



## UvA-DARE (Digital Academic Repository)

### On the Functions, Authority and Legitimacy of Investor-State Arbitration: The Case of the Transatlantic Trade and Investment Partnership (TTIP)

Venzke, I.

**Publication date**

2016

**Document Version**

Final published version

**Published in**

Tiptoeing to TTIP

[Link to publication](#)

**Citation for published version (APA):**

Venzke, I. (2016). On the Functions, Authority and Legitimacy of Investor-State Arbitration: The Case of the Transatlantic Trade and Investment Partnership (TTIP). In L. Pantaleo, W. Douma, & T. Takács (Eds.), *Tiptoeing to TTIP: what kind of agreement for what kind of partnership?* (pp. 59-75). (CLEER papers; No. 2016/1). Centre for the Law of EU External Relations. [http://www.asser.nl/media/3005/cleer16-1\\_complete\\_web.pdf](http://www.asser.nl/media/3005/cleer16-1_complete_web.pdf)

**General rights**

It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

**Disclaimer/Complaints regulations**

If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: <https://uba.uva.nl/en/contact>, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.



Founded in 2008, the Centre for the Law of EU External Relations (CLEER) is the first authoritative research interface between academia and practice in the field of the Union's external relations. CLEER serves as a leading forum for debate on the role of the EU in the world, but its most distinguishing feature lies in its in-house research capacity, complemented by an extensive network of partner institutes throughout Europe.

#### Goals

- To carry out state-of-the-art research leading to offer solutions to the challenges facing the EU in the world today.
- To achieve high standards of academic excellence and maintain unqualified independence.
- To provide a forum for discussion among all stakeholders in the EU external policy process.
- To build a collaborative network of researchers and practitioners across the whole of Europe.
- To disseminate our findings and views through a regular flow of publications and public events.

#### Assets

- Complete independence to set its own research priorities and freedom from any outside influence.
- A growing pan-European network, comprising research institutes and individual experts and practitioners who extend CLEER's outreach, provide knowledge and practical experience and act as a sounding board for the utility and feasibility of CLEER's findings and proposals.

#### Research programme

CLEER's research programme centres on the EU's contribution in enhancing global stability

and prosperity and is carried out along the following transversal topics:

- the reception of international norms in the EU legal order;
- the projection of EU norms and impact on the development of international law;
- coherence in EU foreign and security policies;
- consistency and effectiveness of EU external policies.

CLEER's research focuses primarily on four cross-cutting issues:

- the fight against illegal immigration and crime;
- the protection and promotion of economic and financial interests;
- the protection of the environment, climate and energy;
- the ability to provide military security.

#### Network

CLEER carries out its research via the T.M.C. Asser Institute's own in-house research programme and through a collaborative research network centred on the active participation of all Dutch universities and involving an expanding group of other highly reputable institutes and specialists in Europe.

#### Activities

CLEER organises a variety of activities and special events, involving its members, partners and other stakeholders in the debate at national, EU- and international level.

CLEER's funding is obtained from a variety of sources, including the T.M.C. Asser Instituut, project research, foundation grants, conferences fees, publication sales and grants from the European Commission.



**CLEER**

## Tiptoeing to TTIP: What Kind of Agreement for What Kind of Partnership?

Luca Pantaleo, Wybe Douma and Tamara Takács  
(eds.)



CENTRE FOR THE LAW OF EU EXTERNAL RELATIONS

**TIPTOEING TO TTIP: WHAT KIND OF AGREEMENT FOR  
WHAT KIND OF PARTNERSHIP?**

**LUCA PANTALEO, WYBE DOUMA AND TAMARA TAKÁCS  
(EDS.)**

**CLEER PAPERS 2016/1**

### **Governing board / Board of editors**

Prof. Fabian Amtenbrink (Erasmus University Rotterdam)  
Prof. Steven Blockmans (CEPS/University of Amsterdam)  
Dr. Wybe Douma (T.M.C. Asser Institute)  
Prof. Christophe Hillion (SIEPS/University of Leiden)  
Dr. Andrea Ott (Maastricht University)  
Dr. Luca Pantaleo (T.M.C. Asser Institute)  
Dr. Tamara Takács (T.M.C. Asser Institute)  
Prof. Ramses Wessel (University of Twente)

### **Associate editors**

Dr. Ton van den Brink (Utrecht University)  
Dr. Andrés Delgado Casteleiro (Durham University)  
Dr. Angelos Dimopoulos (Queen Mary University)  
Dr. Christina Eckes (University of Amsterdam)  
Prof. Dr. Peter Van Elsuwege (Ghent University)  
Dr. Ester Herlin-Karnell (VU University, Amsterdam)  
Prof. Dr. Dimitry Kochenov (Groningen University)  
Mr. Jan-Willem van Rossem (Utrecht University)  
Dr. Nikos Skoutaris (University of East Anglia)  
Dr. Bart Van Vooren (University of Copenhagen)  
Prof. Dr. Henri de Waele (Radboud University, Nijmegen)  
Dr. Geert De Baere (KU Leuven)  
Dr. Joris Larik and Dr. Aaron Matta (The Hague Institute for Global Justice)

