**Investor-state arbitration in the light of EU policy and law after the Lisbon Treaty**

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# Introduction

The Treaty of Lisbon extended the European Union’s exclusive competences in the area of the common commercial policy to the topic of foreign direct investment. This meant that from 1 December 2009 on, the EU instead of its Member States is exclusively competent to negotiate and conclude trade and investment agreements, although some aspects of investment policy might not fall under this exclusive competence. Two of such agreements have become the subject of heated debates: the Transatlantic Trade and Investment Partnership (TTIP) between the European Union and the United States of America, and the Canada-EU Trade Agreement (CETA) in its wake.

One of the main points of concern about these agreements is the envisaged inclusion of a privileged possibility for foreign investors to bring complaints about measures adopted by host states to arbiters, and receive compensation from these states. Circumventing existing national courts and the Court of Justice of the European Union (CJEU), foreign investors can challenge public policy measures aimed at, for instance, protection of the environment or public health, if these measures decrease the value of their investments. This type of arbitration is called Investor State Dispute Settlement (ISDS), and besides the objections that many members of the general public have against it, legal specialists on both sides of the Atlantic warn that there exist major challenges from a rule of law[[1]](#footnote-1) and from an EU law point of view.[[2]](#footnote-2) They warn that ISDS, even reformed as an Investor State Court (ICS) system, is incompatible with the autonomy of EU law, with the role of the CJEU in guarding the uniform interpretation and application of EU law, and with the exclusive competence of this court to decide on claims regarding non-contractual liability of the EU.[[3]](#footnote-3) Furthermore, there exist concerns on the independence of the judges and the way in which they would receive remuneration for their work. Notably, it is unclear how the introduction of the obligation to compensate foreign investors in cases where lawful and proportionate public interest measures are adopted can be reconciled with the EU’s obligations to protect human health and the environment with a view to promote sustainable development when defining EU trade policies, and more specifically with the recent Paris climate agreement to which the EU, Canada, the U.S.A. and numerous other countries signed up. Finally, it can be noted that just before in July 2014, Jean-Claude Juncker said about ISDS: ‘Nor will I accept that the jurisdiction of courts in the EU Member States is limited by special regimes for investor disputes. The rule of law and the principle of equality before the law must also apply in this context.’[[4]](#footnote-4) On the surface, that sounds like he is opposing ISDS, but in reality he was keeping all options open as ISDS regimes usually do not prevent investors from bringing their claims to EU Member State courts.

The original 2009 negotiation directives of the Council for CETA did not mention ISDS. In June 2011, an advice on CETA requested by the Commission pointed out that including ISDS in CETA would not create a net overall benefit.[[5]](#footnote-5) Still, in July 2011 the Council agreed to amended negotiation directives that aimed at an agreement providing for an ‘effective and state-of-the-art investor-to-state dispute settlement mechanism’.[[6]](#footnote-6) In spite of the strong and manifold objections raised against the inclusion of this method of dispute settlement, CETA with ‘old style’ ISDS was negotiated and made public in 2014. During the ‘legal scrubbing’ phase that normally speaking only is aimed at removing small mistakes, and hidden from the outside world, the EU and Canada re-opened negotiations on the dispute-settlement part of CETA and agreed on replacing the ISDS system by an ICS. This version of the CETA was presented on 29 February 2016.[[7]](#footnote-7)

On 28 June 2016, EU Commission President Juncker explained that the CETA would be submitted to the approval of the Council as an EU only agreement, falling completely under the EU’s exclusive competence. That announcement did not contribute to his popularity, notably because certain aspects of the CETA do not fall under the exclusive competence of the EU. In July 2016, the Commission proposed to apply CETA provisionally in its entirety, so including the ICS part, not as an EU only agreement but as a mixed agreement. This meant that besides the Council, all the EU Member States needed to agree with CETA.[[8]](#footnote-8) At the end of September 2016, EU Trade Commissioner Malmström made known that the investment chapter of CETA, in which the ICS mechanism is laid down, was likely not to be applied provisionally.[[9]](#footnote-9) In other words, the Commission gave in to political pressure – maybe also because it expected the outcome of a legal complaint in Germany.

On 13 October 2016, the German Constitutional Court (*Bundesverfassungsgericht*, *BVerfG*) ordered Germany only to agree to the provisional application of those parts of CETA that undoubtedly fall within the Union’s exclusive competences. Interestingly enough, the investor protection rules, including ICS, are not among these parts.[[10]](#footnote-10) On top of that, the Walloon regional government made known that it opposed CETA, *inter alia* because of the ICS provisions, and that it rejected the interpretative statement that was supposed to take away remaining doubts.[[11]](#footnote-11) Later that month, after intense debates, Belgium did agree with the provisional application of CETA while declaring that it would ask the CJEU for its opinion on the compatibility of ISDS in CETA with EU law, and that it does not intend to ratify CETA because of the ICS provisions as laid down in Chapter 8 CETA in their current form on the day of the signature of CETA.[[12]](#footnote-12)

Besides the compatibility question, another point that warrants further consideration is the manner in which evidence on the need for ISDS / ICS in EU trade agreements is presented. As one knowledgeable commentator put it, ‘questions about the need of an investment protection treaty between two entities like the EU and the US are certainly legitimate’. He added that it is ‘too easy to dismiss that need in a facile flush of self-satisfaction about the functioning of our judicial systems on both sides of the Atlantic.’[[13]](#footnote-13) In the same vain, claims about discrimination of foreign investors in the U.S.A., Canada and in the EU that have been repeated frequently warrant scrutiny. Also, the ‘China problem’ needs a closer look, as do the hurdles that ICS/ISDS raises when it comes to adoption of measures in the public interest, notably in order to implement the Paris Climate Agreement.[[14]](#footnote-14) Furthermore, the discrepancy between CETA’s Trade Sustainability Impact Assessment (SIA) conveying the message that the inclusion of an investor-state dispute settlement mechanism would not bring overall benefits for the EU and/or Canada and the decision to include ICS in CETA is striking and deserves attention.

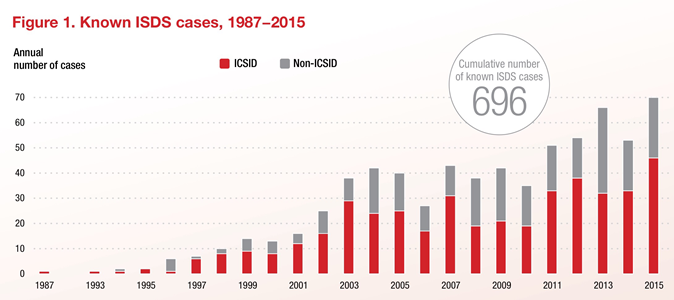
In this contribution, the main question investigated is whether the inclusion of an ISDS or ICS mechanism in EU trade and investment agreements with third countries is problematic from an EU policy and law point of view – and thus inter alia whether the CJEU might find that parts of CETA are incompatible with the Treaties.[[15]](#footnote-15) Other questions that are looked at include whether the need for ISDS/ICS in the relationship between the EU, the USA and Canada has been demonstrated, in line with the evidence based approach that the Commission underlines as the basis for its own action, and whether the Commission followed its own guidelines on trade impact assessments. In order to answer these questions, first a brief look at the history and characteristics of ISDS is taken, at some statistics, and at some of the disputes involving the protection of public interests that have been initiated under treaties that include ISDS mechanisms (para 2). Then, the key challenges from the point of EU law will be dealt with. After a brief introduction about the ICS (para 3.1), the autonomy of the EU legal order (para 3.2), the issue of the exclusive competence of the CJEU to decide on claims regarding non-contractual liability of the EU (para 3.3), the balancing of trade and environment issues (para 3.4), the independency of ICS judges (para 3.5) and the need for ISDS/ICS in agreements between the EU and Canada or the U.S.A. (para 3.6) are discussed. Concluding remarks are presented in the final paragraph 4.

# 2. A short history of ISDS and the protection of public interests

Arguments in favour of the inclusion of ISDS mechanisms that can be encountered frequently are that it has been around in Bilateral Investment Treaties (BITs) since 1959,[[16]](#footnote-16) or since the mid-20th century,[[17]](#footnote-17) and that no-one has criticised these older treaties.[[18]](#footnote-18) In reality, critique exists at least since the late 1990’s when NAFTA came into being.[[19]](#footnote-19) As for the 1959 myth, Germany and Pakistan concluded the first ever BIT in that year,[[20]](#footnote-20) but it did not contain ISDS provisions. The 1970 BIT between the Netherlands and Kenya,[[21]](#footnote-21) mentioned by an MEP involved in trade issues[[22]](#footnote-22) as an early ISDS reference, also does not *oblige* the parties to agree with arbitration in cases where an investor objects to the way in which he is treated by the host state. The earliest example of a treaty with an ISDS clause that obliges the host state to accept this form of arbitration seems to be the 1968 Netherlands–Indonesia BIT.[[23]](#footnote-23)

Only by the 1990s did ISDS emerge as a standard part of the majority of investment protection treaties.[[24]](#footnote-24) At the start, BITs were usually concluded between capital-exporting countries and developing countries. Only gradually, BITs were also concluded between developed countries. More recently, however, a growing number of countries is turning away from ISDS mechanisms.[[25]](#footnote-25) For a while, Australia also opposed ISDS provisions in its trade agreements with other countries categorically. After a change of government in 2013, it introduced an interesting *ad hoc* approach instead. When entering into new free trade agreements Australia now chooses – depending on the specific circumstances of the case – whether there is a need to include ISDS provisions. Interestingly enough, this policy did not stand in the way of a China-Australia agreement with ISDS provisions.[[26]](#footnote-26) In that respect, it seems that the so-called ‘China problem’ - the claim that if ISDS/ICS was excluded from CETA and TTIP, it would be impossible to include ISDS in a future EU agreement with China – forms yet another myth. I will return to this issue below in para 3.6.

Because ISDS mechanisms in BITs and other agreements are a fairly recent phenomenon, experiences with the application in practice of this type of dispute settlement is limited. Only a few ISDS claims started emerging in the late 1990s and early 2000s. Gradually, the number of claims rose, as the figure below illustrates. In the period until 1998, less than 10 cases emerged on average per year worldwide. From 1999 until 2010, on the average less than 40 new ISDS cases emerged per year. After 2011, the numbers rose to over 50 per year and reached a record high of 70 new cases in 2015, bringing the total number of known ISDS cases to 696.[[27]](#footnote-27)



Source: UNCTAD, Recent Developments in Investor-State Dispute Settlement, IIA Issues Note No 2, June 2016 Introducing ICS/ISDS in CETA and TTIP could allow for a sharp increase in the popularity of this type of dispute settlement, if only because the U.S. investments in the EU even without TTIP already amount to a staggering 1810.8 billion Euro. The Canadian investments amount to 165.9 billion Euro, before CETA.[[28]](#footnote-28)

Most of the cases were initiated against developing countries, although lately the percentage of cases brought against developed countries is slowly rising, standing at about 40 per cent in 2015. About one third of the cases initiated in 2015 was between EU member states. A large part of the ISDS claims concerns sustainable development issues. Approximately 30 per cent of ISDS cases initiated in 2015 concerned the regulation of renewable energy producers, all of which were brought against EU member States.[[29]](#footnote-29) Other sustainability related cases concerned protection of the environment, climate change, indigenous protected areas, anti–corruption and taxation. Examples of some of the current or recently concluded ISDS claims against host states show just how wide the scope of public interest related issues covered by investment protection clauses actually is. Not issuing a permit for an oil pipeline,[[30]](#footnote-30) goldmine,[[31]](#footnote-31) metallic mining,[[32]](#footnote-32) quarry,[[33]](#footnote-33) or waste disposal facility,[[34]](#footnote-34) issuing a permit with strict environmental conditions,[[35]](#footnote-35) revoking a license that allowed for the drilling for shale gas,[[36]](#footnote-36) termination of an oil concession after the investor violated national law,[[37]](#footnote-37) claiming compensation when anti-smoking measures like plane packaging are introduced,[[38]](#footnote-38) deciding to phase out nuclear energy by the year 2022 in the wake of the Fukushima disaster in 2011[[39]](#footnote-39) and restricting the fuel additive MMT in fuels[[40]](#footnote-40) are among the ISDS claims with sustainability aspects.

