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AUTHORITY, LEGITIMACY, AND FRAGMENTATION IN THE
(ENVISAGED) DISPUTE SETTLEMENT DISCIPLINES IN MEGA-
REGIONALS

Stephan W. Schill

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Authority, Legitimacy, and Fragmentation in the (Envisaged) Dispute Settlement Disciplines in Mega-Regionals

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Abstract

This chapter analyzes the inter-state and investor-state dispute settlement disciplines included in mega-regionals, with a specific focus on the already finalized Comprehensive Economic and Trade Agreement and the Trans-Pacific Partnership. It argues that dispute settlement disciplines increasingly assume a pivotal role in trade and investment negotiations and raise fundamental questions about the authority and legitimacy of international dispute resolution and concerns of fragmentation. While preferences of states participating in mega-regionals coincide in agreeing on inter-state arbitration as a compliance mechanism that minimizes both the authority of dispute resolvers and negative effects of fragmentation in respect of the World Trade Organization, starker differences arise on investor-state dispute settlement. Whereas the European Union (EU) pushes for the creation of permanent judicial bodies, the United States seemingly prefer a reformed version of investor-state arbitration. The underlying clash of ideologies shapes what may turn into a constitutional moment for international economic law more generally, as the EU and US positions directly clash in the negotiations of the Transatlantic Trade and Investment Partnership.

Keywords

inter-state arbitration – investor-state arbitration – investment court system – mediation – fragmentation – legitimacy – control mechanisms

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I. Innocence Lost in International Dispute Settlement Design

Dispute settlement mechanisms have always been an important component of trade and investment agreements. This holds true for the trading system established by the World Trade Organization (WTO) as well as for preferential trade and investment agreements, including traditionally bilateral investment treaties (BITs) and more recently so-called mega-regionals. The existence and design of dispute settlement provisions can make the difference between a (relatively) inconsequential expression of political intentions concerning the future conduct of contracting parties in respect of an agreement's content and an effective legal regime that provides a mechanism for enforcing substantive obligations and instilling mutual compliance. In addition, dispute settlement mechanisms are important for resolving disagreement between contracting states about the interpretation of (necessarily) indeterminate and incomplete treaty terms and for allowing, within the limits of permissible interpretation, their further development. The juridification connected to both of these functions makes dispute settlement disciplines an important tool for contracting states to achieve the objectives of trade and investment agreements.¹

Yet, for a long time, dispute settlement mechanisms have been seen not only primarily, but almost exclusively, as mere enforcement mechanisms that facilitate compliance of states with substantive economic law disciplines. The WTO Appellate Body, for example, has been conceived by its founders as 'part of the enforcement wing of the WTO institution.'² More recently, this innocence, if not naïveté has been lost. Among scholars and states, an increasingly critical view has taken hold of the analysis of international dispute settlement as they have come to realize that the creation and design of these mechanisms can raise their own problems, problems namely that are not of a technical nature, but concern the multiple functions of dispute settlement disciplines, including in the further development of the law they apply and expound, their increasingly deep impact on domestic governance, their evasiveness to control by states and thus their legitimacy, including from a democratic perspective.³

Two concerns have proven to be particularly prominent in this respect. First, the creation of international dispute settlement mechanisms introduces a new class of actors (judges or arbitrators) that exercise interpretative authority over the governing law independently of the contracting parties. Dispute resolvers do not only mechanically enforce pre-agreed substantive obligations and make them effective, but actively shape the governing law through interpretation, potentially even against the will of the contracting parties.⁴

¹ See John H Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law* (CUP 2006) 148; see also Joel P Trachtman, 'The WTO Cathedral' (2007) 43 *Stanford Journal of International Law* 127, 131.

² See generally on the development of the WTO Appellate body from its conceptualization as an enforcement tool towards the central actor in further developing WTO law Robert Howse, 'The World Trade Organization 20 Years On: Global Governance by Judiciary' (2016) 27 *EJIL* 9 (quote at 31).

³ See generally on the issue of legitimacy of international dispute settlement Armin von Bogdandy and Ingo Venzke, *In Whose Name?: A Public Law Theory of International Adjudication* (OUP 2014); see also Armin von Bogdandy and Ingo Venzke (eds), *International Judicial Lawmaking* (Springer 2012).

⁴ See generally Ingo Venzke, *How Interpretation Makes International Law* (OUP 2012).

Dispute resolvers are thus able to serve as important law-makers in international economic law and contribute to shaping the behavior of states, including the manner in which they regulate in the public interest, as well as that of other actors, such as traders, investors, workers, and the population more generally. This concern has been particularly prominent with respect to investor-state dispute settlement (ISDS) under international investment agreements (IIAs),⁵ but has also been raised in relation to the Appellate Body of the World Trade Organization (WTO).⁶ It involves questions about the scope of authority of dispute resolvers and the way they are controlled and legitimized.

Second, concerns have been raised about the fragmentation of international economic law resulting from the proliferation of bilateral and plurilateral trade and investment agreements with dispute settlement mechanisms.⁷ This concern is particularly pressing in light of the question whether these agreements interfere with, or even undermine, multilateralism in international economic relations, most importantly as regards the functioning of the WTO's multilateral trading system.⁸ In this respect, the interaction of dispute settlement disciplines under mega-regionals with the WTO Dispute Settlement Body (DSB) as envisaged by these agreements becomes key. Do they threaten the authority of

⁵ Charles N Brower, 'A Crisis of Legitimacy' Nat'l LJ (7 October 2002) B9; Charles N Brower, Charles H Brower and Jeremy K Sharpe, 'The Coming Crisis in the Global Adjudication System' (2003) 19 Arb Int'l 415; Charles H Brower, 'Structure, Legitimacy, and NAFTA's Investment Chapter' (2003) 36 Vand J Transnat'l L 37; Ari Afilalo, 'Towards a Common Law of International Investment: How NAFTA Chapter 11 Panels Should Solve Their Legitimacy Crisis' (2004) 17 Georgetown Int'l Envir L Rev 51; Ari Afilalo, 'Meaning, Ambiguity and Legitimacy: Judicial (Re-)construction of NAFTA Chapter 11' (2005) 25 Nw J Int'l L & Bus 279, 282; Susan D Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions' (2005) 73 Fordham L Rev 1521; Charles N Brower and Stephan W Schill, 'Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?' (2009) 9 Chi J Int'l L 471; David Schneiderman, 'Legitimacy and Reflexivity in International Investment Arbitration: A New Self-Restraint?' (2011) 2(2) J Int'l Disp Settlement 471.

⁶ See, for example, Howse (n 2); Venzke (n 4) 135 ff; Ingo Venzke, 'Making General Exceptions: The Spell of Precedents in Developing Article XX GATT into Standards for Domestic Regulatory Policy' in von Bogdandy and Venzke (n 3) 179.

⁷ On fragmentation resulting from the proliferation of international dispute settlement bodies see, for example, Laurence R Helfer and Anne-Marie Slaughter, 'Toward a Theory of Effective Supranational Adjudication' (1997) 107 Yale LJ 273; Benedict Kingsbury, 'Foreword: Is the Proliferation of International Courts and Tribunals a Systemic Problem?' (1999) 31 NYU J Int'l L & Pol 679; Jonathan I Charney, 'The Impact on the International Legal System of the Growth of International Courts and Tribunals' (1999) 31 NYU J Int'l L & Pol 697; Cesare PR Romano, 'The Proliferation of International Judicial Bodies: The Piece of the Puzzle' (1999) 31 NYU J Int'l L & Pol 709; Roger P Alford, 'The Proliferation of International Courts and Tribunals: International Adjudication in Ascendance' (2000) 94 Am Soc'y Int'l L Proc 160; Shane Spelliscy, 'The Proliferation of International Tribunals: A Chink in the Armor' (2001) 40 Colum J Transnat'l L 143; Lucy Reed, 'Great Expectations: Where Does the Proliferation of International Dispute Resolution Tribunals Leave International Law?' (2002) 96 Am Soc'y Int'l L Proc 219. See also the other contributions to a symposium held at New York University School of Law in October 1998 on the proliferation of international courts and tribunals, in (1999) 31 NYU J Int'l L & Pol 679–933. See generally also Martti Koskenniemi, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' Report of the Study Group of the International Law Commission (International Law Commission, 13 April 2006) UN Doc A/CN.4/L.682.

⁸ For the view that free trade agreements undermine multilateralism in international trade law, see Jagdish Bhagwati, *Termites in the Trading System: How Preferential Agreements Undermine Free Trade* (OUP 2008). For a positive view on the relationship between free trade agreements and multilateralism, see, for example, Richard E Baldwin, 'Multilateralising Regionalism: Spaghetti Bowls as Building Blocs on the Path to Global Free Trade' (2006) 29(11) *The World Economy* 1451; Adrian M Johnston and Michael J Trebilcock, 'Fragmentation in International Trade Law: Insights from the Global Investment Regime' (2013) 12(4) *World Trade Review* 621.

WTO multilateralism and the authority of the WTO Appellate Body? Or are dispute settlement disciplines in mega-regionals crafted in a way to minimize possible interference with the multilateral trading regime? Another aspect of fragmentation that has plagued both international trade and investment law is the relationship between economic and non-economic concerns, given that international dispute settlement disciplines tend to be asymmetric to the benefit of specific economic interests.⁹

Despite the fundamental questions that are connected to dispute settlement design in international economic law, these questions have, for a long time, drawn relatively little attention in trade and investment negotiations. Negotiators wring hard about the substantive commitments, in particular the content of liberalization commitments, whether to follow a negative list-approach or a positive list-approach, what substantive standards to base such agreements on, and what exceptions to maintain. Dispute settlement issues, by contrast, have normally only entered relatively late in the game, and with comparatively little academic or prior public discussion. In the Uruguay Round leading up to establishment of the WTO, for example, the creation of a dispute settlement system with a standing appellate body, which was to authoritatively interpret and apply WTO law, rather than a diplomatic mechanism as previously under the General Agreement on Tariffs and Trade (GATT) was left for the later parts of the negotiations.¹⁰ Still, it made all the difference in subjecting international trade relations to independent and effective legal disciplines and in creating institutions that could administer and further develop international trade law independently of the WTO members and their respective political and economic power.¹¹

Meanwhile, public attention to questions of dispute settlement design in mega-regionals abounds. While inter-state dispute settlement attracts very little attention, the intended inclusion of ISDS provisions in the Transatlantic Trade and Investment Partnership (TTIP) has brought hundreds of thousands of protesting citizens to the streets in Europe,¹² and led the European Commission to initiate a public consultation that resulted in almost 150,000, mostly critical responses.¹³ ISDS has also caused public outcry in the United States and made

⁹ Jochen von Bernstorff, 'Reflections on the Asymmetric Rule of Law in International Relations' in James Crawford and Sarah Nouwen (eds), *Select Proceedings of the European Society of International Law: Volume III 2010* (Hart 2012) 381; Benedict Kingsbury, 'International Courts: Uneven Judicialisation in Global Order' in James Crawford and Martti Koskeniemi (eds), *The Cambridge Companion to International Law* (CUP 2012) 203.

¹⁰ See John Croome, *Reshaping the World Trading System: A History of the Uruguay Round* (WTO 1995) 264 (stating that 'the idea of an appellate body ... was discussed in detail from late 1989 onwards'). See also Ernst-Ulrich Petersmann, 'The Uruguay Round Negotiations 1986-1991' in Ernst-Ulrich Petersmann and Meinhard Hilf (eds), *The New GATT Round of Multilateral Trade Negotiations: Legal and Economic Problems* (2nd ed, Kluwer 1991) 501, 555 and, generally, Terence P Stewart (ed), *The GATT Uruguay Round: A Negotiating History (1986-1992), Vol II: Commentary* (Kluwer 1993) 2663 ff ('Dispute Settlement Mechanisms').

¹¹ See also JHH Weiler, 'The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement' (2001) 35(2) *Journal of World Trade* 191.

¹² Chris Johnston, 'Berlin Anti-TTIP Trade Deal Protest Attracts Hundreds of Thousands' (*The Guardian*, 10 October 2015) <<https://www.theguardian.com/world/2015/oct/10/berlin-anti-ttip-trade-deal-rally-hundreds-thousands-protesters>> accessed 28 August 2016.

¹³ European Commission, 'Report: 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) 3.

the ratification of the Trans-Pacific Partnership (TPP) into a topic of US presidential elections.¹⁴ Academic attention to these issues has equally increased tremendously.¹⁵ In line with the emerging focus on international courts and tribunals as law-makers, the driving motivation of criticism of ISDS is its tension with constitutional principles, in particular the principle of democracy, the rule of law, and the protection of fundamental and human rights, in light of the far-reaching decisions tribunals can reach based on relatively indeterminate standards.¹⁶ In parallel, as the assessment of dispute settlement disciplines morphed from a technical question to a highly political concern, negotiations on this issue have become more difficult.

It is therefore little surprising that making decisions on dispute settlement in ongoing trade and investment negotiations is happily deferred to the later parts of negotiations, although state parties regularly already table proposals about dispute settlement at an early stage of the negotiations and although questions of dispute settlement are usually addressed in the negotiators' mandates.¹⁷ Thus, negotiations on questions of dispute settlement in both the plurilateral Trade in Services Agreement (TiSA) and the TTIP are still in their incipient phases at the time of writing, without agreed textual proposals being available on either state-

¹⁴ See José E Alvarez, 'Is the Trans-Pacific Partnership's Investment Chapter the New "Gold Standard"?' IILJ Working Paper 2016/3 (2016) 1.