### **Editor-in-Chief**

Dr. Tamara Takács (T.M.C. Asser Institute)

### **Academic programme coordinator**

Dr. Luca Pantaleo (T.M.C. Asser Institute)

### **Editorial policy**

The governing board of CLEER, in its capacity as board of editors, welcomes the submission of legal papers and commentaries (max. 40,000 resp. 4,000 words, incl. footnotes, accompanied by keywords and short abstracts) at [info@cleer.eu](mailto:info@cleer.eu). CLEER applies a double blind peer review system. When accepted, papers are published on the website of CLEER and in 100 hard copies with full colour cover.

This text may be downloaded for personal research purposes only. Any additional reproduction, whether in hard copy or electronically, requires the consent of the author(s), editor(s). If cited or quoted, reference should be made to the full name of the author(s), editor(s), the title, the working paper or other series, the year and the publisher.

The author(s), editor(s) should inform CLEER if the paper is to be published elsewhere, and should also assume responsibility for any consequent obligation(s).

ISSN 1878-9587 (print)  
ISSN 1878-9595 (online)

© Author  
Printed in The Netherlands  
T.M.C. Asser Institute  
P.O. Box 30461  
2500 GL The Hague  
The Netherlands  
[www.cleer.eu](http://www.cleer.eu)

## CONTENTS

List of Contributors	5
Preface <i>Ronald Roosdorp</i>	7
Introduction	11
Democratic Legitimacy of Enhanced Regulatory Cooperation in TTIP <i>Davor Jančić</i>	15
Regulatory Cooperation Under TTIP: Rulemaking and the Ambiguity of Participation <i>Joana Mendes</i>	29
TTIP, Protection of the Environment and Consumers <i>Wybe Douma</i>	41
On the Functions, Authority and Legitimacy of Investor-State Arbitration: The Case of the Transatlantic Trade and Investment Partnership (TTIP) <i>Ingo Venzke</i>	59
Lights and Shadows of the TTIP Investment Court System <i>Luca Pantaleo</i>	77
Some Final Questions and Conclusions <i>Pieter Jan Kuijper</i>	93

# ON THE FUNCTIONS, AUTHORITY AND LEGITIMACY OF INVESTOR-STATE ARBITRATION: THE CASE OF THE TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP (TTIP)\*

Ingo Venzke

## 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. EU Commissioner Cecilia Malmström makes clear that the proposal 'sets out a series of far-reaching reforms'<sup>1</sup> that shall not be confined to the context of TTIP. Rather, according to Malmström, 'the EU is committed to leading the way globally.'<sup>2</sup>

Things are moving quickly for the EU. After a 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.'<sup>3</sup> Repercussions are even felt in the context of the Comprehensive Economic and Trade Agreement (CETA) that the EU has negotiated with Canada.<sup>4</sup> 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 has proposed for TTIP.<sup>5</sup>

---

\* The present contribution further develops my contribution to the expert roundtable on 'Tiptoeing to the TTIP: What Kind of Agreement for What Kind of Partnership?', held at the Asser Institute on 18 September 2015. Parts of this contribution have appeared as a new postscript to the paperback edition of Armin von Bogdandy and Ingo Venzke, *In Whose Name? A Public Law Theory of International Adjudication* (Oxford: Oxford University Press 2016). I thank Armin von Bogdandy as well as Michael Ioannidis for their helpful comments.

<sup>1</sup> C. Malmström, 'Proposing an Investment Court System', European Commission Blog Post (16 September 2015), available at <[https://ec.europa.eu/commission/2014-2019/malmstrom/blog/proposing-investment-court-system\\_en](https://ec.europa.eu/commission/2014-2019/malmstrom/blog/proposing-investment-court-system_en)>.

<sup>2</sup> *ibid.*

<sup>3</sup> C. Malmström, 'Done deal with Vietnam', European Commission Blog Post (2 December 2015), available at <[https://ec.europa.eu/commission/2014-2019/malmstrom/blog/done-deal-vietnam\\_en](https://ec.europa.eu/commission/2014-2019/malmstrom/blog/done-deal-vietnam_en)>.

<sup>4</sup> 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/>>.

<sup>5</sup> J. McGregor, 'EU quietly asks Canada to rework trade deal's thorny investment clause', *Canadian Broadcasting Corporation* (21 January 2016), available at <<http://www.cbc.ca/news/politics/canada-europe-trade-isds-ceta-1.3412943>>.

