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Transatlantické Obchodní a Investiční Partnerství (TTIP)

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Michael Rott

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Abbreviations

ADR	Alternative dispute resolution
Art	Article
BIT	Bilateral investment treaty
BRD	Bundesrepublik Deutschland (Federal Republic of Germany)
CETA	Comprehensive economic and trade agreement between the EU and Canada
Draft	Draft of the TTIP
ECT	Energy Charter Treaty
FTA	Free Trade Agreement
ICS	Investor Court System
ICSID	International Centre for Settlement of Investment Disputes
IIA	international investment agreement
ISA	investor–state arbitration
ISDS	Investor State Dispute Settlement
ITA	international trade agreement
NAFTA	The North American Free Trade Agreement
NGO	Non-Governmental Organisation
OECD	Organisation for Economic Co-operation and Development
Para	Paragraph
Party	party to the TTIP
TFEU	Treaty on the Functioning of the European Union
TPP	Trans-Pacific Partnership
TTIP	The Transatlantic Trade and Investment Partnership (hereafter also, as "the Agreement")
TTIP Joint Committee	Committee
UNCTAD	United Nations Conference on Trade and Development
UNCITRAL	United Nations Commission on International Trade Law
VCLT	Vienna Convention on the Law of Treaties
UNIDROIT	International Institute for the Unification of Private Law

1. The Introduction & Concept of the Paper

1.1. The Introduction – Evolution towards the ICS

The Transatlantic Trade and Investment Partnership is a proposed bilateral free trade agreement negotiated between European Union and the United States of America. The aim of the TTIP is to liberalise as much possible trade and investment between the two blocs. According to a study by the Centre for Economic Policy Research that could enlarge GDP by estimated 68-119 billion euros for EU and 50-95 billion euros for the US.[1] However it is important to notice, that the volume of the positive impact varies widely between studies and even within studies. Various scenarios of the CEPII study shows that clearly, when Tariffs-elimination-only scenario indicates GDP gains of 0 percent on both sides of the Atlantic.[2] The reason for this is uncertainty about the degree to which the transatlantic barriers to trade is going to be eliminated by the actual agreement.

From the legal point of view, TTIP falls into the category of a so-called "new generation" free trade agreement.[3] This term is used to cover free trade agreements that also contains certain aspects of regulation of investments. The trend of interconnecting FTAs with investment treaties was established by coming into force of the North American Free Trade Agreement in 1994.[4]

The area of investments regulation, however, was long considered as the exclusive competence of the Member States of the EU (hereinafter as "Member States"). The situation changed after the adoption of the Lisbon Treaty. Authority of the EU to regulate the foreign direct investment is based on the Article 207 Paragraph 1 of the Treaty on the Functioning of the European Union, while it newly defines the area of common commercial policy.[5]

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[1] Francois, Joseph, *Reducing Transatlantic Barriers to Trade and Investment: An Economic Assessment* (Centre for Economic Policy Research, London, 2013: 124) p 95 (Accessed on September 11, 2016) <http://trade.ec.europa.eu/doclib/docs/2013/march/tradoc_150737.pdf>

[2] Fóntagne, Lionel, Gourdon, Julien, Jean, Sébastien. *Transatlantic Trade: Whither Partnership, Which Economic Consequences?*. (CEPII – Paris, 2013: 12) p 11 (Accessed on September 13, 2016) <http://www.cepii.fr/PDF_PUB/pb/2013/pb2013-01.pdf>

[3] Cremona, Marise. *Negotiating the Transatlantic Trade and Investment Partnership (TTIP)* (vol. 52, issue 2, Common Market Law Review, Wolters Kluwer, 2015) p 351-362

[4] Šturma, Pavel, Balaš Vladimír, *Mezinárodní ekonomické právo* (2nd ed., C.H. Beck, 2013: 537) p 326.

[5] Ibidem. p 332

The kick-off of the TTIP negotiations took place between 7th and 12th of July 2013 in Washington. It followed a decision from 14th of June 2013 when the Member States granted "the green light" to start talks with the European Commission (hereinafter as "Commission") and adopted clear guidelines for the negotiations for the Commission.[6] Since then there had been fourteen rounds of the TTIP negotiations and in the words of Ignacio García Bercero, EU Chief Negotiator for TTIP:..*"we are now in an advanced stage of the negotiations, but of course still a lot of work needs to be done."*[7]

Through the course of the TTIP negotiations, unusually strong criticism against it has emerged. One of the problematic moments came with the leak of confidential negotiation documents in March 2014. What these drafts implied was the intention to include a standard form of Investor-State Dispute Settlement mechanism in the actual agreement.[8] That immediately caused a massive wave of opposition especially from Non-Governmental Organisations, Think Tanks and political parties. The most significant rejection was presented in May 2014 when Germany announced its opposition to including an ISDS chapter in TTIP.[9] Given this strong public interest in the issue, European Commission launched an online public consultation on a possible approach to the inclusion of ISDS mechanism in TTIP. With a total of nearly 150 000 online contributions[10], it received an unprecedented response. With most of them being critical to the nature of ISDS, European Commission decided to revise its approach, and on 16th September 2015, it proposed new Investor Court System for TTIP as a part of provisions for investment protection.[11]

