Institutional Developments in Investor–State Dispute Settlement and Arbitration Under the Auspices of the International Centre for Settlement of Investment Disputes

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One of the seminal characteristics of most modern–day international investment agreements (IIAs) is the provision for access to investor–State dispute settlement (ISDS), through which an investor alleging a violation of the agreement may directly claim against its host State in international arbitration. Protection standards offered to investors through these international law instruments, such as fair and equitable treatment, full protection and security, and a guarantee of 'prompt, adequate and effective'[1] compensation in case of expropriation, have been tested when their provisions came to be interpreted by arbitral tribunals. And it is so that investor–State arbitration evolved into the centrepiece and guarantor of this system of investment protection and was placed in a unique position from which to formulate international investment law.[2] This privileged position of investment arbitration, evident in the proliferation and growing importance of arbitral tribunals and exponential recourse to dispute settlement,[3] has acted as a catalyst bringing to the fore the uncomfortable tension between investment protections and host State regulatory interests, and, by the same token, it has revealed arbitration as part of a problem.[4] It should then not be astonishing that the much–publicised discussion on the need for reform of international investment law started with and focused on the reform of the investor–State dispute settlement mechanism. The debate has recently

[1] On this dictum of the *Hull doctrine*, see OECD (2004), p. 2, ft. 1; Newcombe and Paradell (2009), p. 18; Sornarajah (2011), pp. 414 et seq.; Kuokkanen (2002), pp. 180 et seq.

[2] Titi (2014a), p. 67. See also Lavranos (2010), p. 2.

[3] See UNCTAD (2013), p. 110; UNCTAD (2012), p. 86; ICSID (2011), pp. 25 et seq.; OECD (2006), p. 184; Reinisch (2008); Lavranos (2006), p. 223, with further references.

[4] Titi (2014a), pp. 67–68.

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intensified, and reform is currently underway. Institutional developments that will lead in the long run to systemic changes are reflected in both novel investment treaty provisions and collective efforts made at various international *fora*.

It is worth recalling that investor–State dispute settlement is closely affiliated with the function of the International Centre for Settlement of Investment Disputes (ICSID). Attracting the vast majority of known investment arbitrations, this World Bank institution provides an important backbone to substantive protection offered to foreign investors through international investment agreements, and it is the most influential investment arbitration forum. Advantages and shortcomings of ISDS conducted under ICSID Rules are quasi–synonymous with advantages and shortcomings of ISDS more generally, although, as will be discussed, one of the leading efforts for reform has been conducted outside the World Bank system by the United Nations Commission on International Trade Law (UNCITRAL).

The present contribution purports to examine recent institutional developments affecting either the investor–State dispute settlement mechanism in general or the ICSID system. The chapter is organised in the following manner. First, it explores investment arbitration in numbers. Second, it considers institutional developments specific to the ICSID context, in the post–Latin American ICSID Convention–denunciations era. Third, it focuses on recent developments in the context of EU negotiations and, particularly, on the division of financial responsibility and ISDS provisions in the treaties under negotiation. Fourth, it reviews two issues that have recently come to the spotlight, namely arbitration of sovereign debt restructurings and mass claims, and transparency. A final section concludes.

Dispute Settlement in Numbers (Or the Popularity of ISDS)

Dispute Settlement in General

The popularity of investor–State dispute settlement is manifest in the multiplication of claims that are being filed each year. In 2013, at least 57 new investor–State claims were registered, bringing the total of known investment treaty claims to 568 by the end of that year.[5] A relatively high percentage of these claims were filed against developed countries, and remarkably against Member States of the European Union.[6] This in itself is a noteworthy development, given that industrialised countries, especially EU Member States, have generally been

[5] UNCTAD, Recent Developments in Investor–State Dispute Settlement (ISDS), IIA Issues Note, No. 1, April 2014, UNCTAD/WEB/DIAE/PCB/2014/3, p. 7, available at: http://unctad.org/en/pages/publications/Intl-Investment-Agreements---Issues-Note.aspx.

[6] UNCTAD, Recent Developments in Investor–State Dispute Settlement (ISDS), IIA Issues Note, No. 1, April 2014, UNCTAD/WEB/DIAE/PCB/2014/3, p. 2, available at: http://unctad.org/en/pages/publications/Intl-Investment-Agreements---Issues-Note.aspx.

shielded from investment claims. Treaties concluded by EU Member States have been strongly protective of investor interests, essentially offering European investors protection in their ventures in the developing world as well as the possibility to resort to arbitration against their host State without the expectation of ("reciprocal") claims initiated against the EU Member States.[7] Interestingly, some older bilateral investment treaties (BITs) were concluded on an expressly non-reciprocal basis.[8] One such example is the 1972 BIT concluded between France and Tunisia, which explicitly encouraged *only* the 'development of French investments in Tunisia'.[9] Although the above description belongs now to the history of investment treaties, it testifies to the one–sided interest of EU Member States in the protection of their own investors. In line with this long–standing tradition of concluding treaties with countries with minimal investment in EU Member States, investment claims have generally been initiated by EU investors against third countries. For instance, in 2012 EU investors were at the basis of 60 % of new disputes.[10]

But the new claims reveal that this comfortable position of EU Member States may be slowly changing. Focusing on 2013, six cases were filed against Spain.[11] Disputes involving the country, also claims against the Czech Republic, were born out of measures relating to renewable energy.[12] In September 2013, France faced its first known investor–State claim.[13] More significantly, recent cases registered against EU Member States resulted from the economic and financial crisis in Europe—notably, the *Ping An* (2012)[14] and the *Marfin*[15] cases against Belgium

[7] Titi (2013a), p. 829 (845); Titi (2014a), p. 21.

