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# 11 European perspectives on the role of national courts in the resolution of investor-state disputes

*Vid Prislan*

## 11.1 Introduction

Before the Treaty of Lisbon (2009), the protection of European Union (EU) investments abroad was largely a prerogative of individual EU member states' policies, with the consequence that such investments today are not subject to a uniform regime. An area where the divergent practice of various EU states remains perhaps best visible is in relation to the system of investor-state dispute settlement (ISDS). While the availability of investor-state arbitration is by and large the rule in the almost 1,600 bilateral investment treaties (BITs) to which EU member states are parties, differences exist as to the types of disputes that can be submitted to arbitration, as well as the conditions under which this is to occur. However, the vagaries of individual policy-making are gradually expected to make room for common regimes of protection, which the EU will attempt to secure in negotiating agreements pursuant to its newly acquired competences in the field of foreign investment.

The purpose of this chapter is to examine an issue on which the EU is bound to develop its own approach when negotiating agreements with third states: the role foreseen for national courts in the settlement of investment disputes. To that end, this chapter explores in Section 11.2 the various positions adopted by EU institutions towards this issue and discusses in Section 11.3 the extent to which these positions have begun to already materialize in EU agreements currently in the making. This chapter then sets out in Section 11.4 the competing policy considerations concerning the role that domestic courts could play in the broader structure of ISDS and concludes in Section 11.5 with some final observations.

## 11.2 EU institutions' evolving views on ISDS and the role of domestic courts

With the transfer of competences resulting from the Treaty of Lisbon, EU institutions not only gained a say in the shaping of dispute settlement procedures under the soon-to-be EU investment treaties; as this shift of competences coincided with the beginning of broader discussions pertaining to the future of the ISDS system, EU institutions were at once also provided with the opportunity to re-think the relationship between domestic and international mechanisms, and to re-define the role to be played by domestic courts in the resolution of investment disputes. The potential for reform, however, has not materialized.[1]

1 On this potential, see further Mavluda Sattorova, 'Return to the Local Remedies Rule in European BITs? Power (Inequalities), Dispute Settlement, and Change in Investment Treaty Law', *Legal Issues of Economic Integration*, Vol. 39 Issue 2 (2012), pp. 223–248.

### *11.2.1 The position of the European Commission*

Over the years, the European Commission has not maintained a uniform position as to the role that domestic judicial remedies are to play in the resolution of investment disputes. The role was rather to depend on the parties to the agreement.

The Commission has strongly opposed the use of investor-state arbitration as a means for the settlement of disputes involving EU member states and investors from other EU member states.[2] In many arbitrations brought pursuant to 'intra-EU' BITs, the Commission thus actively intervened on behalf of respondent member states, alleging the incompatibility of such instruments with mandatory provisions of EU law and with the EU's judicial system.[3] The Commission was initially concerned about the risk of arbitral awards being rendered without relevant questions of EU law being submitted to the Court of Justice of the European Union (CJEU), a situation which would undermine the principle of the primacy of EU law.[4] Later, however, its concerns were equally directed towards the discriminatory treatment that was deemed to necessarily result from the fact that some EU investors were covered under BITs and were granted the opportunity to resort to investor-state arbitration, while others were not.[5] As the Commission made clear in *Achmea*, resorting to outside dispute settlement mechanisms by EU subjects revealed a 'mistrust in the courts of EU member states' which had 'no place' in the European legal order.[6] In 2018, its views eventually found endorsement by the CJEU, which ruled investor-state arbitrations based on intra-EU BITs to be *incompatible* with EU law.[7]

On the other hand, the Commission took an entirely different position in relation to the availability of investor-state arbitration in 'extra-EU' BITs. In the first policy document prepared pursuant to its newly acquired competences in the field of foreign investment, the Commission was favourably disposed towards including ISDS provisions in future EU

2 The Commission's steadfast opposition to intra-EU BITs eventually resulted in 2015 in the commencement of formal infringement proceedings against Austria, the Netherlands, Romania, Slovakia, and Sweden, which were requested to terminate their intra-EU BITs. European Commission, 'Commission Asks Member States to Terminate Their Intra-EU Bilateral Investment Treaties', 18 June 2015, <http://europa.eu/rapid/press-release_IP-15-5198_en.htm>, last accessed on 18 February 2019.

3 *Eastern Sugar B.V. (Netherlands) v The Czech Republic*, SCC Case No. 088/2004, Partial Award of 27 March 2007; *Achmea B.V. v The Slovak Republic*, UNCITRAL, PCA Case No. 2008-13 (formerly *Eureko B.V. v The Slovak Republic*), Award on Jurisdiction, Arbitrability and Suspension of 26 October 2010; *PL Holdings S.à.r.l. v Republic of Poland*, SCC Case No. V 2014/163, Award of 28 June 2017. The European Commission's opposition was not limited to intra-EU BITs but extended to the use of investor-state arbitration in the context of the Energy Charter Treaty. See *AES Summit Generation Ltd and AES-Tisza Erömü Kft v Republic of Hungary*, ICSID Case No. ARB/07/22, Award of 23 September 2010; *Electrabel S.A. v Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability of 30 November 2012.

4 *Eastern Sugar v The Czech Republic*, *ibid*, paras. 119 and 126.

5 *Achmea B.V. v The Slovak Republic*, *supra* note 3, paras. 183ff.

6 *Ibid*, para. 185.

