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BREXIT, BITS AND ENFORCEMENT

1. INTRODUCTION

1.1 The United Kingdom has, under and in terms of Article 50(2) of the Treaty on European Union (TEU), formally notified the European Council of its intention to leave the European Union ("Brexit").

1.2 In this paper I consider what effect the United Kingdom ceasing to be a Member State of the European Union might have on the adjudication of disputes under International Investment Agreements (IIAs) - particularly those Bilateral Investment Treaties (BITs) which have been concluded by the UK - and on the enforcement of the awards resulting from such adjudications.

1.3 In a list published in April 2016 [1] of the bilateral investment agreements which had been notified in the Commission by the Member States under and in terms of Article 4(1) of Regulation (EU) No 1219/2012 (establishing transitional arrangements for bilateral investment agreements between Member States and third countries) the UK was noted as having some 94 BITs in force. [2] Other sources list some 110 Bilateral Investment

[1] See [2016] OJ C-149/01

[2] The full list of the 94 countries within which the UK had concluded BITs as at 2016 were: Republic of Albania - 30.3.1994; Republic of Angola - 4.7.2000; Antigua and Barbuda - 12.6.1987; Argentine Republic -11.12.1990; Republic of Armenia - 27.5.1993; Republic of Azerbaijan - 4.1.1996 ; Kingdom of Bahrain - 30.10.1991; People's Republic of Bangladesh - 19.6.1980; Barbados - 7.4.1993; Republic of Belarus - 1.3.1994; Belize 30.4.1982; Republic of Benin - 27.11.1987; Bolivia - 24.5.1988; Bosnia and Herzegovina - 2.10.2002; Federative Republic of Brazil - 19.7.1994; Republic of Burundi -13.9.1990; Republic of Cameroon - 4.6.1982; Republic of Chile - 8.1.1996; People's Republic of China - 15.5.1986; Republic of Colombia - 17.3.2010; Republic of the Congo - 25.5.1989; Republic of Costa Rica - 7.9.1982; Republic of Côte d'Ivoire - 8.6.1995; Republic of Cuba - 30.1.1995; Commonwealth of Dominica - 23.1.1987; Republic of Ecuador - 10.5.1994; Arab Republic of Egypt - 11.6.1975; Republic of El Salvador - 14.10.1999; Federal Democratic Republic of Ethiopia - 19.11.2009; Republic of the Gambia - 2.7.2002; Republic of Georgia - 15.2.1995; Republic of Ghana - 22.3.1989 ; Grenada - 25.2.1988; Republic of Guyana - 27.10.1989; Republic of Haiti - 18.3.1985; Republic of Honduras - 7.12.1993; Hong Kong Special Administrative Region of the People's Republic of China - 30.7.1998; Republic of India -14.3.1994; Republic of Indonesia - 27.4.1976; Jamaica - 20.1.1987; Hashemite Kingdom of Jordan - 10.10.1979; Republic of Kazakhstan- 23.11.1995; Republic of Kenya -13.9.1999 ; Republic of Korea - 4.3.1976; State of Kuwait - 8.10.2009; Kyrgyz Republic- 8.12.1994; Lao People's Democratic Republic - 1.6.1995; Lebanese Republic Agreement - 16.2.1999; Kingdom of Lesotho - 18.2.1981; Malaysia - 21.5.1981; Republic of Mauritius - 20.5.1986; United Mexican States - 12.5.2006; Republic of Moldova - 19.3.1996 ; Mongolia - 4.10.1991; Kingdom of Morocco - 30.10.1990; Republic of Mozambique - 18.3.2004; Nepal - 2.3.1993; Republic of Nicaragua - 4.12.1996; Federal Republic of Nigeria - 11.12.1990; Sultanate of Oman - 25.11.1995; Islamic Republic of Pakistan - 30.11.1994; Republic of Panama - 7.10.1983; Independent State of Papua New Guinea - 14.5.1981; Republic of Paraguay (as amended by 17 6.1993 Exchange of Notes) - 4 June 1981; Republic of Peru -

Treaties which have been concluded by the UK with third countries, though not all of these are in force. [3]

1.4 Among the countries with which the UK had entered into BITs was: Brazil, Russia, India, China, South Africa, Singapore, Malaysia, Indonesia, and Mexico. All but one of these were concluded prior to the entry into force of the Lisbon Treaty in 2009.

1.5 In order to be able properly to approach this topic, it is necessary to set out the approach currently taken in European Union law to international investment treaties and to the adjudication of disputes and enforcement of awards under their Investor State Dispute Settlement (ISDS) procedures.

2. THE NEED FOR SUPRA-NATIONAL DISPUTE RESOLUTION MECHANISMS BETWEEN STATES AND PRIVATE INVESTORS

2.1 In the era of globalisation, the importance of foreign direct investment as a necessary element in the economic growth of a country cannot be gainsaid. It is widely accepted that such investment will only occur if foreign investors are assured of effective legal protection against the possibility of State takeover and expropriation, without proper compensation, of their assets and investment in the countries in which they might invest.

2.2 The provisions for such protection of foreign investment are commonly contained in international investment Treaty concluded among States and/or with a regional economic integration organization such as the European Union. The term "investment treaty" for these purposes means *any* bilateral or multilateral treaty (including any treaty commonly referred to as a free trade agreement, economic integration agreement,

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4.10.1993; Republic of the Philippines - 3.12.1980; State of Qatar - 27.10.2009; Russian Federation - 6.4.1989; Saint Lucia - 18.1.1983; Republic of Senegal - 7.5.1980; Republic of Serbia (with Exchange of Notes) - 6.11.2002; Republic of Sierra Leone - 13.1.2000; Republic of Singapore- 22.7.1975; Republic of South Africa (as supplemented by 20.9.1994 Protocol to the Agreement) - 25.11.1997; Democratic Socialist Republic of Sri Lanka - 13.2.1980; Kingdom of Swaziland - 5.5.1995; United Republic of Tanzania - 7.1.1994; Kingdom of Thailand - 28.11.1978; Kingdom of Tonga - 22.10.1997; Republic of Trinidad and Tobago - 23.7.1993; Republic of Tunisia -14.3.1989; Republic of Turkey - 15.3.1991; Turkmenistan - 9.2.1995; Republic of Uganda - 24.4.1998; Ukraine - 10.2.1993; United Arab Emirates - 8.12.1992; Eastern Republic of Uruguay - 21.10.1991; Republic of Uzbekistan - 24.11.1993; Republic of Vanuatu - 22.12.2003; Bolivarian Republic of Venezuela - 15.3.1995; Socialist Republic of Vietnam - 1.8.2002; Yemen Arab Republic- 25.2.1982; Republic of Zambia - 27.11.2009; Republic of Zimbabwe - 1.3.1995.

[3] http://investmentpolicyhub.unctad.org/IIA/CountryBits/221#iiaInnerMenu

trade and investment framework or cooperation agreement, or bilateral investment treaty) which contains

- provisions on the protection of investments or investors, and
- a right for investors to resort to arbitration against contracting parties to that investment treaty.

2.3 The 1965 Washington Convention on the Settlement of Investment Disputes ("the ICSID Convention") was concerned with investment arbitration disputes between State parties and commercial private investors. It set up the International Centre for Settlement of Investment Disputes which provides institutional and procedural support to conciliation commissions, tribunals, and other committees which conduct arbitration or conciliation proceedings between one of the centre's contracting member states and a national of another contracting member state. The ICSID Convention has more than 150 State parties, most of which are not EU Member States, and which were parties prior to the UK's accession to the then European Economic Community in 1973. Article 54(1) of the ICSID Convention establishes obligations for all Contracting parties to recognise and enforce awards:

> "Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State."