[8] Banifatemi and von Walter (2013), pp. 247–251.

[9] Convention entre le Gouvernement de la République française et le Gouvernement de la République tunisienne sur la protection des investissements, 1972, Preamble (translation of the author).

[10] European Commission Fact sheet, Investment Protection and Investor-to-State Dispute Settlement in EU agreements, 2013, p. 5. See also UNCTAD, Recent Developments in Investor–State Dispute Settlement, updated for the Multilateral Dialogue on Investment, 28–29 May 2013, IIA Issues Note, No. 1, May 2013, UNCTAD/WEB/DIAE/PCB/2013/3/REV, p. 4.

[11] UNCTAD, Recent Developments in Investor–State Dispute Settlement (ISDS), IIA Issues, No. 1, April 2014, UNCTAD/WEB/DIAE/PCB/2014/3, p. 2, available at: http://unctad.org/en/pages/publications/Intl-Investment-Agreements---Issues-Note.aspx.

[12] UNCTAD, Recent Developments in Investor–State Dispute Settlement (ISDS), IIA Issues Note, No. 1, April 2014, UNCTAD/WEB/DIAE/PCB/2014/3, p. 1, available at: http://unctad.org/en/pages/publications/Intl-Investment-Agreements---Issues-Note.aspx.

[13] ICSID, ARB/13/22, *Erbil Serter v. France*, registered 10 September 2013.

[14] ICSID, ARB/12/29, *Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) Company of China, Limited v. Belgium*, registered 19 September 2012.

[15] ICSID, ARB/13/27, *Marfin Investment Group Holdings S.A., Alexandros Bakatselos and others v. Cyprus*, registered 27 September 2013.

and Cyprus respectively arising out of nationalisations in the banking sector and the *Poštová banka*[16] claim against Greece in relation to that State's 2012 debt restructuring.

Thirty–seven known arbitral decisions were rendered in 2013.[17] Out of an overall number of 274 known concluded cases, approximately 43 % have been decided in favour of the host State and 31 in favour of the investor.[18] The apparent partiality in favour of the State is belied by the fact that investor–State arbitration in the quasi–totality of cases is initiated by the investor with the host State constantly finding itself in the position of respondent.[19] At least 72 of the 2013 cases were initiated on the basis of intra–EU BITs.[20]

ICSID

General

ICSID remains the most popular venue for ISDS. In 2013, 40 new cases—i.e. 70 % of known claims—were registered under the ICSID Convention and the ICSID Additional Facility Rules,[21] bringing the total of registered ICSID disputes at the end of the year to 459.[22] Of these, 407 have been investment arbitration cases under the ICSID Convention, 43 ICSID Additional Facility arbitration cases, and nine conciliation cases under the ICSID Convention or the Additional Facility Rules.[23] A comparison between the topography of all-time claims and new claims is revealing. Most of the former have been brought under bilateral investment treaties,[24] and they have involved a South American party.[25] In 25 % of all decided

[16] ICSID, ARB/13/8, *Poštová banka, a.s. and ISTROKAPITAL SE v. Greece*, registered 20 May 2013.

[17] UNCTAD, Recent Developments in Investor–State Dispute Settlement (ISDS), IIA Issues Note, No. 1, April 2014, UNCTAD/WEB/DIAE/PCB/2014/3, p. 9, available at: http://unctad.org/en/pages/publications/Intl-Investment-Agreements---Issues-Note.aspx.

[18] UNCTAD, Recent Developments in Investor–State Dispute Settlement (ISDS), IIA Issues Note, No. 1, April 2014, UNCTAD/WEB/DIAE/PCB/2014/3, 2014, p. 10, available at: http://unctad.org/en/pages/publications/Intl-Investment-Agreements---Issues-Note.aspx.

[19] Juillard (2009), p. 274 (280); see also Titi (2014a), p. 70. At the time of writing, less than five *State*–investor arbitrations are known to have been initiated; see *ibid.*

[20] UNCTAD, Recent Developments in Investor–State Dispute Settlement (ISDS), IIA Issues Note, No. 1, April 2014, UNCTAD/WEB/DIAE/PCB/2014/3, p. 9, available at: http://unctad.org/en/pages/publications/Intl-Investment-Agreements---Issues-Note.aspx.

[21] Thirty–eight of these cases were registered under the ICSID Convention and two of them under the ICSID Additional Facility Rules.

[22] ICSID (2014), p. 7.

[23] ICSID (2014), p. 8.

[24] ICSID (2014), p. 10.

