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Venzke, I.

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Investor-State Dispute Settlement in TTIP from the Perspective of a Public Law Theory of International Adjudication

Ingo Venzke

University of Amsterdam, The Netherlands

i.venzke@uva.nl

Abstract

The article provides an assessment of the European Commission's recent proposal for reform in investor-state dispute settlement (ISDS) under the Trans-Atlantic Trade and Investment Partnership (TTIP). It does so on the basis of a public law theory of international adjudication that presents international courts and tribunals as multifunctional actors who exercise public authority and therefore require democratic legitimacy. The article introduces this understanding against the background of other, traditional basic conceptions of international courts and tribunals. It then focuses on the prospects of appellate review and politico-legislative input under the European Commission's proposal for TTIP, as well as on the provisions pertaining to the arbitrators, the judicial process, and the judicial decisions. While the net merits of ISDS in the Trans-Atlantic context are uncertain, the article submits that the European Commission's proposal provides, in principle, a welcome response to some of the more egregious shortcomings of investor-state arbitration.

Keywords

investor-state dispute settlement – international public authority – Trans-Atlantic Trade and Investment Partnership – investment law reform – judicial functions – democratic legitimacy

* The present article further develops my contribution to the expert roundtable on 'Tiptoeing to the TTIP', held at the Asser Institute on 18 September 2015, forthcoming as a CLEER Working Paper. Parts of that contribution have also appeared in an earlier version as a new postscript to Armin von Bogdandy and Ingo Venzke, *In Whose Name? A Public Law Theory of International Adjudication* (paperback edn, OUP 2016). I thank Armin von Bogdandy, Michael Ioannidis, Szilárd Gaspar-Szilagyi, and Stephan Schill for their helpful comments.

1 Introduction

With its proposal for an international Investment Court System (ICS) of fall 2015, the European Commission purports to react to critiques of settling investor-state disputes through ad hoc arbitration. The proposal forms part of the negotiations between the European Union (EU) and the United States on the Transatlantic Trade and Investment Partnership (TTIP), but the Commission's ambitions and repercussions are wider. Commissioner Cecilia Malmström makes clear that the proposal 'sets out a series of far-reaching reforms'¹ that shall not be confined to the context of TTIP. Rather, according to Malmström, 'the EU is committed to leading the way globally.'² The European Commission thus places its proposal into the context of wider critiques and reform efforts for investor-state dispute settlement (ISDS). Debates in scholarship and practice are indeed vast already.³

Things are moving quickly for the EU. After concluding a meeting on the EU–Vietnam Free Trade Agreement (FTA), Commissioner Malmström already announced in December 2015 that 'Vietnam has agreed to the EU's new approach to investment protection with a permanent tribunal rather than ad-hoc arbitration panels.'⁴ Repercussions are even felt in the context of the Comprehensive Economic and Trade Agreement (CETA) that the EU has negotiated with Canada.⁵ While those negotiations were concluded in August 2014, the EU has now reportedly tested the waters with Canada's new government to reconsider the mechanism of investor-state dispute settlement, trying to integrate more elements of the ICS that it proposed for TTIP.⁶

¹ Cecilia Malmström, *Proposing an Investment Court System* (16 September 2015) <https://ec.europa.eu/commission/2014-2019/malmstrom/blog/proposing-investment-court-system_en> accessed 5 October 2015.

² *ibid.*

³ Compare eg the summaries provided in UNCTAD, 'Reform of Investor-State Dispute Settlement: In Search of a Roadmap' IIA Issues Note No 2 (June 2013) <http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf> accessed 28 February 2016 and Jean E Kalicki and Anna Joubin-Bret (eds), *Reshaping the Investor-State Dispute Settlement System. Journeys for the 21st Century* (Brill 2015).

⁴ Cecilia Malmström, *Done Deal with Vietnam* (2 December 2015) <https://ec.europa.eu/commission/2014-2019/malmstrom/blog/done-deal-vietnam_en> accessed 27 January 2016.

⁵ For an overview of the negotiations as well as the full text of the agreement, see <<http://ec.europa.eu/trade/policy/in-focus/ceta/>> accessed 27 January 2016.

⁶ Janyce McGregor, *EU Quietly Asks Canada to Rework Trade Deal's Thorny Investment Clause* (21 January 2016) <<http://www.cbc.ca/news/politics/canada-europe-trade-isds-ceta-1.3412943>> accessed 27 January 2016.

There are many dimensions to the existing critiques and to these developments. It is certainly not a given that the EU *can* lead the way globally. While that is a matter of the constellation of interests and power politics, it is also a matter of the normative appeal and of the persuasiveness of its proposal. The present contribution takes a step back from the immediate details of the negotiations and the politics of the European Commission's stance on investor-state arbitration and instead engages in such a normative assessment. It does so by building on extensive research on the functions, authority, and legitimacy of international adjudication. More specifically, it provides an analysis and normative assessment of the proposed ICS on the basis of a public law theory of international adjudication that I have developed together with Armin von Bogdandy.⁷

At its core, this public law theory of international adjudication presents international courts and tribunals—including investment tribunals—as multifunctional actors who exercise public authority and therefore require democratic legitimacy. Each element of this core proposition merits a brief introduction. First, international investment tribunals (or a prospective court) are understood as multifunctional actors rather than instruments for the settlement of disputes in the hands of the parties alone. Nor are they well understood solely as organs of the value-based international community, or as institutions of the specific investment law regime. They are multifunctional actors because they do much more than settling disputes in concrete cases. They contribute to the stabilization and development of the law through their decisions. They review and legitimize the authority exercised by other actors on different levels of government—be it the authority of international or domestic bodies, above all that of domestic administrations. While such multifunctionality is recognized in the basic understandings of international courts and tribunals as organs of the value-based international community or as institutions of specific legal regimes, those conceptions fall short of seeing adjudicators as actors.

Second, international investment tribunals exercise international public authority in the sense that they have the capacity of affecting the freedom of others in pursuance of a common interest.⁸ International investment

⁷ Armin von Bogdandy and Ingo Venzke, *In Whose Name? A Public Law Theory of International Adjudication* (OUP 2014).

⁸ For the definition of international public authority see Armin von Bogdandy, Matthias Goldmann and Ingo Venzke, 'From Public International to International Public Law: Translating World Public Opinion into International Public Authority' (18 September 2015) <<http://ssrn.com/abstract=2662391>> accessed 27 January 2016. For slightly different earlier definitions compare von Bogdandy and Venzke (n 7) 111–119; Armin von Bogdandy, Philipp Dann and Matthias Goldmann, 'Developing the Publicness of Public International law:

tribunals can impose payments of damages or compensation that can hurt. They exercise public authority over the parties in the dispute. They also exercise public authority through their decisions beyond concrete disputes, especially through their contribution to the development of legal normativity or, simply put, through lawmaking.⁹ While the role of earlier decisions is a much disputed matter in the practice of ISDS, with individual tribunals and arbitrators taking different stances, it is clear that the practice of adjudication has critically shaped many areas of international investment law. It is equally clear that earlier decisions redistribute argumentative burdens and shape expectations, even in the context of decentralized arbitration. Moreover, experience from the World Trade Organization (WTO) teaches that an appellate instance tends to render this lawmaking dimension of international adjudication yet more dynamic and more powerful. It is likely to increase international adjudicators' exercise of international public authority beyond the concrete dispute.

