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The EU and Beyond: Dispute Resolution in International Economic Agreements

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Abstract

Dispute resolution mechanisms form key parts of international economic agreements, but they differ considerably. This article reviews the dispute resolution mechanisms in the association agreement the European Union (EU) has with Turkey, those in the European Economic Area Agreement and those in some of the agreements that Switzerland has with the EU. It then turns to the World Trade Organization and the International Convention on the Settlement of Investment Disputes as further points of comparison. It then draws the threads together and concludes that a key element in choosing an appropriate dispute resolution body for a given international economic agreement is the question of direct effect, with some agreements providing for more limited scope for direct enforcement. This conclusion is then examined in light of the Comprehensive Economic and Trade Agreement between the EU and Canada before turning to some of the perceived flaws in the dispute resolution body in this Agreement. A conclusion is then offered on the importance and function of dispute resolution mechanisms in international economic agreements.

I shall examine the dispute resolution mechanisms (DRMs) in some older European Union (EU) agreements before moving to look at DRMs in the World Trade Organization's (WTO) Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and investor–state dispute resolution under the International Convention on the Settlement of Investment Disputes (ICSID).[1] I will then look at the so-called 'new generation' of EU agreements, with particular reference to the EU–Canada Comprehensive Economic and Trade Agreement (CETA) before considering the Commission's proposed investment court system.[2]

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1 Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) 1994, 1869 UNTS 401.

2 EU–Canada Comprehensive Economic and Trade Agreement (CETA) (signed 30 October 2016, not yet in force), available at http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf.

1 'Old Generation' DRMs in International Agreements Involving the EU

I will start by considering the DRMs in three long-standing agreements the EU has with non-EU states.

A *Ankara Agreement (1963)*

The first agreement the European Economic Community entered into was the Association Agreement with Turkey, signed in 1963, also known as the Ankara Agreement.[3] The dispute resolution procedure in Article 25 provides that the contracting parties may submit a dispute to the Council of Association, an essentially political body consisting of government officials from Turkey, the member states and the EU. The Council of Association had the power to settle any such dispute by decision, which would be binding, or it could refer the dispute to any existing court or tribunal or, indeed, to the Court of Justice of the European Union (CJEU). Arbitration was contemplated, based on the rules to be drawn up by the parties, if neither the Council of Association nor the existing court or tribunal could resolve the dispute. However, the fact that the Ankara Agreement provided for a dispute resolution procedure has not precluded the CJEU from holding that certain provisions of the Agreement have direct effect.[4] For example, Article 41 of the 1970 Additional Protocol to the Ankara Agreement, which provides for a standstill on any new restrictions on the freedoms of establishment and service provisions, was found to have direct effect in *Soysal and Savatli* and, as such, was enforceable in national courts.[5]

B *European Economic Agreement and the EU (1992)*

I now turn to the European Economic Agreement (EEA Agreement), which, presently, is an agreement between the EU-28, on the one hand, and Liechtenstein, Iceland and Norway, on the other.[6] The aim of the EEA Agreement is to create a homogenous European economic area (EEA), which promotes the continuous and balanced strengthening of trade and economic relations between the contracting parties, but whose depth of integration is less far-reaching than the EU.[7] The DRM envisioned the

[3] European Economic Community–Turkey Association Agreement and Protocols and Other Basic Texts (Ankara Agreement) 1992, Office for Official Publications of the European Communities, available at www.ab.gov.tr/files/ardb/evt/EEC-Turkey_association_agreements_and_protocols_and_other_basic_texts.pdf.

[4] See, e.g., Case 12/86, *Demirel* (EU:C:1987:400), para. 14; Case C-192/89, *Sevince* (EU:C:1990:322), para. 15.

[5] Case C-228/06, *Soysal and Savatli* (EU:C:2009:101); see also Case C-37/98, *Savas* (EU:C:2000:224), paras 46–50, 54. Additional Protocol to the Ankara Agreement, *supra* note 3.

[6] Agreement on the European Economic Area (EEA Agreement), OJ 1994 L 1.

[7] Compare EEA Agreement, *supra* note 6, Arts 11, 12 with Treaty on the Functioning of the European Union, as adopted by the Treaty of Lisbon (TFEU), OJ 2010 C 83/49, Arts 34–36; Arts 53 and 54 of the EEA Agreement with Arts 101 and 102 of the TFEU. EFTA Court, Case E-9/97, *Sveinbjörnsdóttir v. Iceland*, Judgment of 10 December 1998, para. 59.

creation of a new overarching court system for the EEA. As is well known, the initial DRM, the EEA Court, was found unlawful by the CJEU as a 'threat … to the autonomous of the Community legal order' as it could interpret substantively identical provisions of EEA law in a divergent manner to the CJEU.[8] Nonetheless, the CJEU stressed that 'an international agreement providing for [a court with jurisdiction to settle disputes between the the contracting parties] is in principle compatible with Community law'.[9] It was in this spirit that the second, more modest, proposal for a court with jurisdiction over the EEA Agreement as it applies to the three European Free Trade Association (EFTA) states – the EFTA Court – was approved by the CJEU in Opinion 1/92.[10]

With respect to private enforcement, the EEA Agreement entails no transfer of legislative sovereignty in an EFTA state, strictly speaking,[11] and, as such, lacks direct effect in EFTA states.[12] Yet the EFTA Court, in partnership with the courts of last instance in the EFTA states, has ensured its practical direct effect,[13] particularly through the principle of state liability.[14] In practice, EFTA Court preliminary rulings, which are technically referred to as advisory opinions, are generally treated as binding on all EFTA states,[15] albeit with one notable exception in Norway,[16] and individuals can readily rely on EEA rights before national courts in EFTA states.[17] On

[8] Opinion 1/91, *First Opinion on the EEA Agreement* (EU:C:1991:490), paras 46, 47.

[9] See also Opinion 1/09, *Agreement Creating a Unified Patent Litigation System* (EU:C:2011:123), para. 74 (on the creation of the European Patent Court); Opinion 2/13, *Accession of the European Union to the ECHR* (EU:C:2014:2454), para. 182 (on accession to the European Convention on Human Rights). See more generally Gáspár-Szilágyi, 'A Standing Investment Court under TTIP from the Perspective of the Court of Justice of the European Union', 17(5) *Journal of World Investment and Trade* (2016) 701.

[10] Note that the Court of Justice of the European Union (CJEU) may also interpret the EEA Agreement. See P. Eeckhout, *The EU External Relations Law* (2nd edn, 2011), at 313: '[T]here is none the less a significant amount of EU court's case-law which interprets the [EEA Agreement].'

[11] See, e.g., EEA Agreement, *supra* note 6, Art. 7, Protocol 35.

[12] See Hreinsson, 'General Principles', in C. Baudenbacher (ed.), *The Handbook of EEA Law* (2012) 349. See Opinion 1/91, *supra* note 8, para. 20: 'The EEA is to be established on the basis of an international treaty which, essentially, merely creates rights and obligations as between the Contracting Parties and provides for no transfer of sovereign rights to the inter-governmental institutions which it sets up.'

[13] Called '*ersatz-primacy*' by the current Icelandic European Free Trade Association (EFTA) judge. See Hreinsson, *supra* note 12, at 386.

[14] For a compendious account, see the articles in EFTA Court (ed.), *The EEA and the EFTA Court: Decentred Integration* (2014), particularly Johansson, 'Judicial Protection in the EEA EFTA States: Direct Effect of EEA Law Revisited', 311, and Fredriksen 'The EFTA Court and the Principle of State Liability: Protecting the Jewel in the Crown', 321.

