EU Law and Investor-State Dispute Settlement

Gabriel M. Lentner*

Summary: With the entry into force of the Lisbon Treaty in 2009 the EU has acquired new competences in the area of international investment law and policy. Article 207 TFEU now provides the EU with external treaty-making power in the field of foreign direct investment. Still many legal issues remain unresolved today. This article deals with the legal framework for Investor-State Dispute Settlement (ISDS).It will first discuss the scope of the EU's investment competence since the entry into force of the Lisbon Treaty and what this means for existing BITs. Next, the EU law issues are addressed by looking at the recent *Achmea* decision of the CJEU. Lastly, financial responsibility of the EU and its member states regarding ISDS is addressed.

Key words: EU Investment Policy – Foreign Direct Investment (FDI) – Investor-State Dispute Settlement (ISDS) – International Investment Agreemtent (IIAS) – Investment Court System (ICS) – Article 207 (1) TFEU – External Competence – Achmea – Financial Responsibility

1. Introduction

With the entry into force of the Lisbon Treaty[1] in 2009 the EU has acquired new competences in the area of international investment law and policy. Article 207 TFEU now provides the EU with external treaty-making power in the field of foreign direct investment.[2] The EU is now expressly entitled to negotiate and

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1 Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13 2007, 2007 O. J. (C 306) 1 [hereinafter Lisbon Treaty].

2 Article 207(1) of the Consolidated Version of The Treaty on the Functioning of the European Union art. 207, May 9, 2008 O. J. (C 115) 47 [hereinafter TFEU] provides "The common

conclude international investment agreements (IIAs) or free trade agreements (FTAs), including chapters on investment, comparable to those concluded by EU Member States individually before the Treaty of Lisbon.[3] Thus, the EU's comprehensive investment competence marks the beginning of a unified EU approach toward international investment law. This will undoubtedly have a considerable impact on the future shape of international investment law as the EU is the world's biggest investor and recipient of foreign direct investments.[4]

While the EU Commission clearly indicated that a Model bilateral investment agreement (BIT) will not be adopted,[5] the significance of the EU's investment policy for the world economy necessitates a more detailed look at some of the legal issues arising from the interaction between EU law and international investment law. Because the new generation of IIAs[6] so far concluded by the EU appear to depart from established drafting practice, this article deals with the legal framework for Investor-State Dispute Settlement (ISDS).[7] It will first discuss the scope of the EU's investment competence since the entry into force of the Lisbon Treaty and what this means for existing BITs. Next, the EU law issues are addressed by looking at the recent *Achmea* decision of the CJEU. Lastly, financial responsibility of the EU and its member states regarding ISDS is addressed.

commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, *foreign direct investment*, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action." [emphasis added]; for a discussion of the precise scope of the new investment competence see e.g. FINA, S., LENTNER, G. M. The Scope of the EU's Investment Competence after Lisbon. *Santa Clara Journal of International Law*, 2016, vol.14, iss. 2, p. 419.

3 According to Article 3(1) TFEU, the common commercial policy of the European Union, including foreign direct investment, is an area of exclusive EU competence.

4 European Commission, Trade and Investment, 2014, p. 9 https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017SC0364&from=en

5 See European Commission, Towards a Comprehensive European International Investment.2010, p. 4–6 https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017DC0654&-from=EN. For a first discussion of what could be called the 'invisible' EU Model BIT, see Special Issue: The Anatomy of the (Invisible) EU Model BIT, 15 2014) Journal of World Investment & Trade, 363-704. See also LENTNER, G. M. A Uniform European Investment Policy? The unwritten EU Model BIT. *Journal of Law & Administrative Sciences*, 2014, no. 2, p. 156.

6 Including Investment Chapters in Free Trade Agreements, as well as stand-alone Bilateral Investment Treaties (for example being negotiated between the EU and China).

7 Regarding the substantive investor protection provisions in CETA, see e.g. LENTNER, G. M. Investitionsschutz im Freihandelsabkommen CETA. *Ecolex*, 2016, p. 1026.