According to the Commission's Vice-President Frans Timmermans, this proposal is "breaking new grounds". He expressed confidence that, based on ICS, proceedings will be

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6 European Commission, *The Transatlantic Trade and Investment Partnership (TTIP) – State of Play: 27 April 2016* (2016) (Accessed on September 13, 2016) <http://trade.ec.europa.eu/doclib/docs/2016/april/tradoc_154477.pdf>

7 Conclusion of the 14th TTIP Negotiation Round, Statement by Ignacio García Bercero EU Chief Negotiator for TTIP, Press Release, (15 July 2016) (Accessed on September 14, 2016 <http://trade.ec.europa.eu/doclib/docs/2016/july/tradoc_154811.pdf>

8 As apparent from Draft, *Trade in Services, Investment and E-Commerce: Draft text (dated February 7,2013)* (Accessed on 14 September 2016) <http://keionline.org/sites/default/files/eu-kommission-position-in-den.pdf>

9 Donnan, Shawn, Wagstyl, Stefan, *Transatlantic trade talks hit German snag*. (Financial Times, 2014) (Accessed on September 14, 2016) <http://www.ft.com/cms/s/0/cc5c4860-ab9d-11e3-90af-00144feab7de.html#axzz4KDiJHJ3L>

10 Preliminary report (statistical overview), *Online public consultation on investment protection and investor-to state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP*), (2014) (Accessed on September16 2016) <http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc_152693.pdf>

11 European Commission, *Commission proposes new Investment Court System for TTIP and other EU trade and investment negotiations,* Press release, (2015) (Accessed on September 20, 2016) <http://europa.eu/rapid/press-release_IP-15-5651_en.htm>

transparent, cases will be decided on the basis of clear rules and that it protects the government's right to regulate.[12]

1.2. Outline of the Research & Presentation of the Research Questions

Facts presented above provide sufficient background for the outline of the research which this paper encompasses. In the second section, it is focused on the consultation that takes place in the EU with respect to the conclusions that can be drawn from its' results. Given such opposition to the process of ISA, the consultation serves the important purpose to communicate precise reasons for it. Provided with the outcome of the consultation, the research question is as follows.

"Is the proposed Investment-Protection Chapter of the TTIP along with the newly introduced Investor-Court System capable of securing the protection against the abuse of the process of investment arbitration initiated under its' provisions?"

For an attempt to provide the sufficient answer to this question, the paper, in the second part, examines the individual provisions of the TTIPs' Investment-Protection Chapter. This examination is carried out to analyse the anticipated effect of the provisions and other possible connotations. The end of the part provides partial conclusions with respect to the undertaken research. Providing that the research question is of a more general character, the ultimate answer is provided in relation to the research conducted all parts of the paper.

In the third section of the study, the emphasis is first made of the main institutions that should operate under the scope of dispute settlement mechanism of the TTIP - the ICS, as it was initially identified. These institutions are, at the same time, bearers of the leading innovations that were introduced for the ISDS process in the TTIP Proposal and thus deserve a closer look. The first major difference rests in the entirely different process of the appointment of arbitrators.

The other most significant difference is that the ICS mechanism of the settlement of the investment disputes is provisioned providing the appellate mechanism, which was presented as bringing many improvements into the system of ISDS.

[12] Ibidem

Afterwards, the process of arbitration its own is subject to the closer examination which is focused primarily on the specifics of the proceedings initiated under ICS provisions. The aim is to analyse their possible consequences and evaluate if these are to be welcomed as bringing a qualitative change into the process of ISDS and possibility to ensure protection against the abuse of the investors right with respect to the research question.

1.3. Methodology

The conception adopted and followed in this paper, with possible exceptions in the second section of the Paper, follows a shared pattern. The analysis of the provisions of the Proposal identifies aspects which are worth exploring, and these are compared with wording which they acquired in the latest version of provisions of the ISDS introduced for the EU FTAs – CETA. The disclaimer needs to be expressed in this regard as the text bellow uses the term "ICS" in connection with both the TTIP and the CETA dispute resolution mechanism, although, the CETA has not accepted this terminology. Next, the similar rules of international arbitration are inspected to find out, what qualities or drawbacks they feature, and the context of their possible alteration is also outlined. Eventually, the conclusion is formulated to determine in what way the rules of ICS alters them if such alteration is appropriate and expedient and in sum if the provisions of ICS are well designed. This is carried out to provide an answer to the research questions.

1.4. Hypothesis

At this point, it needs to be asserted that evaluation of the relevant components and features of the ISA is always more or less subjective and author of this pages is naturally of some viewpoint which inherently determines his opinion on the matter. However, the effort is to achieve the highest possible degree of objectivity when carrying out the evaluation. Therefore the works of scholars, previous cases of ISDS and other relevant documents are inspected to reach a conclusion about a character and quality of the past praxis embodied in the provisions of the ISDS.

