INSIGHT

An Investment Court System for the New Generation of EU Trade and Investment Agreements: A Discussion of the Free Trade Agreement with Vietnam and the Comprehensive Economic and Trade Agreement with Canada

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Abstract: The European Commission has recently concluded the negotiations on the free trade agreement between the EU and Vietnam and the Comprehensive Trade and Investment Agreement between the EU and Canada. Amongst other issues, these agreements provide for comprehensive chapters on investment, including provisions on investor-state dispute settlement. In response to stark criticism from civil society, which perceives these mechanisms to be undemocratic, the Commission has seized the opportunity to reform the traditional arbitration-based system and replace it with a permanent court system. The mechanism of the Investment Court incorporates many innovative features and addresses some of the core criticism, including a rooster of appointed members, an appeals mechanism, and heightened ethical standards for members serving on the Court. However, in spite of these structural and procedural innovations, the Investment Court system goes not unchallenged, not least because it risks politicizing the dispute settlement process. Most importantly, it fails to effectively address constitutional requirements under EU law, and thus risks a negative opinion by the CJEU. The recent case law on the principle of autonomy suggests that the prior involvement of the CJEU in questions concerning the interpretation of EU law is a procedural prerequisite for the consistency of every international dispute settlement mechanism with the EU Treaties. And under the agreements with Vietnam and Canada, the assessment of EU law is an essential task of the Investment Court.

Keywords: Investment Court – CETA – EU-Vietnam FTA – ISDS – EU foreign investment policy – principle of autonomy – Art. 267 TFEU.

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I. Introduction: on the (in)transparent negotiation of EU agreements

The Transatlantic Trade and Investment Partnership (TTIP) agreement is, beyond any doubt, the most controversial free trade agreement (FTA) that is currently being negotiated by the European Union. Indeed, TTIP has served as a catalyst for civil society activism of unprecedented proportions, and has come under stark criticism for many reasons, not least the lack of transparency in its negotiation, which is widely perceived as fundamentally undemocratic. Criticism initially arose when the information emerged that the Commission contemplated including investor-state dispute settlement (ISDS) provisions in the transatlantic trade deal. Traditional ISDS mechanisms, which are modelled on commercial arbitration[1] and allow private investors to initiate disputes against the Contracting State that hosts the investment before an international tribunal, have received stark criticism over the recent years for a number of procedural and substantive reasons.[2] Whereas public criticism has swayed the Commission to implement a far reaching transparency initiative for the TTIP negotiations[3] – in the course of which the Commission published on November 12, 2015,[4] a proposal for a permanent TTIP-centred investment court system (ICS) – other EU free trade agreements continue to fly under the radar of public attention. Two of these developments are particularly striking in the context of a procedural EU-led reform of the heavily criticized ISDS system.

First, on December 2, 2015, a Commission press release announced the conclusion of an EU-Vietnam FTA, which, to the surprise of many, not only included a chapter on investment protection but indeed incorporated the ICS.[5] Marking a significant affirmation of reformist EU investment policy, this development received little to no attention outside the investment law community. Second, on February 29, 2016, less than a month after the publication of the final text of the EU-Vietnam FTA, a Commission press release announced that the Comprehensive Economic Trade Agreement (CETA) between the EU and Canada has updated its investment chapter to replace its initially more traditional ISDS mechanism with an ICS, similar to that in the FTA with Vietnam

[1] For an investment tribunal to acknowledge the relationship between investor-state and commercial arbitration see UNCITRAL, award of 8 June 2009, *Glamis Gold Ltd. v. United States of America*, para. 3; for a discussion on this see, C. Titi, *The European Union's Proposal for an International Investment Court: Significance, Innovations and Challenges Ahead*, in *Transnational Dispute Management*, 2016, forthcoming.

[2] R.W. Schwieder, *TTIP and the Investment Court System: A New (and Improved?) Paradigm for Investor-State Adjudication*, in *Columbia Journal of Transnational Law*, 2016, forthcoming.

[3] Commission Press Release of 7 January 2015, trade.ec.europa.eu.

[4] An informal text was already available on September 16, 2015, but was later revised; the proposal is available at trade.ec.eu.

[5] Press Statement by the President of the European Commission Jean-Claude Juncker, the President of the European Council Donald Tusk and the Prime Minister of Viet Nam Nguyen Tan Dung of 2 December 2015, trade.ec.europa.eu.

and the TTIP proposal.[6] This is particularly interesting considering that the CETA text was already finalized and in the process of legal revision. Civil society as well as Member States became aware of this amendment only *ex post facto*. Although this development received little attention, it sets an important precedent for the process of negotiating and concluding EU trade and investment agreements, and the level of involvement of other EU institutions, such as the European Parliament (EP), and Member States.