[25] ICSID (2014), p. 11.

cases, the tribunal has denied jurisdiction, in 28 % arbitrators have dismissed all claims, in 46 % the tribunal has at least partially upheld the claims, and in 1 % the tribunal has rejected the claim for manifest lack of merits, according to ICSID Arbitration Rule 41(5) and Article 45(6) of the Additional Facility Rules, as amended in 2006.[26] At the same time, while in the decade 2001–2010, 96 annulment decisions were rendered, in the 3 years that followed (2011–2013), tribunals delivered already 53 such decisions.[27] In 2013, although the majority of cases were still brought on the basis of a bilateral investment treaty, the percentage of such claims (57 %) was lower than the average of all history. 17 % of cases were brought under the investment law of the host State, 12 % of cases were brought under the Energy Charter Treaty, and 14 % of cases were brought under an investor–State contract.[28] Latin America stopped being the most popular ICSID respondent in 2013,[29] with most cases brought under the ICSID Convention involving, firstly, Eastern Europe and Central Asia and, secondly, Middle East and North Africa.[30] In the same year, in 40 % of cases the tribunal declined jurisdiction, in 30 % the tribunal dismissed all claims, and in the remaining 30 % the tribunal upheld at least one claim.[31]

ICSID Convention

The ICSID Convention counts currently 159 signatory States, of which 150 have also deposited their instruments of ratification, acceptance, or approval of the Convention with the World Bank.[32] Three new members were added in 2013. In April 2013, Montenegro deposited with the World Bank its instrument of ratification of the ICSID Convention, which consequently entered into force for the country in May 2013, in accordance with Article 68(2) of the ICSID Convention.[33] The Democratic Republic of São Tomé and Príncipe deposited its ratification instrument in May 2013, and the Convention entered into force in its respect in June 2013.[34] But probably the most seminal new membership is that of Canada's. Already a signatory to the Convention since 2006, Canada deposited its instrument of ratification of the ICSID Convention on 1 November 2013.[35] Pursuant to Article

[26] ICSID (2014), p. 14.

[27] ICSID (2014), p. 17.

[28] ICSID (2014), p. 23.

[29] Latin America, and especially Argentina, has had the sad privilege of heading investment disputes as a respondent, inviting in one case the comment that Argentina has been ICSID's best client. Christakis (2007), p. 879 (881). See further Titi (2014b), p. 357.

[30] ICSID, The ICSID Caseload—Statistics, Issue 2014–1, p. 24.

[31] ICSID, The ICSID Caseload—Statistics, Issue 2014–1, p. 28.

[32] See https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome$32#&pageName=MemberStates_Home.

[33] Montenegro Ratifies the ICSID Convention, ICSID News Release, 11 April 2013.

[34] Sao Tome and Principe Ratifies the ICSID Convention, ICSID News Release, 21 May 2013.

[35] Canada Ratifies the ICSID Convention, ICSID News Release, 1 November 2013.

68(2) of the ICSID Convention, the latter entered into force for Canada on 1 December 2013. Canada's adhesion to the ICSID Convention opens the door for North American Free Trade Agreement (NAFTA) disputes to be adjudicated under the ICSID Convention. In accordance with Article 1120 of the NAFTA, an investor may submit a claim to arbitration under 'the ICSID Convention, provided that both the disputing Party and the Party of the investor are parties to the Convention'. Given that among NAFTA's signatories only the United States had been party to the Convention prior to Canada's membership, the conditions for the submission of a NAFTA dispute to arbitration under the ICSID Convention may be fulfilled for the first time. It is noteworthy that both the 2004 Canadian Model BIT and the current version of the same model[36] adopted before Canada's ratification of the ICSID Convention provide for the possibility of submitting a claim to the ICSID Convention if both the disputing party and the home economy of the disputing investor are party to the ICSID Convention.[37]

Investor–State Dispute Settlement Challenges and the Division of Financial Responsibility in Arbitration on the Basis of EU Investment Agreements

If the preceding paragraphs have demonstrated the popularity of investment arbitration, the ISDS mechanism has become target for a growing number of critiques.[38] These have not always left government actors indifferent, and some of them have questioned the necessity of including access to investor–State dispute settlement in their investment agreements. The previous Australian government, for example, sought to adopt a policy that would discontinue access to investor–State arbitration in its international investment treaties.[39] However, after the conclusion of a recent Australian FTA that provides for investor–State dispute settlement,[40] it is less than certain that the new Australian Government will go down the same

[36] See Titi (2013b), p. 14.

[37] Article 27(1)(a) Canadian Model BIT of 2004 and Article 24(1)(a) Canadian Model BIT of 2012.

[38] See, e.g., Alvarez (2011), pp. 75–93, 257–263, 352–406; Franck (2005), p. 1521; Van Harten (2007), pp. 152–184; see also Public Statement on the International Investment Regime, 31 August 2010, Osgoode Hall Law School, available at: http://www.osgoode.yorku.ca/public_statement. For further bibliography on the topic, see Titi (2014a), p. 70.

[39] Government of Australia, Department of Foreign Affairs and Trade, Gillard Government Trade Policy Statement: Trading our way to more jobs and prosperity, 2011, available at: http://www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobs-and-prosperity.pdf, p. 14. On the Australian Government's rejection of investor–State dispute settlement, see further Kurtz (2012), p. 9; Kurtz (2011); Nottage (2011). See also Titi (2014a), pp. 25, 45 et seq.