The concept of international public authority is set up so as to capture acts that require a specific kind of legitimacy. The conception of authority does notably not suggest that those acts are justified or that they offer good reasons for action. Instead, public authority as used in the present context is defined as a capacity—the capacity, it bears repeating, to affect others in the exercise of their freedom in pursuit of a common interest. Any exercise of public authority, and this is the third core element of the public law theory of international adjudication, requires democratic legitimacy. That is a tall order and a demand that is easily misunderstood. How should the concept of democracy be set up in this context of legitimizing the public authority of international courts and tribunals? That question requires extensive warming up and an elaborate answer that goes beyond the space and the focus of this contribution.¹⁰ The misunderstanding that ought to be avoided, in any event, is that asking for democratic legitimacy would treat international courts and tribunals, or their domestic or supranational counterparts for that matter, as representative bodies like parliamentary assemblies. Nor does the demand for democratic legitimacy treat with suspicion all international constraints on domestic decision-making. Armin von Bogdandy and my conception of democracy is notably not nationalistic but allows for the generation of democratic legitimacy beyond

Towards a Legal Framework for Global Governance Activities' (2008) 9 German L J 1375–1400.

⁹ Armin von Bogdandy and Ingo Venzke, 'Beyond Dispute : International Judicial Institutions as Lawmakers' in Armin von Bogdandy and Ingo Venzke (eds), *International Judicial Lawmaking. On Public Authority and Democratic Legitimation in Global Governance* (Springer 2012) 7–41. For the specific case of international investment law, see Stephan W Schill, 'System-Building in Investment Treaty Arbitration and Lawmaking' in *ibid* 133–177.

¹⁰ See in detail von Bogdandy and Venzke (n 7) 135–155.

the state. In short, understanding international courts and tribunals as multifunctional actors who exercise international public authority captures the phenomenon and prompts inquiries into adequate, context-specific pathways for the democratic legitimation of this authority.

This analytical and normative framework of the public law theory of international adjudication provides the basis for clarifying and assessing arguments about the legitimacy of different mechanisms for settling investor-state disputes, such as the concrete proposal of the ICS put forward by the European Commission. The present article argues that *if* a choice is made in favor of an international mechanism to settle investor-state disputes, then the ICS, together with other features of TTIP, in principle provides a welcome response to some of the more egregious shortcomings of investor-state arbitration. It is in particular remarkable that the architects of TTIP as well as the critics of this edifice seem to share a core point—the demand, namely, that the law be spoken in the name of the peoples and citizens.

The analysis present here stands under the significant caveat, however, that it is not at all sure that foreign investors should be granted the possibility of directly bringing claims before an international court or tribunal at all—no matter which shape or form this judicial mechanism would ultimately take. The debate about the features of the judicial mechanism leaves largely untouched the concerns about which standard of protection investors should enjoy or which remedies they ought to be able to claim.¹¹ Furthermore, the debate has difficulties in doing justice to the more fundamental critiques of international (investment) law's Western origins and of its obvious ties to the interests of capital.¹² Notwithstanding the fact that according to some such critiques there should better be no ISDS mechanism to begin with, also fundamental critiques

¹¹ On the necessity to link the debates between procedure and substance see the complimentary articles by Stephan W Schill, 'The Sixth Path: Reforming Investment Law from Within' in Kalicki and Joubin-Bret (n 3) 621 (arguing that debates about the right procedure ought to be complemented by debates about the appropriate level of protection—a debate about substantive law—as well as by debates on how to interpret that law) and Joshua Paine, 'The Project of System-Internal Reform in International Investment Law: An Appraisal' (2015) 6 *JIDS* 332–354 (arguing that ambitions to determine the right law to be interpreted in the right manner do not ultimately fix legitimacy concerns that can only be met through institutional reform).

¹² Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (CUP 2005) 211–216; Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (CUP 2011) ch 3; Matthias Kumm, 'An Empire of Capital? Transatlantic Investment Protection as the Institutionalization of Unjustified Privilege' (2015) 4 *ESIL Reflections*.

can and should inform the more targeted debates about the features of ISDS mechanisms. Even if one were to suggest that international mechanisms of investment protection are inherently flawed and best undone, the debate on the right features of ISDS should not be left to those voices which see its partial virtues alone.

The present contribution develops its argument as follows: It first presents TTIP as an example of international public authority's increasing contestation and politicization (2.). It then sets out basic conceptions of international courts and tribunals and illustrates how those conceptions present judicial functions and judicial authority in the context of investor-state dispute settlement. It thereby introduces three traditional understandings of international courts and tribunals as instruments for the settlement of disputes in a state-centric world order, as organs of the value-based international community and as institutions of legal regimes in world marked by interdependence. Against that background, the present article sketches a new, fourth basic conception—that of international courts and tribunals as multifunctional actors exercising international public authority (3.) The contribution then asks what to make of two outstanding features of the current draft for TTIP—the introduction of appellate review and increased opportunities for politico-legislative input (4.). In view of the experience with adjudicating trade disputes in the WTO, this article argues that appellate review adds an accelerating dynamic to judicial lawmaking and is likely not only to increase legal certainty, but also judicial authority. This indeed needs to go hand in hand with increased opportunities for stronger input from politico-legislative processes. Further, the contribution continues to assess the ICS from the perspective of a public law theory by focusing on the individuals who exercise international public authority, that is, arbitrators and judges (5.), the judicial process (6.) and the judicial decision (7.). Section 8 concludes with an emphasis on the core belief in public institutions—a belief that the project of TTIP as well as its critics share.

2 TTIP as an Example of the Politicization of International Public Authority

Investor-state arbitration has become one of the primary examples of an exercise of international public authority whose legitimacy is increasingly questioned in an emerging public sphere.¹³ Within the context of TTIP, two focal

¹³ Michael Zürn, Martin Binder and Matthias Ecker-Ehrhardt, 'International Authority and its Politicization' (2012) 4 Intl Theory 69–106; von Bogdandy, Golmann and Venzke (n 8).

points of critique and debate are precisely the mechanism of the settlement of investor-state disputes, next to the reach of the Regulatory Council.¹⁴ The main fear is deregulation and the imposition of standards that are at odds with the outcome of parliamentary decision-making on the domestic or supranational level—be that through the backdoor of arbitral tribunals or through (de)regulatory cooperation.¹⁵ Other concerns connect to the veritable business of arbitration and the immense costs that it imposes. Whatever the specific concerns may be, the politicization that TTIP negotiations have sparked is remarkable. It even surpasses the attention that the WTO received during the Ministerial Council meetings in Seattle in 1999.¹⁶

The starting point for the EU's presence and practice in the field of international investment law, it may be reminded, was the Member States' conferral to the EU of exclusive competence in the field of 'foreign direct investment' as part of the EU's common commercial policy (Article 207(1) TFEU). As a new actor on this terrain, and with a mandate from all Member States, the European Commission started a series of negotiations with countries such as Canada, Singapore, China, Vietnam and, notably, the United States. During those negotiations—initially lead by then-Commissioner for Trade Karel De Gucht—the Commission purported to react to past experiences of investor-state arbitration, to some criticism, and to some lessons learned. When the negotiations for the Comprehensive Economic and Trade Agreement (CETA) with Canada were closed in August 2014, the Commission hailed the agreement's chapter on ISDS as 'a significant break with the past' and as 'the most progressive system to date ... for Investor-to-State Dispute Settlement'.¹⁷ But as was reported recently,

¹⁴ On the latter see Joana Mendes, 'Regulatory Cooperation Under TTIP: Rulemaking and the Ambiguity of Participation' CLEER Working Paper (forthcoming, 2016); Marija Bartl, 'TTIP's Regulatory Cooperation and the Future of Precaution in Europe (2016) (manuscript on file with the author).