The present paper intends to shed more light on the core features of the new ICS system as it was included in the FTA with Vietnam and CETA. Although the ICS presents many innovations that break from traditional arbitration-based ISDS mechanisms, this paper focuses exclusively on some of the institutional innovations, i.e. the composition of Court, the appeals mechanism, and the heightened ethical requirements for members of the Court.[7] The paper subsequently discusses the ICS in the light of the principle of autonomy of the EU legal order.

II. Core features of the Investment Court system

II.1. Composition of the Court

The ICS in both, the FTA with Vietnam and CETA, establish a two-level judicial structure, the Tribunal of First Instance (the Tribunal) and the Appeals Tribunal. The FTA with Vietnam provides for nine members of the Tribunal, respective six members of the Appeals Tribunal.[8] CETA, on the other hand, encompasses a total of 15 members of the Tribunal whereas the number of members on the Appeals Tribunal is yet to be determined.[9] It is noteworthy that, unlike the TTIP proposal, neither CETA nor the FTA with Vietnam in its current version refer to members of the Tribunal as *judges*.[10] The composition of the Court is one of the striking features that differentiates traditional arbitration-based ISDS mechanisms from the new ICS. Traditional ISDS mechanisms strongly reflect the principle of party autonomy in the composition of the arbitration panel by

[6] Commission Press Release of 29 February 2016, europa.eu.

[7] For a full discussion see, C. Titi, *The European Union's Proposal for an International Investment Court*, cit.; L. Pantaleo, *Lights and Shadows of the TTIP Investment Court System*, in L. Pantaleo, W. Douma, T. Takács (eds), *Tiptoeing to TTIP: What Kind of Agreement for What Kind of Partnership?*, The Hague: CLEER, 2016, p. 77 *et seq*.

[8] Art. 12, para. 2, respective Art. 13, para. 2, Chapter on Trade in Services, Investments and E-Commerce, Sub-Chapter II on Investments, EU-Vietnam FTA, version of January 2016 (hereinafter referred to as EU-Vietnam FTA, unless otherwise specified).

[9] Art. 8.27, para. 2, respective Art. 8.28, para. 7, let. f), CETA, version of February 2016 (hereinafter referred to as CETA).

[10] Notably, whereas Art. 9 of the textual proposal for the Chapter on Trade in Services, Investment and E-Commerce in TTIP of November 12, 2015, Section 3, Sub-Section 5 (hereinafter referred to as TTIP proposal) refers to Judges on the Tribunal, Art. 10 on the Appeal Tribunal refers to members of the Appeal Tribunal.

empowering the investor to actively participate in the appointment of arbitrators hearing the case.[11] The ICS breaks with this approach in two important ways.

First of all, members of the Tribunal, as well as the Appeals Tribunals are categorized evenly in accordance to their affiliation to the Contracting Parties. In the case of the FTA with Vietnam, three members are nationals of Vietnam, three members are nationals of EU Member States, and the remaining three members are third country nationals.[12] CETA provides for a similar division with five members being nationals of Canada, five members being EU nationals, and the remaining five members are represented by third country nationals.[13] Notably, the affiliation of members of the Tribunal and Appeals Tribunal is determined on the basis of appointment, not nationality. Accordingly, national members of Vietnam on the Tribunal or Appeal Tribunal are not required to have the nationality of Vietnam.[14] As for CETA, the same holds true for the Tribunal, although no such reference is made in the provisions governing the appointment of members of the Appeal Tribunal.[15] On first sight this appears to suggest that the appointment of national members of the Tribunal and Appeals Tribunal is left to the respective Contracting Parties. However, both the FTA with Vietnam and CETA have assigned the selection of all members on the Investment Court to special committees established under the agreement,[16] respectively the Trade Committee, and the CETA Joint Committee. These committees are composed, on the one hand, of the Minister for International Trade of Canada, respectively the Minister for Trade and Industry of Vietnam, and, on the other hand, the EU Trade Commissioner;[17] who decide in both cases by mutual consent.[18] It is in this respect noteworthy that the Trade Committee, in the case of the FTA with Vietnam, appoints members to the Tribunal and Appeals Tribunal upon recommendation of the Committee on Services, Investment and Government Procurement.[19] The Committee on Services and Investment in CETA, on the other hand, is not involved in the appointment of members, leaving this issue solely to the CETA Joint Committee.[20] Although many structural and procedural details of the these committees still need to be worked out, the composition of the ICS appears more akin to a

[11] See discussion L. PANTALEO, *Lights and Shadows*, cit., pp. 80-81.