It also needs to be declared when referring to the “qualitative” changes (as an inherently subjective category) it is with respect to the hypothesis of the work. As such, it is, that the positive answer to the research questions represents intended and desired state which improves the current system of the ISDS.

2. Investment Protection in the TTIP

2.1. Background - Commission's Public Consultations

European Commission organised an online public consultation on investment protection and investor-to-state dispute settlement in the Transatlantic Trade and Investment Partnership Agreement between 27 March and 13 July 2014. It was, predominatly, given the strong public interest on the issue of ISDS that was most notably expressed by the open letter from over 100 civil society groups to the chief negotiators of the TTIP, which called for the exclusion of ISDS provisions from the agreement.[13] The consultation outlined a possible EU approach to the ISDS in the TTIP to guarantee balanced state between investor's protection and the ability of EU and the Member States to regulate in the public interest.[14]

Participation in the consultation was free for all interested citizens and organisations. Moreover, the system of it was based on the presentation of the view on the twelve issues, namely, the following:

"1. Scope of the substantive investment protection provisions
2. Non-discriminatory treatment for investors
3. Fair and equitable treatment
4. Expropriation
5. Ensuring the right to regulate and investment protection
6. Transparency in ISDS, Multiple claims and relationship to domestic court
7. Arbitrators ethics
8. Conduct and qualifications
9. Reducing the risk of frivolous and unfounded cases
10. Allowing claims to proceed (filter)
11. Guidance by the parties on the interpretation of the agreement

[13] *Open Letter of Civil Society against Investor Priviliges in TTIP. 16.12.2013,* Letter (Accessed on October 2, 2016) <http://www.s2bnetwork.org/wp-content/uploads/2014/11/CivilSociety_TTIP_Investment_Letter_Dec16-2013_Final.pdf>
[14] European Commission, *Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)* Commission staff working document – Report (2015: 140) (Accessed on October 2 2016) <http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf>

12. Appellate mechanism and consistency of rulings."

Finally, the last open question was intended for respondents to present their general opinion on the ISDS in TTIP.[15] The scope and orientation of the consultation in many ways correspond with the particular chapters of this paper. Conclusions of each issue presented in the consultation will be thus a content of following parts of this chapter.

2.1.1. Overview of the Outcome of the Consultations

The unprecedented level of public contribution in the online consultation, as mentioned above, was caused mostly by a massive mobilisation of the anti-TTIP civil society groups. The report of the consultation states that 145.000 replies (over 97 %) were submitted by various NGOs that offers pre-defined answers to the consulted issues.[16] These collective submissions than were in most cases focused on expressing concerns about implementing ISDS in TTIP or criticising ISDS and TTIP in general.[17] This level of defiance expressed through the public consultation process was a surprise for many representatives of the European Commission. EU Commissioner Karel de Gucht commented it, saying that it was a "regular attack" and that fact "that so many contributions are identical speaks for a coordinated action".[18] Such a statement is rather inconsistent with the one that was quoted in a press release of the Commission, covering the intention to run the public consultations. In it, he expressed comprehension for concerns of the EU society about the ISDS in TTIP. He also openly conceded the right of such 'sceptics' to comment on this issue.[19]

Luckily, the report on the online public consultation, which was released almost six months after the end of the consultation, lacks such emotive positions and does a decent job in providing us with the outcome of the consultations. Respondents who took part in the online consultation via NGOs collective submissions expressed opposition to the inclusion of ISDS mechanism in the TTIP, in general. This opinion was based mainly on the conviction that the

[15] Ibidem, p 8

[16] Ibidem, p 10

[17] Ibidem, p 14

[18] Wettach, Silke. *TTIP-Gegner legen EU-Kommission lahm*. (Wirtschafts Woche, 2014) (Accessed October 19, 2016) <http://www.ft.com/cms/s/0/cc5c4860-ab9d-11e3-90af-00144feab7de.html#axzz4KDiJHJ3L>

[19] European Commission, *Commission to consult European public on provisions in EU-US trade deal on investment and investor-state dispute settlement.* Press Release (2014) (Accessed October 19, 2016) <http://europa.eu/rapid/press-release_IP-14-56_en.htm>

ISDS could undermine the processes of democratic decision-making and lead to 'chilling effect' in the regulatory field of both the EU and the US. It is also seen as unnecessary with regards to the perceived strength and quality of the judicial system of both Parties. Such views were mirrored in the contributions made by most of the trade unions, a vast majority of NGOs, Government institutions and other organisations such as consumer organisations. Also, In the eyes of these respondents, the ISDS is set up for the benefit of investors. It should thus set a higher standard of investor obligations in relation to the protection of human rights, nature, and corporate social responsibility.[20]

By contrast, a majority of the business association declare a strong approval of the inclusion of the investment protection and ISDS in the TTIP. Most of them emphasise a positive influence that foreign direct investment may have on the economic growth and jobs creation. Some of these responses indicate that European investors may not be granted adequate protection in proceedings before US courts. The level of investor protection to which the EU investors are used to must not be lowered, further, suggest these businesses contributions.[21]