[40] This is the 2014 Korea–Australia FTA (KAFTA), see Section B of Chapter 11 (Articles 11.15 et seq.).

path.[41] Beyond the Australian context, scepticism has been expressed in Latin America, with obvious disapproval of investor–State arbitration in recent denunciations of the ICSID Convention.[42] As noted elsewhere, these denunciations constitute a political statement vis-à-vis investor–State dispute settlement, but they target the ICSID system in particular.[43] And more recently, concerns have reportedly been raised in Europe by Germany.[44] The following paragraphs will briefly examine some particular issues and challenges posed by investment arbitration in the framework of the ongoing EU investment negotiations, with a focus on the apportioning of financial liability between the EU and its Member States.[45]

The EU institutions involved in the negotiations have made clear that EU investment agreements need to provide an effective investor–State dispute settlement mechanism.[46] For example, the European Commission has indicated that ISDS is 'such an established feature of investment agreements that its absence would in fact discourage investors and make a host economy less attractive than others',[47] and the Council has stressed 'the need for an effective investor-to-state dispute settlement mechanism'.[48] The European Parliament has dedicated five paragraphs to investment arbitration in its Resolution of 6 April 2011,[49] although it is remarkable that in the text accompanying a proposed amendment to the Commission's 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', the European Parliament has observed that including ISDS in EU investment agreements 'is not a necessity'.[50] It has further added that inclusion of investor–

[41] See further Australian Government Department of Foreign Affairs and Trade, Frequently Asked Questions on Investor–State Dispute Settlement (ISDS), available at: https://www.dfat.gov.au/fta/isds-faq.html and Nottage (2013).

[42] See Titi (2014b), p. 357.

[43] Titi (2014b), p. 357 (364–365).

[44] See also UNCTAD, Recent Developments in Investor–State Dispute Settlement (ISDS), IIA Issues Note, No. 1, April 2014, UNCTAD/WEB/DIAE/PCB/2014/3, p. 24, available at: http://unctad.org/en/pages/publications/Intl-Investment-Agreements---Issues-Note.aspx.

[45] For a more detailed analysis of some of these issues, see Bungenberg and Titi (2014).

[46] European Commission, Communication, Towards a comprehensive European international investment policy, COM(2010) 343 final, 7 July 2010, pp. 9–10; European Council, Conclusions on a comprehensive European international investment policy, 25 October 2010, para. 18; European Parliament, Resolution of 6 April 2011 on the future European international investment policy, 2010/2203 (INI), 2 October 2012, paras. 31–35.

[47] European Commission, Communication, Towards a comprehensive European international investment policy, COM(2010) 343 final, 7 July 2010, p. 10.

[48] European Commission, Communication, Towards a comprehensive European international investment policy, COM(2010) 343 final, 7 July 2010, pp. 9–10, recital 18, see also 14.

[49] European Parliament Resolution of 6 April 2011 on the future European international investment policy, 2010/2203 (INI), 2 October 2012, paras. 31–35.

[50] European Parliament, Report on the proposal for a regulation of the European Parliament and of the Council establishing a framework for managing financial responsibility linked to investor–state

State dispute settlement 'should be a conscious and informed policy choice that requires political and economic justification'.[51] In a more recent document, the European Parliament's Position 'with a view to the adoption of Regulation (EU) No. . ./2014 of the European Parliament and of the Council 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' (hereinafter Position of the European Parliament),[52] and which was adopted with the legislative resolution of 16 April 2014,[53] the Parliament expressly states that EU investment agreements 'may' provide for ISDS.[54]

It does not appear, as of the time of writing, that this statement has an impact on the design of the EU investment policy, although it may reflect a certain amount of sympathy for some policy decisions, such as those of the previous Australian government.[55]

One of the crucial questions that have confronted the EU concerns the highly debated issue of how to apportion responsibility and financial liability between the EU and its Member States as a consequence of investment disputes, and the

dispute settlement tribunals established by international agreements to which the European Union is party, COM(2012) 0335-C70155/2012–2012/0163(COD), 26 March 2013, Amendment 2, Justification.

[51] European Parliament, Report on the proposal for a regulation of the European Parliament and of the Council 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) 0335-C70155/2012–2012/0163(COD), 26 March 2013, Amendment 2, Justification.

[52] Position of the European Parliament adopted at first reading on 16 April 2014 with a view to the adoption of Regulation (EU) No. . ./2014 of the European Parliament and of the Council 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, P7_TC1-COD(2012)0163, available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=−//EP//TEXT+TA+P7-TA-2014-0419+0+DOC+XML+V0//EN.

[53] European Parliament legislative resolution of 16 April 2014 on the proposal for a regulation of the European Parliament and of the Council 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) 0335-C7-0155/2012-2012/0163.

[54] Position of the European Parliament adopted at first reading on 16 April 2014 with a view to the adoption of Regulation (EU) No. . ./2014 of the European Parliament and of the Council 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, P7_TC1-COD(2012)0163, recital 2, available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=−//EP//TEXT+TA+P7-TA-2014-0419+0+DOC+XML+V0//EN. See also recital 4 of the same document that requires EU investment agreements to provide the same high level of protection as Union law but not higher, raising the question of whether this phrasing could eventually also relate to procedural standards of investment protection. The oxymoron is that this statement is included in a document that in fact explains how ISDS is to function with respect to financial liability.

