-establishing-the-asean-australia-new-zealand-free-trade-area-aanzfta.aspx> (visited 10 May 2017).

²⁴⁸ 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 8 May 2017).

This system has, *inter alia*, attracted criticism on two points. Firstly, ad hoc arbitrators may appear as party representatives in other cases²⁴⁹. 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 representative²⁵⁰.

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 goals²⁵¹. ICSID appointments are often sketched as appointments 'through the political process of an international organisation' in which certain States exercise a dominant role²⁵². 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 place²⁵³.

4.4.3 Qualification of judges and arbitrators

Legitimacy and acceptance of arbitral or judicial decisions not least rest on the quality of reasoning and whether the adjudicators reach the correct legal result. All regimes within the scope of this study therefore aim at securing high standards with regard to arbitrators and adjudicators setting a high bar with regard to training and professional experience, some also requiring proficiency in the working language of the pertinent body. Hereby, wrongful judgements may not be entirely eliminated but the approach decreases the error rate. Apart from legal qualifications it should also be considered that caseload and available time for the individual decision also determine the quality thereof.

Sophisticated legal orders normally institute a formalised selection process to assess whether candidates have the required qualifications²⁵⁴. These 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 body²⁵⁵. The process (above 4.4.1 (p. 84)) is far from perfect or entirely transparent (above 4.4.1.3 (p. 86)), but compared to the secretive selection process of ad hoc arbitrators in traditional investor-State arbitrations it appears to be less arbitrary and of higher acceptance.

²⁴⁹ Critically on the dual hat role: T. Buergenthal, *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 8 May 2017), pp. 8-14.

²⁵⁰ G. Van Harten, *Investment Treaty Arbitration and Public International Law*, Oxford University Press, Oxford, 2007, pp. 172 et seqq.

²⁵¹ 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 8 May 2017), 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.

²⁵² J. Paulsson, *Arbitration Without Privity*, *ICSID Review*, Vol. 10 (1995), pp. 232 et seqq., 244.

²⁵³ 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 8 May 2017), p. 101.

²⁵⁴ K. Oellers-Frahm, *International Courts and Tribunals, Judges and Arbitrators*, in: R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, Oxford University Press, Oxford, 2013, opil.ouplaw.com/home/EPIL, paras 10 et seqq.

²⁵⁵ For the trust of domestic judges in the CJEU see J.A. Mayoral, *In the CJEU Judges Trust: A New Approach in the Judicial Construction of Europe*, *Journal of Common Market Studies* Vol. 55 (2017), pp. 551, 564. On the concept and measurability of trust and public opinion see E. Voeten, *Public Opinion and the Legitimacy of International Courts*, *Theoretical Inquiries in Law*, Vol 14, No. 2, pp. 411-436.

4.4.4 Remuneration of judges and arbitrators

Adequate remuneration is considered a cornerstone to ensure the personal and financial independence of international judges and arbitrators²⁵⁶. Another function of the comparably high salaries is ensuring judges' and arbitrators' impartiality²⁵⁷. The fixed monthly salary for an ECtHR judge is currently EUR 12 706.43²⁵⁸ to which several allowances have to be added, resulting in a monthly income reportedly above EUR 16 000²⁵⁹. The CJEU judges earn above EUR 18 000 per month, exclusive of allowances²⁶⁰. The Council is in charge of determining the remuneration for the CJEU judges (Art. 243 TFEU). Pension schemes are in place both for retired ECtHR and CJEU judges²⁶¹.

Arbitrators' remuneration is usually dependant on the pertinent dispute settlement institution's fee guidelines. For example, ICSID arbitrators receive USD 3 000 per day or USD 375 per hour of meetings or other work performed in connection with the proceedings²⁶². Travel expenses and *per diem* allowances are granted additionally²⁶³. The average tribunal costs (i.e. for each case) in ICSID arbitrations concluded between 2011 and 2015 reportedly amount to USD 882 668²⁶⁴.

Thus, it is safe to say that the average costs of an ICSID arbitrator *per case*, by and large, equals the average costs of a judge at the CJEU or the ECtHR *per annum*.

4.4.5 Comparison of EUSFTA, CETA, and EUVFTA; juxtaposition to the CJEU and the ECtHR

EUSFTA, CETA, and EUVFTA expressly define the process of arbitrator appointment²⁶⁵. All treaties require the parties to the respective agreement to compose a list (or 'roster') of *potential* arbitrators, a task which is delegated to the respective treaty committees (Art. 9.18 (3) EUSFTA, Art. 8.27 (2) CETA and Art. 12 (2) EUVFTA).

The lists generally are composed of equal thirds: one third citizens of each treaty party and one third of third-country nationals. The only once renewable 'term' for the potential arbitrators on the list varies from four years (EUVFTA) to five years (CETA). EUSFTA, in contrast, does not provide for terms. The respective lists include nine (EUVFTA) and 15 individuals (EUSFTA, CETA), respectively. Each treaty also allows to raise the number proportionately. Under CETA and EUVFTA every composition of an ad hoc tribunal may (only) be drawn from the respective list; in EUSFTA, however, only those arbitrators which have not been appointed by the disputing parties themselves, cf. Art. 9.18 (1) and (2).

²⁵⁶ K. Oellers-Frahm, International Courts and Tribunals, Judges and Arbitrators, in: R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, Oxford University Press, Oxford, 2013, opil.ouplaw.com/home/EPIL, para 22.

²⁵⁷ D. Ritleng, The Independence and Legitimacy of the European Court of Justice, in: *idem* (ed.), *Independence and Legitimacy in the Institutional System of the European Union*, Oxford University Press, Oxford, 2016, p. 101.

²⁵⁸ Cf. Art. 41 Council of Europe Staff Regulations (as of 1 January 2017), available at <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2956981&SecMode=1&DocId=1993484&Usage=2> (visited 12 April 2017) in conjunction with Appendix IV thereof.

²⁵⁹ Cf. https://jac.judiciary.gov.uk/sites/default/files/sync/basic_page/information_pack_final_0.pdf (visited 12 April 2017)

²⁶⁰ Cf. the table at the end of this chapter.

²⁶¹ K. Oellers-Frahm, International Courts and Tribunals, Judges and Arbitrators, in: R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, Oxford University Press, Oxford, 2013, opil.ouplaw.com/home/EPIL, para 22.

²⁶² <https://icsid.worldbank.org/en/Pages/arbitrators/Claims-for-Fees-and-Expenses.aspx> (visited 23 April 2017).

²⁶³ ICSID Administrative and Financial Regulation 14(1) (c) and (d).

²⁶⁴ Jeffery P. Commission, How Much Does an ICSID Arbitration Cost? A Snapshot of the Last Five Years, <http://kluwerarbitrationblog.com/2016/02/29/how-much-does-an-icsid-arbitration-cost-a-snapshot-of-the-last-five-years/> (visited 01 May 2017).

²⁶⁵ See the text passages highlighted in yellow in the table following this chapter.

With regard to the appointment process for an individual dispute, it appears that especially EUSFTA borrows from the ICSID Convention. Nonetheless, all treaties rely on ICSID infrastructure in one way or another (Art. 9.18 (2), (8)-(10) EUSFTA, Art. 8.27 (16), (17) CETA and Art. 12 (15), (18) EUVFTA²⁶⁶).

EUSFTA relies on the ‘traditional’ approach according to which *each disputing party* appoints one arbitrator. The third, acting as the chairperson, is appointed jointly by the disputing parties, Art. 9.18 (1) EUSFTA. Under Art. 8.27 (7) CETA and Art. 12 (7) EUVFTA, however, the respective president of the tribunal (himself drawn from the pool of third State nationals) appoints the members of the division to rule on the case (one national from each State party and one third State national who chairs the division). Under CETA and EUVFTA the president of the tribunal is obliged to ‘ensur[e] that the composition of the divisions is random and unpredictable, while giving equal opportunity to all Members of the Tribunal to serve’²⁶⁷. There is, however, no further specification on how to ensure such random and unpredictable distribution of business.

The appointment process prior to the establishment of the list of arbitrators by the respective CETA treaty committee relies on the decision of the Secretary General of ICSID as fall-back option (Art. 8.27 (17) CETA). As of now, the currently publicly available EUVFTA draft chapter on investment does not foresee a provision for this case.

While the current solutions in CETA and EUVFTA have still not reached the level of institutional safeguards of a permanent institution with tenured judges, creating a roster from which the arbitrators have to be chosen, allows States to exert greater control over the choice of arbitrators, being able to take into account their expertise and other desired characteristics²⁶⁸. Yet, it remains doubtful whether this procedure will fully ‘eliminate the risk of vested interests’ described above, as the European Commission claims²⁶⁹. Moreover, considering the currently 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 competition²⁷⁰.

Concerning qualification, all three FTAs contain – like the ICSID Convention in Art. 14 (1) – some rather general rules on the professional expertise and independence of arbitrators²⁷¹ to be nominated, which are further developed in the respective code of conducts for arbitrators (below 4.5 (p. 105)). General requirements are that they qualify for appointment in judicial offices in their respective jurisdiction, shall have demonstrated expertise in public international law, particularly in international investment

²⁶⁶ Note that in EUVFTA, the ICSID Secretariat may be replaced by the Permanent Court of Arbitration during legal scrubbing.

²⁶⁷ Art. 8.27 (7) CETA; Art. 12 (7) EUVFTA

²⁶⁸ 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 7 May 2017), pp. 423 and 433.

²⁶⁹ 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 7 May 2017), p. 9.

²⁷⁰ For a draft provision regarding the nomination process (as a Modification of [what is now] Article 8.27 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 7 May 2017), 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.’

²⁷¹ See the text passages highlighted in green in the table following this chapter.

law, in international trade law and the resolution of disputes arising under international investment or international trade agreements. These requirements are generally consistent with international customs²⁷².

The difficult issue that arbitrators may continue to work also as party representatives and arbitrators in other cases has not been solved fully by the three agreements, although some steps have been taken: It appears CETA and EUVFTA attempt to address the problem by stipulating 'limited incompatibilities' of the role of an arbitrator with other professional roles, coupled with granting arbitrators a monthly retainer fee (Art. 8.27 (12) CETA and Art. 12 (14) EUVFTA) to ensure their availability. Nonetheless, it is not comprehensively forbidden – as for instance for CJEU and ECtHR judges – to pursue a different profession so long as 'upon appointment, [arbitrators] [...] refrain from acting as counsel or as party-appointed expert or witness in any pending or new investment dispute under this or any other international agreement'²⁷³ (Art. 8.30 (1) CETA, similarly Art. 14 (1) EUVFTA, which additionally bars arbitrators from the said positions even in the domestic realm) and, furthermore, their other engagements do not conflict with the applicable code of conduct (below 4.5 (p. 105)). For the avoidance of doubt, on principle arbitrators are still allowed to act as arbitrators under different agreements.

In terms of remuneration, the abovementioned retainer fee will be set by the respective treaty committee (Art. 8.27 (12) CETA, Art. 34 (2) (e) EUVFTA). In case of a dispute, for now, CETA and EUVFTA grant the remuneration pursuant to ICSID (above 4.4.4 (p. 88)). The treaty committees are entitled to enact a different remuneration scheme though, even into a regular salary (Art. 8.27 (15) CETA, Art. 12 (17), 34 (2) (f) EUVFTA). EUSFTA relies on the 'traditional approach' in investment arbitration where the fees and expenses of the arbitrators are usually regulated by the chosen arbitration institution administering the dispute. It limits, however, the *recoverable* costs in terms of arbitrators' remuneration to that one of ICSID arbitration (Art. 9.26 (5) EUSFTA).

Finally, it is noteworthy that one privilege commonly bestowed on international judges²⁷⁴ is absent in all FTAs under comparison: immunity (cf., by contrast, Art. 3 CJEU Statute, Art. 51 ECHR).

In sum, the issues of appointment and qualification of arbitrators were at the forefront and centre of the discussion on the reform of the investment law regime. The solutions in CETA and EUVFTA presented above in many ways reflect a compromise between a 'real' permanent court with full-time judges and 'traditional' investor-State arbitration. Many aspects lie in the hands of the respective treaty committees which have the power to further institutionalise the respective dispute settlement system, shifting it towards permanent investment courts with tenured judges.

²⁷² R. McKenzie, The Selection of International Judges, in: C. Romano, K. Alter, and Y. Shany (eds.), *The Oxford Handbook of International Adjudication*, Oxford University Press, Oxford, 2014, p. 748.

²⁷³ Square brackets added.

²⁷⁴ K. Oellers-Frahm, International Courts and Tribunals, Judges and Arbitrators, in: R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, Oxford University Press, Oxford, 2013, opil.ouplaw.com/home/EPIL, para 23.

4.4.6 Table: Appointment, qualification, and remuneration of judges and arbitrators²⁷⁵

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

EUSFTA ²⁷⁶	CETA	EUVFTA ²⁷⁷	CJEU	ECtHR	ICSID Convention
<p>Art. 9.18</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 9.16 (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</p>	<p>Art. 8.27</p> <p>1. The Tribunal established under this Section shall decide claims submitted pursuant to Article 8.23.</p> <p>2. The CETA Joint Committee shall, upon the entry into force of this Agreement, appoint fifteen Members of the Tribunal. Five of the Members of the Tribunal shall be nationals of a Member State of the European Union, five shall be nationals of Canada⁹ and five shall be nationals of third countries.</p> <p>3. The CETA Joint Committee may decide to increase or to decrease the number of the Members of the Tribunal by multiples of three. Additional appointments shall be made on the same basis as provided for in paragraph 2.</p>	<p>Art. 12</p> <p>1. A Tribunal is hereby established to hear claims submitted pursuant to Article 7 (Submission of a claim).</p> <p>2. Pursuant to Article 34(2)(a), the Trade Committee shall, upon the entry into force of this Agreement, appoint nine Members of the Tribunal. Three of the Members shall be nationals of a Member State of the European Union, three shall be nationals of Vietnam and three shall be nationals of third countries.</p> <p>3. The Trade Committee may decide to increase or to decrease the number of the Members of the Tribunal by multiples of three. Additional appointments</p>	<p>Art. 19 TEU</p> <p>[...]</p> <p>2. The Court of Justice shall consist of one judge from each Member State. It shall be assisted by Advocates-General.</p> <p>The General Court shall include at least one judge per Member State.</p> <p>The Judges and the Advocates-General of the Court of Justice and the Judges of the General Court shall be chosen from persons whose independence is beyond doubt and who satisfy the conditions set out in Articles 253 and 254 of the Treaty on the Functioning of the European Union. They shall be appointed by common accord of the governments of the Member States for six years. Retiring</p>	<p>ECHR</p> <p>Art. 21</p> <p>1. The judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence.</p> <p>2. The judges shall sit on the Court in their individual capacity.</p> <p>3. During their term of office the judges shall not engage in any activity which is incompatible with their independence, impartiality or with the demands of a full-time office; all questions arising from the application of this paragraph shall be decided by the Court.</p> <p>Art. 22</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</p>

²⁷⁵ Footnotes and section headings omitted.

²⁷⁶ Numbering according to the May 2015 authentic text; numbering of the articles may change.

²⁷⁷ Numbering according to the January 2016 agreed text (might be subject to change).

<p>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>3. The Trade Committee will, pursuant to subparagraph 2(a) of Article 9.30 (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</p>	<p>4. The Members of the Tribunal shall possess the qualifications required in their respective countries for appointment to judicial office, or be jurists of recognised competence. They shall have demonstrated expertise in public international law. It is desirable that they have expertise in particular, in international investment law, in international trade law and the resolution of disputes arising under international investment or international trade agreements.</p> <p>5. The Members of the Tribunal appointed pursuant to this Section shall be appointed for a five-year term, renewable once. However, the terms of seven of the 15 persons appointed immediately after the entry into force of the Agreement, to be determined by lot, shall extend to six years. Vacancies shall be filled as they arise. A person appointed to replace a Member of the Tribunal whose term of office has not expired shall hold office for the remainder of the predecessor's term. In principle,</p>	<p>shall be made on the same basis as provided for in paragraph 2.</p> <p>4. The Members of the Tribunal shall possess the qualifications required in their respective countries for appointment to judicial offices, or be jurists of recognised competence. They shall have demonstrated expertise in public international law. It is desirable that they have expertise in particular, in international investment law, international trade law and the resolution of disputes arising under international investment or international trade agreements.</p> <p>5. The Members of the Tribunal appointed pursuant to this Section shall be appointed for a four-year term, renewable once. However, the terms of five of the nine persons appointed immediately after the entry into force of the Agreement, to be determined by lot, shall extend to six years. Vacancies shall be filled as they arise. A person appointed to replace a person whose term of office has not expired shall hold office for the remainder</p>	<p>Judges and Advocates-General may be reappointed.</p> <p>TFEU</p> <p>Art. 253</p> <p>The Judges and Advocates-General of the Court of Justice shall be chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognized competence; they shall be appointed by common accord of the governments of the Member</p> <p>States for a term of six years, after consultation of the panel provided for in Article 255.</p> <p>Every three years there shall be a partial replacement of the Judges and Advocates-General, in accordance with the conditions laid down in the Statute of the Court of Justice of the European Union. The Judges shall elect the President of the Court of Justice from among their number for a term of three years. He may be re-elected.</p>	<p>The judges shall be elected by the Parliamentary Assembly with respect to each High Contracting Party by a majority of votes cast from a list of three candidates nominated by the High Contracting Party.</p> <p>Art. 23</p> <p>1. The judges shall be elected for a period of nine years. They may not be re-elected.</p> <p>2. The terms of office of judges shall expire when they reach the age of 70.</p> <p>3. The judges shall hold office until replaced. They shall, however, continue to deal with such cases as they already have under consideration.</p> <p>4. No judge may be dismissed from office unless the other judges decide by a majority of two-thirds that that judge has ceased to fulfil the required conditions.</p> <p>Art. 26</p> <p>1. To consider cases brought before it, the Court shall sit in a single-judge formation, in committees of three judges, in Chambers of</p>	<p>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 period 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 Con-</p>
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<p>list, once established, includes at least fifteen individuals thereafter.</p> <p>4. For the purpose of establishing the list referred to in paragraph 3:</p> <p>(a) each Party shall propose five individuals to serve as arbitrators who may not act as chairpersons or sole arbitrators; and</p> <p>(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.</p> <p>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</p>	<p>ple, a Member of the Tribunal serving on a division of the Tribunal when his or her term expires may continue to serve on the division until a final award is issued.</p> <p>6. The Tribunal shall hear cases in divisions consisting of three Members of the Tribunal, of whom one shall be a national of a Member State of the European Union, one a national of Canada and one a national of a third country. The division shall be chaired by the Member of the Tribunal who is a national of a third country.</p> <p>7. Within 90 days of the submission of a claim pursuant to Article 8.23, the President of the Tribunal shall appoint the Members of the Tribunal composing the division of the Tribunal hearing the case on a rotation basis, ensuring that the composition of the divisions is random and unpredictable, while giving equal opportunity to all Members of the Tribunal to serve.</p> <p>8. The President and Vice-President of the Tribunal shall be responsible for organisational issues and will</p>	<p>of the predecessor's term. A person who is serving on a division of the Tribunal when his or her term expires may, with the authorization of the President of the Tribunal, continue to serve on the division until the closure of the proceedings of that division and shall, for that purpose only, be deemed to continue to be a Member of the Tribunal.</p> <p>6. The Tribunal shall hear cases in divisions consisting of three Members, of whom one shall be a national of a Member State of the European Union, one a national of Vietnam and one a national of a third country. The division shall be chaired by the Member who is a national of a third country.</p> <p>7. Within 90 days of the submission of a claim pursuant to Article 7, the President of the Tribunal shall appoint the Members composing the division of the Tribunal hearing the case on a rotation basis, ensuring that the composition of the divisions is random and unpredictable, while</p>	<p>Retiring Judges and Advocates-General may be reappointed.</p> <p>The Court of Justice shall appoint its Registrar and lay down the rules governing his service.</p> <p>The Court of Justice shall establish its Rules of Procedure. Those Rules shall require the approval of the Council.</p> <p>Art. 254</p> <p>The number of Judges of the General Court shall be determined by the Statute of the Court of Justice of the European Union. The Statute may provide for the General Court to be assisted by Advocates-General.</p> <p>The members of the General Court shall be chosen from persons whose independence is beyond doubt and who possess the ability required for appointment to high judicial office.</p> <p>They shall be appointed by common accord of the governments of the Member States for a term of six years, after consultation of the panel provided for in Article 255. The membership shall be partially renewed every</p>	<p>seven judges and in a Grand Chamber of seven judges. The Court's Chambers shall set up committees for a fixed period of time.</p> <p>2. At the request of the plenary Court, the Committee of Ministers may, by a unanimous decision and for a fixed period, reduce to five the number of judges of the Chambers.</p> <p>3. When sitting as a single judge, a judge shall not examine any application against the High Contracting Party in respect of which that judge has been elected.</p> <p>4. There shall sit as an ex officio member of the Chamber and the Grand Chamber the judge elected in respect of the High Contracting Party concerned. If there is none or if that judge is unable to sit, a person chosen by the President of the Court from a list submitted in advance by that Party shall sit in the capacity of judge.</p> <p>5. The Grand Chamber shall also include the President of the Court, the Vice-Presidents, the Presidents of the</p>	<p>tracting State whose national is a party to the dispute.</p> <p>Art. 39</p> <p>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.</p> <p>Art. 40</p> <p>(1) Arbitrators may be appointed from outside the Panel of Arbitrators, except in the case of appointments by the Chairman pursuant to Article 38.</p> <p>(2) Arbitrators appointed from outside the Panel of Arbitrators shall possess the qualities stated in paragraph (1) of Article 14.</p> <p>Regulation 14 of the Administrative and Financial Regulations</p>
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<p>to an objection to an arbitrator on a ground other than nationality:</p> <p>(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;</p> <p>(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</p> <p>(c) a claimant acting on behalf of a locally established 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</p>	<p>be appointed for a two-year term and shall be drawn by lot from among the Members of the Tribunal who are nationals of third countries. They shall serve on the basis of a rotation drawn by lot by the Chair of the CETA Joint Committee. The Vice-President shall replace the President when the President is unavailable.</p> <p>9. Notwithstanding paragraph 6, the disputing parties may agree that a case be heard by a sole Member of the Tribunal to be appointed at random from the third country nationals. The respondent shall give sympathetic consideration to a request from the claimant to have the case heard by a sole Member of the Tribunal, in particular where the claimant is a small or medium-sized enterprise or the compensation or damages claimed are relatively low. Such a request shall be made before the constitution of the division of the Tribunal.</p> <p>10. The Tribunal may draw up its own working procedures.</p> <p>11. The Members of the Tribunal shall ensure that they</p>	<p>giving equal opportunity to all Members to serve.</p> <p>8. The President and Vice-President of the Tribunal shall be responsible for organisational issues and will be appointed for a two-year term and shall be drawn by lot from among the Members who are nationals of third countries. They shall serve on the basis of a rotation drawn by lot by the Chair of the Trade Committee. The Vice-President shall replace the President when the President is unavailable.</p> <p>9. Notwithstanding paragraph 6, the disputing parties may agree that a case be heard by a sole Member who is a national of a third country, to be selected by the President of the Tribunal. The respondent shall give sympathetic consideration to such a request from the claimant, in particular where the claimant is a small or medium-sized enterprise or the compensation or damages claimed are relatively low. Such a request should be made at the same time as the filing of the claim pursuant to Article 7.</p>	<p>three years. Retiring members shall be eligible for re-appointment.</p> <p>The Judges shall elect the President of the General Court from among their number for a term of three years. He may be re-elected.</p> <p>The General Court shall appoint its Registrar and lay down the rules governing his service.</p> <p>The General Court shall establish its Rules of Procedure in agreement with the Court of Justice.</p> <p>Those Rules shall require the approval of the Council.</p> <p>Unless the Statute of the Court of Justice of the European Union provides otherwise, the provisions of the Treaties relating to the Court of Justice shall apply to the General Court.</p> <p>CJEU Statute</p> <p>Art. 4</p> <p>The Judges may not hold any political or administrative office.</p> <p>They may not engage in any occupation, whether gainful or not, unless exemption is exceptionally granted</p>	<p>Chambers and other judges chosen in accordance with the rules of the Court.</p> <p>When a case is referred to the Grand Chamber under Article 43, no judge from the Chamber which rendered the judgment shall sit in the Grand Chamber, with the exception of the President of the Chamber and the judge who sat in respect of the High Contracting Party concerned.</p> <p>Rules of Court</p> <p>Rule 3</p> <p>1. Before taking up office, each elected judge shall, at the first sitting of the plenary Court at which the judge is present or, in case of need, before the President of the Court, take the following oath or make the following solemn declaration:</p> <p>“I swear” – or “I solemnly declare” – “that I will exercise my functions as a judge honourably, independently and impartially and that I will keep secret all deliberations.”</p> <p>2. This act shall be recorded in minutes.</p>	<p>(1) Unless otherwise agreed pursuant to Article 60(2) of the Convention, and in addition to receiving reimbursement for any direct expenses reasonably incurred, each member of a Commission, a Tribunal or an ad hoc Committee appointed from the Panel of Arbitrators pursuant to Article 52(3) of the Convention (hereinafter referred to as “Committee”) shall receive:</p> <p>(a) a fee for each day on which he participates in meetings of the body of which he is a member;</p> <p>(b) a fee for the equivalent of each eight-hour day of other work performed in connection with the proceedings;</p> <p>(c) in lieu of reimbursement of subsistence expenses when away from his normal place of residence, a per diem allowance based on the allowance established from time to time for the Executive Directors of the Bank;</p> <p>(d) travel expenses in connection with meetings of the body of which he is a mem-</p>
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<p>in public international law and international investment law, or in the settlement of disputes under international investment agreements.</p> <p>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-F. 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>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:</p> <p>(a) the disputing party was notified of the appointment of the arbitrator; or</p> <p>(b) the disputing party first became aware of the arbitrator's alleged failure to meet such requirements.</p>	<p>are available and able to perform the functions set out under this Section.</p> <p>12. In order to ensure their availability, the Members of the Tribunal shall be paid a monthly retainer fee to be determined by the CETA Joint Committee.</p> <p>13. The fees referred to in paragraph 12 shall be paid equally by both Parties into an account managed by the ICSID Secretariat. In the event that one Party fails to pay the retainer fee the other Party may elect to pay. Any such arrears by a Party will remain payable, with appropriate interest.</p> <p>14. Unless the CETA Joint Committee adopts a decision pursuant to paragraph 15, the amount of the fees and expenses of the Members of the Tribunal on a division constituted to hear a claim, other than the fees referred to in paragraph 12, 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 submission of the</p>	<p>10. The Tribunal may draw up its own working procedures. Such Working Procedures shall be compatible with the applicable dispute settlement rules and the provisions of this Section. If it decides to do so, the President of the Tribunal shall draw up draft Working Procedures in consultation with the other Members of the Tribunal and present the draft Working Procedures to the Committee on Services, Investment and Government Procurement. The Working Procedures shall be adopted by the Trade Committee on agreement of the Parties. If the draft Working Procedures are not adopted by the Trade Committee within three months after their presentation to the Committee on Services, Investment and Government Procurement, the President of the Tribunal shall make the necessary revision to the draft Working Procedures, taking into consideration the views expressed by the Parties. The President of the Tribunal shall subsequently present the revised version of the Working Procedures to the</p>	<p>by the Council, acting by a simple majority.</p> <p>When taking up their duties, they shall give a solemn undertaking that, both during and after their term of office, they will respect the obligations arising therefrom, in particular the duty to behave with integrity and discretion as regards the acceptance, after they have ceased to hold office, of certain appointments or benefits.</p> <p>Any doubt on this point shall be settled by decision of the Court of Justice. If the decision concerns a member of the General Court or of a specialised court, the Court shall decide after consulting the court concerned.</p> <p>Art. 16</p> <p>The Court of Justice shall form chambers consisting of three and five Judges. The Judges shall elect the Presidents of the chambers from among their number. The Presidents of the chambers of five Judges shall be elected for three years. They may be re-elected once.</p> <p>The Grand Chamber shall consist of 13 Judges. It shall</p>	<p>Rule 4</p> <p>1. In accordance with Article 21 § 3 of the Convention, the judges shall not during their term of office engage in any political or administrative activity or any professional activity which is incompatible with their independence or impartiality or with the demands of a full-time office. Each judge shall declare to the President of the Court any additional activity. In the event of a disagreement between the President and the judge concerned, any question arising shall be decided by the plenary Court.</p> <p>2. A former judge shall not represent a party or third party in any capacity in proceedings before the Court relating to an application lodged before the date on which he or she ceased to hold office. As regards applications lodged subsequently, a former judge may not represent a party or third party in any capacity in proceedings before the Court until a period of two years from the date on which he or she ceased to hold office has elapsed.</p>	<p>ber based on the norms established from time to time for the Executive Directors of the Bank.</p> <p>The amounts of the fees referred to in paragraphs (a) and (b) above shall be determined from time to time by the Secretary-General, with the approval of the Chairman.</p> <p>[...]</p>
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<p>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.</p> <p>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.</p> <p>10. If, within thirty 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 sixty days of receipt of the notice of challenge and forthwith notify the disputing parties and other arbitrators, as applicable.</p>	<p>claim and allocated by the Tribunal among the disputing parties in accordance with Article 8.39.5.</p> <p>15. The CETA Joint Committee may, by decision, transform the retainer fee and other fees and expenses into a regular salary, and decide applicable modalities and conditions.</p> <p>16. The ICSID Secretariat shall act as Secretariat for the Tribunal and provide it with appropriate support.</p> <p>17. If the CETA Joint Committee has not made the appointments pursuant to paragraph 2 within 90 days from the date that a claim is submitted for dispute settlement, the Secretary General of ICSID shall, at the request of either disputing party appoint a division consisting of three Members of the Tribunal, unless the disputing parties have agreed that the case is to be heard by a sole Member of the Tribunal. The Secretary General of ICSID shall make the appointment by random selection from the existing nominations. The Secretary-General of ICSID may not appoint as</p>	<p>Committee on Services, Investment and Government Procurement. The Working procedures shall be considered adopted, unless the Parties, through a decision of the Trade Committee, reject the draft Working Procedures within three months after their presentation to the Committee on Services, Investment and Government Procurement.</p> <p>11. Where a procedural question arises that is not covered by this Section, any supplemental rules adopted by the Trade Committee or by the Working Procedures drawn up by the Tribunal, the relevant division of the Tribunal may adopt an appropriate procedure that is compatible with those provisions.</p> <p>12. A division of the Tribunal shall make every effort to make any decision by consensus. Where, nevertheless, a decision cannot be arrived at by consensus, a division of the Tribunal shall render its decision by a majority of votes of all its Members. Opinions expressed by individual Members of a division of the Tribunal shall be anonymous.</p>	<p>be presided over by the President of the Court. The Presidents of the chambers of five Judges and other Judges appointed in accordance with the conditions laid down in the Rules of Procedure shall also form part of the Grand Chamber.</p> <p>The Court shall sit in a Grand Chamber when a Member State or an institution of the Union that is party to the proceedings so requests.</p> <p>The Court shall sit as a full Court where cases are brought before it pursuant to Article 228(2), Article 245(2), Article 247 or Article 286(6) of the Treaty on the Functioning of the European Union.</p> <p>Moreover, where it considers that a case before it is of exceptional importance, the Court may decide, after hearing the Advocate-General, to refer the case to the full Court.</p> <p>Art. 18 No Judge or Advocate-General may take part in the disposal of any case in which he has previously</p>	<p>Rule 28</p> <p>1. Any judge who is prevented from taking part in sittings which he or she has been called upon to attend shall, as soon as possible, give notice to the President of the Chamber.</p> <p>2. A judge may not take part in the consideration of any case if</p> <p>(a) he or she has a personal interest in the case, including a spousal, parental or other close family, personal or professional relationship, or a subordinate relationship, with any of the parties;</p> <p>(b) he or she has previously acted in the case, whether as the Agent, advocate or adviser of a party or of a person having an interest in the case, or as a member of another national or international tribunal or commission of inquiry, or in any other capacity;</p> <p>(c) he or she, being an ad hoc judge or a former elected judge continuing to sit by virtue of Rule 26 § 3, engages in any political or administrative activity or any professional activity which is</p>	
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<p>11. Unless the disputing parties otherwise agree, the tribunal shall determine the place of arbitration in accordance with the applicable arbitration rules, provided that the place shall be in the territory of a State that is a party to the New York Convention.</p> <p>Art. 9.26 [...]</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>Annex 9-F [...]</p> <p>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.</p> <p>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,</p>	<p>chair a national of either Canada or a Member State of the European Union unless the disputing parties agree otherwise.</p> <p>Art. 8.30</p> <p>1. The Members of the Tribunal shall be independent. They shall not be affiliated with any government.¹⁰ They shall not take instructions from any organisation, or government with regard to matters related to the dispute. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest. They shall comply with the International Bar Association Guidelines on Conflicts of Interest in International Arbitration or any supplemental rules adopted pursuant to Article 8.44.2. In addition, upon appointment, they shall refrain from acting as counsel or as party-appointed expert or witness in any pending or new investment dispute under this or any other international agreement.</p>	<p>13. The Members shall be available at all times and on short notice, and shall stay abreast of dispute settlement activities under this Agreement.</p> <p>14. In order to ensure their availability, the Members shall be paid a monthly retainer fee to be fixed by decision of the Trade Committee. The President of the Tribunal and, where applicable, the Vice-President, shall receive a daily fee equivalent to the fee determined pursuant to Article 13(16) for each day worked in fulfilling the functions of President of the Tribunal pursuant to this Section.</p> <p>15. The retainer fee and the daily fees for the President or Vice President of the Tribunal when working in fulfilling the functions of President of the Tribunal pursuant to this Section shall be paid by both Parties taking into account their respective levels of development into an account managed by the [Secretariat of ICSID/ Permanent Court of Arbitration] [Negotiators' note: to be decided during legal scrubbing]. In the event that one Party fails to pay the</p>	<p>taken part as agent or adviser or has acted for one of the parties, or in which he has been called upon to pronounce as a member of a court or tribunal, of a commission of inquiry or in any other capacity.</p> <p>If, for some special reason, any Judge or Advocate-General considers that he should not take part in the judgment or examination of a particular case, he shall so inform the President. If, for some special reason, the President considers that any Judge or Advocate-General should not sit or make submissions in a particular case, he shall notify him accordingly.</p> <p>Any difficulty arising as to the application of this Article shall be settled by decision of the Court of Justice.</p> <p>A party may not apply for a change in the composition of the Court or of one of its chambers on the grounds of either the nationality of a Judge or the absence from the Court or from the chamber of a Judge of the nationality of that party.</p> <p>Art. 63</p>	<p>incompatible with his or her independence or impartiality;</p> <p>(d) he or she has expressed opinions publicly, through the communications media, in writing, through his or her public actions or otherwise, that are objectively capable of adversely affecting his or her impartiality;</p> <p>(e) for any other reason, his or her independence or impartiality may legitimately be called into doubt.</p> <p>3. If a judge withdraws for one of the said reasons, he or she shall notify the President of the Chamber, who shall exempt the judge from sitting.</p> <p>4. In the event of any doubt on the part of the judge concerned or the President as to the existence of one of the grounds referred to in paragraph 2 of this Rule, that issue shall be decided by the Chamber. After hearing the views of the judge concerned, the Chamber shall deliberate and vote, without that judge being present. For the purposes of the Chamber's deliberations and vote on this issue, he or she shall</p>	
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<p>16, 17 and 18 of this Code of Conduct.</p> <p>9. An arbitrator shall not engage in ex parte contacts concerning the proceeding.</p> <p>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.</p> <p>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.</p> <p>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.</p>	<p>2. If a disputing party considers that a Member of the Tribunal has a conflict of interest, it shall send to the President of the International Court of Justice a notice of challenge to the appointment. The notice of challenge shall be sent within 15 days of the date on which the composition of the division of the Tribunal has been communicated to the disputing party, or within 15 days of the date on which the relevant facts came to its knowledge, if they could not have reasonably been known at the time of composition of the division. The notice of challenge shall state the grounds for the challenge.</p> <p>3. If, within 15 days from the date of the notice of challenge, the challenged Member of the Tribunal has elected not to resign from the division, the President of the International Court of Justice shall, after hearing the disputing parties and after providing the Member of the Tribunal an opportunity to submit any observations, issue a decision within 45 days of receipt of the notice of challenge and notify the</p>	<p>retainer fee the other Party may elect to pay. Any such arrears will remain payable, with appropriate interest.</p> <p>16. Unless the Trade Committee adopts a decision pursuant to paragraph 17, the amount of the other fees and expenses of the Members on a division of the Investment Tribunal 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 submission of the claim and allocated by the Tribunal among the disputing parties in accordance with Article 27(4).</p> <p>17. Upon a decision by the Trade Committee, the retainer fee and other fees and expenses may be permanently transformed into a regular salary. In such an event, the Members shall serve on a full-time basis and the Trade Committee shall fix their remuneration and related organisational matters. In that event, the Members of the Tribunal shall not be permitted to engage in any occupation, whether</p>	<p>The Rules of Procedure of the Court of Justice and of the General Court shall contain any provisions necessary for applying and, where required, supplementing this Statute.</p> <p>RP CoJ</p> <p>Art. 11</p> <p>1. The Court shall set up Chambers of five and three Judges in accordance with Article 16 of the Statute and shall decide which Judges shall be attached to them.</p> <p>2. The Court shall designate the Chambers of five Judges which, for a period of one year, shall be responsible for cases of the kind referred to in Article 107 and Articles 193 and 194.</p> <p>3. In respect of cases assigned to a formation of the Court in accordance with Article 60, the word 'Court' in these Rules shall mean that formation.</p> <p>4. In respect of cases assigned to a Chamber of five or three Judges, the powers of the President of the Court shall be exercised by the President of the Chamber.</p>	<p>be replaced by the first substitute judge in the Chamber. The same shall apply if the judge sits in respect of any Contracting Party concerned in accordance with Rules 29 and 30.</p> <p>5. The provisions above shall apply also to a judge's acting as a single judge or participation in a Committee, save that the notice required under paragraphs 1 or 3 of this Rule shall be given to the President of the Section.</p> <p>Rule 49</p> <p>1. Where the material submitted by the applicant is on its own sufficient to disclose that the application is inadmissible or should be struck out of the list, the application shall be considered by a single-judge formation unless there is some special reason to the contrary.</p> <p>2. Where an application is made under Article 34 of the Convention and its examination by a Chamber or a Committee exercising the functions attributed to it under Rule 53 § 2 seems justified, the President of the Section to which the case has been assigned shall designate a</p>	
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<p>13. An arbitrator may not allow financial, business, professional, family or social relationships or responsibilities to influence his or her conduct or judgement.</p> <p>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.</p> <p>[...]</p> <p>19. Each arbitrator shall keep a record and render a final account of the time devoted to the procedure and of the expenses incurred.</p> <p>[...]</p>	<p>disputing parties and the other Members of the division. A vacancy resulting from the disqualification or resignation of a Member of the Tribunal shall be filled promptly.</p> <p>4. Upon a reasoned recommendation from the President of the Tribunal, or on their joint initiative, the Parties, by decision of the CETA Joint Committee, may remove a Member from the Tribunal where his or her behaviour is inconsistent with the obligations set out in paragraph 1 and incompatible with his or her continued membership of the Tribunal.</p> <p>[Footnote 10 to Art.8.30 CETA:] "For greater certainty, the fact that a person receives remuneration from a government does not in itself make that person ineligible."</p>	<p>gainful or not, unless exemption is exceptionally granted by the President of the Tribunal.</p> <p>18. The [Secretariat of ICSID/Permanent Court of Arbitration] [Negotiators' note: to be decided during legal scrubbing] shall act as Secretariat for the Tribunal and provide it with appropriate support. The expenses for such support shall be allocated by the Tribunal among the disputing parties in accordance with Article 27(4)</p> <p>Art. 14</p> <p>1. [...] In addition, upon appointment, they shall refrain from acting as counsel or as party-appointed expert or witness in any pending or new investment protection dispute under this or any other agreement or domestic law.</p> <p>[...]</p> <p>Art. 34</p> <p>[...]</p> <p>2. The Trade Committee may, upon recommendation of the Committee on</p>	<p>5. The composition of the Chambers and the designation of the Chambers responsible for cases of the kind referred to in Article 107 and Articles 193 and 194 shall be published in the Official Journal of the European Union.</p> <p>Art. 15</p> <p>1. As soon as possible after the document initiating proceedings has been lodged, the President of the Court shall designate a Judge to act as Rapporteur in the case.</p> <p>2. For cases of the kind referred to in Article 107 and Articles 193 and 194, the Judge-Rapporteur shall be selected from among the Judges of the Chamber designated in accordance with Article 11(2), on a proposal from the President of that Chamber. If, pursuant to Article 109, the Chamber decides that the reference is not to be dealt with under the urgent procedure, the President of the Court may reassign the case to a Judge-Rapporteur attached to another Chamber.</p>	<p>judge as Judge Rapporteur, who shall examine the application.</p> <p>3. In their examination of applications, Judge Rapporteurs</p> <p>(a) may request the parties to submit, within a specified time, any factual information, documents or other material which they consider to be relevant;</p> <p>(b) shall, subject to the President of the Section directing that the case be considered by a Chamber or a Committee, decide whether the application is to be considered by a single-judge formation, by a Committee or by a Chamber;</p> <p>(c) shall submit such reports, drafts and other documents as may assist the Chamber or the Committee or the respective President in carrying out their functions.</p> <p>Rule 52</p> <p>1. Any application made under Article 34 of the Convention shall be assigned to a Section by the President of the Court, who in so doing shall endeavour to ensure a</p>	
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		<p>Services, Investment and Government Procurement, and after completion of the respective legal requirements and procedures of the Parties, adopt decisions to:</p> <p>[...]</p> <p>(e) fix the monthly retainer fee of the Members of the Tribunal and of the Appeal Tribunal pursuant to Articles 12(14) and 13(14) and the amount of the other fees and expenses of the Members of a division of the Appeal Tribunal and of the Presidents of the Tribunal and Appeal Tribunal pursuant to Articles 13(16), 12(14) and 13(14);</p> <p>(f) transform the retainer fee and other fees and expenses of the Members of the Tribunal and Appeal Tribunal into a regular salary pursuant to Articles 12(17) and 13(17);</p> <p>[...]</p>	<p>3. The President of the Court shall take the necessary steps if a Judge-Rapporteur is prevented from acting.</p> <p>Art. 59</p> <p>1. When the written part of the procedure is closed, the President shall fix a date on which the Judge-Rapporteur is to present a preliminary report to the general meeting of the Court.</p> <p>2. The preliminary report shall contain proposals as to whether particular measures of organisation of procedure, measures of inquiry or, if appropriate, requests to the referring court or tribunal for clarification should be undertaken, and as to the formation to which the case should be assigned. It shall also contain the Judge-Rapporteur's proposals, if any, as to whether to dispense with a hearing and as to whether to dispense with an Opinion of the Advocate General pursuant to the fifth paragraph of Article 20 of the Statute.</p> <p>3. The Court shall decide, after hearing the Advocate General, what action to take</p>	<p>fair distribution of cases between the Sections.</p> <p>2. The Chamber of seven judges provided for in Article 26 § 1 of the Convention shall be constituted by the President of the Section concerned in accordance with Rule 26 § 1.</p> <p>3. Pending the constitution of a Chamber in accordance with paragraph 2 of this Rule, the President of the Section shall exercise any powers conferred on the President of the Chamber by these Rules.</p> <p>Rule 52A</p> <p>1. In accordance with Article 27 of the Convention, a single judge may declare inadmissible or strike out of the Court's list of cases an application submitted under Article 34, where such a decision can be taken without further examination. The decision shall be final. The applicant shall be informed of the decision by letter.</p> <p>2. In accordance with Article 26 § 3 of the Convention, a single judge may not examine any application against</p>	
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			<p>on the proposals of the Judge-Rapporteur.</p> <p>Art. 60</p> <p>1. The Court shall assign to the Chambers of five and of three Judges any case brought before it in so far as the difficulty or importance of the case or particular circumstances are not such as to require that it should be assigned to the Grand Chamber, unless a Member State or an institution of the European Union participating in the proceedings has requested that the case be assigned to the Grand Chamber, pursuant to the third paragraph of Article 16 of the Statute.</p> <p>2. The Court shall sit as a full Court where cases are brought before it pursuant to the provisions referred to in the fourth paragraph of Article 16 of the Statute. It may assign a case to the full Court where, in accordance with the fifth paragraph of Article 16 of the Statute, it considers that the case is of exceptional importance.</p>	<p>the Contracting Party in respect of which that judge has been elected.</p> <p>3. If the single judge does not take a decision of the kind provided for in the first paragraph of the present Rule, that judge shall forward the application to a Committee or to a Chamber for further examination.</p> <p>Resolution on Judicial Ethics²⁷⁹</p> <p>I. Independence</p> <p>In the exercise of their judicial functions, judges shall be independent of all external authority or influence. They shall refrain from any activity or membership of an association, and avoid any situation, that may affect confidence in their independence.</p> <p>II. Impartiality</p> <p>Judges shall exercise their function impartially and ensure the appearance of impartiality. They shall take care to avoid conflicts of interest as well as situations</p>	
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²⁷⁹ Adopted by the Plenary Court on 23 June 2008, available at http://www.echr.coe.int/Documents/Resolution_Judicial_Ethics_ENG.pdf (visited 12 April 2017).