As it is apparent from the conclusions of the consultations, there is a visible schism on the form of investment protection TTIP may determine. Giving the European public strong negative appraisal of the intention to include ISDS in the treaty, it is going to be vital for any future investment protection mechanism to dispel these concerns and come with the solution that appeases both opposition and the supporters of ISDS. Similar thoughts were expressed in the text adopted by European Parliament in July 2015. It mentioned the process of reflecting the contributions made in the public consultation and that it is conducted while exchanging views with civil society and the business sector. Also repeating the intention to take into account the best way to achieve investment protection while at the same time ensuring states' right to regulate.[22]

[20] European Commission (n14) p 14-15

[21] European Commission (n14) p 14-15

[22] European Parliament, Resolution of 8 July 2015 containing the European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP) (2014/2228(INI)), (Accessed on October 20, 2016) <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2015-0252+0+DOC+PDF+V0//EN>

2.2. Investment Protection in the TTIP - The Scope of Protected Investments and its Connotations

As the aim of this paper is to describe the functioning of the Commission's proposed mechanism for Settlement of Investment Disputes, it is necessary to outline a scope of investment protection as Commission proposes it for the TTIP. Provisions of the investment protection are part of the same chapter as the proposed ICS, and they were made public on November 2015.[23]

In this part, I am going to analyse a Section 2 of the Investment chapter of the Proposal with respect to possible consequences that such a form of provisions may bring about. The outcome of the way covered investment and investor are defined in IIA's is fundamental for the extent of investment protection it provides. It also manifests itself clearly in proceedings before international tribunals and thus shapes a future appearance of the whole international investment law.

With regards to the investment protection that TTIP may provide, this chapter is designed to illustrate the extent to which investors may seek protection for their investment and how it could affect the balance between the investors' interests and Parties' rights to govern and regulate in the public interest. The question of how balanced these interests are, seem to have dominated the heated debate around TTIP, and it is to be examined in the following text. Mechanisms that are used in the investment protection chapter designed to weaken the protection of foreign investors in favour of the state's right to regulate mark a shift in the doctrine of the investment protection that turns against described fifth principle of the investment regime.[24] Some authors relate this approach to calls for an enactment of ICS in investment treaties.[25] Moreover, this coherence could be traced back to an official statements and concept papers of the EU.[26]

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[23] See European Commission (n11) p 1

[24] See Jeswald W. Salacuse, *The Law of Investment Treaties* (Second ed., Oxford University Press 2015: 528), p 12. *"The fifth principle of the investment regime is that international rules with effective enforcement mechanisms will deal with the problem of the obsolescing bargain by restraining the actions of the host government towards foreign investment in its territory."*

[25] See eg. Herdegen Matthias, *Principles of International Economic Law* (second ed Oxford University Press 2016: 624), p. 486.

[26] See eg. European Commission (n11) p 1, para The need for a new EU approach: *"The key challenge for the EU's reformed investment policy is the need to ensure that the goal of protecting and encouraging investment does not affect the ability of the EU and its Member States to continue to pursue public policy objectives. A major part of that challenge is to make sure that any system for dispute settlement is fair and independent."*

2.2.1. Protected Investment

Scope of application with regards to investment definition, IIAs usually make a similar approach to it and form the definition broad, bringing into the scope of treaties almost all possible forms of investment.[27] As is apparent from the following chapter, the same applies in the case of a definition of investment in the TTIP proposal. Despite the described similarity, the scope of protected investment, its definition and interpretation may have broad implications.[28] Such implications were noted in studies analysing investment protection in TTIP proposal[29], and those in the field of environmental protection are further examined thoroughly.

The formal existence of an investor is tied up with so-called 'covered investment' term. For the purpose of TTIP that includes any asset owned or controlled by investors of one Party in the other's Party territory.[30] The asset must meet the characteristic of an investment, such as a certain duration, expectation of gain or profit or commitment of capital, etc. Otherwise, assets that the definition of 'investment' may encompass are ranging greatly. From the form of an enterprise, bonds or any other kinds of interest in a business, to properties and related rights. As part of the 'investment' definition, Part (x2) letter f) states that it also includes "interests arising from a concession including to search for, cultivate, extract or exploit natural resources."[31]

Given the brief overview of what may be interpreted as an investment protected under TTIP, the biggest risks associated with such definition are further exemined in consideration with a praxis of other investment treaties.