[15] Compare Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (Surveillance and Court Agreement), OJ 1994 L 344, at 3, Arts 33, 34. However, see EFTA Court, Case E-18/10, *ESA v. Norway*, Judgment of 28 June 2011, para. 28, available at www.eftacourt.int/uploads/tx_nvcases/18_10_Judgment_EN.pdf; Baudenbacher, 'EFTA Court: Structure and Tasks', in Baudenbacher, *supra* note 12, 161.

[16] Supreme Court of Norway, Case HR-2013–0496-A, *STX v. Norway, Represented by the Tariff Board*, Decision of 5 March 2013, para. 100. For general reference on this judicial saga, see Barnard, 'Reciprocity, Homogeneity and Loyal Cooperation: Dealing with Recalcitrant National Courts?', in Case E-18/10, *supra* note 15. Infringement proceedings are now being brought against Norway by the European Surveillance Authority.

[17] See Hreinsson, *supra* note 12.

the EU courts' side, the Court of First Instance held, early on in the life of the EEA Agreement, that the 'unconditional and precise' prohibition on customs duties had direct effect within the EU.[18]

With respect to the content of the rights in the EEA Agreement, the EFTA Court has faithfully followed the case law of the CJEU, sometimes reversing its previous case law to achieve such consistency[19] or, in EFTA jargon, 'homogeneity'.[20] Substantively identical provisions of the EEA Agreement and the EU treaties have therefore been given identical interpretations, and EU principles have been readily grafted onto the EEA legal order.[21] The net effect is that, for example, any disguised health restriction on salmon imports would be treated the same way if challenged in a court in Scotland by a Norwegian (Eirik Bjornson) or in a court in Norway by a Scot (Douglas MacDonald).[22]

In relation to EU states, on the one hand, and EFTA states, on the other, Article 111 of the EEA Agreement provides a complex DRM, which, effectively, has a consensual resolution part and a self-help part. First, the Joint Committee is to find an 'acceptable solution' to the dispute, and, where the dispute concerns substantively identical provisions in EEA and EU law, the CJEU is to rule on the matter if both parties agree. Should no such solution be found, or a reference to the CJEU prove impossible due to a lack of consent of the disputing parties, then a contracting party may take proportionate safeguarding measures by regarding the affected part of the EEA Agreement as provisionally suspended. Article 111 also provides for arbitration to review the proportionality of the self-help measures,[23] but it clarifies that this tribunal has no jurisdiction to interpret the EEA Agreement itself. However, the powers of the Joint Committee in this regard have never been invoked. This is because no significant discrepancy between EEA and EU law has ever arisen since the EFTA Court has ensured the homogeneous interpretation of EEA law with respect to substantively identical provisions.[24]

[18] Case T-115/94, *Opel Austria v. Council* (EU:T:1997:3), para. 102.

[19] Compare EFTA Court, Joined Cases E-9/07 and E-10/07, *L'Oreal*, Judgment of 8 July 2008, overruling EFTA Court, Case E-2/97, *Maglite*, Judgment of 3 December 1997, in light of Case C-355/96, *Silhouette* (EU:C:1998:374).

[20] See EEA Agreement, *supra* note 6, Recitals 4, 15, Art. 6; Surveillance and Court Agreement, *supra* note 15, Art. 3(2).

[21] Compare, e.g., Cases C-6/90 and C-9/90, *Francovich and Others* (EU:C:1991:428); *Sveinbjörnsdóttir*, *supra* note 7 (state liability).

[22] See Mueller-Graff, 'Free Movement of Goods', in Baudenbacher, *supra* note 12, 416: 'Apart from this [that there is no provision for a common customs union in the EEA Agreement] the EEA grants the free movement of goods to the same degree as does the TFEU within the EU.'

[23] The arbitration procedure is laid down in skeletal form in the EEA Agreement, *supra* note 6, Protocol 33. Each party to the dispute has 30 days to appoint one arbitrator each, who, in turn, have two months to appoint the third arbitrator who serves as umpire. Decisions are taken on a majority basis according to the rules of procedure drawn up by the arbitral body itself.

[24] Baudenbacher, 'The Relationship between the EFTA Court and the Court of Justice of the European Union', in Baudenbacher, *supra* note 12, 179, at 191: 'The said provisions [of Art. 111] have remained '*lettre morte*' [a dead letter in French] during the past 21 years.'

C *EU and Switzerland*

The relationship between the EU and Switzerland is rather like Switzerland's landscape – multi-faceted. Despite being surrounded by the EU and the EEA, Switzerland is part of neither following its rejection of EEA membership by referendum in 1992.[25] Switzerland chose to adopt a bilateral approach, and the EU–Switzerland relationship is conditioned on an intricate web of more than 100 bilateral treaties, ranging from the broad, such as the 1999 Agreement on Free Movement of Persons, to the very precise, like the 2004 Agreement on Processed Agricultural Foods.[26] Each bilateral agreement has its own DRM, and there is no consistent enforcement scheme that runs through them. The majority mostly have Joint Committees, like the Ankara Agreement. One such example is the Agreement on Free Movement of Persons, which may be used as an example of the relatively weak nature of Joint Committees as DRMs.[27] A formal statement of the Joint Committee of that Agreement in 2012 states that there were 'persistent disagreements' in relation to the freedom of movement and that a number of issues 'show the limits of the Joint Committee as mechanism for the settlement of disputes'.[28] Indeed, the protection of the freedom of movement seems to have fallen by the wayside in Switzerland. Following a referendum in February 2014, the Federal Constitution was modified to impose annual quotas on immigration and to prohibit the conclusion of any international agreement that would undermine those quotas.[29] Such a development poses clear problems in light of the principles contained in the Agreement on Free Movement of Persons.

There is one agreement – the EC–Switzerland Air Transport Agreement – which provides for the exclusive role of the CJEU to resolve any disputes as to the validity of decisions taken by the EU institutions under the agreement, as it did so in relation to conflicting German and Swiss regulations on the flight path of airplanes descending into Zurich airport.[30] In a similar vein, the Cooperation Agreement between the European Atomic Energy Community and the Swiss Confederation confers the CJEU with similar jurisdiction over, first, the legality of enforcement decisions taken by the Commission and, second, the arbitration of certain contracts under the Euratom Framework Programmes.[31]

[25] Switzerland is part of the European Free Trade Association (indeed, it was a founding member in 1960), but it is not part of the European Economic Area, following a referendum in 1992.

[26] Agreement between the European Community and the Swiss Confederation amending the Agreement between the European Economic Community and the Swiss Confederation of 22 July 1972 as Regards the Provisions Applicable to Processed Agricultural Products OJ 2005 L 23, at 19–48.

[27] Agreement between the European Community and Its Member States, of the One Part, and the Swiss Confederation, of the Other, on the Free Movement of Persons (EC–Switzerland Air Transport Agreement), OJ 2002 L 114/6, Art. 19.

[28] Joint Committee Press Release, The EU-Switzerland Joint Committee on Free Movement of Persons Brussels, Doc. A 293/12, 27 June 2012.

[29] Federal Constitution of the Swiss Confederation, 18 April 1999, Art. 121a.

[30] See EC–Switzerland Air Transport Agreement, *supra* note 27, Art. 20; Case C-547/10P, *Switzerland v. Commission* (EU:C:2013:139).

[31] Agreement on Scientific and Technological Cooperation between the European Community and the European Atomic Energy Community, of the One Part, and the Swiss Confederation, of the Other Part, OJ 2007 L189/26, Annex C, at vii. Compare with Cooperation Agreement between the European Atomic Energy Community and the Swiss Confederation in the Field of Controlled Thermonuclear Fusion and Plasma Physics, OJ 1978 L 42/2, Art. 17.