¹⁵ See, for example, Ingo Venzke, 'Investor-State Dispute Settlement in TTIP from the Perspective of a Public Law Theory of International Adjudication' (2016) 17 JWIT 374; Stefanie Schacherer, 'TPP, CETA and TTIP Between Innovation and Consolidation - Resolving Investor-State Disputes under Mega-Regionals' (2016) JIDS (forthcoming) (advance access at <<http://jids.oxfordjournals.org/content/early/2016/09/16/jnlids.idw022.full>> accessed 19 September 2016; Philip Hainbach, 'The EU's Approach to Investor-State Arbitration in the Comprehensive Economic and Trade Agreement (CETA)' (2016) 1 TDM; Armand de Mestral, 'Investor-State Arbitration between Developed Democratic Countries' CIGI Investor-State Arbitration Series Paper No 1 (September 2015); Catharine Titi, 'The European Union's Proposal for an International Investment Court: Significance, Innovations and Challenges Ahead' (2016) TDM (forthcoming) (advance access at <<https://www.transnational-dispute-management.com/journal-advance-publication-article.asp?key=1619>> accessed 19 September 2016; Kyle Dickson-Smith, 'Does the European Union Have New Clothes?: Understanding the EU's New Investment Treaty Model' (2016) 17 JWIT 773; Céline Lévesque, 'The European Commission proposal for an "Investment Court System": Out with the Old, In with the New?' (CIGI Investor-State Arbitration Series Paper) (forthcoming); Robert Howse, 'Courting the Critics of Investor-State Dispute Settlement: The EU Proposal for a Judicial System for Investment Disputes' (2015) <https://cdn-media.web-view.net/i/fjj3t288ah/Courting_the_Criticsdraft1.pdf> accessed 27 September 2016; Piergiuseppe Pusceddu, 'State-to-State Dispute Settlement Provisions in the EU-Canada Comprehensive Economic and Trade Agreement' (2016) 1 TDM; José E Alvarez, 'Is the Trans-Pacific Partnership's Investment Chapter the New "Gold Standard"?' NYU IILJ Working Paper 2016/3 (MegaReg Series) <http://wp.nyu.edu/megareg/wp-content/uploads/sites/3134/2016/03/Alvarez_IILJ-MegaReg_2016-3.pdf> accessed 27 September 2016.

¹⁶ See Stephan W Schill, 'International Investment Law and Comparative Public Law – An Introduction' in Stephan W Schill (ed), *International Investment Law and Comparative Public Law* (OUP 2010) 3, 6-7.

¹⁷ See eg negotiation mandate for the European Commission for CETA, Council of the European Union, 'EU-Canada Trade Negotiating Mandate Made Public' (15 December 2015) <<http://www.consilium.europa.eu/en/press/press-releases/2015/12/15-eu-canada-trade-negotiating-mandate-made-public/>> . For TTIP, see Council of the European Union, 'Directives for the Negotiation on a Comprehensive Trade and Investment Agreement, Called the Transatlantic Trade and Investment Partnership, Between the European Union and the United States of America' ST 11103/13 (17 June 2013) paras 22 ff <<http://data.consilium.europa.eu/doc/document/ST-11103-2013-DCL-1/en/pdf>>. For TiSA, see Council of the European Union, 'Draft Directives for the Negotiation of a Plurilateral Agreement on Trade in Services' 6891/13 ADD 1 (8 March 2013).

to-state or investor-state dispute settlement.¹⁸ This, together with the fact that negotiations largely take place behind closed doors, despite efforts namely of the European Commission to introduce greater transparency,¹⁹ makes meaningful analysis of dispute settlement disciplines as a matter of positive law in these mega-regionals complicated and speculative. What is more, as the case of the Canada-EU Comprehensive Economic and Trade Agreement (CETA) shows, provisions on dispute settlement can still change quite radically even after negotiations were formally concluded. Thus, the ISDS provisions originally agreed on in CETA in September 2014 were altered during so-called ‘legal scrubbing’ from a system of reformed investor-state arbitration to include a version of the ‘investment court system’ (ICS) that the EU first proposed as part of the TTIP negotiations in November 2015.²⁰

While the text of CETA, which reflects the EU’s position on dispute settlement in trade and investment agreements more generally, can therefore be analyzed, no texts exist, at the time of writing, that would reflect agreed positions of the parties negotiating TiSA and TTIP. With respect to TiSA we know little more than the contours of its envisaged dispute settlement mechanism, namely that it will likely include state-to-state arbitration with provisions largely mirroring those of the WTO Dispute Understanding (DSU), but no provisions on ISDS.²¹ With respect to TTIP, proposals of the EU on inter-state and ISDS have been made public,²² but no proposal of the United States is publicly known. Reports on the negotiation indicate, however, that the positions of the EU and the United States on inter-state dispute settlement are relatively close, reflecting differences in detail rather than principle.²³

¹⁸ For the latest state of play on the negotiations of these agreements regarding dispute settlement at the time of writing see the reports by the European Commission. On TiSA, see European Commission, ‘Report of the 19th TiSA Negotiation Round 8–18 July 2016’ (27 July 2016) 2 http://trade.ec.europa.eu/doclib/docs/2016/july/tradoc_154824.pdf. On TTIP, see European Commission, ‘Public Report of the 14th Round of Negotiations for the Transatlantic Trade and Investment Partnership’ (July 2016) pp 15-16 http://trade.ec.europa.eu/doclib/docs/2016/august/tradoc_154837.pdf.

¹⁹ For information provided by the EU, see European Commission, ‘In Focus: Trade in Services Agreement (TiSA)’ <<http://ec.europa.eu/trade/policy/in-focus/tisa/>> and European Commission, ‘In Focus: Trans-Atlantic Trade and Investment Partnership (TTIP)’ <<http://ec.europa.eu/trade/policy/in-focus/ttip/>> all accessed 28 August 2016. Similar efforts from other negotiating parties, including above all the United States, are sparse. See Office of the United States Trade Representative, ‘Transatlantic Trade and Investment Partnership (T-TIP)’ <<https://ustr.gov/ttip>> and Office of the United States Trade Representative, ‘Trade in Services Agreement’ <<https://ustr.gov/TiSA>> all accessed 28 August 2016. In addition, documents relating to mega-regional negotiations are regularly leaked and published, inter alia, on <<https://wikileaks.org/tisa/>> and <<https://wikileaks.org/ttip/>> all accessed 28 August 2016.

²⁰ Compare Comprehensive and Trade Agreement (CETA) Between Canada, of the One Part, and the European Union, of the Other Part (Final Text) (2016) ch 8 (‘Investment’) to Comprehensive and Trade Agreement (CETA) Between Canada, of the One Part, and the European Union, of the Other Part (Consolidated Text as of September 2014) ch 10 (‘Investment’).

²¹ See European Commission (n 18) 2.

²² Proposal of the European Union for Investment Protection and Resolution of Investment Disputes (12 November 2015) <http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf>; Proposal of the European Union on Dispute Settlement (Government to Government) (7 January 2015) <http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153032.pdf> all accessed 28 August 2016.

²³ See European Commission, ‘Public Report of the 14th Round of Negotiations for the Transatlantic Trade and Investment Partnership’ (July 2016) 15-16 http://trade.ec.europa.eu/doclib/docs/2016/august/tradoc_154837.pdf (stating that ‘there is a large extent of convergence in this area’ and listing issues that are still subject to discussion, including question of timing, compliance and post-retaliation, the possibility or not of non-violation complaints, publication of dissenting opinions, and some questions linked to retaliation’).

With respect to ISDS, by contrast, the position still appear further apart, as the EU is seeking the creation of a permanent tribunal for settling investor-state disputes, while the US appears to aim at a reformed version of investor-state arbitration as is reflected in the investment chapter included recently in TPP.²⁴ Consequently, CETA and TPP do not only illustrate the ongoing transatlantic struggle about different approaches to dispute settlement, but are also good indicators of the future structural features of dispute settlement disciplines in TTIP, and by prolongation, given that the EU and the US are still the most important global rule-shapers, perhaps of dispute settlement in international economic agreements at a global level.

Against this background, the present chapter engages in a critical analysis of CETA and TPP as indicators of how mega-regional agreements more generally are likely going to deal with dispute settlement. Dealing with both inter-state as well as ISDS, it argues that dispute settlement disciplines rightly assume a pivotal role in trade and investment negotiations as they raise fundamental questions about the authority and legitimacy of dispute resolution and concerns of fragmentation. Addressing these concerns arguably explains the developments and reforms in dispute settlement design, some rather minor, others more significant, that we are seeing in mega-regional agreements. The comparison between CETA and TPP shows that inter-state dispute settlement in mega-regionals builds largely on, and only cautiously innovates, existing dispute settlement features that developed in the WTO. They do make use, however, of arbitration rather than permanent judicial bodies. Inter-state dispute resolution mechanisms in these agreements aim at striking a balance between the need for effective compliance, on the one hand, and ensuring control of states over dispute resolution and minimizing negative effects of fragmentation, in particular in respect of the WTO, on the other. In respect of ISDS, in turn, both CETA and TPP innovate as compared to classical investment treaty based arbitration and adapt to the constitutional challenges and legitimacy critique by ensuring that policy space is safeguarded, that control by contracting parties over dispute settlement is tightened, and that internal and external fragmentation is limited. However, notwithstanding common trajectories in ISDS reform, stark differences arise as opposition of the United States against the push of the EU for the creation of permanent judicial bodies, both at the bilateral and multilateral level, crystallizes. The outcome of the TTIP negotiations, where both positions directly clash, may therefore have the potential of bringing about global structural change in ISDS as the underlying clash of ideologies may shape what could be a constitutional moment in international economic law.

II. Inter-State Dispute Settlement in Mega-Regionals:

Mega-regionals will all provide for state-to-state dispute settlement mechanisms. This holds true for CETA and TPP as well as for TTIP²⁵ and TiSA.²⁶ What is more, although differences in detail exist, TPP and CETA show a great level of commonality and convergence in their

²⁴ See Trans-Pacific Partnership Agreement (adopted 4 February 2016, not yet in force) arts 9.19-9.30 <<https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf> > accessed 28 August 2016.

²⁵ See supra nn 22 and 23.

²⁶ See supra n 21.

structural approaches and at the level of principle. This convergence is, to a large extent, due to the fact that the state-to-state dispute settlement provisions in both agreements build on well-established practices enshrined in the WTO DSU and in the dispute settlement chapters of existing free trade agreements. Moreover, the inter-state dispute settlement disciplines in CETA and TPP share the concern of minimizing friction with the authority of the WTO DSB, particularly the Appellate Body. This is achieved both through the choice for arbitration and a low level of institutionalization, but also through a number of other features that clarify that the purpose behind the creation of inter-state dispute settlement disciplines in mega-regionals is not to challenge the authority of the WTO (see Section II.A). Still, contracting states are clearly concerned about transferring too much authority to dispute settlement mechanisms. For this reasons, various features in CETA and TPP cater to the interest of contracting states to control the authority of inter-state dispute resolution bodies (see Section II.B.). Both aspects contribute to what parties to mega-regionals consider to be a legitimate role for international dispute settlement that helps to enforce substantive obligations, without becoming too independent from contracting parties (see Section II.C.).

A. Building on and Minimizing Friction with the WTO

Inter-state dispute settlement mechanisms under mega-regionals are, to a large extent, inspired by the dispute settlement mechanism in the WTO. Often enough, they even copy provisions from the DSU verbatim or at least build on them. In other aspects, CETA and TPP codify practices that the WTO Appellate Body has developed in its dispute settlement practice, based on wide interpretations of its governing law and inherent powers. Like in the WTO, inter-state dispute settlement mechanisms in CETA and TPP aim at providing effective compliance mechanisms that allow contracting parties to enforce the substantive obligations undertaken in the respective agreement. This is crucial as alternative fora for the settlement of disputes under these agreements are not available, or of limited use. The WTO DSB, for example, can only be called on for disputes under WTO; it is unavailable to enforce obligations in mega-regionals as these are not ‘covered agreements’ in the sense of Article 1(1) DSU. Other international courts or tribunals, such as the International Court of Justice (ICJ), are not specifically tailored to resolve international economic disputes, above all in terms of the need for speedy dispute resolution in economic matters, and hence not sufficiently efficient.²⁷ Domestic courts, finally, are often equally unavailable for the enforcement of rights and obligations under mega-regionals as the treaties often lack direct effect within the domestic legal order.²⁸ Besides, domestic courts pose a greater risk to incoherent interpretation of the

²⁷ General inter-state dispute resolution mechanisms may lack the necessary expertise in trade and investment matters and are procedurally poorly adapted to the resolution of international economic disputes, *inter alia*, with respect to the necessary speed nor in respect of the mechanisms for implementing their decisions.

²⁸ Both CETA and TPP contain provisions that exclude such direct effect and preclude parties from using domestic courts to enforce rights and obligations under mega-regionals. See Art 30.6 CETA (‘Private rights’), which provides:

1. Nothing in this Agreement shall be construed as conferring rights or imposing obligations on persons other than those created between the Parties under public international law, nor as permitting this Agreement to be directly invoked in the domestic legal systems of the Parties.
2. A Party shall not provide for a right of action under its domestic law against the other Party on the ground that a measure of the other Party is inconsistent with this Agreement.

Similarly, Art 28.22 TPP (‘Private rights’) provides:

agreements and may be subject to home bias, therefore putting a truly neutral and independent application and enforcement of these agreements into question.

The most important difference with the WTO, however, is the fact that mega-regionals do not opt for institutionalized dispute settlement, but rely on *ad hoc* inter-state arbitration. No secretariats are established to support the settlement of mega-regional disputes, no appeal mechanisms are created in the inter-state dispute settlement realm. The low level of institutionalization connected with the choice for arbitration is a mechanism to minimize the authority of dispute settlement and ensure a high level of control by contracting parties. After all, as compared to a standing judicial body, one-off dispute settlement mechanisms are structurally in a much weaker situation to develop a coherent jurisprudence and ensure that this jurisprudence is carried forward independently of the active support of contracting states. A standing judicial body, by contrast, can develop its own jurisprudence and implement its interpretation of the governing law more easily and at times even against the preference of contracting states.

Moreover, the choice of arbitration has the effect of protecting the authority of the WTO DSB, and particular that of the Appellate Body, as it is less likely that a jurisprudential counterweight to its authority develops under the cloak of inter-state dispute settlement in mega-regionals. Certainly, mega-regionals generally grant the parties a choice among different available fora for the enforcement of the substantive obligations contained in TPP and CETA, including those norms that TPP and CETA copy or incorporate from other international agreements, including WTO law (so-called multi-sourced equivalent norms); however, mega-regionals do not establish hierarchies or priorities among different available fora.²⁹ Instead, any dispute settlement mechanism created by mega-regionals is considered as an alternative, not an additional forum to those already in existence elsewhere. After all, a choice for a specific forum once made under a mega-regional, cannot be undone to the benefit of another forum. This rule excludes parallel and subsequent dispute settlement in multiple fora and suggests that dispute settlement disciplines in mega-regionals do not intend to siphon disputes away from other fora or und the respective forums applicable law, nor to multiply dispute settlement possibilities for one and the same dispute by opening up an additional avenue for dispute resolution.