7 *Slovakische Republik (Slovak Republic) v Achmea BV*, C-284/16, Judgment of 6 March 2018, in particular paras. 34 and 58. The case was brought to the CJEU by the German Federal Court of Justice, which requested a preliminary ruling on this issue as part of the setting aside proceedings relating to the *Achmea v Slovakia* award rendered on the basis of the Netherlands-Slovakia BIT. On that count, the CJEU did not follow the opinion of Advocate General Wathelet, who came to the contrary conclusion that arbitration clauses in intra-EU BITs were compatible with EU law. *Slovak Republic v Achmea BV* (Case C-284/16), Advocate General's Opinion of 19 September 2017.

agreements.[8] It even considered that, insofar as ISDS was ‘a key part of the inheritance that the Union receives from member states BITs’, the EU was to ‘build on’ member state practices to arrive at a state-of-the-art ISDS mechanism.[9] At this early stage, however, the priority of the Commission was not to determine the proper role to be played by domestic courts in the overall architecture of investment dispute settlement, but primarily to devise ways to fix the ISDS system as such.

It was only once the Commission became engaged in the negotiations of the first EU agreements pursuant to its newly acquired competences that the relationship between domestic courts and investment tribunals began to receive its consideration. The proposed Comprehensive Economic and Trade Agreement (CETA) with Canada and the Transatlantic Trade and Investment Partnership (TTIP) with the United States (US) sparked discussions on the necessity of providing ISDS in the context of developed legal systems, which were normally considered capable of adequately adjudicating disputes between foreign investors and the host state.[10] To respond to those concerns, the Commission organized public consultations in 2014–2015, which were to address the question of investment protection and investor-state arbitration in TTIP. Not unexpectedly, the consultations revealed a divergence of opinions on this issue between those representing the views of potential claimants (i.e. large companies and business associations) and the views of civil society (non-governmental organisations [NGOs] and academics) that were arguably more favourable to the standpoint of respondent states. The former cautioned against any attempt at introducing any obligatory requirements to exhaust local remedies, pointing not only to the risk that this could create unnecessary delays, but also to the usual limitations existing in domestic legal orders (such as the problem of immunity of state organs or the non-applicability of specific treaties in domestic law) that may often make recourse to domestic courts less advantageous. At the same time, large businesses also pointed to the fact that certain claims, such as those concerning the constitutionality of a particular domestic measure, could not be dealt with at the international level. Hence, their standpoint was that the investor had to be free to choose either a legal path, and such a choice was not to be an irreversible one.[11] Many NGOs, in contrast, considered that domestic courts are better placed to address disputes between investors and the host state, and hence should be the preferred if not exclusive forum for the settlement of investment disputes. Many of them considered those treaty provisions that were merely intended to prevent parallel proceedings as insufficient, and thus argued for the introduction of the requirement of exhaustion of local remedies as a pre-condition for resorting to investment arbitration. The majority of these NGOs and academics, however, were not against investment arbitration in principle, and thus essentially supported

8 European Commission, ‘Communication from the Commission to the Council, the European Parliament, the European Economic & Social Committee and the Committee of the Regions: Towards a Comprehensive European International Investment Policy’, COM(2010)343 final, 7 July 2010, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010DC0343&from=EN>, last accessed on 24 April 2019, pp. 1–12, at 9–10.

9 *Ibid*, at 9–10.

10 Armand de Mestral, ‘Investor-State Arbitration between Developed Democratic Countries’, in Armand de Mestral (ed.) *Second Thoughts: Investor State Arbitration between Developed Democracies* (Waterloo: Centre for International Governance Innovation, 2017), pp. 9–56.

11 Commission Staff Working Document, ‘Report on Online Public Consultation on Investment Protection and Investor-to-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)’, SWD(2015) 3 final, 13 January 2015, <http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf>, pp. 1–140, at 19–20.

approaches aimed at preventing parallel proceedings and double compensation.[12] Based on the outcome of these consultations, the Commission ultimately identified the relationship between domestic judicial systems and ISDS as one of the four areas where further improvements to the EU's approach should further be explored.

It was in the Concept Paper of 2015, which paved the way for ISDS reform, that the Commission also set out concrete ideas as to how the relationship between domestic courts and investment arbitration could be improved.[13] Unlike its proposals in relation to ISDS reform, which were far reaching, the Commission appeared more reserved in its delineation of the roles foreseen for domestic courts. The starting point for the Commission was that international investment arbitration was not on the same footing as domestic judicial remedies: the mandate of investment arbitral tribunals was to determine the compatibility of the conduct of state authorities with the state's international obligations, which was not to be equated with a form of appeal from domestic law. The Commission was, nevertheless, of the opinion that it 'makes sense to try and manage better' the relationship between the two, and it singled out the need to avoid the risk of double compensation as one of the reasons why this would be desirable.[14] Furthermore, the Commission expressed concerns with respect to the compatibility of investment arbitration with the principle of legal autonomy of the EU legal order, especially if investment tribunals were to interpret EU law in a manner that would be binding on EU institutions.[15]

The Commission did not favour the inclusion of the local remedies requirement, fearing it could increase the cost and duration of litigation. Instead, the primary concern was to preclude parallel litigation of claims so as to avoid the risk of double compensation. The Commission identified two ways to achieve this: either through the use of 'fork-in-the-road' provisions, which it considered advantageous to the extent that they could contribute to shortening the duration and the cost of litigation; or through the use of 'no U-turn' clauses, which it saw as having the advantage of not discouraging recourse to domestic courts and thus having the potential of reducing the number of potential ISDS claims. The Commission was of the opinion that either approach, or a combination of both, could be used, depending on the agreement negotiated.[16] The Commission was furthermore of the opinion that, with a view to accommodating the principle of the legal autonomy of the EU legal order, provisions would have to be added ensuring that investment tribunals would not be directly applying domestic law, while stipulating that such law could only be taken into account as a fact, and any interpretations given to such law by investment tribunals would not be binding on domestic courts.[17]

Though developed for the purposes of the negotiations on TTIP, the Commission's Concept Paper of 2015 set out the standard to be used for further development of investment protection provisions and investment arbitration in all future EU investment negotiations.[18] Indeed, while the negotiations on TTIP have in the meantime stalled, as Section 11.3 demonstrates, the solutions proposed in the Concept Paper have already been implemented in several EU investment agreements in the making.

12 *Ibid*, pp. 19–20.