On the EU side, the difference between the depth of integration in the EU treaties and the *à la carte* sectoral bilateralism in the Swiss–EU agreements naturally impacts on the extent to which existing interpretations of EU law apply to them.[32] As a result, the CJEU has refrained from giving the same interpretation to provisions of the Agreement on Free Movement of Persons and corresponding provisions of EU law, citing the more limited scope of integration in the bilateral relationship that Switzerland has with the EU.[33] A similar conclusion was reached where Swiss International Air Lines sought to challenge a Commission decision that derogated from the EU carbon tax scheme for airline operators, but excluded flights to and from Switzerland from that derogation. In response to Swiss International Air Line's argument that this violated the principle of equality, the CJEU responded that 'the institutions and agencies of the Union are relieved of any obligation to apply the principle of equal treatment to third countries' and that, accordingly, there was consequently no need 'to examine whether such a difference in treatment can be objectively justified'.[34] On the Swiss side, enforcement in the Swiss courts proceeds on a piecemeal basis. A good example is *Physiogel*, where the Swiss Supreme Court rejected the *Cassis de Dijon* line of cases, making it clear that it did not need to be 'applied automatically in Switzerland'.[35]

D *DRMs and Direct Effect*

To summarize then, certain provisions of the Ankara Agreement have been given direct effect by the CJEU, certain provisions of the EEA Agreement have been given practical direct effect by the EFTA Court in the EFTA states and direct effect in the EU member states and certain provisions of some of the Swiss agreements have been given selective effect by the Swiss courts and generally no direct effect in the CJEU. More generally, one can say that the question of whether a provision in an international agreement has direct effect has been decided by the CJEU on a case-by-case basis.[36] In more recent years, the trend has been for the EU to exclude direct effect in its international agreements, a practice that seems to have become standard as of 2008, but whose roots go further back.[37] The shift away from direct effect is, in reality,

[32] Case 270/80, *Polydor and RSO Records* (EU:C:1982:43), echoes this point.

[33] Case C-351/08, *Grimme* (EU:C:2009:697); Case T-541/08, *Fokus Invest* (EU:T:2014:628).

[34] Case C-272/15, *Swiss International Air Lines* (EU:C:2016:993), paras 29, 36. In a similar context, an action brought under the EC–Switzerland Air Transport Agreement, *supra* note 27, see also Case C-547/10P, *Switzerland v. Commission* (EU:C:2013:139), para. 81.

[35] Supreme Court of Switzerland, *Physiogel*, BGE 2A.593/2005, at 6. It is to be noted that the Swiss legislator then enshrined the *Cassis de Dijon* approach in primary legislation (Case 120/78, *Rewe-Zentral* (EU:C:1979:42)). Tobler, 'A Look at the EEA from Switzerland', in Baudenbacher, *supra* note 12, 549.

[36] Case C-265/03, *Simutenkov* (EU:C:2005:213). See also Case C-18/90, *Kziber* (EU:C:1991:36), para. 23; Case C-63/99, *Gloszczuk* (EU:C:2001:488).

[37] Bronckers, 'Is Investor-State Dispute Settlement Superior to Litigation before Domestic Courts? An EU View on Bilateral Trade Agreements', 18 *Journal of International Economic Law* (*JIEL*) (2015) 655, at 663. In *Simutenkov*, *supra* note 36, para. 29, the CJEU held that Art. 23(1) of the Communities–Russia Partnership Agreement had direct effect. Agreement on Partnership and Cooperation Establishing a Partnership between the European Communities and Their Member States, of One Part, and the Russian Federation, of the Other Part 1994, OJ 1997 L 327, at 1. The foundations for such an approach were laid down in Case 104/81, *Kupferberg* (EU:C:1982:362), para. 17.

indicative of a broader movement away from individual enforcement of international agreements before national courts towards the exclusive settlement of disputes in such agreements via designated DRMs. To that extent, the EU has increasingly aligned itself with the DRM found in the WTO's DSU.

2 WTO

The WTO is the successor of the 1947 General Agreement on Tariffs and Trade (GATT), which itself rose from the ashes of World War II and the trade protectionism that accompanied the economic downturn that preceded it.[38] GATT, by facilitating the mutual reduction of trade barriers and other significant measures of economic cooperation, moved the world much closer to John Maynard Keynes' vision, which he recorded in 1920, in which '[t]he inhabitant of London could order by telephone, sipping his morning tea in bed, the various products of the whole earth, in such quantity as he might see fit, and reasonably expect their early delivery upon his doorstep'.[39] By 1993, however, it became clear that there was a need for a more formalized DRM to administer the trade regime rather than the former chiefly diplomatic system that, in the words of one commentator, was 'dominated by an anti-legal culture'.[40] The DRM was overhauled in 1994 in the WTO Agreement signed in Marrakesh.[41] Provision was made for a dispute to be heard first by an ad hoc panel, which could then be appealed to the Appellate Body. Both of the reports are adopted by the Dispute Settlement Body (DSB), which may reject the reports but only unanimously.[42]

As a preliminary point, I note that the DRM in the WTO concerns disputes between states only. Thus, our Douglas MacDonald could only challenge a Norwegian disguised health restriction if the UK endorsed his claim and brought it against Norway. As to the structure of the DRM, the panel is constituted of three panellists selected by the WTO Secretariat.[43] Provision is made for the parties to contest the panellists appointed by the Secretariat, in which case the director-general selects the panellists.[44] The panellists are to be selected with a view to ensuring their independence,

[38] D.A. Irwin *et al.*, *The Genesis of the GATT* (2008). General Agreement on Tariffs and Trade 1994 (GATT), 55 UNTS 194.

[39] J.M. Keynes, *The Economic Consequences of the Peace* (1920), ch. II.4.

[40] Steinberg, 'In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO', 56 *International Organization* (2002) 350, at 350. See, more generally, C. VanGrasstek, *The History and Future of the World Trade Organization* (2013), at 11; Davey, 'Dispute Settlement in GATT', 11 *Fordham International Law Journal* (1987) 51.

[41] Agreement Establishing the World Trade Agreement 1994, 1867 UNTS 154.

[42] Ehlermann, 'Experiences from the WTO Appellate Body', 38 *Texas International Journal of Law* (2003) 469, at 470; Abi-Saab, 'The Appellate Body and Treaty Interpretation', in M. Fitzmaurice, O. Elias and P. Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (2010) 101, describes the approval by the Dispute Settlement Body (DSB) as a 'mere ritual or formality in the WTO' and refers to the system as a 'double-check procedure of dispute settlement'.

[43] DSU, *supra* note 1, Art. 8(6).

[44] *Ibid.*, Art. 8(7).

diversity of background and spectrum of experience.[45] To this effect, panellists may not share nationality with any of the parties to the dispute.[46]

The Appellate Body is composed of seven persons, who sit three strong. They are appointed for a four-year term that is renewable once. They are to be 'persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally'.[47] In contra-distinction to the panel members, the members of the Appellate Body must not be affiliated with any government and must serve regardless of their nationality. The DSU allow for an appeal in respect of 'issues of law covered in the panel report and legal interpretations developed by the panel', as per Article 17(6). This is a familiar ground of appeal, as it is an appeal on a point of law.

A distinct feature of the Appellate Body is that it operates according to a principle of collegiality, a practice whereby the appeal is decided and heard by only the chosen three persons, yet the written pleadings are discussed by all seven members of the Appellate Body. In the words of the erstwhile chairman of the Appellate Body, Claus-Dieter Ehlermann, this collegiality 'has proved to be of enormous benefit to the work of the appellate Body … [and has] permitted divisions to draw on the individual and collective expertise of all members'.[48] However, as beneficial as this thought may be, this procedure differs from a court procedure as we understand it.