Even if investors do not always win or are able to settle, threatening to bring a claim alone can have a ‘regulatory chill’ effect.[[41]](#footnote-41) The claims can be as high as several billions of Euros, [[42]](#footnote-42) but even lower claims can be relatively high for smaller countries, that initially also face the costs of the proceedings.[[43]](#footnote-43) In 2015, some 26% of all concluded cases were decided in favour of the investor (a bit less than in previous years)[[44]](#footnote-44) - with monetary compensation awarded, another 26% was settled, and about 36% was decided in favour of the State (with about half of the claims dismissed on jurisdictional grounds and the other half on the merits). The U.S.A. forms an exception: it never lost a case,[[45]](#footnote-45) and U.S. companies initiating claims against host states won over half of the cases.[[46]](#footnote-46) Canada also performed better than the average state, losing only three cases so far.[[47]](#footnote-47) Canadian investors won or settled nine cases and lost 18.

In 2015, 60 per cent of the decisions on the merits in ISDS cases was in favour of the investor, and 40 per cent in favour of the State. Even if these numbers do not relate solely to claims regarding the advancing of public interests, they could indicate that the ISDS/ICS system leads to outcomes that favour investors. At the very least, they show that foreign investors stand a very good chance to persuade host states to pay compensation or accommodate the investors through a settlement. That could be at the detriment of (the adoption of) measures aimed at protecting human health, nature, the environment in general etc.,[[48]](#footnote-48) and even more so in situations where scientific evidence is not yet conclusive and measures are (to be) based on the precautionary principle.[[49]](#footnote-49) More specifically, ICS could seriously undermine reaching the goals of the Paris climate agreement, because investors can fight regulatory changes and other measures aimed at realising the transition towards a more CO2 neutral society if these negatively affect the value of their investments.[[50]](#footnote-50)

Under the Paris Agreement that entered into force on 4 November 2016, states committed themselves to ensure that global average temperatures do not rise more than 2 degrees compared to the pre-industrial revolution era, and preferably even not more than 1.5 degrees. These goals form a challenge as it is, with average global temperatures up already at almost 1 degree and steadily rising.[[51]](#footnote-51) States could choose to achieve this goal by introducing changes in energy production, for instance by introducing obligatory Carbon Capture and Storage (CCS) for coal fired power plants (making this type of energy more expensive)[[52]](#footnote-52) and/or phasing out energy production using coal altogether. Foreign investors in coal could try to dissuade governments from such measures, or demand compensation under ISDS/ICS mechanisms, and in this way hinder the transition towards carbon neutrality and reaching the 1.5 / 2 degrees goals. While the EU and Canada support the Paris Agreement, chances are that the U.S. – responsible for 18% of global greenhouse emissions and unwilling to ratify the preceding Kyoto Protocol because developing countries did not need to reduce emissions - will withdraw from the treaty under the new administration, in spite of the fact that this time around, both developed and developing countries committed themselves to reduce their emissions. A decision in this respect is to be announced in May 2017.

Another argument frequently encountered in favour of ISDS is that where rights for investors are created, there should be a mechanism for them to enforce these rights. At the same time, global climate agreements contain norms protecting citizens against greenhouse gas concentrations in the atmosphere that dangerously interfere with the climate system[[53]](#footnote-53) and against rising global average temperatures.[[54]](#footnote-54) Yet these agreements all lack a dispute settlement mechanism where those negatively affected by climate change could complain about the lack of sufficient action by state parties, let alone take action against companies responsible for greenhouse gas emissions. I fail to see why the interests of investors would be more important than the interests of citizens, especially those that literally are loosing the land they live on due to rising sea levels.

# 3. ISDS, ICS and EU law

## 3.1 From ISDS to ICS

Soon after the entry into force of the Treaty of Lisbon, the European Commission stated that ISDS forms “a key part of the inheritance that the Union receives from Member State BITs”, and that it “is such an established feature of investment agreements that its absence would in fact discourage investors and make a host economy less attractive than others.” For those reasons the future EU agreements with an investment protection component should include ISDS, it was stated.[[55]](#footnote-55) The claims were not further substantiated, in spite of the Commission’s assertions regarding more evidence based, smarter policy making at other occasions,[[56]](#footnote-56) notably where new public policy measures are concerned. As a matter of fact, it can be countered that ISDS only forms a part of trade agreements since a relatively short period of time, that it was included mainly in agreements with countries with rule of law challenges and that for instance none of the EU-15 countries, i.e. the ‘founding fathers’ of the EU, had agreements with the USA that include ISDS provisions.

In spite of the lack of evidence on the need for, proportionality and EU law conformity of ISDS in EU agreements, and the criticism that casts doubt on important aspects of ISDS, the Council agreed with the Commission’s proposals. The EP was more critical, fortunately, and called for significant ISDS reforms, notably in order to ensure transparency, appeals, prevention of ‘double hatting’ and exhaustion of local judicial remedies where they are reliable enough to guarantee due process.[[57]](#footnote-57) The EP also reacted to the Council’s request that the new European legal framework should not negatively affect investor protection.[[58]](#footnote-58) This puts the right to regulate at risk, and ‘may contradict the meaning and spirit of Article 207 TFEU’, the EP stated. That is putting it mildly, considering that this provision demands that the ‘common commercial policy shall be conducted in the context of the principles and objectives of the Union’s external action’ - which include protection of the environment and ensuring sustainable development.[[59]](#footnote-59) The resolution also expresses ‘deep concern regarding the level of discretion of international arbitrators to make a broad interpretation of investor protection clauses, thereby leading to the ruling out of legitimate public regulations’, and calls on the Commission to produce clear definitions of investor protection standards in order to avoid such problems in the new agreements.

The negotiations between the EU and Canada started in May 2009. In June 2011, the Trade SIA was published, explaining that ‘the conflicting costs and benefits of [an ISDS] mechanism make it doubtful that its inclusion in CETA would create a net/overall (economic, social and environmental) sustainability benefit for the EU and/or Canada’. It was added that ‘the policy space reductions caused by ISDS allowances in CETA, while less significant than foreseen by some parties, would be enough to cast doubt on its contribution to net sustainability benefits.’ [[60]](#footnote-60) The independent advisers concluded that instead of an ISDS mechanism, a state-to-state system forms a more appropriate enforcement mechanism in the agreement. The Commission’s own guidelines[[61]](#footnote-61) prescribe a reaction to the Trade SIA findings in the form of a position paper during the negotiations, explaining for instance why ISDS nevertheless should be included. In spite of, or maybe because of the intense debates on the agreement, a CETA position paper on the Trade SIA was neither made public before negotiations ended, nor before national parliaments were asked to agree with provisional application of CETA. Only on 4 April 2017 the position paper was published.[[62]](#footnote-62) The flaws in the use of Trade SIA’s will be returned to below in para 3.6.

Several MEPs did ask the Commission why it disregarded the Trade SIA advice on leaving ISDS out. One answer they got was that the advice does not represent the views of the Commission, and that the EP and the Council had endorsed the inclusion of ISDS in CETA. Instead of refuting the cost/benefit analysis on ISDS of the Trade SIA, the Commission simply stated that it considers ISDS more appropriate than a state-to-state mechanism for the settlement of disputes between an investor and the state hosting the investment. It was added that the state-to-state dispute settlement mechanisms in FTAs had not been used, that those mechanism do not provide for compensation to the investor, and that ‘securing adequate compensation, where an illegal action has been taken, is the core purpose of the ISDS mechanism. ‘For these and other reasons’, the Commission continued, ‘it is appropriate to include an ISDS mechanism in CETA, and not rely on the state-to-state dispute settlement mechanism alone.’[[63]](#footnote-63) These answers did not clarify what was wrong with the analysis of the consulted experts that underpinned their conclusions, nor do they offer evidence supporting the Commission’s preference for ISDS. MEPs had also asked about a statement that ISDS in CETA was only of ‘some economic value’. In reply, several motives for including ISDS in CETA were indicated. European investors in Canada need protection against being expropriated and denied compensation and access to the Canadian courts. This happened several times in the past, according to the Commission, but how often, when or which companies this concerned was not mentioned - so it might have happened twice thirty years ago. To top the answers up, it was submitted that offering more legal certainty through ISDS helps securing trade and investment flows and consequently, which is ‘of significant economic value and importance.’ Interestingly enough, at another occasion Commissioner Malmström admitted that most studies do not show a “direct and exclusive causal relationship” between international investment agreements and foreign direct investment.[[64]](#footnote-64) The political importance of ISDS in CETA was also stressed. Investment protection without an ISDS procedure ‘would be of little value’. To provide adequate protection to investors, the agreement should also include a mechanism for enforcement of the commitments ensuring effective implementation of the provisions. Furthermore, it was explained that the CETA negotiations are the first in a series of negotiations that will take place between the EU and third countries addressing investment issues. With the Singapore, CETA is likely to be the first EU agreement including investment protection and ISDS, it was explained. Hence, it is ‘politically important for the Union to exercise this competence, and in the future to pursue this policy with other key partners … as …. the first agreements will be important in setting the path for this policy.’

In the meantime, the TTIP negotiations had started. The negotiation mandate was adopted by the Council in June 2013[[65]](#footnote-65) and envisaged TTIP to encompass an ISDS mechanism. It was specified that the inclusion of investment protection and ISDS ‘will depend on whether a satisfactory solution, meeting the EU interests (…) is achieved’, notably regarding the right to adopt and enforce ‘measures necessary to pursue legitimate public policy objectives such as social, environmental, (…) public health and safety in a non-discriminatory manner.’[[66]](#footnote-66) Whether the negotiated texts indeed meet the EU interests is a matter to be considered ‘in view of the final balance of the Agreement’, it was specified.

When public protests against the TTIP, CETA and ISDS gained in strength, the Commission temporarily put the ISDS part of the TTIP negotiations on hold in January 2014, and organised a public consultation that brought about a staggering 149,399 contributions.[[67]](#footnote-67) An overview of the main results of the consultation was presented on 13 January 2015.[[68]](#footnote-68) Although the vast majority of the reactions expressed strong opposition to ISDS, the Commission reiterated its mandate to negotiate ISDS as part of TTIP – provided that the outcome corresponds to the EU’s interests. That ‘element of conditionality’ meant that a decision on whether or not to include ISDS is to be made during the final phase of the negotiations.[[69]](#footnote-69) By juxtaposing the positions of opponents and proponents the Commission kept all of its options open.[[70]](#footnote-70)

In July 2015, the EP adopted TTIP recommendations, asking for replacing the envisaged ISDS mechanism with a new public legal structure[[71]](#footnote-71) in which cases are treated in a transparent manner by publicly appointed, independent professional judges in public hearings, with an appellate mechanism, respecting the jurisdiction of courts of the EU and of the Member States, and where private interests cannot undermine public policy objectives.’

In September 2015, a draft TTIP Investment chapter was presented.[[72]](#footnote-72) It encompassed a modernised system Investment Court System (ICS) composed of a first instance Tribunal and an Appeal Tribunal. Critics claim the proposal “amounts to little more than putting lipstick on a particularly unpopular pig”[[73]](#footnote-73) and point out that the new system does not alter the fact that investors still have the right to circumvent national law systems.[[74]](#footnote-74) The Commission announced discussions about the draft with the Council and the EP, and after that the presentation of a TTIP text proposal that would also be used in other ongoing and future negotiations. This proposal was made public on 12 November 2015.[[75]](#footnote-75) As already mentioned above, in February 2016 Canada and the EU announced that they had included the main elements of the ICS proposal in the revised text of CETA.[[76]](#footnote-76) The ICS undoubtedly forms an improvement compared to the current ISDS system, notably where transparency, the availability of an appeal mechanism are concerned.

Nevertheless, other aspects of the new ICS system might still be incompatible with EU law. Thanks to the ‘hot-air Walloons’,[[77]](#footnote-77) Belgium will be asking the CJEU for an opinion on this question. In the next subparagraphs of this paper, some of the issues that the Court might criticise are examined here.

## 3.2 Autonomy of the EU legal order

The ICS offers investors the chance to circumvent the courts of the Member States and the CJEU in claims of investors against host states. Exhaustion of local remedies – contrary to the request of the EP - is not prescribed. This could interfere with the autonomy of the EU legal order in a manner contrary to EU law, notably if the ICS would be interpreting EU law.