13 European Commission, 'Investment in TTIP and Beyond – the Path for Reform,' Concept Paper, 2015, <http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF>, last accessed on 18 February 2019, pp. 1–12.

14 *Ibid*, at 9–10.

15 *Ibid*, at 10.

16 *Ibid*, at 11.

17 *Ibid*, at 11.

18 *Ibid*, at 4.

### *11.2.2 The position of the European Parliament*

The stance of the European Parliament towards the use of local courts is one that has changed noticeably over the years. Initially, the Parliament considered that a greater role could be played by local judicial remedies in the resolution of controversies between investors and host states. In its Resolution of 6 April 2011 on future European international investment policy, the Parliament maintained that whilst investor-state procedures had to remain available in addition to state-to-state dispute settlement procedures,[19] the ISDS regime had to be adjusted so as to provide for '*the obligation to exhaust local judicial remedies where they are reliable enough to guarantee due process*'.[20] Yet, the Parliament's demands concerning the mandatory use of domestic courts soon waned. Already in its Resolution of 9 October 2013 addressing the EU-China negotiations for a BIT, no mention is made of re-introducing the obligation to exhaust local remedies. Instead, the Parliament considered that such bilateral agreement should, 'as a key priority', include effective state-to-state and investor-to-state dispute settlement mechanisms 'in order, on the one hand, to prevent frivolous claims from leading to unjustified arbitration, and, on the other, to ensure that all investors have access to a fair trial, followed by enforcement of all arbitration awards without delay'.[21]

Rather than on increasing the role of domestic judicial remedies, the Parliament's focus gradually shifted to the importance of delineating the proper scope of operation of domestic and international procedures. In its Resolution of 8 July 2015 containing recommendations to the Commission on the negotiations for TTIP, the Parliament urged the Commission to negotiate a solution that would ensure that '*the jurisdiction of courts of the EU and of the Member States is respected*'.[22] In its Resolution of 5 July 2016 on a future strategy for trade and investment – by which it otherwise endorsed the Commission's efforts with respect to the new investment court system, as well as its ambition of eventually establishing a multilateral court system – the Parliament further stressed that this system 'must be *in compliance* with the EU legal order, *the power of the EU courts* in particular, and, more specifically, EU competition rules'.[23]

### *11.2.3 The position of EU member states and of the EU Council*

EU member states may have parted ways with the European Commission on the issue of intra-EU BITs, and the desirability, as well as permissibility, of using investor-state arbitration for the settlement of disputes between EU investors and member states.[24] But their

19 European Parliament Resolution of 6 April 2011 on the Future European International Investment Policy (2010/2203(INI)), para. 32.

20 *Ibid*, para. 31, emphasis added.

21 European Parliament Resolution of 9 October 2013 on the EU-China Negotiations for a Bilateral Investment Agreement (2013/2674(RSP)), para. 42.

22 European Parliament Resolution of 8 July 2015 Containing the European Parliament's Recommendations to the European Commission on the Negotiations for the Transatlantic Trade and Investment Partnership (TTIP) (2014/2228[INI]), para. 2(d)(xv), emphasis added.

23 European Parliament Resolution of 5 July 2016 on a New Forward-Looking and Innovative Future Strategy for Trade and Investment (2015/2105[INI]), para. 68.

24 In all fairness, the views of EU member states were not uniform on this issue. Those of them appearing as respondents in intra-EU investment arbitrations (i.e. primarily the capital-importing states that joined the EU in the latest rounds of enlargement) shared the view of the Commission, whereas the major capital-exporting EU member states considered that an appropriate level of substantive and procedural protection for EU investors should nonetheless be preserved in addition to that which was available under EU law already. On the different positions, see Teis Andersen and Steffen Hindelang, 'The Day After: Alternatives to Intra-EU BITs,' *Journal of World Investment & Trade*, Vol. 17 Issue 6 (2016), pp. 984–1014, at 989ff.

views have largely been aligned with that of the Commission on the need to maintain ISDS in future EU investment agreements with third states. In its conclusions on a comprehensive European international investment policy in 2010, the first policy document adopted by the Council of the EU following the transfer of competences, the Council expressed the view that the goal of a common EU international investment policy was to 'increase' the current level of protection and legal security for European investors abroad, and it thus stressed that the new legal framework was not supposed to negatively affect investor protection and guarantees enjoyed under the existing bilateral investment agreements.[25] The Council emphasized the need to provide an 'effective' ISDS mechanism, which was considered to be one of the 'main pillars' of future EU investment agreements, alongside certain 'fundamental' standards pertaining to the substantive treatment of investors.[26] Thus, in the first negotiation mandates that the Council provided to the Commission in 2011, which set the terms on which the Commission was to negotiate the agreements with Canada, India, and Singapore, the possibility of direct recourse to investor-state arbitration was not questioned. Rather, the Council expected the agreements to provide for an 'effective investor-to-state dispute settlement mechanism'.[27]

In the subsequent negotiating directives for TTIP in 2013, the Council similarly called for the inclusion of 'an effective and state-of-the-art investor-to-state dispute settlement mechanism'.[28] This time, however, it directed the Commission to also give consideration 'to the possibility of creating an appellate mechanism applicable to investor-to-state dispute settlement under the Agreement, and *to the appropriate relationship between ISDS and domestic remedies*'.[29] The Council did not further elaborate on what this 'appropriate' relationship could be. In some EU member states, ideas were advanced at the level of the highest policy-makers that such a relationship could entail the requirement of the exhaustion of local remedies, or the inclusion of 'fork-in-the-road' provisions requiring the investor to make a choice between domestic and international remedies.[30] In certain others, however, the inclusion of an ISDS mechanism in TTIP began to be questioned altogether.[31]

By then, the question of the availability of ISDS in future EU investment and trade agreements had further become complicated by the internal power struggle between EU

25 Council of the European Union, 'Conclusions on a Comprehensive European International Investment Policy', 3041st Foreign Affairs Council meeting, 25 October 2010, <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/117328.pdf>, last accessed on 18 February 2019, paras. 8–9.