2. The EU's Investment Competence

2.1. The Legal Basis

The Member States of the European Union conferred upon the EU new exclusive competences through the Lisbon Treaty[8] in 2009.[9] With regards to the common commercial policy (i.e. the worldwide external trade-policy representation of the internal market of the EU), these competences were extended to include foreign direct investment (FDI).[10] FDI now squarely falls within the ambit of the EU's exclusive competences as part of its Common Commercial Policy (CCP) pursuant to Article 3(1)(e) of the Treaty of the Functioning of the European Union (TFEU). This means that negotiation and ratification of FDI related treaties will now be conducted by the organs of the EU rather than by individual Member States.[11] Overall, the inclusion of competences on foreign investment reflects a growing trend in international economic agreements such as Free Trade Agreements (FTAs) to also include rules on investment protection and promotion.[12]

The EU's competence and decision-making rules pertaining to investment are provided in Article 207 of the CCP. The CCP now covers all matters relating to trade in goods and services, commercial aspects of intellectual property, and foreign direct investment pursuant to Article 207(1) TFEU.[13] The EU is hence expressly entitled to adopt unilateral measures and conclude international agreements in that regard.[14]

The inclusion of FDI in the CCP has attracted great interest and discussion among European and international scholars,[15] mostly because there is neither

[8] Amendment 157(a) Lisbon Treaty.

[9] For an overview see e.g. BUNGENBERG, M. The Division of Competences between the EU and Its Member States in the Area of Investment Politics. In: Bungenberg, M., Griebel, J., Hindelang, S. (eds.). *International Investment Law and EU Law.* European Yearbook of International Economic Law, Springer, 2011, p. 29.

[10] See Art. 47 TFEU.

[11] MAUPIN, J. A. Where Should Europe's Investment Path Lead? Reflections on August Reinisch, "Quo Vadis Europe?" *Santa Clara Journal of International Law*, 2014, vol.12, iss.1, p. 185.

[12] BUNGENBERG, M. The Division of Competences between the EU and Its Member States in the Area of Investment Politics. In: Bungenberg, M., Griebel, J., Hindelang, S. (eds.). *International Investment Law and EU Law.* European Yearbook of International Economic Law. Springer, 2011, p. 31.

[13] SCHÜTZE, R. European Community and Union, Decision-Making and Competences on International Law Issues. In: Wolffrum, R., Guhr, A., Heilmann, D., Kaiser, K., Lachenmann, F., Pohlmann, M. and Reuss, M. (eds.). *The Max Planck Encyclopedia of Public International Law.* Oxford University Press, 2012, vol. III, p. 814, p. 6.

[14] Ibid.

[15] See REINISCH, A. The EU on the Investment Path – Quo Vadis Europe? The Future of EU BITs and other Investment Agreements. *Santa Clara Journal of International Law*, 2014, vol.12, iss. 1, p. 111.

any definition of the term 'foreign direct investment' in the treaties, nor any clarification of the exact scope of the FDI competence under the CCP.[16] A more precise definition would have been desirable, since foreign direct investment in practice necessitates a broad regulatory framework.[17] This ambiguity lead to different interpretations of the new FDI competence of the EU as to the question whether all aspects of the regulation of foreign investment generally included in IIAs are covered by the FDI competence as included in the TFEU.

A clarification from the CJEU was requested by the Commission concerning the EU-Singapore FTA. In its opinion, the CJEU opined that the FTA falls within the exclusive competence of the EU, with the exception of the following provisions related to investment protection: the provisions of Section A (Investment Protection) of Chapter 9 (Investment) of that agreement, in so far as they relate to portfolio investments between the European Union and the Republic of Singapore; the provisions of Section B (Investor-State Dispute Settlement) of Chapter 9. These fall within a competence shared between the European Union and the Member States.[18]

2.2. The Grandfathering Regulation

With the FDI competence, the Commission adopted the view that EU Member States are now barred from taking any action in this area without EU authorization,[19] creating a legal problem for maintaining in force existing Member States' BITs.[20]

[16] SHAN, W., ZHANG, S. The Treaty of Lisbon: Half: Way toward a Common Investment Policy. *European Journal of International Law*, 2011, vol. 21, no. 4, p. 1058.