¹⁵ See eg the critique presented on <<http://www.stop-ttip.org>> accessed 22 October 2015. For a summary overview of this criticism see also Jochen von Bernstorff, 'Streitigkeiten über gemeinwohlorientierte Regulierung von Investoren gehören im demokratischen Rechtsstaat vor die nationalen Gerichte' *VerfBlog* (15 May 2014) <<http://www.verfassungsblog.de>> accessed 22 October 2015.

¹⁶ On the Seattle protests from a public international law perspective see in particular Ruth M Buchanan, 'Protesting the WTO in Seattle: Transnational Citizen Action, International Law and the Event' in Fleur Johns, Richard Joyce and Sundhya Pahuja (eds), *Events: The Force of International Law* (Routledge 2011) 221–233.

¹⁷ European Commission, *Investment Provisions in the EU-Canada Free Trade Agreement (CETA)* (26 September 2014) <http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151918.pdf> accessed 22 October 2015. For one assessment among many, see Philip

the Commission has approached the new Canadian government in order to reconsider the mechanism of dispute settlement yet again after it proposed the establishment of the more permanent ICS.¹⁸

During the TTIP negotiations with the United States, increasing public attention prompted the European Commission to suspend the negotiations on investor-state arbitration and to pause them in order to hold a public consultation.¹⁹ The Commission presented the CETA chapter on ISDS as a point of reference and asked for input on twelve key issues surrounding substantive investment protection and the mechanism of ISDS. The question was notably how to design the investment chapter, not whether to include it or whether to have ISDS in the first place. The Commission received close to 150,000 online contributions, most of which went beyond the narrow scope of the consultations and voiced broader concerns about TTIP or about the net merits of ISDS.²⁰

Commissioner De Gucht's successor, Cecilia Malmström, went on record to express her continued support for an investment chapter as part of TTIP, but also to announce further changes, especially with regard to ISDS. She noted prominently in May 2015 that

I have heard many concerns about dispute settlement between investors and states (ISDS) and the rules included in many of the existing agreements. To a large extent, I share these concerns, especially when it comes to the sometimes unclear definitions that leave too much room for interpretation and possible abuse, and the lack of transparency. ... My

Hainbach, 'The EU's Approach to Investor-State Arbitration in the Comprehensive Economic and Trade Agreement (CETA): Treating the Symptoms But Not the Problem' (forthcoming, 2016) TDM.

¹⁸ McGregor (n 4).

¹⁹ Frank Hoffmeister, 'Wider die German Angst—Ein Plädoyer für die transatlantische Handels- und Investitionspartnerschaft (TTIP)' (2015) 53 *Archiv des Völkerrechts* 35, 50, with reference to Karel De Gucht, 'The Transatlantic Trade and Investment Partnership—Where Do We Stand on the Hottest Topics?' (22 January 2014) <http://trade.ec.europa.eu/doclib/docs/2014/january/tradoc_152075.pdf> accessed 19 October 2015.

²⁰ For the summary of the submissions see European Commission, 'Online Public Consultations on Investment Protection and Investor-to-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)' (13 January 2015) SWD(2015) 3 final <http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf> accessed 5 October 2015; for the full statistical report see European Commission, 'Preliminary Report (Statistical Overview): Online Public Consultation on Investment Protection and Investor-to-state Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)' (July 2014) <http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc_152693.pdf> accessed 5 October 2015.

assessment of the traditional ISDS system has been clear—it is not fit for purpose in the 21st century.²¹

Among other things, she proposed to move toward an international investment court system in lieu of one-off arbitration.²² This proposal is now spelled out in a new draft text of the investment chapter, which the Commission presented to the US in November 2015.²³ This proposal will provide the main basis for the following application of our public law theory of international adjudication.

3 Basic Conceptions, Judicial Functions and Judicial Authority

What are international courts and tribunals? How to understand them? How to look at their practice? The introduction summarized three established basic conceptions of international courts and tribunals against the background of which the public law theory of international adjudication develops its fourth basic understanding, that of international courts and tribunals as multifunctional actors who exercise public authority and therefore require democratic legitimacy.²⁴ Overwhelmingly, international courts and tribunals have been understood as instruments of dispute settlement in the hands of the parties in a state-centric world order. Adjudication here serves but one function: the settlement of individual disputes. Accordingly, it is through the consent of the parties that they gain a sufficient basis of legitimacy for their practice of adjudication. They bind the parties to the case, and that is it. Such a view

²¹ Cecilia Malmström, 'Investments in TTIP and Beyond—Towards an International Investment Court' (5 May 2015) <http://ec.europa.eu/commission/2014-2019/malmstrom/blog/investments-ttip-and-beyond-towards-international-investment-court_en> accessed 5 October 2015.

²² *ibid*; in further detail see 'Concept Paper: Investment in TTIP and Beyond—the Path for Reform: Enhancing the Right to Regulate and Moving from Current ad hoc Arbitration Towards an Investment Court' (May 2015) <http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF> accessed 19 October 2015.

²³ European Commission, 'Draft Text: Transatlantic Trade and Investment Partnership: Trade in Services, Investment and E-Commerce: Chapter II Investment' <http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf> accessed 21 October 2015 (TTIP Draft).

²⁴ The argument in this section follows from Armin von Bogdandy and Ingo Venzke, 'On the Functions of International Courts: An Appraisal in Light of Their Burgeoning Public Authority' (2013) *Leiden JIL* 49–72.

occasionally surfaces with great clarity in the understanding of investment arbitration and in its practice. A prominent example stems from the award in *Romak v Uzbekistan*, where the Tribunal held that

the Arbitral Tribunal has not been entrusted, by the Parties or otherwise, with a mission to ensure the coherence or development of ‘arbitral jurisprudence.’ The Arbitral Tribunal’s mission is more mundane, but no less important: to resolve the present dispute between the Parties in a reasoned and persuasive manner, irrespective of the unintended consequences that this Arbitral Tribunal’s analysis might have on future disputes in general.²⁵

Such an understanding, while not without traction and appeal, faces a number of difficulties. Above all, it eclipses judicial functions other than the settlement of disputes.²⁶ It belittles the contributions that it makes to stabilizing normative expectations, to lawmaking, or to the review and legitimation of other actors’ public authority. Its focus on the single function of dispute settlement in the concrete case goes hand in hand with the narrow basis of legitimacy that it deems sufficient—the consent of the parties. But this conception, including the narrow legitimacy basis that it deems sufficient, is shaky once other judicial functions come into view.

A second basic conception of international courts and tribunals as organs of the value-based international community recognizes the multifunctionality of adjudication and finds a complementary basis of legitimacy in community values. Such an understanding fares much better, for instance, when trying to capture what adjudication in international human rights law or criminal law is about. But it also has some traction in investment arbitration, for instance in *Saipem v Bangladesh*, where the Tribunal held that

it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the

²⁵ *Romak SA v Uzbekistan*, PCA Case No AA 280, UNCITRAL, Award (26 November 2009) para 171. Also see *AES Corporation v Argentina*, ICSID Case No ARB/02/17, Decision on Jurisdiction (26 April 2005) para 30; *GEA Group Aktiengesellschaft v Ukraine*, ICSID Case No ARB/08/16, Award (31 March 2011) para 90.