2.4 Reflecting the terms of the ICSID Convention, registration of an ICSID award before a national court of a Contracting State for its enforcement is a matter of right. There is no equivalent in ICSID Convention which might allow a national court to refuse to recognise or enforcement an arbitration award, such as is provided for in Part V of the 1958 New York Convention on international commercial arbitration between private commercial concerns which allows, in broad terms, for the possibility of set aside applications of international arbitral awards to be made in national courts of New York Convention contracting States on grounds such as: lack of capacity of the parties to conclude an arbitration agreement; lack of a valid arbitration agreement; lack of notice of appointment of an arbitrator or of the arbitral proceedings or inability of a party to present its case; the award deals with matters not covered by the submission to arbitration; the composition of the arbitral tribunal or the conduct of arbitral proceedings are contrary to the effective agreement of the parties; non-arbitrability of the subject-matter of the dispute or; violation of public policy.

2.5 Instead, the principles for recognition of ICSID awards in the UK were recently set out by Blair J. in *Micula v. Romania* [2017] EWHC 31 (Comm) at paras 48-52 as follows:

> "48. The Arbitration (International Investment Disputes) Act 1966 implemented the ICSID Convention in the UK.
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> 49. Section 1(2) of the 1966 Act provides that a person seeking recognition or enforcement of a Convention award
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> > "shall be entitled to have the award registered in the High Court".
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> 50. The award is not to be registered, however, if the pecuniary obligations it imposes have been wholly satisfied (s. 1(5)). There is an issue between the parties on this point.
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> 51. Section 2(1) of the 1966 Act provides for the effects of registration in accordance with Art. 54 of the ICSID Convention, effectively equating a registered Convention award to a judgment of the High Court:
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> > i) As respects the pecuniary obligations which it imposes, the award is "of the same force and effect for the purposes of execution as if it had been a judgment of the High Court given when the award was rendered pursuant to the Convention and entered on the date of registration under this Act, …".
> >
> > ii) So far as relates to such pecuniary obligations, "(a) proceedings may be taken on the award, (b) the sum for which the award is registered shall carry interest, [and] (c) the High Court shall have the same control over the execution of the 52.
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> 52, There is no equivalent in the 1966 Act of s. 103 of the Arbitration Act 1996, which contains grounds for the refusal of recognition or enforcement of a New York Convention award, reflecting the grounds provided for in Article V of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).
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> 53. The ICSID Convention operates so as to bind the State signatories, including the United Kingdom, so that
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> > 'unless an ICSID award is revised or annulled under ICSID's own internal procedures, each contracting state must recognise an ICSID award as if it were a final judgment of its own national courts and enforce the obligation imposed by that award…only an ICSID annulment committee may annul the award. Setting aside or any other review of ICSID awards by domestic courts is not available' (Nigel Blackaby, Constantine Partasides, et al. *Redfern and Hunter on International Arbitration* (6th ed, 2015), §11.125-11.127; and see Rudolf Dolzer and Christoph Schreuer, Principles of International Investment Law, (2nd ed., 2012), p.310-311, and *AIG Capital Partners Inc v Republic of Kazakhstan* [2006] 1 WLR 1420 at [71], Aikens J)."

2.6 Although the concept of the need for protection of investors undoubtedly originally developed within the context of private investment from developed countries to the developing world. Many of these cases invoked bilateral investment treaties (BITs), most of them dating back to the 1990s and earlier. The more recent trend, however, is

for new cases increasingly to be brought against countries with developed economies The most frequently invoked treaty by foreign investors against sovereign States is the Energy Charter Treaty (to which the EU, in addition to the Member States, is a party) followed by the North American Free Trade Agreement (NAFTA). Among the State conduct most frequently challenged by investors are legislative reforms in the renewable energy sector, alleged direct expropriations of investments, alleged discriminatory treatment, and revocation or denial of licences or permits.

2.7 As greater prominence is given to the role of IIAs and their potential to restrict the freedom of sovereign States to make policy and implement legislation which may impact upon the property rights of foreign investors, there has been growing public calls for greater transparency in the adjudication and dispute settlement mechanisms embodied in these treaties and for an acknowledgment that the public interest is paramount and must not be undermined by the provisions of any IIA.

2.8 The fear is that ISDS effectively elevate the interests of trans-national capital to a status greater than that of sovereign States, in enabling foreign investors to challenge the right of independent countries and their governments to regulate and determine their own affairs. It all comes back to sovereignty and to a general anxiety that globalisation carries within its wake disempowerment and disenfranchisement.

3. EU LAW, BITS AND ISDS

3.1 As set out in the EU's Communication of 7 July 2010 "*Towards a Comprehensive European International Investment Policy*", the EU is both the world's leading host and source of Foreign Direct Investment.

3.2 Moreover, EU Member States have individually concluded almost "*half of the investment agreements currently in force around the world*",[4] with a total of almost 1,200 agreements that cover all forms of investment. EU Member States have historically concluded these treaties themselves, independently of the EU, as so-called

[4] Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, "*Towards a comprehensive European international investment policy*", 7 July 2010 (http://trade.ec.europa.eu/doclib/docs/2010/july/tradoc_146307.pdf) at p 4.

"extra-EU" BITs. The UK alone currently has 93 extra-EU BITs in force. As we noted above, ten of these are concluded with countries in the Middle East.

3.3 The Treaty of Lisbon added "foreign direct investment" to the list of matters falling under the EU's common commercial policy. Article 207(1) of the Treaty on the Functioning of the European Union (TFEU) now provides that

> "1. The common 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.
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> The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.

3.4 Article 3(1)(e) TFEU specifies that the EU has exclusive competence with respect to the common commercial policy. The extent to which Member States retain any legal competence in relation to the conclusion of international agreements concerning foreign direct investment will be examined in more details below. It is however clear that the EU itself has legal competence to negotiate and conclude such Treaties in its own right.

3.5 In order to understand the implications of EU competence in the matter of foreign direct investment it is necessary to distinguish among three situations in which EU law currently interacts with investor State dispute settlement as follows:

(1) Disputes between private investors in one Member State against the government of another Member State (intra-EU BITs)

(2) Disputes between private investors in one Member State against the government of a non EU Member State (extra-EU BITs).

(3) Disputes under reference to investment treaties concluded by the European Union EU-third country BITs).

Intra-EU BITs and ISDS

3.6 Disputes between private investors in one Member State against the Government of another Member State are referred to as intra-EU ISDS. The European Commission takes the view that agreements to submit to arbitration contained within intra-EU BITs, are contrary to EU law, because incompatible with provisions of the EU Treaties, and

should therefore be considered to be invalid and unenforceable. [5] The Commission has recently issued a reasoned opinion under the infringement procedure under Article 258 TFEU to a number of EU Member States to the effect that they must terminate their intra-EU bilateral investment treaties.

3.7 At the time of writing there was a case pending before the CJEU on a preliminary reference from the German *Bundesgerichtshof* on this point. In Case C-284/16 *Slovak Republic v Achmea BV* in which the CJEU has been asked whether all or any of Article 18 TFEU (prohibiting discrimination on grounds of nationality) Article 267 TFEU (giving the CJEU jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union) and/or Article 344 TFEU (which specifies that "Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein") preclude the application of a provision for submissions to arbitration contained in a bilateral investment protection agreement concluded between two Member States of the European Union.

3.8 The BIT in question was concluded between Germany and Slovakia before the latter acceded to the European Union. The arbitration clause (which allowed an investor of a contracting State, in the event of a dispute concerning investments in the other contracting State, to bring proceedings against the latter State before an arbitration tribunal) was invoked by a German investor *after* Slovakia had joined the EU, thereby making the BIT at issue one which became wholly internal to the European Union.

Extra-EU BITs and ISDS

3.9 As we have noted, the Member States of the European Union are individually already party to around 1,400 investment agreements in total with third countries. Under

[5] See however, PCA Case No 2008-13 *Eureko BV v Slovak Republic* 10 October 2010 (Permanent Court of Arbitration) available online at http://ita.law.uvic.ca/documents/EurekovSlovakRepublicAwardonJurisdiction.pdf rejecting the claims by the European Commission (intervening) that provisions of a bilateral investment treaty on inward investment had been superseded by the TFEU provisions on free movement of capital in the EU

public international law, BITs remain valid and binding on Member States, unless they expire or are replaced by EU agreements relating to the same subject-matter.