In itself, the fact that the European Union joins an international agreement with a dispute settlement mechanism does not pose a problem from an EU law point of view. However, certain conditions need to be met, as a string of opinions issued by the Court in Luxembourg makes clear when rejecting several dispute settlement mechanisms because they were in conflict with the autonomy of the EU legal order. Recently, it opposed the EU accession to the ECHR in Opinion 2/13.[[78]](#footnote-78) Before that, it had rejected the draft agreement setting up the Community Patent Court in Opinion 1/09,[[79]](#footnote-79) the first draft EEA Agreement (Opinion 1/91)[[80]](#footnote-80) and the draft agreement establishing a European laying-up fund for inland waterway vessels (Opinion 1/76).[[81]](#footnote-81) From these opinions it shows *inter alia* that the mere fact that the mechanism is in the form of a public court system rather than private arbitration does not bar it from being found contrary to EU law. Belgium will ask the CJEU for its opinion on ICS notably in the light of Opinion 1/94 in which the competence to conclude international agreements concerning services and the protection of intellectual property was discussed.

One issue that featured in Opinions 1/91 and 2/13 was that the allocation of competences between the EU and its Member States to determine the respondent in a dispute cannot be transferred to an international dispute settlement body. The new ICS provisions stipulate that the EU is to decide whether it will be respondent itself or one of the Member States (article 8.21 CETA). This seems to warrant the exclusive competence of the CJEU on these issues.[[82]](#footnote-82)

Article 8.31 CETA accommodates concerns in this respect by determining that the Tribunal ‘shall not have jurisdiction to determine the legality of a measure, alleged to constitute a breach of this Agreement, under the domestic law of the disputing Party.’ At the same time, however, the provision allows the Tribunal tasked with determining the consistency of a measure with CETA to consider ‘the domestic law of the disputing Party as a matter of fact.’ In doing so, the Tribunal ‘shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party and any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party.’[[83]](#footnote-83) This provision seems to ensure that the ICS judges will only be interpreting the investor rights granted by the CETA, which forms an integral part of the EU legal order. In itself, this can be compatible with EU law as long as, in the words of the CJEU, the international agreement in which the dispute settlement regime is laid down is designed ‘in essence, to resolve disputes on the interpretation or application of the actual provisions of the international agreements’.[[84]](#footnote-84)

Do these provisions really suffice to conclude that the ICS will not interfere with the autonomy of the EU legal order? Or could the ICS still deprive Member States’ courts of their powers in relation to the interpretation and application of EU rules, which are presumably relevant in the arbitral proceeding?[[85]](#footnote-85) Declaring that the ICS is merely considering EU law as a matter of fact resembles the unlikely idea that a judge can mechanically function as ‘la bouche qui prononce les paroles de la loi; des êtres inanimés qui ne peuvent modérer ni la force ni la rigueur’ (‘the mouth that pronounces the words of the law; unconscious beings that can neither change the strenght nor the strictness’).[[86]](#footnote-86) In practice, ICS judges determining whether, for instance, FET rules were violated by an EU host state, can take a violation of EU law into account.[[87]](#footnote-87) It seems hard or impossible to arrive at a conclusion on such a matter without pronouncing an interpretation of EU law.[[88]](#footnote-88)

## The Commission and other proponents of the trade agreements time and time again stressed that the right to regulate is protected. The fact remains that arbiters nevertheless can pronounce legislation to be in violation of the agreement’s provisions. In the CETA, it is explained that for the purpose of the Investment Chapter 8, “the Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection”.[[89]](#footnote-89) The TTIP proposal of the EU contains a similar provision, but interestingly enough it raises the hurdle higher for the regulator by asserting “the right of the Parties to regulate within their territories through measures *necessary* to achieve legitimate policy objectives”.[[90]](#footnote-90) The same chapter does set out that the Parties must accord foreign investors ‘fair and equitable treatment’ in accordance with a number of stipulations.[[91]](#footnote-91)

As for CETA, where non-discriminatory measures adopted for a public purpose under due process of law are concerned, art. 8.12(1) CETA still obliges the payment of “prompt, adequate and effective compensation” to foreign investors when these measures have an equivalent effect to nationalisation. The good news is that in an annex it is explained that “non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations”, unless “the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive”.[[92]](#footnote-92) This provision is important as it enables governments to adopt non-discriminatory, proportionate measures regarding, for instance, public health in the form of rules on sale of tobacco products without – in principle - having to fear that such measures are judged to be in violation of the trade agreement. Instead of merely stating that states retain the right to regulate, this provision actually could ensure that this right does not form an empty shell.

The provision is largely in line with UNCTAD’s Investment Policy Framework for Sustainable Development, launched in 2012 and updated in 2015, which is intended to serve as a reference point for policymakers in formulating new investment policies.[[93]](#footnote-93) The framework stresses that a balance is to be achieved between the rights of investors and that of the host state, and as one of the options to achieve this, it is set out that it may be appropriate to exclude from a treaty's scope specific areas of public policy.[[94]](#footnote-94)

Without such detailed provisions, in the past the right to regulate was severely limited in practice. Art. 1114 NAFTA (Environmental Measures) sets out that nothing in the Investment Chapter shall be construed to “prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.” That right to regulate provision did not stand in the way of an award of $16,7 million in the case of the US company Metalclad against Mexico when it was not allowed to start the operation of a hazardous waste landfill site that it had constructed.[[95]](#footnote-95) Nor did Art. 1114 NAFTA prevent an award of €5.6 million to the US waste treatment company S.D. Meyers that complained about a Canadian ban on the export of PCBs. This was judged to form a violation of the minimum standards of treatment foreign investors must be provided under NAFTA.[[96]](#footnote-96) Also under NAFTA, Canada payed the Ethyl Corporation $13 million in an out-of-court settlement based on a challenge to Canada’s restrictions on the gasoline additive MMT.[[97]](#footnote-97) The same substance is banned in the EU – with the ECJ rejecting claims attacking the validity of this measure.[[98]](#footnote-98) Last but not least, in the Digby Neck case Canadian authorities did not approve of the re-opening of a quarry in line with an environmental impact assessment. This was judged to be a violation of the fair and equitable treatment provision in NAFTA by the majority of the arbiters.[[99]](#footnote-99) The dissenting arbiter called this decision “a remarkable step backwards in environmental protection.”[[100]](#footnote-100)

The academics critical to ISDS/ICS extensively discussed the EU objectives and approach regarding FET under the TTIP. They underline that the main objective of the EU is to clarify the standard, in particular by incorporating key lessons learned from case-law, and in this manner eliminate uncertainty for both states and investors. In this way, a state could only be held responsible for a breach of the FET obligation for breaches of a limited set of basic rights: the denial of justice; the disregard of the fundamental principles of due process; manifest arbitrariness; targeted discrimination based on gender, race or religious belief; and abusive treatment, such as coercion, duress or harassment. The list can be extended where the parties specifically agree to add such elements to the content of the standard, for instance where there is evidence that new elements of the standard have emerged from international law. While subscribing to the need to curtail unwarranted interpretations of FET, the group of academics opposed the notion of introducing a closed list of basic obligations, and to insert a separate clause that purports to limit the doctrine of ‘legitimate expectations’ to instances where those expectations are generated by specific representations, which need not be in writing, made by the host state in order to induce the investment upon which the investor relied when making the investment. In their eyes, history suggests that the Commission’s approach is unlikely to have the desired effect. “States have tried before to curtail the expansive interpretation of FET by explicitly stipulating that it does not require treatment that goes beyond the customary international law minimum standard of treatment of aliens and does not create additional substantive rights. These efforts, however, have turned fruitless in the face of Tribunals’ insistence that, for example, ‘in fact, the Treaty standard of fair and equitable treatment and its connection with the required stability and predictability of the business environment, founded on solemn and contractual commitments, is not different from the international law minimum standard and its evolution under customary law.’ If this line of reasoning is continued, Tribunals will likely consider the doctrine of ‘legitimate expectations’ to flow from – and give meaning to – components of the various ‘basic obligations’ that the Commission proposes, such as ‘due process’ and the prohibition of ‘arbitrariness.’ In that case, the Commission’s efforts to remove the risk of expansive interpretations of the FET standard and the concept of an investor’s ‘legitimate expectations’ will have very little effect.”[[101]](#footnote-101)

The Commission is of the opinion that the new formulations would avoid claims against legitimate public policy measures. A somewhat stricter standard of review than ‘not necessary’ is introduced, notably demanding that only ‘manifestly excessive’ measures could qualify as indirect expropriation. Yet, the arbiters still would be performing a proportionality test and in this way substitute their opinion for that of a democratic government on the relative importance of the purpose the measures at issue seek to achieve, and could perform a cost-benefit analysis and conclude that the costs imposed on investors are ‘excessive.’ The arbiters would be able to assess whether the contested measure ‘substantially advances’ its stated purpose, or whether the impact of a measure is ‘excessive’ in light of its purpose.

Even when considering several awards of investment tribunals, it the group of academics correctly remarked that inserting the proportionality analysis into the definition of what constitutes an ‘indirect expropriation’ is, quite simply, conceptually flawed. “The norm governing direct expropriations demands compensation for takings that are (a) for a public purpose, (b) non-discriminatory, and (c) taken under due process of law. The logical implication is that governments are required to pay compensation for every measure that constitutes an ‘expropriation,’ however laudable and beneficial to a society as a whole the measure may be. This decoupling of the definition of ‘expropriation’ and the purpose and effect of the measure at issue logically works both ways however: the fact that a non-discriminatory measure designed and applied to protect legitimate public welfare objectives may be thoroughly misguided, may be badly designed, may have unfair distributive consequences, or is not rationally suited to achieve those objectives has no bearing whatsoever on the question of whether it constitutes an ‘expropriation’ or has an effect equivalent to expropriation. Under international law, non-discriminatory measures taken in the exercise of a State’s regulatory powers aimed at the general welfare, and which involve the exercise of States’ ‘police powers’, are simply not ‘expropriations’ requiring compensation.”[[102]](#footnote-102)

## 3.3 Exclusive competence CJEU regarding non-contractual liability of the EU

Articles 268 and 340 TFEU confer on the CJEU the exclusive competence to rule on the non-contractual liability of the EU. If the EU concludes international agreements like CETA and TTIP, these become part of EU, ranking above secondary, but below primary EU law. While article 340 does not preclude the EU from incurring responsibility for violations of an international agreement, introducing ISDS or ICS mechanisms by way of an international agreement and thus robbing the CJEU of its exclusive competence on this matter could be contrary to EU law.

While article 340 TFEU sets out that in the case of non-contractual liability, the Union shall make good any damage caused by its institutions in accordance with the general principles common to the laws of the Member States, the CJEU has spelled out a number of conditions that must be met. Claims for reparation of damages regarding unlawful acts are only successful if ‘a sufficiently flagrant violation of a superior rule of law for the protection of the individual interest’ has occurred, i.e. when the EU ‘manifestly and gravely disregarded the limits on its discretion’.[[103]](#footnote-103) The CJEU takes the complexity of the situations to be regulated, difficulties in the application or interpretation of the legislation and, more particularly, the margin of discretion available to the author of the act in question into account when judging on liability issues.[[104]](#footnote-104) Where liability for lawful acts is concerned, the Court pointed out that this is only recognised in two Member States, and that ‘exercise of the legislative function must not be hindered by the prospect of actions for damages whenever the general interest of the Community requires legislative measures to be adopted which may adversely affect individual interests.’ It also explained that the legislator’s wide discretion is essential for implementing a Community policy, and that hence the Community cannot incur liability unless the institution concerned has ‘manifestly and gravely disregarded the limits on the exercise of its powers’. It therefore found that ‘a Community legislative measure whose application leads to restrictions of the right to property and the freedom to pursue a trade or profession that impair the very substance of those rights in a disproportionate and intolerable manner, perhaps precisely because no provision has been made for compensation calculated to avoid or remedy that impairment, could give rise to non-contractual liability on the part of the Community’.[[105]](#footnote-105) From this case it follows that the CJEU accepts that EU acts that are lawful under EU law can still lead to the duty to compensate, but only under very strict conditions. It also shows that the CJEU is opposed to curtailing the discretion of the legislator in a manner which would bring about a regulatory chill effect. As discussed above, the possibility that ISDS/ICS causes such an effect is not merely hypothetical. Where this already holds true for economic legislation, a similar or even a more stringent ‘exceptional circumstance test’ should also apply when facing legislative choices in the public interest, Govaere submits.[[106]](#footnote-106) Ankersmit adds that while ISDS mechanisms can formally be distinguished from article 340 TFEU, still the exclusive jurisdiction of the CJEU is likely to be affected through ISDS because investors could rely exclusively on international agreements with lower standards.[[107]](#footnote-107) The inclusion of ISDS could infringe the principle of institutional balance of article 13(2) TEU as the EU legislator would delegate one of the powers of the Court to investment tribunals without adequately respecting the ECJ's competences.[[108]](#footnote-108) It will be interesting to see whether the CJEU will follow this line of reasoning when answering the questions that will be put to it by Belgium, provided the questions allow the Court to expand on these issues.