26 *Ibid*, paras. 14, 18.

27 'EU-Canada (CETA), India and Singapore FTAs – EC Negotiating Mandate on Investment (2011)', Council Negotiating Directives of 12 September 2011 (leaked), <https://www.bilaterals.org/?eu-negotiating-mandates-on&lang=en>, last accessed on 18 February 2019.

28 Council of the European Union, 'Directives for the Negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America', 17 June 2013, <http://data.consilium.europa.eu/doc/document/ST-11103-2013-DCL-1/en/pdf>, last accessed on 18 February 2019, pp. 1–18, at 9.

29 *Ibid*, emphasis added.

30 See answers of the Minister for Foreign Trade and Development Cooperation of the Netherlands in relation to parliamentary questions concerning ISDS in TTIP, reproduced in 'Vragen gesteld door de leden der Kamer, met de daarop door de regering gegeven antwoorden', Parliamentary Materials, Second Chamber, 2013–2014, ah-tk-20132014-727, p. 2.

31 This is the case for Germany, for example. German Federal Council Resolution of 11 July 2014, BR-Drs 295/14, <http://www.bundesrat.de/SharedDocs/drucksachen/2014/0201-0300/295-14(B).pdf?__blob=publicationFile&v=1>, last accessed on 18 February 2019, para. 9.

member states and the European Commission pertaining to the scope of EU's competences in the field of investment policy-making.[32] The nature of these competences has a bearing on the form in which future EU agreements will be concluded. The matter was eventually resolved with the CJEU's Opinion (2/15) on the EU-Singapore FTA of May 2017, which ruled that the EU is not endowed with exclusive competence in relation to (1) non-direct (i.e. portfolio) foreign investments (at least in the absence of EU rules that could currently be affected in this field), and (2) the regime governing investor-state dispute settlement.[33] As a consequence of this ruling, any future EU investment agreement offering investor-state arbitration will have to be concluded as a mixed agreement, requiring ratification by individual member states. This, of course, may provide in some cases the policy incentive not to include ISDS.

## 11.3 From policy to practice: Treaty innovations in current EU agreements

Having sketched the various positions taken and policy proposals advanced by various EU institutions, it is now possible to examine how these considerations and proposals have begun to translate into treaty drafting practice. The EU has already completed negotiations for comprehensive free trade/investment protection agreements (IPAs) with Singapore (17 October 2014),[34] Vietnam (1 February 2016),[35] and Canada (5 July 2016).[36] By reference to these finalized treaty texts, as well as to the publicly available drafting proposals of some of the agreements currently under negotiation, it is now possible to provide an initial appraisal of the approaches taken in dealing with the relationship between ISDS and domestic courts.

Notwithstanding slight variations in wording, the agreements examined all take a consistent approach to regulating the relationship between the use of domestic judicial procedures and of investment arbitration in the resolution of investment disputes. None of the agreements foresees a greater role for domestic judicial procedures in the resolution of investment disputes by imposing some form of mandatory recourse to local remedies – either in the stricter form of a requirement of exhaustion, or in the less strict form of compulsory domestic litigation for a defined period of time. Rather, in line with the Commission's draft paper, the primary policy goals are the avoidance of duplicative proceedings and the maintenance

32 As is known, the Commission perceived this competence to be a comprehensive and exclusive one, whereas the member states – which were not particularly keen on relinquishing the prerogatives that they traditionally enjoyed in relation to the conclusion of treaties dealing with the promotion and protection of foreign investment – have generally insisted that the competence was a shared one (at least in relation to portfolio investments). Robert Basedow, 'A Legal History of the EU's International Investment Policy', *Journal of World Investment & Trade*, Vol. 17 Issue 5 (2016), pp. 743–772, at 743.

33 Opinion 2/15 of the CJEU, 16 May 2017, paras. 227–256 and 285–293.

34 Provisions on investment protection initially featured as a separate chapter of the Free Trade Agreement, which was finalized in 2014 (and subsequently amended in 2017). Following CJEU Opinion 2/15, however, the provisions have been moved into a standalone treaty, the EU-Singapore Investment Protection Agreement. This was formally signed on 19 October 2018.

35 Trade and investment negotiations with Vietnam were completed in December 2015. As in the case of the EU-Singapore agreements, the result of negotiations with Vietnam was later adjusted to create a Free Trade Agreement and an Investment Protection Agreement. The final texts of the FTA and IPA were agreed upon in July 2018.

36 The agreement with Canada already entered into force provisionally on 21 September 2017, pending domestic ratification process in the EU member states.

of the integrity of the EU legal order. Hence, the bulk of the provisions relevant to the position of local courts are those dealing with the concurrent use of domestic and treaty remedies (11.3.1) and those addressing the use of domestic law in the resolution of disputes (11.3.2). It is argued here that, on the whole, the provisions included in the present EU agreements, nonetheless, have the potential to contribute to the greater use of domestic courts in the settlement of investment disputes (11.3.3).