3.10 The Lisbon Treaty did not set out any explicit transitional arrangements for investment agreements between EU Member States and third countries, concluded either prior to or after the Lisbon Treaty coming into force. To remedy this gap, on 12 December 2012, the EU adopted Regulation 1219/2012 (the "Transitional Regulation"), establishing transitional arrangements for BITs already concluded between EU Member States and third countries, pending the eventual entry into force of EU-wide investment agreements; it entered into force on 9 January 2013. The EU's intention is to progressively replace extra-EU's BITs with third states by agreements negotiated with and concluded by the EU.

3.11 The key features of the Transitional Regulation are as follows:

(i) all existing BITs with third countries signed before the entry into force of the Lisbon Treaty may remain in force;

(ii) Member States are required to notify the Commission of those BITs;

(iii) where any provisions of the extra-EU BITs are assessed by the Commission to constitute a "serious obstacle" to the negotiation or conclusion of BITs between the EU and third countries, the Commission shall enter into consultations with the Member State concerned to identify the appropriate actions to resolve the matter;

(iv) When Member States intend to enter into negotiations with a third country to amend or conclude a BIT they must seek the authorisation of the Commission. The Commission will authorise these negotiations unless they would be inconsistent with the EU investment policy or EU law, superfluous, or constitute a "serious obstacle" to the negotiation or conclusion of bilateral agreements with third countries by the EU.

(v) Member States must seek the agreement of the Commission before activating any relevant mechanisms for dispute settlement against a third country and shall, where requested by the Commission, activate such mechanisms.

3.12 Once the United Kingdom ceases to be a Member State of the European Union none of the above provisions will continue to apply and, in particular, the European Commission will no longer have any form of supervisory role over the operation and enforcement of BITs concluded by the United Kingdom.

International Investment Agreements (IIAs) concluded by the EU

3.13 In July 2016 the European Commission reached agreement on a final text for a Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada. The European Commission has also reached agreement on a final text for the Free Trade Agreement between the EU and the Republic of Singapore ('the EUSFTA')

3.14 Currently, negotiations of international investment agreements (IIAs) by the EU with a number of countries are underway, including important economies, such as China and the United States. As regards the Middle East, the EU is currently negotiating stand-alone investment agreements with Morocco (which have been ongoing since March 2013) and Tunisia (which have been ongoing since October 2015) as part of Deep and Comprehensive Free Trade Agreements ("DCFTAs"). Negotiating Directives for DCFTAs with Egypt and Jordan were adopted in December 2011, but negotiations have not been yet launched.[6]

3.15 The EU agreements will be subject to the EU's rules for the management of disputes, in line with *Regulation 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party*.[7] That Regulation sets out, among other things, criteria for the apportionment of financial responsibility arising from a dispute as between the EU and the Member State responsible for the treatment in question as well as criteria for determining who must defend the dispute.

4. A CONTINUING ROLE FOR MEMBER STATES IN THE CONCLUSION OF EU IIAS ?

[6] See European Commission, Overview of FTA and Other Trade Negotiations at http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf.

[7] http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.257.01.0121.01.ENG

4.1 In in its judgment in *Re Ratification of the Treaty of Lisbon* [2010] 3 CMLR 13 the German Federal Constitutional Court's (*Bundesverfassengsgericht* or "BVerfGe") gave a narrow interpretation to the EU's post-Lisbon new exclusive competence re investment treaties, noting at paras 348-9, 353(2)-5:

> "348. The common commercial policy, i.e. the worldwide external trade-policy representation of the internal market, is already an exclusive competence of the European Community according to current Community law. [8]
>
> This has, however, not included foreign direct investment, the trade in services and the commercial aspects of intellectual property. The European Community currently does not have competence for direct investment; it only has concurrent competence for the trade in services and the commercial aspects of intellectual property (art.133.5 ECT). This is intended to change with the Treaty of Lisbon. Pursuant to art.3.1(e) TFEU in conjunction with art.207.1 TFEU, the European Union shall have exclusive competence for the common commercial policy including the above-mentioned areas.
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> 348 (1) Accordingly, treaties *inter alia* in the framework of the World Trade Organization (WTO) such as the *General Agreement on Trade in Services (GATS)* and the *Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)* fall under the exclusive competence of the Union.
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> This abolishes the basis of the current case law of the Court of Justice of the European Communities, according to which, due to the mixed competence [9] in this area, the *Agreement Establishing the World Trade Organization (WTO Agreement)* of 15 April 1994 [1994] OJ L336/3, as a so-called mixed agreement, had to be concluded and ratified by the European Community and by the Member States. [10]
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> 349 Thus, *in future, the Union shall have exclusive competence for the conclusion and the ratification of international treaties in the context of the common commercial policy, including those areas newly incorporated into art.207.1 TFEU; the necessity and the possibility a treaty being concluded (also) by the Member States and the connected participation of the national parliaments in accordance with their respective constitutional requirements (art.59.2 of the Basic Law) cease to exist.*

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[8] Opinion 1/94 *Re Competence of the Community to Conclude International Agreements Concerning Services and the Protection of Intellectual Property,* [1994] ECR I-5267 paras 22 et seq.

[9] On the mixed-agreement status of an international agreement see also Opinion 1/78 Re *Draft International Agreement on Natural Rubber, Re* [1979] ECR 2871para.2; and Opinion 2/91 Re *ILO Convention 170 on Chemicals at Work* [1993] ECR I-1061 paras 13 and 39

[10] Opinion 1/94 *Re Competence of the Community to Conclude International Agreements Concerning Services and the Protection of Intellectual Property,* [1994] ECR I-5267, paras 98 and 105.

In contrast, the role of the European Parliament, which, under the current provisions, does not even have to be heard on the conclusion of agreements in the context of the common commercial policy, is strengthened. Under art.207.2 TFEU, a framework for implementing the common commercial policy is established by means of regulations in accordance with the ordinary legislative procedure. The European Parliament must give its consent to the conclusion of treaties under art.218.6(2) TFEU. [11]

...

353 (2) The framework for foreign direct investment must be assessed on a different legal basis. The protection of investment under public international law is an independent category of international law for which the context of world trade is only of marginal importance. [12] The institutional independence reflects the differences of opinion on the protection of property at international level. [13] For decades, far-reaching ideologically motivated differences have existed concerning the socio-political importance of the right to property as a fundamental freedom. [14]

354 Many states have concluded bilateral international agreements concerned with the protection of property in foreign assets. The vast majority of foreign assets, which for the Federal Republic of Germany amounted to 5,004 billion euros in 2007, [15] falls under the scope of application of 126 investment protection agreements currently in force. [16] At the end of 2007, a total of 2,608 bilateral investment protection agreements existed worldwide. [17]

355 The extension of the common commercial policy to "foreign direct investment" (art.207.1 TFEU) confers exclusive competence on the European Union also in this area. Much, however, argues in favour of assuming that the term "foreign direct investment" *only encompasses investment which serves to obtain a controlling interest in an enterprise.* [18] *The consequence of this would be that exclusive*

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[11] See on the extent of the requirement of consent, which has not yet been clarified, Krajewski, "Das institutionelle Gleichgewicht in den auswärtigen Beziehungen", in Herrmann, Krenzler and Streinz (eds), *Die Außenwirtschaftspolitik der Europäischen Union nach dem Verfassungsvertrag* (2006), p.63 (69 et seq.)

[12] See the Agreement on Trade Related Investment Measures [1994] OJ L336/100

[13] See Dolzer and Schreuer, *Principles of International Investment Law* (2008), pp.11 et seq.

[14] See BVerfGE 84, 90 et seq.; 94, 12 et seq.; 112, 1 et seq.