There are many dimensions to the existing critiques and to these developments and ambitions. The proposal that moves away from *ad hoc* arbitration towards a permanent investment court has been met with reluctance, if not criticism, from the side of the EU's negotiating partners as well as from within the EU. 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. Building on extensive research on the functions, authority, and legitimacy of international adjudication over the past five years, the present contribution aims at clarifying the phenomenon of adjudication in the context of investor-state disputes. Together with Armin von Bogdandy, I have developed a public law theory of international adjudication that provides the basis for analysis and normative assessment.<sup>6</sup> The public law theory of international adjudication has dealt with investor-state arbitration, but also with a number of other significant international courts and tribunals. Upon closer scrutiny, they are certainly very different. The present contribution will attune our theory further to the specific questions of adjudicating investor-state disputes.

The main proposition of our public law theory of international adjudication is that international courts and tribunals should be understood as multifunctional actors who exercise public authority and therefore require democratic legitimacy. 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, they make law through their decisions, and they review as well as legitimize the authority exercised by other actors on different levels of government – be it decisions of international bodies or, above all, measures of domestic administration. They exercise public authority because they have the capacity to affect the freedom of others in pursuance of a common interest.<sup>7</sup> They require democratic legitimacy just like any other exercise of public authority on the domestic, supranational or international level of governance. The *modus* of democratic legitimacy differs depending not only on the level of governance but also on the kind of actor that is involved.

This analytical and normative framework provides the basis for clarifying and assessing arguments in the debate about the legitimacy of different mechanisms for settling investor-state disputes, especially of a permanent investment court when compared to *ad hoc* arbitration. The present article argues that *if* a choice is made in favour of an international mechanism to settle investor-state

---

<sup>6</sup> A. von Bogdandy and I. Venzke, *In Whose Name? A Public Law Theory of International Adjudication* (Oxford: Oxford University Press 2014).

<sup>7</sup> For the definition of international public authority see *ibid.*, chapter 3 section A 2 a; for a slightly different framing definition of international public authority, see A. von Bogdandy, P. Dann, and M. Goldmann, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities', 9 *German Law Journal* 2008, 1375–1400; A. von Bogdandy, M. Goldmann, and I. Venzke, 'From Public International to International Public Law: Translating World Public Opinion into International Public Authority' (18 September 2015), available at <<http://ssrn.com/abstract=2662391>>.



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. 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.<sup>8</sup> Notwithstanding the fact that according to some such critiques there should better be no ISDS mechanism to begin with, also fundamental critiques 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: First, it presents TTIP as an example of international public authority's increasing contestation and politicization (Section 2). Second, it clarifies judicial functions and judicial authority in the context of investor-state dispute settlement. What is really the bone of contention? How should we make sense of the practice of adjudication? (Section 3) The contribution then zooms in on two outstanding new features of the current draft for TTIP: the appellate mechanism and opportunities for political-legislative input (Section 4). Against the background of the past experience with adjudication trade disputes in the World Trade Organization, it argues that appellate review adds an accelerating dynamic to judicial lawmaking and is likely to increase not only legal certainty, but also judicial authority. It should thus go hand in hand with increased opportunities for renewed input from political-legislative processes. In a fourth step, and still strongly guided by the analytical and normative framework of our public law theory of international adjudication, the contribution will focus on three specific sets of features of the proposed Investment Court System: the panelists and judges, the judicial process, and the making of the decisions (Section 5). Those are the three main pathways for supporting the democratic legitimacy of international adjudication. Special attention will be paid to the way in which the international judicial decision relates to the domestic level of governance. Section 6 concludes with an

---

<sup>8</sup> Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge: Cambridge University Press 2005) 211–216; Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge: Cambridge University Press 2011), ch. 3; Matthias Kumm, 'An Empire of Capital? Transatlantic Investment Protection as the Institutionalization of Unjustified Privilege', 4 *ESIL Reflections* 2015.

emphasis on the core belief in public institutions – a belief that the project of TTIP as well as its critics in fact share.

## 2. TTIP AS AN EXAMPLE OF THE INCREASED 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. At least in Europe, this public sphere has clearly become transnational due to TTIP-negotiations. It is the prospect of the exercise of authority on the international level – both in the form of adjudication and of regulation – that is of main concern. The two focal points of debate and critique are the mechanism of the settlement of investor-state disputes, on the one hand, and the reach of the Regulatory Council, on the other. The fear is deregulation and the imposition of standards that are at odds with the outcome of parliamentary decision-making – be that through the backdoor of arbitral tribunals or through (de)regulatory cooperation.<sup>9</sup> 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 World Trade Organization received during the Ministerial Council meetings in Seattle in 1999. While earlier instances of vocal contestation mostly went hand in hand with a more general criticism of globalization, it is with regard to TTIP that public opinion and parts of civil society have entered into a more specific and detailed dialogue with policy-makers.