Yet, the structural features of inter-state dispute settlement under mega-regionals cannot only be explained by states' desire to curtail authority of independent third-party participation, but also by the desire to reduce friction with WTO dispute settlement and to avoid undermining the authority of the WTO DSB. Thus, the low level of institutionalization of inter-state dispute settlement under mega-regionals certainly also accounts for the parties' desire to allow a future reintegration of the substantive disciplines of mega-regionals into the WTO. This is not only the goal of TiSA, but also the desire with other WTO+ commitments

No Party shall provide for a right of action under its law against any other Party on the ground that a measure of that other Party is inconsistent with its obligations under this Agreement, or that the other Party has otherwise failed to carry out its obligations under this Agreement.

²⁹ An exception is Art 10.2(7) TPP with respect to dispute settlement provisions provided in respect of air services agreements, which have to be exhausted before recourse is possible under the state-to-state dispute settlement chapter under TPP.

undertaken in mega-regionals, such as TPP or CETA, which the parties may ultimately hope to multilateralize (within the WTO) in the future.

Avoiding fragmentation between mega-regionals and the WTO is also the purpose of specific rules of interpretation included in mega-regionals. Thus, both CETA and TPP make consideration of WTO precedent expressly into a rule of interpretation. Article 28.12(3)2 TPP provides that '[w]ith respect to any provision of the WTO Agreement that has been incorporated into this Agreement, the panel shall also consider relevant interpretations in reports of panels and the WTO Appellate Body adopted by the WTO Dispute Settlement Body.' Article 29.17 CETA even makes it into a general rule of interpretation that '[t]he arbitration panel shall also take into account relevant interpretations in reports of Panels and the Appellate Body adopted by the WTO' without limiting this rule to norms that are equivalent to WTO obligations.

Only in some areas do the dispute settlement disciplines in mega-regionals go beyond WTO disciplines. This holds true, to different degrees, with respect to concerns other than the interests of traders and investors, including in the context of chapters on labor and the environment.³⁰ In this respect, the differences between CETA and TPP, and hence the general approaches taken by the United States and the EU respectively, are somewhat greater than in other areas of state-to-state dispute settlement. CETA, for once, excludes matters arising under the chapters on labor and environment from formal inter-state dispute resolution completely.³¹ Instead, in order to implement the respective chapters and settle disagreement between the contracting parties, it provides for recourse to cooperation mechanisms at the inter-governmental level³² and to panels of experts, whose composition and procedures resemble those of state-to-state arbitration, but whose determinations are not binding.³³ In addition, inter-state mediation is encouraged to settle labour and environmental disputes.³⁴

TPP, by contrast, allows recourse to inter-state arbitration, but foresees some modifications, in particular as regards the necessary qualification of arbitrators in labor, respectively environmental, law and practice.³⁵ TPP equally requires enhanced cooperative efforts by the disputing parties to settle labor and environment amicably.³⁶ In the case of disputes under the chapter on labor, prior inter-governmental consultations are required, including if necessary involvement of the Labour Council, a treaty organ established under TPP and composed of senior governmental representatives.³⁷ The chapter on environment

³⁰ See Chapters 23 ('trade and labour') and 24 ('trade and environment') CETA and Chapters 19 ('labour') and 20 ('environment') TPP.

³¹ See Arts 23.11(1) and 24.16(1) CETA.

³² See Arts 23.9 and 24.14 CETA.

³³ See Arts 23.10 and 24.15 CETA. Similarities with arbitration exist particularly in respect of the requirement of experts to be independent and impartial, in respect of the rules on transparency, and in their task to determine how measures in question have to be judge according to the legal standards contained in the chapters on labor and environment,

³⁴ See Arts 23.11(2) and 24.16(2) CETA.

³⁵ See Art 28.9(5) TPP.

³⁶ See Arts 19.15(12) and (13) and 20.23(1) TPP.

³⁷ For the procedures of labour consultations, see Art 19.15 TPP. Establishment, composition and competences of the Labour Council are provided for in Art 19.12 TPP.

even provides a three-step consultation procedure prior to state-to-state arbitration, involving simple inter-governmental environmental consultations, senior representative consultations within the Environmental Committee established under TPP, and ministerial consultations.³⁸ In case no agreement can be reached among contracting parties to settle disputes about labour or environmental concerns, these concerns are given a better enforcement mechanism under TPP, and other US-led free trade agreements,³⁹ as compared to CETA and the approach the EU generally takes in its trade and investment agreements,⁴⁰ which overall provides for weaker compliance tools for labor and environmental concerns.

All of this suggests that the inter-state dispute settlement provisions in mega-regionals aim at preserving, not undermining, the authority of the WTO DSB. The low level of institutionalization and careful crafting of the scope of inter-state dispute settlement in mega-regionals achieves to limit the authority of dispute resolvers to the necessary minimum for making it into an effective compliance mechanism, while at the same time maximizing state control over dispute settlement, and preventing the emergence of a serious counterweight to the WTO and its dispute settlement mechanism. Areas where dispute settlement are farther-reaching than under the WTO, such as with respect to labor and environmental disputes, in turn, are areas outside the current competence of the WTO. In these areas, dispute settlement under mega-regionals could cautiously develop ideas for future reforms of the WTO, in particular as regards the incorporation of labour and environmental disciplines.

B. Controlling the Authority of Inter-State Dispute Settlement

The experience with dispute settlement in the WTO has not only influenced the contracting parties of mega-regionals in building dispute settlement disciplines that minimize friction with the WTO. It has also provided them with a suitable example for how powerful dispute

³⁸ See Arts 20.20, 20.21 and 20.22 TPP for the three-step procedure. Establishment, composition and competences of the Environmental Committee are provided for in Art 20.19 TPP.

³⁹ US-led agreements allow binding inter-state dispute settlement in order to make states comply with their obligation to enforce domestic environmental and labor legislation. See, for example, eg Dominican Republic-Central America-United States Free Trade Agreement (signed 5 August 2004, entered into force 1 January 2009) art 16.7 (concerning disputes under the labor chapter) and art 17.11 (concerning environmental matters), both in connection with the inter-state dispute settlement mechanisms laid down in chpt 20 <<https://ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text>> accessed 18 September 2016, United States-Bahrain Free Trade Agreement (signed 14 September 2004, entered into force 11 January 2006) art 16.8(5) (concerning environmental matters) and art 15.6(5) (concerning disputes under the labor chapter), each in connection with chpt 19 <<https://ustr.gov/trade-agreements/free-trade-agreements/bahrain-fta/final-text>> accessed 18 September 2016. See also Michele Potestà, 'From Mutual Supportiveness to Mutual Enforcement? The Contribution of US Preferential Trade and Investment Agreements to the Effectiveness of Environmental Norms' in Rainer Hofmann, Stephan W Schill, Christian J Tams (eds), *Preferential Trade and Investment Agreements: From Recalibration to Reintegration* (Nomos 2013) 167.

⁴⁰ For the EU's approach see Lorand Bartels, 'The EU's Approach to Social Standards and the TTIP' in Sangeeta Khorana (ed), *The Transatlantic Trade and Investment Partnership (TTIP) Negotiations between the EU and the USA* (Barcelona Centre for International Affairs 2015) 83, 89 f <http://www.cidob.org/en/publications/publication_series/monographs/monographs/the_transatlantic_trade_and_investment_partnership_ttip_negotiations_between_the_eu_and_the_usa> accessed 27 September 2016; Lorand Bartels, 'Social Issues in Regional Trade Agreements: Labour, Environment and Human Rights' Cambridge University Faculty of Law Legal Studies Research Paper No 57/2014 (2014) 17 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2463246> accessed 27 September 2016; see also Amelia Porges, 'Dispute Settlement' in Jean-Pierre Chauffour and Jean-Christophe Maur (eds), *Preferential Trade Agreement Policies for Development* (World Bank 2011) 482 f.

settlement bodies can become and how much they can take control of a certain international legal regime. It is therefore little surprising that both CETA and TPP contain a variety of features - beyond the choice for arbitration with its low institutionalization - that aim at limiting the impact of dispute resolution bodies and ensuring instead the authority of contracting states. This includes a selective judicialization of subject matters covered by mega-regionals and the modification of the general dispute settlement regime for specifically sensitive areas of law and policy (1.), the inclusion of a number of procedural safeguards (2.), and the encouragement of alternative dispute resolution mechanisms, in particular mediation (3.).

1. Selective Judicialization

First of all, contracting parties control the authority of inter-state arbitral tribunals by circumscribing what the tribunals are competent to decide on. For this purpose, contracting parties limit the applicable law to claims for breach of the agreement in question, thereby excluding the possibility to enforce norms from outside the agreement through the dispute settlement mechanisms under mega-regionals. Both CETA and TPP thus provide that inter-state dispute settlement must concern a ‘dispute concerning the interpretation or application of the provisions of this Agreement.’⁴¹

Yet, unlike in the WTO, inter-state dispute settlement under mega-regionals is not comprehensive in the sense that every dispute under the respective agreements could be submitted to third-party adjudication. Instead, mega-regionals regularly contain a number of carve-outs that exclude recourse to inter-state dispute settlement for certain subject-matters. Mega-regionals therefore follow a model of selective judicialization by only making certain subject matters justiciable.

Under CETA, the following are excluded from recourse for inter-state dispute settlement:

- antidumping and countervailing duties (Art 3.7 CETA);
- subsidies (Art 7.9 CETA);
- decisions under the Investment Canada Act (Art 8.45 CETA and Annex 8-C);
- competition policy (Art 17.4 CETA);
- trade and labor (Art 23.11(1) CETA); and
- trade and environment (Art 24.16(2) CETA).

TPP contains an even greater list of subject-matters that are excluded from state-to-state dispute settlement, including disputes about:

- antidumping and countervailing duties (Art 6.8(3) TPP);
- the equivalence of a sanitary or phytosanitary measures of exporting and importing parties and about the conformity of the measures risk assessment with scientific standards (Art 7.8(6) fn 2 and Art 7.9(2) fn 3 TPP);

⁴¹ Art 29.2 CETA; see further for limitation on dispute settlement to such disputes Arts 29.4(1) and 29.6(2) CETA. For the parallel provisions in TPP, see Arts 28.3(1), 28.5(1), 28.8 TPP.

- violation of the provisions of the TBT Agreement incorporated into the TPP (Art 8.4(2) TPP);
- competition policy (Art 16.9 TPP);
- cooperation and capacity building (Art 21.6 TPP);
- cooperation in respect of competitiveness and business facilitation (Art 22.5 TPP);
- cooperation under the chapter on development (Art 23.9 TPP);
- cooperation on small and medium enterprises (Art 24.2 TPP);
- regulatory coherence (Art 25.11 TPP); and
- the refusal to grant temporary entry except if such refusal involved a pattern of practice (Art 12.10(1) TPP)

Several of these carve-outs have the function of making obligations in mega-regionals softer by excluding them from judicialization. This preserves policy space of contracting parties and allows them to further develop the law in the covered areas cooperatively rather than under the shadow of arbitral control. This is the case, for example, with the obligations on competition policy, movement of personnel of traders and investors,⁴² taxation,⁴³ or anti-corruption laws and policies.⁴⁴ Preserving policy space, albeit in very specific policy contexts, can also be found in country-specific exceptions that allow certain contracting states a transitory period for adaptation in regard of specific measures.⁴⁵ Other carve-outs have the function to protect the authority of the WTO. This is the case, for example, with the exclusion of recourse under TPP for breach of the rules on technical barriers to trade or sanitary and phytosanitary measures that are incorporated into TPP from the WTO - and thereby become independent obligations under TPP - or the rules on anti-dumping and countervailing measures.

Apart from carve-outs that exclude dispute settlement with respect to a specific subject-matter completely, mega-regionals, such as TPP and CETA, also contain certain self-judging exceptions for the protection of core areas of public policy that, while not excluding dispute settlement altogether, expressly modify the standard of review to be applied. With respect to the issues covered by self-judging exceptions, the dispute settlement body cannot conduct a full *de novo* review, but only assess whether the discretion granted was exercised contrary to good faith.⁴⁶ Thus, Art 28.6(b) CETA, contains a narrowly tailored self-judging clause relating to the protection of national security. It allows the contracting states to take measures they consider necessary to protect essential security interests connected to the production and traffic in goods and technology relevant for military activity, actions taken in times of war and other emergency in international relations, and measures relating to

⁴² Art 12.10 TPP.

⁴³ Art 29.4(2) TPP.

⁴⁴ Art. 26.12(3) TPP.

⁴⁵ See Art 14.18 TPP (exempting Malaysia and Vietnam from dispute settlement with respect to certain measures regarding electronic commerce for a period of two years); Art 17.2(5) footnote 10 (exempting Malaysia from dispute settlement with respect to certain state-owned for a period of two years in light of the ongoing process of developing new legislation concerning state-owned enterprise).

⁴⁶ See generally on self-judging clauses the good faith standard of review Stephan W Schill and Robyn Briese, "If the State Considers": Self-Judging Clauses in International Dispute Settlement' (2009) Max Planck Yearbook of United Nations Law 61.

fissionable material. The self-judging exception in TPP is slightly broader and includes, inter alia, measures the contracting state considers necessary for the protection of its own essential security interests, without the specific subject-matter restrictions found in CETA.⁴⁷ Both agreements show, however, that for certain areas limits are set-up to reduce the depth in dispute settlement. Furthermore, the agreements regularly provide for certain modifications to the general inter-state dispute settlement regime with respect to specifically sensitive subject-matters in order to limit the authority of dispute settlement mechanisms and to ensure the contracting parties' control. The most important area in this respect concerns provisions on financial services that are regularly included in mega-regionals in a specific chapter.⁴⁸ While not excluding state-to-state dispute settlement altogether, the chapters on financial services regularly contain stricter safeguards against arbitral scrutiny, in particular in order to protect government measures for 'prudential reasons'.⁴⁹

For this purpose, arbitrators in disputes arising under the financial services chapter are required to have a more specific expertise, namely 'expertise or experience in financial services law or regulation or in the practice thereof, which may include the regulation of financial service suppliers'.⁵⁰ This ensures that decisions in such proceedings are taken in full knowledge of their implications on financial services regulation and the financial system more generally. Noteworthy, are also limitations on enforcement options in order to protect the financial system of contracting states, such as the exclusion of cross-sector suspension of benefits.⁵¹ TPP aims to achieve the same purpose by requiring the involvement of financial experts in non-implementation proceedings.⁵²

2. *Inclusion of Procedural Safeguards*

Contracting parties to mega-regionals not only take pains in tailoring the scope of dispute settlement, they also include a number of procedural safeguards to ensure that the authority of inter-state dispute settlement disciplines remains limited and subject to adequate party control. This includes, inter alia, provisions on arbitrator qualifications, rosters of arbitrators, rules on transparency, third-party and *amicus curiae* participation, notice and comment procedures before the issuance of reports by the tribunals, a stronger role for the parties in the implementation of reports, and a formalized role of the parties in interpreting the respective agreement.