[55] See Bungenberg and Titi (2014).

concomitant topic of identifying the appropriate respondent.[56] The issue was already touched in the 2010 Communication of the European Commission 'Towards a comprehensive European international investment policy', whereby the Commission suggested that the European Union, represented by the European Commission, would be responsible for defending all actions of EU institutions.[57] According to this same argument put forward by the Commission, the EU would be the only defendant where a Member State has taken measures impacting foreign investment and falling within the scope of the agreement in question.[58] In another document issued by the European Commission, its 2010 Proposal for a Regulation establishing transitional arrangements for bilateral investment agreements between Member States and third countries, there was provision for participation of both the EU and the Member States in investment arbitrations initiated on the basis of EU investment treaties,[59] and the topic was also evoked in the Council's Conclusions of the same year, with the Council inviting the Commission to carry out a study on the question of responsibility.[60] In 2011, the European Parliament called on the Commission to propose a regulation on the division of responsibilities between the Union and its Member States, particularly relating to financial liability where the defendant has lost a dispute to an investor of another party.[61]

Things have evolved since these early discussions. In 2012, the European Commission submitted a 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,[62] which in its own express terms sought to establish the framework for managing the financial consequences of investment disputes on the basis of EU investment agreements.[63] The Proposal's main argument was that financial liability born out of an investment dispute needs to be attributed to the actor affording the disputed treatment; in other words, where the EU or an EU institution is responsible

[56] On these issues, see also Bungenberg and Titi (2014).

[57] European Commission, Communication, Towards a comprehensive European international investment policy, COM(2010)343 final, 7 July 2010, p. 10.

[58] European Commission, Communication, Towards a comprehensive European international investment policy, COM(2010)343 final, 7 July 2010, p. 10.

[59] European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries, COM(2010) 344 final, 7 July 2010, see Article 13.

[60] Council of the European Union, Conclusions on a comprehensive European international investment policy, 25 October 2010, recital 18, available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/117328.pdf.

[61] European Parliament Resolution of 6 April 2011 on the future European international investment policy, 2010/2203 (INI), 2 October 2012, para. 35.

[62] European 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, 2012/0163 (COD), 21 June 2012.

[63] European Commission, p. 2. See further Bungenberg and Titi (2014).

for the treatment in question, financial liability should lie with the EU, and where a Member State is responsible for the treatment, liability should be with the Member State.[64] Where treatment afforded by a Member State is required by EU law, then the EU should bear the financial liability.[65] The central organising ideas of the Commission's Proposal have been integrated into the aforecited Position of the European Parliament.[66]

One particular question that needs to be examined in relation to the issue at hand is that the conclusion of an agreement as purely a mixed agreement or as a pure EU agreement may have an impact on the allocation of financial responsibility and on identifying the appropriate respondent.[67] Indeed, this position was upheld by the European Parliament, which notes that in principle the EU will 'be responsible for defending any claims alleging a violation of rules included in an agreement which falls within the Union's exclusive competence, irrespective of whether the treatment at issue is afforded by the Union itself or by a Member State'.[68]

The question of whether EU investment agreements are to be concluded as pure EU agreements or as mixed agreements is one that has been subject to a heated debate since the very beginning of the extension of the EU's competence over the conclusion of treaties that cover foreign direct investment by virtue of Article 207 of the Treaty on the Functioning of the European Union, and it is beyond the scope of the present contribution to explore.[69] But in order to better understand the Commission's arguments, and the European Parliament's response, regarding the apportioning of responsibility and financial liability, suffice it to note at this stage that with its Proposal for a Regulation, the Commission stresses its opinion that the EU 'has exclusive competence to conclude agreements covering all matters relating

[64] European 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, 2012/0163 (COD), 21 June 2012, p. 2.

[65] European 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, 2012/0163 (COD), 21 June 2012. See further Bungenberg and Titi (2014).

[66] E.g., see Article 3 stating, *inter alia*, that 'the Union shall bear the financial responsibility arising from treatment afforded by the institutions, bodies or agencies of the Union; [. . .] the Member State concerned shall bear the financial responsibility arising from treatment afforded by that Member State; [. . .] the Union shall bear the financial responsibility arising from treatment afforded by a Member State where such treatment was required by the law of the Union'.

[67] Bungenberg and Titi (2014). See also Schill (2011), pp. 133 et seq.

[68] Position of the European Parliament adopted at first reading on 16 April 2014 with a view to the adoption of Regulation (EU) No. . ./2014 of the European Parliament and of the Council 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, P7_TC1-COD(2012)0163, recital 3, available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=−//EP//TEXT+TA+P7-TA-2014-0419+0+DOC+XML+V0//EN.

[69] E.g., see Bungenberg et al. (2011).

to foreign investment, that is both foreign direct investment and portfolio investment'.[70]

If a treaty were to be concluded as a mixed agreement, the Commission considered that the responsible actor should be determined 'on the basis of the competence for the subject matter of the international rules in question, as set down in the Treaty' rather than on who were the authors of the act.[71] In the same vein, the Commission recognised that, while international responsibility for the breach of a provision of an agreement falling within the EU's competence rests with the EU itself, it is possible to allocate financial liability between the Union and the Member States. Therefore, while in principle it is the EU that should act as respondent in disputes concerning alleged violations of such provisions, it is possible to empower a Member State to act as respondent under given circumstances. The Commission considered that this approach offers 'pragmatic solutions'.[72]

In the same Proposal, the Commission expressed the opinion that an investor having initiated arbitration on the basis of an EU investment agreement should not suffer the consequences of a potential disagreement between the EU and the Member State concerned as regards the apportioning of responsibility between the two and provision should be made that compensation allocated in a final award or settlement award shall be promptly paid to the investor.[73] While this approach seems reasonable in the case of a final arbitral award, its suitability to a settlement award could be questioned where a Member State has freely negotiated the settlement and its disagreement with the EU leads the latter to undertake the

[70] European 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, 2012/0163 (COD), 21 June 2012, p. 3. See also the Joint declaration by the European Parliament, the Council and the Commission, annexed to the European Parliament's legislative resolution of 16 April 2014 on the proposal for a regulation of the European Parliament and of the Council 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) 0335-C7-0155/2012-2012/0163, which attempts to ensure that the adoption of the regulation in question 'shall not be interpreted as an exercise of shared competence by the Union in areas where the Union's competence has not been exercised'.