## 3.5 Independency ICS

Under CETA’s ICS, the judges possess the power to decide cases that affect fundamental issues like whether public policy measures adopted by democratically elected legislators in EU Member States or in the EU aimed at protecting the greater good are only allowed when investors receive compensation. It is thus of the utmost importance that the ICS judges are democratically legitimised.

The new ICS judges will be appointed by the CETA Joint Committee, according to art. 8.27(2) CETA. The latter body consists of ‘representatives of the European Union and representatives of Canada’ and is ‘cochaired by the Minister for International Trade of Canada and the Member of the European Commission responsible for Trade, or their respective designees’ (art. 26.1(1) CETA). The treaty does not specify how many members the Committee will have, how they are elected and whether representatives of (some of) the Member States will be in it.

Although a step forwards compared to *ad hoc* private arbiters under the old ISDS system, the democratic accountability of the new permanent dispute settlement body still suffers from serious shortcomings, as set out in detail notably by the academic community in its reaction to the Commission’s public consultation.[[109]](#footnote-109)

## 3.6 Need for ISDS / ICS between EU & USA / Canada?

Under ISDS/ICS systems, host states that have a dispute with foreign investors are required to outsource the resolution of the case to arbiters. In this way, rule of law challenges (like biased or corrupt judges) in the host states’ judicial systems can be circumvented. Given the state of the legal system in large parts of the world (not limiting ourselves to developing countries) this makes sense. Which begs the question: do we need to include ISDS in the TTIP and CETA? The US, Canadian and EU legal systems are among the most advanced systems of the world.

Investments from the U.S.A. and Canada in the EU already amounted to 1810.8 and 165.9 billion Euro respectively in 2014, without an EU investment protection regime like the ones envisaged in the TTIP and CETA in place. One argument frequently encountered from the side of ISDS/ICS proponents is that many of the BITs that the EU wants to replace already contain ISDS provisions. What that argument ignores, however, is that where the relationship between the USA and the EU Member States is concerned, not a single BIT with any of the original EU-15 member states exists. Friendship, Commerce and Navigation Treaties (FCNTs) do exist between the USA and several of these EU states. These FCNTs cover, amongst other things, investment protection, but do not contain an ISDS mechanism.[[110]](#footnote-110) Hence, there have not been any ISDS cases between a U.S. company and one of these original EU states under BITs.[[111]](#footnote-111) Only from the 1990s onwards, BITs were concluded between the U.S.A. and a number of Eastern European countries that joined the EU at a later stage.[[112]](#footnote-112) Apparently, the need to regulate investment protection with these countries with their economies and law systems in transition was necessary. In other words: the USA probably did not trust their legal systems, and there might have been good reasons for that at the time - and in some cases maybe some of those reasons remain. U.S. investors initiated six cases against Poland and Romania (respondents in three cases each) in the period 2003-2013.[[113]](#footnote-113)

The former communist countries that concluded BITs with the U.S.A. later on joined the EU after extensive reforms of their legal systems. In principle, that means that there is as little need for ISDS/ICS as there is for such a method of dispute settlement with the rest of the EU member states.[[114]](#footnote-114) Joining the European Union means that the rule of law systems should meet EU requirements. In some cases, the conditions were not applied as strict as they should have, as political reasons to speed up the accession process overruled the process. While remaining challenges in the legal systems of some of the newcomers thus cannot be denied, and new ones can and are emerging, it still is not self-evident that ISDS/ICS provisions need to form a part of the new agreements that the EU aims to conclude with the USA and with Canada. Merely pointing out that ISDS has been a part of BITs traditionally, when that tradition only started during the turbulent 1990s, does not suffice in this respect, especially not where only about one third of the current EU Member States has BITs in place with the U.S.A, while two thirds does not. With Kokott and Sobotta it can be agreed that “[t]hough EU law does not impose trust in the legal system of third states, there could be specific third states where the legal system already provides sufficient investor protection and, therefore, does not justify special privileges for investors.”[[115]](#footnote-115)

Marco Bronckers proposes the argument that we cannot expect the USA to rely on EU domestic courts. Interestingly enough, he refers to Germany in this respect. Foreign investors in that country do not have the same legal protection as domestic investors, he states[[116]](#footnote-116) - referring to an article by Reinhard Quick. In his turn, that author does not actually build the argument, but instead refers to Stephan Schill’s blog.[[117]](#footnote-117) There, it is argued that Art. 19(3) of the German constitution (Grundgesetz, GG) stands in the way of foreign investors invoking that constitution and addressing the German constitutional court (Bundesverfassungsgericht, BVerfG).Art. 19(3) GG states that the basic rights “shall also apply to domestic artificial persons to the extent that the nature of such rights permits.”[[118]](#footnote-118) When accusing the German law system of discrimination, a more in-depth discussion of the issue at hand would seem advisable. This paper does not form the place for such a discussion, but some remarks seem at place. First of all, a company active in Germany with an American investor might very well qualify as a 'domestic artificial person' itself and could bring a claim to the BVerfG. Furthermore, it can be noted that the BVerfG has already allowed legal persons from other EU Member States to invoke the same protection as German companies.[[119]](#footnote-119) In itself, the latter point might not help US companies, but there might actually be yet another way in which exactly those legal persons could still successfully bring a claim under the German constitution. The 1956 U.S.-FRG Treaty of Friendship, Commerce and Navigation[[120]](#footnote-120) affords U.S. investors national treatment and might be invoked in order to ensure that they receive the same protection as German companies. The relevant provision in this treaty (Article V) also specifies that neither Party shall take unreasonable or discriminatory measures that would impair the legally acquired rights or interests within its territories of nationals and companies of the other Party in the enterprises which they have established, in their capital which they have supplied, and prescribes that the taking of property is only possible for the public benefit, provided that just compensation is paid. The next provision in the treaty (Article VI) makes clear that ‘nationals and companies of either Party shall be accorded national treatment with respect to access to the courts of justice and to administrative tribunals and agencies within the territories of the other Party, in all degrees of jurisdiction, both in pursuit and in defence of their rights.’ Hence, from this treaty it looks like U.S. investors should have no problems to bring their cases, even to the German Constitutional Court.[[121]](#footnote-121) Last but not least, the US Department of State itself assures us that there are no legal challenges for US companies operating in Germany: “The German legal, regulatory and accounting systems can be complex, but are transparent and consistent with international norms. Businesses enjoy considerable freedom within a well regulated environment. Investors are treated equally when it comes to investment incentives, establishment, and protection of real and intellectual property.”[[122]](#footnote-122) In sum – it seems as if US companies do not have any particular problem with German law, and the problem raised in Stephan Schill’s blog post might be merely academic.

From the point of view of the EU’s own better regulation initiative, the different options of this aspect of EU external policy should have been investigated and weighed against each other right at the start. The Australian policy of investigating in each separate case whether or not there exists a need for ISDS should have formed the basis for the EU decision as well. What is more, on the outside, the EU committed itself years ago to carry out an open and transparent process of the different elements of planned new trade agreements with the help of Trade Sustainability Impact Assessments (Trade SIAs). These assessments are carried out by independent consultants who make recommendations regarding the pro’s and cons of aspects of the envisaged agreements. As part of the process, the consultants engage with stakeholders, including civil society organisations, and are to take their reactions into account. The Commission in its turn is to react to the consultant’s recommendations, and the recommendations and reaction by the Commission are to be used by the negotiators. The whole process is described in a Handbook with specific guidelines on the Trade SIA.

Where TTIP and CETA are concerned the Commission did not properly follow its own guidelines. First of all, deadlines were not respected. The draft TTIP Trade SIA appeared only by May 2016 – shortly before the envisaged end of the negotiations and thus too late to play any meaningful role in these negotiations, as the guidelines prescribe, and was only finalised in February 2017.[[123]](#footnote-123) The Commission’s reaction only appeared at the end of March 2017.[[124]](#footnote-124) The substance of the reaction leaves a lot to be desired as well. For instance, the reaction assumes that it is reasonable to expect that the predicted negative effects of TTIP on climate change will be mitigated by the environmental and energy policies of both parties, because “both the EU and the US are committed to significant action on climate change, in particular via the 2015 Paris Agreement.”[[125]](#footnote-125) With all due respect, the Commission’s view on U.S. climate and energy politics as expressed here borders on delusion, considering the Trump administration’s support for fossil fuels, scepticism towards climate change, and voiced intentions to possibly withdraw from the Paris Agreement.

Where fossil fuels are concerned, the Commission sets out that it “would be important to look at the environmental credentials of US sources of gas and compare them to those of the energy sources it may replace in the EU, before considering whether or not imported gas from the US may be more environmentally beneficial.”[[126]](#footnote-126) Indeed, the Trade SIA correctly noted that the real emissions of shale gas production are a source of controversy, “as the level of fugitive methane emissions could offset any CO2 gains.”[[127]](#footnote-127) Most gas produced in the US is shale gas. Whether and how the EU could manage to limit imports of shale gas because of the way the gas is produced is not touched upon.

Similar points can be made regarding the CETA Trade SIA. While it did appear in time, its recommendations regarding ISDS were more or less ignored, and on top of that the Commission’s official reaction to the recommendations in the Trade SIA that should appear shortly afterwards in order for the negotiators to take this reaction into account, only appeared when the negotiations were concluded already, in April 2017.[[128]](#footnote-128) In other words, both where TTIP and CETA are concerned the process was not in line with the Commission’s own guidelines, and demonstrated that the system that is designed to allow for better decision making and public participation is not functioning properly. A solution could be to transform the guidelines into legislation with possibilities for judicial action in cases where the Commission does not follow the rules.

Another manner to improve EU trade agreements would be following the already mentioned Australian example where the ISDS element in concerned. For a while, Australia decided against the inclusion of ISDS provisions in its trade agreements with other countries, [[129]](#footnote-129) but a new conservative coalition government that was elected in 2013 introduced an *ad hoc* approach where ISDS is concerned. It has entered into free trade agreements that include ISDS, notably with China, but also concluded agreements without ISDS where the circumstances did not require this. This brings us to the ‘China problem’ – the idea that agreement like the TTIP or CETA without ISDS/ICS provisions would stand in the way of the possibility to conclude an EU-China agreement with such provisions.

The CETA and TTIP are often regarded as test cases for future EU trade and investment treaties with other countries or regional economic organisations. As the EU competence to conclude investment treaties was only introduced through the Treaty of Lisbon, the EU is entering new territories here. Future investment treaties can be concluded with states in which the rule of law is less secured than it is in Canada and the USA, for instance because the independency of the judiciary is not ensured. In such cases, it might be important that agreements with such states will include some form of ISDS/ICS provisions. However, if TTIP would not include ISDS, it is claimed that it might be difficult or even impossible to convince other states to accept this. This is usually referred to as the ‘China problem’. Negotiations between the EU and this country started at the end of 2013.[[130]](#footnote-130) Yet the China-Australia FTA (ChAFTA) that entered into force on 20 December 2015 contains ISDS provisions, in spite of the fact that Australia considers ISDS provisions in FTAs on a case-by-case basis and Australia’s FTAs with other countries, including those with the US and Japan, [[131]](#footnote-131) lack ISDS provisions. In other words: China did not oppose the insertion of ISDS provisions because of the absence of such provisions in the Australia-US FTA (AUSFTA).[[132]](#footnote-132)

Even if it is an extra hurdle to take, ISDS/ICS is to be introduced in investment treaties only in those cases where this the benefits of doing so outweigh the negative aspects. Following the example of Australia, this can be decided on a case by case, *ad hoc* basis.[[133]](#footnote-133) The same example shows that this does not have to stand in the way of concluding an agreement with China that includes ISDS/ICS provisions. Doing so would be in line with the EU policy of better regulation, which demands an evidence based approach.