First, contracting parties to mega-regionals exercise tighter control over the qualifications and attributes of arbitrators in inter-state disputes. For this purpose, mega-

⁴⁷ Art 29.2(b) TPP.

⁴⁸ See Chapter 13 CETA and Chapter 11 TPP.

⁴⁹ See Arts 13.16(1) CETA and 11.11(1) TPP and the prudential measures exception for financial regulation.

⁵⁰ Art 13.20(4) CETA. Accordingly, a specific list of arbitrators may be established for disputes under the financial services chapter (Art. 13.20(3) CETA). See also Art 11.21(3) TPP (requiring 'expertise or experience in financial services law or practice, which may include the regulation of financial institutions').

⁵¹ See Art 13.20(5) CETA (providing that benefits in the financial sector can only be suspended in order to induce compliance with a finding of non-compliance by a state-to-state tribunal if the measure in question related to the financial services sector).

⁵² Art 11.21(5) TPP.

regionals provide that arbitrators have to have relevant expertise in international trade law and the matters covered by the agreement in question.⁵³ This aims to ensure that arbitrators are able to interpret the agreement properly and thereby remain within the textual confines agreed to by the contracting parties. Compared to situations where just anybody could serve as arbitrator this gives contracting parties more control over the concrete settlement of mega-regionals disputes and the future direction of the interpretation of the agreements because states' intentions when concluding the agreement in question are arguably better reflected in interpretations by experts chosen by the parties, rather than interpretations by individuals without the requisite expertise.

Building on existing WTO rules,⁵⁴ mega-regionals also aim at ensuring that arbitrators are not subject to undue influence in their adjudicatory task. For this purpose, both CETA and TPP require that arbitrators are independent from the parties and do not take instructions from any organization or government.⁵⁵ They also have to abide by a specific Code of Conduct that sets out specific ethical obligations and provides for compliance mechanism, in particular through disclosure and challenges procedures.⁵⁶ While such a Code does not yet exist under TPP,⁵⁷ CETA already includes a more elaborate, three-page Code of Conduct for Arbitrators and Mediators,⁵⁸ which is likely to serve as a guidepost for similar rules in other mega-regionals, including perhaps TPP. According to CETA's Code, an

arbitrator shall avoid impropriety and the appearance of impropriety, shall be independent and impartial, shall avoid direct and indirect conflicts of interests and shall observe high standards of conduct so that the integrity and impartiality of the dispute settlement mechanism is preserved.⁵⁹

The Code also provides for disclosure obligation,⁶⁰ which include, inter alia, not only financial interests in the proceedings, but also 'public advocacy or legal or other representation concerning an issue in dispute in the proceeding or involving the same matters.'⁶¹ Once appointed, arbitrators must avoid not only actual conflicts of interests,⁶² but already the 'appearance of bias and shall not be influenced by self-interest, outside pressure,

⁵³ See Art 29.8(2) CETA (requiring arbitrators to have 'specialised knowledge of international trade law'; chairpersons must, in addition, have 'experience as counsel or panellist in dispute settlement proceedings on subject matters within the scope of this Agreement'); Arts 28.10(1)(a) and 28.11(2)2 TPP (requiring all arbitrators to 'have expertise or experience in law, international trade, other matters covered by this Agreement or the resolution of disputes arising under international trade agreements').

⁵⁴ See Arts 8(2) and 17(3) DSU. See further Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes, 11 December 1996, WT/DSB/RC/1 (96-5267).

⁵⁵ See Art 29.8(2)3 CETA; TPP, Art. 28.10(1)(c).

⁵⁶ See Art 29.8(2)3 CETA; Art 28.10(1)(d) TPP.

⁵⁷ The Code of Conduct stills need to be developed as part of the Rules of Procedure by the Trans-Pacific Partnership Commission, a treaty organ composed of government representatives of each contracting party. The establishment of the Commission is provided for in Art 27.1 TPP. Its competence to establish the Rules of Procedure for inter-state dispute settlement is contained in Art 27.2(f) TPP.

⁵⁸ See Annex 29-B CETA.

⁵⁹ *ibid* para 2.

⁶⁰ *ibid* paras 3 and 4.

⁶¹ *ibid* para 4(4).

⁶² For example by incurring obligations or accepting benefits that interfere with their impartiality; see *ibid* para. 12.

political considerations, public clamour, loyalty to a Party, or fear of criticism.’⁶³ Likewise, ‘[a]n arbitrator may not use her or his position on the arbitration panel to advance any personal or private interests’⁶⁴ or allow ‘financial, business, professional, family or social relationships or responsibilities to influence her or his conduct or judgement.’⁶⁵ Finally, they are also bound by strict confidentiality requirements in respect of the proceeding.⁶⁶ All of this is to ensure the independence and impartiality of persons fulfilling adjudicatory functions in inter-state dispute settlement under mega-regionals. While being a sign of increased judicialization of inter-state arbitration, the rules on independence of arbitrators from the parties and other external influences are also a way to limit extraneous motivations or incentives for certain interpretations by arbitration. They thus have the purpose of ensuring that the respective agreement is interpreted, as much as possible, in line with the original intentions of the contracting parties.

Second, contracting parties to mega-regionals set out to determine the persons who can serve as arbitrators in inter-state disputes individually. For this purpose, contracting parties typically agree on the establishment of rosters of arbitrators for appointment in inter-state disputes. While parties in both TPP and CETA inter-state disputes remain free to appoint any arbitrator that meets the necessary criteria in terms of independence and expertise, the parties agree to the establishment of rosters that are binding for appointments by an appointing authority, for example, if one party fails to make an appointment, or for appointments of the chair by the co-arbitrators.⁶⁷ The establishment of rosters not only ensures better control of parties over which individuals are acting as arbitrators. It also increases the democratic legitimacy of the dispute settlement body, as arbitrators under TPP and CETA are more directly linked to domestic democratic processes as compared to institutional appointments that are not bound to rosters established by consensus of the contracting parties.

Third, building on the practice that developed over the past decade in WTO dispute settlement with the judicially activity, some say activism, of the Appellate Body,⁶⁸ mega-regionals, such as TPP and CETA, formally put down rules on transparency, third-party participation and interventions of *amicus curiae* in inter-state proceedings. Subject to an agreement of the disputing parties to the contrary, as well as an exception for the protection of confidential (business) information, both TPP and CETA provide for public hearings in inter-

⁶³ ibid para 11.

⁶⁴ ibid para 13.

⁶⁵ ibid para 14.

⁶⁶ ibid paras 17 19.

⁶⁷ For the establishment of Rosters of Panel Chairs and Party Specific Lists under TPP, see Art 28.11 TPP. The roster becomes binding in certain situation; see Art 28.9 TPP. Under CETA, the CETA Joint Committee is tasked with establishing a roster for arbitrators; see Art 29.8(1) CETA. This roster becomes binding for certain appointments pursuant to Art 29.7(2) CETA.

⁶⁸ For a concise summary of the development and state of law and practice on these issues in WTO dispute settlement, see Christiane Ahlborn and James Headen Pfitzer, ‘Transparency and Public Participation in WTO Dispute Settlement’ (Center for International Environmental Law, 2009) 5-25 <http://www.ciel.org/Publications/Transparency_WTO_Dec09.pdf> accessed 3 September 2016. Panagiotis Delimatsis, ‘Institutional Transparency in the WTO’ in Andrea Bianchi and Anne Peters (eds), *Transparency in International Law* (CUP 2013) 112, 118 ff.

state disputes.⁶⁹ Likewise, parties to a dispute are under an obligation to make their submissions public.⁷⁰ The final report of the panel is equally to be made public by the parties.⁷¹ Furthermore, *amicus* participation is allowed for under both TPP and CETA.⁷² TPP, as a multilateral treaty, also contains express provisions permitting third-party intervention, that is, participation of governments not involved in the dispute at hand.⁷³ All of these rules aim at ensuring that the dispute settlement process can take place under the eyes of all contracting parties, the affected public, academic observers and non-governmental organizations (NGOs). This not only has the purpose of increasing the legitimacy of inter-state dispute settlement; transparency and third party participation are also ways to increase the accountability of dispute resolvers. In transparent proceedings, they are under increased, albeit informal pressure to render decisions, and reasons them accordingly, that are understandable to all involved constituencies, and in principle acceptable to them as a proper construction of the agreement. In addition to being a sign of judicialization of inter-state arbitration, transparency, third-party and *amicus* participation are mechanisms that tighten control over the authority of arbitral tribunals in inter-state dispute settlement and help to legitimize dispute settlement better.

Fourth, the dispute settlement procedures in mega-regionals are cast in a way that allows disputing parties to influence the outcome of an arbitral award and ensure its correctness from their point of view. Similar to existing WTO rules for panel proceedings,⁷⁴ both CETA and TPP provide that panels in inter-state dispute settlement do not immediately issue a final and binding report, but in a first step produce an ‘interim’ or ‘initial’ report which is submitted to the disputing parties for comments.⁷⁵ This procedure gives the parties additional control over the outcome of the dispute and allows them to provide input in order to correct what they see as incorrect or illegitimate decision-making by inter-state arbitral tribunals in mega-regionals, including potentially unacceptable further development of the law of the agreement itself.

Fifth, as compared to the WTO, where the DSB is responsible for the supervision of the implementation of panel and Appellate Body reports,⁷⁶ contracting parties to mega-regionals maintain a comparatively stronger role in the implementation of inter-state awards. Both under CETA and TPP, the implementation of such awards is to take place primarily

⁶⁹ For the requirement of public hearings in CETA, see CETA, Annex 29-A, para 38 (providing that ‘unless the Parties decide otherwise, the hearings of the arbitration panel shall be open to the public’). An exception for the protection of ‘confidential business information’ is provided for in CETA, Annex 29-A, para 39. For the parallel provisions in TPP, see Art 28.13(b) TPP (requiring public hearings except if the parties agree otherwise); for an exception for the protection of ‘confidential information’, see Art 28.13(f) TPP. This exception arguably is broader than the exception under CETA, as it is not limited to ‘business’ information.

⁷⁰ See CETA, Annex 29-A, para 38 (‘each Party shall make its submissions publicly available’). TPP contains a ‘best efforts’-obligation to make submissions public ‘as soon as possible after those documents are filed’ and an unqualified obligation to release documents once the final panel report is issued; see Art 28.13(d) TPP.

⁷¹ See Art 29.10(3) CETA; Art 28.18(1)2 TPP.

⁷² See CETA, Annex 29-A, para 43; Art 28.13(e) TPP.

⁷³ See Art 28.14 TPP.

⁷⁴ See DSU, Appendix 3 (‘Working Procedures’) para 12.

⁷⁵ See Art 29.9 CETA (‘interim panel report’); Art 28.17 TPP (‘initial report’).

⁷⁶ Art. 2(1)(2) DSU.

through voluntary inter-state cooperation. The parties are to agree on a ‘reasonable period of time’ for the losing party to eliminate any non-conformity with the agreement.⁷⁷ Failing such elimination, the parties are to agree on compensation of the prevailing party, and only when no agreement can be reached, can the prevailing party suspend concessions.⁷⁸ Resulting disputes about the implementation of reports, in turn, are relegated to the arbitral tribunal.⁷⁹ Likewise, the arbitral tribunal can be asked to conduct an independent compliance review.⁸⁰ CETA also involves the CETA Joint Committee in the implementation of arbitral awards.⁸¹ Given the lack of a proper institutional enforcement mechanism, the contracting parties have an important role in implementing awards, and potentially have room for efficient breach, but also resisting enforcement unilaterally. This comparatively strong role of the parties in implementing inter-state awards means a relative reduction of the authority of arbitral tribunals as compliance with their awards depends to a large extent on the good-will of the disputing parties, even more so than in the WTO context, for example.

Finally, both TPP and CETA institutionalize the power of the contracting parties to interpret the respective agreement authoritatively through joint interpretations. Under TPP, the TPP Commission, inter alia, has the function to ‘issue interpretations of the provisions of this Agreement’.⁸² Similarly, the CETA Joint Committee, may ‘adopt interpretations of the provisions of this Agreement, which shall be binding on tribunals established under ... Chapter Twenty-Nine (Dispute Settlement)’.⁸³ This express power of a treaty organ serves to control the interpretative power of arbitral tribunals by allowing the parties to react to a tribunal decision or its reasoning, thereby undoing any possible effect of arbitral awards as precedent in future cases. Together with the other procedural safeguards discussed in this subsection, it constitutes one of several elements through which contracting parties in mega-regionals try to control and constrain the powers of inter-state dispute settlement bodies and ensure that the parties remain masters of the treaties.

3. *Encouraging Mediation*

Contracting parties to mega-regionals also attempt to exercise more control over dispute settlement by encouraging cooperative dispute resolution and alternative means of dispute settlement, above all inter-state mediation. Not only is access to formal inter-state arbitration dependent on prior inter-governmental consultations in order to arrive at an agreed solution,⁸⁴ some contracting parties, in particular the EU, seek to channel dispute resolution away from

⁷⁷ Art 29.13 CETA; Art 28.19(3) TPP.

⁷⁸ See Art 29.14 CETA; Art 28.20 TPP.

⁷⁹ See Art 29.14(5) CETA; Art 20.20(5) TPP.

⁸⁰ Art 29.15 CETA; Art 28.21 TPP.

⁸¹ See Arts 29.12-29.15 CETA.

⁸² Art 27.2(2)(f) TPP. This requires agreement of all parties; see Art 27.3(2)1 TPP. This considerable hurdle in a multilateral agreement is slightly alleviated, however, as ‘[a] decision shall be deemed to be reached if a Party which does not indicate agreement when the Commission considers the issue does not object in writing to the interpretation considered by the Commission within five days of that consideration’ (see Art 27.3(2)2 TPP).

⁸³ Art 26.1(5)(e) CETA.