²⁶ By function I mean the contribution that an actor renders to the whole. See in further detail von Bogdandy and Venzke (n 7) 5–7.

legitimate expectations of the community of States and investors towards certainty of the rule of law.²⁷

Adjudication, in this statement, is understood as multifunctional. It is not only about dispute settlement, but also about the reassertion of what the law requires and about the development of the law—the stabilization of normative expectations and the development of legal normativity, in other words.²⁸ What is more, the interests of the community complement the parties as a source of legitimacy in this understanding as exemplarily reflected in *Saipem*. But while important, the interests of meeting legitimate expectation and of contributing to the certainty of the rule of law are of a different nature than the core community values judicial practice in human rights and criminal law purport to safeguard.

The third basic conception of international investment tribunals is now increasingly dominant, at least in scholarship if still less explicit in practice.²⁹ It sees investment tribunals as institutions of the specific legal regime of investment protection. This third, regime-oriented basic understanding places emphasis on the contribution of international adjudication to the shaping of global interdependence. It is further linked to theories of global governance that are especially attuned to the regulatory input of actors other than unitary states. Such theories have been instrumental in mapping and revealing the amorphous processes of global governance.³⁰ They are particularly well attuned to the multifunctionality of international courts and tribunals, placing

²⁷ *Saipem SpA v People's Republic of Bangladesh*, ICSID Case No ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures (21 March 2007) para 67; also see *Noble Energy Inc and Machalapower CIA LTDA v Republic of Ecuador and Consejo Nacional de Electricidad*, ICSID Case No ARB/05/12, Decision on Jurisdiction (5 March 2008) para 50; *Enron Creditors Recovery Corp v Argentine Republic*, ICSID Case No ARB/01/03, Annulment Decision (30 July 2010) para 66.

²⁸ von Bogdandy and Venzke (n 9); Schill (n 9).

²⁹ But see already, inter alia, Thomas Wälde, 'The Specific Nature of Investment Arbitration' in Philippe Kahn and Thomas Wälde (eds), *New Aspects of International Investment Law* (Martinus Nijhoff 2007) 43; *International Thunderbird Gaming v Mexico*, UNCITRAL/NAFTA, Arbitral Award (26 January 2006), Separate Opinion by Prof Wälde, para 12. See further Stephan W Schill, 'Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and Its Significance for the Role of the Arbitrator' (2010) 23 *Leiden JIL* 401.

³⁰ von Bogdandy and Venzke (n 7) 95–101.

them into context with other actors and stressing their function of reviewing as well as legitimizing the authority exercised by others.³¹

The critique of this regime-oriented understanding of investment tribunals provides the stepping-stone for the fourth basic understanding of international courts and tribunals as actors of international public authority. The main original thrust of global governance theory was that it came without any concept of authority.³² It looked at the many forms and fora of co-operation, especially at regulatory networks.³³ Legitimacy concerns were met with reference to the sheer number of actors, none of whom dominates, and by relying on the effectiveness of governance—on output rather than input legitimacy.³⁴ It is this element of outcome legitimacy that has been relatively strongly relied upon in international investment arbitration. This field of law has thrived on the functional logic of the regime and has built its sociological legitimacy narrowly on the economic rationale for promoting and protecting foreign direct investment—above all economic development through investment protection.³⁵

This functional logic is problematic for at least two reasons. First, its underlying rationale may well be questioned. Empirical research on the matter remains divided and does not readily support the existence of a positive link between investment protection, foreign direct investment and, ultimately, economic development.³⁶ The yet more decisive weakness of the regime-oriented understanding is the Achilles-heel of all functionalism—i.e. the reliance on the effective pursuit of regime interests. It is incapable of resolving

³¹ Benedict Kingsbury and Stephan W Schill, 'Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality, and the Emerging Global Administrative Law' in Albert Jan van den Berg (ed), *50 Years of the New York Convention* (Kluwer 2009) 5–68.

³² Henrik Enroth, 'The Concept of Authority Transnationalised' (2009) 4 TLT 336–353; von Bogdandy, Goldmann and Venzke (n 8).

³³ See in particular Anne-Marie Slaughter, *A New World Order* (Princeton UP 2004).

³⁴ On those concepts see Fritz Scharpf, *Governing in Europe: Effective and Democratic?* (OUP 1999).

³⁵ See, as one example from practice, *SGS v Société Générale de Surveillance SA v Republic of the Philippines*, ICSID Case No ARB/02/6, Decision on Jurisdiction (29 January 2004) para 116 ('The BIT is a treaty for the promotion and reciprocal protection of investments. ... It is legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered investments.').

³⁶ See Todd Allee and Clint Peinhardt, 'Contingent Credibility: The Impact of Investment Treaty Violations on Foreign Direct Investment' (2011) 65 Intl Org 401–432 (reviewing the literature and then arguing that much depends on governments behavior after they signed a BIT and, in particular, whether they are forced to appear as a defendant and, should they lose, whether they comply).

normative conflicts, or even of guiding any such resolution.³⁷ Even if the economic rationale underpinning the regime was taken to be solid, how should the regime interest of investment protection be squared with other public policy objectives? Obviously this question cannot be answered with reference to the objectives of investment protection, foreign direct investment or, ultimately, economic development. In its ambition to renew the field of international investment law, the European Commission continues to identify the main challenge as 'achiev[ing] the right balance between protecting investors and safeguarding the EU's and Member States' right and ability to regulate in the public interest.'³⁸ The interests of the regime themselves do not tell how to strike such a balance either when negotiating a treaty or when applying it down the line. This involves choices that cannot be reduced to the pursuit of a single interest.

Against the backdrop of these three basic conceptions, their weaknesses as well as their strengths, the public law theory of international adjudication develops its understanding of international courts and tribunals as multifunctional actors of public authority. It captures these actors' practice of adjudication as an exercise of international public authority because it has the capacity to affect the freedom of others in the pursuit of common interests, not only in the concrete disputes but also, through the multiplicity of its functions, beyond any concrete dispute. It seems highly likely that the ICS in the Commission's draft will have that capacity. When it comes to the parties of the concrete disputes, the ICS can award monetary damages, applicable interest, or under certain circumstances the restitution of property (Article 28 TTIP Draft). Its enforcement mechanism is as robust as that of international investment law generally. An arbitral award shall be final, 'not subject to appeal, review, set aside, annulment or any other remedy' (Article 30(1) TTIP Draft), and it shall be enforced 'as if it were a final judgment of a court [within either party]' (Article 30(2) TTIP Draft). In short, ICS awards will come with effective obligations that matter. When it comes to the exercises of international public authority beyond the parties to the concrete case, the precedential force of awards may well be expected to be truly strong within the TTIP context, especially under the spell of appellate review, to which I will now turn. The degree of such awards' authority beyond TTIP may well be significantly lower and might for now be compared to those of NAFTA. It remains to be seen whether the EU Commission really aims to set up (and succeeds in setting up) an ICS that is

³⁷ See Ingo Venzke, 'International Bureaucracies in a Political Science Perspective – Agency, Authority and International Institutional Law' (2008) 9 *German L J* 1401–1428, 1424.

³⁸ The Commission uses this formulation repeatedly, for example European Commission (n 20) 25.

not only part of TTIP but also embedded in other FTAs, such as the recent one concluded with Vietnam. The public authority exercised through international adjudication would then more easily and more powerfully extend beyond any specific case and its specific parties.

4 Appellate Review and Politico-Legislative Input

While judicial authority under TTIP is thus similar to the general practice of investor-state dispute settlement, there are also some important differences. This section draws attention to two outstanding features and assesses them from the perspective of a public law theory of international adjudication. Those two features are appellate review and new avenues for politico-legislative input.