# 4 Concluding remarks

The EU obliged itself to ensure that protection of the environment would be integrated in its trade and investment policy. Considering the manner in which investor protection with ISDS has worked out in the past, as exemplified in the awards rendered by numerous arbiters so far and the manner in which the mere possibility to instigate claims can cast a regulatory chill on legislators aiming to protect public interests in a non-discriminatory manner, and the lack of evidence proposed to demonstrate the advantages of ISDS/ICS in TTIP and CETA, it is safe to say that the current ISDS system does not strike a fair balance between the interests of investors and that public interest.

Upon examining the changes proposed by the European Union to the investment chapter in TTIP (and noting that it is still far from certain that the U.S.A. will agree to the kind of investment protection rules and an ICS, if it ever comes to the conclusion of a TTIP)[[134]](#footnote-134) and those meanwhile accepted to be a part of CETA, the same conclusion can also be drawn where the new ICS is concerned, in spite of the improvements it would bring compared to ISDS. The compatibility of the ICS with EU law is far from certain. The fact that the Lisbon Treaty provided the EU with exclusive competences on investment protection does not automatically mean that it is also competent to introduce the possibility for foreign investors to circumvent EU domestic courts and the CJEU to protect their rights under a new treaty. Whether or not the critics that underline the incompatible aspects of the ICS are right can easily be discerned by making use of an instrument designed especially for this purpose, namely article 218(11) TFEU which allows Member States, the European Parliament, the Council or the Commission to ‘obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties’. The fact that the this matter has not yet been put to the CJEU is troubling in the light of the existing doubts. The opinion on the Singapore Agreement that was asked for by the European Commission concentrates on competences.[[135]](#footnote-135) Hopefully Belgium will be asking the right questions after the pressure put upon that EU member state by the Walloon region.

It was argued that when investor-state dispute settlement mechanisms were added to BITs, arbiters started to pronounce awards in which they did not grant the authorities of host states the discretion that national courts and the CJEU grant them when adopting measures aimed the protection of public interests. What is more, clauses like ‘fair and equitable treatment’ in the agreements offering mandatory ISDS mechanisms were often explained in manners that favoured investors over legitimate public policies. The new wording used in CETA and TTIP brings about some improvements in this respect but still contain important flaws.

ISDS has been around only for a relatively short while, there exists only limited experience with this type of dispute settlement, and a large part of the claims ends with investors receiving compensation of reaching settlements that could be to the detriment of the protection of public interests and stand in the way of achieving the Paris Agreement goals. Hence, a careful weighing of the pros and cons of ISDS/ICS is called for, depending on the circumstances at hand, notably in case a treaty between developed states with court systems that overall function well. It was also demonstrated that it is possible to follow such an approach, instead of insisting on inclusion of ISDS or ICS in all agreements just to make sure that the mechanism is accepted by China in a future agreement with that country, as the example of Australia shows. Furthermore, the argument was examined that in Germany foreign investors are discriminated against, and thus ISDS/ICS would be necessary in TTIP and CETA. A closer look at these arguments showed that Germany’s judiciary in practice does not seem to cause problems for foreign investors. It was also set out that claims that ISDS has been around since 1957 are besides the truth. In reality, ISDS only emerged in some treaties between developed and developing states in the 1970s and became dominant only in the 1990s.

The TTIP and CETA negotiations show that with the right amount of pressure from the public, the Commission is willing to propose amendments that certainly improve the situation when compared to traditional BITs. It was investigated whether the proposed ICS system that amends the originally foreseen ISDS system sufficiently remedies the challenges from the point of view of EU law and the EU’s obligations to integrate environmental protection requirements stimulating sustainable development into its trade and investment policies. It is submitted that while improvements are clearly visible, more should be done in order to ensure that the references to sustainable development in the preamble and in the trade and sustainability chapters are effectuated. Furthermore, it was argued that the reformed ISDS mechanism as proposed by the Commission for TTIP and inserted in the CETA does not sufficiently resolve the issue of the compatibility of the mechanism with the EU system because the obstacles of the autonomy of the EU legal order and the monopoly of the CJEU on EU law questions remain with the change in the institutional framework.

While ISDS/ICS awards do not overrule domestic regulation, the practical effect can be similar. At a time when the EU, Canada and the U.S.A. have agreed that radical steps need to be taken in order to fight climate change, it is hard to see how ISDS/ICS provisions that could make it more difficult to adopt climate change and other public policy measures are acceptable. Only by inserting carve-outs like the one in the CETA regarding non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment. It is set out in CETA that such measures in principle do not constitute indirect expropriations, meaning that investor complaints against such measures would be fruitless. Unfortunately, the arbiters/judges are still left to decide whether “the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive”, in which case compensation is due after all – which provides them a seat that should be reserved to democratically elected legislators.

The internal guidelines regarding trade negotiations should be observed, and turned into binding legislation. Last but not least, the necessity and proportionality of ISDS/ICS clauses in trade and investment agreements should be examined carefully by the EU, following the EU’s own better regulation, evidence based policy as well as the *ad hoc* Australian approach to the question whether or not to include such mechanisms in trade agreements.

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1. See for instance the letter signed by over 220 law and economics professors from the USA, claiming that the ISDS system (in TPP) “undermines the important roles of our domestic and democratic institutions, threatens domestic sovereignty, and weakens the rule of law”. ‘220+ Law and Economics Professors Urge Congress to Reject the TPP and Other Prospective Deals that Include Investor-State Dispute Settlement (ISDS)’ (2015) *citizen.org*, <www.citizen.org/documents/isds-law-economics-professors-letter-Sept-2016.pdf>. [↑](#footnote-ref-1)
2. For instance the European Association of Judges, ‘Statement on the proposal from the European Commission on a new investment court system’ (2015) *International Association of Judges*, available at <www.iaj-uim.org/iuw/wp-content/uploads/2015/11/EAJ-report-TIPP-Court-october.pdf> (expressing ‘serious reservations’), 120 European academics*, ‘*Statement of Concern about Planned Provisions on Investment Protection and Investor-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership (TTIP)’ *Kent Law School*, <www.kent.ac.uk/law/isds\_treaty\_consultation.html> and some 100 professors and other representatives of the European legal community, ‘Legal Statement on investment protection and investor-state dispute settlement mechanisms in TTIP and CETA’, October 2016,

   <https://stop-ttip.org/wp-content/uploads/2016/10/13.10.16-Legal-Statement-1.pdf>. [↑](#footnote-ref-2)
3. For instance the Dutch Social and Economic Council (SER), [‘TTIP Transatlantic Trade and Investment Partnership’](file:///C:\Users\Wybe\OneDrive\Documents\www.ser.nl\~\media\files\internet\talen\engels\2016\ttip.ashx) (2016) SER Advisory Report 16/04E, 95, L Ankersmit, ‘The Compatibility of Investment Arbitration in EU trade Agreements with the EU Judicial System’ (2016) 14 *Journal for European Environmental & Planning Law* 46, J Kokott and C Sobotta, ‘Investment Arbitration and the EU law’ (2016) *Cambridge Yearbook of European Legal Studies* 1, M Krajewski and R T Hoffmann, ‘The European Commission’s Proposal for Investment Protection in TTIP’ (2016) and I Govaere, ‘TTIP and dispute Settlement: potential consequences for the autonomous EU legal order’ (2016), Collège d’Europe Research Paper in Law 01/2016. Meanwhile, the Legal Services of European Parliament, ‘Legal opinion on compatibility with the Treaties of investment dispute settlement provisions in EU trade agreements’ (2016) reaches a different conclusion.

   <www.fes-europe.eu/fileadmin/public/editorfiles/events/Juni\_2016/FES\_2017plus\_Krajewski\_ENGL.pdf> and M Marwedel, ‘”Reformierter” Investitionsschutz in TTIP: Zwei Schritte voran – und gegen die Wand’, Verfassungsblog 3 December 2015, <verfassungsblog.de/reformierter-investitionsschutz-in-ttip-zwei-schritte-voran-und-gegen-die-wand>. [↑](#footnote-ref-3)
4. J-C Juncker, ‘A new start for Europe’ Political guidelines for the next European Commission, 15 July 2014, <<https://groenlinks.nl/sites/default/files/downloads/newsarticle/PG_EN.pdf>>. Juncker also said he does not understand why great democracies would not have faith in the judiciary: “We have courts which are able to deal with cases that are brought to them, and so I’m not really in favour of what one could call “private courts” or arbitration bodies which may sometimes reach good decisions but don’t always have to justify their decisions.” S McKeagney, ‘Juncker to take ISDS out of TTIP’, 16 October 2014, <ttip2016.eu/blog/ISDS%20out%20Juncker.html>. [↑](#footnote-ref-4)
5. The so-called Trade Sustainability Impact Assessment, discussed in more detail below. [↑](#footnote-ref-5)
6. The original 2009 negotiating directives, as well as a 2011 modification to allow for talks on investment protection, were partially made public only on 15 December 2015. See <www.consilium.europa.eu/en/press/press-releases/2015/12/15-eu-canada-trade-negotiating-mandate-made-public/>. [↑](#footnote-ref-6)
7. See <trade.ec.europa.eu/doclib/docs/2014/september/tradoc\_152806.pdf>. [↑](#footnote-ref-7)
8. Proposal for a Council Decision on the provisional application of the Comprehensive Economic and Trade Agreement between Canada of the one part, and the European Union and its Member States, of the other part, [COM(2016)470](http://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-470-EN-F1-1.PDF) of 5 July 2016. [↑](#footnote-ref-8)
9. A Ericsson, ‘EU admits 'unrealistic' to close TTIP deal this year’, EU Observer 23 September 2016, <https://euobserver.com/economic/135217>. An earlier Presidency’s compromise proposal dated 16 September 2016 can be found at <<https://www.scribd.com/document/325493614/Draft-Council-Decision-on-the-Provisional-Application-of-CETA#download>> and reveals that … [↑](#footnote-ref-9)
10. BVerfG, Urteil des Zweiten Senats vom 13. Oktober 2016 - 2 BvR 1368/16 - Rn. (1-73),