[12] Art. 12, para. 2, respective Art. 13, para. 2, EU-Vietnam FTA.

[13] Art. 8.27, para. 2, respective Art. 8.28, para. 7, let. f), CETA.

[14] Footnote 25 and 26, EU-Vietnam FTA.

[15] Footnote 9, CETA.

[16] Art. 12, para. 2, respective Art. 13, para. 2, EU-Vietnam FTA; Art. 8.27, para. 2, respective Art. 8.28, para. 7, let. f), CETA.

[17] Art. X.1, of the Chapter on Institutional, General and Final Provisions, EU-Vietnam FTA; Art. 26.1, para. 1, CETA.

[18] CETA, Art. 26.3, para. 3; the EU-Vietnam FTA refers to decision making by "mutual agreement", Art. X.5, para. 3, Chapter on Institutional, General and Final Provisions.

[19] Art. 34, para. 2, let. a), EU-Vietnam FTA.

[20] Art. 8.44, CETA.

politically negotiated compromise than an appointment by the respective Contracting Parties.[21]

Second, under the ICS the panel decides cases in a division of three – reflecting the tripartite of its overall composition – which is chaired by a third country member.[22] The appointment of members to individual panels is the responsibility of the President of the Tribunal, herself selected by lot from the pool of third country members.[23] Consequently, neither the investor nor the respondent State have any impact on the individual composition of the panel hearing the dispute.

As for the Appeals Tribunal, CETA is significantly less detailed than the FTA with Vietnam, which largely follows the same principles as for the composition of the Tribunal. The FTA with Vietnam determines the number of members on the Appeals Tribunal to six, two EU nationals and two nationals of Vietnam, and two third country nationals.[24] CETA, on the other hand, provides no guidance on the composition of the Appeals Tribunal, other than confirming its operation in divisions of three.[25] In particular, whereas the FTA with Vietnam embraces the tripartite of the Tribunal's composition,[26] CETA refers simply to "three randomly appointed Members of the Appeals Tribunal".[27] CETA leaves these question to be decided by the CETA Joint Committee along with other "administrative and organizational matters".[28] It remains, therefore, unclear whether the composition of the panel hearing a particular case is determined, as it is the case in the FTA with Vietnam, by a third country member of the Appeals Tribunal, or by the Minister of International Trade of Canada and the EU Trade Commissioner – in their capacity as the CETA Joint Committee – by mutual consent.

By abolishing the influence of the disputing parties on the appointment of a particular panel, the ICS responds to frequent criticism over the influence of investors over the arbitration process. While this approach is in general to be welcomed as reformative of the traditional ISDS system, it inserts a significant element of political influence on investor-state dispute resolution – counteracting the objective of depoliticization that ISDS was designed to achieve.[29] More importantly, however, the ICS composition directly threatens the recognition and enforcement of its decisions. Although both agreements refer in this respect to the New York Convention on the Recognition and Enforcement of

[21] R.W. SCHWIEDER, *TTIP and the Investment Court System*, cit., talks of the risk that the Committee would be captured by State interest.

[22] Art. 12, para. 6, EU-Vietnam FTA; Art. 8.27, para. 6, CETA.

[23] Art. 12, para. 8, EU-Vietnam FTA; Art. 8.27, para. 8, CETA.

[24] Art. 13, para. 2, EU-Vietnam FTA.

[25] Art. 8.28, para. 5, CETA.

[26] Art. 13, para. 8, EU-Vietnam FTA.

[27] Art. 8.28, para. 5, CETA.

[28] Art. 8.28, para. 7, CETA.

[29] L. PANTALEO, *Lights and Shadows*, cit., p. 82; R.W. SCHWIEDER, *TTIP and the Investment Court System*, cit.

Arbitral Awards, arguments have been advanced that the ICS is truly judicial – rather than arbitral – in nature, thus, falling outside the scope of that Convention.[30]

Lastly, members of both, the Tribunal of First Instance and the Appeals Tribunal, are on retainer to guarantee their independence and availability on short notice. Whereas the TTIP proposal departs from a retainer fee at about 2,000 Euro for judges of the Tribunal and 7,000 Euro for members of the Appeals Tribunal,[31] both CETA and the FTA with Vietnam leave the remuneration to be determined at a later stage by, respectively, the CETA Joint Committee and the Trade Committee.[32] In addition, members of the Tribunal are paid daily fees for their activity on panels, in line with Regulation 14, para. 1, of the Administrative and Financial Regulations of the ICSID Convention.[33] No such reference is made for the calculation of daily fees for members of the Appeals Tribunal, which is to be determined by decision of the respective committee. Suffice it to say at this point that the proposed retainer fee for members of the Tribunal in TTIP – amounting to one third of the amount of the WTO Appellate Body – has been heavily criticized as insufficient to guarantee the independence of members of the Tribunal.[34]