The starting point for the EU's presence and practice in this matter 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 in the field, 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 led 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 investor-state dispute settlement (ISDS) as 'a significant break with the past' and as 'the most progressive system to date [...] for Investor-

---

<sup>9</sup> See, e.g., the critique presented on <[www.stop-ttip.org](http://www.stop-ttip.org)>. For a summary overview of this criticism see also J. von Bernstorff, 'Streitigkeiten über gemeinwohlorientierte Regulierung von Investoren gehören im demokratischen Rechtsstaat vor die nationalen Gerichte', *Verfassungsblog* (VerfBlog) post (15 May 2014), available at <<http://verfassungsblog.de/streitigkeiten-ueber-gemeinwohlorientierte-regulierung-von-investoren-gehoren-im-demokratischen-rechtsstaat-vor-die-nationalen-gerichte/>>.

to-State Dispute Settlement'.<sup>10</sup> But as was reported recently, the Commission has approached the new Canadian government in order to reconsider the mechanism of dispute settlement yet again.<sup>11</sup>

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.<sup>12</sup> 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.<sup>13</sup>

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 proposals for 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 assessment of the traditional ISDS system has been clear – it is not fit for purpose in the 21st century.<sup>14</sup>

Among other things, she proposed to move toward an international investment court system *in lieu of ad hoc* arbitration.<sup>15</sup> This proposal is now spelled out in

---

<sup>10</sup> European Commission, 'Investment Provisions in the EU-Canada Free Trade Agreement (CETA)', Factsheet (26 September 2014), available at <[http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc\\_151918.pdf](http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151918.pdf)>.

<sup>11</sup> See J. McGregor, *supra* note 5.

<sup>12</sup> F. Hoffmeister, 'Wider die German Angst—Ein Plädoyer für die transatlantische Handels- und Investitionspartnerschaft (TTIP)' 53 *Archiv des Völkerrechts* 2015, at 35, 50, with reference to K. De Gucht 'The Transatlantic Trade and Investment Partnership – Where Do We Stand on the Hottest Topics?' (22 January 2014), available at <[http://trade.ec.europa.eu/doclib/docs/2014/january/tradoc\\_152075.pdf](http://trade.ec.europa.eu/doclib/docs/2014/january/tradoc_152075.pdf)>.

<sup>13</sup> For the summary of the submissions see European Commission, 'Commission Staff Working Document, Report, Online Public Consultations 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), available at <[http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc\\_153044.pdf](http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf)>; 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)' (18 July 2014), available at <[http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc\\_152693.pdf](http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc_152693.pdf)>.

<sup>14</sup> C. Malmström, 'Investments in TTIP and beyond – towards an International Investment Court', European Commission Blog Post (5 May 2015), available at <[http://ec.europa.eu/commission/2014-2019/malmstrom/blog/investments-ttip-and-beyond-towards-international-investment-court\\_en](http://ec.europa.eu/commission/2014-2019/malmstrom/blog/investments-ttip-and-beyond-towards-international-investment-court_en)>.

<sup>15</sup> *ibid.*

a new draft text of the investment chapter, which the Commission presented to the US in November 2015.<sup>16</sup> This proposal will provide the main basis for the following application of our public law theory of international adjudication.

### 3. JUDICIAL FUNCTIONS AND JUDICIAL AUTHORITY

More so than other international courts, investor-state arbitral tribunals have been understood as institutions of a specific regime, that of investment protection. They have thrived on the functional logic of that regime and have built their sociological legitimacy narrowly on the economic rationale for foreign direct investment – above all economic development. At the same time, many observers have increasingly developed a multifunctional understanding of international adjudication. There is ever more awareness that, beyond settling specific disputes, investment tribunals participate in the making of investment law. Furthermore, they control and legitimize the authority exercised by other actors, especially domestic administrations and courts.<sup>17</sup>

What is more, the understanding of investor-state arbitral tribunals and institutions of the specific investment law regime remains troubled by the weakness of its functionalism – i.e., the effective pursuit of regime interests. This weakness is not only exposed when the underlying economic rationale is called into question but also when normative conflicts between the predominant regime interests and other public policy objectives become increasingly tangible. In its ambition to renew the field of international investment law, the European Commission thus 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.’<sup>18</sup> The goal of economic development by investment protection does not tell how to strike such a balance either when negotiating a treaty or when applying it down the line. It requires, after all, being balanced with something else.

Together with Armin von Bogdandy I have developed an account of international courts and tribunals as actors which exercise international public authority. We have placed this understanding against the background of other established basic conceptions of international courts and tribunals. International courts and tribunals, on our account, are not just instruments in the hands of disputing parties whose activity is entirely justified by party consent, or organs of the international community which protect its core values. Nor are they best understood as *institutions* of specific legal regimes furthering regime interests. They should be considered as *actors* who exercise international public authority,

---

<sup>16</sup> European Commission, ‘Draft Text: Transatlantic Trade and Investment Partnership: Trade in Services, Investment and E-Commerce: Chapter II Investment’ (TTIP Draft), available at <[http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc\\_153807.pdf](http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf)>.