[71] European 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, 2012/0163 (COD), 21 June 2012.

[72] European 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, 2012/0163 (COD), 21 June 2012, p. 5.

[73] European 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, 2012/0163 (COD), 21 June 2012, p. 6. See also Bungenberg and Titi (2014).

payment.[74] For this reason, the Commission's Proposal and the Proposal of the European Parliament explain that a Member State may settle a dispute so long as 'it accepts full financial responsibility'.[75] Likewise, where a dispute also concerns treatment afforded by a Member State, the EU should only be able to negotiate a settlement if this has no 'financial or budgetary implications for the Member State concerned'.[76] A further interesting element in the Commission's proposal has been the establishment of a mechanism for regular payments to be made into the EU budget to be allocated to investor–State dispute settlement costs and for the reimbursement of the Union where it has paid for an award.[77]

These are some of the issues and challenges facing investment arbitration, notably in the context of the European Union, and it will be interesting to watch out in the months to come how some of these dilemmas will be resolved.

[74] Bungenberg and Titi (2014).

[75] European 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, 2012/0163 (COD), 21 June 2012, p. 17; Position of the European Parliament adopted at first reading on 16 April 2014 with a view to the adoption of Regulation (EU) No. . ./2014 of the European Parliament and of the Council 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, P7_TC1-COD(2012)0163, recital. 18, available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=−//EP//TEXT+TA+P7-TA-2014-0419+0+DOC+XML+V0//EN.

[76] Position of the European Parliament adopted at first reading on 16 April 2014 with a view to the adoption of Regulation (EU) No. . ./2014 of the European Parliament and of the Council 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, P7_TC1-COD(2012)0163, recital 18, available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=−//EP//TEXT+TA+P7-TA-2014-0419+0+DOC+XML+V0//EN.

[77] European 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, 2012/0163 (COD), 21 June 2012, p. 6. The Commission's Proposal for a Regulation has been commented in a study prepared by Tietje et al. (2013); Article 20 Position of the European Parliament adopted at first reading on 16 April 2014 with a view to the adoption of Regulation (EU) No. . ./2014 of the European Parliament and of the Council 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, P7_TC1-COD(2012)0163, available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=−//EP//TEXT+TA+P7-TA-2014-0419+0+DOC+XML+V0//EN. See also Bungenberg and Titi (2014).

Further Topical Issues: Adjudication of Sovereign Debt Restructurings and Transparency

The remaining part of the chapter will consider two particular issues that have arisen in relation to investor–State dispute settlement: the adjudication of sovereign debt restructurings and the concomitant question of multiparty treaty claims and transparency.

Investor–State Dispute Settlement and Sovereign Debt Restructurings

Recent disputes concerning Argentina's sovereign debt restructuring have given rise to new issues in investment arbitration. More concretely, two questions have been asked: whether sovereign debt instruments qualify as protected investment under the relevant IIA and, when arbitration is conducted under the ICSID Convention, under Article 25 of the ICSID Convention; and whether multiparty, or *mass*, claims are allowed. Although the issues discussed here are born in the context of Argentina's sovereign debt restructuring, and especially in the *Abaclat*,[78] *Ambiente Ufficio*,[79] and *Alemanni*[80] cases, they may become relevant to other disputes, such as those relating to Greece's sovereign debt restructuring. As mentioned above, an ICSID case has already been registered against the country, and other recent sovereign debt restructurings, including those of Belize, Ecuador, and Jamaica,[81] may open the way for further claims. The paragraphs that follow will give a brief consideration to some of these issues.

While a number of investment treaties expressly include bonds in their definition of investment,[82] it is generally essential to look at the particular way the relevant treaty provision has been drafted. Regarding the question of whether sovereign bonds constitute investment under the ICSID Convention, the majority in the *Abaclat* Tribunal, having rejected the *Salini* test,[83] found that the purchase of security entitlements in government bonds did constitute investment for the

[78] ICSID, ARB/07/5, *Abaclat and Others v. Argentina*, Decision on Jurisdiction and Admissibility, 4 August 2011.

[79] ICSID, ARB/08/9, *Ambiente Ufficio S.P.A. and Others* (*Case formerly known as Giordano Alpi and Others*) *v. Argentina*, Decision on Jurisdiction and Admissibility, 8 February 2013.

[80] ICSID, ARB/07/8, *Giovanni Alemanni and others v. Argentina*, registered 27 March 2007.

[81] International Monetary Fund, Sovereign Debt Restructuring—Recent Developments and Implications for the Fund's Legal and Policy Framework, 26 April 2013, p. 6.

[82] E.g., see Article 1 of the US Model BIT (2012).