			<p>3. The formation to which a case has been assigned may, at any stage of the proceedings, request the Court to assign the case to a formation composed of a greater number of Judges.</p> <p>4. Where the oral part of the procedure is opened without an inquiry, the President of the formation determining the case shall fix the opening date.</p> <p>Art. 2 Regulation No 422/67/EEC, No 5/67/EURATOM of the Council of 25 July 1967</p> <p>[...]</p> <p>2. The basic monthly salary of Members of the Court of Justice shall be equal to the amount resulting from the application of the following percentages to the basic salary of an official of the European Communities on the third step of grade 16:^[278]</p> <p>President 138 %, Vice-President 125 %,</p>	<p>that may be reasonably perceived as giving rise to a conflict of interest.</p> <p>[...]</p> <p>VII. Additional activity</p> <p>Judges may not engage in any additional activity except insofar as this is compatible with independence, impartiality and the demands of their full-time office. They shall declare any additional activity to the President of the Court, as provided for in Rule 4 of the Rules of Court.</p>	
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²⁷⁸ Square brackets added. As of 12 April 2017, this equals the amount of 18 517.81 Euro (Art. 2 Regulation (EU) No 423/2014 of the European Parliament and of the Council of 16 April 2014 *in conjunction with* Art. 66 Regulation (EEC, Euratom, ECSC) No 259/68 of the Council of 29 February 1968 laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities and instituting special measures temporarily applicable to officials of the Commission (OJ L 56, 4 March 1968, p. 1).

			<p>Judge or Advocate-General 112.5 %,</p> <p>Registrar 101 %,</p> <p>[...]</p> <p>Art. 4 Regulation No 422/67/EEC, No 5/67/EURATOM of the Council of 25 July 1967</p> <p>1. Members of the Commission or of the Court shall be entitled to a residence allowance equal to 15 % of their basic salary.</p> <p>2. Members of the Commission shall receive a monthly entertainment allowance amounting to:</p> <p>President EUR 1 418,07</p> <p>Vice-President EUR 911,38</p> <p>Other Members EUR 607,71</p> <p>3. Members of the Court of Justice shall receive a monthly entertainment allowance amounting to:</p> <p>President EUR 1 418,07</p> <p>Vice-President</p>	
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			<p>EUR 911,38, Judge or Advocate-General EUR 607,71 Registrar EUR 554,17</p> <p>Presiding Judges of Chambers of the Court and the First Advocate-General shall in addition receive during their term of office a special duty allowance of EUR 810.74 per month.</p> <p>4. The allowances referred to in paragraphs 2 and 3 shall be increased annually by the Council acting by a qualified majority, allowing for the increase in the cost of living.</p>		
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4.5 Code of conduct for judges and arbitrators

The ‘traditional’ investor-State arbitration system has drawn considerable criticism for not sufficiently guaranteeing the integrity of the adjudicative process²⁸⁰. With a view to address this criticism, specific codes of conduct were drawn up which are believed, to some extent, to advance the integrity of adjudicative process. Recalling that ‘judicial ethics’ is considered a relatively new field of public international law, thus still lacking commonly agreed on ‘best practices’ and universally accepted standards²⁸¹, there was at least no obvious point of reference to model such rules or to adapt standards from commercial arbitration to the needs of the FTAs.

4.5.1 Comparison of EUSFTA, CETA, and EUVFTA; juxtaposition to the CJEU and the ECtHR

EUSFTA and EUVFTA provide rules of their own to address the integrity issue (below 4.5.2). CETA makes reference to an existing framework but tasks a treaty committee to adopt a ‘tailor-made’ code of conduct in the future. 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 disclosure²⁸² and confidentiality²⁸³ obligations and pledges to conduct proceedings independently²⁸⁴ and impartially (Rule 1(4)) and Rule 6(2)). The CJEU and the ECtHR have codes of their own. Furthermore, major arbitration institutions also provide frameworks of their own. Common dimensions of such codes are independence, impartiality and diligence, albeit the specific content varies significantly²⁸⁵.

4.5.1.1 EUSFTA and EUVFTA: codes of conduct

Art. 9.18 (7) EUSFTA states that arbitrators shall comply with the regulations of Annex 9-F, 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-F (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-F (5)). An arbitrator is obliged to fairness and diligence (Annex 9-F (6)) and must be independent and impartial and avoid creating an appearance of bias (Annex 9-F (10)). Annex 9-F (15) clarifies that even former arbitrators are not free from obligations: Annex 9-F (16)-(18) deal with the confidentiality of proceedings, according to which arbitrators shall not disclose or use any non-public information. Special attention is also devoted to financial conflicts of interest, cf. Annex 9-F (13)-(14).

In similar fashion, Art. 14 (1) EUVFTA refers to a code of conduct in Annex II to the Agreement, which stipulates responsibilities and obligations of the arbitrators.

²⁸⁰ Critically especially on the dual hat role of adjudicators as arbitrators in one and representative in another case: T. Buergehal, *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 7 May 2017), pp. 8-14.

²⁸¹ A. Seibert-Fohr, *International Judicial Ethics*, in: C. Romano, K. Alter, and Y. Shany (eds.), *The Oxford Handbook of International Adjudication*, Oxford University Press, Oxford, 2014, pp. 758, 773 et seqq.

²⁸² See the text passages highlighted in yellow in the table following this chapter.

²⁸³ See the text passages highlighted in green in the table following this chapter.

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

²⁸⁵ A. Seibert-Fohr, *International Judicial Ethics*, in: C. Romano, K. Alter, and Y. Shany (eds.), *The Oxford Handbook of International Adjudication*, Oxford University Press, Oxford, 2014, pp. 761 et seqq.

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

For the time being, CETA does not stipulate its individual set of rules for the conduct of arbitrators. According to Art. 8.44 (2) CETA the Committee on Services and Investment 'shall', on agreement of the treaty parties, 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.

For now, the only rule expressly regulating the conduct of arbitrators already contained in CETA can be found in Art. 8.30 (1) CETA. It states that arbitrators shall not take instructions from any party (similar to EUSFTA Annex 9-F (2)). The same provision also states that arbitrators '[...] shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest' – but remains silent on when such conflict arises. To operationalise the term, CETA refers to the International Bar Association Guidelines on Conflicts of Interest in International Arbitration (IBA Guidelines)²⁸⁶. These do not specifically refer to investor-State arbitration. Instead, they address key issues that arise in all arbitrations, commercial and investment alike. They have already been applied in investor-State arbitrations and are understood to represent 'international best practices'²⁸⁷. 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 IBA Guidelines make them mandatory for arbitrators acting in CETA cases until the treaty parties agree on a new code of conduct.

The attempts taken by State parties to more closely regulate the conduct of arbitrators evidences not only a general tendency of a stronger governmental grip on procedural law owing to the public law nature of the disputes adjudicated in investment arbitration but can also be read as concessions to public opinion critical of the system as a whole.

4.5.1.3 The CJEU and the ECtHR: detailed codes of conduct

Both the CJEU and the ECtHR provide an ethics code for their judges. Since 2008, ECtHR judges have to comply with the 'Resolution on Judicial Ethics'²⁸⁸. The new CJEU²⁸⁹ 'Code of Conduct' entered into force on 1 January 2017. Both rulebooks contain the dimensions: independence – impartiality – diligence – confidentiality – disclosure. Confidentiality plays a smaller role compared, for instance, to code of conducts drawn up for commercial arbitration since CJEU's and the ECtHR's hearings are public (below 4.6.2 (p. 119)). The codes also promulgate 'integrity' with the purpose to protect the standing and reputation of the respective institutions and, possibly, the traditionally high public regard for the judicial profession (cf. Art. 3 (1) Code of Conduct; Art. III Resolution on Judicial Ethics). The codes also set forth rules on additional activity of the full-time judges (cf. Art. 8 Code of Conduct; Art. VII Resolution on Judicial Ethics) which are (naturally) not common for arbitral codes of conduct directed at ad hoc arbitrators²⁹⁰.

²⁸⁶ 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 21 April 2017).

²⁸⁷ 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 7 May 2017), p. 423.

²⁸⁸ Adopted by the Plenary Court on 23 June 2008, available at http://www.echr.coe.int/Documents/Resolution_Judicial_Ethics_ENG.pdf (visited 12 April 2017).

²⁸⁹ CJEU, Code of Conduct for Members and former Members of the Court of Justice of the European Union, OJ C, 483, 23. December 2016, p. 1; available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2016:483:FULL&from=FR> (visited 12 April 2017).

²⁹⁰ Cf. also Art. 4 CJEU Statute.

One particularly remarkable feature of the CJEU's new Code of Conduct is its comprehensive obligation to disclose financial interests (Art. 5 Code of Conduct). Every entity in which the judge has direct financial interest and which might reasonably be perceived as being capable of giving rise to a conflict of interest has to be disclosed to the president of the pertinent court. Hereby, the personal interest of a judge in the outcome of a given dispute can more easily be ascertained.

4.5.2 Table: Code of conduct for arbitrators²⁹¹

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

EUSFTA ²⁹²	CETA	EUVFTA ²⁹³	CJEU	ECtHR	ICSID Convention
<p>Art. 9.18</p> <p>[...]</p> <p>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-F. 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>[...]</p> <p>Annex 9-F</p> <p>[...]</p> <p>2. Throughout the proceedings, every candidate and ar-</p>	<p>Art. 8.30</p> <p>1. The Members of the Tribunal shall be independent. They shall not be affiliated with any government.¹⁰ They shall not take instructions from any organisation, or government with regard to matters related to the dispute. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest. They shall comply with the International Bar Association Guidelines on Conflicts of Interest in International Arbitration or any supplemental rules adopted pursuant to Article 8.44.2. In addition, upon appointment, they shall refrain from acting as counsel or as party-appointed expert or witness</p>	<p>Art. 14</p> <p>1. The Members of the Tribunal and of the Appeal Tribunal shall be chosen from persons whose independence is beyond doubt. They shall not be affiliated with any government.²⁷ They shall not take instructions from any government or organisation with regard to matters related to the dispute. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest. In so doing they shall comply with Annex II (Code of Conduct). In addition, upon appointment, they shall refrain from acting as counsel or as party-appointed expert or witness in any pending or new invest-</p>	<p>Code of Conduct for Members and former Members of the Court of Justice of the European Union²⁹⁴</p> <p>[...]</p> <p>Art. 1</p> <p>This Code of Conduct shall apply to Members and former Members of the Courts or Tribunals that constitute or have constituted the Court of Justice of the European Union.</p> <p>Art. 2</p> <p>1. Members shall devote themselves fully to the performance of their duties.</p> <p>2. Members shall perform their duties with complete independence, integrity, dignity and impartiality and with loyalty and discretion, in compliance with the rules</p>	<p>Resolution on Judicial Ethics</p> <p>[...]</p> <p>I. Independence</p> <p>In the exercise of their judicial functions, judges shall be independent of all external authority or influence. They shall refrain from any activity or membership of an association, and avoid any situation, that may affect confidence in their independence.</p> <p>II. Impartiality</p> <p>Judges shall exercise their function impartially and ensure the appearance of impartiality. They shall take care to avoid conflicts of interest as well as situations</p>	<p>Rule 1</p> <p>(4) 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</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>

²⁹¹ Section headings omitted.

²⁹² Numbering according to the May 2015 authentic text; numbering of the articles may change.

²⁹³ Numbering according to the January 2016 agreed text (might be subject to change).

²⁹⁴ OJ C 483, 23 December 2016, p. 1.

<p>bitrator shall avoid impropriety and the appearance of 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.</p> <p>3. Prior to confirmation of his or her selection as an arbitrator under Section B (Investor-State Dispute Settlement) of Chapter Nine (Investment), 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</p>	<p>in any pending or new investment dispute under this or any other international agreement.</p> <p>[...]</p> <p>[Footnote 10 to Art.8.30 CETA:] "For greater certainty, the fact that a person receives remuneration from a government does not in itself make that person ineligible."</p> <p>Art. 8.44</p> <p>[...]</p> <p>2. The Committee on Services and Investment shall, on agreement of the Parties, and after completion of their respective internal requirements and procedures, adopt a code of conduct for the Members of the Tribunal to be applied in disputes arising out of this Chapter, which may replace or supplement the rules in application, and may address topics including:</p> <p>(a) disclosure obligations;</p> <p>(b) the independence and impartiality of the Members of the Tribunal; and</p> <p>(c) confidentiality.</p>	<p>ment protection dispute under this or any other agreement or domestic law.</p> <p>[...]</p> <p>[Footnote 27 to Art.14 EUVFTA:] For greater certainty, the fact that a person receives an income from the government, or was formerly employed by the government, or has family relationship with a person who receives an income from the government, does not in itself render that person ineligible.</p> <p>Annex II</p> <p>Art. 1</p> <p>1. In this Code of Conduct:</p> <p>"member" means a Members of the Tribunal or a Member of the Appeal Tribunal established pursuant to Section 3 (Resolution of Investment Disputes);</p> <p>"mediator" means a person who conducts mediation in accordance with Section 3 (Resolution of Investment Disputes);</p> <p>"candidate" means an individual who is under consideration for selection as a Member of the Tribunal or a</p>	<p>set out in this Code of Conduct.</p> <p>Art. 3</p> <p>1. Members shall perform their duties with complete independence and integrity, without taking account of any personal or national interest. They shall neither seek nor follow any instructions from the institutions, bodies, offices or agencies of the Union, the governments of the Member States or any private or public entities.</p> <p>2. Members shall not accept gifts of any kind which might call into question their independence.</p> <p>3. Members shall respect the dignity of their office.</p> <p>4. Members shall not act or express themselves, through whatever medium, in a manner which adversely affects the public perception of their independence, their integrity or the dignity of their office.</p> <p>Art. 4</p> <p>1. Members shall avoid any situation which may give rise to a conflict of personal interest or which may reasonably be perceived as such. They</p>	<p>that may be reasonably perceived as giving rise to a conflict of interest.</p> <p>III. Integrity</p> <p>Judges' conduct must be consistent with the high moral character that is a criterion for judicial office. They should be mindful at all times of their duty to uphold the standing and reputation of the Court.</p> <p>IV. Diligence and competence</p> <p>Judges shall perform the duties of their office diligently. In order to maintain a high level of competence, they shall continue to develop their professional skills.</p> <p>V. Discretion</p> <p>Judges shall exercise the utmost discretion in relation to secret or confidential information relating to proceedings before the Court. They shall respect the secrecy of deliberations.</p> <p>VI. Freedom of expression</p> <p>Judges shall exercise their freedom of expression in a manner compatible with the dignity of their office. They shall refrain from public</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 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 cir-</p>
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<p>interests, relationships and matters.</p> <p>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.</p> <p>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.</p> <p>6. Upon selection, an arbitrator shall perform his or her duties thoroughly and expeditiously throughout the</p>	<p>The Parties shall make best efforts to ensure that the code of conduct is adopted no later than the first day of the provisional application or entry into force of this Agreement, as the case may be, and in any event no later than two years after such date.</p>	<p>Member of the Appeal Tribunal;</p> <p>"assistant" means a person who, under the terms of appointment of a member, assists the member in his research or supports him in his duties;</p> <p>"staff", in respect of a member, means persons under the direction and control of the member, other than assistants.</p> <p>Art. 2</p> <p>Every candidate and member shall avoid impropriety and the appearance of impropriety, shall be independent and impartial and shall avoid direct and indirect conflicts of interest.</p> <p>Art. 3</p> <p>1. Prior to their appointment, candidates shall disclose to the Parties any past and 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. To this end, a candidate shall make all reasonable efforts to become aware of any such</p>	<p>shall not be involved in dealing with a case in which they have any personal interest.</p> <p>2. Members shall not act or express themselves, through whatever medium, in a manner which adversely affects the public perception of their impartiality</p> <p>Art. 5</p> <p>1. Members shall notify the President of the Court or Tribunal of which they are a Member if they are to hear a case in which they have an interest that might give rise to a conflict of interest.</p> <p>2. On taking up their duties, Members shall submit a declaration of their financial interests, within the meaning of paragraph 3, to the President of the Court or Tribunal of which they are a Member.</p> <p>3. The declaration shall identify every entity in which the Member has a direct financial interest which, because of its scale, might reasonably be perceived as being capable of giving rise to a conflict of interest if the Member were to</p>	<p>statements or remarks that may undermine the authority of the Court or give rise to reasonable doubt as to their impartiality.</p> <p>VII. Additional activity</p> <p>Judges may not engage in any additional activity except insofar as this is compatible with independence, impartiality and the demands of their full-time office. They shall declare any additional activity to the President of the Court, as provided for in Rule 4 of the Rules of Court.</p> <p>VIII. Favours and advantages</p> <p>Judges shall not accept any gift, favour or advantage that could call their independence or impartiality into question.</p> <p>IX. Decorations and honours</p> <p>Judges may accept decorations and honours only where such acceptance does not give rise to a reasonable doubt as to their independence or impartiality. They should inform the President of the Court beforehand.</p>	<p>cumstance that subsequently arises during this proceeding."</p> <p>Any arbitrator failing to sign a declaration by the end of the first session of the Tribunal shall be deemed to have resigned.</p>
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<p>course of the proceeding and with fairness and diligence.</p> <p>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.</p> <p>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.</p> <p>9. An arbitrator shall not engage in ex parte contacts concerning the proceeding.</p> <p>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.</p> <p>11. An arbitrator shall not, directly or indirectly, incur any obligation or accept any benefit that would in any way interfere or appear</p>		<p>interests, relationships or matters.</p> <p>2. Members shall communicate matters concerning actual or potential violations of this Code of Conduct in writing to the disputing parties.</p> <p>3. Member shall at all times continue to make all efforts to become aware of any interests, relationships or matters referred to in paragraph 1 of this Article. The member shall disclose such interests, relationships or matters by informing the disputing parties.³³</p> <p>[Footnote 33 to Art. 3 Annex II:] For greater certainty, Article 3 paragraph 1 does not extend to information which is already in the public domain or was known, or should have reasonably been known, by all disputing parties.</p> <p>Art. 4</p> <p>1. Members shall perform his or her duties thoroughly and expeditiously throughout the course of the proceeding and shall do so with fairness and diligence.</p> <p>2. A member shall consider only those issues raised in</p>	<p>hear a case involving that entity. In this declaration, the Member shall identify each entity in which he or she has such a financial interest, which may be in the form of a specific financial holding in its capital, in particular, shares, or any other form of financial interest, for example, bonds or investment certificates. This paragraph does not apply to entities in which the Member owns holdings managed on a discretionary basis by a third party.</p> <p>4. In the event of changes in the list of entities identified in the declaration within the meaning of paragraph 3, a new declaration shall be submitted at the earliest opportunity and, at the latest, within 2 months after the change in question.</p> <p>5. The declaration referred to in paragraph 3 shall be submitted using the form set out in the Annex to this Code of Conduct.</p> <p>6. The objective of the notifications and declarations under paragraphs 1 to 3 is to allow the President of the Court or Tribunal concerned</p>	<p>X. Scope of this resolution</p> <p>The principles set forth above apply to the members of the Court and, where relevant, to former judges and ad hoc judges.</p> <p>Final provisions</p> <p>In case of doubt as to application of these principles in a given situation, a judge may seek the advice of the President of the Court. The President may consult the Bureau if necessary.</p> <p>The President may report to the Plenary Court on the application of these principles.</p>	
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<p>to interfere, with the proper performance of his or her duties.</p> <p>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.</p> <p>13. An arbitrator may not allow financial, business, professional, family or social relationships or responsibilities to influence his or her conduct or judgement.</p> <p>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.</p> <p>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.</p>		<p>the proceeding and which are necessary for a ruling and shall not delegate this duty to any other person.</p> <p>3. A member shall take all appropriate steps to ensure that his or her assistant and staff are aware of, and comply with, Articles 2, 3, 5 and 7 of this Code of Conduct.</p> <p>4. A member shall not discuss any aspect of the subject matter of the proceedings with a disputing party or the disputing parties in the absence of the other members of the division of the Tribunal or Appeal Tribunal.</p> <p>Art. 5</p> <p>1. A member 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 Party or disputing party or fear of criticism.</p> <p>2. A member shall not, directly or indirectly, incur any obligation or accept any benefit that would in any</p>	<p>to ascertain whether a Member has a personal interest in the outcome of the dispute in a given case.</p> <p>Art. 6</p> <p>1. Members shall comply with their duty of loyalty towards the Institution.</p> <p>2. Members shall make use of the services of officials and other servants of the Institution, in particular those allocated to their Chambers, in a respectful manner.</p> <p>3. Members shall manage the material resources of the Institution in a responsible manner.</p> <p>4. Members shall refrain from making any statement outside the Institution which may harm its reputation.</p> <p>Art. 7</p> <p>1. Members shall preserve the secrecy of the deliberations.</p> <p>2. Members shall comply with their duty to exercise discretion in dealing with judicial and administrative matters.</p>		
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<p>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.</p> <p>17. An arbitrator shall not disclose an arbitration ruling or parts thereof prior to its publication in accordance with Annex 9-G.</p> <p>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.</p> <p>19. Each arbitrator shall keep a record and render a final account of the time devoted to the procedure and of the expenses incurred.</p> <p>20. The disciplines described in this Code of Conduct applying to arbitrators or former arbitrators shall apply, <i>mutatis mutandis</i>, to mediators.</p>		<p>way interfere or appear to interfere, with the proper performance of his or her duties.</p> <p>3. A member may not use his or her position as a member 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.</p> <p>4. A member may not allow financial, business, professional, family or social relationships or responsibilities to influence his or her conduct or judgment.</p> <p>5. A member must avoid entering into any relationship or acquiring any financial interest that is likely to affect his or her impartiality or that might reasonably create an appearance of impropriety or bias.</p> <p>[Footnote 34 to Art. 5 Annex II:]</p> <p>For greater certainty, the fact that a member receives an income from a government or has a family relationship with a person who receives an income from the government shall not in itself be</p>	<p>3. Members shall act and express themselves with the restraint that their office requires.</p> <p>Art. 8</p> <p>1. Members shall undertake to comply in all circumstances with their obligation to be available so as to devote themselves fully to the performance of their duties.</p> <p>2. Members may engage in external activities only if they are compatible with their duties arising under Articles 2 to 4, 6 and 7 of this Code of Conduct. Without prejudice to the derogation provided for in the second paragraph of Article 4 of the Statute of the Court of Justice of the European Union, engaging in any professional activity other than that resulting from the performance of their duties shall be incompatible with the duties set out in this Code of Conduct.</p> <p>3. Members may be authorised to engage in external activities that are closely related to the performance of their duties. In that context: — they may be authorised to represent the Institution or</p>		
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		<p>considered to be inconsistent with paragraph 2 and 5.</p> <p>Art. 6</p> <p>All former members must avoid actions that may create the appearance that they were biased in carrying out their duties or derived advantage from the decisions or awards of the Tribunal or Appeal Tribunal.</p> <p>Art. 7</p> <p>1. No member or former member shall at any time disclose or use any non-public information concerning a proceeding or acquired during a proceeding, except for the purposes of the proceeding, and shall not, in any case, disclose or use any such information to gain personal advantage or advantage for others or to adversely affect the interest of others.</p> <p>2. No member shall disclose a decision or award or parts thereof prior to its publication in accordance with the transparency provisions of Section 3 [Resolution of Investment Disputes].</p>	<p>the Court or Tribunal of which they are a Member at ceremonies and official events, — they may be authorised to participate in activities of European interest that relate, inter alia, to the dissemination of EU law and to dialogue with national and international courts or tribunals. In this respect, Members may be authorised to participate in teaching activities, conferences, seminars or symposia. Only participation in teaching activities may give rise to remuneration in accordance with the rules of the teaching establishment concerned. The Members' activities authorised by the Court or Tribunal of which they are a Member shall be published on the Institution's website after the activity has taken place.</p> <p>4. In addition, Members may be authorised to assume unremunerated duties in foundations or similar bodies in the legal, cultural, artistic, social, sporting or charitable fields and in teaching or research establishments. In that connection, they shall undertake not to engage in</p>		
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		<p>3. No member or former member shall at any time disclose the deliberations of the Tribunal or Appeal Tribunal, or any member's views, whatever they may be.</p> <p>Art. 8</p> <p>Each member shall keep a record and render a final account of the time devoted to the procedure and of the expenses incurred.</p> <p>Art. 9</p> <p>The rules set out in this Code of Conduct as applying to members or former members shall apply, mutatis mutandis, to mediators.</p>	<p>any managerial or administrative activities which might compromise their independence or their availability or which might give rise to a conflict of interest. The expression 'foundations or similar bodies' means not-for-profit establishments or associations which carry out activities in the general interest in the fields referred to.</p> <p>5. Members who wish to take part in an activity covered by paragraphs 3 and 4 shall request prior authorisation from the Court or Tribunal of which they are a Member, by using a specific form.</p> <p>6. Publications and the resulting copyright royalties shall be allowed without prior authorisation.</p> <p>Art. 9</p> <p>1. After ceasing to hold office, Members shall continue to be bound by their duty of integrity, of dignity, of loyalty and of discretion.</p> <p>2. Members undertake that after ceasing to hold office, they will not become involved — in any manner whatsoever in cases which were pending before the Court or Tribunal of which</p>		
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			<p>they were a Member when they ceased to hold office, — in any manner whatsoever in cases directly and clearly connected with cases, including concluded cases, which they have dealt with as Judge or Advocate General, and — for a period of 3 years from the date of their ceasing to hold office, as representatives of parties, in either written or oral pleadings, in cases before the Courts or Tribunals that constitute the Court of Justice of the European Union.</p> <p>3. In cases other than those referred to in the three indents of paragraph 2, former Members may be involved as agent, counsel, adviser or expert or provide a legal opinion or serve as an arbitrator, provided that they comply with the duties arising under paragraph 1.</p> <p>4. If in doubt as to the application of this article, a former Member may contact the President of the Court of Justice, who shall take a decision after obtaining the opinion of the Committee provided for in Article 10.</p> <p>Art. 10</p>		
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			<p>1. The President of the Court of Justice, assisted by a Consultative Committee, shall be responsible for ensuring the proper application of this Code of Conduct. The Consultative Committee shall be composed of the three Members of the Court of Justice who have been longest in office and the Vice-President of the Court of Justice if he or she is not one of those Members. Should a Member or a former Member of the General Court be the person concerned, the President, the Vice-President and another Member of the General Court shall take part in the deliberations of the Committee. The Committee shall be assisted by the Registrar of the Court of Justice.</p> <p>2. Without prejudice to the provisions of the Statute of the Court of Justice of the European Union, the Committee may, in an individual case, give its opinion to the Member or the former Member concerned after hearing him or her.</p> <p>[...]</p>		
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4.6 Transparency of and public access to proceedings