With respect to the interpretation of the WTO Agreement, I note the words of Lord McNair's text on treaty interpretation, according to which 'there is no part of the law of treaties which the text-writer approaches with more trepidation than the question of interpretation'.[49] Article 3.2 of the DSU stipulates that the DRM should 'clarify the existing provisions [of the WTO Agreements] in accordance with the customary rules of interpretation of public international law'. In consequence, the corpus of WTO law chiefly applies the principles of interpretation in the Vienna Convention on the Law of Treaties (VCLT).[50] As such, the interpretations have focused predominantly on the ordinary meaning of the text, although I recognize that this does not capture the full nuance of the corpus of WTO law.[51] This contrasts with the CJEU's approach

[45] *Ibid.*, Art. 8(2).

[46] *Ibid.*, Art. 8(3).

[47] *Ibid.*, Art. 17(3).

[48] Ehlermann, *supra* note 42. Claus Dieter Ehlermann is the former director general of the EU Commission's legal services and former chairman of the Appellate Body of the WTO. See also D. Unterhalter, Farewell Speech of Appellate Body Members, 22 January 2014, available at www.wto.org/english/tratop_e/dispu_e/unterhalterspeech_e.htm: 'What prevails is captured by the idea of collegiality. All voices are heard … There is an abundance of analysis. There is a shared desire to come up with an answer that shows fidelity to the agreements and reflects consensual positions hammered out on the anvil of full debate'; Baetens, 'Judicial Review of International Adjudicatory Decisions', 8(3) *Journal of International Dispute Settlement* (2016) 1, at 16.

[49] Lord Arnold McNair, *The Law of Treaties* (1961), at 364.

[50] On this point, see generally I. van Damme, *Treaty Interpretation by the WTO Appellate Body* (2009). Vienna Convention on the Law of Treaties (VCLT) 1969, 1155 UNTS 331.

[51] See especially *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Report of the Appellate Body*, 12 October 1998, WT/DS58/AB/R, compared to the *Report of the Panel*, 15 May 1998, WT/DS58/R. See Abi-Saab, *supra* note 42, at 106–107: '[T]he judicial policy of the Appellate Body …

to the interpretation of EU law, which, due in part to the binding nature of all 24 linguistic versions of EU law, means that it is not possible for the CJEU to limit itself to a purely textual analysis. Teleological interpretation must necessarily be resorted to when there are inconsistencies between different language versions.[52] By contrast, the WTO Agreement is binding in only three languages (English, French and Spanish).[53]

Enforcement of the WTO reports is carried out by common accord of the disputing parties, first amicably and, if that fails, then by self-help. First, a reasonable period, which shall generally not exceed 15 months, is given to secure compliance, and the DSB is required to monitor the steps taken to ensure this compliance. Second, if the reasonable period for compliance elapses, Article 22 requires the parties to enter negotiations to settle on 'mutually acceptable compensation', which, if not reached within 20 days, then gives the right to the complaining party to suspend existing obligations and concessions to that party according to a finely tuned scheme for suspending tailored parts of the agreement.[54] In terms of remedies, the reports are declaratory. They do not order or enforce anything. Rather, they determine which party is at fault and make recommendations as to how that party can bring itself back into line with WTO obligations in the future.[55] The primary aim of the WTO, therefore, is prospective compliance rather than righting past wrongs by granting damages, ordering the reimbursement of subsidies or granting interim relief.[56]

This brings us to direct effect. The classic formulation for the lack of direct effect of the WTO is laid down by the WTO itself in the panel report in *United States – Sections 301–310 of the Trade Act of 1974*, in which it is stated that '[n]either the GATT nor the WTO has so far been interpreted by GATT/WTO institutions as a legal order producing

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appears, at first glance, as belonging to the strict construction school that interprets texts literally and narrowly … in practice, however, much of the reasoning in interpretation is informed by the object and purpose, either consciously or subconsciously, where they can be identified, even though they may not given explicitly as such in the analysis.' T. Gazzini, *Interpretation of International Investment Treaties* (2016), chs 6, 7; van Damme, *supra* note 50.

52 See TFEU, *supra* note 7, Art. 55; Case C-583/11, *P Inuit Tapiriit Kanatami and Others v. Parliament and Council* (EU:C:2013:625), para. 50; Case C-296/95, *EMU Tabac and Others* (EU:C:1998:152), para. 36.

53 On this point, see VCLT, *supra* note 50, Art. 33; van Damme, *supra* note 50, at 8.3 'Other Authentic Versions of the Treaty'; Gazzini, *supra* note 51, ch. 11 'Plurilingual Treaties'.

54 See the useful summary in Böhmelt and Spilker, 'The WTO Dispute Settlement Mechanism: Enforcement, State Power, and Dispute Recurrence', National Centre of Competence in Research Trade Working Paper no. 2013/07, May 2013.

55 As the Appellate Body indicated in *United States – Subsidies on Upland Cotton – Report of the Article 21.5 Appellate Body*, 2 June 2008, WT/DS267/AB/RW, para. 243, n. 494, the recommendations and rulings of the DSB create implementation obligations with prospective effect. See also *United States – Laws, Regulations and Methodology for Calculating Dumping (Zeroing) – Report of the Article 21.5 Appellate Body*, 14 May 2009, WT/DS294/AB/RW, paras 297–300. Vidigal, 'Re-Assessing WTO Remedies: The Prospective and the Retrospective', 16(3) *JIEL* (2013) 505.

56 P.F.J. Macrory, Arthur E. Appleton and Michael G. Plummer, *The World Trade Organization: Legal, Economic and Political Analysis* (2005), at 1364. Calls, however, are often made for interim relief to be available. See J.H.J. Bourgeois, *Trade Law Experienced: Pottering about in the GATT and WTO* (2005), at 49; G. Sacerdoti, A. Yanovich and J. Bohanes, *The WTO at Ten: The Contribution of the Dispute Settlement System* (2014), at 242.

direct effect … [the GATT/WTO] did not create a new legal order the subject of which comprise both contracting parties or members and their nationals'.[57] EU law also recognizes that the WTO does not generally have direct effect, such that it is only occasionally possible to set aside a measure of EU law for want of consistency with a WTO norm. So much was established in 1972 in *International Fruit*, where the CJEU noted that the GATT was 'characterised by the great flexibility of its provisions' and, accordingly, not sufficiently precise and unconditional.[58] There are exceptions, however; one being where the EU legislature has shown the intention to implement in EU law a particular obligation assumed in the context of the WTO Agreement.[59] This was the case in *Nakajima*, where the EU's basic Regulation on Anti-Dumping and the relevant parts of the GATT Anti-Dumping Agreement were, in the Advocate General's words, 'almost completely identical'.[60]

The lack of direct effect may not necessarily be a disadvantage. The point was recognized by Ehlermann, who stated in 2003:

> I am … opposed to giving WTO law direct effect in giving private parties the right to invoke WTO law before national courts. It is obvious that recognizing the direct effect of international agreements results in a shift of power between constitutional institutions: The position of the government and the parliament is weakened, and that of the courts strengthened. … I am convinced that this would not be a desirable development [as this would] increase the current imbalance between the quasi-judicial and the political processes of the WTO.[61]

3 ICSID

I turn now to ICSID, the arbitration rules set up by the World Bank, which seek to facilitate investment by a foreign investor, on the one hand, and another state – the host state – a process that is known as foreign direct investment (FDI).[62] While this might

[57] *United States – Sections 301–310 of the Trade Act 1974 – Report of the Panel*, 22 December 1999, WT/DS152/R, at 7.72; G. Zonnekeyn, *Direct Effect of WTO Law* (2008). Note that the panel did not exclude the possibility of direct effect, explaining in a footnote that '[w]e make this statement as a matter of fact without implying any judgment on the issue'. See Ruiz Fabri, 'Is There a Case – Legally and Politically – for Direct Effect of WTO Obligations?', 25 *European Journal of International Law* (2014) 151, at 154.