    <www.bverfg.de/e/rs20161013\_2bvr136816.html> . The courts reservations regarding investment protection probably are linked to the fact that the chapter covers both foreign direct investment (FDI) and portfolio investment. According to the Commission, the EU is competent to conclude agreements covering all these matters, including portfolio investment (in accordance with art. 3(2) TFEU, the existing common rules on free movement of capital and in particular art. 63 TFEU, see [answers by Commissioner De Gucht on behalf of the Commission of 3 November 2014](http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2014-007127&language=EN)). Besides Chapter 8 and 13 on investment protection and financial services respectively, other areas where the constitutional court expects the German government to ensure that provisional application is not agreed to include international maritime transport services (Chapter 14) and mutual recognition of professional qualifications (Chapter 11). [↑](#footnote-ref-10)
11. Financieel Dagblad, [Wallonië zegt nee tegen EU-verdrag met Canada](https://fd.nl/economie-politiek/1171394/wallonie-zegt-nee-tegen-ceta), 14 October 2016. [↑](#footnote-ref-11)
12. Declaration of the Kingdom of Belgium on the conditions regarding the powers of the federal state and the regional states for the signing of CETA. [↑](#footnote-ref-12)
13. P J Kuijper, ’Study on investment protection agreements as instruments of international economic law’, in: European Parliament, Directorate-General for External Policies of the Union, Investor-state dispute settlement (ISDS) provisions in the EU’s international investment agreements (Study), Vol. 2 – studies (2014), 33. [↑](#footnote-ref-13)
14. Compare the MEP [questions](http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fTEXT%2bWQ%2bE-2016-007422%2b0%2bDOC%2bXML%2bV0%2f%2fEN&language=EN) on the possibility to challenge climate change decisions under ICS in CETA of 30 September 2016. [↑](#footnote-ref-14)
15. Belgium will request such an opinion under art. 218(11) TFEU, where it is stipulated that in case the opinion of the Court is adverse, the agreement envisaged may not enter into force, unless it is amended or the Treaties are revised. [↑](#footnote-ref-15)
16. F Bermingham, ‘TTIP: Germany accused of hypocrisy over opposition to ISDS clause’, *International Business Times* (6 November 2014), <www.ibtimes.co.uk/ttip-germany-accused-hypocrisy-over-opposition-isds-clause-1473566> , ‘Investor-State Dispute Settlement: the Arbitration Game’, *The Economist* (11 October 2014), available at <[www.economist.com/news/finance-and-economics/21623756-governments-are-souring-treaties-protect-foreign-investors-arbitration](http://www.economist.com/news/finance-and-economics/21623756-governments-are-souring-treaties-protect-foreign-investors-arbitration)> and American Chamber of Commerce, Belgium, ‘7 Surprising things about ISDS’ (2015), available at <www.amcham.be/blog/2015/04/7-surprising-things-about-isds>. [↑](#footnote-ref-16)
17. C Tietje, F Baetens and Ecorys, ‘The Impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership’ (2014), study for Ministry of Foreign Affairs, The Netherlands, 21. <https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/rapporten/2014/06/24/the-impact-of-investor-state-dispute-settlement-isds-in-the-ttip/the-impact-of-investor-state-dispute-settlement-isds-in-the-ttip.pdf>. The authors claim that: ‘Beginning in the mid-20th Century (…) BITs supplemented state-to-state dispute settlement by allowing investors to directly bring claims against host states.’ [↑](#footnote-ref-17)
18. K. Vanlouwe (N-VA) in a debate in the Commission for Foreign Policy, European Affairs, International Cooperation etc. of the Flemish Parliament, 17 May 2016, <https://www.vlaamsparlement.be/commissies/commissievergaderingen/1058503/verslag/1059820> . [↑](#footnote-ref-18)
19. See A Titi, ‘The right to regulate in international investment law’ (2014). [↑](#footnote-ref-19)
20. [Treaty for the Promotion and Protection of Investments between the Federal Republic of Germany and Pakistan](http://www.iisd.org/pdf/2006/investment_pakistan_germany.pdf), signed on 25 November 1959, UNTS 1963, 24. [↑](#footnote-ref-20)
21. ‘Agreement on economic co-operation between the Government of the Kingdom of the Netherlands and the Government of the Republic of Kenya’ (1970), Article XI, <wetten.overheid.nl/BWBV0004287/1979-06-11> (‘The Contracting Party in the territory of which a national of the other Contracting Party makes or intends to make an investment, shall give sympathetic consideration to a request on the part of such national to submit, for conciliation or arbitration, to the Centre established by the Convention of Washington of 18 March 1965, any dispute that may arise in connection with the investment.’). [↑](#footnote-ref-21)
22. M Schaake, ‘ISDS - what's going on?’ (*marietjeschaake.eu*, 19 November 2014)*, <*marietjeschaake.eu/nl/isds-whats-going-on>. [↑](#footnote-ref-22)
23. Agreement on economic cooperation between the Kingdom of the Netherlands and the Republic Indonesia (7 July 1968), provisionally applied from the date of signature, entry into force 17 July 1971. See [<investmentpolicyhub.unctad.org/Download/TreatyFile/3329](http://investmentpolicyhub.unctad.org/Download/TreatyFile/3329)>. See J W Salacuse, The law of investment treaties, 2d edition (2015), 103. Other early examples of agreements with ISDS are the Belgian/Luxembourg-Indonesia BIT (1970), the Malaysia-Netherlands BIT (1971), the Morocco-Netherlands BIT (1971)), and the France-Tunisia BIT (1972). [↑](#footnote-ref-23)
24. H Lenk 'Investor-state arbitration under TTIP: resolving investment disputes in an (autonomous) EU legal order' (June 2015) 2 *Sieps*, 20, <www.sieps.se/sites/default/files/Sieps 2015\_2 web.pdf>. [↑](#footnote-ref-24)
25. Notably Bolivia, Ecuador, South Africa, Indonesia and India. See R Abbott et. al., ‘Demystifying Investor-State Dispute Settlement (ISDS)’ (2014) *ECIPE Occasional Paper 5*, (Abbott et al. 2014)(Abbott et al. 2014)<ecipe.org/publications/isds/>.<ecipe.org/publications/isds/>. [↑](#footnote-ref-25)
26. Such as the China-Australia Free Trade Agreement, Ch 9 section B. [↑](#footnote-ref-26)
27. Arbitrations can be kept confidential under certain circumstances, hence the actual number of disputes is likely to be higher. [↑](#footnote-ref-27)
28. Sources: <ec.europa.eu/trade/policy/countries-and-regions/countries/united-states> and <ec.europa.eu/trade/policy/countries-and-regions/countries/canada> , data on 2014; accessed 1 Oct. 2016. [↑](#footnote-ref-28)
29. Notably Bulgaria, Italy and Spain. In 2013, that percentage was lower, namely some 25%, and concerned Spain and the Czech Republic. [↑](#footnote-ref-29)
30. *Transcanada* v *USA.* Canadian companies complain about U.S. authorities not granting them a permit to construct the Keystone XL Pipeline from Canada to the U.S.A. that would transport tar sands oil. According to the investors, this amounts to a violation of several NAFTA provisions, notably those on non-discrimination, and they demand US$ 15 billion in damages. The U.S.A. decided not to grant the permit because of climate policy reasons. While some say there would be no significant effect, others claim the pipeline could lead to 935 million ton extra CO2 emissions over the coming 5 decades. See <[www.keystone-xl.com/wp-content/uploads/2016/01/TransCanada-Notice-of-Intent-January-6-2016.pdf](http://www.keystone-xl.com/wp-content/uploads/2016/01/TransCanada-Notice-of-Intent-January-6-2016.pdf)>, www.italaw.com/sites/default/files/case-documents/italaw7407.pdf and D Biello, ‘How much will tar sands oil add to global warming’, Scientific American 23 January 2013, <www.scientificamerican.com/article/tar-sands-and-keystone-xl-pipeline-impact-on-global-warming>. [↑](#footnote-ref-30)
31. *Gabriel Resources Ltd. and Gabriel Resources (Jersey)* v. *Romania* (ICSID Case No. ARB/15/31). The Canadian gold exploration companies filed an ICSID claim against Romania in 2015. The investor was granted a licence to develop a mine in 1997, but subsequently failed to receive an approval of the environmental impact assessment and to obtain the environmental permit required to start exploitation of the project. The mine was to use cyanide to extract gold, causing wide opposition in the country that had witnessed the disastrous effects of the Baia Mare cyanide spill of 2000, which also affected Hungary and Serbia. The European Court of Human Rights later on held that the Romanian authorities’ failure to protect the applicants who lived in the vicinity of the Baia Mare gold mine violated their right to respect for private and family life (ECtHR, Application No 67021/01, *Tatar* v. *Romania*, 27 January 2009). [↑](#footnote-ref-31)
32. ICSID Case nr. ARB/09/12, *Pac Rim Cayman LLC* v *El Salvador*, award in favour of state issued 14 October 2016, see <www.ciel.org/wp-content/uploads/2016/10/PacRimVElSal-award.pdf>. [↑](#footnote-ref-32)
33. PCA Case No. 2009-04 *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc.* v *Canada* , <www.italaw.com/cases/1588>. [↑](#footnote-ref-33)
34. Case No. ARB (AF)/97/1 *Metalclad Corporation* v. *United Mexican States*. See fn. 70 below. [↑](#footnote-ref-34)
35. *Vattenfall* v *Germany* I, ARB/09/6. Germany had imposed conditions in the water permit regarding the impact of the coal-fired power plant on the water of the river Elbe, which according to the investor were so strict that the whole project became ‘unviable’ in violation of the ECT rules on protection of investments, and probably claimed compensation, the amount of which remains unknown as the arbitration was kept confidential, but is rumoured to be 1.4 billion Euro. A settlement was reached under which Germany lowered its conditions. See N Bernasconi, ‘Background paper on Vattenfall v. Germany arbitration’, (2009) IISD <www. iisd.org/pdf/2009/background\_vattenfall\_vs\_germany.pdf> and Investment Arbitration Public Policy, ‘*Vattenfall* v *Germany* (Energy Charter Treaty)’, <iiapp.org/media/uploads/vattenfall\_v\_germany.rev2.pdf>. [↑](#footnote-ref-35)
36. In the *Lone Pine Resources Inc.* v *Canada* case (ICSID Case No. UNCT/15/2), the Government of Quebec’s ‘arbitrary, capricious, and illegal revocation of the Enterprise’s valuable right to mine for oil and gas under the St. Lawrence River’ forms a violation of NAFTA according to the investor, notably because Quebec decided to a impose a moratorium on the drilling for shale gas on its territory, “without due process, without compensation, and with no cognizable public purpose” and in violation of the obligation to ensure “fair and equitable treatment”. Lone Pine claims compensation for damages of up to 250 million US$. See <www.italaw.com/sites/default/files/case-documents/italaw1596.pdf>. [↑](#footnote-ref-36)
37. *Occidental* v *Ecuador* (ICSID Case No. ARB/06/11. Also see fn. 31 below. [↑](#footnote-ref-37)
38. *Philip Morris Asia* v *Australia*, PCA Case No. 2012-12, Award on jurisdiction and admissibility 17 December 2015, <https://www.pcacases.com/web/sendAttach/1711>. Philip Morris had claimed the measure constitutes an expropriation of its Australian investments in violation of the ‘1993 Agreement between the Government of Australia and the Government of Hong Kong for the Promotion and Protection of Investments’ (1993) 30 *Australian Treaty Series* < www.austlii.edu.au/au/other/dfat/treaties/1993/30.html>, that it forms an unreasonable and discriminatory measure, and that investments have been deprived of full protection and security. The arbitral tribunal declined jurisdiction to hear the case, because the company restructured to Hong Kong in order to benefit from the BIT this country had in place with Australia at a moment in time when the dispute was already foreseeable. This constitutes an abuse of right, or abuse of process (Award, para 585). In the *Philip Morris* v *Uruguay* dispute (ICSID Case No. ARB/10/7), an award discussing the merits of the case was issued on 8 July 2016. The arbiters found that increasing the size of graphic health warnings on cigarette packages and the ban on marketing more than one variant of cigarette per brand family did not violate the Uruguay-Switzerland BIT, rejected all claims and ordered the investor to pay all costs of the proceeding (nearly 1.5 million US$, plus 7 million US$ to Uruguay on account of its own costs. Yet Uruguay still is left with costs it had to make of several million dollars that it does not get back, forming a considerable burden for this country with a mere 3.3 million inhabitants (see <https://www.theguardian.com/global-development/2016/jul/28/who-really-won-legal-battle-philip-morris-uruguay-cigarette-adverts>). Australia still faces challenges against plain packaging in the WTO after Ukraine, Honduras, Indonesia, Dominican Republic and Cuba argued the measure breached Australia’s WTO obligations. [↑](#footnote-ref-38)
39. *Vattenfall* v *Germany* II, ICSID Case No. ARB/12/12. Germany amended its Atomic Energy Act for the thirteenth time (13. AtGÄndG of 31.07.2011, BGBl I S. 1704 (No. 43)). Because of this amendment, Vattenfall was forced to shut down two nuclear power plants, in Brunsbüttel and Krümmel (the latter had not operated since 2007 due to accidents). The Swedish company issued a claim against Germany for reparation of damages that reportedly amounts to 3.7 billion Euro. See N Bernasconi-Osterwalder and R T Hoffmann, ‘The German nuclear phase-out put to the test in international investment arbitration? Background to the new dispute Vattenfall v. Germany (II)’ (2012) *International Institute for Sustainable Development* 2. [↑](#footnote-ref-39)
40. *Ethyl* v *Canada*, NAFTA Case, 1997. The case concerned the banning of importation and interprovincial trade in MMT, because of, *inter alia*, its potential toxic effects. Ethyl demanded over 200 million USD in damages, but in a settlement it agreed to 13 mln USD, with the measure being withdrawn. Source: <investmentpolicyhub.unctad.org/ISDS/Details/16>. In the EU, MMT was banned and a challenge before the EU courts remained unsuccessfull (case C-343/09, *Afton Chemical Limited* v *Secretary of State for Transport*, [2010] ECR I-7027). [↑](#footnote-ref-40)
41. It has been claimed that the decision in the *Philip Morris* v *Australia* case (see fn 24 above) shows that the regulatory chill effect is a myth: see N Lavranos, ‘After Philip Morris II: the “regulatory chill” argument failed – yet again’ (*Kluwer Arbitration Blog,* 18 August 2016) <kluwerarbitrationblog.com/2016/08/18/after-philipp-morris-ii-the-regulatory-chill-argument-failed-yet-again/>. More convincingly, others pointed out that it is premature to claim that the regulatory chill argument failed because of this case – noting that some states that waited for the outcome of the case now might introduce Australia- or Uruguay like tobacco regulations (reaction by L Nottage (22 August 2016), < kluwerarbitrationblog.com/2016/08/18/after-philipp-morris-ii-the-regulatory-chill-argument-failed-yet-again/#comment-21209>). See also I Govaere (fn above), p. 8-11. [↑](#footnote-ref-41)
42. The highest award in an investor-state arbitration case used to be the $2.3 billion awarded to the oil company Occidental, against the government of Ecuador (see fn. 27 above), over its (apparently lawful) termination of an oil-concession contract. See T-H Cheng, ‘ICSID’s largest award in history: an overview of Occidental Petroleum Corporation v the Republic of Ecuador’ (*Kluwer Arbitration Blog*, 19 December 2012) <kluwerarbitrationblog.com/2012/12/19/icsids-largest-award-in-history-an-overview-of-occidental-petroleum-corporation-v-the-republic-of-ecuador/>. More recently, the Yukos award topped all other awards, amounting to 50 billion US dollars. See PCA Case AA226, *Hulley Enterprises (Cyprus)* v *Russia*, final award 18 July 2014, <www.pca-cpa.org/showfile.asp?fil\_id=2722>. Also see A.M. Niebruegge, ‘Provisional application of the Energy Charter Treaty: the Yukos arbitration and the future place of provisional application in international law’ (2007) 8(1) *Chicago Journal of International Law* 355. [↑](#footnote-ref-42)
43. According to an OECD study from 2012, legal and arbitration costs for the parties in ISDS cases averaged over USD 8 million with costs exceeding USD 30 million in some cases. See D Gaukrodger and K Gordon, ‘Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community’, OECD Working Papers on International Investment, 2012/03, <http://dx.doi.org/10.1787/5k46b1r85j6f-en>. [↑](#footnote-ref-43)
44. Up to 2013, some 31% of the cases was decided in favour of the investor, 26% was settled and 43% was decided in favour of states. By 2014, some 25% of the concluded cases was decided in favour of the investor, 28% of the cases was settled and 37% was decided in favour of the State. Source: UNCTAD, Latest development in Investor-State Dispute Settlement (2014) and (2015), <http://investmentpolicyhub.unctad.org/Publications/Details/132>. [↑](#footnote-ref-44)
45. Of the 16 cases, 2 are pending (one of which is the *Keystone XL Pipeline* case discussed below), 1 discontinued, 3 were settled and 10 decided in favour of the U.S.A. [↑](#footnote-ref-45)
46. U.S. companies initiated 145 cases against other countries, which is by far more than in any other country. The Netherlands is nr 2 with 89, and UK nr 3 with 64 cases. 42 of the 145 U.S. cases are still pending or were discontinued; in 56 of the remaining 103 cases, a settlement was reached or the U.S. investor won. Source: UNCTAD ISDS Database, accessed 1 October 2016. [↑](#footnote-ref-46)
47. Canada was respondent in 26 cases. Eight cases are still pending, 6 won, 5 settled (notably the MMT case, see fn 31 above), 4 discontinued and 3 lost. [↑](#footnote-ref-47)
48. An example in the area of public health is the Asian arm of tobacco group Philip Morris suing the Australian government for introducing plain white cigarette packaging at the end of 2011. Philip Morris claims the measure constitutes an expropriation of its Australian investments in violation of the ‘1993 Agreement between the Government of Australia and the Government of Hong Kong for the Promotion and Protection of Investments’ (1993) 30 *Australian Treaty Series* < www.austlii.edu.au/au/other/dfat/treaties/1993/30.html>, that it forms an unreasonable and discriminatory measure. The arbiters declined jurisdiction on 17 December 2015, see <https://www.pcacases.com/web/sendAttach/1711>. [↑](#footnote-ref-48)
49. See P-T. Stoll, W.Th. Douma, N. De Sadeleer and P. Abel, ‘CETA, TTIP und das europäische Vorsorgeprinzip. Eine Untersuchung zu den Regelungen zu sanitären und phytosanitären Maßnahmen, technischen Handelshemmnissen und der regulatorischen Kooperation in dem CETA-Abkommen und nach den EU-Vorschlägen für TTIP’ (German original); ‘CETA, TTIP and the precautionary principle. Legal analysis of selected parts of the draft CETA agreement and the EU TTIP proposals’ (English condensed version), foodwatch, June 2016. [↑](#footnote-ref-49)
50. Compare Council of Canadians, ‘Paris climate summit: New report protects climate legislation from trade deals’ (2015), <http://canadians.org/media/paris-climate-summit-new-report-protects-climate-legislation–trade-deals>, G Van Harten, ‘An ISDS Carve-out to Support Action on Climate Change’, Osgood Hall Law School Legal Studies Research Paper Series, Volume 11, Issue 8, 2015,