<sup>17</sup> See A. von Bogdandy and I. Venzke, *supra* note 6, ch. 2 section C 3.

<sup>18</sup> The Commission uses this formulation repeatedly, for example European Commission, ‘Online Public Consultations on Investment Protection and Investor-to-state Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)’, Staff Working Document SWD(2015) 3 final (January 2015), at 2, 25.

which is to say that they enjoy the capacity, based on legal acts, to impact others in the exercise of their freedom, be it legally, or only *de facto*.<sup>19</sup> It seems highly likely that the practice of adjudication as it will unfold under the Commission's draft will have that capacity. It can award monetary damages, applicable interest, or 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, those awards will come with effective obligations that matter. They will amount to exercises of international public authority

#### 4. APPELLATE REVIEW AND POLITICAL-LEGISLATIVE LAWMAKING

While judicial authority under TTIP is thus similar to the general practice of investor-state dispute settlement, there are also some important differences. I wish to draw attention to two outstanding features before highlighting and assessing further differences from the perspective of a public law theory of international adjudication: appellate review and political-legislative lawmaking.

The Commission's draft negotiation text proposes that an 'Appeals Tribunal' be established. That would be a stark change compared to the investment law regime generally. Under the ICSID-Convention, awards may only be challenged before an Annulment Committee on a very limited number of grounds. Those grounds notably do 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).<sup>20</sup> If the investment tribunal was constituted under arbitral rules other than ICSID, the New York Convention governs the question under which conditions the award may be set aside or enforcement may be refused (Article V New York Convention). In neither case is there an opportunity for appeal.

What to expect from the possibility of appellate review under the TTIP and what to make of it? 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 Appellate Body of the World Trade Organization (WTO), 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

---

<sup>19</sup> See von A. Bogdandy and I. Venzke *supra* note 6, ch. 3 section A 2 a; for a slightly different framing definition of international public authority, see von A. Bogdandy, M. Goldmann, and I. Venzke, *supra* note 7.

<sup>20</sup> C. Schreuer, 'From ICSID Annulment to Appeal Half Way Down the Slippery Slope', 10 *The Law and Practice of International Courts and Tribunals* 2011, 211–225.

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.<sup>21</sup> 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%.<sup>22</sup> 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.<sup>23</sup>

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.<sup>24</sup> 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.'<sup>25</sup> Appellate Body reports thus become practically inescapable reference-points for litigants, judges, and participants of the legal discourse.<sup>26</sup> The experience of regimes with appellate review points in the direction of a significantly different, stronger dynamic of judicial lawmaking. Some investment tribunals have already suggested that earlier awards create legitimate expectations and thereby justified their reference to those awards or even argued for a duty to refer to them and to thereby 'contribute to the harmonious development of the law.'<sup>27</sup> But in the still 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 depend on how it compares to, and is embedded within, political-legislative mechanisms.

<sup>21</sup> P. van den Bossche, 'From Afterthought to Centrepiece: The WTO Appellate Body and Its Rise to Prominence in the World Trading System' in G. Sacerdoti *et al.* (eds.), *The WTO at Ten: The Contribution of the Dispute Settlement System* (Cambridge: Cambridge University Press 2006), at 289.

<sup>22</sup> For those current statistics see <[http://www.wto.org/english/tratop\\_e/dispu\\_e/stats\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/stats_e.htm)>.

<sup>23</sup> See A. von Bogdandy and I. Venzke, *supra* note 6, ch. 4 section B 3.

<sup>24</sup> *Japan: Taxes on Alcoholic Beverages – Appellate Body Report* (4 October 1996) WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 14.

<sup>25</sup> *United States: Final Anti-Dumping Measures on Stainless Steel from Mexico – Appellate Body Report* (30 April 2008) WT/DS344/AB/R, para 162.

<sup>26</sup> A. von Bogdandy and I. Venzke, 'The Spell of Precedents: Lawmaking by International Courts and Tribunals', in C.P. R. Romano *et al.* (eds.), *The Oxford Handbook of International Adjudication* (Oxford: Oxford University Press 2013), at 503; also see K.J. Pelc, 'The Politics of Precedent in International Law: A Social Network Application', 108 *American Political Science Review* 2011, 547–564.

<sup>27</sup> *Saipem SpA v. People's Republic of Bangladesh* (Decision on Jurisdiction and Recommendation of Provisional Measures) ICSID Case No ARB/05/07 (21 March 2007), para 90.