[17] WEISS, W. Artikel 207 AEUV. In: Grabitz, E., Hilf, M., Nettesheim, M. Nettesheim (eds.). *Das Recht der Europäischen Union: Kommentar.* C. H. Beck, 2011, p. 40.

[18] Ag Sharpston Opinion 2/15 (16 May 2017).

[19] Art 2(1) TFEU ("When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States mentation of Union acts."); for existing BITs see 351 (1) TFEU.

[20] Indeed, as eg Lavranos correctly points out, under public international law "the transfer of FDI competence to the EU has not affected in any possible way the legal status and binding effect of all existing Member States' BITs". LAVRANOS, N. In: Defence of Member States' BITs Gold Standard: The Regulation 1219/2012 establishing a Transitional Regime for existing Extra-EU BITs: A Member State's Perspective. *Transnational Dispute Management*, 2013, vol. 10, iss. 2, p. 3.; see also generally TIETJE, Ch. The Status of International Law in the European Legal Order: The Case of International Treaties and Non-Binding International Instruments. In: Wouters, J., Nollkaemper, A., De Wet, E. (eds.). *The Europeanisation of International Law – the Status of International Law in the EU and its Member States*. The Hague: 2008, p. 55; TIETJE, Ch. EU-Investitionsschutz und -förderung zwischen Übergangsregelungen und umfassender europäischer Auslandsinvestitionspolitik. *Europäische Zeitschrift für Wirtschaftsrecht,* 2010, vol. 21, no. 17, p. 647.

Hence a quick pragmatic solution had to be found for the approximately 1200 BITs of EU Member States.[21]

A compromise to the European Commission's proposal for grandfathering existing Member States' BITs was reached after 2 years of arduous negotiations.[22] The adopted 'grandfathering' Regulation then permits the EU to authorize Member States to act in fields of its own exclusive powers.[23]

The outcome is – compared to the Commission's original proposal – providing a significant reduction of the Commission's powers.[24] It ensures the continuation of all pre-Lisbon BITs of Member States until they are replaced by EU investment agreements.[25] Regarding future BITs and those estimated thirty[26] that have been signed after the entry into force of the Lisbon Treaty (1 December 2009) but before the entry into force of the grandfathering Regulation, the European Commission will in essence perform a full assessment of the EU law compatibility and can prescribe in detail which provisions in the BITs will have to be included or removed.[27] Hinting at the Commission's proposed standard, recital 6 of the Regulation includes a mention that these future EU agreements shall provide 'for high standards of investment protection'. As a result, the European Commission fully controls all Member State BITs post-Lisbon.<?>

With regards to dispute settlement, the grandfathering regulation[28] provides the European Commission with considerable powers to participate in proceedings initiated against Member States on the basis of existing BITs of EU Member States.[29] Pursuant to Article 13 of the regulation, the Commission may direct the

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21 REINISCH, A. The EU on the Investment Path – Quo Vadis Europe? The Future of EU BITs and other Investment Agreements. *Santa Clara Journal of International Law*, 2014, vol. 12, iss. 1, p. 120.

22 LAVRANOS, N. In: Defence of Member States' BITs Gold Standard: The Regulation 1219/2012 establishing a Transitional Regime for existing Extra-EU BITs: A Member State's Perspective. *Transnational Dispute Management*, 2013, vol.10, iss. 2, p. 2.

23 Regulation 1219/2012, OJEU, L 351/40, 20. 12. 2012. Regulation No. 1219/2012 of the European Parliament and the Council of 12 December 2012 Establishing Transitional Arrangements for Bilateral Investment Treaties Between Member States and Third Countries, O.J. (L 351) 40; Reinisch, (n 21) 120.