### *11.3.1 Avoidance of duplicative proceedings*

In the EU agreements currently in the making, the primary concern has clearly been the avoidance of duplicative proceedings and the risk that these could lead to conflicting legal outcomes and allow the investors to obtain double recovery. Though leaving open in its concept paper which treaty device could best be employed to address this concern, the Commission refrained from insisting on the inclusion of 'fork-in-the-road' clauses, which were previously commonly used in EU member states' BITs. Instead, the primary device adopted to regulate the relationship between investment arbitration and domestic courts in the EU agreements thus far has been the 'no U-turn' clause, which allows covered investors to commence arbitration under the agreement provided that the investor discontinues any other proceedings regarding the dispute. Thus, pursuant to Article 8.22(1)(f) of CETA, the claimant 'may only submit' a claim to arbitration if it 'withdraws or discontinues any existing proceeding before a tribunal or court under domestic or international law with respect to a measure alleged to constitute a breach referred to in its claim'. Similar requirements are invariably present in the other agreements.[37]

In most of these agreements, use is made of 'no U-turn' clauses proper, which not only place restrictions on the simultaneous use of local remedies and investment arbitration but also prevent claims being submitted to local courts subsequent to investment arbitration, which could result in contradictory decisions and the possibility of double recovery. Pursuant to Article 8.22(1) (g) of CETA, a claimant is expected to waive 'its right to initiate any claim or proceeding before a tribunal or court under domestic or international law with respect to a measure alleged to constitute a breach referred to in its claim'. Similar waiver requirements are present in the other agreements.[38]

37 Cf. Article 3.7(1)(f) EU-Singapore IPA (referring to a 'claim submitted to a domestic court or tribunal concerning the same treatment as alleged to breach the provisions of Section A (Investment Protection)'); Article 3.34 EU-Vietnam IPA (referring to a 'pending claim […] before any other domestic […] court or tribunal concerning the same measure as that alleged to be inconsistent with the provisions referred to in Article 1(1) (Scope) and the same loss or damage'); or Article 14(1) TTIP draft (referring to a claim submitted 'to any other domestic or international court or tribunal concerning the same treatment as that alleged to be inconsistent with the provisions referred to in Article 1(1)').

38 See Article 14(2)(b) TTIP draft (requiring a claimant to submit 'a declaration that it will not initiate any claim or proceeding before any domestic or international court or tribunal under domestic or international law concerning the same treatment as that alleged to be inconsistent with the provisions referred to in Article 1(1).'); Article 3.34(4)(b) EU-Vietnam IPA (stipulating that 'the claimant shall provide […] a waiver of its right, and where applicable, of the locally established company, to initiate any claim referred to in paragraph 1'); or Article 3.7(1)(f) EU-Singapore IPA (requiring that claimant 'declares that it will not submit such a claim [i.e. one concerning the same treatment as alleged to breach the provisions of Chapter Two (Investment Protection), brought to any other domestic or international court or tribunal under domestic or international law] in the future').

The current 'no U-turn' clauses are formulated capaciously so as to prevent them being sidestepped in the absence of identity of the cause of action and/or of the parties, which has usually constituted the grounds for investment tribunals not giving effect to 'fork-in-the-road' clauses. Hence, instead of referring to the same 'dispute' as the latter, the 'no U-turn' clauses in EU agreements prevent duplicative/concurrent proceedings before domestic courts and arbitral tribunals with respect to the same 'measure',[39] or concerning the same 'treatment'.[40] The clauses apply to all actions with a legal basis derived from the same conduct on the part of host state authorities that have adversely affected the investor or its investment. Furthermore, the clauses invariably attempt to limit duplicative proceedings commenced by, or on behalf of, connected legal persons. In CETA, for example, the limitations on duplicative proceedings apply both to the investor and to the locally established enterprise that the investor owns or controls directly or indirectly if the claims are those for loss or damage to that enterprise or to an interest in such enterprise.[41] The EU-Singapore IPA goes a step further in that it excludes not only claims concurrently brought by the investor and a locally established company but also claims brought by 'all persons who directly or indirectly have an ownership interest in, or who are controlled by the investor or, where applicable, the locally established company'.[42] Similar broad stipulations are found in the EU-Vietnam IPA[43] and the TTIP draft proposal.[44]

Then again, not all recourse to domestic courts is prohibited while arbitral proceedings are pending. With the exception of CETA (which is silent on the matter), the EU agreements considered expressly provide for the possibility of claimants resorting to domestic judicial or administrative organs with a view to obtaining injunctive or declaratory relief.[45] However, in the case of the EU-Vietnam IPA, this possibility is subject to the proviso that the relief sought does 'not involve the payment of monetary damages',[46] whereas the EU-Singapore IPA excludes relief that would 'involve the payment of damages or the resolution of the substance of the matter in dispute'.[47] The availability of interim relief on the part of domestic courts is, of course, necessary since provisional measures of protection, which can otherwise be ordered by investment tribunals, may not have direct effect in the domestic legal orders of the contracting states. Besides, CETA, the TTIP draft, and the EU-Vietnam IPA, while expressly conferring the general competence on arbitral tribunals to order interim measures of protection,[48] exclude such competence from measures involving the seizure of assets or those aimed at enjoining the application of the impugned measures.[49]

39 Article 8.22(1)(f) CETA (referring to a 'proceeding [...] with respect to a measure alleged to constitute a breach referred to in its claim'); or Article 3.34(1) EU-Vietnam IPA (referring to 'a pending claim [...] concerning the same measure as that alleged to be inconsistent with the provisions referred to in Article 1(1) (Scope) and the same loss or damage').
40 Article 3.7(1)(f)(i) EU-Singapore IPA (referring to a 'claim [...] concerning the same treatment as alleged to breach the provisions of Chapter Two (Investment Protection)'); or Article 14(1) TTIP draft (referring to 'a claim [...] concerning the same treatment as that alleged to be inconsistent with the provisions referred to in Article 1(1)').
41 Article 8.22(2) CETA.
42 Article 3.7(2) EU-Singapore IPA.
43 Article 3.34 EU-Vietnam IPA.
44 Article 14(3) TTIP draft.
45 Article 14(1) TTIP draft.
46 Article 3.34(7) EU-Vietnam IPA.
47 Article 3.7(4) EU-Singapore IPA.
48 The EU-Singapore IPA is silent on this matter. However, most arbitration rules grant arbitral tribunals the capacity to order provisional measures. Cf. relevant ICSID / UNCITRAL Rules.
49 Article 8.34 CETA; Article 19 TTIP draft; and Article 3.47 EU-Vietnam IPA.