[58] Joined Cases 21/72 and 24/72, *International Fruit Company and Others* (EU:C:1972:115). Significantly, the CJEU recognized that it had the jurisdiction, and obligation, to examine the compatibility of EU law in light of international law. More specifically, it recognized that the validity of measures adopted by the Union institutions also refers, within the meaning of what is now the TFEU, *supra* note 7, Art. 267, to their validity under international law.

[59] Case 70/87, *Fediol v. Commission* (EU:C:1989:254), paras 19–22; Case C-69/89, *Nakajima v. Council* (EU:C:1991:186), paras 29–32.

[60] Council Regulation 2423/88, OJ 1991 L 362; Case C-69/89, *Nakajima v. Council* (EU:C:1990:433), para. 56, Opinion of Advocate General Lenz. For a case on the other side of the line, see Case C-21/14P, *Commission v. Rusal Armenal* (EU:C:2015:494), at 46. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, 1868 UNTS 201.

[61] Ehlermann, *supra* note 42, at 487. His assessment would be confirmed by more recent literature. See, e.g., G. Shaffer, E. Manfred and S. Puig James, *The Extensive (but Fragile) Authority of the WTO Appellate Body*, School of Law, University of Arizona, Legal Studies Research Paper Series no. 2014–54 (2014), at 38.

[62] See Lowenfeld, 'The ICSID Convention, Origins and transformation', 38 *Georgia Journal of International and Comparative Law* (2009) 47. International Centre for Settlement of Investment Disputes, *ICSID*

seem an innocuous idea, its implications were far from it in the 1960s. Following the decolonization of Africa and parts of Asia, there was considerable emphasis on state sovereignty in international discourse.[63] As such, the idea of fettering this newly gained sovereignty by imposing global rules of conduct as to what a host state could and could not do in relation to those investors was unlikely to find many champions.[64]

The solution proposed by the World Bank's General Counsel Aron Broches in 1963 was that the World Bank would not propose any substantive rules governing the treatment of foreign property or even require the adjudication of disputes arising out of such treatment in a particular forum. Rather, 'they would make available to foreign investors and host governments facilities for conciliation or arbitration of disputes between them' on a strictly voluntary basis.[65] Should the parties both agree to the arbitration, it would remove the dispute from the purview of the judiciary of the host state and that of the investor's state, and it would be resolved by an arbitral scheme that would provide for the enforceability of the awards. Thus, the system insulated the dispute from the realm of politics and diplomacy – a boon to both the investor, who would benefit from a stable safety net in case investments went awry, and the state, whose sovereignty would not be eroded by a foreign court but, rather, by a specific ad hoc tribunal to which the state had consented. In short, and unlike the WTO, ICSID simply provides a forum, and not the rules, for dispute resolution.

The substantive rules for arbitration come from Article 42 of the ICSID Convention.[66] That is, Article 42(1) provides a conduit to the rules that are applicable:

> The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

In practice, there will be rules governing a given investment in the form of a bilateral investment treaty (BIT) between the state of the investor and the host state. As a result, the law that is applied by the tribunal is as varied as there are BITs, which sources estimate as numbering over 3,000.[67] However, the principles contained in them generally

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Convention, Regulations and Rules (2006), available at https://icsid.worldbank.org/en/Documents/resources/2006%20CRR_English-final.pdf.

63 See, e.g., Consideration of Principles of International Law Concerning Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations, Doc. A/RES/17/1815 (1962); Ng'ambi, 'Permanent Sovereignty over Natural Resources and the Sanctity of Contracts, from the Angle of Lucrum Cessans', 12 *Loyola University Chicago International Law Review* (2015) 153.

64 Indeed, in 1964, the Supreme Court of the United States explained: '[T]here are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens.' *Banco Nacional de Cuba v. Sabbatino*, 376 US 398, 428 (1964).

65 General Counsel Aaron Broches, Paper Prepared by the, and Transmitted to the, Members of the Committee of the Whole, Doc. SID/63-2, 18 February 1963, reprinted in *Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Documents Concerning the Origin and Formulation of the Convention* (1963), vol. 2, at 72–73.

66 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) 1965, 575 UNTS 159.

67 European Commission, *Investor-to-State Dispute Settlement (ISDS): Some Facts and Figures*, 12 March 2015, available at http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153046.pdf.

tend to include freedom from discrimination, protection against expropriation and fair and equitable treatment.[68]

Thus, unlike the WTO, the ICSID Convention provides an institutional structure for individuals to bring claims against states in the field of investment. Thus, our Douglas MacDonald can bring his case directly against Norway. That said, ICSID resembles the two-tiered system of the WTO. There is an appeal mechanism, with a tribunal whose awards can be reviewed by an ad hoc committee. For the tribunal, unlike the WTO, the parties are free to choose the arbitrators.[69] They may choose from the Panel of Arbitrators, which is a body of arbitrators put forward by the state members of the ICSID Convention, but they do not have to. In any case, the arbitrator must meet the requirements in Article 14 of a 'high moral character', 'recognised competence' in a relevant field and those who 'may be relied on to exercise independent judgment'.

After the tribunal makes an award in respect of the dispute, which, unlike the WTO, may contain named dissents and concurring opinions,[70] recourse is available to an ad hoc committee of three persons chosen by the chairman of ICSID from a roster of arbitrators.[71] These arbitrators may not, *inter alia,* share nationality with the parties or any of the members of the tribunal. The sole function of the committee is to annul the award, in part or in full, or to let it stand; it may not enter a merits review. Indeed, if the decision is annulled, it will have to be submitted afresh to a tribunal to recommence the arbitration.[72] Unlike the WTO, where the seven Appellate Body members are distinct from the panel arbitrators, in ICSID, there is one common roster of arbitrators for both the tribunal and the ad hoc committee.

There is no requirement for the parties to be consulted in the composition of the ad hoc committee, although, in practice, it appears that the ICSID administration informs the parties of the proposed appointees and circulates their *curricula vitae* with a view to giving parties an opportunity to submit comments indicating that there might be a manifest lack of the qualities required for serving as a committee member.[73] The grounds of annulment set out in Article 52 are very limited, namely:

(a) That the Tribunal was not properly constituted;
(b) That the Tribunal has manifestly exceeded its powers;

[68] United Nations Commission on International Trade Law, Settlement of Commercial Disputes: Presentation of a Research Paper on the Mauritius Convention on Transparency in Treaty-based Investor-State Arbitration as a Possible Model for Further Reforms of Investor-State Dispute Settlement, Doc. A/CN.9/890, 24 May 2016, para. 12.

[69] ICSID Convention, *supra* note 66, Art. 37(2)(a). Note that, in any case, the arbitrators must possess the qualities in Art. 14. See *ibid.*, Art. 40(2).

[70] Contrast DSU, *supra* note 12, Art. 14.3: 'Opinions expressed in the panel report by individual panelists shall be anonymous.' ICSID Convention, *supra* note 66, Art. 48(4): 'Any member of the Tribunal may attach his individual opinion to the awards, whether he dissents from the majority or not, or a statement of his dissent.'

[71] ICSID Convention, *supra* note 66, Arts 52, 52(3).

[72] *Ibid.*, Art 52(6).

[73] International Centre for Settlement of Investment Disputes (ICSID), Background Paper on Annulment for the Administrative Council of ICSID, 10 August 2012, para. 46, available at https://icsid.worldbank.org/en/Pages/resources/Background-Papers.aspx.