The Commission's draft negotiation text notably proposes that an 'Appeals Tribunal' be established—a stark change in comparison to the existing investment law regime. Under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention),³⁹ awards may only be challenged before an Annulment Committee on a very limited number of grounds. Those grounds do notably not provide a possibility for arguing that the tribunal erred in its legal reasoning, unless that was found to lead to a manifest excess of power (Article 52(1)(b) ICSID Convention) or a failure to state the reasons on which the award is based (Article 52(1)(e) ICSID Convention).⁴⁰ If the investment tribunal was constituted under non-ICSID arbitral rules, the New York Convention governs the question under which conditions enforcement of the award may be refused (Article V New York Convention). In neither case is there an opportunity for appeal.

The public law theory of international adjudication argues for the specific normative yardstick of democratic legitimacy. What does it have to say about the possibility of appellate review under the TTIP and how to assess such a proposal?⁴¹ First of all, appellate review can correct simple mistakes and thus strengthen the arbitrators' and judges' attachment to the law.⁴² In its controlling function, it pushes the first instance towards compelling and transparent

³⁹ 575 UNTS 159.

⁴⁰ Christoph Schreuer, 'From ICSID Annulment to Appeal Half Way Down the Slippery Slope' (2011) 10 LPICT 211–225.

⁴¹ See in further detail von Bogdandy and Venzke (n 7) 184–6.

⁴² For a compelling theoretical account of how arbitrators and judges are tied to the law, Ralph Christensen and Hans Kudlich, *Gesetzesbindung: Vom vertikalen zum horizontalen Verständnis* (Duncker & Humblot 2008).

justifications. The possibility of appellate review is also the obvious cure to inconsistent decisions. It is this promise that has been most appealing in the debates about institutional reform in international investment law.⁴³ Considerations of democratic legitimacy would point to the contribution that consistency makes to the goal of equality. It would furthermore draw attention to the fact that appellate review can channel attention and can create points of reference for larger, even public debates. Appellate review promotes openness and responsiveness. But as any cure, it comes with, significant side-effects.

Appellate review not only controls and contributes to the legitimization of judicial authority, it also adds a new layer of judicial authority. What is more, appellate review increases judicial authority because it forcefully stabilizes and develops normative expectations. Especially in light of the experience with the WTO Appellate Body, but also with reference to appellate review in other fields, such as international criminal law and in human rights law, appellate review is likely to usher in a new dynamic of judicial lawmaking. When state delegates discussed the establishment of the WTO Appellate Body in the final stages of the negotiations leading to the WTO and its Dispute Settlement Understanding (DSU), many of them expected appellate review to be used only sporadically in order to correct egregious mistakes.⁴⁴ Reality turned out differently. Last year, 2014, all but two of the 15 adopted panel reports were appealed. That is 87%. The overall average since 1996 lies lower but still at 67%.⁴⁵ Notably, even parties that had won but still disagreed with the panel's reasoning appealed the first instance panel reports because they did not want to leave undesired precedent uncontested.⁴⁶

The dynamics of judicial lawmaking through precedents is likely to accelerate in a system with appellate review, allowing for a check on the authority of the first instance but adding to the overall judicial authority. In the WTO, the Appellate Body has famously argued that earlier reports create legitimate expectations among members and should therefore be taken into account in

⁴³ See already Asif H Qureshi, 'An Appellate System in International Investment Arbitration?' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *Oxford Handbook of International Investment Law* (OUP 2008) 1154.

⁴⁴ Peter Van den Bossche, 'From Afterthought to Centrepiece: The WTO Appellate Body and Its Rise to Prominence in the World Trading System' in Giorgio Sacerdoti, Alan Yanovich and Jan Bohanes (eds), *The WTO at Ten: The Contribution of the Dispute Settlement System* (CUP 2006) 289.

⁴⁵ For those current statistics see <http://www.wto.org/english/tratop_e/dispu_e/stats_e.htm> accessed 7 October 2015.

⁴⁶ See von Bogdandy and Venzke (n 7) 184–6.

dispute settlement in the future.⁴⁷ It added to the weight of its own reports by arguing that a panel's departure 'from well-established Appellate Body jurisprudence clarifying the interpretation of the same legal issues ... has serious implications for the proper functioning of the WTO dispute settlement system.'⁴⁸ Appellate Body reports thus become practically inescapable reference-points for litigants, judges, and participants of the legal discourse.⁴⁹ Some investment tribunals, such as that in the *Saipem* case, have already suggested that earlier awards create legitimate expectations and even argued for a duty to refer to them to thereby 'contribute to the harmonious development of the law.'⁵⁰ But in the flat, decentralized system of investment arbitration, arbitrators are much more at ease to ignore or to sideline earlier decisions. This comes at the cost of certainty and consistency, while diminishing the contribution of arbitral awards to the creation of general international investment law. Although appellate review in principle constitutes a welcome innovation, its further assessment will critically depend on how it compares to, and is embedded within, politico-legislative mechanisms.

The second new feature of TTIP that I wish to highlight right away can be understood as a reaction to judicial lawmaking and to judicial authority in general: denser legal provisions and more opportunities for politico-legislative input. The European Commission emphasizes how CETA and TTIP contain more detailed standards of protection. This notably includes the standard of fair and equitable treatment standard (FET), which has generated particular uncertainty for the parties and accords the arbitrators broad discretion. It is now defined by a closed, enumerative list of elements that would constitute possible breaches (Article X.9 CETA and Article 3.2 TTIP Draft).⁵¹ The treaty texts also react to past uncertainty and unwelcome past developments by defining in clearer detail the standards of indirect expropriation, of national treatment, and of most-favoured-nations treatment. While the new treaty texts certainly do not

⁴⁷ *Japan: Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, Appellate Body Report (4 October 1996) 14.

⁴⁸ *United States: Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, Appellate Body Report (30 April 2008) para 162.

⁴⁹ Armin von Bogdandy and Ingo Venzke, 'The Spell of Precedents: Lawmaking by International Courts and Tribunals' in Cesare PR Romano, Karen J Alter, and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (OUP 2013) 503; also see Krzysztof J Pelc, 'The Politics of Precedent in International Law: A Social Network Application' (2014) 108 *Am Pol Sc Rev* 547–564.

⁵⁰ *Saipem SpA v People's Republic of Bangladesh*, ICSID Case No ARB/05/07, Decision on Jurisdiction and Recommendation of Provisional Measures (21 March 2007) para 90.

⁵¹ The standard of indirect expropriation provides another notable example, see art 5 and Annex I.

settle all possible doubts and will raise new questions of interpretation, it is also clear that TTIP structures in a more detailed fashion the normative space for all participants in the legal discourse, including litigants and arbitrators.

Very important is the accompanying political mechanism that allows for control of the interpretations of investment provisions by the dispute settlement mechanism. Like CETA, TTIP is planned to establish a Trade Committee that is charged, among other things, with the interpretation of the treaty.⁵² In the words of the TTIP Draft:

Where serious concerns arise as regards matters of interpretation relating to [the Investment Protection or the Resolution of Investment Disputes and Investment Court System Section of this Agreement], the ... Committee may adopt decisions interpreting those provisions. Any such interpretation shall be binding on the Tribunal and the Appeal Tribunal.

This institutional set-up follows the NAFTA Free Trade Commission (FTC), which has notably intervened in the past to react to the judicial treatment of the FET standard.⁵³ Whereas earlier bilateral investment treaties (BITs) did not usually set up such a body, newer BITs increasingly do.⁵⁴ Of course, treaty parties always could have reached an interpretative agreement even in the absence of any such treaty provision,⁵⁵ but bodies such as the NAFTA FTC channel and facilitate those efforts. They further add to the authority of treaty parties' agreements, rendering them binding force vis-à-vis the tribunal.⁵⁶

⁵² Art X.27 CETA (consolidated version) published on 26 September 2014 <http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf> accessed 22 October 2015; art 13(5) TTIP Draft ('Committee').