### *11.3.2 Limitations on the application of domestic law*

Not insignificant to the relationship between domestic and international remedies is also the fact that the EU agreements currently in the making avoid the creation of any direct jurisdictional overlap between domestic courts and investment arbitration. Most significant in this respect is the limited scope of the dispute settlement clauses, which are invariably restricted to claims concerning violations of discrete standards of protection provided by the applicable treaty.[50] By not using the 'any dispute' formula that has otherwise customarily been employed in many of EU member states' BITs, the EU agreements effectively preclude investment tribunals from taking cognizance of claims relating to simple breaches of contract or breaches of specific domestic law. The narrower dispute settlement clauses thus preserve investment arbitration as an exceptional remedy, preventing it from devolving into a form of appeal from domestic jurisdictions.

While limiting the scope of claims of which investment tribunals now can take cognizance, the current EU agreements also limit the scope of the law that such tribunals will apply in deciding whether or not the provisions of the agreement have been breached. Pursuant to the choice-of-law provisions, arbitral tribunals are accordingly only entitled to apply the agreement in question and other rules and principles of international law that may be applicable between the parties.[51] To the extent that they may have to consider domestic law with a view to determining the consistency of a measure with the standards imposed by the agreements, they can only do so 'as a matter of fact' and by following 'the prevailing interpretation given to the domestic law by the courts or authorities' of the relevant party.[52] Furthermore, most of the current EU agreements explicitly preclude investment tribunals from determining the legality of impugned measures under the domestic law of the disputed party.[53] The primary purpose of these provisions is apparently to preserve the integrity of the EU legal order by not allowing adjudicatory bodies operating outside the European judicial order to conclusively determine points of European law. But these provisions also significantly diminish the potential jurisdictional overlap – and thus jurisdictional competition – between investment tribunals and domestic courts; they also further strengthen the function of investment tribunals as exceptional remedies and prevent these from devolving into a mechanism of appellate review from domestic jurisdictions.

### *11.3.3 Indirect encouragement of recourse to local courts?*

On the face of it, the current EU agreements may seem primarily concerned with the avoidance of parallel proceedings and the maintenance of the integrity of the EU legal order. Effectively, however, the provisions currently employed may, in many ways, encourage recourse to domestic courts as opposed to investment arbitration.

Not insignificant, of course, is the use of 'no U-turn' clauses, instead of 'fork-in-the-road' or other mandatory choice of forum provisions. By not foreclosing investment arbitration once the investor has brought the matter before the host state's courts, the 'no U-turn'

50 Article 8.18 CETA.

51 Article 8.31(1) CETA; Article 3.13(2) EU-Singapore IPA; Article 3.42(2) EU-Vietnam IPA; and Article 13(3) TTIP draft.

52 Article 8.31(2) CETA; provisions to the same effect are found in Article 13(3) TTIP draft, and Article 3.42(2) EU-Vietnam IPA.

53 Article 8.31(2) CETA; Article 13(4) TTIP draft; and Article 3.42(3) EU-Vietnam IPA.

provisions not only do not discourage resorting to local remedies, but in fact, when considered with other provisions, they also encourage investors to seek redress for wrongs before domestic courts before they are raised to the international level. Such an encouragement, for example, comes in the form of extensions of the time limits within which a claim may be submitted to international arbitration, in the event that the impugned measures had first been challenged through domestic judicial procedures. To remain with the example of CETA, whereas the claimant would otherwise have to submit a request for consultations (which is a precondition for the commencement of arbitration) within three years after first having (or having been in a position to have) acquired knowledge of the alleged breach and of the loss or damage incurred thereby, it is instead allowed that they submit such a request within two years after 'ceas[ing] to pursue claims or proceedings before a tribunal or court under the law of a Party, or when such proceedings have otherwise ended' (though no later than 10 years after first having, or having been in a position to have, acquired knowledge of the alleged breach and of the thereby incurred loss or damage).[54] Similar extensions can be found in the other agreements.[55]

Apart from such direct incentives, the EU agreements also provide several less direct incentives for investors to seek redress in domestic courts. First, as already noted, the limited scope of dispute settlement clauses and choice-of-law provisions prevent tribunals from taking cognizance of domestic law claims and thus direct the investors to have such claims submitted to domestic courts. Especially where controversy could exist on points of domestic law – such as in relation to threshold questions as to whether an investor actually possessed a proprietary right capable of constituting a protected investment – these limitations could make prior recourse to domestic courts advisable so as to have certain matters of domestic law first conclusively determined by domestic courts.

Second, it is also not immaterial that several of the key standards of treatment imposed by current EU agreements are now formulated less expansively, by way of exhaustive definitions and limitative language, instead of through open-ended formulations as used to be the practice under the European BITs. Particularly noteworthy in this respect is that the content of the Fair and Equitable Treatment (FET) standard is now limited to a set of most egregious instances of misconduct involving cases of denial of justice, fundamental breaches of due process in judicial and administrative proceedings, instances of 'manifest arbitrariness', 'targeted discrimination on manifestly wrongful grounds', and 'harassment, coercion, abuse of power or similar bad faith conduct'.[56] The setting of a higher threshold to establish violations of the FET standard is not unlikely to operate as a disincentive for investors to immediately resort to investment arbitration, leading them more frequently to seek recourse to local remedies instead. An additional deterrent in this respect comes in the form of more narrowly formulated 'observance of obligations'/'umbrella' clauses. As their scope of protection is now expressly limited to adverse measures adopted by the host state in the exercise of governmental authority (*puissance publique*),[57] simple contractual breaches can no longer serve as predicates for such claims. Last but not least, the addition of clarificatory language

54 Article 8.19(6) CETA.

55 Cf. Article 4(5)(b) TTIP draft; Article 3.30(2)(b) EU-Vietnam IPA; and Article 3.3(3) EU-Singapore IPA.

56 Article 8.10(2) CETA; Article 2.4(2) EU-Singapore IPA; Article 2.5(2) EU-Vietnam IPA; and Article 3(2) TTIP draft.

57 Cf. 2.4(6) EU-Singapore IPA; 2.5(6) EU-Vietnam IPA; and Article 7 TTIP draft. CETA does not contain such provision.

– such as stipulations to the effect that the host state's decision not to issue, renew, or maintain a subsidy, or to request its reimbursement, will not normally amount to a violation of the treaty[58] – may equally become a hurdle to direct recourse to arbitration in some cases.