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[27] Newcombe Andrew, Paradell Lluís, *Law and Practice of Investment Treaties:Standards of Treatment* (1st ed., Kluwer Law International, 2009: 598), p 65-66

[28] See ibidem. p 67-68

[29] Krajewski Markus, Hoffman Rhea Tamara, *The European Commission's Proposal for Investment Protection in TTIP* (Friedrich-Ebert-Stiftung, 2016: 18) p 8 (Accessed on December 20, 2016) <http://library.fes.de/pdf-files/bueros/bruessel/12662.pdf>

[30] TTIP Proposal*, Trade in Services, Investment and E-Commerce. Chapter II - Investment.* EU proposal (Made public on 12 November 2015: 39). Section 1, Par. x1 (Accessed on December 20, 2016) <http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf>

[31] Ibidem Section 1, Par. x2

2.2.2 Environmental policy threats

Implications of such a definition are, that possible future legislation in the area of environmental protection may be contradictory to the intention of the investors whose investments are covered under TTIP. Moreover, that may prove to be problematic particularly in the context of regulating or banning unconventional fossil fuel extraction. Development of the legal regulation of fracking is foreseeable thanks to its massive development in recent years. Same conclusions are drawn in the Commission's Impact Assessment document, which also presents the whole number of risks to the environment that are linked with such a technique.[32] The area of this future regulation may be directly or indirectly affected by the inclusion of business activities such as concession for investors to perform the technique of fracking among the protected TTIP investments. NGO repeatedly presented such findings.[33]

To make an assumption that investment protection of that kind could in some way affect future environmental legislation and policies of governments of Parties, I examine one of the cases before ICSID, Vattenfall AB and others v. the Federal Republic of Germany. The claim of Swedish national Vattenfall AB and its German subsidiaries is arising out of Germany's enactment of legislation to discard nuclear power plants in the country by 2022.[34] These claimants are alleging that the 2012's amendment of Atomic Energy Act of Germany, which purpose is to phase out the use of nuclear energy for the commercial production by 2022[35], is breaching the Energy Charter treaty. Specifically, the obligations imposed upon Germany under Part III of the ECT[36] for the fair and equitable treatment of investors.[37]

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[32] European Commission, Commission Staff working document - Exploration and production of hydrocarbons (such as shale gas) using high volume hydraulic fracturing in the EU - Impact Assessment (2014) p 35 (Accessed on December 26, 2016) <http://eur-lex.europa.eu/resource.html?uri=cellar:a46647dd-843b-11e3-9b7d-01aa75ed71a1.0001.01/DOC_1&format=PDF>

[33] see eg. European Environmental Bureau, Regulatory rollback: how TTIP puts the environment at risk, Position paper (2014) p 5 (Accessed on December 26, 2016) <http://www.eeb.org/EEB/?LinkServID=4AFDDA9F-5056-B741-DB18FBAC26DE3743&showMeta=0>

[34] *Vattenfall AB and others v. Federal Republic of Germany (II)*, ICSID Case No. ARB/12/12, Summary of matters at issue (2012)

[35] Act on the Peaceful Utilization of Atomic Energy and the Protection against its Hazards (Atomic Energy Act), 2013 Amendment, Chap 1 Par 1 and Chap 2 Par 7 Letter 1a

[36] Energy Charter Treaty (Came into force on April 1998), Part III Art 10 Para 1

[37] Vattenfall vs. Germany, *Nuclear Phase-Out Faces Billion-Euro Lawsuit* (Spiegel online, 2011) (Accessed on November 7 2016) <http://www.spiegel.de/international/germany/vattenfall-vs-germany-nuclear-phase-out-faces-billion-euro-lawsuit-a-795466.html>

Although the status of proceeding is currently pending[38], the bottom line of this case is clear. Investment treaty grants private investor a right to challenge a public policy measure that is legitimate in the eye of the clear and long-term support for a change of German energy policy.[39] There is even a unique term of *"Energiewende"* that designates the transformation of energy production structure of BRD and was first introduced as long ago as in 1980.[40]

While the ECT is focused solely on the protection of economic activities in the energy sector[41], the investment defined by both the ECT and TTIP encompasses a similarly wide range of assets.[42] In the context of environmental protection, both treaties express relatively strong commitment to take into account "environmental consideration" while implementing its policies,[43] with Commission's TTIP proposal designating it the whole chapter and calling for collective action for low-emission and climate resilient development.[44] With this being acknowledged it seems even more questionable that the case mentioned above is currently held before ICSID, and above all that it has not been suspended after the preliminary objection of the Respondent that the claim is without legal merit.[45]

Therefore, it is foreseeable that TTIP may serve as a new ground for investors to take on government legitimate environmental policies. So, in this case, NGOs' assumptions have proven warrantable.

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[38] See eg - Vattenfall AB (Sweden) et al v. Germany, International Energy Charter - Investment Dispute Settlement Cases, (Accessed 10 November, 2016) <http://www.energycharter.org/what-we-do/dispute-settlement/investment-dispute-settlement-cases/33-vattenfall-ab-sweden-et-al-v-germany/>

[39] Amelang, Sören, Wettengel, Julian. Polls reveal citizens' support for Energiewende. (Clean Energy Wire, 4 Oct 2016) (Accessed on 12 Nov 2016. <https://www.cleanenergywire.org/factsheets/polls-reveal-citizens-support-energiewende>

[40] Jacobs, David. *"The German Energiewende - History, Targets, Policies and Challenges"*. Renewable Energy Law and Policy Review. (2012): 223. (Accessed 13 December, 2016) <http://heinonline.org/HOL/LandingPage?handle=hein.journals/relp2012&div=35&id=&page=>

[41] Energy Charter Treaty (n36) Part I Art 1(5) Para a)