[15] Bundesbank, *Das deutsche Auslandsvermögen seit Beginn der Währungsunion: Entwicklung und Struktur, Monatsbericht 10.2008*, p.19 (table)

[16] Federal Ministry of Economics and Technology, *Übersicht über die bilateralen Investitionsförderungs- und -schutzverträge (IFV) der Bundesrepublik Deutschland* (as per May 27, 2008)

[17] See UNCTAD, World Investment Report 2008, Transnational Corporations, and the Infrastructure Challenge, p.15

[18] See Tietje, *Die Außenwirtschaftsverfassung der EU nach dem Vertrag von Lissabon* (2009), pp.15–16

competence only exists for investment of this type whereas investment protection agreements that go beyond this would have to be concluded as mixed agreements."

4.2 Consistently with this analysis by the BVerG in July 2016 the European Commission declared the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada whose text was finalised in 2016 to be a "mixed agreement". This necessitated its ratifications by each of the member States in accordance with their national constitutional requirements and its approval by the European Parliament. The European Parliament's approval to CETA was given on 15 February 2017. This means that at least those areas within EU exclusive competence (but without the ISDS provisions of CETA) may come into force provisionally. [19] But CETA cannot enter fully

[19] Art. 30.7 CETA provides (emphasis added):

"1. The Parties *shall* approve this Agreement *in accordance with their respective internal requirements and procedures*.

2. This Agreement *shall enter into force* on the first day of the second month following the date the Parties exchange written notifications *certifying that they have completed their respective internal requirements and procedures or on such other date as the Parties may agree*.

3.
(a) The Parties *may* provisionally apply this Agreement from the first day of the month following the date on which the Parties have notified each other that *their respective internal requirements and procedures necessary for the provisional application of this Agreement have been completed* or on such other date as the Parties may agree.

(b) If a Party intends *not* to provisionally apply a provision of this Agreement, it shall first notify the other Party of the provisions that it will *not* provisionally apply and shall offer to enter into consultations promptly. Within 30 days of the notification, the other Party may either object, in which case this Agreement shall *not* be provisionally applied, or provide its own notification of equivalent provisions of this Agreement, if any, that it does not intend to provisionally apply. If within 30 days of the second notification, an objection is made by the other Party, this Agreement shall *not* be provisionally applied. *The provisions that are not subject to a notification by a Party shall be provisionally applied by that Party from the first day of the month following the later notification*, or on such other date as the Parties may agree, provided the Parties have exchanged notifications under sub-paragraph(a).

(c) A Party may terminate the provisional application of this Agreement by written notice to the other Party. Such termination shall take effect on the first day of the second month following that notification.

(d) If this Agreement, *or certain provisions of this Agreement*, is provisionally applied, the Parties shall understand the term "entry into force of this Agreement" as meaning the date of provisional application. *The CETA Joint Committee and other bodies established under this Agreement may exercise their functions during the provisional application of this Agreement*. Any decisions adopted in the exercise of their functions will cease to be effective if the provisional application of this Agreement is terminated under subparagraph (c).

and finally into force unless and until ratified by the Member States' national parliaments (and, at least in the case of Belgium, also approval by its regional/sub-national legislatures).

4.3 There was at the time of writing a request made under and in terms of Article 218(11) TFEU by the Commission for an Opinion of the CJEU (Opinion 2/15, notice of which was published in the OJEU of 3 November 2015) on issues arising from a draft free trade agreement (FTA) with Singapore in which the Court is asked to rule on the following questions:

> **"Question submitted to the Court**
> Does the Union have the requisite competence to sign and conclude alone the Free Trade Agreement with Singapore? More specifically:
> - Which provisions of the agreement fall within the Union's exclusive competence?
> - Which provisions of the agreement fall within the Union's shared competence? And
> - Is there any provision of the agreement that falls within the exclusive competence of the Member States?"

4.4 In an exhaustive analysis of the relevant law, Advocate General Sharpston advised in her AG Opinion (ECLI:EU:C:2016:992, 21 December 2016) that

> "1. The Free Trade Agreement envisaged between the European Union and the Republic of Singapore ('the EUSFTA') can be concluded only by the European Union and the Member States acting jointly.
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> 2. The European Union enjoys exclusive external competence as regards the parts of the EUSFTA which comprise the provisions falling within the common commercial policy, namely:
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> – objectives and general definitions (Chapter 1);
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> – trade in goods (Chapters 2 to 6);
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> – trade and investment in renewable energy generation (Chapter 7);
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> – trade in services and government procurement (Chapters 8 and 10), under exclusion of those parts of the EUSFTA applying to transport services and services inherently linked to transport services;
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> – foreign direct investment (Chapter 9, Section A);

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4. Canada shall submit notifications under this Article to the General Secretariat of the Council of the European Union or its successor. The European Union shall submit notifications under this Article to Canada's Department of Foreign Affairs, Trade and Development or its successor."

– the commercial aspects of intellectual property rights (Chapter 11 under exclusion of the provisions relating to the non-commercial aspects of those rights);

– competition and related matters (Chapter 12); and

– trade and sustainable development in so far as the provisions in question primarily relate to commercial policy instruments (Chapter 13, under exclusion of the provisions relating to the conservation of marine and biological resources and the provisions laying down fundamental labour and environmental standards and thus falling within the scope of either social policy or environmental protection policy).

The European Union also enjoys exclusive external competence as regards the parts of the EUSFTA (Chapter 13) relating to the conservation of marine and biological resources.

The European Union also enjoys exclusive external competence as regards the provisions of the EUSFTA (Chapter 8) concerning trade in rail and road transport services.

The European Union also enjoys exclusive external competence in respect of the matters covered by Section B in Chapter 9, Articles 13.16 and 13.17, Chapters 14 to 17 of the EUSFTA in so far as those provisions apply to (and are therefore ancillary to) the parts of the EUSFTA for which the European Union enjoys exclusive external competence.

3. The European Union's external competence is shared with the Member States with respect to the following components of the EUSFTA:

- the provisions on trade in air transport services, maritime transport services, and transport by inland waterway, including services inherently linked to those transport services (Chapter 8);

- the provisions on types of investment other than foreign direct investment (Chapter 9, Section A);

- the provisions on government procurement in so far as they apply to transport services and services inherently linked to transport services (Chapter 10);

- the provisions relating to the non-commercial aspects of intellectual property rights (Chapter 11);

- the provisions laying down fundamental labour and environmental standards and thus falling within the scope of either social policy or environmental protection policy (Chapter 13); and

- the matters covered by Section B of Chapter 9, Articles 13.16 and 13.17, and Chapters 14 to 17 of the EUSFTA in so far as those provisions apply to (and are therefore ancillary to) the parts of the EUSFTA for which the European Union enjoys shared external competence.

> 4. The European Union has no external competence to agree to be bound by Article 9.10.1 of the EUSFTA (Chapter 9, Section A), terminating bilateral agreements concluded between certain Member States and Singapore. That competence belongs exclusively to those Member States."

4.5 AG Sharpston she distinguishes "direct investment" from "portfolio investment" (which is said to be characterised by the absence of an "intention to influence the management or control of a company" [20]) defining foreign *direct* investments (para 322) as

> "investments made by natural or legal persons of a third State in the European Union and investments made by EU natural or legal persons in a third State which serve to establish or maintain lasting and direct links, in the form of effective participation in the company's management and control, between the person providing the investment and the company to which that investment is made available in order to carry out an economic activity."

4.6 The complexity of the analysis required to distinguish between the exclusive competence of the EU and the competence it continues to share with the member States in the area of international investment outside the EU means that in practice, notwithstanding the fact that foreign direct investment now falls within the EU exclusive competence, it is likely that the Member States individual approval and ratification will be sought by the EU in its future IIAs. This may well mean that some negotiated agreement with the EU never enter force because not approved even by one member State in accordance with its particular requirements.

4.7 From the point of view of the UK this does not perhaps augur well for the conclusion and entry into force any post-Brexit trade and investment agreement which might be negotiated between the UK and the continuing EU. It does however mean that the post-Brexit UK will be able perhaps more readily and immediately than the EU to conclude future BITs with non-EU countries.