Third, an additional factor that could incentivize the pursuit of local remedies first is the inclusion in several EU agreements of provisions aiming at early exclusion of frivolous and unmeritorious claims. These take the form of (1) a fast-track system allowing the rejection of claims that are 'manifestly without legal merit'[59] already at the first session of the tribunal or promptly thereafter;[60] (2) the alternative possibility of having the tribunal address, as a preliminary question, an objection that a claim is 'unfounded as a matter of law';[61] and (3) stipulations to the effect that the losing party in principle bears all costs of the proceedings.[62] Although these provisions will not prevent treaty claims being brought without recourse to local remedies, their combined effect will likely be to discourage the use of arbitration as a mere alternative to domestic remedial processes, as claimants will want to make sure that their treaty claims also have sufficient prospects of success. The pursuit of local remedies may frequently increase such prospects. In general, an indication that a domestic measure is illegal under domestic law, though not in itself determinative of the question of liability under international law, has frequently been considered as valuable to determining treaty claims in practice.[63] More specifically, especially when the impugned measures complained of are those stemming from lower-level state officials, proceedings before domestic courts will likely reveal whether the failure on their part is also one which displays insufficiently in the system, so as to rise to the level of treaty breach.[64] Of course, resorting to domestic judicial remedies may not only clarify the factual predicate of a treaty claim but may also amplify it, insofar as improper treatment on the part of the domestic judiciary – in the form of denial of justice or fundamental breaches of due process – will separately be capable of giving rise to violations of the FET standard.

## 11.4 Policy considerations

How is one to then evaluate the current EU agreements in terms of the use of domestic remedies for the resolution of investment disputes? That these do not do away with investor-state arbitration does not come as a surprise, given that the replacement of investor-state arbitration

58 Article 8.9(3) and (4) CETA; Article 2.2(3) EU-Vietnam IPA; Article 2(3) and (4) TTIP draft.

59 This resembles the expedited procedure provided for under Rule 41(5) of the ICSID Arbitration Rules, which was introduced in 2006 to dispose of unmeritorious claims at the preliminary stage of a proceeding.

60 Article 8.32 CETA; Article 3.14 EU-Singapore IPA; Article 16(1) TTIP draft; and Article 3.44 EU-Vietnam IPA.

61 Article 8.33 CETA; Article 3.15 EU-Singapore IPA; Article 17 TTIP draft; and Article 3.45 EU-Vietnam IPA. The possibility of invoking the objection that a claim is 'manifestly without legal merit' is without prejudice to the objection that the claim is 'unfounded as a matter of law'. The distinction between the two objections appears to pertain to the applicable standard of review. A claim which is 'manifestly without legal merit' appears to be one that is so obviously defective from a legal point of view that it can be subject to summary determination, whereas a claim that is 'unfounded as a matter of law' will probably require more elaborate argument or factual enquiry for its disposition.

62 Article 8.39(5) CETA; Article 3.21(1) EU-Singapore IPA; Article 28(4) TTIP draft; and Article 3.53(4) EU-Vietnam IPA.

63 Cf. *Compañiá de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic*, Decision on Annulment, ICSID Case No ARB/97/3, 3 July 2002, para.101 (noting that 'municipal law will often be relevant [...] in assessing whether there has been a breach of the treaty'.).

64 Cf. *Helnan International Hotels A/S v Arab Republic of Egypt*, Decision of the *ad hoc* Committee, ICSID Case No ARB/05/19, 14 June 2010, paras. 48–50.

with other types of remedies would probably only be acceptable where such other remedies are deemed equivalent to, or at least approximately substitutable with, investor-state arbitration.

As investor-state arbitration operates at a different level than domestic courts, it may often be difficult to treat the latter as a functional equivalent of the former. One of the decisive advantages of investor-state arbitration over domestic remedies is precisely the fact that such arbitration operates independently from the domestic legal order of the host state – with the consequence that it cannot be affected by possible domestic immunities applicable to state organs, or by possible legislative changes introduced by the host state in the exercise of its sovereign powers (*puissance publique*), nor be otherwise constrained by domestic constitutional limitations that can possibly prevent domestic courts from reviewing impugned conduct against internationally-prescribed standards.[65] In the absence of this external positioning, the only way for domestic remedies to offer a functional alternative to investor-state arbitration is in combination with state-to-state dispute settlement mechanisms – an alternative, however, which is generally seen as leading to the politicization of investment disputes.

This is not to dismiss the possibility that, in practice, domestic and international remedies may actually operate as alternatives in some cases, even if genuine comparisons on this point are difficult to make for want of reliable information.[66] Despite the lack of reliable data, the argument is sometimes made in favour of abandoning ISDS mechanisms in relation to countries with well-functioning judicial systems, such as in the context of TTIP, CETA, or the EU-Japan FTA. Though attractive in theory, this possibility will be difficult to implement in practice, as any differential treatment when it comes to the inclusion of ISDS will be difficult to sell to other treaty partners without the EU being accused of pursuing a new form of imperialism. Besides, the proposition that the judicial systems of EU member states *invariably* provide for sufficient guarantees for the effective resolution of investment disputes remains open to rebuttal, especially in light of the low scores that some EU member states obtain on international indexes pertaining to the quality of the domestic judiciary,[67] not to mention the fact that violations of the right to a fair trial are among the most common violations of the European Convention on Human Rights on the part of EU member states.[68]

Absenting concrete evidence that domestic judicial procedures really offer an alternative to investor-state arbitration, it is not surprising that the question of the relationship between domestic and international remedies has become a much politicized one. There are certainly arguments in favour of reverting the resolution of investment disputes to domestic courts. First, there is the question of fairness. The fact that foreign investors enjoy greater rights

65 On domestic courts' competence to adjudicate private treaty-based claims and their inadequacy for deciding investment disputes, see Marco Bronckers, 'Is Investor-State Dispute Settlement (ISDS) Superior to Litigation before Domestic Courts? An EU View on Bilateral Trade Agreements', *Journal of International Economic Law,* Volume 18 (2015), pp. 655–677, at 659ff.