⁸⁴ See Art 29.6(1) in connection with Art 29.4 CETA; Art 28.1(1) in connection with Art 28.5(1) TPP.

adjudicatory dispute resolution into inter-state mediation.⁸⁵ Mediation gives parties additional control over both the outcome and mechanism of dispute settlement as compared to dispute settlement through adjudication. For this reason, strengthening inter-state mediation is also a means to limit the authority of inter-state arbitration in dispute resolution.

As illustrated by CETA, mediation is provided for as a mechanism for dispute resolution that can take place at any time, prior to, but also in parallel with, formal inter-state arbitration.⁸⁶ Furthermore, the EU aims at formalizing mediation as an alternative mechanism for inter-state dispute settlement by not just making passing reference to mediation, as is the case under TPP,⁸⁷ but by including an elaborated four-page annex for the administration of inter-state mediation proceedings in the agreement.⁸⁸ This annex contains detailed rules on the initiation and implementation of mediation proceedings, including the process for selecting mediators, rules on independence and impartiality of mediators,⁸⁹ the procedure to follow with time limits, the powers and instruments available to mediators, provisions on implementation of an agreed result, and costs.

All of this enhances the status of mediation compared to the WTO, where mediation receives only passing mention as one form of aiming to settle disputes prior to, and exceptionally in parallel with adjudication by panels and the Appellate Body,⁹⁰ without detailed regulation. Other mega-regionals, such as the TPP, follows the same lax approach and copies almost verbatim the provision on mediation from the WTO DSU.⁹¹

Mediating inter-state disputes, instead of arbitrating them, stresses the authority of states because a settlement reached through mediation is, unlike in third-party adjudication, always dependent upon the consent of both disputing states. What is more, mediation proceedings are confidential,⁹² therefore shielding the dispute from public scrutiny. As transparency increases in formal inter-state and investor-state dispute settlement, mediation may serve as an exit valve for disputes that neither states wants to see resolved under public scrutiny. Mediation would then serve as a device for flexibility and preservation of certain policy concerns.⁹³ Either way, efforts to promote mediation coincide with giving disputing parties additional control over the resolution of the dispute at hand.

⁸⁵ See Art 29.5 CETA and Annex 29-C.

⁸⁶ See Annex 29-C, Arts 2(1) and 6(2) and (3) CETA.

⁸⁷ TPP only mentions inter-state mediation in Art 28.6 TPP.

⁸⁸ Annex 29-C CETA.

⁸⁹ With respect to mediators the same Code of Conduct applies as the one applicable to arbitrators. See Annex 29-C, Art 3(3)2 CETA.

⁹⁰ See Art 5 WTO DSU.

⁹¹ See Art. 28.6 TPP.

⁹² Annex 29-C, Art 6(1) CETA.

⁹³ See generally for the connection between confidentiality and flexibility in dispute resolution Emilie M Hafner-Burton, Zachary C Steinert-Threlkeld and David G Victor, 'Predictability Versus Flexibility' (2016) 68 World Politics 413.

C. Evaluation

The inter-state dispute settlement provisions in mega-regionals are carefully crafted to balance the need of contracting parties for an effective compliance mechanism with the desire to limit any overreach of the dispute settlement body into sensitive areas of public policy. With the low level of institutionalization, various carve-outs, modifications for specific subject-matters, and encouragement of mediation, contracting parties maintain much greater levels of control in dispute settlement under mega-regionals as compared to WTO dispute settlement. They seek to contain the authority of inter-state dispute settlement to the minimum necessary for serving as an effective compliance mechanism, while also minimizing negative effects for the multilateral trading system and WTO dispute settlement. This also serves to ensure the legitimacy of inter-state dispute under mega-regionals as the control contracting states exercise in relation to inter-state arbitral tribunals links dispute settlement under mega-regionals closer to domestic democratic decision-making. Ensuring the authority of the WTO and avoiding fragmentation in turn preserves the legitimacy value of multilateralism and fosters predictability and the continued observance of the rule of law in international economic relations.

Yet, there is overall relatively little remarkable about the developments in inter-state dispute settlement in mega-regionals when compared to the debates surrounding ISDS. At the most, developments in the inter-state regime may be interpreted an example of the renewed interest of states in arbitration and possible hesitation towards permanent judicial bodies under international law. Whether this is truly the case will depend, however, on the actual use made of the inter-state dispute settlement provisions in these agreements. If past experience with the dispute settlement under free trade agreements is any indicator, the contracting parties to mega-regionals are likely to continue settling trade-related disputes in the WTO rather than outside of it. Reasons for this are the WTO DSB's track record and the support by the WTO Secretariat, both of which make dispute settlement in the WTO predictable and efficient.⁹⁴ This notwithstanding, dispute settlement under mega-regionals, albeit still cautiously, develops some features that could feed into future reforms at the WTO. The enhanced rules on transparency, stronger emphasis on mediation, and the establishment of enforcement mechanisms for labor and environmental rules could be seen as precursors of a future multilateralization of these issues within the WTO. In any event, the more remarkable developments as regards dispute settlement in mega-regionals undoubtedly take place in the realm of ISDS, to which the next section turns.

⁹⁴ William J Davey, 'Dispute Settlement in the WTO and RTAs: A Comment' in Lorand Bartels and Federico Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (OUP 2006) 343, 344 ff. See also Patrick Specht, 'The Dispute Settlement Systems of WTO and NAFTA – Analysis and Comparison' (1998) 27 *Ga J Int'l & Comp L* 57, 127; Rafael Leal-Arcas, 'Comparative Analysis of NAFTA's Chapter 20 and the WTO's Dispute Settlement Understanding' (2011) 8(3) *Transnational Dispute Management*.

III. Investor-State Dispute Settlement in Mega-Regionals

Increasing control by contracting parties over dispute settlement and avoiding fragmentation by restricting the possibility of parallel, subsequent, and overlapping proceedings, and thereby enhancing the legitimacy of dispute settlement, are also the main factors that drive the provisions on ISDS in mega-regionals, as illustrated by the investment chapters in CETA and TPP. More so than in the context of inter-state dispute settlement, ISDS had become a contested, publicly scrutinized and highly political issue in the negotiation of mega-regionals. It takes place against the background of the intense criticism that investor-state arbitration under BITs has attracted over the past year, which is widely associated with what is often called a ‘legitimacy crisis’ of the field. This crisis takes issue with the constitutional implications of ISDS on the principle of democracy, the concept of the rule of law, and the protection of human and fundamental rights, and hence challenges the legitimacy of investor-state arbitration from a constitutional law perspective (see Section III.A). This constitutional challenge determines the evaluation of ISDS and explains many of the elements of reform that are being introduced to ISDS in modern trade and investment treaty practices on both sides of the Atlantic in order to safeguard contracting states’ right to regulate and increase consistency in dispute settlement (see Section III.B). Despite the many commonalities that emerge from an analysis of the ISDS provisions in CETA and TPP, a major dissonance remains with respect to the question whether ISDS should continue to take place in the form of loosely institutionalized, one-off investor-state arbitration, as is preferred by the United States, or whether it should be further institutionalized by creating either an appeals mechanism or, as proposed by the EU, a permanent international investment court (see Section III.C).

A. Legitimacy Crisis of Investment Law as a Constitutional Challenge

From the perspective of foreign investors, investment treaty arbitration, which is offered in addition to, or as an alternative for, the host state’s domestic courts, has been successful in making host states comply with their IIA obligations in an effective, neutral, and independent forum for the settlement of investment disputes.⁹⁵ In particular, in countries with weak government and judicial institutions, ISDS is considered to be a crucial safeguard to allow foreign investors to sanction illegitimate government conduct, such as arbitrary conduct or expropriations without compensation, without the need to being subject to the vagaries of litigating against the host government in its own courts.⁹⁶ In addition, direct recourse to ISDS replaces the otherwise available mechanism for the investor’s home state to exercise

⁹⁵ The text of this sub-section is adapted from Stephan W Schill, ‘Reforming Investor-State Dispute Settlement (ISDS): Conceptual Framework and Options for the Way Forward’, E15 Task Force on Investment Policy Think Piece (International Centre for Trade and Sustainable Development/World Economic Forum, July 2015) 2-4.

⁹⁶ Problems with domestic courts may involve a lack of personal or institutional independence of the domestic judiciary, including in some cases problems of corruption, or major shortcomings in the length of judicial proceedings. Furthermore, ISDS can serve as a mechanism to make states comply with their obligations in IIAs, given that these are not necessary directly applicable in domestic courts and cannot always be vindicated there. In such a case, a dispute settlement mechanism under international law is the only option for invoking breaches of the international legal obligations involved.

diplomatic protection, thus preventing an investor-state dispute from becoming a diplomatic incident that can strain inter-governmental relations.⁹⁷

At the same time, the success of ISDS has created its own problems and generated vocal criticism, which is often said to have resulted in a ‘legitimacy crisis’ of the system.⁹⁸ Signs of this crisis are seen in the withdrawal of some Latin American states from the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention) (Bolivia, Ecuador, Venezuela); the withdrawal of some states from IIAs or entire IIA programs (including Ecuador, Venezuela, South Africa, the Czech Republic, and Indonesia); abstaining from including ISDS in new IIAs (which was Australia’s policy for a time); or recrafting the substance and procedure of IIAs to increase state control and ensure government policy space. Further, ISDS has become the focal point of criticism in IIAs by public interest groups, in particular in Europe and North America, by scholars from various disciplines, including constitutional law, international law, and economics, in the general media, and by the general public.⁹⁹

Claims for the lack of legitimacy are the common denominator of the current critique of ISDS. Recurring concerns in this context include the following.

- First, the increasing number of conflicting and inconsistent interpretations by arbitral tribunals of standard principles of investment protection, not only under different treaties, but also in virtually identical cases brought under the same treaty.
- Second, the wide latitude investment treaties give to arbitrators to interpret broadly formulated principles of investment protection, which creates uncertainty and unpredictability in arbitral decision making and gives arbitrators significant powers in further developing IIA disciplines.
- Third, the insufficient regard paid by some tribunals to the need for host states to regulate in the public interest, for example, to protect public health, labor standards, the environment, or to react to economic and financial crises.
- Fourth, the misalignment between governance effects of ISDS that go beyond the disputing parties and private law-inspired procedural maxims of arbitration, in particular confidentiality of proceedings, the understanding of independence and impartiality of arbitrators, and the idea that dispute settlement under investment

⁹⁷ O Thomas Johnson and Jonathan Gimblett, ‘From Gunboats to BITs: The Evolution of Modern International Investment Law’ in Karl P Sauvant (ed), *Yearbook on International Investment Law and Policy 2010–2011* (OUP 2012) 649.

⁹⁸ See, for example, Charles N Brower and Stephan W Schill, ‘Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?’ (2009) 9 *Chicago JIL* 471; Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press, 2007); Gus Van Harten et al, ‘Public Statement on the International Investment Regime’ (31 August 2010) <<http://www.osgoode.yorku.ca/public-statement-international-investment-regime-31-august-2010/>> accessed 12 July 2016; M Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (CUP 2015).

⁹⁹ See contributions dealing with the different symptoms of the crisis and state reactions to it see Michael Waibel et al (eds), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Kluwer 2010); Steffen Hindelang and Markus Krajewski (eds), *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (OUP 2016); Andreas Kulick (ed), *Reassertion of Control over the Investment Treaty Regime* (CUP 2016) (forthcoming).

treaties constitutes a party-owned process, in which non-parties, even if affected, are voiceless.

- Fifth, the lack of mechanisms to ensure “correct” interpretations of IIA obligations in line with the intentions of the contracting parties and to control the further development of investment law by arbitral tribunals.
- Sixth, the high costs and considerable length of many arbitral proceedings, including in cases that manifestly are lacking of merits or are even frivolous or abusive.

Common to all these aspects of criticism is that they do not principally concern the outcome of individual decisions rendered in ISDS, but concern ISDS as a system. Moreover, the criticism does not focus primarily on the function of arbitral tribunals to settle past disputes, but rather on the impact the ISDS system has on the future conduct of governments. ISDS, in other words, is analyzed and criticized as a system of governance in which individual tribunals exercise public authority 1) by reviewing government conduct under IIA disciplines in place of, or in addition to, administrative or constitutional courts at the domestic level; and 2) by further developing applicable IIA standards and effectively making investment law.¹⁰⁰ In sum, the criticism focuses on ISDS’ public governance function, not its private function to settle individual disputes, and the tension it causes with constitutional standards that are customarily used to assess the legitimacy of public authority.

While any adjudicatory mechanism, including domestic courts, has governance functions, the ISDS system as structured so far under BITs and investment chapters in free trade agreements lacks the institutional infrastructure in which courts that exercise judicial review are usually embedded. In ISDS, there is no hierarchical court system that could control judicial errors and ensure consistency and coherence in adjudication, nor is there a legislative body that could control the law-making activities of arbitral tribunals. Instead, ISDS so far is composed of one-off tribunals that decide individual cases only, usually without the possibility of appeal or comparable control mechanisms. In addition, ISDS procedures follow largely private law rationales that most domestic systems consider inadequate for settling private-public disputes. ISDS is based on the idea of a party-owned and party-controlled process that has few, if any, public repercussions and is often conducted based on confidentiality, rather than in transparent and open procedures. Finally, several arbitrators, unlike tenured judges, also take up other professional roles in the system, including as counsel in other ISDS proceedings.

¹⁰⁰ On the understanding of ISDS as a system of governance and the legitimacy concerns raised from a public law perspective, see Stephan W Schill, ‘International Investment Law and Comparative Public Law: An Introduction’ in Stephan W Schill (ed), *International Investment Law and Comparative Public Law* (OUP 2010) 3-37. In many cases, ISDS proceedings deal with matters that are customarily considered as public law disputes. Claims concerning environmental conditions for the operation of power plants, the legality of subsidies, or the prohibition of harmful substances are examples of what are in essence administrative law disputes. Claims against Uruguay and Australia on cigarette packaging, or the claim concerning Germany’s nuclear power phase-out, are examples of genuinely constitutional law disputes settled in arbitration. In this context, law-making occurs, notwithstanding a considerable number of inconsistent decisions, because arbitral tribunals generally operate in a strongly precedent-oriented fashion in which they further develop and concretize the vague standards of treatment, such as fair and equitable treatment or the concept of indirect expropriation. See further Stephan W Schill, *The Multilateralization of International Investment Law* (CUP 2009) 321-61.