(c) That there was corruption on the part of a member of the Tribunal;
(d) That there has been a serious departure from a fundamental rule of procedure; or
(e) That the award has failed to state the reasons on which it is based.[74]

The narrow grounds of annulment focus on the 'procedural legitimacy' of a decision rather than on substantive correctness.[75] It is therefore immaterial whether that decision was substantively wrong. This reflects the underlying rationale of arbitration; as it is recorded in the drafting debates:

> [a]fter considerable discussion [the International Law Commission] decided, having regard to the paramount requirement of finality, not to amplify – subject to one apparent exception [the failure to state the reasons for the award] – the grounds on which the annulment of the award may be sought.[76]

In other words, annulment is a 'limited and exceptional recourse' that protects against the egregious breaches of fundamental principles; it seeks to safeguard the finality of the award subject only to its procedural integrity and not to substantive legitimacy or accuracy.[77]

Unlike the WTO, which is predominantly forward-looking, an ICSID award, depending on the underlying BIT, can order the losing party to pay damages. The arbitrators can also impose 'provisional measures' in order to safeguard the rights of the parties, a measure that has some parallels to the English doctrine of interim relief.[78] The enforcement mechanism for ICSID lies in the 'distinctive feature' of Article 54, which provides that each contracting state to the ICSID Convention shall recognize the binding force of an award rendered pursuant to that Convention.[79] This means that the national courts of all 161 contracting states shall recognize such an award upon the provision of a copy signed by the Secretary General of ICSID and shall enforce it accordingly. Moreover, as Article 53 makes it clear, the award cannot be subject to appeal or remedy except in accordance with the Convention itself. The award is, in effect, *res judicata* and cannot be impugned or reopened in national courts.[80]

[74] Note that these rules started off by not having any scope for review. See Baetens, *supra* note 48.

[75] Discussed at length in Caron 'Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction between Annulment and Appeal', 7 *Foreign Investment Law Journal* (1992) 21. See, e.g., C.H. Schreuer *et al.*, *THE ICSID Convention: A Commentary* (2nd edn, 2009), at 901.

[76] Documents of the Fifth Session Including the Report of the Commission to the General Assembly, UN Doc. A/CN.4/SER.A/1953/Add.1, reprinted in 2 *ILC Yearbook* (1953) 211, at 205.

[77] ICSID, *supra* note 73, para. 110: '[T]he increase in annulment applications in the last 11 years reflects the vastly increased number of cases registered and awards rendered at ICSID in this same period.'

[78] For an overview, see commentary in Schreuer *et al.*, *supra* note 75; Kaufmann-Kohler and Antonietti, 'Interim Relief in International Investment Agreements', in K. Yannaca-Small (ed.), *Arbitration under Investment Agreements: A Guide to the Key Issues* (2010) 767.

[79] Schreuer *et al.*, *supra* note 75, at 1117.

[80] *Ibid.*, at 1140: 'The Convention's drafting history show that domestic authorities charged with recognition and enforcement have no discretion to review the award once its authenticity has been established. Not even the *ordre public* of the forum may furnish a ground for refusal.'

4 New Generation Agreements

A *Is ICSID Still Fit for Its Purpose?*

The solution proposed by Broches in 1963 of removing international dispute settlement from national courts and giving it to arbitrators has come into question in recent times.[81] Why so? Because, in addition to the concerns of consistency in case law, transparency and fairness, DRM via arbitration has been criticized as being inimical to 'basic principles of democratic and public accountability, regulatory capacity, budgetary flexibility, [and] judicial independence'.[82] Particularly controversial is the perceived loss of the 'right to regulate', which is vividly depicted in the following comment by one interest group:

> After the Fukushima nuclear disaster the German government decided to phase-out nuclear energy. To protect public health, the governments of Uruguay and Australia introduced compulsory health warnings on cigarette packets. To redress the inequalities created by the apartheid regime, the South African government grants black people certain economic privileges. What do these scenarios have in common? They have all been legally challenged by companies that considered them harmful to their profits. However, they did not challenge the legislation in their respective host countries courts but sued the governments before an international tribunal of arbitrators in international investment disputes. In the past 20 years, many of these tribunals have granted big business dizzying sums in compensation – paid out of taxpayers' pockets often for democratically made laws to protect the environment, public health or social well-being.[83]

This is a debate that rages far beyond legal circles. Indeed, the European Commission's consultation on the investor–state dispute settlement (ISDS) clause in the Transatlantic Trade and Investment Partnership Agreement (TTIP) received over 150,000 responses.[84]

[81] For a good, brief overview, see Chase, 'TTIP, Investor–State Dispute Settlement and the Rule of Law', 14(2) *European View* (2015) 217. For greater depth, see Alverez *et al.*, 'A Response to the Criticism against ISDS by EFILA', 33 *Journal of International Arbitration* (2016) 1; for opposing views, see G. van Harten, 'Key Flaws in the European Commission's Proposals for Foreign Investor Protection in TTIP', Osgoode Legal Studies Research Paper no. 16/2016 (2016); C. Eberhardt *et al., Profiting from Injustice: How Law Firms Arbitrators and Financiers Are Fuelling an Investment Arbitration Boom* (2012), at 36.

[82] For a vivid example, see van Harten, *supra* note 81; for sources and overview, see also Miles, 'Investor State Dispute Resolution: Conflict, Convergence and Future Directions', 7 *European Yearbook of International Economic Law* (2016) 287: '[C]riticism over the last 15 years has also been directed at aspects of ISDS [investor–state dispute resolution] that go beyond the substantive provisions contained within international investment agreements. It has extended to the procedural and institutional structures of investor-state arbitration, focusing on the lack of transparency, restrictions on public participation, arbitral practice, its commercial emphasis, and the lack of an appeals mechanism. The sum of these individual issues has pointed to fundamental systemic problems within ISDS, leading commentators to question the legitimacy of investor-state arbitration altogether.'

[83] Eberhardt *et al.*, *supra* note 81.

[84] European Commission, Online Public Consultation on Investment Protection and Investor-to-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement, Doc. SWD (2015) 3 final, 13 January 2015, available at http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf. Transatlantic Trade and Investment Partnership (TTIP), draft dated 12 November 2015.

These concerns have taken root in the Commission's approach to future international investment treaties concluded by the EU. Trade Commissioner Cecilia Malmström has stated: 'My assessment of the traditional ISDS system has been clear – it is not fit for purpose in the 21st century. I want the rule of law, not the rule of lawyers. I want to ensure fair treatment for EU investors abroad, but not at the expense of governments' right to regulate' and 'a state [should] never be forced to change legislation, only to pay fair compensation in cases where the investor is deemed to have been treated unfairly.'[85] Malmström has also criticized the fact that '[t]here is, for instance, no possibility to appeal errors of law or fact', 'that the system lacks legitimacy, accountability and transparency' and that the 'fragmented system' has 'no coherent multilateral rules on investment protection, nor any permanent structure to resolve investment disputes'.[86] In response to these concerns, the Commission has pushed for a new form of DRM in its recent trade agreements.[87]

B *CETA: A New Generation Agreement*

For brevity, one may take CETA as a base for our examination. The DRM for investment is found in section F of Chapter 8. Under Article 8.19, a dispute should be settled amicably if it is possible to do so, and provision is made for a consultation period in which to work out any differences. Further, mediation may be resorted to at any time in the dispute resolution procedure.[88] If the dispute has not been resolved within 90 days of the submission of the request for consultations, the investor may submit a notice to bring his claim.[89]

A claim may be submitted under the ICSID Arbitration Rules, or other arbitral rules specified in Article 8.23(2), to the CETA tribunal on condition that the investor waives the right to bring the dispute before another international or national tribunal and desists from any existing claims.[90] The tribunal consists of 15 members, five EU

[85] C. Malmström, *The Way Ahead for an International Investment Court*, 18 July 2016, available at https://ec.europa.eu/commission/2014–2019/Malmström/blog/way-ahead-international-investment-court_en; cf. Judge S. Schwebel, 'The Proposals of the European Commission for Investment Protection and an Investment Court System', Speech given in the United States, 17 May 2016: 'The extensive Concept paper attached to [Commissioner Malmström's blog] cites no case illustrative of the rule of lawyers, and no case where the State was forced to change legislation. … If there are awards sustaining the investor's "expectations of profits" they are not cited in the EU's papers.' Judge Stephen Schwebel has served both as a judge (World Bank Administrative Tribunal, International Monetary Fund Administrative Tribunal and International Court of Justice) as well as an arbitrator (Permanent Court of Arbitration and a plethora of private arbitrations).