II.2. The appellate mechanism

The lack of an effective judicial review of arbitral decisions has long been one of the most criticized shortcomings of traditional ISDS mechanisms.[35] Investment awards rendered under the ICSID framework are subject to an internal judicial control in accordance with Arts 52 and 53, whereby the annulment Committee may decide to annul the award partially or in full. Reasons for annulment are, however, limited to questions of improper constitution of the panel, manifest excess of power, corruption, serious departure of fundamental rules of procedure, and failure to provide reasons.[36] Similarly,

[30] L. Pantaleo, *Lights and Shadows*, cit., pp. 85-87, points out that the lack of party autonomy in the ICS system is likely to render ICS awards judicial decisions rather than arbitral awards in accordance with Art. 1 of the New York Convention; C. Titi, *The European Union's Proposal for an International Investment Court,* cit., p. 27, furthermore points out that the enforcement of ICS awards is dependent on the provisions of the underlying agreement to which third parties are not bound.

[31] Arts. 9, para. 12, and 10, para. 12, TTIP proposal.

[32] Art. 12, para. 14, and Art. 13, para. 14, EU-Vietnam FTA; Art. 8.27, para. 12, and Art. 8.28, para. 7, let. d), CETA.

[33] Art. 12, para. 16, EU-Vietnam FTA; Art. 8.27, para. 14, CETA.

[34] D. Richterverbund, *Stellungnahme zur Errichtung eines Investitionsgerichtes für TTIP – Vorschlag der Europäischen Kommissionvom 16.09.2015 und 12.11.2015*, February 2016, www.drb.de.

[35] United Nations Conference on Trade and Development, *World Investment Report 2015: Reforming International Investment Governance,* New York, p. 150; it is generally suggested that an appeals mechanism would enhance credibility, legitimacy, coherence and foreseeability of the ISDS system, although it was also argued that an agreement-centric permanent court system risks increasing already existing discrepancies in awards, see R.W. Schwieder, *TTIP and the Investment Court System,* cit.

[36] C. Titi, *The European Union's Proposal for an International Investment Court*, cit., pp. 9-10.

domestic courts may set aside non-ICSID awards at the seat of arbitration.[37] In order to guarantee the recognition and enforceability of arbitral awards, domestic arbitration acts provide only limited grounds for the setting aside of awards to, for instance, personal misconduct, procedural improprieties, and the lack of a valid arbitration agreement;[38] but do not generally provide for a substantive review of the award.

In addition to the reasons for annulment in Art. 52 of the ICSID Convention, the ICS also provides for the possibility to appeal against an award rendered by the Tribunal, where it is alleged to have erred in the interpretation or application of the applicable law, or manifestly erred in the appreciation of the facts, including the relevant domestic law – which for the purpose of these proceedings also comprises EU law.[39] Where the TTIP proposal infers some complexity into the appeals procedure,[40] the FTA with Vietnam provides for broad competences for the Appeal Tribunal to "modify or reverse the legal findings and conclusions" of the Tribunal, partially or *in toto*.[41] Only where the facts of the case do not allow for a final decision to be taken is the matter to be referred back to the Tribunal.[42] In CETA, on the other hand, the appeals procedure is to be decided by the Joint Committee.[43]

II.3. Ethical requirements

Lastly, heightened ethical standards in the FTA with Vietnam and CETA are likely to have a real impact on the pool of people from which members of the Tribunal and Appeal Tribunal can be drawn. Members shall fulfill the requirements in their respective countries for appointment to judicial office, or be jurists of recognized competence.[44] To that extent, members of both, the Tribunal and Appeal Tribunal, shall have demonstrated

[37] R. Dolzer, C. Schreuer, *Principles of international investment law*, Oxford: Oxford University Press, 2012, pp. 300-301.

[38] Section 34, Swedish Arbitration Act (SFS 1999:116).

[39] Art. 28, para. 1, EU-Vietnam FTA; Art. 8.28, para. 2, CETA; L. Pantaleo, *Lights and Shadows*, cit., pp. 89-90, differentiates between an a private and public purpose objective underlying appeals mechanisms and emphasizes that the broad powers to review of the Appeal Tribunal in the ICS, including the possibility to review the appreciation of facts, goes beyond what is necessary to guarantee overall credibility, legitimacy and coherence of the dispute resolution mechanism.