[42] Cf. TTIP Proposal (n30) Part (x2), Energy Charter Treaty (n36) Part I Art 1(6)

[43] Energy Charter Treaty (n36) Part IV Art 19(1)(a)

[44] TTIP Proposal, EU proposal on provisions on climate aspects of the TTIP Trade and Sustainable Development chapter. (Made public on 14 July 2016) Para 1 (Accessed 13 December, 2016) <http://trade.ec.europa.eu/doclib/docs/2016/july/tradoc_154800.pdf>

[45] Taking into account: Vattenfall AB and others v. Federal Republic of Germany (II) (n34): Decision on the Respondent's preliminary objections pursuant to ICSID Arbitration Rule 41(5) dated 2 July 2013 and the ICSID Convention, Regulations and Rules (as Amended and Effective April 10, 2006) Chapter V Rule 41(5): "Unless the parties have agreed to another expedited procedure for making preliminary objections, a party may, no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is manifestly without legal merit."

2.3. Ways to tackle treaty-shopping and ensuring Parties right to regulate in the TTIP

The treaty-shopping, a practice which contributed to the current unpopularity of the investment dispute settlement mechanism and investment protection system in general[46], may serve as an umbrella term for the process of abusing vested investment protection by investors. In the same time, it is suggested, that an enactment of new IIAs and FTAs give investors the ability to carry out the praxis of treaty-shopping.[47]

Concerns about rising number of arbitration claims in recent years[48] and their effort to challenge state's right to regulate in public interest triggered public resentment of arbitral mechanism[49] and provoked discussion among academics and representatives of the general public.[50]

In the eyes of these expressed doubts and concerns, maximisation of scrutiny and precautions in the process of drafting new provisions stipulating the protection of investment seems appropriate and fitting. It is to be said in this regard, that representatives of the EU accepted this premise gradually in the TTIP's negotiation process and took steps to incorporate it.[51] One of the most notable being the initiation of the public consultation, as described above. Evaluation of the results of the consultation was reflected in the presented EU revised approach towards the negotiation of the TTIP and its investment chapter.[52] Particular concerns derived from the analyses of the consultation encompasses, besides the functioning of the arbitral tribunal, also the protection of the right to regulate[53]. The potential reform of the dispute

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46 See eg. *Investor-state dispute settlement: The arbitration game*, (The Economist, 2014) (Accessed on February 12 2017) <http://www.economist.com/news/finance-and-economics/21623756-governments-are-souring-treaties-protect-foreign-investors-arbitration>

47 Wellhausen Rachel L.,*Recent Trends in Investor–State Dispute Settlement*,(Journal of International Dispute Settlement, 2016:19) p9 (Accessed on February 12 2017) <http://www.rwellhausen.com/uploads/6/9/0/0/6900193/j_int._disp._settlement-2016-wellhausen-jnlids_idv038.pdf>

48 see UNCTAD, *Investor-state dispute settlement: Review of developments in 2015*, (2016: 51) p 2, Figure 1. Known ISDS cases, 1987-2015 (Accessed on February 12 2017) <http://unctad.org/en/PublicationsLibrary/webdiaepcb2016d4_en.pdf>

49 see eg. Provost, Claire, Kennard, Matt, *The obscure legal system that lets corporations sue countries* (The Guardian, 2015) (Accessed on February 12 2017) <https://www.theguardian.com/business/2015/jun/10/obscure-legal-system-lets-corportations-sue-states-ttip-icsid>

50 OECD, *Investor-State Dispute Settlement, Public Consultation: 12 May - 9 July 2012*, (OECD, Investment Division, Directorate for Financial and Enterprise Affairs, 2012: 102) p 5 (Accessed on 12 February 2017) <http://www.oecd.org/investment/internationalinvestmentagreements/50291642.pdf>

51 Although, at the same time, the turning point came as a response to valid criticisms of a lack of transparency of the negotiation process that followed the leak of negotiation documents in March 2014. For more see Draft, *Trade in Services, Investment and E-Commerce: Draft text* (n8)

52 See European Commission, *Investment in TTIP and beyond – the path for reform,* Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court, Concept Paper (2015: 12) p 3 (Accessed on January 21, 2017) <http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf>

53 Ibidem p 3

settlement mechanism was therefore linked with efforts to ensure parties right to regulate.[54] This paper operates with this given connection not only because it was repeatedly (as described above) mentioned by EU representatives. However, also, for the purpose of the assessment, whether measures incorporated into the text of the Proposal reflects the calls for ensuring the right of Parties to regulate matters of public order, health, environmental protection and what are provisions to establish it.