[83] ICSID, ARB/07/5, *Abaclat and Others v. Argentina*, Decision on Jurisdiction and Admissibility, 4 August 2011, paras. 362 et seq.

purposes of the ICSID Convention.[84] The dissenting arbitrator noted his disagreement with the majority view remarking that 'a good faith international law interpretation [. . .] derived from the inherent *ordinary meaning* of term "investment" of Article 25(1) in its context and in the light of the object and purpose of the 1965 ICSID Convention' cannot lead to the conclusion that portfolio investment and 'other financial negotiable products (traded with high velocity of circulation in capital markets and at places far remote from the State in whose territory the investment is supposed to take place) between persons alien to any economic activity in the host State and which, generally speaking, cover a wide spectrum of financial products ranging from standardized instruments (i.e. shares, bonds, loans) to structured and derivatives products (i.e. hedges of currencies, oil, etc., credit default swaps)'.[85]

The second important question has been whether multiparty claims are covered by a State's consent to arbitrate in the investment treaty and under the ICSID Convention. Two relevant decisions have been rendered so far. First, the *Abaclat* Tribunal, and then the *Ambiente* Tribunal, following in the latter's steps, found that nothing in the ICSID Convention 'would militate in favour of interpreting the "silence" of the ICSID Convention as standing in the way of instituting multi–party proceedings'.[86] It is worth noting the dissenting arbitrator's 'total disagreement' with the majority view in the *Ambiente* dispute.[87]

Some treaties, especially newer ones, have started to preclude sovereign debt restructuring from coming into the scope of an investment dispute. They do so by altogether excluding portfolio investments from their coverage,[88] by specifying that 'public debt operations' do not constitute an investment[89] or that such operations

[84] ICSID, ARB/07/5, *Abaclat and Others v. Argentina*, Decision on Jurisdiction and Admissibility, 4 August 2011, para. 387.

[85] ICSID, ARB/08/9, *Ambiente Ufficio S.P.A. and Others* (*Case formerly known as Giordano Alpi and Others*) *v. Argentina*, Decision on Jurisdiction and Admissibility, Dissenting Opinion of Santiago Torres Bernárdez, paras. 262–263.

[86] ICSID, ARB/08/9, *Ambiente Ufficio S.P.A. and Others* (*Case formerly known as Giordano Alpi and Others*) *v. Argentina*, Decision on Jurisdiction and Admissibility, 8 February 2013, para. 146.

[87] ICSID, ARB/08/9, *Ambiente Ufficio S.P.A. and Others* (*Case formerly known as Giordano Alpi and Others*) *v. Argentina*, Decision on Jurisdiction and Admissibility, Dissenting Opinion of Santiago Torres Bernárdez, para. 81. See further UNCTAD, Recent Developments in Investor–State Dispute Settlement (ISDS), IIA Issues Note, No. 1, April 2014, UNCTAD/WEB/DIAE/PCB/2014/3, p. 18, available at: http://unctad.org/en/pages/publications/Intl-Investment-Agreements---Issues-Note.aspx.

[88] Article 1(1)(b) Denmark–Poland BIT (1990).

[89] Article 838, ft 11, Canada–Colombia FTA, Article I Colombia–UK BIT (2010), Article I Colombian Model BIT (2007). For a relevant discussion, see also República de Colombia, Departamento Nacional de Planeación, 2002, Documento Conpes 3197, 'Manejo de los Flujos de Endeudamiento en los Acuerdos Internacionales de Inversión Extranjera', 26 August 2002, available at: https://www.dnp.gov.co/Portals/0/archivos/documentos/Subdireccion/Conpes/3197.PDF. See also Rivas (2013), p. 203.

are not subject to the treaty's investment protection provisions,[90] or by excluding the possibility of raising claims related to sovereign debt restructurings.[91] Other ways in which States could ensure that agreements prevent the arbitration of this type of claims would be to specify that sovereign crises come within the scope of an essential security interest exception[92] or provide explicit waivers in contracts associated with sovereign debt.[93]

Transparency in Investor–State Dispute Settlement

A catchword in today's international investment law, transparency kindled a particularly vivid discussion in the context of (the reform of) investor–State dispute settlement.[94] Envisioning the future EU investment policy, already in 2010, the European Commission emphasised that 'the EU should ensure that investor–state dispute settlement is conducted in a transparent manner'[95] and transparency in ISDS is a prominent feature of current investment policy discussions at the EU level.[96] Transparency in ISDS is essentially related to publication of and access to arbitral awards and open hearings, and third–party participation.[97] These topics will be briefly examined below.

While according to the ICSID Convention, publication of awards is subject to the parties' consent[98] and comparable provisions are found in most arbitration rules,[99] UNCITRAL has pioneered in the transparency debate by adopting, on 11 July 2013, the UNCITRAL Rules on Transparency in Treaty–based Investor–State Arbitration (hereinafter UNCITRAL Transparency Rules), which provide for transparency in investment dispute resolution conducted

[90] Annex 10–A US-DR-CAFTA.

[91] See Annex 10–F US–Colombia FTA.

[92] See also Gallagher (2011), p. 27; Gallagher (2012).

[93] Strong (2014).

[94] Titi (2014c).

[95] European Commission, Communication, COM(2010) 343 final, 7 July 2010, p. 10.

[96] E.g., see European Commission (Trade), Fact sheet: Investment Protection and Investor-to-State Dispute Settlement in EU agreements, November 2013, available at: http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151916.pdf; European Commission, Public consultation on modalities for investment protection and ISDS in TTIP 2014, http://ec.europa.eu/yourvoice/ipm/forms/dispatch?form=ISDS.

[97] Titi (2014c).

[98] Article 48(5) ICSID Convention.