[40] C. Titi, *The European Union's Proposal for an International Investment Court*, cit., pp. 11-12, points out that the TTIP proposal blurs the line as to whether the TTIP Appeals Tribunal is endowed with powers of final decision making, instead the procedure envisates that matters are in all cases referred back to the Tribunal with binding and detailed instructions as to the modification or reversal of the provisional award.

[41] Art. 28, para. 3, EU-Vietnam FTA; a decision of the Appeal Tribunal is considered final in accordance with Art. 29, para. 3, EU-Vietnam FTA.

[42] Art. 28, para. 4, EU-Vietnam FTA.

[43] Art. 8.28, para. 7, let. b), CETA.

[44] Art. 12, para. 4, EU-Vietnam FTA; Art. 8.27, para. 4, and Art. 8.28, para. 4, CETA. It is noteworthy that members of the Appeal Tribunal under the FTA with Vietnam shall fulfill the requirements to be appointed to the highest judicial office in their respective countries, thus imposing an even higher threshold.

expertise in public international law and, ideally, in international investment law, international trade law, and international dispute resolution. Additionally, members must not only be independent but also clearly appear to be free of any direct or indirect conflict of interest pertaining to a particular dispute. In slightly more ambiguous terms, both the FTA with Vietnam and CETA, stipulate that "upon *appointment*, they shall refrain from acting as counsel or as party-appointed expert or witness"[45] in any other dispute. It is unclear whether this refers to the appointment of members to a particular dispute or the general appointment as member of the Tribunal. If the former reading is correct, the new ethical standard is much less stringent than thus far perceived.[46] Be that as it may, while it is not uncommon for arbitrators to handle various arbitration cases in parallel, the language of the ethics provision appears to exclude the management of multiple disputes. In a similar vein, members that are affiliated to law firms that are counsel in investment disputes under other international agreements risk posing an indirect conflict of interest. Practicing lawyers with their primary field of activity in commercial arbitration do not seem to be affected. Neither are academics. The designation of panel members in other institutional *fora* with pre-established lists of arbitrators (e.g. ICSID) might, on the other hand constitute a potential conflict of interest under the above provision. Leaving aside whether or not the remuneration on the ICS is sufficient to guarantee the independence of members of the Tribunal, it is likely to be discouraging for experienced investment arbitrators with more promising financial incentives in traditional investment arbitration. Notably, also, the ethical requirement is also applicable for members of the Appeals Tribunal, which is likely to hear even fewer cases than the Tribunal of First Instance.

III. A critical assessment in the light of EU law

III.1. The autonomy of the EU legal order

Recent decisions of the CJEU have put into question to what extent the EU is capable to integrate in international settings with their own respective judicial bodies. In fact, the relationship between the CJEU and international courts and tribunals has been challenged since the early 1990's[47] and the Court's recent decision in Opinion 2/13[48] on the accession of the EU to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) has given anything but hope for increased interna-

[45] Art. 14 EU-Vietnam FTA; Art. 8.30 CETA.

[46] C. Titi, *The European Union's Proposal for an International Investment Court*, cit., p. 13.

[47] Court of Justice, opinion 1/91 of 14 December 1991; Court of Justice, opinion 1/00 of 18 April 2002; Court of Justice, opinion 1/09 of 8 March 2011.

[48] Court of Justice, opinion 2/13 of 18 December 2014.

tional integration.[49] Amongst the prominent stumbling blocks *en route* to the successful negotiation of EU agreements that set up international courts or tribunals, or purport to establish cooperation with systems that already provide for their own judicial bodies, is the principle of autonomy of the EU legal order. Accordingly, neither the EU nor the Member States shall conclude an international agreement that either empowers an international court or tribunals to authoritatively interpret EU law to the effect that its interpretations bind the CJEU internally; or an agreement that affects the essential characteristics of powers conferred upon the EU institutions under the Treaty.[50] The latter precludes international courts and tribunals from determining the allocation of competences between the EU institutions and the Member States, and preserves the nature of powers conferred upon EU institutions.[51] The negative track record raises pertinent questions as to whether the ICS is in line with the requirements of autonomy, which have been so adamantly pronounced by the CJEU. This part shall lift two of these questions, placing the ICS into perspective and inviting more detailed studies to be conducted on this matter.

III.2. EU law: a matter of law or a matter of fact?