In sum, the current ISDS system conceptually suffers from a tension between its public governance functions and its set-up as a private dispute settlement mechanism that is modeled on, and breathes the intellectual and epistemic spirit of, how private-private disputes are settled in commercial arbitration. Against this background, ISDS comes as a challenge to core constitutional law values, such as the principle of democracy, the concept of the rule of law, and the protection of fundamental or human rights. Inconsistencies in arbitral jurisprudence are a problem from a constitutional perspective because they undermine the value of predictability inherent in the idea of the rule of law. Concerns about possible conflicts of interests of arbitrators pose a challenge to the independence of decision makers, which forms part of the rule of law. High costs and overly lengthy proceedings limit the parties' access to justice, which also follows from the concept of the rule of law.

Other points of criticism concern challenges to the principle of democracy. Thus, disregard for domestic policy space can limit a host state's democratic choices. Further, creative interpretations of arbitral tribunals, or even the further development of investment law, are in essence legislative functions that require decision makers' democratic legitimation. Yet, arbitrators do not dispose of a solid democratic mandate to further develop investment disciplines. On the contrary, arbitral tribunals are on the whole far removed from democratic processes, both in the appointment of arbitrators and control of their decisions. Arbitrators' democratic legitimacy is limited to the state's one-time consent to the governing IIA and the appointment of some members of a tribunal in a concrete dispute. Moreover, there is no functioning separation of power between adjudicatory and legislative institutions, as required by the principle of democracy.

ISDS also poses a problem for the principle of equality, which is part of the democratic principle, because it only grants standing to foreign investors, while denying access to domestic investors who are limited to accessing domestic courts. Similarly, the lack of transparency and of third-party participation pose a challenge to the openness and transparency the principle of democracy requires of the exercise of public authority and the possibility for everyone affected to have a voice in decision making through participatory rights.

Finally, the protection of fundamental or human rights is affected by ISDS to the extent arbitral tribunals extend investor rights to the detriment of competing non-investment concerns, such as the right to public health, the right to water, or the rights of indigenous people. It is to these challenges that mega-regionals, such as CETA and TPP, react.

B. Public Law Responses Common to CETA and TPP

Both CETA and TPP formulate responses to, and include reform elements for, at least some of the above challenges to ISDS. While adhering to the principle that foreign investors, and only foreign investors, have recourse to a specialized jurisdiction independently of domestic courts, and hence rejecting more radical reform options that would consist in a return to the system of diplomatic protection coupled with recourse to domestic courts, CETA and TPP particularly aim at addressing problems relating to a lack of consistency in ISDS and strengthening the control of contracting states over dispute resolvers. Overall, both CETA and

TPP aim at implementing a system for ISDS that is more legitimate and less problematic than the system of investor-state arbitrations under BITs that we have seen so far. In pursuing the aim of creating a more legitimate system of ISDS, both CETA and TPP include many elements that are also present in the agreements' state-to-state dispute settlement provisions discussed in Part II, while adding features that are specific to ISDS. Some of these features are relatively novel and have only been found in a few earlier IIAs; others build on reform efforts that have been present more widely in the IIA practice of the past decade and in reforms that have already taken place at the level of arbitration rules. This includes in particular the revisions of the ICSID Arbitration Rules in 2006, which already contained some elements of transparency and mechanisms to reject frivolous and spurious claims more expeditiously,¹⁰¹ and the reform of the UNCITRAL Arbitration Rules in 2013, which introduced comprehensive rules for transparency and third-party participation for treaty-based investor-state arbitration.¹⁰²

First, both CETA and TPP confine the scope of possible investor-state claims to breaches of the investment chapter of the respective agreement. Breaches of provisions of other chapters generally remain in the realm of state-to-state dispute settlement. Under TPP, access to ISDS is limited to claims for breach of all treaty provisions in the investment chapter, as well as claims for breach of 'investment agreements' and 'investment authorisations'.¹⁰³ This includes claims for breach of market access provisions and performance requirements. The governing law in ISDS under TPP may therefore include both the TPP as such and the law governing an investment agreement or investment authorisation, that is, either the law chosen by the parties, or by default the law of the respondent state.¹⁰⁴ CETA is even more limited and only allows claims for breach of investment protection standards related to established investments; it excludes claims relating to alleged violations of market access rights or to unlawful performance requirements.¹⁰⁵ CETA also excludes claims for breach of domestic law entirely,¹⁰⁶ and provides that fraudulently obtained investments not protected.¹⁰⁷ Similar to state-to-state dispute settlement, both CETA and TPP thus adhere to a principle of selective judicialization that aims at ensuring control of the contracting parties over the type of disputes that can end up in ISDS.

Second, both CETA and TPP provide for specific carve-outs and modifications for subject-matters that are specifically sensitive for public policy-making, be it for all countries involved, or for individual contracting parties. TPP, for example, contains a number of

¹⁰¹ For analysis of the changes introduced in 2006, see Aurélia Antonietti, 'The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules' (2006) 21 ICSID Review-FILJ 427; Jarrod Wong and Jason W Yackee, 'The 2006 Procedural and Transparency-Related Amendments to the ICSID Arbitration Rules: Model Intentions, Moderate Proposals, and Modest Returns' in Karl P Sauvant (ed), *The Yearbook on International Investment Law & Policy 2009-2010* (2010) ch 6.

¹⁰² United Nations, 'Report of the United Nations Commission on International Trade Law of its Fourty-sixth Session (8-26 July 2013)' *Official Records of the General Assembly, Sixty-eighth Session, Supplement No 17 (A/68/17)* (2013) para 128 and Annex I <http://www.un.org/en/ga/search/view_doc.asp?symbol=A/68/17> accessed 20 October 2016.

¹⁰³ Arts 9.19(1)(a)(i) and (b)(i) TPP.

¹⁰⁴ Art 9.25(2) TPP.

¹⁰⁵ Art 8.18(1) CETA.

¹⁰⁶ Art 8.31(2) CETA.

¹⁰⁷ Art 8.18(2) CETA.

country-specific limitations on ISDS,¹⁰⁸ as well as specific limitations for claims relating to sensitive areas of government conduct, such as the restructuring of public debt.¹⁰⁹ Likewise, CETA excludes access to ISDS for certain areas of government action, including notably procurement and subsidies, but also services supplied in the exercise of governmental authority, air services, as well as audio-visual services for the EU and cultural services for Canada.¹¹⁰ Similar to the TPP, CETA also provides limitations on claims relating to public debt.¹¹¹

Furthermore, both TPP and CETA provide special dispute settlement regimes for ISDS in the financial services sector.¹¹² This includes not only the need for dispute resolvers to have specific expertise in financial services law and regulation¹¹³ but also the involvement of the Financial Services Committees established under the agreements in limiting the authority of the ISDS system.¹¹⁴ Thus, if the respondent state relies on certain defenses for financial measures, in particular the prudential carve-out, it can refer the question of whether the exception applies for determination to the Financial Services Committee, which is binding on an investor-state tribunal.¹¹⁵ Similarly, with respect to taxation, both CETA and TPP ensure additional policy space by providing for enhanced involvement of the contracting parties who can, through inter-state consultations requested by the respondent, decide, with binding effect for the tribunal, *inter alia*, on whether the measure in question is a taxation measure and whether it breached the substantive standards of protection.¹¹⁶ All of these features provide nuanced reactions to square the need for contracting states' policy space in order to govern effectively in the public interest with the interest in ensuring effective protection and fair treatment of foreign investors.

¹⁰⁸ See, for example, the exceptions for certain claims against Mexico for breach of investment agreements of investment authorisations, listed in TPP, Annex 9-L(C), or the exceptions for claims against Malaysia for breach of specific government procurement contracts und TPP, Annex 9-K.

¹⁰⁹ See TPP, Annex 9-G, which excludes investor-state proceedings in case of 'negotiated restructurings' of public debt.

¹¹⁰ Access to investor-state dispute settlement here is excluded because the scope of application of the entire investment chapter is subject to certain carve-outs. See the list in Art 9.2(2) CETA.

¹¹¹ See Art 8.18(4) CETA and Annex 8-B (excluding *inter alia* dispute settlement in case it concerns a negotiated restructuring and imposing a time-bar of 270 days on claims in order to ensure more policy space.

¹¹² For modifications of the general investor-state dispute settlement regime see Art Art. 13.21 CETA and Art 11.22 TPP.

¹¹³ See Art 13.21(2) in connection with Art 13.20.3 and 4 CETA; Art 11.22(1) TPP.

¹¹⁴ See Arts 13.18 CETA and 11.19 TPP.

¹¹⁵ See Arts 11.22(2)(a) and (b)3 TPP. Almost identical provisions exist under Art 13.21(3) CETA, which provides for referral to Committee. If the Committee accepts respondent's reliance on the prudential carve-out, the investor-state dispute settlement mechanism is discontinued (Art 13.21(4)3 CETA); in case of partial acceptance of the defense, this decision is binding on the tribunal (Art 13.21(4) 4 CETA). Under TPP, in case no determination by the Committee can be reached, the respondent can initiate state-to-state arbitration under the financial services chapter whose decision on whether an exception applies, in particular whether it was covered as a prudential measure, is equally binding on an investor-state tribunal. See Art 11.22(3) TPP; see also Art 11.11(1)1 fn. 11 TPP (clarifying that an investor-state dispute settlement tribunal has to accept the determination pursuant to Art. 11.22 TPP by the Committee that a measure was for prudential reasons).

¹¹⁶ See Art 28.7(7) CETA. Under TPP, the involvement of the respondent state and the investor's home state is slightly more limited. Still, the two parties can determine whether the measure in question constituted an expropriation; Art 29.4(8) TPP. However, the scope of application of TPP to taxation measures is more limited. It excludes taxation matters generally from the scope of coverage of the treaty, except for those causes of action specifically permitted. See Art. 29.4(2) TPP.

Third, just as in the context of state-to-state dispute settlement, recourse to ISDS is dependent on attempts at prior amicable settlement. Both TPP and CETA require consultations between the disputing parties for six months prior to formal recourse to investor-state dispute settlement.¹¹⁷ Likewise, both TPP and CETA mention mediation in order to settle investor-state disputes under the agreements amicably, with CETA going slightly further in putting emphasis on the fact that mediation can take place at any time during the course of a dispute, including in parallel to adjudication, and providing for the development of formalized rules for investor-state mediation by CETA's Committee on Services and Investment.¹¹⁸ The need for amicable dispute settlement and encouragement of mediation puts a check on the unregulated escalation of investor-state disputes and thereby limits the authority of adjudication in ISDS.

Fourth, both CETA and TPP contain a variety of provisions that aim at reducing, if not excluding parallel, overlapping and subsequent proceedings, thereby ensuring more consistency in ISDS. TPP, while much less systematic in this respect than CETA, prohibits recourse to domestic courts by requiring a waiver of such proceedings when ISDS proceedings are initiated.¹¹⁹ Fork-in-the-road provisions that would exclude recourse to ISDS once domestic proceedings have been initiated, by contrast, are only provided for under TPP with respect to Chile, Mexico, Peru, Vietnam.¹²⁰ Parallel and subsequent proceedings are further excluded to the extent TPP provides for the primacy of forum selection clauses in relation to claims involving breach of an investment agreement.¹²¹ Finally, more consistency is achieved by the possibility of consolidation of claims¹²² if two or more proceedings have a 'question of law or fact in common and arise out of the same facts or circumstances'.¹²³ In such a case, the constitution of a consolidation tribunal can be requested, which decides the disputes in question instead of the original tribunal(s), thereby excluding inconsistent and contradictory decisions.

CETA, in turn, is stricter and more systematic when it comes to limitations on parallel, overlapping and subsequent proceedings. It contains a version of a fork-in-the-road clause under which parallel domestic and international proceedings are prohibited.¹²⁴ When submitting a claim under CETA's investment chapter, investors are required to waive any future recourse to domestic or other international proceedings.¹²⁵ Where a claim is pending under the ISDS disciplines of CETA and under another international agreement, which would affect the remedies due, CETA requires the tribunal to stay its proceedings or ensure through other means that the outcome of the other proceeding is taken into account.¹²⁶ Furthermore,

¹¹⁷ See Art 8.23(1)(b) CETA and Art 9.19(1) TPP.

¹¹⁸ See Art 8.20 CETA and Art 9.18(1) TPP.

¹¹⁹ See Art 9.21(2)(b) TPP.

¹²⁰ See TPP, Annex 9-J.

¹²¹ See TPP, Annex 9-L(A).

¹²² See Art 9.28 TPP.

¹²³ Art 9.28(1) TPP.

¹²⁴ Art 8.22(1)(f) CETA.

¹²⁵ Art 8.22(1)(g) CETA. Turning back to dispute settlement before domestic courts is only possible if the claim under CETA's investment chapter is not successful on procedural grounds; see Art 8.22(5) CETA.

¹²⁶ Srt 8.24 CETA.

CETA, in principle, excludes inter-state proceedings in parallel to ISDS, unless measures of general application are at issue; in this case, inter-state arbitration may contribute to limiting the number of claims as it creates an incentive for investors to refrain from initiating investor-state claims, thereby shifting the cost risks to their home state.¹²⁷ Finally, CETA includes provisions on the consolidation of investor-state claims that are rather similar to those under TPP.¹²⁸ Hence, both TPP and CETA aim at ensuring consistency by limiting the possibilities for parallel, subsequent and overlapping proceedings that could create inconsistencies.

Fifth, both CETA and TPP establish requirements for the qualifications and ethical obligations of dispute resolvers. This not only enhances the control of contracting parties over ISDS but also contributes to making decision-making more coherent by limiting the pool of appointable persons, thus leading to a more uniform mindset and epistemic outlook of the individuals involved in investor-state dispute resolution. CETA requires dispute resolvers to possess the qualifications needed for appointment to judicial office, or being a jurist of recognised competence, hold demonstrated expertise in public international law and desirable expertise in international investment law, in international trade law and the resolution of disputes arising under international investment or international trade agreements.¹²⁹ TPP, in turn, stipulates that expertise in the governing law is desirable.¹³⁰ Likewise, tighter and more concrete ethical standards for dispute resolvers will help ensure a more coherent habitus and adjudicatory posture, which will arguably translate into more coherent interpretations. Under CETA,¹³¹ decision-makers must be independent and comply with the International Bar Association Guidelines on Conflicts of Interest in International Arbitration or any supplemental rules adopted later by the CETA Services and Investment Committee; they are also excluded from ‘double-hatting’, that is, acting as counsel or experts in other investment disputes under CETA or any other international proceedings.¹³² CETA further requires expressly the disclosure of third-party funding arrangements in order to ensure that any possible conflicts of interests are avoided.¹³³ Under TPP, the same Code of Conduct as in inter-state disputes applies to arbitrators in investor-state proceedings.¹³⁴

Sixth, both CETA and TPP provide for largely identical rules on transparency of proceedings as well as participation of *amici curiae* and non-disputing parties. Building on the UNCITRAL Transparency Rules,¹³⁵ CETA and TPP foresee public hearings¹³⁶ and

¹²⁷ See Art 8.42(1) CETA.