24 KLEINHEISTERKAMP, J. Financial Responsibility in the European International Investment Policy. *LSE Law, Society and Economy Working Papers*, 2013, no. 15, p. 3–4.

25 Article 3 of Regulation (EU) 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries OJ L 351/40.

26 LAVRANOS, N. Member States' Bilateral Investment Treaties (BITs): Lost in Transition? *Hague Yearbook of International Law*, 2011, vol. 24, p. 290.

27 Ibid 291.

28 Regulation 1219/2012, Establishing Transitional Arrangements for Bilateral Investment Treaties Between Member States and Third Countries, 2012 O. J. (L 351) 40.

29 LAVRANOS, N. In: Defence of Member States' BITs Gold Standard: The Regulation 1219/2012 establishing a Transitional Regime for existing Extra-EU BITs: A Member State's Perspective.

respective Member States to take or refrain from taking a particular position or action during the dispute settlement proceedings.[30] Where appropriate, the Commission may be even granted standing to take part in the defense of a Member State in the context of an ISDS initiated by a third state investor.[31] This means that the EU (as represented by the Commission) will be the sole defendant when Member State measures become the subject of investment arbitration claims by investors from third party countries.[32] The EU also enacted the regulation on financial responsibility[33] dealing with the potential financial consequences flowing from investor-to-state dispute settlement.

Since investor-state awards by arbitral tribunals are susceptible to annulments or denials of recognition and enforcement in Member State courts, the relationship of these arbitration treaties and EU law face two sets of imperatives: those flowing from the obligation to uphold, recognize and enforce awards under the arbitration treaties and those flowing from obligations to comply with EU law.[34] How these two imperatives are resolved appears to remain an open question especially with a view to the principle of the autonomy of EU law.[35]

3. The EU and Investor-State Dispute Settlement

3.1. The Background

The interaction between EU law and international investment law already caused problems before the entry into force of the Lisbon Treaty. In three important cases, the Commission brought infringement proceedings under former Article 307(2) EC Treaty (ECT) against Austria, Finland and Sweden, on the grounds that their respective BITs concluded with third states were in violation

Transnational Dispute Management, 2013, vol.10, iss. 2, p.10.

30 Ibid

31 Ibid.

32 BERMANN, G. A. Reconciling European Union Law Demands with the Demands of International Arbitration. *Fordham International Law Journal*, 2011, vol. 34, no. 5, p. 1213–1214.

33 Regulation 912/2014, Establishing a Framework for Managing Financial Responsibility Linked to Investor-State Dispute Settlement Tribunals Established by International Agreements to which the European Union is Party, 2014 O. J. (L 257), p. 121–134.

34 BERMANN, op. cit., p. 1215.

35 See also, HINDELANG, S. The Autonomy of the European Legal Order. In: Bungerberg, M., Hermann, Ch. (eds.). *Common Commercial Policy after Lisbon. European Yearbook of International Economic Law.* Springer, Berlin/Heidelberg: 2013, p. 157. On the autonomy of the EU legal order in light of the case law of the Court of Justice of the European Union see e.g. LENTNER, G. M. Kadi II before the ECJ – UN Targeted Sanctions and the European Legal Order. *European Law Reporter,* 2013, p. 202.

of Community law even in case of only 'hypothetical incompatibilities'.[36] The (then) ECJ held in those cases that indeed the respondent States failed to fulfil their obligations under Article 307(2) ECT by not taking appropriate steps to eliminate incompatibilities concerning the provisions on transfer of capital contained in an investment agreement it has entered into with a third country.[37] These cases concerned BITs entered by the respective States before their accession to the EU.[38]

The CJEU's approach represents a claim of supremacy of EU law over BITs (and the applicable public international law rules and principles) similar to the much debated *Kadi* jurisprudence.[39] In any case, for the internal EU law, former Article 307(2) EC (now Article 351(2) TFEU), obliges Member States to eliminate any incompatibilities between their international and EU law obligations in favour of the latter.[40]

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[36] C-249/06, COM/Swe; C-205/06, Com/Austria, Commission v. Austria, [2009] E.C.R. I-1301, P 45; Commission v. Sweden [2009] E.C.R. I-1335, P 45; Case C-118/07 Commission v. Finland, [2009] E.C.R. I-10,889, P 50.