According to the CJEU, a central aspect of the principle of autonomy is its own judicial prerogative over the interpretation of EU law. In other words, Art. 19 TEU, identifying the CJEU as the only institution to authoritatively determine the meaning of primary and secondary EU law, must be safeguarded also in EU agreements. For the ICS, this poses two challenges. First, does the Investment Court have jurisdiction to interpret EU law? And if so, second, are interpretations rendered by the Investment Court binding on the CJEU?

Under the FTA with Vietnam and CETA, the Investment Court is endowed with the interpretation of domestic law merely as a matter of fact.[52] This includes EU law to the same extent as domestic law of the Member States, considering that EU law is not part of the international law applicable between the Parties. It is explicit from the text of the relevant provisions that no domestic court or authority shall be bound by the interpre-

[49] P. Eeckhout, *Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky?*, in *Fordham International Law Journal*, 2015, p. 955 *et seq.*; S.W. Schill, *Editorial: Opinion 2/13 – The End for Dispute Settlement in EU Trade and Investment Agreements?*, in *Journal of World Investment and Trade*, 2015, p. 379 *et seq*.

[50] Opinion 1/00, cit., paras 11-12, 16, and 21; opinion 2/13, cit., paras 183-184.

[51] For a detailed discussion of the principle of autonomy, see P. Eeckhout, *Opinion 2/13*, cit.; H. Lenk, *Investor-state Arbitration under TTIP: Resolving Investment Disputes in an (Autonomous) EU Legal Order*, in *SIEPS Report*, 2015; C. Eckes, *The European Court of Justice and (Quasi-) Judicial Bodies of International Law*, in R.A. Wessel, S. Blockmans (eds), *Between Autonomy and Dependence: The EU Legal Order under the Influence of International Organisations*, The Hague: T.M.C. Asser Press, 2013, p. 85 *et seq.*; S. Hindelang, *The Autonomy of the European Legal Order*, in M. Bungenberg, C. Herrmann (eds), *Common Commercial Policy after Lisbon: Special Issue*, Berlin Heidelberg: Springer Verlag, 2013, p. 187 *et seq*.

[52] Art. 16, para. 2, EU-Vietnam FTA; Art. 8.31, para. 2, CETA.

tation of domestic law made by the Investment Court.[53] Although the explicit wording may be perceived as safeguarding the principle of autonomy, it merely restates the accepted view in international law.[54] Certain activities of the Investment Court, however, blur the line between legal interpretation and factual appreciation of EU law e.g. when determining the respondent to a dispute or the attribution of responsibility under international law.[55] Arguably, in as far as this includes an assessment of the allocation of competences between the EU and its Member States, or legal obligations for Member States derived from primary or secondary EU law, this is likely to amount to a violation of the principle of autonomy.[56] More importantly, however, it may be argued that the line between interpretation of law and appreciation of fact is thin – if not illusive. Jenks suggested that "[the] line between exposition and interpretation is perilously indeterminate, and it would therefore seem to be a mistake to attach undue importance [to it]."[57] The domestic law clause in the FTA with Vietnam and CETA is, therefore, unlikely to influence how Investment Court's approach EU law.[58] Questions such as the determination of the nationality of an investor, the requirements for a covered investment, and, in particular, cases of denial of justice, where the interpretation of domestic law might itself amount to, *inter alia*, manifest arbitrariness,[59] ultimately require from the investment tribunal an interpretation of domestic law.

As to the second question, the wording of both agreements explicitly rejects any binding effect of the Investment Court's appreciation of domestic law on domestic courts or the CJEU. Yet again, this merely appears to reflect the general view under international law. Moreover, in the absence of an explicit reference to the contrary, the doctrine of hierarchy of legal sources in the EU suggests that primary EU law outranks international law. However, more than upholding a formal prerogative, the principle of

[53] For a view that these provisions might safeguard the principle of autonomy see C. TITI, *The European Union's Proposal for an International Investment Court*, cit., pp. 31-33.

[54] S. HINDELANG, *The Autonomy of the European Legal Order*, cit., pp. 193-194; C. HERRMANN, *The Role of the Court of Justice of the European Union in the Emerging EU Investment Policy*, in *Journal of World Investment and Trade*, 2014, p. 570 *et seq.*, p. 582; see also Permanent Court of International Justice, *Certain German Interests in Polish Upper Silesia*, judgment on merits of 25 May 1926, p. 20: "[f]rom the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States [...]".

[55] D. GALLO, F. NICOLA, *The External Dimension of EU Investment Law: Jurisdictional Clashes and Transformative Adjudication*, in *Washington College of Law Research Paper*, 2016, pp. 30-31, forthcoming in *Fordham International Law Journal*; S. HINDELANG, *Repellent Forces: The CJEU and Investor-State Dispute Settlement*, in *Archiv des Völkerrechts*, 2015, p. 68 *et seq.*, p. 81.