2.3.1. Definition of an Investor and Substantive Business Operation Requirement

The definition of an "investor" is set down in the general provisions of the TTIP's proposed text for Trade in services, Investment and E-commerce. It comprises any natural or juridical person of a Party that intends to make, is currently making or has already made an investment in the territory of the other Party.[55] In the same time, it takes a same path as the CETA agreement in a way it undertakes possible abuse of the investment protection by so-called "letterbox" or "shell" companies. Concerns about this phenomenon that could be illustrated on the recent case heard before ICSID - *Transglobal Green Energy v The Republic of Panama*[56] - was raised by Commission in the report on the online public consultation on ISDS in the TTIP.[57] TTIP proposal thus defines a juridical person of a Party as a person that is "engaged in substantive business operation" in the territory of their home state.[58] Such provisions can also be found in denial of benefits clause of some investment treaties.[59] However

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[54] European Commission, *Meeting report*, Transatlantic Trade & Investment Partnership Advisory Group, Expert meeting on Investment issues (9 October 2015) p 3 (Accessed on January 13, 2017) <http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153669.pdf>

[55] TTIP Proposal: Trade in Services, Investment and E-Commerce, EU proposal (Made public on 31 July 2015) Chapter 1 Art 1-1 Para 3(q) (Accessed on January 13, 2017) <http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153669.pdf>

[56] *Transglobal Green Energy, LLC and Transglobal Green Energy de Panama, S.A. v. The Republic of Panama*, ICSID Case No. ARB/13/28 (award rendered on 2 June 2016) As the Respondent objected and the tribunal acknowledged in the award, the claimant attempted to abuse the system of investment treaty arbitration by his effort to create artificial jurisdiction under an BIT. Claimant abuse laid in the fact that the owner of Panamanian national, Transglobal Green Energy, S.A, transferred its assets to Transglobal LLC, a company incorporated in Texas. This maneuver serves only the purpose of gaining the jurisdiction for Transglobal LLC under the US-Panama BIT, although it has not conducted any business activity in the territory of neither parties to this BIT before. In the context of TTIP this case represents an abuse of investment protection mechanism by letter box company.

[57] European Commission (n14) p 37

[58] TTIP Proposal (n30) Chapter 1 Art 1-1 Para 3(c) and Comprehensive economic and trade agreement (CETA) between the EU and Canada (Open for signature on October 30, 2016) Chap Eight Art 8.1

[59] See eg *Austria-Libia BIT* (entered into force on 1 January 2004). Chapter One Art 9.: *"A Contracting Party may deny the benefits of this Agreement to an investor of the other Contracting Party and to its investments, if investors of a Non-Contracting Party own or control the first mentioned investor and that investor has no substantial business activity in the territory of the Contracting Party under whose law it is constituted or organized. "*

neither TTIP proposal nor CETA or other agreements that use the term of "substantive business operation", do not take any further steps to clarify the term or provide guidelines to apply it. Calls for greater clarification of the wording and the definition of the substantive business operation were expressed by respondents of the mentioned online public consultation on ISDS in the TTIP.[60]

2.3.2 Denial of Benefits Clause

As a part of noticeable effort to restrict access to the investment protection under TTIP for investors engaged in so-called treaty shopping[61] (as a praxis of above mentioned Transglobal Green Energy could also be labelled), commission's proposal also includes denial of benefits clause that corresponds to it. DOB clause of TTIP proposal suggests that a Party may deny benefits arising from investment protection chapter to an investor of the other Party that is an enterprise if that enterprise is owned or controlled by the non-Party investor. Formulation of DOB clause suggests that such a denial may be exercised only if, at the same time[62], the denying Party has taken up measures with respect to the non-Party which were imposed for purposes of maintaining international peace and security or which are aimed at a prohibition of transactions with the enterprise.[63] The proposed denial of benefits in the TTIP thus serves rather a different purpose than the envisaged protection from abuse of the investors right. It could serve as safeguard, for example in cases of the international sanctions adopted against third countries that are aimed at maintaining international peace and security.

In general, disregarding the TTIPs' example, incorporation of such clause may give the impression that it is a "handy safeguard" against possible abuse of investment protection. Mainly to protect it from the non-Party investors. However, there are causes for circumspection about its practical applicability. The main one arises from unsuccessful efforts of states to

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60 European Commission (n14) p 16, Art 3.2. Specific considerations, Question 1

61 See Billiet, Johan, *International Investment Arbitration, A Practical Handbook*. (1st ed Maklu-Publishers,2016: 494), p. 147. "Treaty shopping may be defined as the process of routing an investment so as to gain access to a BIT where one did not previously exist or for gaining access to a more favourable BIT protection. This allegation claim under a MIT/BIT that is most favourable for them in order to benefit from the most extensive protection (Phillip Morris v Uruguay, Phillip Morris v Australia), although sometimes without material investment in the host state."

62 Otherwise it was also concluded in e.g. *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction (8 February 2005) para 143. Tribunal noted that in case that limbs of DOB in the Art 17 of the ECT are linked using the word "and", it is required for both of these limbs to be satisfied. DOB in TTIP goes the same way in linking the limbs together with the word "and".