The ‘traditional’ investor-State arbitration system has drawn considerable criticism due to the perceived severe lack of opportunities for ‘passive’ and ‘active’ involvement of the wider general public²⁹⁵. ‘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’).

As permanent courts, the CJEU and the ECtHR have a different tradition with regard to transparency and public access. These features of proceedings are considered part of the principles of due process and a fair trial pursuant to Art. 47 Charter of Fundamental Rights of the EU, Art. 6 (1) ECHR (in conjunction with Art. 6 (2), (3) TEU)²⁹⁶. Additionally, being funded by the contributions of the Member States of the EU and State parties to the ECHR respectively²⁹⁷, transparency and public access can also be understood as one dimension of accountability to the public. Also, these features serve the purpose of trust²⁹⁸ of the citizens in the judiciary and its legitimacy.

4.6.1 Transparency of proceedings

The comparably high level of confidentiality of investor-State arbitration can be traced back, at least in part, to commercial arbitration from which many rules and concepts were borrowed. Commercial arbitration, without doubt, is in practice characterised by a high level of secrecy which is often referred to as one key benefit in comparison to State courts²⁹⁹. One should bear in mind though that commercial arbitration is a private affair between two disputing parties which (rightfully) seek to protect, for instance, knowhow and trade secrets from the public and competitors. While these roots are still visible, transparency in investor-State arbitration has steadily been improving over the last years³⁰⁰. Whether it has reached a satisfactory level is debatable. In any event, a high level of transparency of arbitral proceedings could potentially have a positive effect on the ‘checks and balances’ by parliaments and public as well as the conduct of investors which are made publicly accountable for any claims they lodge³⁰¹.

²⁹⁶ B. Wägenbaur, *Court of Justice of the European Union. Commentary on Statute and Rules of Procedure*, C.H. Beck, Hart Publishing and Nomos, Munich, Oxford and Baden-Baden, 2013, Art. 31 Stat, para 1.

²⁹⁷ T. Ingadottir, The Financing of International Adjudication, in: C. Romano, K. Alter, and Y. Shany (eds.), *The Oxford Handbook of International Adjudication*, Oxford University Press, Oxford, 2014, p. 608.

²⁹⁸ On the concepts and measurability of trust and public opinion of courts cf. E. Voeten, Public Opinion and the Legitimacy of International Courts, *Theoretical Inquiries in Law*, Vol. 14, No. 2, pp. 411-436.

²⁹⁹ J. Paulsson and N. Rawding, The Trouble with Confidentiality, *Arbitration International*, Vol. 11, No. 3 (1995), pp. 303-320; R. Oldenstam, J. von Pachelbel, Confidentiality and Arbitration - a few reflections and practical notes, *German Arbitration Journal* (2006), pp. 31, 32.

³⁰⁰ 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 Feldman, Mark, International Arbitration and Transparency (September 25, 2016). Peking University School of Transnational Law Research Paper No. 16-12. Available at SSRN: <https://ssrn.com/abstract=2843140R> (visited 28 April 2017); R. Knieper, Rethinking Investment Arbitration, *German Arbitration Journal* (2015), pp. 25, 28; J. Maupin, Transparency in International Investment Law: The Good, the Bad, and the Murky, in: A. Bianchi and A. Peters (eds.), *Transparency in International Law*, Cambridge University Press, Cambridge, 2013, pp. 142 et seqq.

³⁰¹ S. Hindelang and C. P. Sassenrath, *The Investment Chapters in EU's International Trade and Investment Agreements in a Comparative Perspective*, European Union, Belgium, 2015, p. 70; available at [http://www.europarl.europa.eu/Reg-Data/etudes/STUD/2015/534998/EXPO_STU\(2015\)534998_EN.pdf](http://www.europarl.europa.eu/Reg-Data/etudes/STUD/2015/534998/EXPO_STU(2015)534998_EN.pdf) (visited 4 May 2017).

Proponents of (more) transparency in investor-State arbitral proceedings and the publicity of documents (e.g. awards) make the argument that the subject-matter of investor-State arbitral claims is different from commercial arbitration: In their opinion, the review of exercise of public authority towards an individual would demand a high degree of transparency³⁰². Ultimately, the degree of transparency to govern a certain agreement's dispute settlement provisions lies in the hand of its negotiators, whose idea of an 'adequate' level of transparency is not least determined by those principles prevalent in their home jurisdiction³⁰³.

4.6.2 Public access to proceedings

Amici curiae ('friends of the court') is originally a common law concept which can also be found in public international law³⁰⁴. Such *amici curiae* usually intervene in proceedings without the request of a tribunal or court³⁰⁵. The reasons for intervening in this sense are manifold but can often be traced to an interest in the outcome of the proceedings or the advocacy of public interests³⁰⁶. *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 tribunal³⁰⁷; often, the *amici* aim at influencing the decision³⁰⁸. The actual contribution of *amicus curiae* interventions is often claimed but difficult to prove³⁰⁹. In investor-State arbitration practice, tribunals have in principle accommodated for the submission of *amicus curiae* briefs, though largely at their discretion³¹⁰. Access to documents and participation in the proceedings,

³⁰² 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: A.J. 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.

³⁰³ S. Hindelang and C. P. Sassenrath, *The Investment Chapters in EU's International Trade and Investment Agreements in a Comparative Perspective*, European Union, Belgium, 2015, pp. 70-71; available at [http://www.europarl.europa.eu/Reg-Data/etudes/STUD/2015/534998/EXPO_STU\(2015\)534998_EN.pdf](http://www.europarl.europa.eu/Reg-Data/etudes/STUD/2015/534998/EXPO_STU(2015)534998_EN.pdf) (visited 4 May 2017).

³⁰⁴ Y. Ronen and Y. Naggan, Third Parties, in: C. Romano, K. Alter, and Y. Shany (eds.), *The Oxford Handbook of International Adjudication*, Oxford University Press, Oxford, 2014, pp. 821-825; cf. also 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 2017). 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.

³⁰⁵ 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.

³⁰⁶ K. Fach Gómez, Rethinking the Role of Amicus Curiae in International Investment Arbitration: How to Draw the Line Favorably for the Public Interest, *Fordham International Law Journal* Vol. 35, No. 2 (2012), pp. 513 et seqq.

³⁰⁷ 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.

³⁰⁸ 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.

³⁰⁹ S. Hindelang and C. P. Sassenrath, *The Investment Chapters in EU's International Trade and Investment Agreements in a Comparative Perspective*, European Union, Belgium, 2015, p. 71; available at [http://www.europarl.europa.eu/Reg-Data/etudes/STUD/2015/534998/EXPO_STU\(2015\)534998_EN.pdf](http://www.europarl.europa.eu/Reg-Data/etudes/STUD/2015/534998/EXPO_STU(2015)534998_EN.pdf) (visited 8 May 2017).

³¹⁰ 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 curia

however, was frequently denied³¹¹ with reference to the dominant concept of secrecy of proceedings in the pertinent arbitration rules³¹².

4.6.3 Comparison of EUSFTA, CETA, and EUVFTA; juxtaposition to the CJEU and the ECtHR

To determine the level of ‘publicness’, the different procedural steps of a claim should be addressed separately. These steps are typically (1) the written proceedings following the submission of a claim, (2) the oral proceedings before the court or tribunal, and finally (3) the decision or judgement bringing the proceedings to a close and the time thereafter.

EUSFTA in Annex 9-G³¹³ and – to a lesser extent – CETA and EUVFTA provide for their own public access rules. CETA and EUVFTA refer to and slightly modify the UNCITRAL Rules on Transparency in Treaty-based investor-State Arbitration (UNCITRAL Rules on Transparency)³¹⁴ by including additional documents, for instance, exhibits, into the list of documents that must be published or by allowing for the publication of documents even before the constitution of the tribunal, Art. 8.36 (4) CETA, Art. 20 (4) EUVFTA. Two noteworthy differences between CETA and EUVFTA which, otherwise, are very similar, are contained in Art. 20 (3) EUVFTA: The tribunal established on the basis of EUVFTA may decide, either on its own initiative or upon request of any third party, on making available any documents not included in Art. 3 (1) or (2) UNCITRAL Transparency Rules³¹⁵, after consultation with the disputing parties. All in all, it is noteworthy that EUVFTA is silent on a number of the issues discussed in the following and lets the reference to the UNCITRAL Rules on Transparency suffice.

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 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.

³¹¹ Cf. L. Bastin, *Amici Curiae in Investor-State Arbitration - Eight Recent Trends*, *Arbitration International*, Vol. 30 (2014), pp. 125 et seqq., 142.

³¹² S. Hindelang and C. P. Sassenrath, *The Investment Chapters in EU's International Trade and Investment Agreements in a Comparative Perspective*, European Union, Belgium, 2015, p. 72; available at [http://www.europarl.europa.eu/Reg-Data/etudes/STUD/2015/534998/EXPO_STU\(2015\)534998_EN.pdf](http://www.europarl.europa.eu/Reg-Data/etudes/STUD/2015/534998/EXPO_STU(2015)534998_EN.pdf) (visited 8 May 2017).

³¹³ Title: ‘Rules on Public Access to Documents, Hearings and the Possibility of Third Persons to Make Submissions’.

³¹⁴ 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 31 May 2017). The UNCITRAL Rules on Transparency are not to be confused with the UN Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention) which was adopted by the UN General Assembly on 10 December 2014 and opened for signature on 17 March 2015.

[\http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention.html (visited 22 May 2017)]. The expected date of entry into force is 18 October 2017. The Mauritius Convention extends the applicability of the UNCITRAL Rules on Transparency to investment agreements concluded before 1 April 2014 regardless the applicable arbitration rules. Two modes of application of said rules are provided [cf. N. J. Calamita, *The (In)Compatibility of Appellate Mechanisms with Existing Instruments of the Investment Treaty Regime* (2017). *Journal of World Investment & Trade* (forthcoming). Available at SSRN: <https://ssrn.com/abstract=2945881> (visited 22 May 2017), pp. 39-40.]: First, ‘Unilateral offer’ requiring the claimant whose home State is not party to the Mauritius Convention to consent to the application (Art. 2 (2) Mauritius Convention). And second, ‘bilateral or multilateral application’ in case both investor home State and respondent State are party to the Mauritius Convention which results in an automatic application in all investor State disputes regardless of the arbitral rules governing the dispute (Art. 2 (1) Mauritius Convention).

³¹⁵ These include: The notice of arbitration, the response to 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 expert reports and witness statements, exclusive of the exhibits thereto.

The CJEU and the ECtHR have transparency rules of their own, which are scattered in the respective rules of procedure, the CJEU Statute (for the CJEU) and the ECHR (for the ECtHR)³¹⁶.

4.6.3.1 Submission of a claim and written proceedings

To begin with, submissions of the parties (or interveners) are not made publicly available by the CJEU. However, names of the main parties, a summary of the pleas in law and the main supporting arguments are published in the *Official Journal* upon submission (Art. 21 (4) RP CoJ; Art. 79 RP GC). Apart from that, the EU laws on transparency, ranging from TFEU to secondary law in the field³¹⁷, exempt CJEU (except when acting in an administrative capacity). Accordingly, at least at the CoJ, no formal right of third party access to court files is granted³¹⁸. The GC has apparently revoked the formerly (at least theoretically) possible access to case files with the entry into force of its new 'Practice Rules for the Implementation of the Rules of Procedure of the General Court' in 2015³¹⁹. This differs from the practice of some US federal courts which publish virtually all legal papers³²⁰. The parties to a dispute, on principle, are entitled to publish case-related submissions where they see fit without the authorisation of the CJEU³²¹.

The policy of the ECtHR is very liberal: 'Documents deposited with the Registrar shall be accessible to the public unless the President of the Court decides otherwise' (Art. 40 (2) ECHR, Rule 33 Rules of Court). Quite straightforward, all documents are thus publicly accessible, save for national security or sphere of privacy reasons³²².

EUSFTA and – by way of reference in CETA and EUVFTA – the UNCITRAL Rules on Transparency make a significant number of documents, listed in Art. 1 (1) EUSFTA ANNEX 9-G, Art. 3 (1) UNCITRAL Rules on Transparency, publicly available by default³²³. 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 decisions. Documents not listed can be made publicly available by discretion of the tribunal, Art. 1 (2) EUSFTA Annex 9-G, Art. 3 (3) UNCITRAL Rules on Transparency. As a rule of exception, in order to protect certain legitimate interests, specific information (Art. 4 EUSFTA Annex 9-G, 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 systems³²⁴.

³¹⁶ Cf. table at the end of this section.

³¹⁷ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145, 30 May 2001 pp. 43–48.

³¹⁸ Cf. Art. 5 (8) Instructions to the Registrar of the Court of First Instance of the European Communities of 5 July 2007, OJ L 232, 4 September 2007, pp. 1–6 (as amended from time to time), which contained a right to submit a written request to view the file or to procedural documents. Access is limited by express authorisation by the President of the GC, and, if the case is still pending, after the parties have been heard. Legitimate interest was mandatory. No such rule exists for the CoJ. This rule is not in force anymore. It has been replaced with the 'Practice Rules for the Implementation of the Rules of Procedure of the General Court', OJ L 152, 14 November 2016, p. 1, cf. para 269, lit. E.

³¹⁹ *Ibid.*

³²⁰ Cf. <https://www.pacer.gov/> (visited 28 April 2017).

³²¹ Judgement of 11 January in Case C-174/98 P: *Van der Wal* [2000] ECR I-1, para 17. In an earlier case, the GC found the publication of written submissions of the counterparty on the internet to violate its rights to independently pursue its rights and an abuse of procedure, cf. Judgement of 17 June 1998 in Case T-174/95: *Journalistförbundet* [1995] ECR II-2289, paras 135–139.

³²² W. Schabas, *The European Convention on Human Rights*, Oxford University Press, Oxford, 2015, p. 828.

³²³ Documents are also made available to the non-disputing treaty party, cf. Art. 1 (1) EUSFTA ANNEX 9-G, Art. 8.38 (1) CETA, and Art. 20 (4) EUVFTA.

³²⁴ For a detailed account of, *inter alia*, ICSID see S. Hindelang and C. P. Sassenrath, *The Investment Chapters in EU's International Trade and Investment Agreements in a Comparative Perspective*, European Union, Belgium, 2015, pp. 72–73; available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/534998/EXPO_STU\(2015\)534998_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/534998/EXPO_STU(2015)534998_EN.pdf) (visited 8 May 2017).

With regard to dissemination of information by the disputing parties, CETA has two approaches: Firstly, with regard to the respondent, the State is not required to withhold information from the public insofar as this would violate the State's own laws (Art. 8.36 (6) CETA). Secondly, disclosure is limited to persons in connection with the proceedings (such as witnesses and experts) and a respondent's civil servants (Art. 8.37 CETA). EUFSTA and EUVFTA seem to take a slightly more restrictive stand on the disclosure of confidential or protected information to third parties and the public.

4.6.3.2 Hearings

Hearings before the CJEU and the ECtHR are generally public, only allowing exceptions for 'serious reasons' (CJEU) or 'exceptional circumstances' (ECtHR) such as national security, the interests of juveniles or the private life of the parties (Art. 31 CJEU Statute, Art. 79 RP CoJ, and Rule 63 Rules of Court). CJEU sessions are generally also accessible via *Europe by Satellite*³²⁵, although—reportedly—in practice recordings are only made of the opening of the oral proceeding and of the reading of the judgement³²⁶. Deliberations of the court are not public (Art. 35 CJEU Statute, Rule 22 Rules of Court).

A similar picture is presented in respect of public access to hearings of investment disputes on the basis of the three FTAs discussed in this study. According to Art. 2 EUSFTA Annex 9-G and Art. 6 UNCITRAL Rules on Transparency³²⁷, hearings shall be held in public, while access can be restricted to preserve the confidentiality of certain information.

4.6.3.3 Judgements, awards, and orders

With regard to the judgements and orders, in case of the CJEU the date and operative part of a judgement or order are published in the Official Journal of the European Union (Art. 92 RP CoJ, Art. 122 RP GC). Judgements are read in open court (Art. 37 CJEU Statute, Art. 118 (1) RP GC; in practice the operative part only³²⁸) and published in full on the EUR-Lex website³²⁹. ECtHR judgements are also read in open court and published (Rules 77 (2), 78 Rules of Court)³³⁰.

Orders, awards and decisions are publicly available under the three FTAs within the scope of this study (Art. 3 (1) UNCITRAL Transparency Rules, Art. 1 (1) lit. (g) Annex 9-G EUSFTA).

³²⁵ http://curia.europa.eu/jcms/jcms/Jo2_7056/en/ (visited 13 April 2017).

³²⁶ J. Neumann, in: H. W. Rengeling, A. Middeke and M. Gellermann (eds.), *Handbuch des Rechtsschutzes in der Europäischen Union*, 3rd ed., C.H. Beck, Munich 2013, § 21 para 20.

³²⁷ Note Art. 8.36 (5) CETA and Art. 20 (1) EUVFTA.

³²⁸ B. Wägenbaur, *Court of Justice of the European Union. Commentary on Statute and Rules of Procedure*, C.H. Beck, Hart Publishing and Nomos, Munich, Oxford and Baden-Baden, 2013, Art. 37 Stat, para 1.

³²⁹ <http://eur-lex.europa.eu/homepage.html> (visited 13 April 2017) – apparently without a formal provision specifying which judgements shall be published in the CJEU Statute or rules of procedure.

³³⁰ <http://hudoc.echr.coe.int/eng> (visited 9 May 2017).

4.6.3.4 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’)³³¹; 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 treaty³³². The latter shall not be dealt with here since non-disputing parties do not constitute the public in a strict sense.

At CJEU third parties may not act as *amicus curiae*. They have to be party or privileged interveners³³³ to the dispute³³⁴, cf. Art. 40 CJEU Statute.

Although not expressly allowed for in Art. 36 ECHR, the ECtHR hears third parties on specific questions relating to the dispute and accepts their briefs³³⁵.

Corresponding to Art. 4 UNCITRAL Rules on Transparency, Art. 3 (2) EUSFTA Annex 9-G 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. Although some commentators are doubtful of whether the reference to the UNCITRAL Rules on Transparency can be understood in a way that it includes the *amicus curiae* provisions thereof³³⁶, a contextual reading of Art. 8.36 (1) CETA together with Art. 8.38 (1) (b) (ii) CETA reveals that the State parties to the treaty assume the third person submissions according to Art. 4 UNCITRAL Rules on Transparency to be admissible.

It appears that the European Commission did in fact implement its proposal to ‘confer a right to intervene to third parties with a direct and existing interest in the outcome of a dispute’³³⁷. Thereby, the level of publicly available information and third party access to proceedings surpass many domestic legal orders.

³³¹ 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.

³³² 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. 8.38 (2) to submissions on treaty interpretation. In EUSFTA submissions by the non-disputing party are also confined to treaty interpretation, Art. 9.23. The non-disputing Party provision of EUVFTA only includes: request for consultations, notice of intent and notice requesting a determination of the respondent as well as the claim (Art. 25 (1) EUVFTA). It is thus more limited compared to CETA.

³³³ Union institutions and Member States, cf. K. Lenaerts, I. Maselis and K. Gutman, *EU Procedural Law*, Oxford University Press, Oxford, 2015, para 25.62.

³³⁴ President of the Court on 12 September 2007 in Case C-73/07: *Satakunnan Markkinapörssi and Satamedia*, [2007] ECR I-7075 at paras 8, 12, 13.

³³⁵ Y. Ronen and Y. Naggan, *Third Parties*, in: C. Romano, K. Alter, and Y. Shany (eds.), *The Oxford Handbook of International Adjudication*, Oxford University Press, Oxford, 2014, p. 824; W. Schabas, *The European Convention on Human Rights*, Oxford University Press, Oxford, 2015, pp. 789, 793, 807.

³³⁶ L. Pantaleo, *Investment Disputes Under CETA. Taking the Best from Past Experience?* (2016). Available at <https://ssrn.com/abstract=2739128> (visited 22 May 2017), p. 69.

³³⁷ 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 7 May 2017), p. 8.

4.6.4 Table: Transparency of and public access to proceedings³³⁸

bold = important passages
yellow = public access to hearing
green = publication of documents
turquoise = third person and non-disputing Party submissions

EUSFTA ³³⁹	CETA ³⁴⁰	EUVFTA ³⁴¹	CJEU	ECtHR
<p>Art. 9.22 Annex 9-G shall apply to disputes under this Section.</p> <p>Art. 9.23 1. The tribunal shall accept or, after consultation with the disputing parties, may invite oral or written submissions on issues of treaty interpretation from the non-disputing Party to the Agreement.</p> <p>2. The tribunal shall not draw any inference from the absence of any submission or response to any invitation pursuant to paragraph 1.</p> <p>3. The tribunal shall ensure that any submission does not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party.</p> <p>4. The tribunal shall also ensure that the disputing parties are given a reasonable opportunity to present</p>	<p>Art. 8.28 [...] 6. Articles 8.36 and 8.38 shall apply to the proceedings before the Appellate Tribunal. [...]</p> <p>Art. 8.36 1. The UNCITRAL Transparency Rules, as modified by this Chapter, shall apply in connection with proceedings under this Section.</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 a Member of the Tribunal, the decision on challenge to a Member of the Tribunal and the request for consolidation shall be included in the list of</p>	<p>Art. 20 1. The UNCITRAL Rules on Transparency in treaty-based Investor-State Arbitration (the “UNCITRAL Transparency Rules”) shall apply to disputes under this Section, subject to the following rules:</p> <p>2. The request for consultations under Article 4, the notice of intent and the notice of determination under Article 6, the notice of challenge and the decision on challenge under Article 14, and the request for consolidation under Article 33 shall be included in the list of documents referred to in Article 3(1) of the UNCITRAL Transparency Rules.</p> <p>3. Subject to Article 7 of the UNCITRAL Transparency Rules, 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</p>	<p>Art. 15 TFEU 1. In order to promote good governance and ensure the participation of civil society, the Union institutions, bodies, offices and agencies shall conduct their work as openly as possible.</p> <p>[...]</p> <p>3. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with this paragraph.</p> <p>[...]</p> <p>The Court of Justice of the European Union, the European Central Bank and the European Investment</p>	<p>Art. 40 ECHR 1. Hearings shall be in public unless the Court in exceptional circumstances decides otherwise.</p> <p>2. Documents deposited with the Registrar shall be accessible to the public unless the President of the Court decides otherwise.</p> <p>Rules of Court Rule 33 1. All documents deposited with the Registry by the parties or by any third party in connection with an application, except those deposited within the framework of friendly-settlement negotiations as provided for in Rule 62, shall be accessible to the public in accordance with arrangements determined by the Registrar, unless the President of the Chamber, for the reasons set out in paragraph 2</p>

³³⁸ Section headings omitted.

³³⁹ Numbering according to the May 2015 authentic text; numbering of the articles may change.

³⁴⁰ Footnotes omitted.

³⁴¹ Numbering according to the January 2016 agreed text (might be subject to change).

<p>their observations on any submission by the non-disputing Party to the Agreement.</p> <p>Annex 9-G, Rules on Public Access to Documents, Hearings and the Possibility of Third Persons To Make Submissions</p> <p>Art. 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 9.13 (Consultations);</p> <p>(b) the notice of intent to arbitrate referred to in paragraph 1 of Article 9.15 (Notice of Intent to Arbitrate);</p> <p>(c) the determination of the respondent referred to in paragraph 2 of Article 9.15 (Notice of Intent to Arbitrate);</p> <p>(d) the submission of a claim to arbitration referred to in Article 9.16 (Submission of Claim to Arbitration);</p> <p>(e) pleadings, memorials, and briefs submitted to the tribunal by a disputing party, expert reports,</p>	<p>documents to be made available to the public under Article 3(1) of the UNCITRAL Transparency Rules.</p> <p>3. Exhibits shall be included in the list of documents to be made available to the public under 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 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. If the Tribunal determines that there is a need to protect confidential or protected information, it shall make the appropriate arrangements to hold in private</p>	<p>documents provided to, or issued by, the Tribunal not falling within Article 3(1) and 3(2) of the UNCITRAL Transparency Rules. This may include exhibits when the respondent so agrees.</p> <p>4. Notwithstanding Article 2 of the UNCITRAL Transparency Rules, the European Union or Viet Nam as the case may be shall, after receiving the relevant documents pursuant to paragraph 2, promptly transmit them to the non-disputing Party and make them publicly available, subject to the redaction of confidential or protected information²⁸.</p> <p>5. Documents referred to in paragraphs 2, 3 and 4 may be made publicly available by communication to the repository referred to in the UNCITRAL Transparency Rules or otherwise.</p> <p>6. No later than three years after the entry into force of this Agreement, the Trade Committee shall review the operation of paragraph 3 above. Upon request of either Party, the Trade Committee may adopt a decision pursuant to Article 34(2)(d) stipulating that Article 3(3) of the UNCITRAL transparency rules will apply instead of paragraph 3.</p> <p>7. Subject to any decision by the Tribunal on an objection regarding</p>	<p>Bank shall be subject to this paragraph only when exercising their administrative tasks.</p> <p>[...]</p> <p>Charter of Fundamental Rights of the European Union</p> <p>Art. 42</p> <p>Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to European Parliament, Council and Commission documents.</p> <p>Art. 47</p> <p>Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.</p> <p>Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.</p> <p>[...]</p> <p>CJEU Statute</p> <p>Art. 31</p> <p>The hearing in court shall be public, unless the Court of Justice, of its</p>	<p>of this Rule, decides otherwise, either of his or her own motion or at the request of a party or any other person concerned.</p> <p>2. Public access to a document or to any part of it may be restricted in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties or of any person concerned so require, or to the extent strictly necessary in the opinion of the President of the Chamber in special circumstances where publicity would prejudice the interests of justice.</p> <p>3. Any request for confidentiality made under paragraph 1 of this Rule must include reasons and specify whether it is requested that all or part of the documents be inaccessible to the public.</p> <p>4. Decisions and judgments given by a Chamber shall be accessible to the public. Decisions and judgments given by a Committee, including decisions covered by the proviso to Rule 53 § 5, shall be accessible to the public. The Court shall periodically make accessible to the public general information about decisions taken by single-judge formations pursuant to Rule</p>
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<p>and any written submissions submitted pursuant to Article 9.23 (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 include, for example, making such documents available at a specified site or through the repository referred to in Article 5 of this Annex.</p> <p>Art. 2</p> <p>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.</p>	<p>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 apply those laws in a manner sensitive to protecting from disclosure information that has been designated as confidential or protected information.</p> <p>Art. 8.37</p> <p>1. A disputing party may disclose to other persons in connection with the proceedings, including witnesses and experts, such unredacted documents as it considers necessary in the course of proceedings under this Section. However, the disputing party shall ensure that those persons protect the confidential or protected information contained in those documents.</p> <p>2. This Agreement does not prevent a respondent from disclosing to officials of, as applicable, the European Union, Member States of the European Union and subnational governments, such unredacted documents as it considers necessary in the course of proceedings under this Section. However, the respondent shall ensure that those officials protect the confidential or</p>	<p>the designation of information claimed to be confidential or protected information, neither the disputing parties nor the Tribunal shall disclose to any non-disputing Party or to the public any protected information where the disputing party that provided the information clearly designates it as such²⁹.</p> <p>8. A disputing party may disclose to other persons in connection with proceedings, including witnesses and experts, such unredacted documents as it considers necessary in the course of proceedings under this Section. However, the disputing party shall ensure that those persons protect the confidential or protected information in those documents.</p> <p>[Footnote 28 to Art. 20 EUVFTA:] For greater certainty, confidential or protected information, as defined in Article 7(2) of the UNCITRAL Transparency Rules, includes classified government information.</p> <p>[Footnote 29 to Art. 20 EUVFTA:] For greater certainty, where a disputing party that submitted the information decides to withdraw all or parts of its submission containing such information in accordance with Article 7(4) of the UNCITRAL Transparency Rules, the other disputing party shall, whenever neces-</p>	<p>own motion or on application by the parties, decides otherwise for serious reasons. Art. 35</p> <p>The deliberations of the Court of Justice shall be and shall remain secret.</p> <p>Art. 37</p> <p>Judgments shall be signed by the President and the Registrar. They shall be read in open court.</p> <p>CoJ RP</p> <p>Art. 21</p> <p>[...]</p> <p>4. A notice shall be published in the Official Journal of the European Union indicating the date of registration of an application initiating proceedings, the names of the parties, the form of order sought by the applicant and a summary of the pleas in law and of the main supporting arguments or, as the case may be, the date of lodging of a request for a preliminary ruling, the identity of the referring court or tribunal and the parties to the main proceedings, and the questions referred to the Court.</p> <p>Art. 22</p> <p>1. Anyone may consult the register at the Registry and may obtain copies or extracts on payment of a</p>	<p>52A § 1 and by Committees in application of Rule 53 § 5.</p> <p>Rule 63</p> <p>1. Hearings shall be public unless, in accordance with paragraph 2 of this Rule, the Chamber in exceptional circumstances decides otherwise, either of its own motion or at the request of a party or any other person concerned.</p> <p>2. The press and the public may be excluded from all or part of a hearing in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the Chamber in special circumstances where publicity would prejudice the interests of justice.</p> <p>3. Any request for a hearing to be held in camera made under paragraph 1 of this Rule must include reasons and specify whether it concerns all or only part of the hearing.</p> <p>Rule 78</p> <p>In accordance with Article 44 § 3 of the Convention, final judgments of the Court shall be published, under the responsibility of the Registrar, in an appropriate form. The Registrar shall in addition be responsible for the publication</p>
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<p>The tribunal shall make appropriate arrangements to protect this information from disclosure.</p> <p>Art. 3</p> <p>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.</p> <p>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 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>protected information contained in those documents.</p> <p>Art. 8.38</p> <p>1. The respondent shall, within 30 days after receipt or promptly after any dispute concerning confidential or protected information has been resolved, deliver to the non-disputing Party:</p> <p>(a) a request for consultations, a notice requesting a determination of the respondent, a notice of determination of the respondent, a claim submitted pursuant to Article 8.23, a request for consolidation, and any other documents that are appended to such documents;</p> <p>(b) on request:</p> <p>(i) pleadings, memorials, briefs, requests and other submissions made to the Tribunal by a disputing party;</p> <p>(ii) written submissions made to the Tribunal pursuant to Article 4 of the UNCITRAL Transparency Rules;</p> <p>(iii) minutes or transcripts of hearings of the Tribunal, if available; and</p>	<p>sary, resubmit complete and redacted documents which either remove the information withdrawn by the disputing party that first submitted the information or redesignate the information consistent with the designation of the disputing party that first submitted the information.</p>	<p>charge on a scale fixed by the Court on a proposal from the Registrar.</p> <p>2. The parties to a case may, on payment of the appropriate charge, obtain certified copies of procedural documents.</p> <p>3. Anyone may, on payment of the appropriate charge, also obtain certified copies of judgments and orders.</p> <p>Art. 79</p> <p>1. For serious reasons related, in particular, to the security of the Member States or to the protection of minors, the Court may decide to hear a case in camera.</p> <p>2. The oral proceedings in cases heard in camera shall not be published.</p> <p>Art. 84</p> <p>1. The Registrar shall draw up minutes of every hearing. The minutes shall be signed by the President and by the Registrar. They shall constitute an official record.</p> <p>2. The parties and interested persons referred to in Article 23 of the Statute may inspect the minutes at the Registry and obtain copies.</p> <p>Art. 85</p> <p>The President may, on a duly substantiated request, authorise a</p>	<p>of official reports of selected judgments and decisions and of any document which the President of the Court considers it useful to publish.</p>
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<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 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>(iv) orders, awards and decisions of the Tribunal; and</p> <p>(c) on request and at the cost of the non-disputing Party, all or part of the evidence that has been tendered to the Tribunal, unless the requested evidence is publicly available.</p> <p>2. The Tribunal shall accept or, after consultation with the disputing parties, may invite, oral or written submissions from the non-disputing Party regarding the interpretation of the Agreement. The non-disputing Party may attend a hearing held under this Section.</p> <p>3. The Tribunal shall not draw any inference from the absence of a submission pursuant to paragraph 2.</p> <p>4. The Tribunal shall ensure that the disputing parties are given a reasonable opportunity to present their observations on a submission by the non-disputing Party to this Agreement.</p>		<p>party or an interested person referred to in Article 23 of the Statute who has participated in the written or oral part of the proceedings to listen, on the Court's premises, to the soundtrack of the hearing in the language used by the speaker during that hearing.</p>	
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<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 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>Art. 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>				
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<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 document 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</p>				
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<p>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 4, any disputing party other than the person who submitted the document in question may object to the proposed 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</p>				
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<p>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 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</p>				
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<p>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 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>Art. 5</p> <p>The Secretary-General of the United</p>				
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<p>Nations, through the UNCITRAL Secretariat, shall act as repository and shall make available to the public information pursuant to this Annex.</p> <p>Art. 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>				
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4.7 Preventing frivolous claims

4.7.1 Investor-State arbitration as 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 inactive³⁴². Occasionally, 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 device³⁴³. 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 claims³⁴⁴.