    <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2663504> and NRC Handelsblad, ‘Handelsarbitrage vormt risico voor soevereiniteit regeringen’, 10 June 2016, where G Van Harten explains that the ICS proposal forms a small improvement but does not change fundamental challenges that ISDS poses (only foreign investors can bring a claim, they only have rights (notably to public money if their claims are accepted) and no duties); he agrees with the request of Dutch parliament for a carve-out in CETA for Paris Agreement related measures. [↑](#footnote-ref-50)
51. According to NASA, global annual average temperature in 2015 was 0.87 °C higher than before, see <climate.nasa.gov/vital-signs/global-temperature>. [↑](#footnote-ref-51)
52. With CCS techniques, waste carbon dioxide (CO2) from fossil fuel power plants is captured and stored in underground geological formation, preventing it from reaching the atmosphere and allowing for some 80% reduction of CO2 emissions. [↑](#footnote-ref-52)
53. Art. 2 UNFCCC. [↑](#footnote-ref-53)
54. Art. 2(1)(a) Paris Agreement. [↑](#footnote-ref-54)
55. Commission, ‘Towards a comprehensive European international investment policy’ (Communication) COM (2010) 342 final, 9 and 10. Available at <trade.ec.europa.eu/doclib/docs/2010/july/tradoc\_146307.pdf>. It is noted that challenges exist where transparency, consistency and predictability and rules for the conduct of arbitration are concerned. [↑](#footnote-ref-55)
56. See for instance Commission Communication ‘[Smart Regulation in the European Union’](http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52010DC0543), COM(2010)543 final of 8.10.2010, in which it is claimed that ‘regulation must promote the interests of citizens, and deliver on the full range of public policy objectives from ensuring financial stability to tackling climate change’. [↑](#footnote-ref-56)
57. EP, ‘Resolution on the future European international investment policy’ 2 October 2012, 2010/2203(INI)

    < [www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2011-0141&language=EN](http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2011-0141&language=EN)>. It noted a number of ISDS problems because of vague language, the possibility of conflict between private interests and the regulatory tasks of public authorities (for example where the adoption of legitimate legislation led to states being condemned for breaches of the ‘fair and equitable treatment’ (FET) principle), and asked the Commission to ‘better address the right to protect the public capacity to regulate and meet the EU's obligation to exercise policy coherence for development’. [↑](#footnote-ref-57)
58. Council, ‘[Conclusions on a comprehensive European international investment policy’](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/foraff/117328.pdf), 3041st Foreign Affairs Council meeting, Luxembourg (25 October 2010), 2. [↑](#footnote-ref-58)
59. Articles 21 TEU and 11 TFEU. [↑](#footnote-ref-59)
60. Development Solutions, ‘A Trade SIA relating to the negotiation of a Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada’, Final Report (June 2011) 19, 20. Available at <[trade.ec.europa.eu/doclib/docs/2011/september/tradoc\_148201.pdf](http://trade.ec.europa.eu/doclib/docs/2011/september/tradoc_148201.pdf)>. The report also notes that there ‘is no solid evidence to suggest that ISDS will maximise economic benefits in CETA beyond simply serving as one form of an enforcement mechanism, just as state-state dispute settlement is also an enforcement mechanism. (…) As such, the study’s assessment suggests that a well-crafted state-state dispute settlement mechanism might be a more appropriate enforcement mechanism in CETA than ISDS.’ [↑](#footnote-ref-60)
61. Handbook for Trade Sustainability Impact Assessment, 1st edition. A second edition was adopted in 2016, see <trade.ec.europa.eu/doclib/docs/2016/april/tradoc\_154464.PDF>. [↑](#footnote-ref-61)
62. See <http://trade.ec.europa.eu/doclib/docs/2017/april/tradoc\_155471.pdf>. [↑](#footnote-ref-62)
63. [Answer](http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2012-011275&language=EN) given by Mr De Gucht on behalf of the Commission of 5 February 2013, [OJ C 321 E](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C:2013:321E:TOC) of 7 November 2013. [↑](#footnote-ref-63)
64. EurActiv 16 September 2015, ‘Positive effects of TTIP tribunals for investment unclear’, <www.euractiv.com/section/trade-society/news/positive-effects-of-ttip-tribunals-for-investment-unclear>. [↑](#footnote-ref-64)
65. Council of the EU, Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America, 17 June 2013 (made public on 9 October 2014). See <[data.consilium.europa.eu/doc/document/ST-11103-2013-DCL-1/en/pdf](http://data.consilium.europa.eu/doc/document/ST-11103-2013-DCL-1/en/pdf)> and <http://www.consilium.europa.eu/uedocs/cms\_data/docs/pressdata/en/foraff/145014.pdf>. It can be added that the Commission’s Impact Assessment report on the future of EU-US relations SWD(2013)68 of 12.3.2013 accompanying the document Recommendation for a Council Decision authorising the opening of negotiations on TTIP does not discuss ISDS at all. [↑](#footnote-ref-65)
66. Idem, p. 8. [↑](#footnote-ref-66)
67. European Commission, ‘Preliminary report (statistical overview)’ (July 2014) *European Commission*. Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP), July 2014. The report shows that the largest number of replies was received from the United Kingdom, followed by Austria, Germany, France, Belgium, the Netherlands and Spain, which together account for 97% of the replies. The vast majority of replies (more than 99%) were submitted by individuals. Some 145 800 of the responses were part of collective, coordinated civil society actions. 569 organisations also responded to the consultation, many of these being NGOs. Of the remaining responses, 3144 stemmed from individual citizens, 445 from companies, trade unions etc., and eight from academics. Of the latter submissions, one was signed by 120 European academics*, ‘*Statement of Concern about Planned Provisions on Investment Protection and Investor-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership (TTIP)’ *Kent Law School*,

    <www.kent.ac.uk/law/isds\_treaty\_consultation.html>. [↑](#footnote-ref-67)
68. European Commission, ‘Report on the Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)’ (Staff Working Document] SWD (2015)3 final,