[99] E.g., see Article 53(3) Schedule C, Arbitration (Additional Facility) Rules; Article 6 of Appendix I: Statutes of the International Court of Arbitration annexed to the ICC Arbitration Rules; Article 46 SCC Arbitration Rules (2010); Article 30(1) (LCIA) Arbitration Rules (1998).

under the UNCITRAL Rules.[100] The Transparency Rules are an unprecedented set of norms providing, *inter alia*, for the publication of documents relating to the proceedings, such as the notice of arbitration and the awards,[101] and, subject to the exceptions in Article 7 of the Transparency Rules, for hearings open to the public.[102] The Transparency Rules are applicable to investor–State dispute settlement pursuant to an agreement concluded on or after 1 April 2014, unless the parties to the treaty agree otherwise.[103] In some cases, the Transparency Rules may equally apply to investment disputes born on the basis of earlier investment agreements.[104] In all probability, the UNCITRAL Transparency Rules will apply to future EU investment agreements.[105] In December 2014, UNCITRAL adopted the Convention on Transparency in Treaty–based Investor–State Arbitration (Mauritius Convention on Transparency) to extend application of the Transparency Rules to earlier IIAs. Signed by ten States as of the end of March 2015, the Convention has not yet come into force.

Where participation of third parties is concerned, ICSID Rule 37(2), introduced in 2006, provides that, after consultations with the parties, the tribunal may allow non-disputing parties to file submissions in relation to matters that fall within the purview of the dispute. Comparable provisions exist in the ICSID Additional Facility Rules[106] and the UNCITRAL Transparency Rules.[107] One step ahead in the transparency debate, the latter further establish that the tribunal shall allow or, after consultation with the parties, *invite* 'submissions on issues of treaty interpretation from a non-disputing Party to the treaty'.[108]

Beyond these institutional transparency rules, provisions on transparency may be found in a number of investment agreements, especially those concluded by North American countries. The NAFTA itself provides in Annex 1137.4 that, where Canada or the United States is a disputing party, either the State or an investor party to the arbitration may make the award public. The 2001 Notes of Interpretation of Certain Chapter 11 Provisions of the NAFTA Free Trade Commission (FTC) underlined the

[100] UNCITRAL, Rules on Transparency in Treaty–Based Investor–State Arbitration, available at: http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf.

[101] Article 3 UNCITRAL Transparency Rules. See also Titi (2014c).

[102] Article 6 UNCITRAL Transparency Rules.

[103] Article 1(1) UNCITRAL Transparency Rules.

[104] Article 1(2) UNCITRAL Transparency Rules.

[105] See for example Article x–33 of the Draft CETA text of March 2014, annexed to the European Commission's Public consultation on modalities for investment protection and ISDS in TTIP (Consultation document) 2014, available at: http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152280.pdf.

[106] Article 41(3) Schedule C, Arbitration (Additional Facility) Rules.

[107] Article 4 UNCITRAL Transparency Rules.

[108] Article 5 UNCITRAL Transparency Rules.

absence of a general duty of confidentiality.[109] Three years later, the FTC welcomed the fact that Mexico has 'joined Canada and the United States in supporting open hearings for investor–state disputes'.[110] All NAFTA awards have been made public.[111] It is further worth noting that, although the NAFTA does not contain express provisions on *amicus curiae* submissions, the *Methanex* Tribunal allowed third–party participation.[112] Its approach was formally endorsed in 2003, with the FTC's Statement on third–party participation.[113] Provisions on transparency figure more prominently in new North American treaties,[114] and they also appear in the draft CETA text of March 2014.[115]

Conclusion

Reform of investor–State dispute settlement is part of an attempt to both improve the system and to increase its legitimacy. Reform is currently afoot with important amendments, such as the provision for more transparency, having taken place in the last couple of years. The present contribution has examined some of these recent institutional developments concerning investment arbitration in general and, especially, the ICSID system. Particular attention has been paid to issues that have arisen in the ongoing EU negotiations, with a focus on one of the seminal 'internal' decisions that need to be taken in that context, namely the division of financial responsibility between the EU and its Member States. Lastly, two questions were considered, the arbitration of mass claims and claims relating to sovereign bonds in light of recent sovereign debt restructurings and transparency in institutional and conventional provisions. Of course, several other investor–State dispute settlement issues that may have unfurled in parallel have remained unexplored in the present contribution, and this is an interesting area to watch, given the importance of the

[109] NAFTA Free Trade Commission Notes of Interpretation of Certain Chapter 11 Provisions, 31 July 2001, available at: http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp.

[110] See NAFTA FTC, Joint Statement on 'Decade of Achievement', 16 July 2004, available at: http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/JS-SanAntonio.aspx?lang=eng.

[111] Ortino (2013), p. 124.

[112] E.g., UNCITRAL, *Methanex Corporation v. United States*, Decision of the Tribunal on Petitions from Third Persons to Intervene as 'amici curiae', paras. 47 et seq.

[113] Statement of the Free Trade Commission on non–disputing party participation, 7 October 2003, available at: www.naftaclaims.com/Papers/Nondisputing-en.pdf.

[114] E.g., see Articles 28–29 US Model BIT (2012), Articles 31–32 Canadian Model BIT (2012), Article 10.20 US-Chile FTA, Article 10.21 US-DR-CAFTA.

[115] Articles x–33 and x–35 of the Draft CETA text of March 2014, annexed to the European Commission's Public consultation on modalities for investment protection and ISDS in TTIP (Consultation document) 2014, available at: http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152280.pdf.

essential investment protection mechanism that is access to international arbitration.

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