4.7.2 Frivolous claims at the CJEU and the ECtHR

The two CJEU-remedies within the scope of this study are rarely associated with frivolous claims as they are hardly suited for improving negotiation positions vis-à-vis the EU or a Member State. With regard to direct action proceedings, this is explained by the restrictive admissibility criteria for natural and legal persons (i.e. so-called 'non-privileged' applicants) under Art. 263 TFEU (above 4.2.1 (p. 48)). In this respect, it is worth recalling the wording of the provision, which allows applicants to 'institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures'. Without going into the details of the criteria³⁴⁵, it is safe to say that if an individual applicant is not the addressee of a Union act (first alternative) the threshold is set rather high by the Court³⁴⁶. It should be noted that with the degree of specificity of the act vis-à-vis the applicant (second alternative) and especially where the contested act is addressed toward the applicant (first alternative), this (for individual, non-privileged applicants) *decisive* criterion is fulfilled. On a practical level, claims which do not meet these comparably high standards, may be dismissed.

Furthermore, where an application is 'manifestly inadmissible', a dismissing order may be rendered at any stage of the proceedings, i.e. even before the notice of application was sent to the other disputing party (Art. 53 (2) RP CoJ)³⁴⁷. Such orders provide some (brief) grounds and are usually not published on the EUR-Lex website³⁴⁸.

³⁴² 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 7 May 2017).

³⁴³ 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 7 May 2017).

³⁴⁴ 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 8 May 2017), p. 107.

³⁴⁵ K. Lenaerts, I. Maselis and K. Gutman, *EU Procedural Law*, Oxford University Press, Oxford, 2015, paras 7.86 et seqq.

³⁴⁶ H.-J. Cremer, in: C. Calliess and M. Ruffert (eds.), *EUV / AEUV Kommentar*, 5. ed., C.H. Beck, Munich 2016, Art. 263 AEUV, paras 33 et seqq.

³⁴⁷ E. Tichadou, in: H. W. Rengeling, A. Middeke and M. Gellermann (eds.), *Handbuch des Rechtsschutzes in der Europäischen Union*, 3rd ed., C.H. Beck, Munich, 2013, § 26 para 23.

³⁴⁸ *Ibid.*

With regard to the preliminary reference procedure, national courts act as ‘filter’ for frivolous claims: In a first step, any claim would have to qualify as non-frivolous under the respective national laws. Secondly, the competent court will only refer a question to the CJEU, where a number of criteria is met³⁴⁹: Inter alia, the referred question has to be on the interpretation and validity of EU law. It has to be relevant to the dispute before the referring court. The CJEU has, for instance³⁵⁰, ruled that referrals can be inadmissible where they lack factual information or information regarding the domestic law which the CJEU requires for a decision³⁵¹; where the questions are obviously not related to the dispute at hand³⁵²; and even abuse of the preliminary reference procedure, especially where the it is used for other than the purposes in Art. 267 TFEU³⁵³ (for instance for submitting hypothetical questions) or where the dispute is spurious and aims to elicit a judgement by the CJEU³⁵⁴.

However, since the preliminary reference procedure is a means of cooperation between national courts and the CJEU, the CJEU will in principle strive to clarify questions in dialogue with the Member State court or even refer the matter back to the referring court³⁵⁵. In any case, inadmissibility is rather exceptional³⁵⁶. In case of manifestly inadmissible referrals, however, Art. 53 (2) RP CoJ allows a decision in form of an order, just as in case of the direct action. Additionally, in accordance with Art. 99 RP CoJ, ‘[w]here a question referred to the Court for a preliminary ruling is identical to a question on which the Court has already ruled, where the reply to such a question may be clearly deduced from existing case-law or where the answer to the question referred for a preliminary ruling admits of no reasonable doubt, the Court may at any time, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, decide to rule by reasoned order.’ This additional procedural tool, which is frequently made use of at least in its first and second alternative³⁵⁷, enable a decision by reasoned order instead of a judgement. It waives written procedure according to Art. 20 CJEU Statute, oral hearing and (formal) opinion of the Advocate General, thereby contributing to the economy and speed of the proceedings. One reason for this rule additionally to Art. 53 (2) RP CoJ is that the latter does not allow admissible, but manifestly unfounded claims to be dismissed by order (cf., by contrast, Art. 181 RP CoJ and Art. 126 RP GC).

At the ECtHR, the central provision for dealing with frivolous claims is Art. 35 (3) (a) ECHR. By virtue of this provision, individual applications incompatible with the ECHR (or protocols thereto), manifestly ill-founded applications or such applications constituting an abuse of the right of application may be quashed and be declared inadmissible. Incompatibility means lack of jurisdiction, i.e. in terms of personal (*ratione personae*), territorial (*ratione loci*) or temporal (*ratione temporis*) jurisdiction³⁵⁸. It should be noted that the merits of the application are (preliminarily) considered to determine its dismissal as ‘inadmissible’ and that the criteria are read quite freely by the ECtHR, ranging from lacking substantiation of alleged breaches to no *prima facie* breach of the Convention³⁵⁹. Not all dismissed cases, at least

³⁴⁹ K. Lenaerts, I. Maselis and K. Gutman, *EU Procedural Law*, Oxford University Press, Oxford, 2015, paras 6.21 et seqq.

³⁵⁰ Extensive case law is compiled at J. Schwarze, in: J. Schwarze (ed.), *EU-Kommentar*, Nomos, Freiburg, 2012, Art. 234 EGV, paras 36-37.

³⁵¹ Judgement of 2 March 1999 in Case C-422/98: *Colonia Versicherung* [1999] ECR I-1279, paras 5-6.

³⁵² Judgement of 18 March 2004 in Case C-314/01: *Siemens AG Österreich et al.* [2004] ECR I-2549, para 34.

³⁵³ Judgement of 16 December 1981 in Case C-244/80: *Foglia vs Novello* [1981] ECR 3047, para 18.

³⁵⁴ Judgement of 8 November 1990 in Case C-231/89: *Gmurzynska-Bscher* [1990] ECR I-4012, para 23.

³⁵⁵ K. Lenaerts, I. Maselis and K. Gutman, *EU Procedural Law*, Oxford University Press, Oxford, 2015, para 6.25.

³⁵⁶ Cf. Judgement of 7 December 2000 in Case C-79/99: *Schnorbus* [2000] ECR I-10997, para 23.

³⁵⁷ B. Wägenbaur, *Court of Justice of the European Union. Commentary on Statute and Rules of Procedure*, C.H. Beck, Hart Publishing and Nomos, Munich, Oxford and Baden-Baden, 2013, Art. 99 RP ECJ, para 1.

³⁵⁸ W. Schabas, *The European Convention on Human Rights*, Oxford University Press, Oxford, 2015, p. 778.

³⁵⁹ D. J. Harris, et al, *Law of the European Convention of Human Rights*, Oxford University Press, Oxford, 2009, p. 785.

in the view of some authors, qualify as ‘manifestly’ ill-founded³⁶⁰. The ECtHR struggles with the ‘application of the criterion, torn between the requirements of an increasingly burdensome caseload and the imperative of providing individualized justice to a huge number of applicants’³⁶¹. Finally, ‘abuse’ is found only exceptionally³⁶². The concept of abuse applied by the ECtHR consists of two elements: First, harmful exercise of a rights by its holder, and, second, such exercise must be contrary to the purpose of the right³⁶³. Case-law has yielded a number of examples where this concept applied, namely cases of outright dishonesty of the applicant (e.g. untrue facts, false identities, forged documents or failure to inform the court about essential evidence or crucial developments for the proceedings); inappropriate language (e.g. threats, contemptuous or provocative expressions beyond the bounds of legitimate criticism); breaches of confidentiality of the friendly settlement negotiations (cf. Rule 38 (2) Rules of Court) by the applicant; and petty, vexatious, quibbling, applications³⁶⁴. The rejection may take place at any stage of the proceedings, Art. 35 (4) ECHR.

4.7.3 Comparison of EUSFTA, CETA, and EUVFTA; juxtaposition to the CJEU and the ECtHR

EUSFTA, EUVFTA, and CETA explicitly address the issue of frivolous claims. The treaties distinguish between ‘claims manifestly without legal merit’ (Art. 9.20 (1) EUSFTA, Art. 8.32 (1) CETA and Art. 18 (1) EUVFTA) and ‘claims unfounded as a matter of law’ (9.21 (1) EUSFTA, Art. 8.33 (1) CETA and Art. 19 (1) EUVFTA). While under EUSFTA and CETA the former have to be reprimanded no later than 30 days after the constitution of the tribunal but ‘in any event before [its] first session’³⁶⁵, the latter may be raised as an objection ‘no later than date the tribunal fixes for the respondent to submit its counter memorial’. In case of EUVFTA, the respondent may also object to claims ‘manifestly without legal merit’ after the first session of the tribunal within 30 days after he becomes aware of the facts on which the objection is based (Art. 18 (1), (3) EUVFTA). In this case, another noteworthy difference with regard to claims manifestly without legal merit is that the tribunal has to rule on the respondent’s objection within 120 days after the objection was filed (if, at that time, the tribunal had already conducted a first session), Art. 18 (3) EUVFTA. Such deadline is unknown to CETA and EUSFTA.

4.7.3.1 Terminology

None of the FTAs clarify the term ‘manifestly without legal merit’³⁶⁶. 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 Proceedings³⁶⁷. One tribunal has found that ‘the ordinary meaning of the word [‘manifest’] requires the respondent to establish its objection clearly and

³⁶⁰ W. Schabas, *The European Convention on Human Rights*, Oxford University Press, Oxford, 2015, 2015, p. 779; D. J. Harris, et al, *Law of the European Convention of Human Rights*, 2nd ed., Oxford University Press, Oxford, 2009, p. 785.

³⁶¹ W. Schabas, *ibid.*

³⁶² W. Schabas, *The European Convention on Human Rights*, Oxford University Press, Oxford, 2015, p. 780.

³⁶³ *Ibid.*

³⁶⁴ W. Schabas, *The European Convention on Human Rights*, Oxford University Press, Oxford, 2015, pp. 780-781; D. J. Harris, et al, *Law of the European Convention of Human Rights*, 2nd ed., Oxford University Press, Oxford, 2009, pp. 785-786.

³⁶⁵ Square brackets added.

³⁶⁶ See the text passages highlighted in yellow in the table following this chapter.

³⁶⁷ J. R. Crook, Four Tribunals Apply ICSID Rule for Early Ouster of Unmeritorious Claims, *ASIL insights*, Vol. 15, (2011), available at <https://www.asil.org/insights/volume/15/issue/10/four-tribunals-apply-icsid-rule-early-ouster-unmeritorious-claims> (visited 14 May 2017).

obviously, with relative ease and despatch. The standard is thus set high³⁶⁸. 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 jurisdiction³⁶⁹. 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 Convention³⁷⁰, or where the respondent wanted to re-arbitrate a case already decided elsewhere³⁷¹. Not subject to the preliminary objection are factual disputes. As these cases provided by example show, the interpretation of the phrase 'manifestly without legal merit' is not without uncertainty. Against this background it is regrettable that the State parties to EUSFTA, CETA, and EUVFTA have missed the opportunity to clarify its requirements.

What concerns claims 'unfounded as a matter of law', these are claims, or any part thereof, for which an award in favour of the claimant may not be made³⁷², even if the facts alleged were assumed to be true. Here again, a further clarification would have been useful.

4.7.3.2 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. 8.32 (2) CETA states that the objection under Art. 8.32 CETA ('Claims manifestly without legal merit') is not admissible if an objection pursuant to Art. 8.33 CETA ('Claims unfounded as a matter of law') has been filed. Conversely, if an objection pursuant to Art. 8.33 CETA is filed earlier than that of Art. 8.32 CETA, the latter is *not* automatically inadmissible. Rather, the tribunal may in this case decline to address a parallel objection on the grounds of claims unfounded as a matter of law (pursuant to Art. 8.33 (3) CETA).

EUSFTA goes a different way: it merely states that an objection according to Art. 9.21 ('Claims Unfounded as a Matter of Law') cannot be submitted as long as proceedings under Art. 9.20 ('Claims Manifestly Without Legal Merit') are pending (Art. 9.21 (2) EUSFTA). EUVFTA takes the same approach as EUSFTA (Art. 19 (2) EUVFTA). The tribunal may, however, under both agreements, '[grant] leave to file an objection [...], after having taken due account of the circumstances of the case'³⁷³.

Substantively, the decision on Art. 8.32 CETA ('Claims manifestly without legal merit') is in any case without prejudice for other objections at a late stage of the proceedings (Art. 8.32 (6) CETA). The same goes for EUSFTA and EUVFTA where Art. 9.20 (4) and Art. 18 (4) respectively state that the objection on the grounds of 'Claims Manifestly Without Legal Merit' is without prejudice to other objections.

³⁶⁸ *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 8 May 2017).

³⁶⁹ *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 <https://www.italaw.com/cases/174> (visited 10 May 2017).

³⁷⁰ *Global Trading Resource Corp. v. Ukraine*, ICSID Case No. ARB/09/11, Award, para. 56, available at <https://www.italaw.com/cases/5060> (visited 10 May 2017).

³⁷¹ *RSM Prod. Corp. v. Grenada*, ICSID Case No. ARB/10/6, para. 7.3.6, available at <https://www.italaw.com/cases/940> (visited 10 May 2017).

³⁷² See the text passages highlighted in green in the table following this chapter.

³⁷³ Square brackets added.

4.7.3.3 Effectiveness of the approach taken in EUSFTA, CETA, and EUVFTA

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 State³⁷⁴.

4.7.3.4 The 'three-ply shield' against frivolous claims of the CJEU and the ECtHR

In comparison to traditional investor-State arbitration mechanisms, mainly three points make the courts less prone to abuse and frivolous claims: In the case of CJEU, at least with regard to the remedies within the scope of this study, there is no chance for a judgement *directly* awarding any financial compensation. The direct action seeks for annulment of an act and the preliminary reference procedure clarifies questions of EU law. Of course, both procedures can eventually lead to some sort of pecuniary advantage for the applicant (e.g. tax or subsidy refunds, a prevailing judgement in a civil law suit, etc.), but it is more complex to 'stage' such setting than to be able to directly claim damages. Secondly, the relatively high bars for admissibility both at the CJEU and ECtHR can also be seen as working towards preventing frivolous claims. Thirdly, another way to 'de-incentivise' applications manifestly inadmissible or unfounded (in law) is by charging costs in proceedings otherwise free of charge (Art. 139 (a) RP GC) and denying eligibility for legal aid (cf. Art. 146 (2) RP GC). Furthermore, it should be also noted that both courts may respond to frivolous claims in a less costly fashion as – in contrast to investor-State arbitration – they do not require an appointment procedure for the establishment of an ad hoc tribunal in order to dismiss frivolous claims.

At first sight, the 'opposite' of rules directed at preventing frivolous claims are such directed at 'manifestly *well-founded*' cases whose substantial legal questions have already been decided upon in former rulings. Despite existing differences, a commonality of both types of rules can be seen in the way they provide for 'procedural fast track' and, thus, improve effectiveness of adjudication. While such rules are provided for in proceedings before the CJEU and the ECtHR (cf. Artt. 99, 182 RP CoJ; Art. 28.1 (b) ECHR), for investor-State arbitral tribunals such rules are neither common and nor appropriate taking into account their ad hoc formation and the dogmatic strangeness of the concept of 'legal precedent' to investor-State arbitration³⁷⁵.

³⁷⁴ 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 8 May 2017), p. 107.

³⁷⁵ 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 8 May 2017), pp. 66-69.

4.7.4 Table: Preventing frivolous claims³⁷⁶

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

EUSFTA ³⁷⁷	CETA	EUVFTA ³⁷⁸	ICSID Rules of Procedure for Arbitration Proceedings	CJEU	ECtHR
<p>Art. 9.20</p> <p>1. The respondent may, either no later than thirty days after the constitution of a tribunal pursuant to Article 9.18 (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</p>	<p>Art. 8.32</p> <p>1. The respondent may, no later than 30 days after the constitution of the division of the Tribunal, and in any event before its first session, file an objection that a claim is manifestly without legal merit.</p> <p>2. An objection shall not be submitted under paragraph 1 if the respondent has filed an objection pursuant to Article 8.33.</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 such an objection consistent with its</p>	<p>Art. 18</p> <p>1. The respondent may, no later than 30 days after the constitution of the division of Tribunal pursuant to Article 12, and in any event before the first session of the division of the Tribunal, or 30 days after the respondent became aware of the facts on which the objection is based, 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 the first meeting of the division of the Tri-</p>	<p>Rule 41</p> <p>[...]</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</p>	<p>RP CoJ</p> <p>Art. 53</p> <p>[...]</p> <p>2. Where it is clear that the Court has no jurisdiction to hear and determine a case or where a request or an application is manifestly inadmissible, the Court may, after hearing the Advocate General, at any time decide to give a decision by reasoned order without taking further steps in the proceedings.</p> <p>[...]</p> <p>Art. 99</p> <p>Where a question referred to the Court for a preliminary ruling is identical to a question on which the Court has already ruled, where the reply to such a question may</p>	<p>ECHR</p> <p>Art. 27</p> <p>1. A single judge may declare inadmissible or strike out of the Court's list of cases an application submitted under Article 34, where such a decision can be taken without further examination.</p> <p>2. The decision shall be final.</p> <p>3. If the single judge does not declare an application inadmissible or strike it out, that judge shall forward it to a committee or to a Chamber for further examination.</p> <p>Art. 28</p> <p>1. In respect of an application submitted under Article 34, a committee may, by a unanimous vote,</p>

³⁷⁶ Footnotes and section headings omitted.

³⁷⁷ Numbering according to the May 2015 authentic text; numbering of the articles may change.

³⁷⁸ Numbering according to the January 2016 agreed text (might be subject to change).

<p>shall be without prejudice to the right of a respondent to object, pursuant to Article 9.21 (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. 9.21</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 9.16 (Submission 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.</p>	<p>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. 8.33</p> <p>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 an 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 8.23 is not a</p>	<p>bunal or promptly thereafter, issue a decision or provisional award on the objection, stating the grounds therefor. In the event that the objection is received after the first meeting of the division of the Tribunal, the Tribunal shall issue such decision or provisional award as soon as possible, and no later than 120 days after the objection was filed. In doing so, the Tribunal shall assume the alleged facts to be true, and may also consider any relevant facts not in dispute.</p> <p>4. The decision of the tribunal shall be without prejudice to the right of a disputing party to object, pursuant to article 19 (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 a Tribunal's authority to address other objections as a preliminary question. For greater certainty, such objection may include an objection that the dispute or any ancillary claim is not within the jurisdiction of the Tribunal or, for other reasons, is not within the competence of the Tribunal.</p>	<p>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> <p>[...]</p>	<p>be clearly deduced from existing case-law or where the answer to the question referred for a preliminary ruling admits of no reasonable doubt, the Court may at any time, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, decide to rule by reasoned order.</p> <p>Art. 181</p> <p>Where the appeal or cross-appeal is, in whole or in part, manifestly inadmissible or manifestly unfounded, the Court may at any time, acting on a proposal from the Judge-Rapporteur and after hearing the Advocate General, decide by reasoned order to dismiss that appeal or cross-appeal in whole or in part.</p> <p>Art. 182</p> <p>Where the Court has already ruled on one or more questions of law identical to those raised by the pleas in law of the appeal or cross-appeal and considers the appeal or cross-appeal to be manifestly well founded, it may, acting on a proposal from the Judge-Rapporteur and after hearing the parties and</p>	<p>(a) declare it inadmissible or strike it out of its list of cases, where such decision can be taken without further examination; or</p> <p>(b) declare it admissible and render at the same time a judgment on the merits, if the underlying question in the case, concerning the interpretation or the application of the Convention or the Protocols thereto, is already the subject of well-established case-law of the Court.</p> <p>2. Decisions and judgments under paragraph 1 shall be final.</p> <p>[...]</p> <p>Art. 29</p> <p>1. If no decision is taken under Article 27 or 28, or no judgment rendered under Article 28, a Chamber shall decide on the admissibility and merits of individual applications submitted under Article 34. The decision on admissibility may be taken separately.</p> <p>2. A Chamber shall decide on the admissibility and merits of inter-State applications submitted under Article 33.</p>
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<p>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 9.20 (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.</p> <p>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</p>	<p>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.</p> <p>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.</p> <p>3. If an objection has been submitted pursuant to Article 8.32, 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.</p> <p>4. On receipt of an objection under paragraph 1, and, if appropriate, after rendering 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</p>	<p>Art. 19</p> <p>1. Without prejudice to the Tribunal's authority to address other objections as a preliminary question, such as an objection that the dispute or any ancillary claim is not within the jurisdiction of the Tribunal or, for other reasons, is not within the competence of the Tribunal 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 27 (Provisional Award), even if the facts alleged were assumed to be true. The Tribunal may also consider any relevant facts not in dispute.</p> <p>2. An objection under paragraph 1 shall be submitted to the Tribunal as soon as possible after the division of the Tribunal is constituted, and in no event later than the date the Tribunal fixes for the respondent to submit its</p>		<p>the Advocate General, decide by reasoned order in which reference is made to the relevant case-law to declare the appeal or cross-appeal manifestly well founded.</p> <p>GC RP</p> <p>Art. 126</p> <p>Where it is clear that the General Court has no jurisdiction to hear and determine an action or where the action is manifestly inadmissible or manifestly lacking any foundation in law, the General Court may, on a proposal from the Judge-Rapporteur, at any time decide to give a decision by reasoned order without taking further steps in the proceedings.</p> <p>Art. 139</p> <p>Proceedings before the General Court shall be free of charge, except that:</p> <p>(a) where a party has caused the General Court to incur avoidable costs, in particular where the action is manifestly an abuse of process, the General Court may order that party to refund them;</p>	<p>The decision on admissibility shall be taken separately unless the Court, in exceptional cases, decides otherwise.</p> <p>Art. 35</p> <p>[...]</p> <p>3. The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:</p> <p>(a) the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application; or</p> <p>(b) the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.</p> <p>4. The Court shall reject any application which it considers inadmissible under this Article. It may do so at any stage of the proceedings</p>
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<p>sion or award on the objection, stating the grounds therefor.</p>	<p>the objection stating the grounds therefor.</p>	<p>counter-memorial or statement of defence or, in the case of an amendment to the claim, 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 18 (Preliminary objections) 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.</p> <p>3. On 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 provisional award on the objection, stating the grounds therefor.</p>		<p>[...]</p> <p>Art. 146</p> <p>[...]</p> <p>2. Legal aid shall be refused if it is clear that the General Court has no jurisdiction to hear and determine the action in respect of which the application for legal aid is made or if that action appears to be manifestly inadmissible or manifestly lacking any foundation in law.</p>	<p>Rule 52A</p> <p>1. In accordance with Article 27 of the Convention, a single judge may declare inadmissible or strike out of the Court's list of cases an application submitted under Article 34, where such a decision can be taken without further examination. The decision shall be final. The applicant shall be informed of the decision by letter.</p> <p>2. In accordance with Article 26 § 3 of the Convention, a single judge may not examine any application against the Contracting Party in respect of which that judge has been elected.</p> <p>3. If the single judge does not take a decision of the kind provided for in the first paragraph of the present Rule, that judge shall forward the application to a Committee or to a Chamber for further examination.</p>
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4.8 Remedies

4.8.1 The CJEU and the ECtHR

The CJEU remedies within the scope of this study do not directly provide for pecuniary compensation. Regarding the preliminary reference procedure, a CoJ judgement on *interpretation* of EU law (Art. 267 (1) lit. a, b (2. alt.) TFEU) has binding effect for the dispute before the national court, which referred the case (and, arguably, all national courts)³⁷⁹. In a CoJ judgement on *validity* of secondary EU acts (Art. 267 (1) lit. b (1. alt.) TFEU), the act violating EU law is invalidated *erga omnes*³⁸⁰, i.e. the act has to be disregarded by anyone. In case the referring national court does not follow the CoJ's judgement, infringement proceedings against the Member State pursuant to Artt. 258 to 260 TFEU may be initiated³⁸¹.

Direct action (for annulment, Art. 263 (1), (4) TFEU), if successful, leads to a decision declaring the contested act *of an EU institution*³⁸² void (Art. 264 (1) TFEU). While the CJEU, under Art. 263 (4) TFEU, may *not* order that *consequences* arising from the violation of EU law are to be eliminated, Art. 266 TFEU, however, stipulates that the EU institution responsible for violating EU law is under a duty to eliminate any such consequences, including financial ones. In analogous application of Art. 266 TFEU the same holds true if the CJEU declares an EU act invalid within the preliminary reference procedure according to Art. 267 (1) lit. b (1. alt.) TFEU³⁸³.

Also, a procedurally independent action for damages may be brought on the basis of Art. 268 TFEU. The provision refers jurisdiction on the CJEU for claims relating to compensation for damages on the basis of Art. 340 (2) and (3) TFEU. According to Art. 340 (2) TFEU, the EU is liable for damages caused by its institutions and servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States. Where a judgement holds the EU liable, damages comprise material damage, including (future) loss of profits, and non-material damage³⁸⁴. Unsettled is the question of whether the claimant has to seek annulment of an act first before resorting to a damages claim³⁸⁵. While the CoJ stated that the actions for annulment and damages constitute 'autonomous' remedies³⁸⁶, a claimant may nonetheless lack a legitimate interest to take legal action if he failed to seek annulment in due time according to Art. 263 (4) and (6) TFEU although such remedy was available to him³⁸⁷.

³⁷⁹ K. Lenaerts, I. Maselis and K. Gutman, *EU Procedural Law*, Oxford University Press, Oxford, 2015, paras 6.27, 6.30.

³⁸⁰ Order of the Court of 8 November 2007 in Case C-421/06: *Fratelli Martini & C. SpA* [2007] ECR 2007, I-152: "In any event, the invalidity of a Community provision results directly from the judgment of the Court declaring that invalidity and it is for the national authorities and courts of the Member States to draw the consequences from that declaration in their national legal order."

³⁸¹ K. Lenaerts, I. Maselis and K. Gutman, *EU Procedural Law*, Oxford University Press, Oxford, 2015, para 6.29.

³⁸² Note that acts of Member State bodies cannot be declared void by the CJEU.

³⁸³ U. Karpenstein, in: E. Grabitz, M. Hilf and M. Nettesheim (eds.), *Das Recht der Europäischen Union*, C.H. Beck, Munich, 2016, Art. 267 AEUV, para. 108; Order of the Court of 8 November 2007 in Case C-421/06: *Fratelli Martini & C. SpA* [2007] ECR 2007, I-152.

³⁸⁴ K. Lenaerts, I. Maselis and K. Gutman, *EU Procedural Law*, Oxford University Press, Oxford, 2015, paras 11.67, 11.44 et seqq.

³⁸⁵ If a Member State executes EU law, the action according to Art. 268, 340 (2) and (3) TFEU is subsidiary to actions available within the respective Member State. Cf. Order of the Court of 8 April 1981 in Joined Cases 197 to 200, 243, 245 and 247/80: *Ludwigshafener Walzmühle Erling KG and others v Council and Commission* [1981] ECR 1041, para. 9.

³⁸⁶ Judgement of 2 December 1971 in Case 5/71: *Aktien-Zuckerfabrik Schöppenstedt v Council of the European Communities* [1971] ECR 975, para 3.

³⁸⁷ H.-J. Cremer, in: C. Calliess, M. Ruffert (eds.), *EUV/AEUV Kommentar*, 5. Ed., C.H. Beck, Munich 2016, Art. 268 AEUV, para. 6; W. Berg, in: J. Schwarze (ed.), *EU-Kommentar*, Nomos, Freiburg, 2012, Art. 288 AEUV, para 18; H.W. Arndt, K. Fischer, T. Fetzer, *Europarecht*, 11th ed., C.F. Müller, Heidelberg, 2015, para. 300.

The ECtHR's judgements, if they find that there has been a violation of the ECHR, declare that the contested act is in violation of the ECHR, without voiding it. The parties have to abide by the judgement and strive to end the violation, albeit by means of their choice (cf. Artt. 41, 46 ECHR)³⁸⁸. If the domestic law of the respondent State allows only partial reparation to be made, the judgement shall – conditional upon a specific claim to that effect³⁸⁹ – afford 'just satisfaction' to the successful applicant (cf. Art. 41 ECHR). Where awarded, 'just satisfaction' can include pecuniary damages as well as non-pecuniary damages; punitive damages are not (expressly) awarded³⁹⁰. There is, however, no entitlement to an award of just satisfaction³⁹¹.