[37] LEAL-ARCAS, R. The European Union's New Common Commercial Policy after the Treaty of Lisbon. In: Trybus, M., Rubini, L. (eds.). *The Treaty of Lisbon and the Future of European Law and Policy*. Edward Elgar Publishing, 2012, p. 279; for an elaborate discussion see eg LAVRANOS, N. Member States' Bilateral Investment Treaties (BITs): Lost in Transition? *Hague Yearbook of International Law*, 2011, vol. 24, p. 281; ANDERER, C. E. Bilateral Investment Treaties and the EU Legal Order: Implications of the Lisbon Treaty. *Brooklyn Journal of International Law*, 2010, vol. 35, p. 851.

[38] The concept 'hypothetical incompatibility' has been continued and expanded by the ECJ in Case C-45/07 *Commission v. Greece* [2009] ECR 1-701; Case C-246/07, *Commission v. Sweden* [2010] ECR I-3317; Cf LAVRANOS, N. Member States' Bilateral Investment Treaties (BITs): Lost in Transition? *Hague yearbook of International Law,* 2011; For the limit to the supremacy of EU law regarding pre-accession treaties, see Case C-264/09 *Commission v. Slovak Republic* [2011] ECR I-08065; In: similar proceedings Denmark agreed to terminate the respective agreement and Malta terminated its 1965 Agreement with Switzerland before joining the EU, Amtliche Sammlung des Bundesrechts der Schweiz (AS) 2005, 1163.

[39] Joined cases C-402/05 P and C-415/05 P, Kadi and Al Barakaat International Foundation v Council and Commission, 2008 ECR I-6351; Joined cases C-584/10 P, C-593/10 P und C-595/10 P, European Commission and Others v Yassin Abdullah Kadi, 18 July 2013; see also Case C-459/03, Commission v. Ireland, 2006 ECR I-4635; for a brief commentary on the Kadi jurisprudence see eg: LENTNER, G. M. Kadi II before the ECJ – UN Targeted Sanctions and the European Legal Order. *European Law Reporter,* 2013, p. 202.

[40] See further on this issue e.g. TERHECHTE, J. P. Article 351 TFEU: The Principle of Loyalty and the Future Role of the Member States' Bilateral Investment Treaties. *European Yearbook for International Economic Law, Special Issue: International Investment Law and EU Law*, 2011, p. 79; LAVRANOS, N. Member States' Bilateral Investment Treaties (BITs): Lost in Transition? *Hague Yearbook of International Law*, 2011, vol. 24, p. 287.

3.2. Achmea

On 6 March 2018, the Court of Justice of the European Union (CJEU) handed down its decision in the case of Achmea v Slovakia in which it held that an arbitration clause included in a bilateral investment agreement (BIT) between two EU member states (so-called intra-EU BITs) is incompatible with EU law.[41] Before the ECJ was the question whether an arbitration clause, which grants an investor of a member state in case of a dispute concerning investments in another member state the possibility to initiate proceedings before an arbitral tribunal, is compatible with articles 18, 267 and 344 TFEU. The CJEU found incompatibility relying in particular on the autonomy of EU law, because according to the Court the arbitral tribunal, due to its nature, may interpret or even apply EU law. And because it cannot be regarded as a Court of a member state within the meaning of Article 267 TFEU, the arbitration clause of the BIT, together with the limited reviewability of the award by national courts, therefore calls into question 'not only the principle of mutual trust between the Member States but also the preservation of the particular nature of the law established by the Treaties, ensured by the preliminary ruling procedure provided for in Article 267 TFEU, and is not therefore compatible with the principle of sincere cooperation.'[42]