5. THE DEMANDS FOR TRANSPARENCY IN INVESTOR-STATE DISPUTE RESOLUTION

5.1 Traditionally, investor-state dispute settlement has been conducted on the basis of international commercial arbitration rules. But one of the most notable characteristics of commercial arbitration is the emphasis on confidentiality and the privacy of the proceedings. Individual arbitration decisions concluded in a purely commercial context

[20] Court of Justice, judgment of 21 October 2010, case C-81/09, *Idrima Tipou AE v. Ipourgos Tipou kai Meson Mazikis Enimerosis*, para. 48; Court of Justice, judgment of 10 November 2011, case C-212/09, *Commission v. Portugal*

are not generally published and there is generally no right of appeal on the merits against a decision of an arbitration tribunal.

5.2 While this model might well appeal to the commercial interests of private parties (in terms of minimising any reputation damage that a dispute and its adjudication might cause) there is, a growing consensus that such opacity/lack of transparency is inappropriate for investor-state dispute settlement. This is because Investor State Disputes normally involve a private investor challenging the lawfulness of a decision by a State as being incompatible with respect for the investor's private property rights.

5.3 Investor-State dispute settlement may concern disputes raising questions relating to public policies or impact public finances. The fear is Investor State Dispute settlement may involve the elevation of international capitalists' private property rights over the ability of States to make regulations within their national territory in what the legislative/government authorities of the State – and the electorates to whom they are democratically accountable to – consider to be the public interest without being exposed to unsustainable claims for compensation for alleged loss in value occasioned to a private investment by the implementation of the regulation under challenge.

5.4 The United Nations Conference on Trade and Development (UNCTAD) has proposed significant reform of the current system for ISDS, considering that establishment of an International Investment Court provides the best solution to ensure a democratic, fair, transparent and equitable system.

5.5 In the meantime the United Nations Commission on International Trade Law ("UNCITRAL") (which was formed in 1966 and which co-operates with WTO in developing the rules on international trade with a view to contributing to the removal of legal barriers to, and promoting the development of, international trade) adopted on 10 July 2013 rules on transparency for investor-state dispute settlement ("the Transparency Rules"), which were in turn endorsed by the United Nations General Assembly on 16 December 2013. These provide for all documents to be made public (both decisions of the tribunal and submissions of the parties), for hearings to be open to the public and for interested parties (civil society) to make submissions to the tribunal. Appropriate protections for confidential information are provided, but these do not go beyond comparable protections in domestic courts. The rules became effective on 1 April 2014

and apply automatically to investor-state dispute settlement arising on the basis of treaties concluded after 1 April 2014 where a reference was made therein to UNCITRAL Arbitration rules.

5.6 The UNCITRAL Transparency Rules do not apply arbitrations based on treaties concluded prior 1 April 2014. A multilateral convention which would facilitate the application of the UNCITRAL Transparency Rules to existing investment treaties was concluded on 9 July 2014 and the Convention adopted by the United Nations General Assembly on 10 December 2014 and opened for signature on 17 March 2015

The EU response to the demands for transparency in IIAs

5.7 The EU has sought to (i) integrate the UNCITRAL Rules on transparency for Investor-to-State Dispute Settlement in all of its IIA negotiations and (ii) has proposed that the UNCITRAL Transparency Rules be applied to existing extra-EU BITs and other IIA's the EU already has in place. This is seen as important as Investor-State dispute settlement may concern disputes raising questions relating to public policies or impact public finances.

5.8 The UNCITRAL Transparency rules provide a base line for the transparency to be afforded to ISDS arrangements falling within the ambit of EU law. Examples of how the EU proposes to increase the transparency of these processes beyond the base-line requirements of the UNCITRAL Transparency rules is seen in the terms of the separate investment chapter added to the EU-Singapore FTA, which together with CETA contains the first ever investment chapters negotiated by the EU in any agreement since the EU gained competence for investment under the Lisbon Treaty in 2009. The models used in EU-Singapore FTA and in CETA are not identical. The CETA text on ISDS is currently the basis for negotiation in the EU Japan FTA.

5.9 The European Economic and Social Committee gives voice to criticism of these new ISDS provisions in IIAs concluded by the EU noting:

> "[I]n the opinion of many, ISDS remains an imbalanced, highly expensive process which reins in democracy, has no right of appeal and puts at risk a government's right

> to regulate by providing foreign investors with rights beyond those enshrined in national constitutions and above those enjoyed by domestic investors." [21]

Investor Dispute Settlement EU-Singapore FTA

5.10 The Free Trade Agreement negotiated between the European Union and the Republic of Singapore ('the EUSFTA') includes among its provisions Article 9.28 EUSFTA which is based on the ICSID Convention. Article 9.28 of the EUSFTA concerns the relationship between, on the one hand, the jurisdiction of arbitral tribunals within the meaning of Section B of Chapter 9 ('an EUSFTA Chapter 9 arbitral tribunal') and, on the other hand, other (national or international) courts and tribunals and other processes for invoking the responsibility of another Party (Article 9.28.1) and arbitration panels within the meaning of Chapter 15 of the EUSFTA ('an EUSFTA Chapter 15 arbitration panel') (Article 9.28.2).

5.11 Where a Party and an investor of another Party have consented to submit their dispute to arbitration under Section B of Chapter 9, that dispute may (in principle) not be submitted to the jurisdiction of another court or tribunal through either diplomatic protection or an international claim. Two exceptions apply: first, where the Party has failed to abide by or comply with the award rendered by an EUSFTA Chapter 9 arbitral tribunal (Article 9.28.1) and, second, where an EUSFTA Chapter 15 arbitration panel has jurisdiction to hear a dispute with respect to a measure of general application (Article 9.28.2).

Investor Dispute Settlement CETA Tribunal

5.12 Article 30.6 CETA specifies under the heading "Private rights" that:

> "1. Nothing in this Agreement shall be construed as conferring rights or imposing obligations on persons other than those created between the Parties under public international law, nor as permitting this Agreement to be directly invoked in the domestic legal systems of the Parties.
>
> 2. A Party shall not provide for a right of action under its domestic law against the other Party on the ground that a measure of the other Party is inconsistent with this Agreement."

[21] Opinion of the European Economic and Social Committee on investor protection and investor to state dispute settlement in EU trade and investment agreements with third countries (May 2015) [2015] OJ C-332/06 at para 1.9

5.13 As we have seen, instead of allowing the domestic/municipal courts jurisdiction over disputes, the norm to date in international investment treaties containing provisions on Investor-State Dispute Settlement (ISDS) had been to allow private foreign investors to challenge government measures before an *ad hoc* international arbitral tribunal whose members are appointed by the disputing parties themselves.

5.14 CETA departs from this model by providing in Section F of Chapter 8 (Articles 8.17 to 8.45 CETA) that among the bodies which are to be established under the Agreement are what amounts to an international investment court system [22] with a permanent roster of arbitrators appointed by Canada and the EU constituted as the "CETA Joint Committee" to consider and make binding rulings on claims of alleged breach of the Agreement. Article 26.1(1) specifies that the "CETA Joint Committee" comprises representatives of the European Union and representatives of Canada and that "the CETA Joint Committee shall be co-chaired by the Minister for International Trade of Canada and the Member of the European Commission responsible for Trade, or their respective designees."

5.15 Members the CETA Tribunal have to be independent once appointed,[23] and the proceedings before the CETA Tribunal transparent. [24]

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[22] Article 8.29 CETA appears to envisage the eventual development more general international investment court system which will supersede these CETA specific provisions by providing as follows

> **"Establishment of a multilateral investment tribunal and appellate mechanism**
>
> The Parties shall pursue with other trading partners the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes. Upon establishment of such a multilateral mechanism, the CETA Joint Committee shall adopt a decision providing that investment disputes under this Section will be decided pursuant to the multilateral mechanism and make appropriate transitional arrangements."

[23] See Article 8.30(1) CETA *Ethics*

> 1. The Members of the Tribunal shall be independent. They shall not be affiliated with any government (For greater certainty, the fact that a person receives remuneration from a government does not in itself make that person ineligible.). They shall not take instructions from any organisation, or government with regard to matters related to the dispute. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest. They shall comply with the International Bar Association Guidelines on Conflicts of Interest in International Arbitration or any supplemental rules adopted pursuant to Article 8.44.2. In addition, upon appointment, they shall refrain from acting as counsel or as party-appointed expert or witness in any pending or new investment dispute under this or any other international agreement."