The second new feature of TTIP that I wish to highlight can be understood as a reaction to judicial lawmaking and to judicial authority in general: denser legal provisions and more opportunities for political-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 generates particular uncertainty for the parties and accords the arbitrators broad discretion. It is now defined by a closed, enumerative list of elements which defines possible breaches (Article X.9 CETA and Article 3.2 TTIP Draft).<sup>28</sup> 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 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.<sup>29</sup> 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 fair and equitable treatment (FET) standard.<sup>30</sup> Whereas earlier bilateral investment treaties (BITs) did not usually set up such a body, newer BITs increasingly do.<sup>31</sup> Of course, treaty parties always could have reached an interpretative agreement even in the absence of any such treaty provision,<sup>32</sup> but bodies such as the NAFTA FTC channel and facilitate those efforts. They further add to the

---

<sup>28</sup> The standard of indirect expropriation provides another notable example, see Art. 5 and Annex I.

<sup>29</sup> Art. X.27 CETA (consolidated version) published on 26 September 2014, available at <[http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc\\_152806.pdf](http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf)>; Art. 13(5) TTIP Draft ('Committee').

<sup>30</sup> NAFTA Free Trade Commission, 'Notes of Interpretation of Certain Chapter 11 Provisions' (31 July 2001), available at <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/NAFTA-Interpr.aspx?lang=eng>>; see also A. Roberts, 'Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States' 104 *American Journal of International Law* 2010, at 179.

<sup>31</sup> S.W. Schill and M. Jacob, 'Trends in International Investment Agreements, 2010–2011: The Increasing Complexity of International Investment Law', *Yearbook on International Investment Law & Policy* 2012, 141–79.

<sup>32</sup> That is already a matter of treaty law and treaty interpretation, see especially Art. 31(3)(a) Vienna Convention on the Law of Treaties (VCLT): 'There shall be taken into account, together

authority of treaty parties' agreements conferring them binding force *vis-à-vis* the tribunal.<sup>33</sup> 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 members<sup>34</sup> to ever act accordingly and to possibly react to judicial authority and judicial lawmaking.<sup>35</sup> In a bilateral setting of two parties with rather analogous interests such as in CETA or TTIP, such renewed political-legislative input may be more likely. The TTIP draft specifically invites parties to continuously develop the content of the FET standard political-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 political-legislative input. At the same time, it should be noted that political-legislative processes at the WTO remain largely paralyzed.

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 political-legislative processes, curing some problems of judicial authority, but adding new ones arising from the fact that the political-legislative processes continue to lag behind. In TTIP, this political-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 the three main pathways of democratic legitimacy: connecting to the judges, the judicial process, and the decision itself.<sup>36</sup>

---

with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions'.

<sup>33</sup> 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 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.

<sup>34</sup> As of 26 April 2015, see <[https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm)>.

<sup>35</sup> See R. Howse, 'The Legitimacy of the World Trade Organization' in J.-M. Coicaud and V. Heiskanen (eds.), *The Legitimacy of International Organizations* (Tokyo: United Nations University Press 2001) 355–407; A. von Bogdandy, 'Law and Politics in the WTO – Strategies to Cope with a Deficient Relationship', 5 *Max Planck Yearbook of United Nations Law* 2001, 609–673; P.J. Kuijper, 'WTO Institutional Aspects' in D. L. Bethlehem *et al.* (eds.), *The Oxford Handbook of International Trade Law* (Oxford: Oxford University Press 2009), 79–128.

<sup>36</sup> A. von Bogdandy and I. Venzke, *supra* note 6, ch. 4.



## 5. PATHWAYS OF DEMOCRATIC LEGITIMACY

### 5.1. The Judge

The European Commission has identified striking the right balance between investment protection and member states' regulatory autonomy as the key challenge – 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.<sup>37</sup> 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.'<sup>38</sup> 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.<sup>39</sup> 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.<sup>40</sup> 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.<sup>41</sup> Of course the demand has always been that arbitrators act independently and impartially. While the interest in repeat appointment may have supported such demands,<sup>42</sup> 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.<sup>43</sup>

---

<sup>37</sup> For an earlier example see, e.g., Art. 268 Trade Agreement between the European Union and Colombia and Peru, signed 2012, available at <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=691>>. Also see M. Wagner, 'Regulatory Space in International Investment Law and International Trade Law', 36 (1) *UPenn Journal of International Law* 2014.

<sup>38</sup> European Commission, 'Investment Provisions in the EU-Canada Free Trade Agreement (CETA)', *supra* note 10.

<sup>39</sup> See in detail, I. Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (Oxford: Oxford University Press 2012), 46–57.

<sup>40</sup> A. Von Bogdandy and I. Venzke, *supra* note 6, 158–171; see also, in agreement, E. De Brabandere, *Investment Treaty Arbitration as Public International Law: Procedural Aspects and Implications* (Cambridge: Cambridge University Press 2014), 74–89.