In its *Achmea* decision, the CJEU did not provide any guidance as regards the effects of its decision. The European Commission opines that *Achmea* has now clarified that all arbitration clauses in intra-EU BIT no longer apply and, moreover, that all arbitration tribunals established on the basis of such a clause no longer have jurisdiction.[43] Member States' courts are – according to the European Commission – thus required to set aside and not enforce arbitral awards issued on the basis of intra-EU BITs and Member States have to terminate all their intra-EU BITs.[44]

However, open questions remain on the effects of the decision.[45] This relates to pending intra-EU BIT arbitrations as well as future proceedings on the basis of intra-EU BITs still in force. Whether ICSID tribunals will consider the CJEU's ruling appears also questionable, as they are not directly bound by the CJEU's decision.

[41] CJEU C-284/16 (6 March 2018).

[42] CJEU C-284/16 (6 March 2018), p. 58.

[43] European Commission, 'Protection of intra-EU investment' (Communication from the Commission to the European Parliament and the Council, 18 July 2018) COM(2018) 547/2.

[44] Ibid.

[45] For an exhaustive treatment of all questions, see e.g. LANG, A. Die Autonomie des Unionsrechts und die Zukunft der Investor-Staat-Streitbeilegung nach Achmea. *Beiträge zum Transnationalen Wirtschaftsrecht*, 2018, iss. 156, p. 1.

The most important issue, however, revolves around the Energy Charter Treaty (ECT) and investment disputes arising within the EU under it. Here, the European Commission argues that *Achmea* equally applies to such disputes.[46] However, the CJEU has not addressed the issue and an arbitral tribunal has already made it clear that *Achmea* does not apply to ECT cases.[47]

Further issues under EU law[48] as well as under certain domestic constitutions[49] arise as regards investor-state dispute settlement procedures in EU negotiated treaties such as CETA. It is not undisputed whether the Court of Justice of the European Union (CJEU) accepts the EU's submission to an investment tribunal (be it an Investment Court System or investment arbitration), particularly in light of *Achmea* and opinion 2/13 in connection with the EU's accession to the European Convention of Human Rights.[50] Much will depend on the specific design of ISDS in that respect. For example, Article 8.31(2) CETA (on the applicable law in the resolution of investment disputes) states that

The Tribunal shall not have jurisdiction to determine the legality of a measure, alleged to constitute a breach of this Agreement, under the domestic law of the disputing Party. For greater certainty, in determining the consistency of a measure with this Agreement, the Tribunal may consider, as appropriate, the domestic law of the disputing Party as a matter of fact. In doing so, the Tribunal shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party and any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party.

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46 European Commission, 'Protection of intra-EU investment' (Communication from the Commission to the European Parliament and the Council, 18 July 2018) COM(2018) 547/2, p. 3–4.

47 *Masdar Solar & Wind Cooperatief U. A. v Kingdom of Spain,* ICSID Case No. ARB/14/1, Award (16 May 2018), p. 678–683.

48 See https://stop-ttip.org/wp-content/uploads/2016/10/28.10.16-Updated-Legal-Statement_EN.pdf ; http://www.iaj-uim.org/iuw/wp-content/uploads/2015/11/EAJ-report-TIPP-Court-october.pdf

49 See the constitutional complaint regarding CETA before the German Constitutional Court, https://www.mehr-demokratie.de/fileadmin/pdf/2016-08-30_CETA-Klage.pdf

50 CJEU (18. 12. 2014) Opinion 2/13, p. 155–176. See also SCHILL, S. Opinion 2/13 – The End for Dispute Settlement in EU Trade and Investment Agreements? *Journal of World Investment & Trade*, 2015, vol. 16, iss. 3, p. 379; HERRMANN, Ch. The Role of the Court of Justice of the European Union in the Emerging EU Investment Policy. *The Journal Of World Investment & Trade*, 2011, vol.15, iss. 3–4, p. 570; GÁSPÁR-SZILÁGYI, S. A Standing Investment Court under TTIP from the Perspective of the Court of Justice of the European Union, *Journal of World Investment & Trade,* 2016, vol.17, iss. 5, p. 701; UWERA, G. Investor-State Dispute Settlement (ISDS) in Future EU Investment-Related Agreements: Is the Autonomy of the EU Legal Order an Obstacle? *The Law & Practice of International Courts and Tribunals*, 2016, vol.15, iss. 1, p. 102.