[56] Court of Justice, opinion 1/78 of 14 November 1978, para. 35; Opinion 1/91, cit., paras 31-36; Opinion 2/13, cit., paras 221-225.

[57] C.W. JENKS, *The Interpretation and Application of Municipal Law by the Permanent Court of International Justice*, in *British Yearbook of International Law*, 1938, p. 67 *et seq.*, p. 68.

[58] C. HERRMANN, *The Role of the Court of Justice*, cit.

[59] Art. 8.10, para. 2, let. c), CETA.

autonomy protects a consistent and uniform interpretation and application of EU law.[60] And that might indeed be affected as far as the application of secondary EU law is concerned, which must be interpreted, as far as possible, in conformity with the EU's international obligations.[61] In particular, this is the case where the administration within Member States is confronted with the implementation of EU law, whose interpretation by the CJEU is conflicting to interpretations by the Investment Court. The Member State would in such circumstances be put between a rock and a hard place, having to decide whether to risk a potential investment dispute or litigation before the CJEU. It is suggested here that the CJEU is looking more broadly on the effects of decisions of international courts and tribunals on the harmonious interpretation and application of EU law, beyond their (non-)binding nature *strictu sensu*. Thus, even though the Investment Court's interpretation of EU law is not formally binding on domestic courts or the CJEU, it has nonetheless the potential to impact the understanding EU law in the light of international commitments.[62]

III.3. The prior involvement of the Court of Justice

One of the procedural safeguards for the uniformity in the interpretation and application of EU law internally is Art. 267 TFEU. Accordingly, domestic courts have the possibility, and in certain circumstances an obligation, to refer question on the interpretation of EU law to the CJEU. Having received an interpretation of the relevant provision of EU law, it is then for the domestic court to apply that interpretation to the facts of the case before it. Preliminary reference mechanisms, not unlike Art. 267 TFEU, have also been incorporated into EU agreements with third countries.[63] Initially, these mechanisms were assessed by the CJEU under the second leg of the principle of autonomy, that is to say whether it is designed in a way so as to safeguard the essential characteristic of powers conferred upon the CJEU under the Treaty. The binding nature of preliminary rulings on domestic courts of the Member States is in this respect an essential characteristic of the power of the CJEU under Art. 267 TFEU, and the same effect must be guaranteed under international agreements.[64] The language in Opinion 2/13 even sug-

[60] Opinion 2/13, cit., para. 174.

[61] Court of Justice, judgment of 10 September 1996, case C-61/94, *Commission v. Federal Republic of Germany*, para. 52; Court of Justice, judgment of 1 April 2004, case C-286/02, *Bellio F.lli Srl v. Prefettura di Treviso*, para. 33; Court of Justice, judgment of 10 January 2006, case C-344/04, *International Air Transport Association v. Department for Transport*, para. 35; see also A. Rosas, *The Status in EU Law of International Agreements Concluded by EU Member States*, in *Fordham International Law Journal*, 2011, p. 1304 *et seq.*, pp. 3009-3011.

[62] This has sometimes been referred to as "factual spillover effects", see S. Hindelang, *Repellent Forces*, cit., pp. 74-76; see C. Herrmann, *The Role of the Court of Justice*, cit., p. 582, for an opinion that these effects might be exaggerated.

[63] Court of Justice, opinion 1/92 of 10 April 1992, para. 32; Opinion 1/09, cit., para. 75.

[64] Opinion 1/00, cit., paras 20-26; Opinion 1/09, cit., para. 76.

gests that the prior involvement of the CJEU is in itself a procedural prerequisite for international agreements to be in conformity with the principle of autonomy.[65] I have argued elsewhere that since Opinion 2/13 – and perhaps already since Opinion 1/09 on the European Patents Court – any ISDS mechanism in future EU investment agreements is likely to be considered in violation of the principle of autonomy if it lacked a prior involvement of the CJEU.[66] The ICS provides for no such mechanism, neither the FTA with Vietnam nor CETA, leaving it open to be challenged in light of the principle of autonomy.[67] It has been argued that, unlike commercial arbitration tribunals, which do not fulfill the requisite criteria of a "court or tribunal" for the purpose of Art. 267 TFEU,[68] investor-state tribunals in institutionalized settings (e.g. ICSID) – and by the same reasoning the ICS – are endowed with the power to refer questions to the CJEU.[69] Indeed, the CJEU has on occasions argued that arbitral tribunals may be considered "courts or tribunals" within the meaning of Art. 267 TFEU, where the constitution is subject to the exercise of state authority and arbitration is an integral part of the judicial system of that Member State.[70] The notion that investment tribunals fall within this line of reasoning has recently been endorsed by AG Wathelet.[71] Although the CJEU has not entertained the argument in its decision, this marks a shift towards the potential recognition of request for preliminary references from investment tribunals under the ordinary mechanism provided by Art. 267 TFEU.