<sup>41</sup> See, e.g., Arts. 8–10 UNCITRAL Arbitration Rules; Arts. 37–38 ICSID Convention.

<sup>42</sup> C.N. Brower and S.W. Schill, 'Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?', 9 *Chicago Journal of International Law* 2009, at 471.

<sup>43</sup> On those problems see J.D. Fry and J.I. Stampalija, 'Forged Independence and Impartiality: Conflicts of Interest of International Arbitrators in Investment Disputes', 30 *Arbitration International* 2014, at 189; A. Reinisch and C. Knahr, 'Conflict of Interest in International Investment Arbitration' in A. Peters and L. Handschin (eds), *Conflict of Interest in Global, Public and Corporate Governance* (Cambridge: Cambridge University Press 2012), at 103; A. Roberts, 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System', 107 *American Journal*

In the proposed ICS, it would now be the Trade Committee, composed of equal parts by representatives of the US and the EU, which appoints fifteen judges to the Tribunal of First Instance (Article 9(2) TTIP Draft). Investors play no part, at least not formally. One third of these judges come from the US, one third from EU member states, and one third from other 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 typically two of three arbitrators are appointed by the disputing parties and the third one either by them or by an appointing authority such as the Secretary General of the Permanent Court of Arbitration. Under normal BITs, 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 more one of agents acting on behalf of the parties rather than of judges acting in a broader interest. This conception as well as the prevailing ethos is pushed to change within TTIP. In light of the courts' 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 then 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 requirement that the judges 'possess the qualifications required in their respective countries for appointment to judicial office', or else that they 'be jurists of recognized competence.' This reference to public international law, and notably not to commercial law, clearly places investment arbitration within that realm – as it should be. The TTIP provisions on the qualifications of judges do not make reference to something like a 'high moral character' (Article 2 ICJ Statute). 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

---

*of International Law* 2013, at 45, 87; J. Paine, 'The Project of System-Internal Reform in International Investment Law: An Appraisal', 6 *Journal of International Dispute Settlement* 2015, at 332.

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 legitimization of traditional arbitral tribunals' exercise of public authority that arise from arbitrators' conflicts of interests.<sup>44</sup> 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.<sup>45</sup> And it leaves unresolved the financial gains from accepting and continuing disputes, which creates incentives that might possibly question judges' impartiality.<sup>46</sup>

## 5.2. The Process

In the Commission's proposal for an ICS, is it more or less likely that the judicial process contributes to the democratic legitimization 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.<sup>47</sup> 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 Mauritius Convention on Transparency of December 2014,<sup>48</sup> the new UNCITRAL rules meet demands for transparency half-way. TTIP goes yet further in these rules' effort at ensuring the 'transparency and accessibility to the public of treaty-based investor-State arbitration'<sup>49</sup> by adding 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

---

<sup>44</sup> On those problems see J.D. Fry and J.I. Stampalija, 'Forged Independence and Impartiality: Conflicts of Interest of International Arbitrators in Investment Disputes' 30 *Arbitration International* 2014, at 189; A. Reinisch and C. Knahr, 'Conflict of Interest in International Investment Arbitration' in A. Peters and L. Handschin (eds.), *Conflict of Interest in Global, Public and Corporate Governance* (Cambridge: Cambridge University Press 2012), at 103.

<sup>45</sup> Art. 11(1) TTIP Draft does not mention the word 'arbitrator' in the list of prohibited side activities. See also the critique in G. 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).

<sup>46</sup> 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, available at <<http://www.drj.de>>.

<sup>47</sup> A. von Bogdandy and I. Venzke, *supra* note 6, 172–184.

<sup>48</sup> United Nations Convention on Transparency in Treaty-based Investor-State Arbitration adopted on 10 December 2014.

<sup>49</sup> Available at <[http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/2014Transparency.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency.html)>.

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.<sup>50</sup> The ICSID rules provide since 2006 that proceedings may be opened to the public unless one party objects.<sup>51</sup> 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.<sup>52</sup>

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.<sup>53</sup> At the same time, dissenting and separate opinions are possible. That corresponds to the practice of investment arbitration and is overall a beneficial feature as it has the potential of adding to the clarity of the award, to the possibilities of critique, and to the opportunities for change.<sup>54</sup>

### 5.3. The Decision

The third pathway that we identified as contributing to the democratic legitimacy of the public authority exercised by international investment tribunals connects to the decision itself, especially to how it is justified and how it is placed within the broader institutional contexts across levels of governance.<sup>55</sup> TTIP clearly places the practice of investment arbitration within the field of public international

<sup>50</sup> We are bracketing the practical questions arising from the fact that the EU is not a party to ICSID and, as a supranational organization, cannot become so without further ado.

<sup>51</sup> See A. von Bogdandy and I. Venzke, *supra* note 6, ch. 4 section B 1 a.