Such wording is clearly drafted to ensure the exclusive jurisdiction of the CJEU under Articles 19(1) TEU and 267 TFEU over the interpretation, application and validity of EU law. A similar provision is included in Article 16(2) EU-Vietnam FTA.[51] It must be noted, however, that this is arguably already ensured by 8.18(5) that specifies that 'A Tribunal constituted under this Section shall not decide claims that fall outside of the scope of this Article.' This provision already 'provides that the tribunal has no jurisdiction to decide (ie, make principal determinations on) anything other than claimed breaches of CETA's substantive investment protections.'[52]

In any event, it will be up to the CJEU to decide on these issues, as the Belgian federal government sought an opinion of the CJEU on the compatibility of the Investment Court System (ICS) with the EU treaties.[53]

In addition to the legal issues regarding ISDS, limiting the access to these investment tribunals to foreign investors appears problematic in light of Article 47 in connection with Article 52 Charter of Fundamental Rights of the European Union.[54] The resulting privileges with respect to the procedural and substantive status of foreign investors in contrast to domestic investors through these agreements can be seen as problematic as well.[55] Furthermore, the issues relating to the tendencies of investment tribunals to disregard human rights in its decisions[56] are not mitigated simply by new institutional arrangements.[57]

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[51] Similar provisions are found in the 2008 Canada-Colombia FTA, the Colombia 2007 Model BIT and Colombia's BITs with Belgium, China, India, Japan, Peru, UK and Switzerland.

[52] HEPBURN, J. 'CETA's New Domestic Law Clause' (EJIL:Talk!, 17 March 2016), http://www.ejiltalk.org/cetas-new-domestic-law-clause/.

[53] Belgian Request for an Opinion from the European Court of Justice (6 September 2017), https://diplomatie.belgium.be/sites/default/files/downloads/ceta_summary.pdf. On 29 January 2019, AG Bot delivered his opinion on the case finding the ICS in CETA compatible with the EU treaties, see Opinion 1/17 (Opinion of AG Bot).

[54] See PETERSMANN, E. U. Transformative Transatlantic Free Trade Agreements without Rights and Remedies of Citizens? *Journal of International Economic Law*, 2015, vol. 18, iss. 3, p. 579, 589–594. Additionally, CETA excludes any legal remedies for private persons in its Art 30.6 CETA.

[55] It is debatable whether that in fact satisfies the goals and principles of the EU in general (see Articles 3 and 21 Treaty of European Union). See also Ernst-Ulrich Petersmann (n 55), p. 590. For a comprehensive critique see KUMM, M. Ein Weltreich des Kapitals? Die Institutionalisierung ungerechtfertigter Investorenprivilegien in TTIP und CETA. *Leviathan–Berliner Zeitschrift für Sozialwissenschaft*, 2015, vol. 43, iss. 3, p. 464.

[56] See HIRSCH, M. Investment Tribunals and Human Rights: Divergent Paths. In: Dupuy, P. M., Francioni, F., Petersmann, E. U. (eds.). *Human Rights in International Investment Law and Arbitration*. Oxford University Press, 2009, p. 106–107.

[57] See however, the legal opinion of the European Parliament that considers investor protection compatible with fundamental rights, Legal Service of the European Parliament, 'Legal Opinion on the Compatibility with the Treaties of investment dispute settlement provisions in EU trade agreements' [2016], p. 84–92.