4.8.2 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*³⁹² of repeal of a challenged administrative act or law or the restitution of property is rare³⁹³, although investment instruments only occasionally explicitly prohibit non-compensatory relief³⁹⁴. 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 reparation³⁹⁵. 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

³⁸⁸ D. J. Harris et al, *Law of the European Convention of Human Rights*, 2nd ed., Oxford University Press, Oxford, 2009, p. 26.

³⁸⁹ Cf. Rule 60 (1) Rules of Court

³⁹⁰ W. Schabas, *The European Convention on Human Rights*, Oxford University Press, Oxford, 2015, pp. 836-39.

³⁹¹ W. Schabas, *The European Convention on Human Rights*, Oxford University Press, Oxford, 2015, p. 834.

³⁹² A court or a tribunal cannot annul the wrongful act itself.

³⁹³ 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 8 May 2017), p. 113.; S. Hindelang, *Restitution and Compensation – Reconstructing the Relationship in International Investment Law*, in: Hofmann and 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 7 May 2017); 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 8 May 2017), pp. 28 et seqq.; L. Malintoppi, *Provisional Measures in Recent ICSID Proceedings: What Parties Request and what Tribunals Order*, in: C. Binder, U. Kriebaum, and A. Reinisch, S. Wittich (eds.), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer*, Oxford University Press, Oxford, 2009, pp. 157 et seqq.

³⁹⁴ Articles 1135 et seqq. NAFTA.

³⁹⁵ 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: R. Hofmann, C. 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 8 May 2017); 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: S. Schill (ed.), *International Investment Law and Comparative Public Law*, Oxford University Press, Oxford, 2010, pp. 377 et seqq.

'only' pay compensation³⁹⁶. 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.

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 arbitration³⁹⁷. 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.

Broadening the picture, restitution of, e.g., unlawfully expropriated 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 based on 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 onerousness³⁹⁸. Furthermore, if an investment instrument would provide for restitution as the primary remedy, it would also have to specifically address compliance and enforcement questions³⁹⁹.

³⁹⁶ '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).

³⁹⁷ 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 investor-State arbitration, modelling their cases along similar lines; see above at footnote 148. Similarly, an erratic change in its energy policy led to a wave of 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.

³⁹⁸ S. Hindelang, Restitution and Compensation – Reconstructing the Relationship in International Investment Law, in: R. Hofmann and C. 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 7 May 2017), p. 5.

³⁹⁹ 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 7 May 2017), pp. 98 et seqq.

4.8.3 Comparison of EUSFTA, CETA, and EUVFTA; juxtaposition to the CJEU and the ECtHR

EUSFTA, CETA, and EUVFTA in Art. 9.24 (1), Art. 8.39 (1) and in Art. 27 (1) respectively provide that a tribunal may *only* award pecuniary damages including interest⁴⁰⁰ and, under certain conditions, restitution of property⁴⁰¹.

All 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. 9.24 (2) EUSFTA, Art. 8.39 (3) CETA and Art. 27 (2) EUVFTA. Only CETA additionally clarifies 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. All three FTAs make clear that Tribunals shall not award punitive damages, Art. 9.24 (2), Art. 8.39 (4) and Art. 27 (3) EUVFTA⁴⁰². It appears that lost profits are *not* to be excluded from a possible damages award under all three treaties⁴⁰³.

Except for restitution of property⁴⁰⁴, all treaties exclude restitution *in rem* by the way of orders to repeal a law, court or administrative decision⁴⁰⁵.

An ECtHR judgement makes a *declaration* on whether there has been a violation of the ECHR and may provide for 'just compensation' (cf. Artt. 41, 46 ECHR). To be sure, under the ECHR, implementation of the judgements is left largely at the discretion of the respondent State⁴⁰⁶. Nonetheless, judgements may require (and in practice cause) legislative, administrative or judicial changes of the practice violating the Convention⁴⁰⁷. The ECHR Committee of Ministers supervises the execution of judgements (Art. 46 (2) ECHR). It may even refer the case to the ECtHR again if it considers that a Party refuses to abide by the judgement (Art. 46 (4) ECHR). If the ECtHR concurs, the ECHR Committee of Ministers may consider 'measures to be taken' (Art. 46 (5) ECHR). Such measures suffer from the usual constraints of enforcement of public international law and will ultimately recur to political pressure⁴⁰⁸. This reflects that, in the end, the only legal reason for abiding by a judgement remains the general principle '*pacta sunt servanda*' (cf. Art. 26 and third recital of the Preamble of the Vienna Convention on the Law of Treaties)⁴⁰⁹.

What concerns the CJEU, it was explained above that within annulment proceedings the competent court may declare an EU act *void*; effective *ex tunc*⁴¹⁰. Formally, this is certainly the sharpest sword available to the tribunals and courts under comparison in this study. In practice, one should not forget though, pecuniary remedies can have the same effect on the respondent government. Under the rules

⁴⁰⁰ See the text passages highlighted in yellow in the table following this chapter.

⁴⁰¹ See the text passages highlighted in green in the table following this chapter.

⁴⁰² See the text passages highlighted in turquoise in the table following this chapter.

⁴⁰³ 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 8 May 2017), p. 113.

⁴⁰⁴ Under all three FTAs the respondent may prevent restitution of property by paying monetary compensation.

⁴⁰⁵ 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 8 May 2017), p. 95.

⁴⁰⁶ D. J. Harris et al, *Law of the European Convention of Human Rights*, 2nd ed., Oxford University Press, Oxford, 2009, pp. 25-28.

⁴⁰⁷ W. Schabas, *The European Convention on Human Rights*, Oxford University Press, Oxford, 2015, pp. 866-868.

⁴⁰⁸ W. Schabas, *The European Convention on Human Rights*, Oxford University Press, Oxford, 2015, p. 871.

⁴⁰⁹ W. Schabas, *The European Convention on Human Rights*, Oxford University Press, Oxford, 2015, p. 867.

⁴¹⁰ K. Lenaerts, I. Maselis and K. Gutman, *EU Procedural Law*, Oxford University Press, Oxford, 2015, para 10.22-10.23 also with reference to the exceptions.

on annulment, the CJEU may *not* order that any consequences arising from the violation of EU law are eliminated. However, from Art. 266 TFEU it follows that the EU institution responsible for violating EU law is under a duty to eliminate such consequences which includes financial consequences, too⁴¹¹. On principle, the same holds true if the CJEU should declare an EU act invalid in accordance with Art. 267 (1) lit. b (1. alt.) TFEU (above 4.8.1 (p. 144)). Furthermore, the duty to eliminate the said consequences exist irrespective of whether the claimant may pursue an action for damages under Artt. 268, 340 (2) and (3) TFEU.

In sum, compared to the ECtHR and the three FTAs, the CJEU offers the most nuanced and sophisticated concept of remedies: from voiding or invalidating the unlawful act, to eliminating the consequences caused by this act, to providing damages. In doing so, it does not merely perceive rights of the individual as representing a certain pecuniary value but the EU legal system of remedies also protects the substance of these rights.

⁴¹¹ O. Dörr, in: E. Grabitz, M. Hilf and M. Nettesheim (eds.), *Das Recht der Europäischen Union*, C.H. Beck, Munich, 2016, Art. 266 AEUV, para. 16.

4.8.4 Table: Remedies⁴¹²

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

EUSFTA ⁴¹³	CETA	EUVFTA ⁴¹⁴	ECtHR
<p>Art. 9.24</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:²⁴</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</p>	<p>Art. 8.39</p> <p>1. If the Tribunal makes a final award against the respondent, the Tribunal may only award, separately or in combination:</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 8.12.</p> <p>2. Subject to paragraphs 1 and 5, if a claim is made under Article 8.23.1(b):</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>Art. 27</p> <p>1. Where the Tribunal concludes that a measure in dispute breaches any of the provisions referred to in Article 1(1) (Scope), the Tribunal may, on the basis of a request from the claimant, and after hearing the disputing parties, award 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 and any applicable interest in lieu of restitution, determined in a manner consistent with the relevant provisions of Section II (Investment Protection).</p> <p>Where the claim was submitted on behalf of a locally-established company, any award under this paragraph shall provide that:</p> <p>(a) any monetary damages and interest shall be paid to the locally established company;</p> <p>(b) any restitution shall be made to the locally established company.</p>	<p>ECHR</p> <p>Art. 41</p> <p>If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.</p> <p>Art. 46</p> <p>1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.</p> <p>2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.</p> <p>[...]</p> <p>Practice direction issued by the President of the Court in accordance with Rule 32 of the Rules of Court on 28 March 2007</p> <p>[...]</p>

⁴¹² Footnotes and section headings omitted.

⁴¹³ Numbering according to the May 2015 authentic text; numbering of the articles may change.

⁴¹⁴ Numbering according to the January 2016 agreed text (might be subject to change); footnotes and section headings omitted.

<p>award shall be made to the locally established company.</p> <p>Footnote 24 to Art.9.24: “For greater certainty, a final award shall be made on the basis of a request from the claimant and shall be made after considering any comments of the disputing parties.”</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 8.22, may have in monetary damages or property awarded under a Party’s 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. The Tribunal shall not award punitive damages.</p> <p>[...]</p>	<p>The Tribunal may not order the repeal of the treatment concerned.</p> <p>2. Monetary damages shall not be greater than the loss suffered by the claimant or, as applicable by its locally established company, as a result of the breach of the relevant provisions of the agreement, reduced by any prior damages or compensation already provided by the Party concerned. For greater certainty, when an investor submits a claim on its own behalf, it may recover only loss or damage that it has incurred with regards to its investment as referred to in Article (Scope) of Section II (Investment Protection).</p> <p>3. The Tribunal may not award punitive damages.</p> <p>[...]</p> <p>7. A provisional award shall become final if 90 days have elapsed after it has been issued and neither disputing party has appealed the award to the Appeal Tribunal.</p>	<p>6. Just satisfaction may be afforded under Article 41 of the Convention in respect of:</p> <p>(a) pecuniary damage;</p> <p>(b) non-pecuniary damage; and</p> <p>(c) costs and expenses.</p> <p>[...]</p> <p>10. The principle with regard to pecuniary damage is that the applicant should be placed, as far as possible, in the position in which he or she would have been had the violation found not taken place, in other words, restitutio in integrum. This can involve compensation for both loss actually suffered (damnum emergens) and loss, or diminished gain, to be expected in the future (lucrum cessans).</p> <p>11. It is for the applicant to show that pecuniary damage has resulted from the violation or violations alleged. The applicant should submit relevant documents to prove, as far as possible, not only the existence but also the amount or value of the damage.</p> <p>12. Normally, the Court’s award will reflect the full calculated amount of the damage. However, if the actual damage cannot be precisely calculated, the Court will make an estimate based on the facts at its disposal. As pointed out in paragraph 2 above, it is also possible that the Court may find reasons in equity to award less than the full amount of the loss.</p> <p>13. The Court’s award in respect of non-pecuniary damage is intended to provide financial compensation for non-material</p>
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			<p>harm, for example mental or physical suffering.</p> <p>14. It is in the nature of non-pecuniary damage that it does not lend itself to precise calculation. If the existence of such damage is established, and if the Court considers that a monetary award is necessary, it will make an assessment on an equitable basis, having regard to the standards which emerge from its case-law.</p> <p>15. Applicants who wish to be compensated for non-pecuniary damage are invited to specify a sum which in their view would be equitable. Applicants who consider themselves victims of more than one violation may claim either a single lump sum covering all alleged violations or a separate sum in respect of each alleged violation.</p> <p>[...]</p> <p>23. The Court's awards, if any, will normally be in the form of a sum of money to be paid by the respondent Contracting Party to the victim or victims of the violations found. Only in extremely rare cases can the Court consider a consequential order aimed at putting an end or remedying the violation in question. The Court may, however, decide at its discretion to offer guidance for the execution of its judgment (Article 46 of the Convention).</p> <p>[...]</p>
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4.9 Costs

4.9.1 Actual costs

A study of ICSID arbitration costs in 2016 has revealed that average total costs (for claimants, respondents and the tribunal) amount to slightly below USD 11.5 million⁴¹⁵. Back in 2012, according to the OECD, average costs for both parties participating in investor-State arbitration amounted to an average of USD 8 million⁴¹⁶, but also have exceeded USD 30 million in some cases. The OECD study indicated that 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 case⁴¹⁷. While the figures in the 2012 and 2016 studies are not fully comparable because the newer study does not differentiate in similar detail, it is safe to conclude a noteworthy increase in costs since the 2012 study which cannot be a mere effect of inflation⁴¹⁸. Probably owing to the vast differences of the cases before the CJEU and the ECtHR, comparable analysis, to the best of this study's knowledge, is not available for these courts and the procedures within the scope of this study.

4.9.2 Regulations on costs in 'traditional' investor-State arbitration

Currently, most investment agreements in force do not contain their own specific rules for costs and their attribution. Rather, investor-State arbitral 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 question⁴¹⁹. Some tribunals resorted to the rule generally used in public international law, whereby

⁴¹⁵ Jeffery P. Commission, *How Much Does an ICSID Arbitration Cost? A Snapshot of the Last Five Years*, <http://klowerarbitrationblog.com/2016/02/29/how-much-does-an-icsid-arbitration-cost-a-snapshot-of-the-last-five-years/> (visited 8 May 2017).

⁴¹⁶ 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 8 May 2017) p. 19; S. Franck, *Rationalizing Costs in Investment Arbitration*, *Washington University Law Review*, Vol. 88 (2011), pp. 769 et seqq.

⁴¹⁷ 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 8 May 2017), p. 19.

⁴¹⁸ The average inflation rate in the Euro zone, for instance, was less than two percent from 2012 to 2017, see <http://www.tradingeconomics.com/euro-area/inflation-cpi> (visited 8 May 2017).

⁴¹⁹ 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://klowerarbitrationblog.com/blog/2010/07/16/more-on-corporate-criticism-of-international-arbitration/> (visited 8 May 2017); 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 7 May 2017).

each party has to bear its own costs and arbitrators and institutional costs are split⁴²⁰. Yet, some tribunals have opted to shift a greater part of the costs to the unsuccessful party⁴²¹. One is therefore left with the general observation that the outcome of cost awards is difficult to predict⁴²².

4.9.3 Regulations on costs at the CJEU and the ECtHR

Direct action proceedings before the CoJ are, on principle, free of judicial cost (i.e. costs for the work of the CoJ)⁴²³, Art. 143 RP CoJ. Exceptionally, a party may be ordered to refund such costs where it has caused avoidable costs or where excessive copying or translation work has been carried out by the CoJ upon request of the party (Art. 143 RP CoJ). The provision has rarely ever been made use of⁴²⁴. With regard to other, potentially retrievable costs, Art. 144 RP CoJ contains a definition, which includes costs for experts and witnesses as well as legal fees, remuneration for agents and advisers, and travel and subsistence expenses. These costs are (upon such request by a party) allocated between the parties to a dispute in accordance with Art. 138 RP CoJ, which, as a basic rule, establishes in its paragraph (1) that the unsuccessful party is obliged to bear the costs. Paragraph (3) goes on and establishes that where a party is partly successful and partly unsuccessful, each party shall bear its own costs. Importantly, only costs caused by bringing the case before the CJEU and incurred during the proceedings are recoverable⁴²⁵. Where disputes arise over the amount of the recoverable costs or legal fees, the smallest chamber to which the Judge-Rapporteur of the case is assigned will be seized of the matter and decide on the amount of costs recoverable⁴²⁶. There is no scale for lawyers' fees, but hourly rates of up to 400 Euros per hour have been held recoverable⁴²⁷.

As regards the preliminary reference procedure, all costs incurred by the parties (the CoJ's work remains 'free of charge') have to be allocated by the *final* judgement of the referring court, thus emphasising the *interlocutory* character of the procedure pursuant to Art. 267 TFEU (Art. 102 RP CoJ).

At the ECtHR, costs for legal representation and similar expenses may be awarded as 'just satisfaction' under Art. 41 ECHR⁴²⁸. The practice of reimbursement is, however, strict⁴²⁹: Only actual costs incurred have a chance to be reimbursed; costs have to be itemized diligently (Rule 60 (2) Rules of Court), hours billed and rates thereof are frequently found to be excessive. The allocation of cost follows the basic rule that the successful applicant is reimbursed but only insofar as he succeeds with the application.

⁴²⁰ 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 7 May 2017), p. 110 et seqq.

⁴²¹ 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.

⁴²² 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 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.

⁴²³ B. Wägenbaur, *Court of Justice of the European Union. Commentary on Statute and Rules of Procedure*, C.H. Beck, Hart Publishing and Nomos, Munich, Oxford and Baden-Baden, 2013, Art. 137 RP ECJ, para 3.

⁴²⁴ B. Wägenbaur, *Court of Justice of the European Union. Commentary on Statute and Rules of Procedure*, C.H. Beck, Hart Publishing and Nomos, Munich, Oxford and Baden-Baden, 2013, Art. 143 RP ECJ, paras 3-5.

⁴²⁵ K. Lenaerts, I. Maselis and K. Gutman, *EU Procedural Law*, Oxford University Press, Oxford, 2015, para 25.91.

⁴²⁶ K. Lenaerts, I. Maselis and K. Gutman, *EU Procedural Law*, Oxford University Press, Oxford, 2015, paras 25.92-25.93.

⁴²⁷ K. Lenaerts, I. Maselis and K. Gutman, *EU Procedural Law*, Oxford University Press, Oxford, 2015, paras 25.93 (footnote 341).

⁴²⁸ In detail see Practice direction issued by the President of the Court in accordance with Rule 32 of the Rules of Court on 28 March 2007 on just satisfaction claims, paras 2-3, 16-21.

⁴²⁹ The following draws on D. J. Harris et al, *Law of the European Convention of Human Rights*, 2nd ed., Oxford University Press, Oxford, 2009, pp. 858-859 and the Practice direction issued by the President of the Court in accordance with Rule 32 of the Rules of Court on 28 March 2007 on just satisfaction claims, paras 2-3, 16-21.

For fees and hourly rates the ECtHR in practice looks at the standard in the applicant's jurisdiction, without being bound thereto. Costs which incurred by pursuing local remedies will also be awarded where these remedies were directed against the actions eventually found to constitute a violation of the Convention.

Finally, it should be noted that, on principal, legal aid is available to parties pursuing certain remedies before the CJEU and the ECtHR if such party is unable to meet the costs of the proceedings (cf. Artt. 115 et seqq. RP CoJ; Rule 101 Rules of Court).

4.9.4 Possible approaches in allocating costs

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 (successful) claimant party appears no option as it is hardly consistent with the idea of the rule of law. It should be noted that between these extremes, numerous solutions can be found from jurisdiction to jurisdiction, differentiating between the types of cost (e.g. each party bears its own legal fees and only court or tribunal fees are allocated according to the relative success of the claimant⁴³⁰) or capping of costs (e.g. legal fees of the successful party only have to be reimbursed up to a certain amount⁴³¹).

When discussing the issue of cost attribution, a set of arguments and interests concerning the different stakeholders have to be considered. On the one hand, the access to investor-State arbitration must not be prevented by a threat of extraordinary high costs in case the investor loses. This applies especially to SMEs, which are less equipped to take such risks⁴³². 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 costs⁴³³.

4.9.5 Comparison of EUSFTA, CETA, and EUVFTA; juxtaposition to the CJEU and the ECtHR

EUSFTA, CETA, and EUVFTA provide for some guidance on costs in Art. 9.26 EUSFTA, Art. 8.39 CETA and Art. 27 (4), (5) EUVFTA respectively. According to the European Commission, EUSFTA- and CETA-rules

⁴³⁰ Cf., for instance, Section 92 (1) German Code of Civil Procedure: 'Where each of the parties has prevailed for a part of its claim, but has not been able to enforce another part of its claim in the dispute, the costs are to be cancelled against each other, or they are to be shared proportionately. If the costs have been cancelled against each other, the parties shall bear the court costs at one half each.' Translation available at https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html (visited on 8 May 2017).

⁴³¹ Cf., for instance, Section 91 (2) first sentence German Code of Civil Procedure: 'In all proceedings, the statutory fees and expenditures of the attorney of the prevailing party are to be compensated.' Translation available at https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html (visited on 8 May 2017).

⁴³² 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 May 2017), p. 23. Small- and medium-sized undertakings could benefit from a small 'small claims centre' with simplified procedures and lower costs in order to allow for access to ISDS.

⁴³³ The access of less-developed countries to high-quality legal defence 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 2017), 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 May 2017), p. 23.

are the first of their kind in agreements providing for investor-State arbitration⁴³⁴. Both, the costs of arbitration⁴³⁵ (including the fees and expenses of the arbitrators⁴³⁶) as well as other reasonable costs⁴³⁷ (defined as including costs of legal representation and assistance) shall be borne by the unsuccessful party ('loser pays all' principle).

Although EUVFTA contains provisions on cost distribution very similar to those in CETA and EUSFTA (cf. 27 (4) and (5) EUVFTA), the definition of 'costs of proceedings' is slightly more specific: 'For greater certainty, the term "costs of proceedings" includes (a) the reasonable costs of expert advice and of other assistance required by the Tribunal, and (b) the reasonable travel and other expenses of witnesses to the extent such expenses are approved by the Tribunal.' (Footnote 31 to Art. 27.4 EUVFTA). And it should be noted that EUVFTA Trade Committee should, within one year after entry into force of the FTA, adopt rules on *maximum costs* of legal representation and assistance to be borne by the unsuccessful disputing party (Art. 27 (5) EUVFTA).⁴³⁸ By comparison, CETA only contains rules charging the CETA Joint Committee with the task of adopting provisions relating to the costs of appeals (Art. 8.28 (7) lit. e CETA) and 'to consider supplemental rules aimed at reducing the financial burden on claimants who are natural persons or small and medium-sized enterprises' (Art. 8.39 (6) CETA). Absent a decision on the basis of the Committee Services and Investment's general power to 'adopt and amend rules supplementing the applicable dispute settlement rules' (Art. 8.44 (3) lit. b CETA), the question of a maximum amount of costs recoverable by a disputing party will be left to the tribunal and thereby, most likely, to 'traditional' standards. EUSFTA, with regard to recoverable costs for fees and expenses of the arbitrators, refers to Regulation 14 (1) of the Administrative and Financial Regulations of the ICSID Convention (Art. 9.26 (5) EUSFTA).

The clear establishment of the 'loser pays all' principle in the three aforementioned FTAs can be helpful in containing costs on both the claimant's as well as the respondent's side. Yet, this principle does not assure that financially robust claimants are deterred from resorting to arbitration if it serves their strategic interests⁴³⁹. At the same time, it is possible that SMEs might shy away from investor-State arbitration if a loss of the case bears too big a financial risk for them.

All FTAs within the scope of this study 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 by the parties⁴⁴⁰. The provisions differentiate between costs of proceedings and other reasonable costs. This way, the FTAs allow to differently apportion arbitration costs and other costs, because the circumstances relevant for each apportionment might not necessarily be the same.

⁴³⁴ 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 7 May 2017), p. 6.

⁴³⁵ See the text passages highlighted in yellow in the table following this chapter.

⁴³⁶ 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.

⁴³⁷ See the text passages highlighted in green in the table following this chapter.

⁴³⁸ Art. 27 (5) EUVFTA: 'The Trade Committee may adopt supplemental rules on fees for the purpose of determining the maximum amount of costs of legal representation and assistance that may be borne by specific categories of unsuccessful disputing parties. Such supplemental rules shall take into account the financial resources of a claimant which is a natural person or a small or medium-sized enterprise. The Trade Committee shall endeavour to adopt such supplemental rules no later than one year after the entry into force of this Agreement.'

⁴³⁹ 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 8 May 2017), p. 110.

⁴⁴⁰ See the text passages highlighted in turquoise in the table following this chapter.

4.9.6 Working towards cost reduction and a SME-friendly access to justice

So far, only EUVFTA and CETA explicitly address the issue of cost allocation with regard to SMEs, but only vaguely. Art. 27 (5) EUVFTA and Art. 39 (6) CETA respectively obliges the treaty committee in charge to take into account the financial limitations of SMEs in the supplemental rules on costs. While this may be considered a starting point, the provision remains too broad and does not take into account the actual issues with regard to SMEs, starting with the question what might qualify as SME under the agreement.

With a view to making investor-State arbitration in the said FTAs more accessible to SMEs, the issue deserves closer attention. For small claims, the fees and expenses of arbitrators and party representatives could be fixed to the value of the dispute⁴⁴¹. On the national or European level, this could be aided by schemes for legal financial aid. Also, the length of proceedings increases the costs. A stricter time regime for proceedings initiated by SMEs could be installed⁴⁴². Despite the importance of the topic in this context as in many others, the State parties have thus far not sufficiently addressed the issue.

⁴⁴¹ For a draft provision regarding the establishment of special schedules for SMEs (as a modification of [what is now] Art. 8.44 CETA: Committee on Services and Investment) see S. Hindelang and S. Wernicke (eds.), *Grundzüge eines modernen Investitionsschutzes – Harnack-Haus Reflections*, 2015, available at <http://tinyurl.com/ofzq7k3> (visited 8 May 2017), 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.'

⁴⁴² See the proposal *supra* note 441 as presented in S. Hindelang and S. Wernicke (eds.), *Grundzüge eines modernen Investitionsschutzes – Harnack-Haus Reflections*, 2015, available at <http://tinyurl.com/ofzq7k3> (visited 8 May 2017), pp. 23-24.

4.9.7 Table: Costs⁴⁴³

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

EUSFTA ⁴⁴⁴	CETA	EUVFTA ⁴⁴⁵	CJEU	ECtHR
<p>Art. 9.26</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</p>	<p>Art. 8.39</p> <p>[...]</p> <p>5. The Tribunal shall order that the costs of the proceedings 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 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. If 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. 27</p> <p>[...]</p> <p>4. The Tribunal shall order that the costs of proceedings 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 circumstance of the case. Other reasonable costs, including reasonable 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 case. Where only some 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. The Appeal Tribunal shall deal with costs in accordance with this article.</p>	<p>Art. 38 CJEU Statute</p> <p>The Court of Justice shall adjudicate upon costs.</p> <p>RP CoJ</p> <p>Art. 137</p> <p>A decision as to costs shall be given in the judgment or order which closes the proceedings.</p> <p>Art. 138</p> <p>1. The unsuccessful party shall be ordered to pay the costs if they have been applied for in the successful party's pleadings.</p> <p>2. Where there is more than one unsuccessful party the Court shall decide how the costs are to be shared.</p> <p>3. Where each party succeeds on some and fails on other heads, the parties shall bear their own costs. However, if it appears justified in the circumstances of the case, the Court may order that</p>	<p>Art. 41 ECHR</p> <p>If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.</p> <p>Rules of Court</p> <p>Rule 74</p> <p>1. A judgment as referred to in Articles 28, 42 and 44 of the Convention shall contain</p> <p>[...]</p> <p>(j) the decision, if any, in respect of costs;</p> <p>[...]</p> <p>Practice direction issued by the President of the Court in accordance with Rule 32 of the Rules of</p>

⁴⁴³ Footnotes and section headings omitted.

⁴⁴⁴ Numbering according to the May 2015 authentic text; numbering of the articles may change.

⁴⁴⁵ Numbering according to the January 2016 agreed text (might be subject to change).

<p>are dismissed on application of Article 9.20 (Claims Manifestly without Legal Merits) or Article 9.21 (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>[...]</p> <p>6. The CETA Joint Committee shall consider supplemental rules aimed at reducing the financial burden on claimants who are natural persons or small and medium-sized enterprises. Such supplemental rules may, in particular, take into account the financial resources of such claimants and the amount of compensation sought.</p> <p>[...]</p> <p>Art. 8.28</p> <p>[...]</p> <p>7. The CETA Joint Committee shall promptly adopt a decision setting out the following administrative and organisational matters regarding the functioning of the Appellate Tribunal:</p> <p>[...]</p> <p>(e) provisions related to the costs of appeals;</p> <p>[...]</p>	<p>5. The Trade Committee may adopt supplemental rules on fees for the purpose of determining the maximum amount of costs of legal representation and assistance that may be borne by specific categories of unsuccessful disputing parties. Such supplemental rules shall take into account the financial resources of a claimant which is a natural person or a small or medium-sized enterprise. The Trade Committee shall endeavour to adopt such supplemental rules no later than one year after the entry into force of this Agreement.</p> <p>[...]</p>	<p>one party, in addition to bearing its own costs, pay a proportion of the costs of the other party.</p> <p>Art. 139</p> <p>The Court may order a party, even if successful, to pay costs which the Court considers that party to have unreasonably or vexatiously caused the opposite party to incur.</p> <p>Art. 140</p> <p>1. The Member States and institutions which have intervened in the proceedings shall bear their own costs.</p> <p>2. The States, other than the Member States, which are parties to the EEA Agreement, and also the EFTA Surveillance Authority, shall similarly bear their own costs if they have intervened in the proceedings.</p> <p>3. The Court may order an intervener other than those referred to in the preceding paragraphs to bear his own costs.</p> <p>Art. 141</p> <p>1. A party who discontinues or withdraws from proceedings shall be ordered to pay the costs if they have been applied for in the other party's observations on the discontinuance.</p>	<p>Court on 28 March 2007 regarding just satisfaction claims</p> <p>[...]</p> <p>6. Just satisfaction may be afforded under Article 41 of the Convention in respect of:</p> <p>(a) pecuniary damage;</p> <p>(b) non-pecuniary damage; and</p> <p>(c) costs and expenses.</p> <p>[...]</p> <p>16. The Court can order the reimbursement to the applicant of costs and expenses which he or she has incurred – first at the domestic level, and subsequently in the proceedings before the Court itself – in trying to prevent the violation from occurring, or in trying to obtain redress therefor. Such costs and expenses will typically include the cost of legal assistance, court registration fees and such-like. They may also include travel and subsistence expenses, in particular if these have been incurred by attendance at a hearing of the Court.</p> <p>17. The Court will uphold claims for costs and expenses only in so far as they are referable to the violations it has found. It will reject them in so far as they relate to complaints that have not led to the finding of a vio-</p>
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			<p>2. However, at the request of the party who discontinues or withdraws from proceedings, the costs shall be borne by the other party if this appears justified by the conduct of that party.</p> <p>3. Where the parties have come to an agreement on costs, the decision as to costs shall be in accordance with that agreement.</p> <p>4. If costs are not claimed, the parties shall bear their own costs.</p> <p>Art. 142</p> <p>Where a case does not proceed to judgment the costs shall be in the discretion of the Court.</p> <p>Art. 143</p> <p>Proceedings before the Court shall be free of charge, except that:</p> <p>(a) where a party has caused the Court to incur avoidable costs the Court may, after hearing the Advocate General, order that party to refund them;</p> <p>(b) where copying or translation work is carried out at the request of a party, the cost shall, in so far as the Registrar considers it excessive, be paid for by that party on the Registry's scale of charges referred to in Article 22.</p> <p>Art. 144</p>	<p>lation, or to complaints declared inadmissible. This being so, applicants may wish to link separate claim items to particular complaints.</p> <p>18. Costs and expenses must have been actually incurred. That is, the applicant must have paid them, or be bound to pay them, pursuant to a legal or contractual obligation. Any sums paid or payable by domestic authorities or by the Council of Europe by way of legal aid will be deducted.</p> <p>19. Costs and expenses must have been necessarily incurred. That is, they must have become unavoidable in order to prevent the violation or obtain redress therefor.</p> <p>20. They must be reasonable as to quantum. If the Court finds them to be excessive, it will award a sum which, on its own estimate, is reasonable.</p> <p>21. The Court requires evidence, such as itemised bills and invoices. These must be sufficiently detailed to enable the Court to determine to what extent the above requirements have been met.</p>
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			<p>Without prejudice to the preceding Article, the following shall be regarded as recoverable costs:</p> <p>(a) sums payable to witnesses and experts under Article 73 of these Rules;</p> <p>(b) expenses necessarily incurred by the parties for the purpose of the proceedings, in particular the travel and subsistence expenses and the remuneration of agents, advisers or lawyers.</p> <p>Art. 145</p> <p>1. If there is a dispute concerning the costs to be recovered, the Chamber of three Judges to which the Judge-Rapporteur who dealt with the case is assigned shall, on application by the party concerned and after hearing the opposite party and the Advocate General, make an order. In that event, the formation of the Court shall be composed of the President of that Chamber, the Judge-Rapporteur and the first Judge or, as the case may be, the first, two Judges designated from the list referred to in Article 28(3) on the date on which the dispute is brought before that Chamber by the Judge-Rapporteur.</p> <p>2. If the Judge-Rapporteur is not a member of a Chamber of three Judges, the decision shall be taken, under the same conditions, by the Chamber of five Judges to which he</p>	
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			<p>is assigned. In addition to the Judge-Rapporteur, the formation of the Court shall be composed of four Judges designated from the list referred to in Article 28(2) on the date on which the dispute is brought before that Chamber by the Judge-Rapporteur.</p> <p>3. The parties may, for the purposes of enforcement, apply for an authenticated copy of the order.</p> <p>Art. 146</p> <p>1. Sums due from the cashier of the Court and from its debtors shall be paid in euro.</p> <p>2. Where costs to be recovered have been incurred in a currency other than the euro or where the steps in respect of which payment is due were taken in a country of which the euro is not the currency, the conversion shall be effected at the European Central Bank's official rates of exchange on the day of payment.</p> <p>Art. 184</p> <p>1. Subject to the following provisions, Articles 137 to 146 of these Rules shall apply, mutatis mutandis, to the procedure before the Court of Justice on an appeal against a decision of the General Court.</p> <p>2. Where the appeal is unfounded or where the appeal is well founded</p>	
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			<p>and the Court itself gives final judgment in the case, the Court shall make a decision as to the costs.</p> <p>3. When an appeal brought by a Member State or an institution of the European Union which did not intervene in the proceedings before the General Court is well founded, the Court of Justice may order that the parties share the costs or that the successful appellant pay the costs which the appeal has caused an unsuccessful party to incur.</p> <p>4. Where the appeal has not been brought by an intervener at first instance, he may not be ordered to pay costs in the appeal proceedings unless he participated in the written or oral part of the proceedings before the Court of Justice. Where an intervener at first instance takes part in the proceedings, the Court may decide that he shall bear his own costs.</p>	
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4.10 Enforcement

Enforceability is the litmus test for the substantive law underlying a decision. This follows from the fact that, in case of non-compliance by the respondent, it is only by way of enforcement that the operative part of the judgement will manifest in reality. Questions of enforceability are closely related to such of appeals (below 4.11 (p. 172)) since in some legal traditions, enforceability is on principle contingent upon finality of the decision. Thus, at least in such jurisdictions where the finality of decisions is stalled by an appeal ('suspensory effect')⁴⁴⁶, decisions are (on principle) only enforceable after an unsuccessful appeal or the lapse of a given deadline to appeal⁴⁴⁷.