<sup>52</sup> 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 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 *amicus curiae* see Art. 4 UNCITRAL Transparency Rules; Rule 37 Section 2 ICSID Rules of Procedure for Arbitration Proceedings.

<sup>53</sup> A. von Bogdandy and I. Venzke, *supra* note 6, ch. 4 section B 1 b.

<sup>54</sup> A. von Bogdandy and I. Venzke, *supra* note 6, ch. 4 section B 1 c.

<sup>55</sup> A. von Bogdandy and I. Venzke, *supra* note 6, ch. 4 section C.

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' (Article 13 TTIP Draft). Even newer BITs do not regularly make that commitment.<sup>56</sup> 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.<sup>57</sup> Granted, such a textual approach can become absurd in the extreme.<sup>58</sup> It also hides policy choices where they should better 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.

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.<sup>59</sup> However, such proportionality analysis, rather than being part of the solution, can easily aggravate problems of judicial authority. 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 political-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.<sup>60</sup> The way in which the new right to regulate is now phrased in Article 2 of the TTIP Draft offers a similar solution: '[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' [emphasis added]. The analysis of the question of whether a measure is necessary 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

---

<sup>56</sup> See, for instance, 2012 US Model Bilateral Investment Treaty, available at <<https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>>.

<sup>57</sup> With regard to bad examples or even a 'textual fetish' in the practice of WTO adjudication, see D. Irwin and J. Weiler, 'Measures Affecting the Cross-Border Supply of Gambling and Betting Services (DS 285)' 7 *World Trade Review* 2014, at 71, 89. For our assessment on the scope of reasons in judicial justifications see A. von Bogdandy and I. Venzke, *supra* note 6, ch. 4 section C 1.

<sup>58</sup> D. Irwin and J. Weiler, *supra* note 62.

<sup>59</sup> S.W. Schill, 'International Investment Law and Comparative Public Law: An Introduction'. In S.W. Schill (ed.), *International Investment Law and Comparative Public Law* (Oxford: Oxford University Press 2010), 3–38; critically: J. Paine, 'The Project of System-Internal Reform in International Investment Law: An Appraisal', 6 *Journal of International Dispute Settlement* 2015, 332–354; C. Foster, 'A New Stratosphere? Investment Treaty Arbitration as "Internationalized Public Law"', 64 *International and Comparative Law Quarterly* 2015, at 461.

<sup>60</sup> 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.

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. It remains to be seen how political-legislative processes such as within the Trade Committee will unfold and how much input they will provide for the practice of adjudication as it is presently envisioned. Returning to the interaction with the domestic level, it should be noted that TTIP 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, it 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.<sup>61</sup> 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 Convention. Under the New York Convention, domestic courts enjoy but a rather narrow role in possibly refusing its enforcement for reasons of public policy.<sup>62</sup> Under the ICSID Convention, domestic courts are not even given the possibility of refusing enforcement for those limited grounds.<sup>63</sup> Since the possibilities of contesting the judicial authority 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.

---

<sup>61</sup> See the pointed argument by the Deutsche Richterbund, *supra* note 47.

<sup>62</sup> Art. V New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

<sup>63</sup> Art. 54 ICSID Convention.



## 6. 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, prove the point of a public law theory of international adjudication. That theory shows analytical purchase and normative guidance in this case. It clarifies what it is that we are talking about – the multifunctional practice of adjudication under TTIP as an exercise of public authority. And it provides a basis for arguments as to how that practice should be framed and justified. It 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. What, for instance, are really the net merits of international investment adjudication in the transatlantic context when compared to domestic adjudication? Is such a mechanism, even if thoroughly reformed, possibly still more troublesome than the problems of domestic adjudication to which it purports to respond? Would it perpetuate a bias in favour of investment protection? Would domestic adjudication perpetuate a nationalist bias against foreign investors? Which bias to chose?

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, a public law theory of international adjudication provides a basis for understanding the phenomenon, for framing it, and for supporting its democratic legitimacy.

In closing, it merits emphasis that the sheer project of Trans-Atlantic institution-building in the form of TTIP as well as its critics in fact share a core point – the demand, namely, that the law be spoken in the name of the peoples and citizens. By clearly opting for public institutions within TTIP, not only the critics but also the negotiators reject the idea that international arbitral tribunals are but an instrument of dispute settlement in the hands of the parties alone. The basic conceptions of international courts and tribunals as organs of the international community or as institutions of specific legal regimes also do not hold sufficient sway. Negotiators and citizens, at least implicitly, share the belief that nothing can ultimately carry the legitimacy of international judicial authority – including under TTIP – other than peoples and citizens.<sup>64</sup>

---

<sup>64</sup> That is the formula that we propose in response to the leading question ('In whose name?') in A. von Bogdandy and I. Venzke, *supra* note 6.