[24] See Article 8.36 CETA on *Transparency of proceedings*

5.16 Article 8.27 CETA contains the provisions concerning the constitution of the Tribunal to decide claims submitted pursuant to Article 8.23 CETA. It provides, so far as relevant, as follows:

> "2. The CETA Joint Committee shall, upon the entry into force of this Agreement, appoint fifteen Members of the Tribunal. Five of the Members of the Tribunal shall be nationals of a Member State of the European Union, five shall be nationals of Canada and five shall be nationals of third countries. (Either Party may instead propose to appoint up to five Members of the Tribunal of any nationality. In this case, such Members of the Tribunal shall be considered to be nationals of the Party that proposed his or her appointment for the purposes of this Article.)
>
> 3. The CETA Joint Committee may decide to increase or to decrease the number of the Members of the Tribunal by multiples of three. Additional appointments shall be made on the same basis as provided for in paragraph 2.
>
> 4. The Members of the Tribunal shall possess the qualifications required in their respective countries for appointment to judicial office, or be jurists of recognised competence. They shall have demonstrated expertise in public international law. It is desirable that they have expertise in particular, in international investment

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"1. The UNCITRAL Transparency Rules, as modified by this Chapter, shall apply in connection with proceedings under this Section.

2. The request for consultations, the notice requesting a determination of the respondent, the notice of determination of the respondent, the agreement to mediate, the notice of intent to challenge a Member of the Tribunal, the decision on challenge to a Member of the Tribunal and the request for consolidation shall be included in the list of documents to be made available to the public under Article 3(1) of the UNCITRAL Transparency Rules.

3. Exhibits shall be included in the list of documents to be made available to the public under Article 3(2) of the UNCITRAL Transparency Rules.

4. Notwithstanding Article 2 of the UNCITRAL Transparency Rules, prior to the constitution of the Tribunal, Canada or the European Union as the case may be shall make publicly available in a timely manner relevant documents pursuant to paragraph 2, subject to the redaction of confidential or protected information. Such documents may be made publicly available by communication to the repository.

5. Hearings shall be open to the public. The Tribunal shall determine, in consultation with the disputing parties, the appropriate logistical arrangements to facilitate public access to such hearings. If the Tribunal determines that there is a need to protect confidential or protected information, it shall make the appropriate arrangements to hold in private that part of the hearing requiring such protection.

6. Nothing in this Chapter requires a respondent to withhold from the public information required to be disclosed by its laws. The respondent should apply those laws in a manner sensitive to protecting from disclosure information that has been designated as confidential or protected information."

law, in international trade law and the resolution of disputes arising under international investment or international trade agreements.

5. The Members of the Tribunal appointed pursuant to this Section shall be appointed for a five-year term, renewable once. However, the terms of seven of the 15 persons appointed immediately after the entry into force of the Agreement, to be determined by lot, shall extend to six years. Vacancies shall be filled as they arise. A person appointed to replace a Member of the Tribunal whose term of office has not expired shall hold office for the remainder of the predecessor's term. In principle, a Member of the Tribunal serving on a division of the Tribunal when his or her term expires may continue to serve on the division until a final award is issued.

6. The Tribunal shall hear cases in divisions consisting of three Members of the Tribunal, of whom one shall be a national of a Member State of the European Union, one a national of Canada and one a national of a third country. The division shall be chaired by the Member of the Tribunal who is a national of a third country." [...]

9. Notwithstanding paragraph 6, the disputing parties may agree that a case be heard by a sole Member of the Tribunal to be appointed at random from the third country nationals. The respondent shall give sympathetic consideration to a request from the claimant to have the case heard by a sole Member of the Tribunal, in particular where the claimant is a small or medium-sized enterprise or the compensation or damages claimed are relatively low. Such a request shall be made before the constitution of the division of the Tribunal."

5.17 Under Article 28 CETA, a CETA Appellate Tribunal is established to review awards by the first instance Tribunal. Article 28(2) CETA provides that:

"2. The Appellate Tribunal may uphold, modify or reverse a Tribunal's award based on:

(a) errors in the application or interpretation of applicable law;

(b) manifest errors in the appreciation of the facts, *including the appreciation of relevant domestic law*;

(c) the grounds set out in Article 52(1) (a) through (e) of the ICSID Convention, in so far as they are not covered by paragraphs (a) and (b)."

5.18 A claim may be submitted to the CETA Tribunal by: (a) an investor of a Party on its own behalf; or (b) an investor of a Party, on behalf of a locally established enterprise which it owns or controls directly or indirectly. But, in principle, an investor may only submit a claim to a CETA Tribunal if it "withdraws or discontinues any existing proceeding before a tribunal or court under domestic or international law with respect to a measure alleged to constitute a breach referred to in its claim" and "waives its right to initiate any claim or proceeding before a tribunal or court under domestic or international law with

respect to a measure alleged to constitute a breach referred to in its claim: Article 8.22(1)(f) and (g) CETA.

5.19 The European Union or a Member State of the European Union may potentially be respondents in these proceedings before the CETA Tribunals. If the measures identified in the notice to the CETA Tribunal are exclusively measures of a Member State of the European Union, the Member State shall be the respondent; if the measures identified in the notice include measures of the European Union, the European Union shall be the respondent (Article 8.21(4) CETA). The EU is responsible for defending any claims alleging a violation of rules included in an agreement which fall within the EU's exclusive competence, irrespective of whether the treatment at issue is afforded by the EU itself or by a Member State. The EU itself bears the financial responsibility for and resulting from ISDS arbitration proceedings where the treatment complained is afforded by an EU institution, body, office or agency. The Member State bears the financial responsibility where the treatment concerned is afforded by that Member State, except where the Member State acts in a manner required by EU Union law, for example in transposing an EU directive, and the action complained of is required as a matter of EU law: see Regulation (EU) No 912/2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals stablished by international agreements to which the European Union is party.

5.20 Article 8.34 CETA gives the CETA Tribunals power to recommend or "order an interim measure of protection to preserve the rights of a disputing party or to ensure that the Tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the Tribunal's jurisdiction."

5.21 Article 8.39 CETA on *Final award* states:

> "1. If the Tribunal makes a final award against the respondent, the Tribunal may only award, separately or in combination:
>
> (a) monetary damages and any applicable interest;
> (b) restitution of property, in which case the award shall provide that the respondent may pay monetary damages representing the fair market value of the property at the time immediately before the expropriation, or impending expropriation became known, whichever is earlier, and any applicable interest in lieu of restitution, determined in a manner consistent with Article 8.12.

2. Subject to paragraphs 1 and 5, if a claim is made under Article 8.23.1(b):

(a) an award of monetary damages and any applicable interest shall provide that the sum be paid to the locally established enterprise;
(b) an award of restitution of property shall provide that restitution be made to the locally established enterprise;
(c) an award of costs in favour of the investor shall provide that it is to be made to the investor; and
(d) the award shall provide that it is made without prejudice to a right that a person, other than a person which has provided a waiver pursuant to Article 8.22, may have in monetary damages or property awarded under a Party's law.

3. Monetary damages shall not be greater than the loss suffered by the investor or, as applicable, the locally established enterprise, reduced by any prior damages or compensation already provided. For the calculation of monetary damages, the Tribunal shall also reduce the damages to take into account any restitution of property or repeal or modification of the measure.

4. The Tribunal shall not award punitive damages.

5. The Tribunal shall order that the costs of the proceedings be borne by the unsuccessful disputing party. In exceptional circumstances, the Tribunal may apportion costs between the disputing parties if it determines that apportionment is appropriate in the circumstances of the claim. Other reasonable costs, including costs of legal representation and assistance, shall be borne by the unsuccessful disputing party, unless the Tribunal determines that such apportionment is unreasonable in the circumstances of the claim. If only parts of the claims have been successful the costs shall be adjusted, proportionately, to the number or extent of the successful parts of the claims."