⁵³ NAFTA Free Trade Commission, 'Notes of Interpretation of Certain Chapter 11 Provisions' (31 July 2001) <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/NAFTA-Interpr.aspx?lang=eng>> accessed 28 October 2015; see also Anthea Roberts, 'Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States' (2010) 104 AJIL 179.

⁵⁴ Stephan W Schill and Marc Jacob, 'Trends in International Investment Agreements, 2010–2011: The Increasing Complexity of International Investment Law' in Karl P Sauvant (ed), *Yearbook on International Investment Law and Policy 2011–2012* (OUP 2012) 141–79.

⁵⁵ That is already a matter of treaty law and treaty interpretation, see especially art 31(3)(a) VCLT: 'There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions'.

⁵⁶ Art 31(3) VCLT indeed creates an obligation to take into account subsequent agreements ('shall'). But those agreements, being taken into account, are not necessarily determinative of the outcome. They are an element of the interpretative factor. An interpretation by

By way of comparison, Article IX of the WTO Agreement gives '[t]he Ministerial Conference and the General Council ... the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements' to 'be taken by a three-fourths majority of the Members.' Even though this provision does not require a unanimous decision, the threshold has still been too high for the now 161 members⁵⁷ to ever act accordingly and to possibly react to judicial authority and judicial lawmaking.⁵⁸ In a bilateral setting of two parties with rather analogous interests such as in CETA or TTIP, such renewed politico-legislative input may be more likely. The TTIP draft specifically invites parties to continuously develop the content of the FET standard through politico-legislative input (Article 3.3 TTIP Draft). It furthermore provides that tribunals 'shall accept, or after consultation with the disputing parties, may invite written or oral submissions on issues relating to the interpretation of this Agreement from the non-disputing Party' (Article 22.3 TTIP Draft). All this provides opportunities for increased politico-legislative input by the contracting parties.

In sum, the establishment of the WTO Appellate Body has contributed to a new dynamic of judicial lawmaking that has further distanced the law from politico-legislative processes, curing some problems of judicial authority, but adding new ones arising from the fact that politico-legislative processes continue to lag behind. In TTIP, this politico-legislative process is at least mildly strengthened when compared to traditional BITs.

Against the backdrop of this general new set-up, marked by appellate review and increased opportunities for inter-governmental co-operation, I now turn to a brief assessment of other elements of institutional innovation within TTIP from the perspective of a public law theory of international adjudication. I thereby stick to three main pathways of democratic legitimacy—pathways connecting to the judges (5.), the judicial process (6.), and the decision itself (7.).⁵⁹

a treaty body such as the FTC of which the treaty also says that it be binding on the tribunal ought to be determinative of the outcome.

⁵⁷ As of 26 April 2015, see <https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm> accessed 7 October 2015.

⁵⁸ See Robert Howse, 'The Legitimacy of the World Trade Organization' in Jean-Marc Coicaud and Veijo Heiskanen (eds), *The Legitimacy of International Organizations* (UN University Press 2001) 355–407; Armin von Bogdandy, 'Law and Politics in the WTO - Strategies to Cope with a Deficient Relationship' (2001) 5 Max Planck YB UN L 609–673; Pieter Jan Kuijper, 'WTO Institutional Aspects' in Daniel L Bethlehem and others (eds), *The Oxford Handbook of International Trade Law* (OUP 2009) 79–128.

⁵⁹ von Bogdandy and Venzke (n 7) 156–205.

5 The Arbitrators and Judges

The European Commission has notably identified striking the right balance between investment protection and member states' regulatory autonomy as the key challenge in current reform efforts—a challenge that treaty design has to meet. Next to the explicit, and as such rather novel, recognition of a right to regulate (Article 2 TTIP Draft), the Commission has tried to do so by more detailed standards of substantive investment protection.⁶⁰ The effect that this will have most crucially depends on those individuals who end up interpreting and applying the law. The European Commission submits that now 'a clear, closed text defines precisely the standard of treatment without leaving unwelcome discretion to arbitrators.'⁶¹ While differences in the density of treaty provisions make a difference in the adjudication of disputes down the road, both legal theory and practice teach that varying—and oftentimes unpredicted—levels of discretion inevitably remain.⁶² In turn, the composition of the bench continues to make a significant difference. Who decides?

The legitimacy of arbitrators and judges arises from the process of their appointment or election, their qualities and their actions.⁶³ In investment arbitration, the common procedure has been that each party appoints one arbitrator and presiding arbitrators is appointed either by agreement of the parties, agreement of the party-appointed arbitrators, or by an appointing authority in a process specified in the rules of arbitration.⁶⁴ Of course the demand has always been that arbitrators act independently and impartially. While the interest in repeat appointment may have supported such demands,⁶⁵ the ease with which individuals move between the roles of arbitrator and counsel, the relatively lax rules on conflicts of interest, as well as the interest in future appointments has been identified as problematic.⁶⁶

⁶⁰ Also see Markus Wagner, 'Regulatory Space in International Investment Law and International Trade Law' 36 U Pa JIL 1 (2014).

⁶¹ European Commission, 'Investment Provisions in the EU-Canada Free Trade Agreement (CETA)' 1.

⁶² See in detail Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (OUP 2012) 46–57.

⁶³ von Bogdandy and Venzke (n 7) 158–171; see also, in agreement, Eric De Brabandere, *Investment Treaty Arbitration as Public International Law: Procedural Aspects and Implications* (CUP 2014) 74–89.

⁶⁴ See eg arts 8–10 UNCITRAL Arbitration Rules; arts 37–38 ICSID Convention.

⁶⁵ 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.

⁶⁶ On those problems see James D Fry and Juan I Stampalija, 'Forged Independence and Impartiality: Conflicts of Interest of International Arbitrators in Investment Disputes'

In the proposed ICS, it would now be the Trade Committee, composed of equal parts by representatives of the United States and the EU, which appoints fifteen judges to the Tribunal of First Instance (Article 9(2) TTIP Draft). Investors notably play no part in this process, at least not formally. One third of these judges come from the United States, one third from EU Member States, and one third from third countries. Furthermore, the disputing parties have no say regarding which three judges sit in any specific case. That decision is made by the President of the Tribunal, 'ensuring that the composition of the divisions is random and unpredictable, while giving equal opportunity to all Judges to serve' (Article 9(7) TTIP Draft). All judges choose the President by lot among judges from third countries (Article 9(8) TTIP Draft). The permanent Appeal Tribunal, which counts a total of six members (Article 10 TTIP Draft), is composed in the same way.

The appointment process for both the Tribunal of First Instance and the Appellate Tribunal stands in stark contrast to traditional investment arbitration, where the composition of the investment tribunal lies principally in the hands of the parties. While subject to exceptions and generally a matter of degree, the corresponding conception of arbitrators used to be one of agents acting on behalf of the parties rather than of judges acting in the broader interest. This conception as well as the prevailing ethos is pushed to change within TTIP. In light of the tribunals' multifunctionality and in realization of their exercise of international public authority it makes sense to not leave the appointment process in the hands of the parties alone. At the same time, the current draft leaves yet open the process by which members of the ICS would be nominated and the appointed by the Trade Committee. It should be borne in mind that the acclaimed success of the WTO Appellate Body at its inception was largely due to its composition and its relative distance to the group of trade lawyers and diplomats that were dominant under the GATT regime.