4.10.1 Enforcement in 'traditional' investor-State arbitration

Once an 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 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. The unsuccessful respondent State will not only try to prevent enforcement by legally challenging enforcement in foreign courts but also might consider challenging the award itself.

Depending on the chosen arbitration rules, the unsuccessful respondent State may seek annulment of the award in accordance with Art. 52 ICSID Convention⁴⁴⁸, or could apply for annulment in the courts of the State where the arbitration was seated⁴⁴⁹. The latter case relates to arbitrations, for example, under the UNCITRAL Arbitration Rules or the ICSID Additional Facility Rules.

⁴⁴⁶ Cf., for instance, Section 167 (1) first sentence German Code of Administrative Court Procedure in conjunction with Section 705 Code of Civil Procedure: 'Unless the present Act provides otherwise, [...] the Code of Civil Procedure shall apply mutatis mutandis to execution.' and '**Judgments shall not attain legal validity prior to expiry of the period determined for the lodgement of the admissible legal remedy** or of the admissible protest. **The legal validity shall be suspended** in all cases in which the legal remedy or the protest is lodged in due time.' (Bold typesetting added.) Translation available at http://www.gesetze-im-internet.de/englisch_vwgo/englisch_vwgo.html#p0365 and https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html (both visited 8 May 2017).

⁴⁴⁷ Cf., for instance, Section 188 (1) No. 1 German Code of Administrative Court Procedure: 'Execution shall be effected on the basis of final and provisionally-executable court rulings [...]' Translation available at http://www.gesetze-im-internet.de/englisch_vwgo/englisch_vwgo.html#p0365 (visited 8 May 2017).

⁴⁴⁸ 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.'

⁴⁴⁹ For example, if the seat of arbitration were in Germany, *inter alia*, Section 1059 (2) Code of Civil Procedure would apply, 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,

If annulment actions were unsuccessful and the respondent State is unwilling to comply with the award, the claimant will seek 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 Artt. 53 and 54 of the ICSID Convention, arbitral awards shall be binding and must be treated as if they were a final judgement of a court of any party to the ICSID Convention. Specifically, awards 'shall not be subject to any appeal or to any other remedy except those provided for in this Convention' (Art. 53 (1) 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)⁴⁵⁰. The New York Convention provides for an obligation to recognize and enforce foreign arbitral awards if the award is of an international or non-domestic nature and conforms to certain other formal requirements⁴⁵¹. Art. 5 of the New York Convention provides for an exhaustive list of possible grounds for judicial review by domestic courts.

4.10.2 Enforcement of CJEU and ECtHR decisions

In general, the enforcement of decisions of the CJEU is regulated in Art. 280 in conjunction with Art. 299 TFEU. Although the provisions expressly only make reference to 'judgements', it is undisputed that the CJEU's orders, too, are enforceable⁴⁵². For instance, pecuniary obligations, by virtue of these provisions, receive an order for enforcement by the competent national authority and are enforced in accordance with the applicable domestic laws on enforcement⁴⁵³. For the remedies within the scope of this study, however, enforcement is not an issue. The direct action is a cassatory remedy (above 4.2.1 p. 48), which means that the judgement declares the contested act to be void (Art. 264 (1) TFEU). This effect is inflicted upon the contested act *ipso iure* with delivery of the judgement (which is not subject to appeal, see below 4.11 (p. 172)) and hence without any need for enforcement whatsoever. The preliminary reference procedure, on the other hand, is not enforceable because of its name-giving 'preliminary' character: The final judgement is handed down by the referring court. As has been explained before (above 4.8.1 (p. 144)), a CoJ judgement on interpretation of EU law is binding on the referring court upon its delivery (cf. Art. 91 (1) RP CoJ)⁴⁵⁴. In this context, the only (however, untechnical) 'enforcement mechanism' available in case of non-compliance of the referring court with the CoJ's judgement is the infringement proceedings against the court's Member State pursuant to Artt. 258 to 260 TFEU⁴⁵⁵ and State liability for violation of EU law.

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. [...] Translation available at https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html (visited 8 May 2017).

⁴⁵⁰ 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 8 May 2017).

⁴⁵¹ See J. Kleinheisterkamp, Recognition and Enforcement of Foreign Arbitral Awards, in: R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, Oxford University Press, Oxford, 2008, opil.ouplaw.com/home/EPIL, paras 22 et seqq.

⁴⁵² M. Jakobs, in: H. W. Rengeling, A. Middeke and M. Gellermann (eds.), *Handbuch des Rechtsschutzes in der Europäischen Union*, 3rd ed. (C.H. Beck, Munich 2013), § 31 para 4.

⁴⁵³ K. Lenaerts, I. Maselis and K. Gutman, *EU Procedural Law*, Oxford University Press, Oxford, 2015, para 23.94.

⁴⁵⁴ Judgement of 3 February 1977 in Case 52/76: *Benedetti v Munari* [1977] ECR 164, para 26.

⁴⁵⁵ K. Lenaerts, I. Maselis and K. Gutman, *EU Procedural Law*, Oxford University Press, Oxford, 2015, para 6.29.

Since appeals against GC judgements, at least on principle, do not have ‘suspensory effect’, contested judgements remain enforceable until a CoJ judgement quashing such contested judgement is delivered (Art. 60 (1) CJEU Statute). Hereby, any incentive to appeal in order to delay the enforcement of a judgement is removed⁴⁵⁶.

Enforcement of ECtHR judgements, as has been indicated before (see 4.2.1, p. 48), is characterised by the ‘typical’ challenges⁴⁵⁷ found in public international law contexts⁴⁵⁸. The process of enforcement is laid down in Art. 46 ECHR. On principle, the violating State may end the violation by means at its discretion⁴⁵⁹. According to said article, the Committee of Ministers, which is composed of the ministers of foreign affairs of the Member States⁴⁶⁰, supervises the execution of the judgement⁴⁶¹ and may—in case of perceived non-compliance—refer the question of whether the State failed to abide by the judgement to the ECtHR (Art. 46 (4) ECHR). If the ECtHR concurs, it may refer the case back to the Committee of Ministers, which considers ‘the measures to be taken’ (Art. 46 (5) ECHR). Supervision is conducted in sessions of the Committee of Ministers⁴⁶² and pursuant to the ‘Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements’⁴⁶³. It reviews 2 500-3 500 cases in four three day *in camera* sessions per year, with around twenty to forty cases reported as actually debated in session. Applicants and their legal representatives are excluded from the meetings.

William A. Schabas notes, however that ‘[u]ltimately, of course, the system still falls back upon the political pressure of civil society, combined with the disapproval and condemnation of the State Parties when there is a failure to implement the rulings of the Court.’⁴⁶⁴ What measures in accordance with the relatively new Art. 46 (5) ECHR and the supplementary Rules 94 to 99 Rules of Court could look like is not clear yet since—as far as can be seen—the provision has not been made use of⁴⁶⁵.

4.10.3 Comparison of EUSFTA, CETA, and EUVFTA; juxtaposition to the CJEU and the ECtHR

All FTAs within the scope of this study⁴⁶⁶ – independently from the chosen set of arbitration rules – provide that an award issued by a tribunal is binding on the disputing parties in respect of the particular case.

⁴⁵⁶ B. Wägenbaur, *Court of Justice of the European Union. Commentary on Statute and Rules of Procedure*, C.H. Beck, Hart Publishing and Nomos, Munich, Oxford and Baden-Baden, 2013, Art. 60 Stat, para 1.

⁴⁵⁷ See generally A. Huneeus, Compliance with Judgements and Decisions, in: C. Romano, K. Alter, and Y. Shany (eds.), *The Oxford Handbook of International Adjudication*, Oxford University Press, Oxford, 2014, pp. 437 et seqq.; M. Bothe, Compliance, in: R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, Oxford University Press, Oxford, 2010, opil.ouplaw.com/home/EPIL.

⁴⁵⁸ However, J. Meyer-Ladewig and K. Brunozzi, *Europäische Menschenrechtskonvention: Handkommentar*, Nomos, Baden Baden 2017, Art. 46 EMRK, para 54, claim that enforcement of ECHR judgements is dependent on whether Member States’ domestic law recognises ECHR judgements as enforceable judgements.

⁴⁵⁹ D. J. Harris, et al, *Law of the European Convention of Human Rights*, 2nd ed., Oxford University Press, Oxford, 2009, p. 26

⁴⁶⁰ D. J. Harris, et al, *Law of the European Convention of Human Rights*, 2nd ed., Oxford University Press, Oxford, 2009, 871.

⁴⁶¹ The supervision procedure is well described by D. J. Harris et al, *Law of the European Convention of Human Rights*, 2nd ed., Oxford University Press, Oxford, 2009, pp. 872 et seqq.

⁴⁶² W. Schabas, *The European Convention on Human Rights*, Oxford University Press, Oxford, 2015, p. 871; D. J. Harris et al, *Law of the European Convention of Human Rights*, 2nd ed., Oxford University Press, Oxford, 2009, p. 872.

⁴⁶³ Adopted by the Committee of Ministers on 10 May 2006 at the 964th meeting of the Ministers’ Deputies and amended on 18 January 2017 at the 1275th meeting of the Ministers’ Deputies available at <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806eebf0> (visited 8 May 2017).

⁴⁶⁴ W. Schabas, *The European Convention on Human Rights*, Oxford University Press, Oxford, 2015, p. 871.

⁴⁶⁵ W. Schabas, *The European Convention on Human Rights*, Oxford University Press, Oxford, 2015, p. 872.

⁴⁶⁶ Art. 9.27 (1) EUSFTA, Art. 8.41 (1) CETA, and Art. 31 (1) (a) EUVFTA.

EUVFTA further provides that irrespective of the set of chosen arbitration rules each State party shall recognize an award as binding and enforce it as if it were a final judgement of a court in that State party⁴⁶⁷. Domestic courts of the respondent State cannot overturn decisions by arbitral tribunals established on the basis of the treaties⁴⁶⁸. This rule is mirrored in the ICSID Convention in Art. 53 for awards covered by this provision.

EUSFTA and CETA do not contain a clause similar to that in EUVFTA. They refer to the respective enforcement provisions in the ICSID Convention or the New York Convention, depending on the set of chosen arbitration rules. Art. 9.27 (4) EUSFTA, Art. 8.41 (5) CETA, and Art. 31 (7) EUVFTA try to put beyond dispute that investor-State arbitral awards qualify for enforcement under the New York Convention⁴⁶⁹. Furthermore, CETA and EUVFTA take the same approach with regard to clarifying that a final award under the respective agreement shall qualify as an award under the ICSID Convention (Art. 8.41 (6) CETA, and Art. 31 (8) EUVFTA). Some authors imply that negotiators inserted this clarification to ensure that awards are recognised and enforceable under the ICSID Convention (where applicable to the dispute), by States *not* party to CETA or EUVFTA, respectively⁴⁷⁰. Even if the ICSID Convention governs a certain dispute, some authors believe the modifications by EUVFTA and CETA to be of such depth that an award rendered does not qualify as one 'pursuant to this Convention' (Art. 54 (1) ICSID Convention)⁴⁷¹. Yet, this is the prerequisite for the award being enforceable in all States party to the ICSID Convention (as if it were a final judgment of a court of the respective State party).

Such kind of reference to an enforcement framework is, as explained above, unknown to the ECtHR and unneeded for the CJEU.

Except for EUVFTA, the examined FTAs contain specific provisions for the situation that enforcement is stayed, Art. 9.27 (2) EUSFTA, Art. 8.41 (3) (a) (ii) and (b) (ii) CETA⁴⁷². For now, CETA establishes additional waiting periods before an award can be enforced in Art. 8.41 (3) (a) (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 the ICSID Additional Facility Rules), enforcement can be sought after 90 days.

Art. 8.41 (3) (a) (ii), (b) (ii) CETA applies only until the CETA Joint Committee adopts the decision enabling the functioning of the appellate tribunal, Art. 8.28 (7) and (9) CETA. In such case, according to Art. 8.28 (9) (c) CETA, an award becomes final and enforceable either 90 days after its issuance if no appeal is filed, if an appeal is rejected by the appellate tribunal or withdrawn, or 90 days after the appellate tribunal has issued its award and did not refer the case back to the tribunal 'of first instance'. Hence, After the said decision by the CETA Joint Committee, the only available remedy is an appeal under

⁴⁶⁷ Art. 31 (2) EUVFTA. See the text passages highlighted in yellow in the table following this chapter.

⁴⁶⁸ J. Griebel, *Internationales Investitionsrecht*, C.H. Beck, München, 2008, p. 142.

⁴⁶⁹ See the text passages highlighted in green in the table following this chapter.

⁴⁷⁰ A. Reinisch, Will the EU's Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards? – The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration (2016), 19 *Journal of International Economic Law*, 761, 781; N. J. Calamita, The (In)Compatibility of Appellate Mechanisms with Existing Instruments of the Investment Treaty Regime (2017), *Journal of World Investment & Trade* (forthcoming). Available at <https://ssrn.com/abstract=2945881> (visited 22 May 2017), pp. 19 et seqq.

⁴⁷¹ N. J. Calamita, The (In)Compatibility of Appellate Mechanisms with Existing Instruments of the Investment Treaty Regime (2017), *Journal of World Investment & Trade* (forthcoming). Available at <https://ssrn.com/abstract=2945881> (visited 22 May 2017), pp. 19 et seqq. K.D. Dickson-Smith, Does the European Union Have New Clothes? Understanding the EU's New Investment Treaty Model (2016), *Journal of World Investment & Trade*, Vol. 17, No. 5; available at <https://ssrn.com/abstract=2859412776> (visited 23 May 2017), pp. 803 et seqq.

⁴⁷² See the text passages highlighted in turquoise in the table following this chapter.

CETA. Thus, ICSID Convention annulment proceedings, for instance, will not be available any longer (Art. 8.28 (9) (e) CETA).

EUVFTA departs from the wording of EUSFTA and CETA in at least one remarkable aspect: The New York Convention is supposed to (continue to) apply for a timespan of five years after the entry into force of EUVFTA and only where Vietnam is a respondent (Art. 31 (3) and (4) EUVFTA).

Where the EU or one of its Member States is respondent, Art. 31 (1) (b) EUVFTA declares that final awards (in the sense of Art. 29 EUVFTA) shall not be subject to appeal, review, set aside, annulment or any other remedy. Hence, the only remedy available against awards of a tribunal 'of first instance' is the appeal procedure foreseen in Artt. 13 and 28 EUVFTA (below 4.11.3(p. 175)).

Thus, for the time of five years after entry into force of the agreement, it appears that awards against Vietnam can be challenged in two ways: Firstly, they are subject to the appeal procedure established by EUVFTA (Artt. 13 and 28 EUVFTA); secondly, they can be reviewed under the New York Convention. This contrasts with awards against the EU or its Member States, which are only subject to the appeal procedure established by EUVFTA (Art. 31 (1) (b) EUVFTA, see also Art. 10 (3) (b) EUVFTA).

As a side note, (also) settlements under the FTAs are, on principle, enforceable under the New York Convention⁴⁷³. Court settlements before the CJEU can be enforced as well⁴⁷⁴.

⁴⁷³ Y. Kryvoi and D. Davydenko, Consent Awards in International Arbitration: From Settlement to Enforcement (2015), *Brooklyn Journal of International Law*, Vol. 40; available at <https://ssrn.com/abstract=2580572> (visited 23 May 2017), pp. 850 et seqq.

⁴⁷⁴ M. Jakobs, in: H. W. Rengeling, A. Middeke and M. Gellermann (eds.), *Handbuch des Rechtsschutzes in der Europäischen Union*, 3rd ed. (C.H. Beck, Munich 2013), § 31 para 4.

4.10.4 Table: Enforcement⁴⁷⁵

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

EUSFTA ⁴⁷⁶	CETA	EUVFTA ⁴⁷⁷	CJEU	ECtHR
<p>Art. 9.27</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 9.16 (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. 8.28</p> <p>[...]</p> <p>7. The CETA Joint Committee shall promptly adopt a decision setting out the following administrative and organisational matters regarding the functioning of the Appellate Tribunal:</p> <p>[...]</p> <p>9. Upon adoption of the decision referred to in paragraph 7:</p> <p>(a) a disputing party may appeal an award rendered pursuant to this Section to the Appellate Tribunal within 90 days after its issuance;</p> <p>(b) a disputing party shall not seek to review, set aside, annul, revise or initiate any other similar procedure as regards an award under this Section;</p> <p>(c) an award rendered pursuant to Article 8.39 shall not be con-</p>	<p>Art. 10</p> <p>[...]</p> <p>3. The consent under paragraphs 1 and 2 implies:</p> <p>(a) the disputing parties shall refrain from enforcing an award rendered pursuant to this Section before such award has become final pursuant to Article 29; and</p> <p>(b) the disputing parties shall refrain from seeking to appeal, review, set aside, annul, revise or initiate any other similar procedure before an international or domestic court or tribunal, as regards an award pursuant to this Section.²⁴</p> <p>[...]</p> <p>Art. 31</p> <p>1. Final awards issued pursuant to this Section:</p>	<p>TFEU</p> <p>Art. 280</p> <p>The judgments of the Court of Justice of the European Union shall be enforceable under the conditions laid down in Article 299.</p> <p>Art. 299</p> <p>Acts of the Council, the Commission or the European Central Bank which impose a pecuniary obligation on persons other than States, shall be enforceable.</p> <p>Enforcement shall be governed by the rules of civil procedure in force in the State in the territory of which it is carried out. The order for its enforcement shall be appended to the decision, without other formality than verification of the authenticity of the decision, by the national authority which the government of each Member State shall designate for this purpose and</p>	<p>Art. 46 ECHR</p> <p>1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.</p> <p>2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.</p> <p>3. If the Committee of Ministers considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment, it may refer the matter to the Court for a ruling on the question of interpretation. A referral decision shall require a majority vote of two-thirds of the representatives entitled to sit on the committee.</p> <p>4. If the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal</p>

⁴⁷⁵ Footnotes and section headings omitted.

⁴⁷⁶ Numbering according to the May 2015 authentic text; numbering of the articles may change.

⁴⁷⁷ Numbering according to the January 2016 agreed text (might be subject to change).

	<p>sidered final and no action for enforcement of an award may be brought until either:</p> <p>(i) 90 days from the issuance of the award by the Tribunal has elapsed and no appeal has been initiated;</p> <p>(ii) an initiated appeal has been rejected or withdrawn; or</p> <p>(iii) 90 days have elapsed from an award by the Appellate Tribunal and the Appellate Tribunal has not referred the matter back to the Tribunal;</p> <p>(d) a final award by the Appellate Tribunal shall be considered as a final award for the purposes of Article 8.41; and</p> <p>(e) Article 8.41.3 shall not apply.</p> <p>Art. 8.41</p> <p>1. An award issued 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, a disputing party shall recognise and comply with an award without delay.</p> <p>3. A disputing party shall not seek enforcement of a final award until:</p> <p>(a) in the case of a final award issued under the ICSID Convention:</p>	<p>(a) shall be binding between the disputing parties and in respect of that particular case; and</p> <p>(b) shall not be subject to appeal, review, set aside, annulment or any other remedy.</p> <p>2. Each Party shall recognize an award rendered pursuant to this Agreement as binding and enforce the pecuniary obligation within its territory as if it were a final judgement of a court in that Party.</p> <p>3. Notwithstanding paragraphs 1 and 2, during the period mentioned in paragraph 4, the recognition and enforcement of a final award in respect of a dispute where Viet Nam is the respondent shall be conducted pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10th June, 1958 (New York Convention). During this time, paragraph 1(b) of this Article and paragraph 3(b) of Article 10 (Consent) do not apply to disputes where Viet Nam is a respondent.</p> <p>4. Upon completion of a period of 5 years after the entry into force of this Agreement, or a longer period fixed by the Trade Committee should the conditions warrant, the recognition and enforcement of a final award in respect of disputes where Viet Nam is the respondent</p>	<p>shall make known to the Commission and to the Court of Justice of the European Union. When these formalities have been completed on application by the party concerned, the latter may proceed to enforcement in accordance with the national law, by bringing the matter directly before the competent authority.</p> <p>Enforcement may be suspended only by a decision of the Court. However, the courts of the country concerned shall have jurisdiction over complaints that enforcement is being carried out in an irregular manner.</p> <p>Art. 60 CJEU Statute</p> <p>Without prejudice to Articles 278 and 279 of the Treaty on the Functioning of the European Union or Article 157 of the EAEC Treaty, an appeal shall not have suspensory effect.</p> <p>By way of derogation from Article 280 of the Treaty on the Functioning of the European Union, decisions of the General Court declaring a regulation to be void shall take effect only as from the date of expiry of the period referred to in the first paragraph of Article 56 of this Statute or, if an appeal shall have been brought within that period, as from the date of dismissal of the appeal, without prejudice, however, to the</p>	<p>notice on that Party and by decision adopted by a majority vote of two-thirds of the representatives entitled to sit on the committee, refer to the Court the question whether that Party has failed to fulfil its obligation under paragraph 1.</p> <p>5. If the Court finds a violation of paragraph 1, it shall refer the case to the Committee of Ministers for consideration of the measures to be taken. If the Court finds no violation of paragraph 1, it shall refer the case to the Committee of Ministers, which shall close its examination of the case. paragraph 1, it shall refer the case to the Committee of Ministers, which shall close its examination of the case.</p>
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	<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.</p> <p>(b) in the case of a final award under the ICSID Additional Facility Rules the UNCITRAL Arbitration Rules, or any other rules applicable pursuant to Article 8. 23.2(d):</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 or awards in force where the execution is sought.</p> <p>5. A final award issued pursuant to this Section is an arbitral award that is deemed to relate to claims arising out of a commercial relationship or transaction</p>	<p>shall be in accordance with paragraphs 1 and 2.</p> <p>5. Execution of the award shall be governed by the laws concerning the execution of judgments or awards in force where such execution is sought.</p> <p>6. For greater certainty, Article X (Rights and obligations of natural or juridical persons under this Agreement, Chapter X) shall not prevent the recognition, execution and enforcement of awards rendered pursuant to this Section.</p> <p>7. For the purposes of Article 1 of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, final awards issued pursuant to this Section shall be deemed to be arbitral awards and to relate to claims arising out of a commercial relationship or transaction.</p> <p>8. For greater certainty and subject to paragraph 1, where a claim has been submitted to dispute settlement pursuant to Article 7(2)(a), a final award issued pursuant to this Section shall qualify as an award under Section 6 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 (ICSID).</p>	<p>right of a party to apply to the Court of Justice, pursuant to Articles 278 and 279 of the Treaty on the Functioning of the European Union or Article 157 of the EAEC Treaty, for the suspension of the effects of the regulation which has been declared void or for the prescription of any other interim measure.</p>	
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	<p>for the purposes of Article I of the New York Convention.</p> <p>6. For greater certainty, if a claim has been submitted pursuant to Article 8.23.2(a), a final award issued pursuant to this Section shall qualify as an award under Section 6 of the ICSID Convention.</p>			
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4.11 Challenges and appeals (overview)

Allowing for a challenge or appeal of a decision always involves a trade-off: The finality of judgement in general and the permanent legal certainty (*Rechtsfrieden*) associated therewith is 'postponed' in favour of correcting an erroneous decision and, thus, serving 'material justice'. In its summary of the final negotiating results of CETA, the European Commission states: 'CETA also creates an appeal system comparable to what is found in domestic legal systems, meaning that decisions of the tribunal will be checked and reversed in case of a legal error'⁴⁷⁸. When the European Commission finally opted for the introduction of an appeals mechanism in CETA, it aimed at addressing one of the main criticisms in respect of the traditional investor-State arbitration system: The unpredictability of its outcomes coupled with one-sided emphasis on the finality of its judgements. The origin of this problem has been traced to the use of ad hoc tribunals in dispute settlement. Of the two ideas discussed to remedy this and other flaws of the dispute settlement practice⁴⁷⁹, i.e. that of a permanent investment court and the installation of some kind of an appellate mechanism, the European Commission has resorted to a compromise between both. In doing so, it brought investor-State arbitration closer to the institutions such as the CJEU or the ECtHR which are permanent and which also provide for an appeals or related mechanism under certain circumstances.

4.11.1 Appeals and related mechanisms at the CJEU and the ECtHR

CoJ judgements are non-appealable as the CoJ is the highest instance in the European court system; thus, they become final on the day of their delivery (Art. 91 (1) RP CoJ). GC judgements become final if they are not contested within the two months of the notification of the decision or if the CoJ quashes the appeal as unfounded in law (Art. 56 (1) CJEU Statute, cf. Art. 256 (1) TFEU). Since no appeal is available against preliminary references due to the fact that they are decided by the CoJ (above 4.2.1 (p. 48)), the following overview of the appeals procedure relates to the cases where the GC has first instance jurisdiction for direct actions (cf. Art. 51 (1) lit. a CJEU Statute)⁴⁸⁰.

Admissible and well-founded appeals to the CoJ lead to an annulment of the appealed GC judgement (61 (1) CJEU Statute). Where a case is 'ripe' for adjudication, the CoJ itself will render a judgement (and its costs), Art. 61 (1) CJEU Statute, cf. Art. 169 (1) RP CoJ. Where this is not the case, for instance, because certain facts are not clear or evidence is missing⁴⁸¹, the CoJ will refer the case back to the GC (Art. 61 (1) CJEU Statute), which will—pursuant to the procedure laid down in Artt. 117 et seqq.⁴⁸²—decide the case anew, this time being bound to the legal assessment of the judgement of the CoJ (Art. 61 (2) CJEU Statute). Appeals may, on principle, only be brought by unsuccessful parties and interveners directly affected by the decision (Art. 56 (2) CJEU Statute). Appeals are limited to points on law such as the lack of competence of the GC, a breach of procedure or an infringement of EU law whereas mere appeals of the amount of costs are not permissible (Art. 58 CJEU Statute). The appellate proceedings are similar to the proceedings in first instance, i.e. divided into a written and an oral part (Art. 59 CJEU Statute). Appeals, on principle, do not have 'suspensory effect' meaning that the contested judgement remains

⁴⁷⁸ Available at https://trade.ec.europa.eu/doclib/docs/2014/december/tradoc_152982.pdf (visited 8 May 2017).

⁴⁷⁹ Cf. in detail S. Hindelang and C.P. Sassenrath, *The Investment Chapters in EU's International Trade and Investment Agreements in a Comparative Perspective*, European Union, Belgium, 2015, pp. 105-110; available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/534998/EXPO_STU\(2015\)534998_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/534998/EXPO_STU(2015)534998_EN.pdf) (visited 4 May 2017).

⁴⁸⁰ See B. Wägenbaur, *Court of Justice of the European Union. Commentary on Statute and Rules of Procedure*, C.H. Beck, Hart Publishing and Nomos, Munich, Oxford and Baden-Baden, 2013, Art. 51 Stat, paras 3, 5, 7.

⁴⁸¹ B. Wägenbaur, *Court of Justice of the European Union. Commentary on Statute and Rules of Procedure*, C.H. Beck, Hart Publishing and Nomos, Munich, Oxford and Baden-Baden, 2013, Art. 61 Stat, para 4.

⁴⁸² See K. Lenaerts, I. Maselis and K. Gutman, *EU Procedural Law*, Oxford University Press, Oxford, 2015, para 26.12.

enforceable until a judgement quashing the contested judgement of first instance is delivered (Art. 60 (1) CJEU Statute). This takes away any incentive of parties to appeal only in order to delay the finality of a judgement (and enforcement thereof)⁴⁸³.

Technically, no appeals procedure can be found in the ECHR and the Rules of Court⁴⁸⁴. Nonetheless, the following instruments function quite similar to appeals proceedings⁴⁸⁵ and shall thus be taken into account briefly. Basically, different rules exist depending on the *formation* in which the ECtHR took the decision⁴⁸⁶: Judgements of the ECtHR Grand Chamber are not subject to 'appeal' and thus final upon delivery (Art. 44 (1) ECHR). Judgements of Chambers (above 4.2.3.4 (p. 56)) may be referred to the Grand Chamber at the request of any party but only in 'exceptional cases' (Art. 43 (1) ECHR). Such cases are, for instance, given where the case raises a serious question affecting the interpretation or application of the ECHR or serious issues of general importance (Art. 43 (2) ECHR)⁴⁸⁷. A panel of five judges of the Grand Chamber pre-examines whether these conditions are met and, if this is the case, accepts such request for referral. Consequently, the Grand Chamber 'shall' decide the case (Art. 43 (3) ECHR), which in practice means it examines the accepted case and renders a judgement; it cannot refer the case back to a chamber⁴⁸⁸. Judgements by the Grand Chamber carry a greater authority (seventeen instead of seven judges); the success rate for referrals is at approximately 5 percent⁴⁸⁹. In conclusion, judgements by chambers become final either when the parties to the dispute waive their right of referral to the Grand Chamber, after the passing of the three months deadline to request referral or if the abovementioned panel rejects such request (Art. 44 (2) ECHR). Finally, single judge decisions finding an individual application inadmissible, three judge decisions finding it inadmissible or judgements finding it admissible but without merits, become final with delivery (Art. 27 (2) and Art. 28 (2) ECHR, respectively).

This being said, however, it should be noted that ECHR commentators concede that 'nothing is really final, and the European Court of Human Rights is no exception'⁴⁹⁰. This statement refers to the right of a party to seek revision of any judgement under Rule 80 Rules of Court, which stipulates that 'in the event of the discovery of a fact which might by its nature have a decisive influence and which, when a judgment was delivered, was unknown to the Court and could not reasonably have been known to that party' a party may 'request the Court, within a period of six months after that party acquired knowledge of the fact, to revise that judgment.' (Rule 80 (1) Rules of Court). Art. 61 of the Statute of the International Court of Justice contains a similar provision and served as model to Rule 80 Rules of Court⁴⁹¹. Since the excessive application of such rules would undermine the finality of judgement in general and the permanent legal certainty ('*Rechtsfrieden*') associated therewith, the application is handled cautiously and requests are only exceptionally successful⁴⁹².

⁴⁸³ B. Wägenbaur, *Court of Justice of the European Union. Commentary on Statute and Rules of Procedure*, C.H. Beck, Hart Publishing and Nomos, Munich, Oxford and Baden-Baden, 2013, Art. 60 Stat, para 1.

⁴⁸⁴ J. Meyer-Ladewig and K. Brunozzi, *Europäische Menschenrechtskonvention: Handkommentar*, Nomos, Baden-Baden, 2017, Art. 46 EMRK, para 54.

⁴⁸⁵ K. Oellers-Frahm, International Courts and Tribunals, Appeals, in: R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, Oxford University Press, Oxford, 2010, opil.ouplaw.com/home/EPIL, paras 19-20.

⁴⁸⁶ One could also differentiate between *judgements* of the Grand Chamber and Chambers, to which Art. 44 (1), (2) ECHR applies, *decisions* of single judges, to which Art. 27 (2) ECHR applies, and, finally, *decisions* and *judgements* of three judge formations, to which Art. 28 (2) ECHR applies.

⁴⁸⁷ For case law cf. W. Schabas, *The European Convention on Human Rights*, Oxford University Press, Oxford, 2015, pp. 847-848.

⁴⁸⁸ W. Schabas, *The European Convention on Human Rights*, Oxford University Press, Oxford, 2015, p. 846.

⁴⁸⁹ W. Schabas, *The European Convention on Human Rights*, Oxford University Press, Oxford, 2015, p. 843, 846.

⁴⁹⁰ W. Schabas, *The European Convention on Human Rights*, Oxford University Press, Oxford, 2015, p. 849.

⁴⁹¹ W. Schabas, *The European Convention on Human Rights*, Oxford University Press, Oxford, 2015, p. 852.

⁴⁹² W. Schabas, *The European Convention on Human Rights*, Oxford University Press, Oxford, 2015, p. 853.

An important feature of ‘finality’ of judgements (also ‘legal force’ or ‘binding nature’) is that future remedies with the same subject-matter are inadmissible⁴⁹³ (so called *res judicata*)⁴⁹⁴. The subject-matter is usually determined by the specific remedy applied for and by the facts of the case underlying this remedy.

4.11.2 Investor-State arbitration appeals mechanism

Traditionally in investor-State arbitration 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 enforcement⁴⁹⁵. As will be explained in more detail further below, the EU in CETA and EUVFTA breaks with this ‘tradition’ by introducing some sort of appeals facility⁴⁹⁶.