¹²⁸ See Art 8.43 CETA.

¹²⁹ See Art 8.27(4) CETA.

¹³⁰ Art 9.22(5) TPP.

¹³¹ Art 8.30(1) CETA.

¹³² Art 8.30(1) CETA.

¹³³ See Art 8.27(2) CETA.

¹³⁴ See Art 9.22(6) TPP.

¹³⁵ See Art 8.36 CETA. For the UNCITRAL Transparency Rules see United Nations, ‘Report of the United Nations Commission on International Trade Law of its Forty-sixth Session (8-26 July 2013)’ Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17 (A/68/17) (2013) para. 128 and Annex I <http://www.un.org/en/ga/search/view_doc.asp?symbol=A/68/17> accessed 14 September 2016. TPP contains a transparency regime that does not expressly mention the UNCITRAL Transparency Rules but matches them by and large in terms of content. See Art 9.24 TPP.

¹³⁶ Art 8.36(5)1 CETA; Art 9.24(2) TPP.

publication of relevant documents,¹³⁷ while ensuring the protection of ‘confidential or protected information’.¹³⁸ Both agreements also permit the participation of non-disputing parties¹³⁹ and that of *amici*.¹⁴⁰ These provisions not only ensure better knowledge of the public about the existence, administration, outcome and implementation of investor-state disputes and allows for the participation of everybody who is affected by such proceedings, but will also increase the consistency of decisions, as the greater number of participating actors is likely to insist on coherent and consistent decision-making once a proper and widely acceptable construction of the respective agreement is settled. Transparency of proceedings, in turn, will create an incentive for dispute resolvers to render their decisions so as to correspond with the expectations of all actors involved in consistent decision-making and take account of interpretations of the same and similar agreements by other dispute settlement bodies.

Seventh, both CETA and TPP contain a number of procedural features that react to the constitutional challenge and make ISDS both more effective and expedient and more legitimate. Thus, CETA and TPP allow for the expedient dismissal of frivolous and spurious claims at the stage of preliminary objections.¹⁴¹ Both agreements also include a statute of limitation for bringing claims in ISDS of three, respectively three and a half years.¹⁴² The agreements further limit the available remedies to monetary damages and restitution, provided that the state maintains the possibility to substitute restitution for the payment of compensation;¹⁴³ punitive damages, in turn, are excluded.¹⁴⁴ Furthermore, the provisions on costs are adapted in order to limit effectively the bringing of unmeritorious claims, with CETA expressly incorporating the ‘loser pays’-principle,¹⁴⁵ and TPP containing a clause that permits to shift costs, including attorney fees.¹⁴⁶ Both agreements also provide that no enforcement of investor-state awards is possible until a possible annulment or set-aside proceeding is completed.¹⁴⁷

All of these provisions limit the use of ISDS for illegitimate purposes and aim at ensuring that it does not reduce the policy space states need to govern in the public interest. TPP even goes further and requires, in mirroring the provisions on state-to-state dispute settlement, the submission of draft decisions by the investor-state tribunals to the disputing

¹³⁷ Art 8.36(2)-(4) CETA; Art 9.24(1) TPP.

¹³⁸ Art 8.36(4) and (5) CETA (covering ‘confidential or protected information’); Art 9.24(3) TPP (covering ‘protected information ... that it may withhold in accordance with Article 29.2 (Security Exceptions) or Article 29.7 (Disclosure of Information)’).

¹³⁹ Art 8.38 CETA; Art 9.23(2) TPP.

¹⁴⁰ See Art 8.36(1) CETA in connection with Art 4 of the UNCITRAL Transparency Rules; Art 9.23(3) TPP.

¹⁴¹ See the provisions on preliminary objections under Art 8.32 CETA for claims that are ‘manifestly without legal merit’ and under Art 8.33 CETA for claims that are ‘unfounded as a matter of law’. For the parallel provision in TPP, see Art 9.23(4) TPP.

¹⁴² See Art 8.19(6) CETA; Art 9.21(1) TPP.

¹⁴³ Art 8.39(1) CETA; Art 9.29(1) TPP.

¹⁴⁴ Art. 8.39(4) CETA; Art. 9.29(6) TPP.

¹⁴⁵ Art 8.39(5) CETA.

¹⁴⁶ Art 9.29(3) TPP.

¹⁴⁷ Art 8.41(3) CETA; Art 9.29(9) TPP.

parties for comments.¹⁴⁸ At the same time, CETA and TPP also clarify that ISDS has the powers and the duty to settle disputes effectively and expeditiously. For this purpose, both agreements clarify that tribunals can render interim measures;¹⁴⁹ CETA even requires that decisions in ISDS are rendered, in principle, within 24 months.¹⁵⁰ All of this ensures efficient dispute settlement, but also limits the authority of ISDS so that contracting parties possess the policy space they need.

Finally, as with inter-state dispute resolution, both CETA and TPP put in place treaty organs that can render authoritative interpretations of the investment chapter with binding effect on ISDS. This allows the contracting parties to effectively react to unwanted interpretations and further development of the governing agreement through ISDS. CETA provides for the authority of the CETA Joint Committee to issue binding interpretations of CETA's investment chapter in cases '[w]here serious concerns arise as regards matters of interpretation that may affect investment';¹⁵¹ under TPP, interpretations by the TPP Commission are binding on ISDS tribunals.¹⁵² Unlike often feared, these provisions do not allow the treaty organs in question to resolve a specific dispute in a binding fashion. They are only empowered to interpret the agreements, that is, to give an abstract and general concretization of the meaning of its terms without applying this interpretation to the facts of a specific dispute. Such activity would transcend the realm of interpretation and enter into the field of adjudication. By establishing the treaty organs in question, the contracting parties maintain better control of ISDS, in particular as it relates to the potential for law-making through interpretation. In addition, the CETA Joint Committee and the TPP Commission have competences to adapt the dispute settlement provisions to changing circumstances, if needed, without the need to formally renegotiate the agreements.¹⁵³ This also ensures that parties can react to deficits in dispute settlement that may become apparent over time.

All of the features discussed in this Section react to (at least some of) the challenge ISDS poses for constitutional values, in particular the principle of democracy, the concept of the rule of law and the protection of fundamental and human rights. By making proceedings more transparent, allowing the participation of non-disputing parties and *amici curiae*, establishing control bodies for interpretations of the agreements, imposing stricter limits on the type of claims that can be submitted to ISDS, and limiting the remedies that are available, CETA and TPP aim both at limiting the authority of ISDS and at ensuring that the agreements do not unnecessarily limit the policy space needed for the implementation of public interests. Moreover, the different features ensuring more consistency in decision-making aim at

¹⁴⁸ See Art 9.23(10) TPP.

¹⁴⁹ Art 8.34 CETA; Art 9.23(9) TPP..

¹⁵⁰ Art 8.39(7) CETA.

¹⁵¹ Art 8.31(3) CETA.

¹⁵² Art 9.25(3) TPP; regarding the interpretation of Annexes, see also Art 9.26(2) TPP.

¹⁵³ Under CETA, the CETA Joint Commission and the Committee Services and Investment work jointly in this respect; see Art. 8.44(3) CETA. Under TPP, the competences of the TPP Commission are arguably more restricted than those of the CETA Joint Committee, but include the monitoring of the implementation of the agreements and its interpretation, issuing binding interpretations and proposing amendments or changes if needed and its competences see TPP, Chapter 27. Matters relating to dispute settlement that fall short of an amendment of TPP can be implemented under Art 27.2(1)(a) TPP (

increasing the predictability of the operation of the investment chapter, for both states and investors, therefore contributing to a better alignment of ISDS with the rule of law.

At the same time, both CETA and TPP maintain access to ISDS as a form of access to justice that allows investors to enforce the rights granted to them. This redeems the promise of the rule of law that rights must correspond to remedies. Yet, they only fulfill this promise only for foreign, not domestic investors, and equally do not directly enhance access to justice for third parties. Finally, both CETA and TPP aim at making dispute settlement under their respective investment chapters more efficient and effective by clarifying certain competences of the dispute resolution body and trying to ease the financial burden of the proceedings on parties by making them more efficient. To this end, it bears noting that CETA also takes first steps to enhance the usefulness of the investment protection provisions for small and medium-sized enterprises (SMEs), for whom ISDS so far has often been too expensive. Thus, CETA includes provisions that try to make the system more attuned to the special needs of SMEs, in particular by stating a preference for sole arbitrators, instead of a three-member tribunal, for such disputes,¹⁵⁴ and through an opening clause that allows the CETA Joint Committee to develop other rules to deal with the special needs of SMEs, including perhaps even the establishment of an advisory center or some other legal aid mechanism.¹⁵⁵

All of these measures will contribute to making ISDS not only more palatable to constitutional values but using it decisively to further such values in times of globalization and take them seriously as a yardstick for ISDS design. To a great extent, TPP and CETA are therefore aligned in implementing public law reforms of ISDS. They both aim to implement similar principles for how investor-state relations should be regulated in a global economy and how investor-state dispute should be settled. Notably, there seems to be little difference on both sides of the Atlantic about the principle that ISDS mechanisms need to be designed in a way that they are democratically legitimate, do not intrude illegitimately into states' policy space, and live up to the requirements set up by the idea of the rule of law. Similarly, many of the responses that follow from conceptualizing ISDS provisions from the perspective of constitutional law standards are shared by CETA and TPP and hence by two of the major actors in international investment governance, namely the EU and the United States. This is promising for the global reform efforts and initiatives of ISDS that are under way in different fora. The broad agreement on matters of principle notwithstanding, there is greater divergence when it comes to the institutional structures for ISDS that are preferred on either side of the Atlantic.

C. The Transatlantic Gap on Further Institutionalization of Investor-State Dispute Settlement

Both TPP and CETA take a common approach to the procedure applicable to ISDS. Under both agreements, investors have a choice between the arbitral rules under ICSID, ICSID

¹⁵⁴ See Art 8.23(5) and 8.27(9) CETA.

¹⁵⁵ See Art 8.39(6) CETA ('The CETA Joint Committee shall consider supplemental rules aimed at reducing the financial burden on claimants who are natural persons or small and medium-sized enterprises. Such supplemental rules may, in particular, take into account the financial resources of such claimants and the amount of compensation sought.').

Additional Facility, UNCITRAL Arbitration Rules, or any other rules as may be agreed between the disputing parties.¹⁵⁶ Similarly, the enforcement of awards is to take place under either the ICSID or New York Conventions.¹⁵⁷ These similarities notwithstanding, there are fundamental differences in the organizational rules for ISDS under CETA and TPP, in particular as regards the question of who decides disputes under the respective investment chapters, and what remedies are available against an ISDS award. In this respect a transatlantic gap exists that may not only complicate the successful conclusion of TTIP, but that may ultimately hamper the development of a global consensus on ISDS in ongoing reform discussions.

TPP is by far the more traditional agreement in this respect. Notwithstanding the integration of the reform features discussed above, TPP continues to build on arbitration, with party-appointed arbitrators as the method of choice for settling investor-state disputes under the agreement's investment chapter. It does not engage in fundamental institutional reform of the ISDS system, and does not even pursue or build on earlier positions held by the United States on creating an appeals facility for investor-state disputes under IIAs.¹⁵⁸ All that TPP contains is an 'opening clause' concerning the creation of an appellate mechanism in the future which provides:

In the event that an appellate mechanism for reviewing awards rendered by investor-State dispute settlement tribunals is developed in the future under other institutional arrangements, the Parties shall consider whether awards rendered under Article 9.29 (Awards) should be subject to that appellate mechanism. The Parties shall strive to ensure that any such appellate mechanism they consider adopting provides for transparency of proceedings similar to the transparency provisions established in Article 9.24 (Transparency of Arbitral Proceedings).¹⁵⁹

TPP therefore continues to trust in arbitration as an appropriate mechanism for settling investor-state disputes under international trade and investment agreements. In the eyes of its contracting parties, the inclusion of a reformed version of investor-state arbitration seemingly strikes an appropriate balance between the protection of foreign investors, consistency in decision-making and remaining control of contracting parties and reacts sufficiently to the legitimacy concerns posed by ISDS.

The EU, by contrast, as illustrated by CETA, wants to go beyond the innovations in access conditions, procedural law, and increased state control of ISDS, and build entirely new dispute settlement institutions. Although the September 2014 version of CETA still contained a reformed version of investor-state arbitration, the final text of February 2016, which resulted

¹⁵⁶ See Art 8.23(2) CETA; Art 9.19(4) TPP.

¹⁵⁷ Srt Art 8.41(5) and (6) CETA; Art 9.29(12) TPP.

¹⁵⁸ See 2004 US Model BIT, art 28(10) <<http://www.state.gov/documents/organization/117601.pdf>>; United States-Chile Free Trade Agreement (signed 6 June 2003, entered into force 1 January 2004) art 10.19(10) <<https://ustr.gov/trade-agreements/free-trade-agreements/chile-fta/final-text>> accessed 27 September 2016; Dominican Republic-Central America-United States Free Trade Agreement (signed 5 August 2004, entered into force 1 January 2009) art 10.20(10) <<https://ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text>> accessed 18 September 2016.

¹⁵⁹ Art 9.23(11) TPP.

from ‘legal scrubbing’, contains a version of the ‘investment court system’ that the European Commission had developed for TTIP and introduced formally into the TTIP negotiations in November 2015. Similar provisions are also contained in the EU-Vietnam Free Trade Agreement of 2 December 2015. The EU-Singapore Free Trade Agreement from May 2015, by contrast, still contains a reformed version of investor-state arbitration.