5.22 Article 8.31 CETA makes the following provision in relation to *Applicable law and interpretation*

"1. When rendering its decision, the Tribunal established under this Section shall apply this Agreement as interpreted in accordance with the *Vienna Convention on the Law of Treaties*, and other rules and principles of international law applicable between the Parties.

2. 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"

Towards an international multilateral Investment Court system with the EU ?

5.23 The Commission and the Council have being pushing in the context of the now defunct TTIP but also in CETA the idea of a reformed ISDS an 'Investment Court System' (ICS)) which will involve the establishment of a multilateral investment court which will, in the long term, become the body responsible for resolving disputes between investors and States. Thus even on the signing of CETA by the EU the Commission has stated is committed to further review, without delay, of the CETA dispute settlement mechanism. The Commission and Council have issued a statement to the effect that

> "there will be a rigorous process for selecting all judges of the Tribunal and the Appellate Tribunal, under the control of the European Union institutions and the Member States, with the aim of guaranteeing the judges' independence and impartiality, as well as the highest degree of competence.
>
> As regards the European judges in particular, the selection process must also ensure that the richness of European legal traditions is reflected, above all over the long term.
>
> Consequently:
>
> - Candidate European judges will be nominated by the Member States, which will also participate in the assessment of candidates.
>
> - Without prejudice to the other conditions set out in Article 8.27.4 of the CETA agreement, the Member States will propose candidates who fulfil the criteria set out in Article 253(1) TFEU.
>
> - The Commission, in consultation with the Member States and Canada, will ensure an equally rigorous assessment of the candidacies of the other judges of the Tribunal.
>
> - The judges will be paid by the European Union and Canada on a permanent basis.
>
> - The system should progress towards judges who are employed full time.
>
> The ethical requirements for members of the Tribunals, already provided for in CETA, will be set out in detail as soon as possible and allowing sufficient time so that Member States can consider them in their ratification processes, in an obligatory and binding code of conduct (which is also already provided for in CETA). This Code will include in particular:
>
> - detailed rules of conduct applicable to candidates for appointment as members of the Tribunal or the Appellate Tribunal, in particular concerning of disclosure of their past and current activities that might affect their appointment or the exercise of their duties;
>
> - detailed rules of conduct applicable to members of the Tribunal and the Appellate Tribunal during their term of office;

- detailed rules of conduct applicable to members of the Tribunal and the Appellate Tribunal at the end of their term of office; including the prohibition of the exercise of specific duties or professions for a specified period after the end of their term of office;

- a sanction mechanism in the event of non-compliance with the rules of conduct which is effective and fully respects the independence of judicial power.

There will be better and easier access to this new court for the most vulnerable users, namely SMEs and private individuals. To that end:

- The adoption by the Joint Committee of additional rules, provided for in Article 8.39.6 of the CETA, intended to reduce the financial burden imposed on applicants who are natural persons or small and medium-sized enterprises, will be expedited so that these additional rules can be adopted as soon as possible.

- Irrespective of the outcome of the discussions within the Joint Committee, the Commission will propose appropriate measures of (co)-financing of actions of small and medium-sized enterprises before that Court and the provision of technical assistance

The appeal mechanism laid down in Article 8.28 of the CETA will be organised and improved to render it wholly fit to ensure consistency of decisions rendered at first instance and thus to contribute to legal certainty. This presupposes in particular:

- The composition of the Appellate Tribunal will be organised so as to ensure the greatest possible continuity.

- Each member of the Appellate Tribunal will have the obligation to keep informed of decisions by divisions of the Appellate Tribunal of which he or she is not a member.

- The Appellate Tribunal should have the option to sit as a 'Grand Chamber' in cases raising important questions of principle or on which the divisions of the Appellate Tribunal are divided.

Moreover, the Council supports the European Commission's efforts to work towards the establishment of a multilateral investment court, which will replace the bilateral system established by CETA, once established, and according to the procedure foreseen in CETA." [25]

5.24 Belgium has advised that it will ask the European Court of Justice for an opinion on the compatibility of the ICS with the European treaties, in particular in the light of Opinion A-2/15. There is, however, a long line of case law from the Court of Justice of the European Union, culminating in its rejection of the terms of the draft agreement for

[25] See Statement by the Commission and the Council on investment protection and the Investment Court System [2017] OJ L11/20-1

the accession of the EU to the ECHR, that any agreement concluded by the EU or its Member States which has the effect of displacing the CJEU from its pinnacle as the ultimate and final source of judicial power and authority within the EU legal system is contrary to EU law. [26]

6. THE IMPACT OF BREXIT

6.1 The first obvious matter to underscore is that, until it withdraws from the EU, the UK currently remains bound by EU regime in relation to investment agreements. Accordingly:

(i) The UK will not be able to negotiate new BITs with any third countries or renegotiate existing BITs without EU authorisation;

(ii) The UK's Extra EU BITs will have to be interpreted and applied consistently with EU law;

(iii) To the extent that any new IIA's are successfully negotiated and concluded by the EU with any third countries prior to the UK's withdrawal from the EU (e.g. most proximately Morocco and Tunisia), those could, at least provisionally, replace the UK BITs concluded with those countries. Investors would also have to bring claims pursuant to the EU agreements and those disputes will be governed by the EU's dispute resolution rules.

6.2 Moreover, it is unclear presently whether and to what extent the UK would continue to be bound by the Transitional Regulation and any EU IIAs even after it withdraws. The Government's White Paper "*Legislating for the United Kingdom's withdrawal from the European Union*" (March 2017) states that, pursuant to the "Great Repeal Bill", EU law as it currently exists will be converted into UK law on the day of withdrawal and that historic decisions of the CJEU will continue to be binding on the domestic courts. It may be the case that the Transitional Regulation is not carried across, or that the

[26] See Opinion 2/13 *On the proposed accession of the EU to the European Convention on Human Rights* ECLI:EU:C:2014:2454 (CJEU Full Court). See generally on some of these issues https://www.iisd.org/itn/2017/03/13/the-power-to-conclude-the-new-generation-of-eu-ftas-ag-sharpston-in-opinion-2-15-laurens-ankersmit/

requirement to notify/seek authorisation from the Commission is dispensed with (consistent with the general intention of the Government to dispense with references to EU institutions and bodies). However, no clear intention as regards this particular area of law has been formulated. Moreover, the terms under which the UK will exit the EU are completely unknown and it is uncertain whether the parties will opt to continue to cooperate *vis à vis* their investment policy.

6.3 To the extent that the Transitional Regulation (and any other relevant obligations vis a vis investment agreements) are *not* carried forward into UK law and the UK opts out of the common investment policy, once the UK finally withdraws from the EU, the consequences for third countries are twofold:

i) the UK will not be part of any IIAs eventually concluded between the EU and third countries, and any claims will have to be brought pursuant to the UK BITs.

ii) By a similar token, the UK will be able to retain, renegotiate, and conclude BITs with third countries outside the UK without any limitation.

6.4 There is no reason to believe that the UK's extra-EU BITs with third countries will be affected by its withdrawal from the EU. Similarly, cases currently pending or to be brought under these treaties are unlikely to be so affected.

Brexit and transparency in ISDS

6.5 After Brexit there will be no such Europeanisation replacement of the UK's BITs with third countries. So I suppose we can expect that the UK will try to conclude new BITs with third countries where there is currently no such Treaty.

6.6 Since a post-Brexit UK will not be directly bound by the positions taken by the EU and/or required by EU law in relation to the EU's conclusion of future IIAs, in theory after Brexit the UK could adopt a policy in future BITS not to adopt the UNCITRAL rules on transparency in ISDS. This is unlikely to happen, however. The clear trend in international law is for transparency in the adjudication and dispute settlement aspects of international investment agreements, and it is likely that the UK will follow this movement and in future BITs incorporate the UNCITRAL transparency rules and procedures.

Brexit and Anti-Suit Injunctions

6.7 Another way in which foreign States/investors may be affected by the UK's withdrawal from the EU is in relation to forum in which investor-State arbitrations may be initiated.