3.3. Financial Responsibility

As regards financial responsibility,[58] the EU has adopted a Regulation for establishing a framework for managing financial responsibility linked to investor-state dispute settlement tribunals established by international agreements to which the European Union is party.[59] The regulation addresses the issue of allocating responsibility and financial liability between Member States and the EU. The Commission recognized the need to establish a framework for managing the financial consequences of ISDS.[60] This is an important step in defining the future shape of the European international investment policy, clearing the path for substitution of the Member State's BITs with EU agreements.[61] The Regulation builds on the one agreement to which the EU is already a party with the possibility for ISDS, namely the Energy Charter Treaty.[62]

The central principle guiding the regulation is that financial responsibility flowing from ISDS is to be attributed to the actor which has afforded the treatment in dispute. For treatment afforded by the Union, the Union shall act as respondent pursuant to Article 4 of the Regulation, whereas if a Member State afforded the treatment in dispute, the Member State shall act as respondent pursuant to Article 5 of the Regulation. Where the actions of the Member State are required by EU law, financial responsibility lies with the Union according to Article 3(1)(c) of the Regulation.

Among the issues that must be addressed is the fact that Article 3(1)(c) of the Regulation would expose the EU to financial responsibility for (under EU law) perfectly legal legislative acts in the case where an arbitral tribunal considers the EU to be in breach of standards of an investment treaty. While not surprising from the perspective of existing BITs, this would significantly alter the traditional institutional approach towards the liability of the EU.[63]

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[58] For a recent discussion see e.g. KLEINHEISTERKAMP, J. Financial Responsibility in the European International Investment Policy. *International and Comparative Law Quarterly*, 2014, vol. 63, no. 2, p. 449.

[59] Regulation 912/2014, Establishing a Framework for Managing Financial Responsibility Linked to Investor-State Dispute Settlement Tribunals Established by International Agreements to which the European Union is Party, 2014 O. J. (L 257) 121.

[60] Commission Proposal for a Regulation,Establishing a Framework for Managing Financial Responsibility Linked to Investor-State Dispute Settlement Tribunals Established by International Agreements to which the European Union is Party, COM (2012) 335 final, http://trade.ec.europa.eu/doclib/docs/2012/june/tradoc_149567.pdf

[61] KLEINHEISTERKAMP (n 59), p. 449–450.

[62] *See* Energy Charter Treaty, Annex 1 to the Final Act of the Conference on the European Energy Charter, Dec. 17, 1994, 34 I.L.M. 381, 1995.

[63] KLEINHEISTERKAMP (n 59), p. 461–462; TIETJE C., SIPIORSKI, E., TÖPFER, G. Responsibility in Investor-State Arbitration in the EU – Managing Financial Responsibility Linked

The regulation also includes rules on the conduct of ISDS procedures, under which it is largely at the Commission's discretion as to who will act as respondent when non-EU investors bring a claim. In addition, the regulations structure co-operation between the Commission and the Member State in specific cases, and ensure that any apportionment of financial responsibility can be made effective.

However, any such criteria for allocating responsibility must find their basis in the provisions of the EU investment agreement under which the foreign investor is bringing his/her claim.[64] This means that, in order to have effect under public international law, the proposed rules regarding the determination of responsibility in this Regulation must be included in the future EU investment agreement. Hence, for the sake of legal certainty, it is important that any future EU investment agreement contain such a clarification.[65] In order to avoid circumvention of the effective application of this Regulation, further clarification is needed to the effect that future EU IIAs must completely and effectively supersede existing BITs of Member States with the same third state.[66]

4. Conclusion

This article sought to present an analysis of the legal framework of the EU regarding ISDS and revealed that many open questions remain. Clarification will be required regarding the constitutional basis for ISDS and the proper relationship between the ISDS mechanism and the autonomy of the EU legal order. It remains to be seen how the Investment Court System works in practice and whether and how this will then be replaced by a multilateral investment court in the future, as the European Commission envisions.[67]

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64 KLEINHEISTERKAMP, J. Financial Responsibility in the European International Investment Policy. *LSE Law, Society and Economy Working Papers*, 2013, no. 15, p. 8.

65 Ibid.

66 Ibid 9.

67 On these proposals see the European Commission's proposals from 18 January 2019 submitted to UNCITRAL concerning establishment of such court http://trade.ec.europa.eu/doclib/press/index.cfm?id=1972

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