Departing starkly from the model of reformed investor-state arbitration contained in TPP, CETA’s ‘investment court system’ consists of a permanent two-tiered dispute settlement body for investor-state disputes; it comprises a (first-instance) Tribunal and an Appellate Tribunal.¹⁶⁰ In CETA, the first instance is composed of fifteen members, who are appointed jointly by the EU and Canada, rather than by the disputing parties (investor and host state).¹⁶¹ The Tribunal’s members decide in chambers of three, which are staffed following a system to be established by the President of the Tribunal that has to ensure a random composition and give equal opportunity to all members.¹⁶² The Tribunal is, however, not a standing court or treaty organ. It does not dispose of a courthouse or seat, nor does it have judges as members. Instead, its fifteen members are remunerated with a monthly retainer to secure their availability; they only exercise adjudicatory functions *ad hoc* as disputes may arise under CETA’s investment chapter, in which case the same fees as for a regular investor-state arbitration accrue. ICSID, in turn, serves as the Tribunal’s Secretariat. Challenges to members are to be decided by the President of the ICJ.¹⁶³

The Appellate Tribunal, in turn, which consists of a yet unspecified number of Members, can review the (first instance) Tribunal’s awards for ‘(a) errors in the application or interpretation of applicable law; (b) manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law; (c) the grounds set out in Article 52(1) (a) through (e) of the ICSID Convention, in so far as they are not covered by paragraphs (a) and (b).’¹⁶⁴ Recourse to the Appellate Tribunal excludes control of the outcome of dispute settlement under CETA’s investment chapter by ICSID Annulment Committees or domestic courts, depending on the choice of forum and procedure.

All in all, the ‘investment court system’ now included in CETA, and proposed for TTIP, is somewhat of a hybrid that combines features of international arbitration and of permanent judicial institutions. Yet, whether it is a true court or just another form of arbitration arguably matters little for most practical purposes. What is crucial, instead, is that it represents the EU’s vision of how to ensure legitimacy and consistency in ISDS beyond a reformed version of investor-state arbitration that will remedy some, but not all shortcomings identified as part of the constitutional challenge to ISDS. It is the EU’s answer to the criticism of ISDS among Europe’s population and the values of democracy, rule of law, and protection of fundamental rights enshrined in its own constitution.¹⁶⁵ Above all, the permanent features

¹⁶⁰ Arts 8.27 and 8.28 CETA.

¹⁶¹ Art 8.27(2) CETA.

¹⁶² Art 8.27(6) and (7) CETA.

¹⁶³ Art 8.30(2) CETA.

¹⁶⁴ See Art 8.28(2) CETA.

¹⁶⁵ Article 21 of the Treaty on European Union (TEU) draws a direct connection between the EU’s own constitutional principles and the formulation of a constitutional response to the constitutional challenges

of the ‘investment court system’ are likely to create a greater degree of consistency in the interpretation and application of the agreement concerned, as the number of decision-makers is much lower compared to TPP’s system of arbitration and because the creation of an Appellate Tribunal will no doubt lead to the development of a highly consistent jurisprudence on the interpretation of CETA, comparable to how the WTO Appellate Body has interpreted WTO law consistently.

CETA does not, however, only envisage the bilateral creation of more permanent structures for ISDS. Widening the transatlantic gap on ISDS even further, the EU’s approach as contained in CETA also envisages and actively encourages the creation of a permanent multilateral investment court in the future. For this purpose, Article 8.29 CETA (entitled ‘Establishment of a multilateral investment tribunal and appellate mechanism’) provides:

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

The establishment of a multilateral court is the EU’s policy for the reform of international investment law more generally. Its approach has the potential to constitute a watershed in international investment law and increase differences with the US preference for merely

international dispute settlement under mega-regionals poses to democracy, the rule of law, and the protection of fundamental and human rights in a global economy. Article 21 TEU provides in relevant part as follows:

1. The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.

The Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations which share the principles referred to in the first subparagraph. It shall promote multilateral solutions to common problems, in particular in the framework of the United Nations.

2. The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to:

- (a) safeguard its values, fundamental interests, security, independence and integrity;
- (b) consolidate and support democracy, the rule of law, human rights and the principles of international law;
- (c) preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris, including those relating to external borders;
- (d) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty;
- (e) encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade;
- (f) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development;
- (g) assist populations, countries and regions confronting natural or man-made disasters; and
- (h) promote an international system based on stronger multilateral cooperation and good global governance.

[...]

reforming ISDS without structural change. While many tricky details remain, the Commission's political courage and craftsmanship merit applause. It clearly breaks with a private law conceptualization of investment law and takes the long-called-for 'public law approach' to ISDS to its logical conclusion,¹⁶⁶ aiming at building new dispute settlement institutions and ultimately envisaging even the creation of a multilateral investment court. This allows not only an increase in the consistency of decision-making in ISDS. It also allows building the investment court system into a system of checks and balances that lives up in all nuances to the challenges of a dispute settlement framework that takes constitutional principles, in particular democracy, the rule of law, and the protection of fundamental and human rights, to heart. The system of reformed investor-state arbitration contained in TPP, by contrast, is less likely to produce the same level of consistency and would be viewed with more suspicion by the populations in many important host and home countries, in particular in many quarters in Europe.

Yet, whether the predominantly bilateral set-up of permanent investment courts in the EU's new trade and investment agreements is the best way forward towards more consistency in international investment law generally, is more than questionable.¹⁶⁷ While investment courts included in bilateral agreements would eliminate inconsistent interpretations of that agreement, it is less likely that treaty-overarching inconsistencies will equally be reduced, unless largely identical individuals will sit on different investment courts within a broader network of investment courts. Instead, if permanent investment courts were to proliferate on a bilateral basis as a result of the Commission's approach, inconsistencies in the approaches of different investment courts to essentially identical issues and treaty provisions are likely to persist.

What is more, the inclusion of permanent investment courts in important mega-regionals, such as TTIP or CETA, may further entrench bilateralism in international investment law, rather than constitute a stepping stone towards a genuine multilateralization with more global consistency. After all, the more effectively a TTIP or CETA Tribunal function, the more difficult it will become to replace the status quo later with a multilateral mechanism whose functioning will still be unknown. Such an effect can only be avoided if permanent investment courts in important mega-regionals, such as TTIP, are structured so as to morph easily into a multilateral institution with third states being able to simply join the tribunal's statute. This could be achieved if judges on such an investment court were appointed not by the contracting parties (e.g. the EU and the United States under TTIP), but by a multilateral body representing the entire international community, such as the UN General Assembly and the UN Security Council (as with the International Court of Justice).¹⁶⁸

¹⁶⁶ For one example of this approach see the contributions in Stephan W Schill (ed), *International Investment Law and Comparative Public Law* (OUP 2010). For a critical discussion of this, and other proponents' public law approach to ISDS, see Jose E Alvarez, 'Beware: Boundary Crossings' – A Critical Appraisal of Public Law Approaches to International Investment Law' (2016) 17 *JWIT* 171.

¹⁶⁷ See on this and the following Stephan W Schill, '[The European Commission's Proposal of an "Investment Court System" for TTIP: Stepping Stone or Stumbling Block for Multilateralizing International Investment Law?](https://www.asil.org/insights/volume/20/issue/9/european-commissions-proposal-investment-court-system-ttip-stepping)' (2016) 20(9) *ASIL Insights* <<https://www.asil.org/insights/volume/20/issue/9/european-commissions-proposal-investment-court-system-ttip-stepping>> accessed 15 September 2016.

¹⁶⁸ See Statute of the International Court of Justice art. 4, Oct 24, 1945, 59 Stat. 1031; T.S. 993.

Although the contracting parties to a mega-regional would thereby relinquish their appointment powers as an instrument to influence the interpretation of the agreement, the jurisprudence of that tribunal would still be controlled by the contracting parties through the type of committees that CETA and TPP envisage, which allow contracting parties to issue interpretations that are binding upon the tribunal. Either way, all of this would require concerted efforts of the US and the EU to become reality.

The big question, however, is whether the United States is going to be amenable to the creation of such, or any other, permanent investment court. While it has signaled its openness towards an appellate mechanism, in TPP as well as other free trade agreements and its model BIT, the creation of a full-fledged two-tier permanent court system as envisaged by the EU is less certain, given the critical stance the United States is generally taking towards the creation of new, as well as the submission to the jurisdiction of existing international courts. For this reason alone, continuing to pursue the creation of an appellate mechanism, rather than a full-fledged court system may be the more feasible way forward both for TTIP as well as for efforts in global ISDS reform. After all, an appellate mechanism would have benefits that are similar to a multilateral investment court in terms of creating coherence and ensuring an appropriate balance in ISDS jurisprudence. Its great advantage could be it is potentially more easily agreeable for a greater number of states. An appellate mechanism could also be combined more easily with the existing arbitral system serving as a first instance. This would allow an appellate mechanism to build on the trust the system has earned with investors, while the creation of a two-tiered investment court system is seen with suspicion among many in the business community.

This notwithstanding, it is also important to remember that the establishment of a multilateral appellate mechanism or a permanent investment court comes with its own problems. Notably, the introduction of centralized dispute resolution institutions, whether an appellate mechanism or permanent court, could raise its own legitimacy concerns. Apart from the question of who sits as decision-makers, and who appoints or elects them, permanent institutions may display stronger dynamics in enlarging their jurisprudential powers than a system of one-off arbitral tribunals. After all, a permanent institution could develop international investment law much more consistently, including in ways governments may not agree with. In addition, the influence of individual states on who gets to sit as decision-makers in a permanent institution is likely going to be lower compared to the current arbitral system where the majority of the arbitrators on a tribunal generally require support of the state party to the dispute. Both aspects arguably move a standing appellate mechanism or permanent court further away from democratic processes and the democratic influence of individual states than the present arbitral system.¹⁶⁹ Either way, given the importance of the EU and the United States as global rule-makers in international investment law, the outcome of the TTIP negotiations and the question whether the transatlantic gap on ISDS can be overcome, is likely to influence the future architecture of global investment governance. Whose approach will succeed, that of the EU or of the United States, is not only a matter of bargaining power

¹⁶⁹ For the argument that arbitration may be closer to domestic democratic decision-making processes, see Schill (n 32).

on both sides of the Atlantic; it will be key, too, whose vision for governing international investment relations is more persuasive to third parties.

IV. Conclusion: Constitutional Moments in International Economic Governance

Mega-regionals, such as CETA and TPP, will influence the debates about the modes and structures of dispute settlement disciplines in international economic law. They also show that concerns for fragmentation, the authority of dispute settlement bodies, their control by states, and their overall legitimacy have become important topics in scholarly analysis, dispute settlement design and treaty negotiation. In many regards they build on, refine and reform pre-existing experiences made with dispute settlement, above all in the multilateral trading system, without introducing fundamentally new approaches or bringing about major change. This is the case with state-to-state dispute settlement disciplines in CETA and TPP. They are relatively unremarkable and follow practices that are fairly established in WTO dispute settlement and in the crafting of preferential trade and investment agreements. While generally seeking to avoid conflict with, or worse undermining the authority of, the WTO DSB, their most important contribution could be in consolidating and approving practices the WTO Appellate Body has developed jurisprudentially on the legally shaky grounds, such as opening dispute settlement to the public and allowing amicus participation, and provide impetus for reforms of the WTO dispute settlement mechanism.

In other regards, however, mega-regionals are likely going to function as a catalyst for more fundamental change and potentially bring about a constitutional moment in international economic law. This is particularly true for ISDS, which is at a historic juncture, as starkly diverging positions of the United States and the EU emerge in the negotiations of TTIP on the institutional structure for ISDS. While largely agreeing on the need to ensure regulatory space, the inclusion of wide-spread transparency rules and tighter state control of ISDS - thus reforming ISDS in light of the constitutional challenge - the United States prefers a reform of investor-state arbitration, whereas the EU aims at a proper institutionalization, with the creation of permanent international investment courts with an appellate division, first at the bilateral level, and later ideally multilaterally. If the EU's Proposal is accepted by the United States and beyond, the establishment of a permanent investment court system will constitute a constitutional moment in international economic governance and mark the beginning of a new era for international investment law, and international economic law generally. If it meets with insurmountable resistance by the United States, the EU will need to consider its reactions and either settle on a reformed version of investor-state arbitration à la TPP or develop a permanent international investment court without the United States.

Which vision - that of the United States or that of the EU - will ultimately prevail at a global scale is also a reflection of different philosophies in international politics. The United States, as is often the case, is taking a pragmatic and realistic approach. Concerns about ISDS and regulatory space are taken into account as one element in the much broader endeavor to

integrate different national economies, including between developed economies, in order to create more open markets that benefit all participating actors. The EU, by contrast, takes a much more cautious and still too introverted approach that focuses more on the question of how to preserve regulatory space at home and too little on how to shape the international economic order according to its own ideals. If the proposal to establish a permanent investment court becomes a deal-breaker for TTIP, Europe is likely to lose more global rule-making power, as the United States is already turning its head towards the Pacific. This does not mean that the idea of a permanent investment court should not be pursued. On the contrary, this idea is likely better suited to deal with the problems in investment governance than the current system of one-off arbitration.

Instead, what the EU should focus on is to link its proposal for a permanent investment court to its own constitutional ideals and vision for the future legal infrastructure of the global economy. For this purpose, it would be most critical to overcome the predominance of shortcomings with investor-state arbitration as the justification for the establishment of a permanent investment court. This court, just like the EU's entire approach, is sold mainly as a cure to an ill, rather than as the foundation and lodestar of a new paradigm for global economic governance. However, if a permanent investment court is no more than medicine, there are less fundamental ways of curing the ills investor-state arbitration has produced, namely by reforming it along the lines of TPP, rather than abolishing it altogether. As a consequence, in order to make a stronger case for a permanent investment court as an independent global public good, more is needed than thinking of it only as medicine for introverted European sensitivities. It needs to be seen—and sold—as an entirely different ball game that can attract attention and excitement on both sides of the Atlantic (and beyond). It could be viewed as what is actually is: a means to shape the future institutional infrastructure of the global economy in ways that are more in line with fundamental constitutional values, such as democracy, the rule of law, and the protection of economic and non-economic concerns, than the present system. It is in emphasizing these constitutional elements in an outward-looking perspective that Europe can develop a decidedly value-oriented and perhaps idealistic vision that is not only in line with its own constitutional mandate in the Lisbon Treaty, but shared both across the Atlantic as well as with a great number of important players in international trade and investment relations across the globe. Further developing and aiming to implement such a constitutional vision for international economic governance could be the EU's most important contribution in the age of mega-regionals and their quest for building the legal infrastructure of the global economy.