6.8 In particular, the English courts at least have historically utilised the mechanism of an "anti-suit injunction" in the context of arbitrations. An anti-suit injunction is an order of the court for a party not to pursue court proceedings in another jurisdiction or to withdraw them where those proceedings were commenced in breach of an arbitration agreement. Accordingly, where an arbitration clause specifies London as the seat of arbitration, attempts to initiate the arbitration in another jurisdiction may be met with an anti-suit injunction from the courts in England and Wales.

6.9 If a party does not comply with the court order and refuses to withdraw proceedings, or initiates them anyway, they may be held in contempt of court and face a fine or custodial sentence. Moreover, third parties deemed to be colluding in the initiation or maintenance of wrongful foreign proceedings may be also be faced with an anti-suit injunction.

6.10 In the context of investor-State arbitrations, to the extent that the seat of arbitration is identified as the UK in any investment agreement (or the UK is deemed to be the "natural forum"), a party to the dispute could seek an anti-suit injunction from the UK courts to restrain any foreign proceedings.

6.11 However, in Case C-185/07 *Allianz SpA v. West Tankers Inc.* EU:C:2009:69 [2009] 1 AC 1138 the CJEU held anti-suit injunctions to be unlawful and inconsistent with the Brussels Regulation 44/2001. In particular, under the Brussels Regulation it is the Member State court which is *first* seized that must rule on its jurisdiction first, against a background that the courts of the Member States are applying common rules of jurisdiction. An anti-suit injunction from the courts of one Member State purporting to prevent parties continuing with proceedings which they have already commenced in another Member State was incompatible with the scheme of the Brussels Convention/Brussels Regulation because "*such an anti-suit injunction also runs counter to the trust which the Member States accord to one another's legal systems and judicial institutions …*": para 30.

6.12 Perhaps from a still unshaken confidence in the superiority of their legal system over all others, the English courts have continued to pronounce anti-suit injunctions in relation to proceedings taken in the courts of third country non-Member States: *Shashoua and others v. Sharma* [2009] EWHC 957 (Comm) [2009] 1 CLC 716.

6.13 The CJEU's decision in *West Tankers* was widely criticized, particularly in the UK, for allowing a party to delay proceedings by initiating the arbitration in a "slow-moving" jurisdiction, thereby blocking the progress of the claim in the contractually agreed forum until a decision is taken by the Court first seized of the matter. In C-536/13 *Gazprom v. Lithuania* EU:C:2015:316 the CJEU held that since arbitral tribunals were *not* courts of a state, an anti-suit injunction in the context of an arbitral award prohibiting a party from bringing certain claims related to the arbitration before a court of a member state did not fall within the scope of the Brussels Regulation 44/2001, which governed only conflicts of jurisdiction between courts of the member states and did not infringe the general principle of mutual trust between the courts of the member States.

6.14 Brexit is likely to have substantial repercussions in this area of Europeanised private international law. The Recast Brussels 1215/2012 (which, with effect from 10 January 2015, sets out the rules determining the proper jurisdiction among EU Member States in disputes on civil and commercial matters) is part of EU law and will, in principle, cease to have any direct applicability within the UK legal order when the UK leaves the EU (unless specific agreement is made in relation to it, including on the issue of the CJEU's continuing jurisdiction authoritatively to determine the uniform meaning to be afforded to the Regulations for all States subject to it). The UK is party to the Lugano Convention and to the Hague Convention on Choice of Court Agreements. What the UK Government's plans are (if any) for this area post-Brexit have not yet been made public. In terms of how Brexit will impact the UK court's use of anti-suit injunctions, as above, the White Paper makes clear that when the UK withdraws from the EU, pursuant to the Great Repeal Bill, historic judgements of the CJEU will continue to be binding on UK Courts. Presumably therefore, the CJEU's decision in *West Tankers* will continue to restrain the UK Courts from issuing anti-suit injunctions against a party initiating proceedings in another EU Member State, unless this particular aspect of EU law is explicitly not carried forward (or it is not otherwise agreed between the EU and UK to continue to cooperate in this area).

6.15 To the extent that this aspect of the law is not carried forward and converted in to UK law, however, parties will be free to pursue anti-suit injunctions against the initiation of proceedings in a foreign jurisdiction whether those proceedings are taking place inside or outside the EU. For those seeking to ensure the swift adjudication of the arbitration, there could be advantages associated with specifying the UK as the seat as any attempts to delay proceedings through initiating them in an alternate jurisdiction could be frustrated by the UK courts. Conversely, those who may wish for some flexibility in relation to the forum of the arbitration, will want to consider carefully their exposure to the risks of a UK court order.

Foreign investors suing UK for financial losses resulting from Brexit ?

6.16 One of the issues that has recently been raised among a number of commentators [27] is that foreign investors might sue – in terms of taking investment arbitration claims for damages against the UK - in respect of their financial losses suffered as a result of changes in the UK's regulatory and legal landscape resulting from Brexit.

6.17 Clearly this issue will depend very much on the terms of any withdrawal agreement negotiated between the UK and the EU 27. But the suggestion at this stage is that foreign owned business undertakings might try to obtain damages from the UK Government on the basis that the UK leaving the EU and the consequent transformation of the regulatory and legislative framework upon which they had invested in the UK violated, if not their rights, then at least their enforceable legisitmate expectations protected under and in terms of the Bilateral Investment Treaties concluded by the UK with their countries of origina – for example China, Hong Kong, Singapore, Mexico or indeed Russia.

6.18 The example given by Glivanos is that of a Mexican-owned bank operating out of the City of London taking the UK to the ISDS arbitration mechanisms provided for under the UK-Mexico BITs seeking damages in respect of the loss of financial „passporting rights" to market its financial services freely throughout the rest of the EU. It is said that legitimate expectations are those which arose on the basis of the conditions offered by or prevailing in the host State at the time the original investment is made.

[27] See Ioannis Glivanos http://verfassungsblog.de/brexit-lawsuits-but-not-as-you-know-them/. See too http://international.nd.edu/events/2017/05/30/can-foreign-investors-sue-the-uk-for-brexit/ and

6.19 It is undoubtedly the case that as a State intergrated into the EU single market the UK did actively promote itself on the international stage as a business friendly environment with relatively liberal line on regulation, but which allowed for foreign businesses based in the UK to access all the benefits of the EU Single Market. The investment by Nissan in car manufacturing in the UK and its plant in Sunderland comes immediately to mind in this regard.

6.20 The suggestion made by Glivanos that it would be difficult for the United Kingdom to make a legally compelling defence before an investement arbitral tribunal to the effect that that the significant regulatory changes resulting from Brexit - and, in particular, the closing off from immediate access to the EU Single Market of a non-EU foreign business which had invested in the UK on the strength of its EU membership – gave rise to no State liability for breach of the foreign investors' legitimate expectations because this was an unavoidable consequence of an internal democratic process within the UK. The whole point about BITs is to *protect* foreign investment against regime change or fundamental regulatory shifts, whether democratically mandated or not, which negatively impact upon the investors' fundamental property rights as recognised as a matter of international law.

6.21 Glivanos adds that even if ultimate legal success for the foreign investor is not assured in any such references to arbitration, by simply referring or threatening to refer the matter to an ISDS, the foreign investor may encourage a special deal to be made in their favour by the UK government, or some offer of financial settlement to be made. The case of Nissan car manufacturers who invested in the UK in Sunderland again comes to mind and the reports that the UK Government has agreed a special deal with them to encourage them to maintain their investment in tke UK after Brexit. But a special deal for one opens the prospects of all foreign investors seeking similar deals from the Government, particularly against a background that one of the generally principles embodied in IIAs is precisely that of non-discrimination.

6.22 In essence, it is said, you don't need to win a case legally to win financially and politically. The anti-democratic aspects of globalisation appear to be coming home to roost. Maybe it is not so easy "to take back control" of one economy and its economic regulation within a globalised world. Perhaps Brexit was not such a good idea after all ?

15 May 2017

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