[86] Malmström, *supra* note 85; cf. S. Nappert, 'Escaping from Freedom? The Dilemma of an Improved ISDS Mechanism', Speech delivered in London for the 2015 EFILA Inaugural Lecture, 26 November 2015; Alverez *et al.*, *supra* note 81.

[87] As put in the *Investment in TTIP and Beyond: The Path for Reform*, Commission Concept Paper (2015), at 11, available at http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF: 'The proposals outlined above are intended as the stepping stones towards the establishment of a multilateral system … the EU should pursue the creation of one permanent court. This court would apply to multiple agreements and between different trading partners, also on the basis of an opt-in system.'

[88] CETA, *supra* note 2, Art. 8.20.

[89] *Ibid.*, Art. 8.21(1).

[90] *Ibid.*, Art. 8.22(1)(f), (g).

nationals, five Canadians and five third country nationals who, like judges at the CJEU under Article 255 of the Treaty on the Functioning of the European Union (TFEU), possess the qualifications required in their respective countries for appointment to judicial office and, in addition, demonstrate expertise in public international law.[91] They are appointed for a five-year term that is renewable once. The tribunal sits three strong, with one member for each of the sub-group of five,[92] although there is the possibility of a tribunal comprising only one member, which is a third country national, particularly where the investor is a small- or medium-sized enterprise.[93] The president is chosen by lot from the third country nationals, and the members shall be paid a monthly retainer fee to ensure their availability.

There is also an appellate tribunal with the power to review awards rendered by the tribunal. The grounds of review are to be found in Article 8.28(2), which allow for review on all of the bases of annulment in ICSID as well as for errors in the application or interpretation of applicable law and manifest errors in the appreciation of the facts, including the appreciation of domestic law.[94] The parties commit in Article 8.29 to the establishment of a multilateral investment tribunal and an appellate mechanism for the resolution of investment disputes with trading partners, with a view to the hearing of disputes under this section by that body when established. There is an explicit code of ethics in Article 8.30, which refers to the International Bar Association's Guidelines on Conflicts of Interest in International Arbitration and further provides that, upon appointment, a member shall refrain from acting as counsel or witness in any pending or new investment dispute.[95] Challenges to the appointments can be made to the International Court of Justice.

There are also provisions on how CETA is to be interpreted. It must be interpreted according to Article 31 of the VCLT, 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose', a point that is consistent with the rules applicable to WTO dispute resolution. Furthermore, it is expressly stated that the tribunal does not have jurisdiction to determine the validity of a domestic measure and must follow the prevailing interpretation given to the domestic law by the courts or authorities of that party.[96] To reduce the risk of what might be perceived as judicial activism, Article 8.31(3) provides that where

[91] *Ibid.*, Art. 8.27(2). Treaty on the Functioning of the European Union, as adopted by the Treaty of Lisbon, OJ 2010 C 83/49.

[92] CETA, *supra* note 2, Art. 8.27(6).

[93] *Ibid.*, Arts 8.23(5), 8.27(8).

[94] CETA, *ibid.*, also makes provision for administrative and organizational support for the appellate tribunal, with the details for the appointment of the members of the appellate tribunal and its functioning left to be fleshed out at a later date.

[95] International Bar Association, Guidelines on Conflicts of Interest in International Arbitration, 23 October 2014, available at www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.

[96] CETA, *supra* note 2, Art. 8.31(2). There are also provisions that prevent double-dipping, the practice of bringing simultaneous claims arising out of the same set of facts in different arbitral or judicial fora (Art. 8.22(1)(f), (g)) and rules that establish the transparency of proceedings by providing open hearings and, in principle, the disclosure of documents (Art. 8.36(1), (5)) and prohibiting punitive damages (Art. 8.39(3), (4)).

'serious concerns' arise as in relation to an interpretation that may affect investment, the CETA Joint Committee may adopt interpretations of CETA and may specify that a given interpretation may have binding effect from a specific date. The exercise of this power does not appear to preclude the giving of an interpretation after the tribunal has made an award or the appellate tribunal has rendered a review, effectively giving a non-judicial body the power to reverse a decision of the tribunal or committee or, during the review, giving the state parties the possibility to interfere with the process.[97]

In terms of remedies, Article 8.34 allows for interim measures to protect the rights of the disputing party. Damages awarded by the tribunal must not be greater than the loss suffered by the investor, and, in any case, punitive damages are prohibited.[98] The enforcement of the award depends on the arbitration rules that the parties have selected for the arbitration. If they have selected the ICSID Arbitration Rules, then the tribunal's award is enforced as an ICSID award.[99] In any case, the award is binding between the disputing parties, and, subject to waiting periods to allow for revision, setting aside or annulment, the parties must swiftly comply with the awards.

It should be noted, however, that this is only the DRM for investment. There are other DRMs, for example, for Chapter 24, which deal with trade and environmental protection.[100] For this chapter, there is a process that involves, first, consultations with the relevant designated contact point and, second, if those do not give rise to a satisfactory solution, resort to a panel of experts with 'specialised knowledge or expertise in environmental law, issues addressed in … Chapter [24], or in the resolution of disputes arising under international agreements', who will then give a report setting out 'findings, determinations and recommendations'.[101] It is then up to the parties to strive to come up with a 'mutually satisfactory action plan'.[102] Of course, this is a much less robust DRM, no doubt considered to be more appropriate to the more sensitive issues of environmental regulation. By way of further contrast, Chapter 23 on trade and labour has a similar dispute resolution system, but the final article of this chapter simply states that '[t]he Parties understand that the obligations included under this Chapter are binding and enforceable'. This brief analysis of the DRM in CETA shows that, even within the scope of one agreement, there may be no 'one-size-fits-all' DRM.

C *Policy and Legality*

Much of this goes a long way in addressing the Commission's concerns, as expressed by Malmström.[103] However, it still falls short of the Commission's ideal – a multilateral

[97] Baetens, *supra* note 48, at 14.

[98] CETA, *supra* note 2, Art. 8.39(3), (4).

[99] *Ibid.*, Art. 8.41(6).

[100] *Ibid.*, Art. 24.16.

[101] *Ibid.*, Arts 24.15(7),(10) respectively.

[102] *Ibid.*, Art. 24.15(11).