    <http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc\_153044.pdf>. [↑](#footnote-ref-68)
69. Idem, p. 26. [↑](#footnote-ref-69)
70. Idem, p. 21. For instance, it was explained that NGO’s and trade unions had warned that ISDS would insufficiently address concerns regarding the right to regulate, whereas others (notably business representatives) had warned that investors might not be sufficiently protected any more if standards were to be lowered. [↑](#footnote-ref-70)
71. European Parliament, ’Resolution of containing the European Parliament’s recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP)’. ([2014/2228(INI](http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0252+0+DOC+XML+V0//EN))). This contentious point was adopted by 447 votes for to 229 against, with 30 abstentions. [↑](#footnote-ref-71)
72. <http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc\_153807.pdf>. [↑](#footnote-ref-72)
73. Global Justice Now, quoted by W. Louch, *EU Commission TTIP proposal attacked by MEPs and campaigners*, The Parliament Magazine, 12 November 2015. [↑](#footnote-ref-73)
74. Stephane Alsonso, ‘Nederland zaagt aan interne [↑](#footnote-ref-74)
75. <<http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf>>. [↑](#footnote-ref-75)
76. European Commission, ‘CETA: EU and Canada agree on new approach on investment in trade agreement’ (29 February 2016) *European Commission Press Release* <europa.eu/rapid/press-release\_IP-16-399\_en.htm>. [↑](#footnote-ref-76)
77. The Economist, ‘Hot-air Walloons’, 22 October 2016, <www.economist.com/news/europe/21709060-tiny-region-belgium-opposes-trade-reasons-are-hard-understand-wallonia>. [↑](#footnote-ref-77)
78. ECLI:EU:C:2014:2454. [↑](#footnote-ref-78)
79. ECLI:EU:C:2011:123. [↑](#footnote-ref-79)
80. ECLI:EU:C:1991:490. [↑](#footnote-ref-80)
81. ECLI:EU:C:1977:63. [↑](#footnote-ref-81)
82. As laid down in Articles 215‑235 TFEU. [↑](#footnote-ref-82)
83. Article 8.31 para 3 CETA adds that where serious concerns arise as regards matters of interpretation that may affect investment, the Committee on Services and Investment may recommend to the CETA Joint Committee the adoption of interpretations of this Agreement that are binding on Tribunals. [↑](#footnote-ref-83)
84. Case 181/73, *Haegeman* [1974] ECR 449, para. 5. [↑](#footnote-ref-84)
85. Compare European Commission, ‘Amicus Curiae submission in *European American Investment Bank AG (EURAM)* v. *Slovak Republic* (13 October 2011). [↑](#footnote-ref-85)
86. Montesquieu, ‘De l’esprit des lois’ (1748), Livre XI Chapitre VI. http://classiques.uqac.ca/classiques/montesquieu/de\_esprit\_des\_lois/partie\_2/esprit\_des\_lois\_Livre\_2.pdf [↑](#footnote-ref-86)
87. Article 8.10 CETA does determine that ‘the fact that a measure breaches domestic law does not, in and of itself, establish a breach of the FET provision. In a somewhat circular manner, the article further explains that in order to ascertain whether the measure breaches the FET provision, a Tribunal must consider whether a CETA Party has acted inconsistently with the FET obligations set out in the previous paragraphs. [↑](#footnote-ref-87)
88. Compare L Ankersmit, ‘The Compatibility of Investment Arbitration in EU Trade Agreements with the EU Judicial System’, JEEPL 13 (2016) 46-63 at 53. [↑](#footnote-ref-88)
89. Art. 8.9(1) CETA. [↑](#footnote-ref-89)
90. Art. 2(1) Investment Chapter TTIP. [↑](#footnote-ref-90)
91. Art. 8.10 CETA. [↑](#footnote-ref-91)
92. Article 3 Annex 8-A CETA. [↑](#footnote-ref-92)
93. [↑](#footnote-ref-93)
94. Idem, p. 81. [↑](#footnote-ref-94)
95. Case No. ARB (AF)/97/1 *Metalclad Corporation* v. *United Mexican States*, International Center for Settlement of Investment Disputes [2000]. The arbiters found that “the Municipality’s insistence upon and denial of the construction permit in this instance was improper” and that “this conclusion is not affected by NAFTA Article 1114” (paras 97 and 98 award). The amount was reduced to $15.6 million. See <www.citizen.org/documents/ACF186.PDF>, at 12. [↑](#footnote-ref-95)
96. [↑](#footnote-ref-96)
97. *Ethyl Corporation v. Canada*, award on jurisdiction 24 June 1998, <www.italaw.com/cases/409>. MMT stands for methylcyclopentadienyl manganese tricarbonyl and contains the heavy metal manganese, a neuro-toxin. [↑](#footnote-ref-97)
98. Case C-343/09 *Afton Chemical*, [2010] ECR I-7027. [↑](#footnote-ref-98)
99. *Bilcon* v *Canada*, see fn 23 above. While Bilcon is seeking $300 million in damages, the amount to be paid was not yet decided. [↑](#footnote-ref-99)
100. Dissenting Opinion of Professor Donald McRae, <www.italaw.com/sites/default/files/case-documents/italaw4213.pdf>. [↑](#footnote-ref-100)
101. 120 academics, fn. 2 above, under Question 3, point 1. [↑](#footnote-ref-101)
102. Idem, under Question 4. [↑](#footnote-ref-102)
103. *FIAMM and Fedon* v *Council* *and others,* ECJ 9 September 2008, C-120/06 P and C-121/06 P, [ECR] 2008 I-6513, paragraph 174. [↑](#footnote-ref-103)
104. *Bergaderm and Goupil* v *Commission*, Case C-352/98 P, 4 July 2000, [ECR] 2000 I-5291, paragraphs 43 and 44. [↑](#footnote-ref-104)
105. *FIAMM and Fedon* v *Council* *and others* (see fn 81 above), paragraph 184. [↑](#footnote-ref-105)
106. Govaere (2016), 15. [↑](#footnote-ref-106)
107. Ankersmit (2016), 61-62. [↑](#footnote-ref-107)
108. Ankersmit and Hill, ‘Legality of investor-state dispute settlement (ISDS) under EU law’, legal study, ClientEarth (2015), 15. [↑](#footnote-ref-108)
109. See fn. 2 above. [↑](#footnote-ref-109)
110. As will be discussed below, such treaties can play a role where the treatment of US companies is concerned that try to seek legal protection at an EU member state’s court. [↑](#footnote-ref-110)
111. R Abbott et. al., ‘Demystifying Investor-State Dispute Settlement (ISDS)’ (2014) *ECIPE Occasional Paper 5*, (Abbott et al. 2014)(Abbott et al. 2014), <ecipe.org/publications/isds/>. The authors explain that “[t]there has been no known case with an EU investor as claimant and the United States as respondent since the late 1980s, the time from when there is some public information available.” [↑](#footnote-ref-111)
112. Bulgaria, Croatia, the Czech Republic, Estonia, Latvia, Lithuania, Poland, Romania and Slovakia. [↑](#footnote-ref-112)
113. R Abbott et. al., ‘Demystifying Investor-State Dispute Settlement (ISDS)’ (2014) *ECIPE Occasional Paper 5*, (Abbott et al. 2014)(Abbott et al. 2014), <ecipe.org/publications/isds/>.. [↑](#footnote-ref-113)
114. Compare SER, ‘TTIP Transatlantic Trade and Investment Partnership’ (2016) *SER Advisory Report 16/04E*, 95 <www.ser.nl/~/media/files/internet/talen/engels/2016/ttip.ashx> where after studying ISDS and ICS it is concluded that “a separate investment arbitration mechanism is not necessary in a properly functioning and highly developed legal system.” [↑](#footnote-ref-114)
115. J Kokott and C Sobotta, ‘Investment Arbitration and the EU law’ (2016) *Cambridge Yearbook of European Legal Studies* 1, 14. [↑](#footnote-ref-115)
116. M Bronckers, ‘Is Investor-State Dispute Settlement (ISDS) superior to litigation before domestic courts? An EU view on Bilateral Trade Agreements’ (2015) 18 *Journal of International Economic Law* 655, 658. [↑](#footnote-ref-116)
117. S Schill, ‘Internationaler Investitionsschutz und Verfassungsrecht‘ (*Verfassungsblog*, 14 May 2014) <verfassungsblog.de/internationaler-investitionsschutz-und-verfassungsrecht/>. [↑](#footnote-ref-117)
118. Basic Law for the Federal Republic of Germany, translated by C Tomuschat and D P Currie, as revised, [<www.gesetze-im-internet.de/englisch\_gg/englisch\_gg.html#p0101](http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0101)>. [↑](#footnote-ref-118)
119. BVerfG, Beschluss des Ersten Senats vom 19. Juli 2011, - 1 BvR 1916/09 - Rn. (1-100),

     <www.bverfg.de/e/rs20110719\_1bvr191609.html>. [↑](#footnote-ref-119)
120. BGB1.1956 II, S. 488. [↑](#footnote-ref-120)
121. It has been underlined that if a treaty awards the right to be treated equal to non-German persons, this implies that this would include the right to bring forward claims regarding violation of German constitutional rights. See K. Doehring, [*Die Staatsrechtliche Stellung der Ausländer in der Bundesrepublik Deutschland*](http://www.degruyter.com/viewbooktoc/product/169189)*,* Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer, Berlin/New York, 1974, 15. [↑](#footnote-ref-121)
122. U.S.A. Department of State: 2014 Investment Climate Statement, June 2014, [<www.state.gov/documents/organization/226815.pdf](http://www.state.gov/documents/organization/226815.pdf) , 1. [↑](#footnote-ref-122)
123. Ecorys, SIA in support of the negotiations on a Transatlantic Trade and Investment Partnership (TTIP), Final report, March 2017, < http://www.trade-sia.com/ttip/wp-content/uploads/sites/6/2014/02/TSIA-TTIP-Final-Report.pdf>. [↑](#footnote-ref-123)
124. European Commission services' position paper on the sustainability impact assessment in support of negotiations of the Transatlantic Trade & Investment Partnership between the European Union and the United States of America, March 2017, < http://trade.ec.europa.eu/doclib/docs/2017/march/tradoc\_155462.pdf>. [↑](#footnote-ref-124)
125. Idem, p. 8. [↑](#footnote-ref-125)
126. Ibidem. [↑](#footnote-ref-126)
127. The Trade SIA (p. 67) refers to the EIA 2015 Annual energy outlook, according to which emissions of methane along the supply chain will dent the environmental credentials of gas unless action is taken to tackle these leaks. [↑](#footnote-ref-127)
128. See < http://trade.ec.europa.eu/doclib/docs/2017/april/tradoc\_155471.pdf>. [↑](#footnote-ref-128)
129. The Gillard government announced in 2011 that it supports the principle of national treatment – that foreign and domestic businesses are treated equally under the law, but opposes provisions that would confer greater legal rights on foreign businesses than those available to domestic businesses. It also opposed provisions that would constrain the ability of Australian governments to make laws on social, environmental and economic matters in circumstances where those laws do not discriminate between domestic and foreign businesses, and stated that it “will not accept provisions that limit its capacity to put health warnings or plain packaging requirements on tobacco products or its ability to continue the Pharmaceutical Benefits Scheme.” If “Australian businesses are concerned about sovereign risk in Australian trading partner countries, they will need to make their own assessments about whether they want to commit to investing in those countries” It was added. Australian Government, Department of Foreign Affairs and Trade, *Gillard Government Trade Policy Statement:* [*Trading our way to more jobs and prosperity*](http://blogs.usyd.edu.au/japaneselaw/2011_Gillard%20Govt%20Trade%20Policy%20Statement.pdf), April 2011. Critical about this decision: (Kurtz 2012). [↑](#footnote-ref-129)
130. At the 16th EU-China summit that took place 20-21 November 2013 in Beijing. [↑](#footnote-ref-130)
131. <http://dfat.gov.au/trade/topics/pages/isds.aspx> [↑](#footnote-ref-131)
132. AUSFTA was signed in May 2004 and entered into force on 1 January 2005. [↑](#footnote-ref-132)
133. Compare H Klodt, *Investitionsschutzabkommen: mehr Rechtssicherheit oder Verzicht auf Souveränität?*, Wirtschaftsdienst 2014/7, p. 459-463, at 460. [↑](#footnote-ref-133)
134. Compare Politico, ‘EU faces tough sell on TTIP compromise’, 7 February 2016, <[www.politico.eu/article/eu-faces-tough-sell-on-ttip-compromise-malmstroem-froman](http://www.politico.eu/article/eu-faces-tough-sell-on-ttip-compromise-malmstroem-froman)> and Reuters, 29 October 2015, ‘U.S. wary of EU proposal for investment court in trade pact’, <www.reuters.com/article/us-trade-ttip-idUSKCN0SN2LH20151029>. [↑](#footnote-ref-134)
135. It concerns the questions whether the Union has the requisite competence to sign and conclude alone the Free Trade Agreement with Singapore, and more specifically which provisions of the agreement fall within the Union’s exclusive competence, which within the Union’s shared competence and whether any provision falls within the exclusive competence of the Member States. The opinion C-2/15 will be delivered on 16 May 2017 by the CJEU. [↑](#footnote-ref-135)