The introduction of an appeals facility will allow for *correcting* (i.e. altering the initial) erroneous decision and, thus, will not only save time and money compared to the current situation in which the whole arbitration has to be retried if the original arbitral award was annulled. Additionally, it can be expected that such facility will 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 overturned⁴⁹⁷. 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 predictability⁴⁹⁸’. It appears that the benefits of this solution outweighed potential disadvantages connected with the postponement of the finality of proceedings (and awards)⁴⁹⁹.

4.11.2.1 Multilateral vs. bilateral appeals mechanism

Although all FTAs under comparison refer to the political vision of establishing a permanent investment court of sorts which may also contain an appeals mechanism, details on the realisation of such a court are, however, scant. Assuming, for the sake of the argument, that a permanent multilateral appeals facility would be created, one question in this context is whether this facility applies the same

⁴⁹³ M. Reiling, *Streitgegenstand und Einrede der „res judicata“ in Direktklageverfahren vor den Gemeinschaftsgerichten*, Europäische Zeitschrift für Wirtschaftsrecht (2002), pp. 136, 138 et seq.

⁴⁹⁴ W. Schabas, *The European Convention on Human Rights*, Oxford University Press, Oxford, 2015, p. 842.

⁴⁹⁵ Note that, currently, in particular errors of law in respect of substantive provisions of an investment agreement can hardly be corrected.

⁴⁹⁶ On earlier efforts (not by the EU) see K. Oellers-Frahm, *International Courts and Tribunals, Appeals*, in: R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, Oxford University Press, Oxford, 2010, opil.ouplaw.com/home/EPIL, paras 3-4.

⁴⁹⁷ 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: A. 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 8 May 2017); 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/webdi-aepcb2013d4_en.pdf (visited 8 May 2017), p. 9.

⁴⁹⁸ 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 8 May 2017), p. 9.

⁴⁹⁹ Cf. S. Hindelang and C.P. Sassenrath, *The Investment Chapters in EU’s International Trade and Investment Agreements in a Comparative Perspective*, European Union, Belgium, 2015, p. 108; available at [http://www.europarl.europa.eu/Reg-Data/etudes/STUD/2015/534998/EXPO_STU\(2015\)534998_EN.pdf](http://www.europarl.europa.eu/Reg-Data/etudes/STUD/2015/534998/EXPO_STU(2015)534998_EN.pdf) (visited 4 May 2017).

substantial (and procedural) standards to all investment agreements within its jurisdiction or differentiates with regard to each investment agreement.

The current fragmented regulatory environment is anything but ideal to realise the potential for more consistency inherent to a multilateral appeals facility⁵⁰⁰. As long as international investment law consists predominantly of bilateral relations, consistency of adjudication 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 lawmaker void of checks and balances⁵⁰¹.

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.

4.11.2.2 Ad hoc vs. permanent appellate mechanism

In principle, 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.⁵⁰² 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.

4.11.3 Comparison of EUSFTA, CETA, and EUVFTA; juxtaposition to the CJEU and the ECtHR

EUSFTA does not include an appellate mechanism; all awards are thus 'final', Art. 9.24 (1) EUSFTA. By contrast, CETA and EUVFTA will eventually⁵⁰³ establish appellate tribunals (Art. 8.28 CETA and Art. 27 (7) and Art. 28 EUVFTA):

Under CETA⁵⁰⁴, the appellate tribunal is established to review awards rendered by CETA tribunals. The errors reviewed are the application or interpretation of applicable law, i.e. in particular the substantive CETA investment protection standards, 'manifest' errors in the appreciation of the facts of the case, which includes the application of relevant domestic law, and—where not congruent with the former—

⁵⁰⁰ 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. 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 seqq., p. 387; C. Tams, *An Appealing Option? The Debate about an ICSID Appellate Structure*, in: C. 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 8 May 2017). Very sceptical from a practitioner's perspective B. Legum, *Options to Establish an Appellate Mechanism for Investment Disputes*, in: K. Sauvart and M. Chiswick-Patterson (eds.), *Appeals Mechanism in Investment Disputes*, Oxford University Press, New York, 2008, pp. 231 et seqq.

⁵⁰¹ 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 8 May 2017), pp. 64 et seq.

⁵⁰² 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 8 May 2017), p. 64 (footnote 116).

⁵⁰³ Proper operation of the appellate tribunals is dependent on certain decisions of the respective treaty committees.

⁵⁰⁴ With regard to this and the following paragraph, please refer to Art. 8.28 CETA.

the grounds pursuant to Art. 52 (1) (a) to (e) of the ICSID Convention⁵⁰⁵. Despite the fact that the mechanism is inspired by the WTO Appellate Body, which is 'limited to issues of law covered in the panel report and legal interpretations developed by the panel' (Art. 17 (6) Understanding on Rules and Procedures Governing the Settlement of Disputes⁵⁰⁶). The scope of review under CETA is, however, wider as it also extends to facts under certain circumstances⁵⁰⁷.

Appointment of the members of the appellate tribunal is a task of the CETA Joint Committee, which also has to provide for the administrative and organizational prerequisites to ensure the functioning of the appellate tribunal 'promptly'. This includes such matters as, for instance, procedures for conduct of appeals and for filling vacancies of the appellate tribunal, determining costs of appeals and remuneration of appellate tribunal members. With regard to requirements facing the appellate tribunal members, their qualification and judicial ethics, the same standards as for tribunals apply.

Only after establishment of the appellate tribunal by the CETA Joint Committee, disputing parties may appeal awards within 90 days after its issuance. Consequently, other remedies to annul an award, 'shall' not be sought by parties after the appellate tribunal takes up its work. This also implies that prior to the establishment, such remedies are permissible. A division of three 'randomly appointed' members of the appellate tribunal will decide on the appeal, although the mechanism to ensure such randomization is not specified. Awards will not be final (and enforceable) before either the abovementioned 90 days pass without the initiation of an appeal, such appeal has been rejected or withdrawn or 90 days after an award rendered by the appellate tribunal itself. The wording leaves no doubt that the appellate tribunal may decide a case itself or refer it back to the initial tribunal.

The by far most extensive regulation of an appellate mechanism can be found in EUVFTA. Here, every tribunal award is preliminary and becomes final 90 days after its delivery if it is not appealed (Art. 27 (7) EUVFTA). The appeal tribunal is composed of at least six members appointed by a treaty committee for a four year term, renewable once, the selection process and requirements being equal to the EUVFTA tribunals (above 4.4 (pp. 84 et seqq.)), Art. 13 EUVFTA. President and vice-president of the tribunal serve two year terms and are third-country nationals. Like in CETA, appeals are heard in divisions of three appellate tribunal members, chaired by the third-country national. Cases are assigned randomly and to unpredictable formations of appellate tribunal divisions, ensuring, however that all members receive equal opportunity to serve. Differently from CETA, the appellate tribunal itself is mandated to draw up its own working procedures, being bound however by the agreement of the State parties to EUVFTA in Annex IV. Nonetheless, the working procedures have to be adopted by a treaty committee. To ensure their availability at all times, members of the appellate tribunal receive a monthly retainer fee, the amount of which is to be determined by a treaty committee, too. The appeal procedure itself is also densely regulated: Art. 28 EUVFTA prescribes that an appeal need be made within 90 days of the issuance of an award. The grounds for appeal are identical to the ones mentioned in CETA. On principle within 180 days, but by no means later than 270 days after the appeal, the appellate tribunal shall render its judgement, i.e. either decide the case or refer it back to the tribunal (Art. 28 (4) and (5) EUVFTA). 'Finality' and 'enforceability' of an award are defined the same way as in CETA, Art. 29 and 31 EUVFTA.

⁵⁰⁵ Which contains the following items: '(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.'

⁵⁰⁶ Marrakesh Agreement Establishing the World Trade Organization, Annex 2, signed 21 April 1994, entered into force 1 January 1995, 1869 U.N.T.S. 401; available at https://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm#17 (visited 22 May 2017).

⁵⁰⁷ J. A. VanDuzer, *Investor-State Dispute Settlement in CETA: Is It the Gold Standard?* (2016). C.D. Howe Institute Commentary No. 459; Ottawa Faculty of Law Working Paper No. 2016-44. Available at <https://ssrn.com/abstract=2860319> (visited 22 May 2017), p. 11.

The powers of the competent treaty committee are described in Art. 34 EUVFTA. Like for the tribunal ‘of first instance’, the administration of appeals will either be vested in the ICSID Secretariat or the Permanent Court of Arbitration (Art. 13 (15) and (18) EUVFTA), which is to be decided by the parties during ‘legal scrubbing’ (above 4.2.3.5 (p. 57)).

Both CETA and EUVFTA display certain similarities with the CJEU’s appeals proceedings. Notable differences are, for instance, that GC judgements have to be appealed within *two* months and that appeals have no ‘suspensory effect’, i.e. judgements remain enforceable regardless of the pending appeal (Art. 60 (1) CJEU Statute). A certain incentive for States to appeal in order to suspend enforcement is thus given. Also, a ‘deadline’ to render a verdict is not provided for in the CoJ framework, the average duration of proceedings (regardless of whether these are appeals proceedings or not) being 14.7 months in 2016⁵⁰⁸.

It is apparent from the comparison of CETA and EUVFTA that in case of CETA, large parts of the ground work associated with the establishment of the appellate tribunals has been pushed off to treaty committees, which, thereby, gain significant influence over the institutional, functional and material structure of these bodies. A failure to agree within the treaty committee can delay or even prevent the establishment of an appellate tribunal. While it is clear that details have to be left to committees, such far-reaching transfer of power to ‘create and design’ might attract new criticism. Also, commentators have raised technical questions supposedly unanswered by the agreements⁵⁰⁹: Some commentators suggest that ‘the mechanism of appeal is incompatible with the text of the ICSID Convention, which expressly excludes it’⁵¹⁰ (cf. Art. 53 ICSID Convention⁵¹¹). Also, the relationship to the ICSID annulment procedures is deemed problematic. This, however, does not mean that the State parties may not modify the ICSID Convention *inter se*⁵¹².

⁵⁰⁸ Court of Justice of the European Union, *Annual Report 2016 – The Year in Review*, European Union, Luxembourg, 2017, p. 28; available at http://curia.europa.eu/jcms/upload/docs/application/pdf/2017-04/ragp-2016_final_en_web.pdf (visited 4 May 2017).

⁵⁰⁹ N. J. Calamita, *The (In)Compatibility of Appellate Mechanisms with Existing Instruments of the Investment Treaty Regime* (2017), *Journal of World Investment & Trade* (forthcoming). Available at <https://ssrn.com/abstract=2945881> (visited 22 May 2017), pp. 19 et seqq. Issues relating the application of the New York Convention are not found problematic despite the fact that the award rendered becomes more and more detached from an ‘arbitral award’ in the sense of the New York Convention with the approximation of the appellate system to an adjudicative body. Cf. also, more critical (but with regard to TTIP) K.D. Dickson-Smith, *Does the European Union Have New Clothes? Understanding the EU’s New Investment Treaty Model* (2016), *Journal of World Investment & Trade*, Vol. 17, No. 5; available at <https://ssrn.com/abstract=2859412776> (visited 23 May 2017), pp. 803 et seqq.

⁵¹⁰ N. J. Calamita, *ibid.*, p. 19.

⁵¹¹ Art. 53 (1) ICSID Convention reads “The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention.”

⁵¹² Cf. A. Reinisch, *Will the EU’s Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards? – The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration* (2016), 19 *Journal of International Economic Law*, 761, 771 et seqq.; see also W. M. Reisman, *The Breakdown of the Control Mechanism in ICSID Arbitration* (1989), *Duke Law Journal* 739, 806.

4.11.4 Table: Challenges and appeals⁵¹³

bold = important passages

yellow = appellate mechanism under the respective agreement

green = appellate mechanism pursuant to other institutional arrangements

EUSFTA ⁵¹⁴	CETA	EUVFTA ⁵¹⁵	CJEU	ECtHR
<p>Art. 9.33 (1)</p> <p>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. 8.28</p> <p>1. An Appellate Tribunal is hereby established to review awards rendered under this Section.</p> <p>2. The Appellate Tribunal may uphold, modify or reverse a Tribunal's award based on:</p> <p>(a) errors in the application or interpretation of applicable law;</p> <p>(b) manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law;</p> <p>(c) the grounds set out in Article 52(1) (a) through (e) of the ICSID Convention, in so far as they are not covered by paragraphs (a) and (b).</p> <p>3. The Members of the Appellate Tribunal shall be appointed by a decision of the CETA Joint Committee at the same time as the decision referred to in paragraph 7.</p>	<p>Art. 10</p> <p>1. The Respondent consents to the submission of a claim under this Section.</p> <p>2. The claimant shall deliver its consent in accordance with the procedures provided for in this Section at the time of submitting a claim pursuant to Article 7.</p> <p>3. The consent under paragraphs 1 and 2 implies:</p> <p>[...]</p> <p>(b) the disputing parties shall refrain from seeking to appeal, review, set aside, annul, revise or initiate any other similar procedure before an international or domestic court or tribunal, as regards an award pursuant to this Section.²⁴</p> <p>[Footnote 24 to Art.10:] Article 10(3)(b) shall apply in conjunction with Article 31(3) (Enforcement of awards).</p>	<p>Art. 256 TFEU</p> <p>[...]</p> <p>Decisions given by the General Court under this paragraph may be subject to a right of appeal to the Court of Justice on points of law only, under the conditions and within the limits laid down by the Statute.</p> <p>CJEU Statute</p> <p>Art. 56</p> <p>An appeal may be brought before the Court of Justice, within two months of the notification of the decision appealed against, against final decisions of the General Court and decisions of that Court disposing of the substantive issues in part only or disposing of a procedural issue concerning a plea of lack of competence or inadmissibility.</p> <p>Such an appeal may be brought by any party which has been unsuccessful, in whole or in part, in</p>	<p>ECHR</p> <p>Art. 42</p> <p>Judgments of Chambers shall become final in accordance with the provisions of Article 44, paragraph 2.</p> <p>Art. 43</p> <p>Referral to the Grand Chamber</p> <p>1. Within a period of three months from the date of the judgment of the Chamber, any party to the case may, in exceptional cases, request that the case be referred to the Grand Chamber.</p> <p>2. A panel of five judges of the Grand Chamber shall accept the request if the case raises a serious question affecting the interpretation or application of the Convention or the Protocols thereto, or a serious issue of general importance.</p>

⁵¹³ Section headings omitted.

⁵¹⁴ Numbering according to the May 2015 authentic text; numbering of the articles may change.

⁵¹⁵ Numbering according to the January 2016 agreed text (might be subject to change).

	<p>4. The Members of the Appellate Tribunal shall meet the requirements of Articles 8.27.4 and comply with Article 8.30.</p> <p>5. The division of the Appellate Tribunal constituted to hear the appeal shall consist of three randomly appointed Members of the Appellate Tribunal. 6. Articles 8.36 and 8.38 shall apply to the proceedings before the Appellate Tribunal.</p> <p>7. The CETA Joint Committee shall promptly adopt a decision setting out the following administrative and organisational matters regarding the functioning of the Appellate Tribunal:</p> <p>(a) administrative support;</p> <p>(b) procedures for the initiation and the conduct of appeals, and procedures for referring issues back to the Tribunal for adjustment of the award, as appropriate;</p> <p>(c) procedures for filling a vacancy on the Appellate Tribunal and on a division of the Appellate Tribunal constituted to hear a case;</p> <p>(d) remuneration of the Members of the Appellate Tribunal;</p> <p>(e) provisions related to the costs of appeals;</p> <p>(f) the number of Members of the Appellate Tribunal; and</p>	<p>Art. 13</p> <p>1. A permanent Appeal Tribunal is hereby established to hear appeals from the awards issued by the Tribunal.</p> <p>2. The Appeal Tribunal shall be composed of six Members, of whom two shall be nationals of a Member State of the European Union, two shall be nationals of Vietnam and two shall be nationals of third countries.</p> <p>3. Pursuant to Article 34(2)(a), the Trade Committee shall, upon the entry into force of this Agreement, appoint the members of the Appeal Tribunal. For this purpose, each Party shall propose three candidates, two of which shall be nationals of that Party and one shall be a nonnational, for the Trade Committee to thereafter jointly appoint the Members.²⁶</p> <p>4. The Trade Committee may agree to increase the number of the Members of the Appeal Tribunal by multiples of three. Additional appointments shall be made on the same basis as provided for in paragraphs 2 and 3.</p> <p>5. The Appeal Tribunal Members shall be appointed for a four-year term, renewable once. However, the terms of three of the six persons appointed immediately after the entry into force of the agreement,</p>	<p>its submissions. However, interveners other than the Member States and the institutions of the Union may bring such an appeal only where the decision of the General Court directly affects them.</p> <p>With the exception of cases relating to disputes between the Union and its servants, an appeal may also be brought by Member States and institutions of the Union which did not intervene in the proceedings before the General Court. Such Member States and institutions shall be in the same position as Member States or institutions which intervened at first instance.</p> <p>Art. 57</p> <p>Any person whose application to intervene has been dismissed by the General Court may appeal to the Court of Justice within two weeks from the notification of the decision dismissing the application.</p> <p>The parties to the proceedings may appeal to the Court of Justice against any decision of the General Court made pursuant to Article 278 or Article 279 or the fourth paragraph of Article 299 of the Treaty on the Functioning of the European Union or Article</p>	<p>3. If the panel accepts the request, the Grand Chamber shall decide the case by means of a judgment.</p> <p>Art. 44</p> <p>1. The judgment of the Grand Chamber shall be final.</p> <p>2. The judgment of a Chamber shall become final</p> <p>(a) when the parties declare that they will not request that the case be referred to the Grand Chamber; or</p> <p>(b) three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or</p> <p>(c) when the panel of the Grand Chamber rejects the request to refer under Article 43.</p> <p>[...]</p> <p>Art. 46</p> <p>1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.</p> <p>2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.</p> <p>3. If the Committee of Ministers considers that the supervision of the execution of a final judgment is</p>
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	<p>(g) any other elements it determines to be necessary for the effective functioning of the Appellate Tribunal.</p> <p>8. The Committee on Services and Investment shall periodically review the functioning of the Appellate Tribunal and may make recommendations to the CETA Joint Committee. The CETA Joint Committee may revise the decision referred to in paragraph 7, if necessary.</p> <p>9. Upon adoption of the decision referred to in paragraph 7:</p> <p>(a) a disputing party may appeal an award rendered pursuant to this Section to the Appellate Tribunal within 90 days after its issuance;</p> <p>(b) a disputing party shall not seek to review, set aside, annul, revise or initiate any other similar procedure as regards an award under this Section;</p> <p>(c) an award rendered pursuant to Article 8.39 shall not be considered final and no action for enforcement of an award may be brought until either:</p> <p>(i) 90 days from the issuance of the award by the Tribunal has elapsed and no appeal has been initiated;</p> <p>(ii) an initiated appeal has been rejected or withdrawn; or</p>	<p>to be determined by lot, shall extend to six years. Vacancies shall be filled as they arise. A person appointed to replace a person whose term of office has not expired shall hold office for the remainder of the predecessor's term.</p> <p>6. The Appeal Tribunal shall have a President and Vice-President who shall be selected by lot for a two-year term and shall be selected from among the Members who are nationals of third countries. They shall serve on the basis of a rotation drawn by lot by the Chair of the Trade Committee. The Vice-President shall replace the President when the President is unavailable.</p> <p>7. The Members of the Appeal Tribunal shall have demonstrated expertise in public international law, and possess the qualifications required in their respective countries for appointment to the highest judicial offices or be jurists of recognised competence. It is desirable that they have expertise in international investment law, international trade law and the resolution of disputes arising under international investment or international trade agreements.</p> <p>8. The Appeal Tribunal shall hear appeals in divisions consisting of three Members of whom one shall be a national of a Member State of</p>	<p>157 or the third paragraph of Article 164 of the EAEC Treaty within two months from their notification.</p> <p>The appeal referred to in the first two paragraphs of this Article shall be heard and determined under the procedure referred to in Article 39.</p> <p>Art. 58</p> <p>An appeal to the Court of Justice shall be limited to points of law. It shall lie on the grounds of lack of competence of the General Court, a breach of procedure before it which adversely affects the interests of the appellant as well as the infringement of Union law by the General Court.</p> <p>No appeal shall lie regarding only the amount of the costs or the party ordered to pay them.</p> <p>Art. 60</p> <p>Without prejudice to Articles 278 and 279 of the Treaty on the Functioning of the European Union or Article 157 of the EAEC Treaty, an appeal shall not have suspensory effect.</p> <p>Art. 61</p> <p>If the appeal is well founded, the Court of Justice shall quash the decision of the General Court. It may itself give final judgment in the</p>	<p>hindered by a problem of interpretation of the judgment, it may refer the matter to the Court for a ruling on the question of interpretation. A referral decision shall require a majority vote of two-thirds of the representatives entitled to sit on the committee.</p> <p>4. If the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two-thirds of the representatives entitled to sit on the committee, refer to the Court the question whether that Party has failed to fulfil its obligation under paragraph 1.</p> <p>5. If the Court finds a violation of paragraph 1, it shall refer the case to the Committee of Ministers for consideration of the measures to be taken. If the Court finds no violation of paragraph 1, it shall refer the case to the Committee of Ministers, which shall close its examination of the case. paragraph 1, it shall refer the case to the Committee of Ministers, which shall close its examination of the case.</p> <p>Rule 80 Rules of Court</p> <p>1. A party may, in the event of the discovery of a fact which might by</p>
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	<p>(iii) 90 days have elapsed from an award by the Appellate Tribunal and the Appellate Tribunal has not referred the matter back to the Tribunal;</p> <p>(d) a final award by the Appellate Tribunal shall be considered as a final award for the purposes of Article 8.41; and(e) Article 8.41.3 shall not apply.</p> <p>Art. 8.29</p> <p>The Parties shall pursue with other trading partners the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes. Upon establishment of such a multilateral mechanism, the CETA Joint Committee shall adopt a decision providing that investment disputes under this Section will be decided pursuant to the multilateral mechanism and make appropriate transitional arrangements.</p>	<p>the European Union, one a national of Vietnam and one a national of a third country. The division shall be chaired by the Member who is a national of a third country.</p> <p>9. The composition of the division hearing each appeal shall be established in each case by the President of the Appeal Tribunal on a rotation basis, ensuring that the composition of each division is random and unpredictable, while giving equal opportunity to all Members to serve. A person who is serving on a division of the Appeal Tribunal when his or her term expires may, with the authorisation of the President of the Appeal Tribunal, continue to serve on the division until the closure of the proceedings of that division and shall, for that purpose only, be deemed to continue to be a Member of the Appeal Tribunal.</p> <p>10. The Appeal Tribunal shall draw up its own working procedures. Such working procedures shall be compatible with the provisions of this Section and the instructions provided in Annex IV. The President of the Appeal Tribunal shall draw up draft Working Procedures in consultation with the other Members of the Appeal Tribunal. The President of the Appeal Tribunal shall present the draft</p>	<p>matter, where the state of the proceedings so permits, or refer the case back to the General Court for judgment.</p> <p>Where a case is referred back to the General Court, that Court shall be bound by the decision of the Court of Justice on points of law.</p> <p>When an appeal brought by a Member State or an institution of the Union, which did not intervene in the proceedings before the General Court, is well founded, the Court of Justice may, if it considers this necessary, state which of the effects of the decision of the General Court which has been quashed shall be considered as definitive in respect of the parties to the litigation.</p> <p>RP CoJ</p> <p>Art. 91</p> <p>1. A judgment shall be binding from the date of its delivery.</p> <p>[...]</p> <p>Art. 165</p> <p>1. The provisions of this Chapter shall apply to applications to suspend the enforcement of a decision of the Court or of any measure adopted by the Council, the European Commission or the Euro-</p>	<p>its nature have a decisive influence and which, when a judgment was delivered, was unknown to the Court and could not reasonably have been known to that party, request the Court, within a period of six months after that party acquired knowledge of the fact, to revise that judgment.</p> <p>2. The request shall mention the judgment of which revision is requested and shall contain the information necessary to show that the conditions laid down in paragraph 1 of this Rule have been complied with. It shall be accompanied by a copy of all supporting documents. The request and supporting documents shall be filed with the Registry.</p> <p>3. The original Chamber may decide of its own motion to refuse the request on the ground that there is no reason to warrant considering it. Where it is not possible to constitute the original Chamber, the President of the Court shall complete or compose the Chamber by drawing lots.</p> <p>4. If the Chamber does not refuse the request, the Registrar shall communicate it to the other party or parties and shall invite them to submit any written comments within a time-limit laid down by the President of the Chamber. The President of the Chamber shall also</p>
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		<p>Working Procedures to the Committee on Services, Investment and Government Procurement within one year after the entry into force of the Agreement. The Working Procedures shall be adopted by the Trade Committee on agreement of the Parties. If the draft Working Procedures are not adopted by the Trade Committee within three months after their presentation to the Committee on Services, Investment and Government Procurement, the President of the Appeal Tribunal shall make the necessary revision to the draft Working Procedures, taking into consideration the views expressed by the Parties. The President of the Appeal Tribunal shall subsequently present the revised version of the Working Procedures to the Committee on Services, Investment and Government Procurement. The Working procedures shall be considered adopted, unless the Parties, through a decision of the Trade Committee, reject the draft Working Procedures within three months after their presentation to the Committee on Services, Investment and Government Procurement.</p> <p>11. Where a procedural question arises that is not covered by this Section, any supplemental rules adopted by the Trade Committee or by the Working Procedures</p>	<p>pean Central Bank, submitted pursuant to Articles 280 TFEU and 299 TFEU or Article 164 TEAEC.</p> <p>[...]</p> <p>Art. 167</p> <p>1. An appeal shall be brought by lodging an application at the Registry of the Court of Justice or of the General Court.</p> <p>[...]</p>	<p>fix the date of the hearing should the Chamber decide to hold one. The Chamber shall decide by means of a judgment.</p>
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		<p>drawn up by the Appeal Tribunal, the relevant division of the Appeal Tribunal may adopt an appropriate procedure that is compatible with those provisions.</p> <p>12. A division of the Appeal Tribunal shall make every effort to make any decision by consensus. Where, nevertheless, a decision cannot be arrived at by consensus, a division of the Appeal Tribunal shall render its decision by a majority of votes of all its Members. Opinions expressed by individual Members of a division of Appeal Tribunal shall be anonymous.</p> <p>13. All persons serving on the Appeal Tribunal shall be available at all times and on short notice and shall stay abreast of other dispute settlement activities under this agreement.</p> <p>14. The Members of the Appeal Tribunal shall be paid a monthly retainer fee to be determined by decision of the Trade Committee. The President of the Appeal Tribunal and, where applicable, the Vice-President, shall receive a daily fee equivalent to the fee determined pursuant to paragraph 16 for each day worked in fulfilling the functions of President of the Appeal Tribunal pursuant to this Section.</p> <p>15. The retainer fee of the Members of the Appeal Tribunal and the daily</p>		
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		<p>fees for the President or Vice President of the Appeal Tribunal when working in fulfilling the functions of President of the Appeal Tribunal pursuant to this Section shall be paid by both Parties taking into account their respective levels of development into an account managed by [the Secretariat of ICSID/Permanent Court of Arbitration] [Negotiators' note: to be decided during legal scrubbing]. In the event that one Party fails to pay the retainer fee the other Party may elect to pay. Any such arrears will remain payable, with appropriate interest.</p> <p>16. Upon entry into force of the Agreement, the Trade Committee shall adopt a decision determining the amount of the other fees and expenses of the Members of a division of the Appeal Tribunal. Such fees and expenses shall be allocated by the Tribunal among the disputing parties in accordance with Article 27(4).</p> <p>17. Upon a decision by the Trade Committee, the retainer fee and the fees for days worked may be permanently transformed into a regular salary. In such an event, the Members of the Appeal Tribunal shall serve on a full-time basis and the Trade Committee shall fix their remuneration and related organisational matters. In that event, the</p>		
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		<p>Members shall not be permitted to engage in any occupation, whether gainful or not, unless exemption is exceptionally granted by the President of the Appeal Tribunal.</p> <p>18. The [Secretariat of ICSID/Permanent Court of Arbitration] [Negotiators' note: to be decided during legal scrubbing] shall act as Secretariat for the Appeal Tribunal and provide it with appropriate support. The expenses for such support shall be allocated by the Appeal Tribunal among the disputing parties in accordance with Article 27(4).</p> <p>[Footnote 26 to Art. 13:] Instead of proposing the appointment of two Members who have its nationality or citizenship, either Party may propose to appoint up to two Members who have another nationality or citizenship. In this case, such Members shall be considered to be nationals or citizens of the Party that proposed his or her appointment for the purposes of this Article.</p> <p>Art. 15</p> <p>The Parties shall enter into negotiations for an international agreement providing for a multilateral investment tribunal in combination with, or separate from, a multilateral appellate</p>		
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		<p>mechanism applicable to disputes under this Agreement. The Parties may consequently agree on the non-application of relevant parts of this Section. The Trade Committee may adopt a decision specifying any necessary transitional arrangements.</p> <p>Art. 27</p> <p>1. The Members of the Tribunal and of the Appeal Tribunal shall be chosen from persons whose independence is beyond doubt. They shall not be affiliated with any government.²⁷ They shall not take instructions from any government or organisation with regard to matters related to the dispute. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest. In so doing they shall comply with Annex II (Code of Conduct). In addition, upon appointment, they shall refrain from acting as counsel or as party-appointed expert or witness in any pending or new investment protection dispute under this or any other agreement or domestic law.</p> <p>2. If a disputing party considers that a Member has a conflict of interest, it shall send a notice of challenge to the appointment to the President of the Tribunal or to the President</p>		
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		<p>of the Appeal Tribunal, respectively. The notice of challenge shall be sent within 15 days of the date on which the composition of the division of the Tribunal or of the Appeal Tribunal has been communicated to the disputing party, or within 15 days of the date on which the relevant facts came to its knowledge, if they could not have reasonably been known at the time of composition of the division. The notice of challenge shall state the grounds for the challenge.</p> <p>3. If, within 15 days from the date of the notice of challenge, the challenged Member has elected not to resign from that division, the President of the Tribunal or the President of the Appeal Tribunal, respectively, shall, after hearing the disputing parties and after providing the Member 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 Members of the division.</p> <p>4. Challenges against the appointment of the President of the Tribunal to a division shall be decided by the President of the Appeal Tribunal and vice-versa.</p> <p>5. Upon a reasoned recommendation from the President of the Ap-</p>		
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		<p>peal Tribunal, or on their joint initiative, the Parties, by decision of the Trade Committee, may decide to remove a Member from the Tribunal or a Member from the Appeal Tribunal where his behaviour is inconsistent with the obligations set out in paragraph 1 and incompatible with his continued membership of the Tribunal or Appeal Tribunal. If the behaviour in question is alleged to be that of the President of the Appeal Tribunal then the President of the Tribunal shall submit the reasoned recommendation. Articles 12(2) and 13(3) shall apply mutatis mutandis for filling vacancies that may arise pursuant to this paragraph.</p> <p>[...]</p> <p>7. A provisional award shall become final if 90 days have elapsed after it has been issued and neither disputing party has appealed the award to the Appeal Tribunal.</p> <p>Art. 28</p> <p>1. Either disputing party may appeal before the Appeal Tribunal a provisional award, within 90 days of its issuance. The grounds for appeal are:</p> <p>(a) that the Tribunal has erred in the interpretation or application of the applicable law;</p>		
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		<p>(b) that the Tribunal has manifestly erred in the appreciation of the facts, including the appreciation of relevant domestic law; or,</p> <p>(c) those provided for in Article 52 of the ICSID Convention, in so far as they are not covered by (a) and (b).</p> <p>2. The Appeal Tribunal shall reject the appeal where it finds that the appeal is unfounded. It may also dismiss the appeal on an expedited basis where it is clear that the appeal is manifestly unfounded.</p> <p>3. If the Appeal Tribunal finds that the appeal is well founded, the decision of the Appeal Tribunal shall modify or reverse the legal findings and conclusions in the provisional award in whole or part. Its decision shall specify precisely how it has modified or reversed the relevant findings and conclusions of the Tribunal.</p> <p>4. Where the facts established by the Tribunal so permit, the Appeal Tribunal shall apply its own legal findings and conclusions to such facts and render a final decision on the matter. Where this is not possible, it shall refer the matter back to the Tribunal.</p> <p>5. As a general rule, the appeal proceedings shall not exceed 180</p>		
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		<p>days from the date a party to the dispute formally notifies its decision to appeal to the date the Appeal Tribunal issues its decision. When the Appeal Tribunal considers that it cannot issue its decision within 180 days, it shall inform the disputing parties in writing of the reasons for the delay together with an estimate of the period within which it will issue its decision. In no case should the proceedings exceed 270 days.</p> <p>6. A disputing party lodging an appeal shall provide security, including the costs of appeal, as well as a reasonable amount determined by the Appeal Tribunal in light of the circumstances of the case.</p> <p>7. The provisions of Articles 11 [Third-Party Funding], 20 [Transparency], 21 [Interim decisions], 23 [Discontinuance] and 25 [The non-disputing Party] shall apply mutatis mutandis in respect of the appeal procedure.</p> <p>Art. 29</p> <p>1. A provisional award issued pursuant to this Section shall become final if neither disputing party has appealed the provisional award pursuant to Article 28 (1).</p>		
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		<p>2. Where a provisional award has been appealed and the Appeal Tribunal has rejected or dismissed the appeal pursuant to Article 28(2), the provisional award shall become final on the date of rejection or dismissal of the appeal by the Appeal Tribunal.</p> <p>3. Where a provisional award has been appealed and the Appeal Tribunal has rendered a final decision on the matter, the provisional award as modified or reversed by the Appeal Tribunal shall become final on the date of the issuance of the final decision of the Appeal Tribunal.</p> <p>4. Where a provisional award has been appealed and the Appeal Tribunal has modified or reversed the legal findings and conclusions of the provisional award and referred the matter back to the Tribunal, the Tribunal shall, after hearing the disputing parties if appropriate, revise its provisional award to reflect the findings and conclusions of the Appeal Tribunal. The Tribunal shall be bound by the findings made by the Appeal Tribunal. The Tribunal shall seek to issue its revised award within 90 days of receiving the report of the Appeal Tribunal. The revised provisional award will become final 90 days after its issuance.</p>		
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		<p>5. For the purposes of this Section, the term "final award" shall include any final decision of the Appeal Tribunal rendered pursuant to Article 28 (4).</p> <p>Art. 31</p> <p>1. Final awards issued pursuant to this Section:</p> <p>(a) shall be binding between the disputing parties and in respect of that particular case; and</p> <p>(b) shall not be subject to appeal, review, set aside, annulment or any other remedy.</p> <p>[...]</p> <p>3. Notwithstanding paragraphs 1 and 2, during the period mentioned in paragraph 4, the recognition and enforcement of a final award in respect of a dispute where Viet Nam is the respondent shall be conducted pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10th June, 1958 (New York Convention). During this time, paragraph 1(b) of this Article and paragraph 3(b) of Article 10 (Consent) do not apply to disputes where Viet Nam is a respondent.</p> <p>4. Upon completion of a period of 5 years after the entry into force of this Agreement, or a longer period fixed by the Trade Committee</p>		
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		<p>should the conditions warrant, the recognition and enforcement of a final award in respect of disputes where Viet Nam is the respondent shall be in accordance with paragraphs 1 and 2.</p> <p>[...]</p> <p>Art. 34</p> <p>1. The Committee on Services, Investment and Government Procurement 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;</p> <p>(c) upon request of either Party, the implementation of any mutually agreed solution as regards a dispute under this Section;</p> <p>(d) draft Working Procedures drawn up by the President of the Tribunal or Appeal Tribunal pursuant to Articles 12(10) and 13(10).</p> <p>2. The Trade Committee may, upon recommendation of the Committee on Services, Investment and Government Procurement, and after completion of the respective legal requirements and procedures of the Parties, adopt decisions to:</p>		
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		<p>(a) appoint the Members of the Tribunal and the Members of the Appeal Tribunal pursuant to Articles 12(2) and 13(3), to increase or decrease the number of the Members pursuant to Articles 12(3) and 13(4), and to remove a Member from the Tribunal or Appeal Tribunal pursuant to Article 14(5);</p> <p>(b) adopt interpretations of the agreement pursuant to Article 16(4);</p> <p>(c) adopt and subsequently amend rules supplementing the applicable dispute settlement rules. Such rules and amendments are binding on the Tribunal and Appeal Tribunal;</p> <p>(d) adopt a decision stipulating that that Article 3(3) of the UNCITRAL transparency rules will apply instead of paragraph 3 of Article 20 (Transparency of Proceedings);</p> <p>(e) fix the monthly retainer fee of the Members of the Tribunal and of the Appeal Tribunal pursuant to Articles 12(14) and 13(14) and the amount of the other fees and expenses of the Members of a division of the Appeal Tribunal and of the Presidents of the Tribunal and Appeal Tribunal pursuant to Articles 13(16), 12(14) and 13(14);</p> <p>(f) transform the retainer fee and other fees and expenses of the Members of the Tribunal and Appeal Tribunal into a regular salary</p>		
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		<p>pursuant to Articles 12(17) and 13(17);</p> <p>(g) adopt or reject the draft Working Procedures of the Tribunal or Appeal Tribunal pursuant to Articles 12(10) and 13(10);</p> <p>(h) specify any necessary transitional arrangements pursuant to Article 15 (Multilateral dispute settlement mechanism);</p> <p>(i) adopt supplemental rules on fees pursuant to Article 27(5).</p> <p>ANNEX IV</p> <p>Working Procedures for the Appeal Tribunal</p> <p>1. The Working Procedures of the Appeal Tribunal drawn up in accordance with Article 13 (10) of this Section shall, among other relevant aspects, include and address:</p> <p>(a) Practical arrangements relating to the deliberations of the divisions of the Appeal Tribunal and to the communication between the Members of the Appeal Tribunal;</p> <p>(b) Arrangements for the service of documents and of supporting documentation, including rules on the correction of clerical errors in such documents;</p> <p>(c) Procedural aspects relating to the temporary suspension of proceedings in the event of death, resignation, incapacity or removal of a</p>		
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		<p>Member from a division or from the Appeal Tribunal;</p> <p>(d) Modalities for the rectification of clerical errors in decisions of the divisions of the Appeal Tribunal;</p> <p>(e) The joinder of two or more appeals relating to the same provisional award;</p> <p>(f) The language of the appeal procedure which shall in principle be conducted in the same language as the proceedings before the Tribunal which has rendered the provisional award subject to appeal.</p> <p>2. The Working Procedures may also include guiding principles with regard to the following aspects which may be subsequently addressed through procedural orders of the divisions of the Appeal Tribunal:</p> <p>(a) Indicative timelines and the sequencing of submissions to and hearings of the divisions of the Appeal Tribunal;</p> <p>(b) Logistical aspects relating the conduct of the proceedings, such as to the places of deliberation and of the hearings of divisions and the modalities of representation of the disputing parties;</p> <p>(c) Preliminary procedural consultations and possible pre-hearing</p>		
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		conferences between a division and the disputing parties.		
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4.12 Conclusions and outlook: Of cosmetic changes, modifications to the ‘ancient regime’, and ‘new systems’