66 On this problem, see Martins Paparinskis, 'Investors' Remedies under EU Law and International Investment Law', *Journal of World Investment & Trade*, Vol. 17 Issue 6 (2016), pp. 919–941.

67 'Rule of Law Index 2016', World Justice Project, <https://worldjusticeproject.org/sites/default/files/documents/RoLI_Final-Digital_0.pdf>, last accessed on 18 February 2019, pp. 1–204, at 41 and 43.

68 In the period between 1959 and 2015, more than 41% of the violations found by the European Court of Human Rights have concerned Article 6 of the Convention, whether on account of the fairness or the length of the proceedings. See Council of Europe, 'Overview 1959-2015: ECHR', March 2016, <http://www.echr.coe.int/Documents/Overview_19592015_ENG.pdf>, last accessed on 18 February 2019, pp. 1–12, at 6. In the judgments delivered by the Court in 2015, nearly a quarter of the violations (still) concerned Article 6. See Council of Europe, 'The ECHR in Facts & Figures 2016', <http://www.echr.coe.int/Documents/Facts_Figures_2016_ENG.pdf>, last accessed on 18 February 2019, pp. 1–11, at 7.

than investors of domestic origin creates unequal competitive conditions and distorts the level playing field in the global economy. Another is the problem of legitimacy, resulting from the fact that arbitrators, unlike domestic judges, have no relation to the political constituencies in the host state and are thus unaccountable to those most likely to be affected by their decisions.[69] Last but not least, there is also the issue of local institution-building. The availability of international adjudicatory alternatives has the effect of disempowering local judicial institutions.[70] But there are equally strong arguments in favour of not leaving investment disputes entirely to resolution by national courts. Most important is probably the problem of the rule of law.[71] The non-independence, inefficiency, and/or incompetence of domestic courts provide perhaps the most cogent reasons why maintaining an external mechanism for the resolution of investment disputes is necessary.[72]

The approach adopted in current EU investment agreements attempts to balance these competing considerations by retaining the possibility of direct recourse to investor-state arbitration, while at the same time encouraging resorting to domestic judicial remedies. Arguably, one may wonder whether the current treaty provisions have not gone far enough by failing to make resorting to local remedies compulsory. In response to this, the argument is usually made that subjecting recourse to international arbitration to some prior resort to, or even exhaustion of, local remedies will end up increasing the duration and the costs of litigation.[73] But this argument rests on the presumption that domestic courts are inherently incapable of resolving disputes between the foreign investor and the host state, and that such disputes will necessarily persist even in the event of a positive outcome of domestic litigation. One may equally proceed, however, from the opposite assumption that mandatory recourse to local judicial remedies may actually decrease the costs of litigation, for where investment disputes are satisfactorily resolved by domestic courts, investors are less likely bring their claims to arbitration. In the end, the question turns on the extent to which one believes that investment disputes are capable of disposition by domestic courts, which is ultimately a question of trust. Economically, the addition of an extra layer of proceedings may not add much to the overall costs of litigation, at least not when compared to the total costs of investment arbitration. And as a matter of legal principle, the introduction of compulsory resort to domestic judicial remedies would certainly not be an extraordinary measure given the wide prevalence of such a requirement in the context of human rights courts.

69 UNCTAD, 'UNCTAD's Reform Package for the International Investment Regime', <http://investmentpolicyhub.unctad.org/Upload/Documents/Reform_Package_web.pdf>, last accessed on 18 February 2019, pp. 1–119, at 44.

70 Tom Ginsburg, 'International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance,' *International Review of Law and Economics*, Vol. 25 Issue 1 (2005), pp. 107–123, at 107.

71 Stephan Schill, 'Reforming Investor-State Dispute Settlement (ISDS): Conceptual Framework and Options for the Way Forward', E15 Task Force on Investment Policy, Think Piece, <http://e15initiative.org/wp-content/uploads/2015/07/E15-Investment-Schill-FINAL.pdf>, last accessed on 18 February 2019, pp. 1–11, at 7.

72 Jeswald Salacuse, 'Explanations for the Increased Recourse to Treaty-Based Investment Dispute Settlement: Resolving the Struggle of Life against Form?' in Karl P. Sauvant (ed.), *Appeals Mechanism in International Investment Disputes* (Oxford: Oxford University Press, 2008), pp. 105–125.

73 Nicolas Hachez and Jan Wouters, 'International Investment Dispute Settlement in the Twenty-First Century: Does the Preservation of the Public Interest Require an Alternative to the Arbitral Model?' in Freya Baetens (ed.), *Investment Law within International Law: Integrationist Perspectives* (Cambridge: Cambridge University Press, 2013), pp. 417–449, at 441.

## 11.5 Conclusions

In spite of calls on the part of some EU institutions to increase the role of domestic courts in ISDS, and even to (re-)introduce the requirement of exhaustion of local remedies, not much has changed in relation to the use of domestic courts to resolve controversies between foreign investors and host states. Under the EU investment agreements currently in the making, recourse to domestic judicial procedures remains facultative, although several incentives are nonetheless provided that promote recourse by foreign investors to domestic courts. Given the lack of trust even among EU member states themselves in each other's domestic judicial systems, it is difficult to expect any significant changes to occur in treaty-making practice involving third states and their legal systems of which EU member states may have even less trust in the independence, efficiency, and/or competence.

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