What is explicitly required from ICS judges is that they possess a 'demonstrated expertise in public international law' (Article 9(4) TTIP Draft) next to 'the qualifications required in their respective countries for appointment to judicial office', or else they need to 'be jurists of recognized competence.' This reference to public international law, and notably not to commercial law, clearly places investment arbitration within the realm of public international

(2014) 30 *Arb Intl* 189; August Reinisch and Christina Knahr, 'Conflict of Interest in International Investment Arbitration' in Anne Peters and Lukas Handschin (eds), *Conflict of Interest in Global, Public and Corporate Governance* (CUP 2012) 103; Anthea Roberts, 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System' (2013) 107 *AJIL* 45, 87; Paine (n 11).

law—as it should be. The TTIP provisions on the qualifications of judges do not make reference to something like a ‘high moral character’, as in Article 2 of the Statute of the International Court of Justice. However, what is most relevant to ensuring their impartiality and independence—and thus something like ‘moral character’—is the avoidance of conflicts of interest. It is in this regard that the TTIP Draft makes a welcome leap forward and sets up strict rules. The whole of Article 11 of the TTIP Draft is dedicated to ‘ethics’ and, *inter alia*, precludes judges ‘from acting as counsel in any pending or new investment protection dispute under this or any other agreement or domestic law.’ A yet more detailed Code of Conduct is annexed (Annex II to the TTIP Draft). This is a significant improvement compared to the problems concerning the legitimation of traditional arbitral tribunals’ exercise of international public authority that arise from arbitrators’ conflicts of interests.⁶⁷ At the same time, problems remain. The TTIP Draft does not seem to preclude members of the tribunals to continue to act as arbitrators in other, ‘traditional’ investor-state cases.⁶⁸ And it leaves unresolved the financial gains from accepting and continuing disputes, which creates incentives that might possibly question judges’ impartiality.⁶⁹

6 The Judicial Process

In the Commission’s proposal for an ICS, is it more or less likely that the judicial process contributes to the democratic legitimation of the exercise of international public authority through adjudication when compared to the system of arbitration as we know it from past practices? The public law of international adjudication stresses the importance of publicness, transparency, participation, and links with relevant publics.⁷⁰

The TTIP draft provides that the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (UNCITRAL Transparency Rules), which only entered into force on 1 April 2014, shall apply. Together with the

⁶⁷ *ibid.*

⁶⁸ Art 11(1) TTIP Draft does not mention the word ‘arbitrator’ in the list of prohibited side activities. See also the critique in Gus Van Harten, ‘Key Flaws in the European Commission’s Proposals for Foreign Investor Protection in TTIP’ 12(4) *Osgoode Legal Studies Research Paper No 16* (2016).

⁶⁹ See the critique of the Deutsche Richterbund, ‘Stellungnahme zur Errichtung eines Investitionsgerichts für TTIP – Vorschlag der Europäischen Kommission vom 16.09.2015 und 12.11.2015’, Nr 4/16, February 2016 <<http://www.dr.b.de>> accessed 24 February 2016.

⁷⁰ von Bogdandy and Venzke (n 7) 172–184; see also De Brabandere (n 63) 148–174.

Mauritius Convention on Transparency of December 2014,⁷¹ the new UNCITRAL rules meet demands for transparency half-way. TTIP goes yet further than these rules' efforts in ensuring the 'transparency and accessibility to the public of treaty-based investor-State arbitration'⁷² and adds a number of documents to the list of those that shall be made public (Article 18(2) TTIP Draft), including the request for consultations, notices and decisions on the challenge of judges, and 'all documents submitted to and issued by the Arbitral Tribunal'. Article 3 of the UNCITRAL Transparency Rules itself provides that, among other things, 'transcripts of hearings, where available,' shall be made public. The text of the TTIP Draft does not itself say anything about the publicness of the hearings; proceedings would thus by default continue to follow the rules and the practice of either the ICSID or UNCITRAL regime.⁷³ ICSID rules provide since 2006 that proceedings may be opened to the public unless one party objects.⁷⁴ Article 6 of the UNCITRAL Transparency Rules stipulates that hearings shall be public unless either confidential information or the integrity of the arbitral process does not allow that.

Turning from transparency and publicness to possibilities of participation, Article 22 of the TTIP Draft contains a number of obligations and possibilities that allow the non-disputing treaty party (i.e. the private claimant's state of nationality) to be informed about the proceedings. The non-disputing party can also actively participate as the '[t]he Tribunal shall accept [its] written and oral submissions on issues relating to the interpretation of this Agreement' (Article 22(3) TTIP Draft). Third parties—be they natural or legal persons—may intervene if they have an interest in the result of the disputes (Article 23 TTIP Draft). This is in line with the new Articles 4 and 5 of the UNCITRAL Transparency Rules. Furthermore, both the UNCITRAL Transparency Rules as well as the ICSID Rules contain provisions on the role of *amici curiae*, but the issue is better left aside until an apparent error in the present TTIP Draft is resolved.⁷⁵

⁷¹ United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration, adopted on 10 December 2014.

⁷² See <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency.html> accessed 7 October 2015.

⁷³ I am bracketing the practical questions arising from the fact that the EU is not a party to the ICSID Convention and, as a supranational organization, cannot become so without further ado. It should further be recognized that the Mauritius Convention renders the UNCITRAL Transparency Rules applicable regardless of which arbitration rules otherwise apply, see art 2(1) and (2).

⁷⁴ von Bogdandy and Venzke (n 7) 172–5.

⁷⁵ Art 23(5) TTIP Draft provides that 'the right of intervention conferred by this Article is without prejudice to the possibility for the Tribunal to accept *amicus curiae* briefs from

Are there other hooks in the judicial process that would contribute to publicness, transparency, and participation? The deliberations of the judges remain confidential, as is overwhelmingly the case.⁷⁶ At the same time, dissenting and separate opinions are possible. This corresponds to the practice of investment arbitration and is overall a beneficial feature as it has the potential of adding to the clarity of judicial decisions, to the possibilities of critique, and to the opportunities for change.⁷⁷ It also is a feature of the judicial process that feeds into larger debates about how the law ought to be approached and applied.

7 The Decision and Its Reasons

Apart from the individuals who apply the law and the process that leads to its application, the actual judicial decision provides a further focal point for thinking about the legitimization of judges' authority. How should arbitrators and judges reason, especially how should they relate their authority to that of other institutions on domestic and international levels of governance?⁷⁸

TTIP clearly places the practice of investment arbitration within the field of public international law. It prescribes that the treaty shall be interpreted 'in accordance with customary rules of interpretation of public international law, as codified in the Vienna Convention of the Law of Treaties' (VCLT) (Article 13 TTIP Draft). Even newer BITs do not regularly make that commitment.⁷⁹ Quite a bit can be made of the VCLT and its rule of interpretation which again places emphasis on those who use it. Overall, the VCLT is still taken to demand an objective, textual approach.⁸⁰ Granted, such a textual approach can become absurd in the extreme.⁸¹ It also hides policy choices where they should better

third parties in accordance with Article 19'. Presumably there is thus a possibility for *amicus curiae* participation, but neither does Art 19 TTIP Draft, which deals with 'interim decisions,' say anything about it. Nor is there another article that deals with *amicus curiae* participation. For the provisions on *amici curiae* see art 4 UNCITRAL Transparency Rules; Rule 37 Section 2 ICSID Rules of Procedure for Arbitration Proceedings.

⁷⁶ von Bogdandy and Venzke (n 7) 175–7.

⁷⁷ *ibid* 172–184.

⁷⁸ *ibid* 186–206.