[103] For greater detail, see *Proposal of the European Union for Investment Protection and Resolution of Investment Disputes*, Commission Proposal, 12 November 2015, available at http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf; *Investment in TTIP and Beyond*, *supra* note 87; for an overview, see, among many, Titi, 'The European Union's Proposal for an International Investment Court: Significance, Innovations and Challenges Ahead', 14 *Transnational Dispute Management* (2017) 1.

appellate mechanism known as the Investment Court System – as each EU international investment agreement will have its own appellate body as opposed to having recourse to a one-stop shop for all international investment disputes.[104] Therefore, there will be a Vietnam Appellate Body, a CETA one, a TTIP one and so on. In purely monetary terms, this is problematic; the members of those bodies must be paid a retainer in order to ensure that they are available at short notice. The Commission itself has recognized the advantage of one Appellate Body 'applying to multiple agreements with multiple partners', but it has also recognized the level of international consensus that this will require.[105] Nonetheless, as one commentator has noted, given that the EU states are party to over half of the world's BITs, if the EU is serious about a multilateral Investment Court System, then the EU would be a good place to start.[106]

Responses to the Commission's proposals have been mixed for diametrically opposing reasons. Some see it as losing all of the advantages of ISDS by 'judicializing' DRMs whose purported virtue lie precisely in the fact that they are not state judicial bodies,[107] whereas others simply see the Investment Court System as arbitration in different clothes under a new acronym.[108] Issues of policy aside, questions have been asked as to whether this form of DRM is compatible with the EU legal order on the basis that it could involve EU legislation being called into question outside the EU legal system. The Walloon administration in Belgium thinks it is not compatible, and, as part of an agreement to ratify CETA, it has prevailed upon the Belgian federal government to

[104] European Commission, *Commission Proposes New Investment Court System for TTIP and Other EU Trade and Investment Negotiations*, 16 September 2015, available at http://europa.eu/rapid/press-release_IP-15-5651_en.htm; European Commission, *A Future Multilateral Investment Court*, 13 December 2016, available at http://europa.eu/rapid/press-release_MEMO-16-4350_en.htm; European Commission, *Draft Text on TTIP, Section 3: Resolution of Investment Disputes and Investment Court System*, available at http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf.

[105] *Investment in TTIP and Beyond*, *supra* note 87: 'The EU should work towards the establishment of an international investment court and appellate mechanism with tenured judges with the vocation to replace the bilateral mechanism which would be established [in the TTIP]. This would be a more operational solution in the sense of applying to multiple agreements with multiple partners but it will require a level of international consensus that will need to be built. It is suggested to pursue this in parallel with establishing bilateral appeal mechanisms. These changes are intended to be the stepping stones towards a permanent multilateral system for investment dispute'; Titi, *supra* note 103: '[T]he EU's TTIP proposal is probably more about setting a global standard than about obtaining a bilateral investment court in an IIA with the United States.'

[106] Baetens, *supra* note 48, at 28.

[107] See, e.g., Alverez *et al.*, *supra* note 81, at 35, who conclude that the Commission's proposals cannot exclude the same criticisms levelled against ISDS and that ISDS is 'still the most suitable forum' for international investment disputes; James Roberts *et al.*, *The U.S. Should Reject the European Commission's Proposed Investment Court* (2015), available at www.heritage.org/trade/report/the-us-should-reject-the-european-commissions-proposed-investment-court: 'Much of the EC's proposal differs substantially from the established ISDS system. ISDS panels are created by trade and investment treaties between nations … The treaty signatories and investors alike seek flexibility and autonomy … ISDS panels secure all of these objectives. For the following reasons, however, the EC's proposed ICS fails to be a flexible, reliable, or secure means of protecting investors.'

[108] Van Harten, 'Key Flaws in the European Commission's Proposals for Foreign Investor Protection in TTIP', 12(4) *Osgoode Legal Studies Research Paper Series* (2016) 139.

ask the CJEU, under Article 218(11) of the TFEU, to give an opinion on the compatibility of the DRM in CETA with EU law.[109] A similar issue has been brought before the German Constitutional Court.[110]

Further concerns have been raised in relation to the possibility that an investment tribunal may reach a decision that may be contrary to EU law. Let me give you a recent example where this may have happened. In the *Micula* case, an ICSID tribunal concluded in December 2013 that Romania had breached the Romania–Sweden BIT by withdrawing tax incentives that benefited the claimants' food production businesses. They were awarded US $250 million in damages. The Commission, however, adopted a decision in March 2015, finding that those incentives were unlawful state aid, that Romania had to withdraw them as part of its accession to the EU in 2007 and that the enforcement of the award was, in consequence, unlawful. The Micula brothers are now challenging that decision in the General Court.[111] No doubt, it is to avoid such a possible conflict that the DRM includes in some new generation EU agreements a provision to make references to the CJEU. Thus, in the deep and comprehensive free trade agreement between the EU and Georgia, it is stated, coincidentally in Article 267, that where a dispute arises that involves a question of interpretation of EU law, the arbitration panel must not decide the question but refer it to the CJEU.[112]

[109] Opinion 1/17 pending. The question referred by the Belgian government is as follows: 'Is Chapter Eight ("Investments"), Section F ("Resolution of investment disputes between investors and states") of the Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part, signed in Brussels on 30 October 2016, compatible with the Treaties, including with fundamental rights?' The background to this question is set out in Belgian Foreign Affairs, *Minister Reynders Submits Request for Opinion on CETA*, 6 September 2017, available at https://diplomatie.belgium.be/sites/default/files/downloads/ceta_summary.pdf.

[110] For summary, see J. Baeumler, *Only a Brief Pause for Breath: The Judgment of the German Federal Constitutional Court on CETA*, *Investment Treaty News*, 12 December 2016, available at www.iisd.org/itn/2016/12/12/only-a-brief-pause-for-breath-the-judgment-of-the-german-federal-constitutional-court-on-ceta-jelena-baumler-baeumler/.

[111] Case T-694/15, *Ioan Micula/Commission*, Judgment of 30 November 2015; Case T-704/15, *Viorel Micula e.a. v. Commission*, Judgment of 28 November 2015. The challenged act in both cases is Commission Decision 2015/1470 of 30 March 2015, OJ 2015 L 232, at 43–70, which was implemented by Romania. ICSID, *Micula and Others v. Romania*, Award, 11 December 2013, ICSID Case no. ARB/05/20. There is a vast amount of academic literature on this case and on other cases where arbitral awards were allegedly inconsistent with EU law. For an overview of *Micula*, see K. Bacon, *BIT Arbitration Awards and State Aid: The Commission's Micula Decision*, 10 September 2015, available at http://uksala.org/bit-arbitration-awards-and-state-aid-the-commissions-micula-decision/. For another possible example, see ICSID, *Electrabel S.A. v. Republic of Hungary*, Award, 25 November 2015, ICSID Case no. Arb/07/19. For a broader context, see also Kokott and Sobotta, 'Investment Arbitration and EU Law', 18 *Cambridge Yearbook of European Legal Studies* (2016) 3. Another issue is the very compatibility of intra-EU BITs with the EU legal order. This has been addressed in the Opinion of Advocate General Wathelet in *Achmea*, C-284/16, EU:C:2017:699. See also *Achmea*, C-284/16, judgment of 6 March 2018, EU:C:2018:158.

[112] See, e.g., Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the One Part, and Georgia, of the Other Part, OJ 2014 L 261/4, Art. 267(2): 'Where a dispute raises a question of interpretation of a provision of Union law referred to in paragraph 1, the arbitration panel shall not decide the question, but request the Court of Justice of the European Union to give a ruling on the question. In such cases, the deadlines applying to the rulings of the arbitration panel shall be suspended until the Court of Justice of the European Union has given its ruling. The ruling of the Court of Justice of the European Union shall be binding on the arbitration panel.'

5 Concluding Remarks

As I have shown, the possibility that DRMs in EU international trade agreements might replicate, at least to some extent, the EU direct effect model for individual-driven enforcement has now been superseded in non-investment agreements by a system that is much more closely aligned to the WTO system. In other words, the dispute is to be resolved by the contracting parties alone at the international level. The WTO system is undoubtedly a less effective DRM than the system of direct effect within the EU, but this is a deliberate policy choice to preclude, as Ehlermann puts it, a shift of power from the executive and legislature to the courts. By contrast, the DRM in ICSID is, in many respects, more powerful than in the WTO, notably in that it can be invoked directly by individuals and that awards are enforceable through national courts, but it is in part these features that have led to its legitimacy being now called into question in some circles. All of this provides much to mull over with respect to the content of DRMs in future international trade and investment agreements. One thing that is clear, however, is that DRMs of an arbitral or judicial nature are here to stay.