Albeit a significant step towards judicial comity between the CJEU and investment tribunals, it would not, however, guarantee the compatibility of the ICS with the principle of autonomy. Without an explicit reference in the agreement, in the FTA with Vi-

[65] Opinion 2/13, cit., para 237: "[t]he necessity for the prior involvement of the Court of Justice in a case […] in which EU law is at issue satisfies the requirement that the competences of the EU and the powers of its institutions, notably the Court of Justice, be preserved […]", see also para. 241.

[66] H. LENK, *Investment Arbitration under EU investment agreements: is there a role for an autonomous EU legal order?*, in *European Business Law Review*, 2016, forthcoming; see also S.W. SCHILL, *Editorial: Opinion 2/13*, cit.

[67] D. GALLO, F. NICOLA, *The External Dimension of EU Investment Law*, cit.

[68] Court of Justice, judgment of 17 September 1997, case C-54/96, *Dorsch Consult Ingenieurgesellschaft mbH v. Bundesbaugesellschaft Berlin mbH*, para. 23; Court of Justice, judgment of 23 March 1982, case 102/81, *Nordsee Deutsche Hochseefischerei GmbH v. Reederei Mond Hochseefischerei Nordstern AG & Co. KG and Reederei Friedrich Busse Hochseefischerei Nordstern AG & Co. KG,* paras 12-13.

[69] J. BASEDOW, *EU Law in International Arbitration: Referrals to the European Court of Justice*, in *Journal of International Arbitration*, 2015, p. 367 *et seq.*; K. VON PAPP, *Clash of 'Autonomous Legal Orders': Can EU Member State Courts Bridge the Jurisdictional Divide Between Investment Tribunals and the ECJ? A Plea for Direct Referral from Investment Tribunals to the ECJ*, in *Common Market Law Review*, 2013, p. 1039 *et seq.*; J. GAFFNEY, *Should Investment Treaty Tribunals Be Permitted to Request Preliminary Rulings from the Court of Justice of the European Union?*, in *Transnational Dispute Management*, 2013, p. 1 *et seq*.

[70] Court of Justice, judgment of 12 June 2014, case C-377/13, *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta SA v. Autoridade Tributária e Aduaneira*, para. 29.

[71] Opinion of AG Wathelet delivered on 17 March 2016, case C-567/14, *Genentech Inc. v. Hoechst GmbH, formerly Hoechst AG, Sanofi-Aventis Deutschland GmbH*, footnote 34.

etnam and in CETA, the ICS is not, strictly speaking, bound by the rulings rendered by the CJEU. Additionally, if investment tribunals constituted "courts and tribunals" under Art. 267 TFEU, they must inherit the rights as well as the obligations under that mechanism. It must therefore be determined whether, and in what circumstances the ICS would be a court against whose decision there is no judicial remedy in national law, according to Art. 267, para. 3, TFEU. It is in this respect questionable whether the Investment Court would accept a duty to refer and subject itself to the rulings of the CJEU, without a legal basis in the agreement.[72]

IV. Concluding Remarks

The ICS in the FTA with Vietnam and CETA effectively addresses a number of the prominent concerns through an innovative structural reform of the traditional, arbitration-based, ISDS system. The result, a more court-like, permanent judicial body with an appeals mechanism, which is imbued with far reaching powers to review, modify and reverse provisional awards, has the potential to impact the drafting of future ISDS provisions beyond the European context. But one of the hardest challenges may still lie ahead. Although EU policy makers and technocrats appear to have listened to civil society, this mechanism fails to respond to internal constitutional challenges. The preemptive strategy of including a domestic law clause that excludes EU law from the applicable law is unlikely to safeguard the ICS from an infringement of the principle of autonomy, and thus of the EU Treaties. Without an explicit prior involvement of the CJEU in investment disputes under the FTA with Vietnam or CETA, which concern the interpretation or appreciation of EU law, the future of both agreements remains uncertain.

[72] D. Gallo, F. Nicola, *The External Dimension of EU Investment Law*, cit., pp. 33-36; H. Lenk, *Preliminary References and Investment Tribunals: is the Luxembourg Court Extending a Helping Hand?*, in *EU Law Analysis*, 29 March 2016, eulawanalysis.blogspot.se.