The appreciation of ‘traditional’ investor-State arbitration 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 investor-State arbitration. Critique of investor-State arbitration 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 investor-State arbitration mechanisms⁵¹⁶. Investor-State arbitration 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, a small, elitist ‘caste’ of potential arbitrators, insufficient procedural integrity, no sufficient safeguards against misuse and no balanced relationship between investor-State arbitration and the domestic legal systems, just to mention the main issues⁵¹⁷.

This study’s analysis of the key concepts and mechanisms of investor-State dispute settlement within the context of three EU FTAs clearly evidences that the European International Investment Policy in general and the said EU agreements specifically strike out in new directions, most prominently in regard to CETA and EUVFTA⁵¹⁸. It is also clear that CETA and EUVFTA stop short of establishing permanent courts for the settlement of investment disputes⁵¹⁹. The current state of play is, however, not the end point to reform⁵²⁰. The EU’s middle and long term ideas on the future investor-State dispute settlement system is outlined in the European Commission’s roadmap on the ‘Establishment of a Multilateral Investment Court for investment dispute resolution’⁵²¹ of August 2016⁵²²: A streamlined and more effective system is envisaged, to be created in cooperation with trade partners and taking into account legitimacy concerns and stakeholder interests. Nothing short of ‘an overall reform of the ISDS system’ is proposed by the European Commission with the view to remove the perceived deficiencies of the current system, especially its ‘patchwork nature’, ‘inconsistencies’ and ‘the lack of mechanisms for correcting legal and factual errors.’

As of now, in essence, all EU FTAs are (still) formally committed to the ‘traditional’ model of investor-State *arbitration*. However, they modify it to a larger (CETA, EUVFTA) or lesser (EUSFTA) extent. All of

⁵¹⁶ Cf. S. W. Schill, *Sind Regelungen Zur Investor-Staat-Streitbeilegung in EU-Freihandelsabkommen Sinnvoll? (Are Provisions on Investor-State Dispute Settlement in EU Free Trade Agreements Sensible?)* (2017), Amsterdam Law School Research Paper No. 2017-06; available at <https://ssrn.com/abstract=2922698> (visited 23 May 2017), pp. 1-2.

⁵¹⁷ Cf. on the matter of challenges of the investor-State arbitration 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 10 May 2017), pp. 56 et seqq.

⁵¹⁸ G. Van Harten, *ISDS in the Revised CETA: Positive Steps, But is it the ‘Gold Standard’?* Centre for International Governance Innovation (CIGI), *Investor-State Arbitration Commentary Series No. 6* (May 25, 2016); available at <https://ssrn.com/abstract=2784461> (visited 10 May 2017) takes a generally positive view on the steps taken.

⁵¹⁹ Critical of the reforms altogether Dickson-Smith, K.D., *Does the European Union Have New Clothes? Understanding the EU’s New Investment Treaty Model*, *Journal of World Investment & Trade*, Vol. 17 (2016), pp. 811 et seqq.

⁵²⁰ J. VanDuzer, *Investor-state Dispute Settlement in CETA: Is it the Gold Standard?*, C.D. Howe Institute Commentary No. 459; Ottawa Faculty of Law Working Paper No. 2016-44 (October 4, 2016); available at <https://ssrn.com/abstract=2860319> (visited 10 May 2017).

⁵²¹ Available at http://ec.europa.eu/smart-regulation/roadmaps/docs/2016_trade_024_court_on_investment_en.pdf (visited 10 May 2017).

⁵²² See also Stöbener de Mora, P. S., *Investitionsschutzrecht: Kommissions-Roadmap für multilateralen Investitionsgerichtshof*, *Europäische Zeitschrift für Wirtschaftsrecht* (2016), pp. 605 et seqq.; *idem*, *Änderungen an CETA zur Einführung eines Investitionsgerichtshofs*, *Europäische Zeitschrift für Wirtschaftsrecht* (2016), pp. 203 et seqq.

them continue to use ad hoc tribunals and all of them are suspicious towards domestic courts; at least, however, they do not explicitly attempt – like older drafts of the aforesaid FTAs and other investment agreements – to make the recourse to domestic courts more unattractive than to investor-State arbitration.

If compared to the CJEU and the ECtHR, all FTAs appear to exercise at least a similar, in case of the CJEU arguably even a higher level of transparency and public access. This has received mainly positive responses⁵²³. Yet, some commentators also advocate more transparency, for instance with regard to the publication of settlements⁵²⁴, or still find the codified possibilities of third party participation insufficient to meet an adequate level of procedural fairness⁵²⁵.

With the view to increase legitimacy and to advance procedural integrity, CETA and EUVFTA deviate from the 'traditional' way of appointing arbitrators. Now governments preselect a roster of arbitrators who serve for a predetermined time. From the said roster typically three arbitrators are randomly allocated to a claim. This innovation has been widely commended by commentators. Still, some have deemed it insufficient since major caveats to independence supposedly remain in place⁵²⁶: For one, the compensation model for arbitrators has been criticized. Case-based pay could create an incentive to proceed with (questionable) cases rather than quashing them at an early stage; the intended retainer fee is believed not to mitigate this peril sufficiently since the lion's share of arbitrators' compensation is still based on the days and hours 'billed' to a case. While this critique cannot be simply dismissed, it appears that the alternative – i.e. a fixed salary – might create overheads for a dispute settlement mechanism whose utilisation by claimants is unforeseeable at the moment. Since not all State parties involved were apparently willing to bear the risk of such costs, adhering, for the moment, to the case-based pay, for the most part with an option to transfer the retainer fee into a regular salary was the compromise struck.

Further on, the qualification requirements for arbitrators have been commented on as clearing 'a way [...] for the same clubby crowd of investor-friendly arbitrators to dominate ISDS under CETA'⁵²⁷. Also, the codes of conduct and definitions of conflict of interest are viewed as too lax to ensure independence and legitimacy. Especially the possibility of arbitrators to continue their work as arbitrators in cases under other treaties has been shrouded with suspicion⁵²⁸. These points carry some weight. Indeed, the homogeneity of the group of arbitrators could impede both the legitimacy and the quality

⁵²³ J. A. VanDuzer, *Investor-State Dispute Settlement in CETA: Is It the Gold Standard?* (2016), C.D. Howe Institute Commentary No. 459; Ottawa Faculty of Law Working Paper No. 2016-44. Available at <https://ssrn.com/abstract=2860319> (visited 22 May 2017), pp. 15-16; G. Ruscilla, *Transparency in International Arbitration: Any (Concrete) Need to Codify the Standard?* (2015), *Groningen Journal of International Law*, Vol. 3, No. 1; available at <https://ssrn.com/abstract=2611325> (visited 23 May 2017), pp. 25-26; L. Pantaleo, *Investment Disputes Under CETA. Taking the Best from Past Experience?* (2016); available at <https://ssrn.com/abstract=2739128> (visited 22 May 2017), p. 68.

⁵²⁴ Cf. J. A. VanDuzer, *ibid.*, p. 8.

⁵²⁵ G. Van Harten, *ISDS in the Revised CETA: Positive Steps, But is it the 'Gold Standard'?* (2016), Centre for International Governance Innovation (CIGI), *Investor-State Arbitration Commentary Series No. 6*; available at <https://ssrn.com/abstract=2784461> (visited 23 May 2017), p. 2.

⁵²⁶ On the following points of critique, see especially G. Van Harten, *The European Union's Emerging Approach to ISDS: a Review of the Canada-Europe CETA, Europe-Singapore FTA, and European-Vietnam FTA* (2016), *University of Bologna Law Review* Vol. 1, No. 1; available at <https://bolognalawreview.unibo.it/article/view/6318/6095> (visited 23 May 2017), pp. 144 et seqq.

⁵²⁷ G. Van Harten, *ISDS in the Revised CETA: Positive Steps, But is it the 'Gold Standard'?* (2016), Centre for International Governance Innovation (CIGI), *Investor-State Arbitration Commentary Series No. 6*; available at <https://ssrn.com/abstract=2784461> (visited 23 May 2017), p. 1.

⁵²⁸ J. A. VanDuzer, *Investor-State Dispute Settlement in CETA: Is It the Gold Standard?* (2016), C.D. Howe Institute Commentary No. 459; Ottawa Faculty of Law Working Paper No. 2016-44; available at <https://ssrn.com/abstract=2860319> (visited 22 May 2017), pp. 10-11.

of judgements. Other fields of regulation have accepted that monopolistic or oligopolistic market structures result in a reduction of competition with all its negative effects: A suboptimal allocation of resources, inefficient pricing behavior and reduction of quality. Or in short: Competition stimulates the market, which means in the present context that a broader base of arbitrators could correct market failure⁵²⁹. With regard to the codes of conduct it appears that an *a priori* assessment is difficult and that exhaustive codification will be quite difficult to agree upon in an international context; the actual practice and casuistry has to demonstrate their effectiveness and codes of conduct have to be adapted through treaty committee procedures if need be. Finally, while it is true that adjudicators at the CJEU and the ECtHR may not act as judges or counsel, again, an outright exclusion of arbitrators from any other occupation within the legal profession appears inappropriate as long as investment arbitration tribunals are not turned into permanent courts with security of tenure. All in all, the changes appear in a better light than put in by popular opinion, especially if one considers that even the well-established systems of the CJEU and the ECtHR display certain flaws⁵³⁰. Operating under the given constraints and conditions, reform by way of gradual approximation towards what is deemed an 'optimal' outcome appears more realistic than expecting a 'perfect' solution right away.

CETA and EUVFTA also seek to establish appeals mechanisms after the agreements will have entered into force. In doing so, they hope to improve consistency and predictability of arbitral outcomes and allow for error correction. Despite the inroads made, some commentators remain doubtful of the details such as the question of the precise extent of review by the appeals tribunal and its decision, which could be a referral back to the arbitral tribunal or a decision of the appeals tribunal itself⁵³¹ or the compatibility of such mechanism with the ICSID Convention and New York Convention (above 4.11.3 (p. 175))⁵³².

Other points of critique relate especially to the (still) 'lacking respect' for domestic courts in the sense that, by opening an alternative judicial review, domestic courts are implied 'unable' to produce unbiased and fair decisions⁵³³. The supposedly preferential treatment of foreign over domestic investors is also pointed out by some commentators⁵³⁴.

On the one hand, the treatment of these questions in the FTA texts by way of a rather reluctant adaptation of the 'ancient regime' is not necessarily surprising, since they lie at the heart of an ongoing

⁵²⁹ Hindelang, S., 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 8 May 2017), p. 104.

⁵³⁰ A. Alemanno, How Transparent is Transparent Enough? Balancing Access to Information Against Privacy in European Judicial Selections, in: M. Bobek (ed.), *Selecting Europe's Judges: A Critical Review of the Appointment Procedures to the European Courts*, Oxford University Press, Oxford, 2015, pp. 202, 217 et seqq.; see also A. von Bogdandy and I. Venzke, In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification, *The European Journal of International Law*, Vol. 23 (2012), No. 1, pp. 34-35.

⁵³¹ K.D. Dickson-Smith, Does the European Union Have New Clothes? Understanding the EU's New Investment Treaty Model (2016), *Journal of World Investment & Trade*, Vol. 17, No. 5; available at <https://ssrn.com/abstract=2859412776> (visited 23 May 2017), pp. 800 et seqq.

⁵³² N. J. Calamita, The (In)Compatibility of Appellate Mechanisms with Existing Instruments of the Investment Treaty Regime (2017). *Journal of World Investment & Trade* (forthcoming). Available at <https://ssrn.com/abstract=2945881> (visited 22 May 2017), pp. 19 et seqq.; A. Reinisch, Will the EU's Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards? – The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration (2016), 19 *Journal of International Economic Law*, 761, 781; cf. also K.D. Dickson-Smith, *ibid.*, pp. 803 et seqq.

⁵³³ G. Van Harten, ISDS in the Revised CETA: Positive Steps, But is it the 'Gold Standard'? (2016), Centre for International Governance Innovation (CIGI), Investor-State Arbitration Commentary Series No. 6; available at <https://ssrn.com/abstract=2784461> (visited 23 May 2017), p. 1.

⁵³⁴ G. Van Harten, ISDS in the Revised CETA: Positive Steps, But is it the 'Gold Standard'? (2016), Centre for International Governance Innovation (CIGI), Investor-State Arbitration Commentary Series No. 6; available at <https://ssrn.com/abstract=2784461> (visited 23 May 2017), p. 3.

debate⁵³⁵. On the other hand, one may indeed wonder whether the State parties might have been too hesitant on this crucial point. Models to regulate the relationship of domestic courts and ISDS on the basis of FTAs in a novel and differentiated fashion, paying due regard to the greatly varying quality of domestic courts from country to country, are available⁵³⁶. While apparently progressive forces were not strong enough in the course of negotiating the respective paragraphs in the three FTAs under comparison, a recent opinion of the CoJ might function as an outside catalyst for progress. The CoJ has reviewed EUSFTA in a so-called 'opinion procedure' pursuant to Art. 218 (11) TFEU and found that the competence for the conclusion of international agreements containing the type of investor-State arbitration clauses found in the said agreement is generally of shared nature between the EU and its Member States⁵³⁷.

At first sight, this finding on the distribution of competences between the EU and its Member States might appear to be of little relevance when it comes to the question of how the relationship between domestic courts and investor-State arbitration is regulated in (future) EU FTAs. However, a closer look at the Court's arguments might rebut this impression quickly. The CoJ stated: 'The claimant investor may [...] decide, pursuant to Article 9.16 [EUSFTA], to submit the dispute to arbitration, without that Member State being able to oppose this, as its consent in this regard is deemed to be obtained under Article 9.16.2 [EUSFTA]. Such a regime, which removes disputes from the jurisdiction of the courts of the Member States, cannot be of a purely ancillary nature [...] and cannot, therefore, be established without the Member States' consent.'⁵³⁸ Hence, if the European Union does not want to conclude each and every FTA providing for investor-State arbitration designed in a EUSFTA-fashion as a so-called 'shared agreement' which invites Member States to 'sell' their consent for all sorts of concessions related or unrelated to the individual FTA, the EU has no choice but to include a strict local remedies rule. Only if the FTA provides that the investor cannot choose between investor-State arbitration on the basis of the FTA on the one hand and domestic courts on the other, but has to resort to local remedies before bringing a claim on the basis of the FTA, Member States' competences, in this study's understanding of the CoJ's opinion, are not touched upon. This is due to the fact that Member States' courts would not be by-passed, but such dispute settlement mechanism in a FTA would be a mere ancillary instrument to those substantive investment protection provisions for which the EU enjoys exclusive competence.

Turning to the advancements found in CETA and EUVFTA, if compared to 'traditional' investor-State arbitration, the most significant are more transparency, random allocation of claims to arbitrators pre-selected by the State parties, and the appeals mechanism. In contrast to the CJEU and the ECtHR

⁵³⁵ See only the views of S. W. Schill, *Sind Regelungen Zur Investor-Staat-Streitbeilegung in EU-Freihandelsabkommen Sinnvoll? (Are Provisions on Investor-State Dispute Settlement in EU Free Trade Agreements Sensible?)* (2017), Amsterdam Law School Research Paper No. 2017-06; available at <https://ssrn.com/abstract=2922698> (visited 23 May 2017), pp. 3 et seqq. on local remedies and preferential treatment and G. Van Harten, *The European Commission's Push to Consolidate and Expand ISDS: An Assessment of the Proposed Canada-Europe CETA and Europe-Singapore FTA* (2015), Osgoode Legal Studies Research Paper No. 23/2015; available at <https://ssrn.com/abstract=2613544> (visited 23 May 2017), p. 17 on 'vetting' of claims.

⁵³⁶ S. Hindelang, and C. P. Sassenrath, *The Investment Chapters of the EU's International Trade and Investment Agreements in a Comparative Perspective*, European Union, Belgium, 2015; available at [http://www.europarl.europa.eu/Reg-Data/etudes/STUD/2015/534998/EXPO_STU\(2015\)534998_EN.pdf](http://www.europarl.europa.eu/Reg-Data/etudes/STUD/2015/534998/EXPO_STU(2015)534998_EN.pdf) (visited 4 May 2017), pp. 53-55.

⁵³⁷ Opinion of 16 March 2017 in Opinion Procedure 2/15 [2017] ECLI:EU:C:2017:376, paras 290 et seqq., see also paras 78 et seqq., 225 et seqq.

⁵³⁸ *Ibid.*, paras. 291-292 (omissions and square brackets by authors).

though, the two aforesaid EU agreements do not provide for tenured judges and do not subject arbitrators to comparably strict rules in terms of conduct and conflict of interest. Such steps might have been too bold for what was supposed to be 'legal scrubbing' and not 'renegotiation'⁵³⁹.

Minor but still notable reforms are the time-lines both for potential claimants and, in some cases, even for the tribunals as well as the 'proceduralisation' of the consultation process. The clearer allocation of costs and avoidance of parallel proceedings also falls into this category as does the bundle of rules on conduct and conflict of interests of arbitrators. Considering this 'mix' of cautious reform, little steps, and continuity, the equally mixed responses by scholarly commentators⁵⁴⁰ are anything but surprising.

An issue not having received sufficient attention so far by both scholars and by negotiators of the FTAs compared (at least if measured against the pertinent political rhetoric and their economic significance for the European Union⁵⁴¹) is the one of the special situation and, consequently, needs of SMEs when pursuing internationalisation strategies. Only few provisions directly address SMEs and these remain vague. It is largely unclear whether SMEs are able to benefit or are affected in the same way as large firms from trade and investment liberalisation and regulation agreed to in FTAs or whether the former require specific, i.e. 'tailored' regulation in order to equality participate in the economic opportunities provided for by FTAs⁵⁴².

4.12.1 Political pledge – seeking to establish a multilateral investment court in the long term

All three FTAs under comparison, in some way or another, signal the willingness of the State parties to keep the process of reforming investor-State dispute settlement on the political agenda after these agreements eventually have entered into force⁵⁴³. To begin with, the most 'traditional' one amongst the three agreements, EUSFTA in its Art. 9.33 (1) (c) tasks a treaty committee with examining whether an appellate mechanism could be created under the agreement or whether awards by EUSFTA tribunals could be subjected to appellate mechanisms in other 'institutional arrangements'. The other

⁵³⁹ J. A. VanDuzer, *Investor-State Dispute Settlement in CETA: Is It the Gold Standard?* (2016), C.D. Howe Institute Commentary No. 459; Ottawa Faculty of Law Working Paper No. 2016-44; available at <https://ssrn.com/abstract=2860319> (visited 22 May 2017), p. 17.

⁵⁴⁰ Praise for the most part is uttered by some commentators (for instance J. A. VanDuzer, *Investor-State Dispute Settlement in CETA: Is It the Gold Standard?* (2016), C.D. Howe Institute Commentary No. 459; Ottawa Faculty of Law Working Paper No. 2016-44; available at <https://ssrn.com/abstract=2860319> (visited 22 May 2017), pp. 15 et seqq.; L. Pantaleo, *Investment Disputes Under CETA. Taking the Best from Past Experience?* (2016); available at <https://ssrn.com/abstract=2739128> (visited 22 May 2017), p. 75) whereas others maintain a critical if not negatory standpoint (for instance, K.D. Dickson-Smith, *Does the European Union Have New Clothes? Understanding the EU's New Investment Treaty Model* (2016), *Journal of World Investment & Trade*, Vol. 17, No. 5; available at <https://ssrn.com/abstract=2859412776> (visited 23 May 2017), pp. 811 et seqq.; G. Van Harten, *The European Union's Emerging Approach to ISDS: a Review of the Canada-Europe CETA, Europe-Singapore FTA, and European-Vietnam FTA* (2016), *University of Bologna Law Review* Vol. 1, No. 1; available at <https://bolognalawreview.unibo.it/article/view/6318/6095> (visited 23 May 2017), pp. 163 et seqq.; *idem*, *ISDS in the Revised CETA: Positive Steps, But is it the 'Gold Standard'?* (2016), Centre for International Governance Innovation (CIGI), *Investor-State Arbitration Commentary Series* No. 6; available at <https://ssrn.com/abstract=2784461> (visited 23 May 2017)).

⁵⁴¹ The UN report that 'SMEs (operating both within and outside of the legally regulated economy) account for 72 per cent of total employment and 64 per cent of Gross Domestic Product (GDP) in developed economies, while they represent 47 per cent of employment and 63 per cent of GDP in low-income countries', UN, General Assembly, *Reducing the legal obstacles faced by micro, small and medium-sized enterprises (MSMEs): Note by the Secretariat, A/CN.9/WG.I/WP.92* (12 August 2015), para 7.

⁵⁴² S. Hindelang and C. Dreher, *Umfassende Wirtschafts- und Handelsabkommen – Das Recht der Happy Few?*, *Zeitschrift für Gesetzgebung* 2017 (forthcoming).

⁵⁴³ Cf. Commission, *Roadmap on the 'Establishment of a Multilateral Investment Court for investment dispute resolution'*, available at http://ec.europa.eu/smart-regulation/roadmaps/docs/2016_trade_024_court_on_investment_en.pdf (visited 10 May 2017).

agreements have already prescribed for the establishment of an appellate mechanism and lay out its basic structure.

However, CETA and EUVFTA are bolder in their aims and go beyond a 'mere' modification of investor-State arbitration. Art. 8.29 CETA obliges the parties to pursue 'with other trading partners' the establishment of a multilateral investment tribunal and appellate mechanism. After its establishment, such mechanism shall have jurisdiction over investment disputes under CETA in accordance with transitional arrangements adopted by the CETA Joint Committee. The Joint Interpretive agreement specifies that

*'CETA represents an important and radical change in investment rules and dispute resolution. It lays the basis for a multilateral effort to develop further this new approach to investment dispute resolution into a Multilateral Investment Court. The EU and Canada will work expeditiously towards the creation of the Multilateral Investment Court. It should be set up once a minimum critical mass of participants is established, and immediately replace bilateral systems such as the one in CETA, and be fully open to accession by any country that subscribes to the principles underlying the Court.'*⁵⁴⁴

In EUVFTA, Art. 15 ensures the 'openness' of the agreement to a multilateral investment dispute settlement body in a way similar to CETA.

These provisions, on the one hand, demonstrate a general openness to a future, multi- or plurilateral 'permanent solution'. On the other hand, substantive guidance as to how such solution could (and should) be structured or to which principles it ought to adhere, is lacking. The future will show which balance negotiators will achieve with regard to the crucial points mentioned above (see 4.11.2.1 (p. 174) and 4.11.2.2 (p. 174)). It is not beyond imagination that the appellate mechanisms established, for instance, under CETA will serve as point of departure for any such solution, not only in terms of the experience gathered thereby but also institutionally⁵⁴⁵.

4.12.2 Benefits, drawbacks, and prospects of a 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 investment court⁵⁴⁶. Introducing a standing investment court with tenured judges⁵⁴⁷ had for long been rejected by the stakeholders involved in the debate on the grounds that standing courts,

⁵⁴⁴ 'Joint Interpretive Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States', OJ L 11, 14 January 2017, pp. 3-8.

⁵⁴⁵ Cf. S. W. Schill, *Sind Regelungen Zur Investor-Staat-Streitbeilegung in EU-Freihandelsabkommen Sinnvoll? (Are Provisions on Investor-State Dispute Settlement in EU Free Trade Agreements Sensible?)* (2017), Amsterdam Law School Research Paper No. 2017-06; available at <https://ssrn.com/abstract=2922698> (visited 23 May 2017), pp. 11 et seqq. also pointing out perceived risks of such institutionalisation.

⁵⁴⁶ 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 10 May 2017).

⁵⁴⁷ The idea of 'arbitrator rosters', as included in CETA in Art. 8.27 (2), can be presented as a (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.

compared to ad hoc tribunals, supposedly show a stronger tendency of construing their own jurisdiction expansively and developing it in directions not desired by States⁵⁴⁸. However, as experience with NAFTA (and arguable also in regard to many other investment protection agreements) has demonstrated, it can be doubted that ad hoc tribunals effectively perform the claimed role of a guardian of the State parties' intentions. Rather, States feel that they have lost grip to a considerable extent as the ad hoc-system also shows, among other flaws, power-grabbing tendencies⁵⁴⁹.

For the sake of equality, predictability and credibility⁵⁵⁰, such a permanent 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 tribunals⁵⁵¹.

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 as early as in its Resolution on TTIP of 8 July 2015⁵⁵².

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. A permanent court would undoubtedly be the starting point for a 'new' system as many of the current issues associated with investor-State arbitration could be wiped off the table⁵⁵³. However, there is obviously no guarantee, and experience with the existing international courts confirms this, that 'new' problems would not arise. As always, irrespective of the possible political resistance 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 ideas have been rather vague on many issues. From a practical standpoint, States might be reluctant to establish a costly permanent court with tenured and remunerated judges

⁵⁴⁸ S. Montt, *State Liability in Investment Treaty Arbitration*, Hart Publishing, Oxford, 2009, pp. 155 et seqq.

⁵⁴⁹ 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 10 May 2017), pp. 66-69.

⁵⁵⁰ 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 10 May 2017).

⁵⁵¹ 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.

⁵⁵² '[...] 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 May 2017).

⁵⁵³ This is not to say that a significantly reformed investor-State arbitration mechanism would not qualify as a 'new' system.

all too quickly before the actual case load has become clear⁵⁵⁴. A basic question seems however to be decided, at least for the time being. This question relates to the context in which 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. In the context of signing CETA, the parties to this agreement made clear, that they aim at establishing a multilateral investment court.

If the EU, its Member States, and Canada would indeed be successful in their ongoing initiative to set up a 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 contexts⁵⁵⁵. 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 increase⁵⁵⁶. 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 rules⁵⁵⁷. Put in the words of the European Commission: '[...] it will require a level of international consensus that will need to be built'⁵⁵⁸. What in fact would be required is a global or at least regional consensus on the fundamental balance between the protection of private property interests and other public interests such as the environment, public health, and others. So far, such attempts have not been proven overly successful due to vastly varying perceptions of the social function of private property around the globe.

While the struggle for the establishment of a multilateral investment court might prove worthwhile in the long run, it could prove to 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 skeptical towards such effort, stating that '[p]ursuing

⁵⁵⁴ J. A. VanDuzer, *Investor-State Dispute Settlement in CETA: Is It the Gold Standard?* (2016), C.D. Howe Institute Commentary No. 459; Ottawa Faculty of Law Working Paper No. 2016-44; available at <https://ssrn.com/abstract=2860319> (visited 22 May 2017), p. 17.

⁵⁵⁵ 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 10 May 2017), p. 63.

⁵⁵⁶ 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 seqq., 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.

⁵⁵⁷ 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 10 May 2017), p. 10.

⁵⁵⁸ 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 10 May 2017), p. 4.

such an investment court for each individual EU agreement that includes ISDS presents obvious, technical and organizational challenges⁵⁵⁹. And indeed, within CETA and EUVFTA the EU chose middle grounds by sticking to the 'traditional' model of arbitration and modifying the selection of arbitrators and the revision process of potentially erroneous decisions.

However, depending on the number of claims expected⁵⁶⁰, establishing a bilateral permanent court could also make sense in the EU-US or EU-Canada relations⁵⁶¹. 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 the currently not further negotiated 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 any possible agreement with the USA at least an obligation for the parties to negotiate in good faith on the establishment of a permanent court within a certain time period.

⁵⁵⁹ 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 10 May 2017), p. 11.

⁵⁶⁰ 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 10 May 2017), pp. 21 et seqq. 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 10 May 2017). 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 10 May 2017).

⁵⁶¹ 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.

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