⁷⁹ See, for instance, 2012 US Model Bilateral Investment Treaty <<https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>> accessed 28 October 2015.

⁸⁰ With regard to bad examples or even a 'textual fetish' in the practice of WTO adjudication, see Douglas Irwin and Joseph Weiler, 'Measures Affecting the Cross-Border Supply of Gambling and Betting Services (DS 285)' (2008) 7 World T R 71, 89.

⁸¹ See *ibid* 95 (referring to the 'battle of dictionaries').

be articulated. And yet the approach of the VCLT is likely to curb the overly presumptive or reductionist decision-making which can be found in some investment awards' reasoning.⁸²

As regards the possibilities of arbitral decisions to react to legitimacy concerns, proportionality analysis has frequently and prominently featured as part of the solution in recent debates.⁸³ However, such proportionality analysis, rather than being part of the solution, can easily aggravate problems of judicial authority.⁸⁴ As a tool, proportionality analysis broadens the judicial reach and, hence, adds to the legitimacy burden it would have to carry. How to balance investment protection with other public policy process is a question that is best settled at the level of politico-legislative lawmaking, not at the moment of adjudication. The practice of WTO adjudication has notably steered clear of weighing and balancing different policy objectives and instead asks the less incisive and more suitable question whether there is an alternative, less trade-restrictive measure that is equally effective in pursuing legitimate public-policy objectives that conflict with trade liberalization.⁸⁵

The way in which the new right to regulate is now phrased in Article 2 of the TTIP Draft offers a similar solution to that of WTO adjudication: '[t]he provisions of this section shall not affect the right of the Parties to regulate within their territories through *measures necessary to achieve legitimate policy objective* such as the protection of public health, safety, environment or public morals, social or consumer protection or promotion and protection of cultural diversity.'⁸⁶ The analysis of the question of whether a measure is necessary

⁸² See Federico Ortino, 'Legal Reasoning of International Investment Tribunals: A Typology of Egregious Failures' (2012) 3 JIDS 31–52.

⁸³ 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) 3–38; Caroline Henckels, *Proportionality and Deference in Investor-State Arbitration Balancing Investment Protection and Regulatory Autonomy* (CUP 2015).

⁸⁴ Thus critical of such an approach, inter alia, Paine (n 11); Caroline Foster, 'A New Stratosphere? Investment Treaty Arbitration as "Internationalized Public Law"' (2015) 64 ICLQ 461.

⁸⁵ The language of weighing and balancing that the WTO Appellate Body still uses does not change this. It is rather directed at establishing whether there is an effective alternative that members can reasonably be obliged to use. This is even the case for the case that may be most ambivalent in this regard *Korea–Beef*, WT/DS161/AB/R, Appellate Body Report (2 December 2000) especially para 164. See the discussion in Ingo Venzke, 'Making General Exceptions: The Spell of Precedents in Developing Article XX GATT into Standards for Domestic Regulatory Policy' (2011) 12 German LJ 1111–1140.

⁸⁶ Italics added.

should not lead to a policy review as under the principle of proportionality. Such a review could mean that a measure is unnecessary because restrictions on foreign investments could outweigh the possibly marginal contribution that a measure makes to the legitimate policy objective in question. Rather, as is the case in the WTO, Article 2 of the TTIP Draft should be understood as asking whether there is a reasonably available alternative which makes *at least the same* contribution to the legitimate policy objective. In other words, as long as there is no such alternative measure, strong restrictions on foreign investments would still be considered necessary even if they only make a marginal contribution to achieving a legitimate policy objective. There should, however, be no balancing between those restrictions and the policy objective in question.

The standards of review are one way in which, at the moment of the judicial decision, the practice of adjudication places itself in relation to public choices on the domestic level of governance.⁸⁷ Further with regard to the interaction with the domestic level, it should be noted that the TTIP Draft makes no changes to the role of domestic courts in the lead-up or enforcement of awards when compared to established investment law and practice. There is no requirement to exhaust local remedies before bringing a claim. Rather, the TTIP Draft sets up a strongly worded fork-in-the road provision according to which a claim is inadmissible before an international tribunal if a claim concerning the same treatment has been brought before a domestic court and a final judgment by the domestic court has not yet been delivered (Article 14(1) TTIP Draft). The side-lining of ordinary courts in largely functional constitutional democracies has possibly been among the most solid reasons for criticism.⁸⁸ Would it not be an option to at least give national courts a first go in taking up complaints by foreign investors—indeed, even if they did not directly apply the international standards of investment protection?

The enforcement of awards in the TTIP Draft follows the rules of either the ICSID or the New York Conventions. Under the New York Convention, domestic courts enjoy but a rather narrow role in refusing the enforcement of awards for reasons of public policy.⁸⁹ Under the ICSID Convention, domestic courts are not even given the possibility of refusing enforcement on those limited grounds.⁹⁰ Since the possibilities of contesting the judicial authority

⁸⁷ See already Andreas von Staden, 'Democratic Legitimacy of Review Beyond the State: The Need for an Appropriate Standard of Review' (2012) 10 I-CON 1023–1049.

⁸⁸ See the pointed argument by the Deutsche Richterbund (n 69).

⁸⁹ Art V New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

⁹⁰ See art 54 ICSID Convention.

exercised within the ICS at the domestic level are thus limited, the justification of that authority, if it comes to pass, must thus mostly occur at the international level—through appellate review as well as the increased input of politico-legislative processes, through the legitimacy of judges, the judicial process, and through the way that the judicial decision is crafted.

8 In Closing: The Belief in Public Institutions

The recent developments in the international law of investment protection, as they have been carried forward by the European Commission, egged on by civil society and social movements, make good sense from the perspective of a public law theory of international adjudication, which presents international courts and tribunals as multifunctional actors who exercise international public authority and therefore require democratic legitimacy. These recent developments reject a conception of ISDS as an instrument for the settlement of disputes alone and credit its multifunctionality. The European Commission's proposal does not suggest that the practice of international adjudication in investment law can find sufficient support in the functional logic of investment protection. The recent developments rather suggest, and this merits emphasis, that nothing can ultimately carry the public authority—including the judicial authority under TTIP—other than peoples and citizens.⁹¹

The present article has assessed, and tried to further guide, debates about reform in investment adjudication, especially as taken forward by the European Commission from the perspective of the public law theory of international adjudication. It has provided a basis for arguments as to how the practice of investment adjudication should be framed and justified. The present argument does not carry the weight of any conclusion as to the overall legitimacy of a particular institutional arrangement. That would require a much more detailed assessment including, notably, a comparison with the alternatives and their relative legitimacy. What, for instance, are really the net merits of international investment adjudication in the Trans-Atlantic context when compared to domestic adjudication? Is international investment adjudication, even if thoroughly reformed, possibly still more troublesome than the problems of domestic adjudication to which it purports to respond? Do domestic courts really show a national bias that disadvantages foreign investors? Conversely, would the ICS not be biased in favor of foreign investors? Which bias to choose?

⁹¹ That is the formula that we propose in response to the leading question 'In Whose Name?', von Bogdandy and Venzke (n 7).

The present assessment of the proposed ICS has stood under the caveat set out at the beginning—that it is unsure whether foreign investors should be granted the possibility of bringing a case directly to an international judicial mechanism at all, no matter which shape or form such a mechanism might take. The present assessment, it was added, neither gets to more fundamental critiques of investment protection. *If* the choice for international mechanisms for the settlement of investor-state disputes is made, it is submitted, a public law theory of international adjudication provides a powerful basis for understanding the phenomenon, for framing it, and for supporting the democratic legitimacy of international public authority.