63 TTIP Proposal (n30) Section 2 Art 9

invoke DOB clause of ECT. In often commented *Plama v. Bulgaria* (one of the first award to adress Art 17 of ECT[64]), Bulgaria attempted to deny the benefits of ECT to Plama Consortium Limited, company incorporated in Cyprus, on the grounds that it's owned or controlled by nationals of a third state and has no substantial business activities in the state of incorporation. Tribunal held, that it is required for the state to successfully claim the denial of benefits in the proceedings actually to exercise it and that such exercise operates with prospective effect only.[65] Such interpretation results in very unfavourable and disadvantageous position of states in their attempts to invoke DOB clause. In order to be successful in these attempts, they should steadily observe the ownership structure of all investors potentially covered by a treaty, and even then, any importance of such conduct is based solely on the arising of the dispute. Therefore, interpretation of the wording of the DOB clause of the ECT in the way Tribunal did it in *Plama v. Bulgaria* is problematic, as some scholars suggested.[66] Plus, thanks to the importance and number of the signatories of the ETC, it may affect future cases before ICSID and interpretation of DOB clauses in general.[67]

2.3.3. Anti-Circumvention

The anti-circumvention article further expands the possibilities to avoid treaty-shopping or other forms of abuse of investment protection. In terms of the systematics, it is a procedural measure of the ICS whereas substantive business operation test and DOB clause determine the range of recipients of investment protection before the commencement of any proceedings. Although it is important to mention the necessity of exercising the formal invocation of the DOB clause by the state that requires certain steps for a needed effect to take place. Moreover, as mentioned earlier, even the actual invocation may be viewed as made not in accordance with the provisions of the DOB clause of the particular IIA. That may be due to the tribunal adherence of the same reasoning as in the case of *Plama v. Bulgaria,* where it did not grant a retrospective effect to the invocation of the DOB clause.[68]

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[64] See Talus, Kim, *Research Handbook on International Energy Law* (1st ed Edward Elgar Publishing 2014: 704) p. 220.

[65] *Plama Consortium Limited v. Republic of Bulgaria* (n62) para 240 B

[66] See Vandevelde, J. Kenneth, *Bilateral Investment Treaties - History, Policy, and Interpretation* (1st ed Oxford University Press 2010: 574) p. 279

[67] See Talus, Kim (n64) p 221

[68] See Baumgartner, Jorun, *Treaty Shopping in International Investment Law* (1st ed., Oxford University Press 2016: 400) p 117. In such regards it mentions, apart from the notorious case of *Plama v Bulgaria, Liman Caspian Oil v Kazakhstan, Ascom and Stati v Kazakhstan*, *Pan American Energy v Argentina* and *Khan Resources and others v Mongolia*. These arbitral cases ended up the same way in case of exercising the state's right to deny benefits of that IIAs.

This article is part of ICS provisions, and it grants discretionary power to Tribunal of First Instance (also as "Tribunal") to decline jurisdiction in the case of acquisition of the investment by the claimant that is purpose-built only to submit the claim under the investment protection section of the TTIP[69]. This Art was clearly designed to preclude such flagrant cases of treaty shopping as in the case of Philip Morris v Australia.[70] Commission even mentioned this case and confirmed the purpose of the Art on Expert meeting on investment issues in October 2015.[71]

2.3.4. Protection of the State's Right to Regulate

An Art 2 of a second section of the investment chapter could be interpreted as the general exemption for certain measures conducted by Parties within their territories to be construed as a breach of the obligations imposed on them by the investment chapter. The measures that shall be treated this way are generalized as those "necessary to achieve legitimate policy objectives", and extensive list of them is given. It encompasses a wide range of measures, explicitly such in the field of public health, safety, environment or public morals, social or consumer protection or promotion and protection of cultural diversity.[72]

For the purposes of legal certainty, following Para lay down the reassurance that Parties adherence to the TTIP does not include a commitment not to change the legislative framework. Also, taking into account changes that may interfere with the interest of investors and their investment.[73]

A great deal of attention in the Art 2 is dedicated to the maintenance and administration of subsidies by the Parties. In the circumstances that they are not obligated to do so by contract or by law, and they proceed in accordance with conditions of the issuance of the subsidy, Party's decision denying the grant, maintain or renewal of the subsidy shall not be treated as a

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[69] TTIP Proposal (n30) Section 3 Art 15

[70] See wording of the *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility (17 December 2016) Para 585 *"…the Tribunal concludes that the commencement of treaty based investor-State arbitration constitutes an abuse of right (or abuse of process) when an investor has changed its corporate structure to gain the protection of an investment treaty at a point in time where a dispute was foreseeable."*

[71] See European Commission - TTIP Advisory Group, *Expert meeting on Investment issues*, Meeting report (9 October 2015) p 7 (Accessed on February 10, 2017) <http://trade.ec.europa.eu/doclib/docs/2015/december/tradoc_154015.pdf>

[72] TTIP Proposal (n30) Section 2 Art 2 Para 1

[73] TTIP Proposal (n30) Section 2 Art 2 Para 2

breach of invest. Section provisions.[74] The same shall apply in the case that such conduct is requested by the Commission or a court of Member State when applying EU law on state aid.[75]

An Evident intention of this section of the Draft is to provide background for interpretation that considers Party's regulation in those areas to be in compliance with investment protection of the TTIP. Compared to other IIAs and FTAs in particular, TTIP goes farther to proclaim protection of Parties right to regulate. TPP, for instance, mentions a number of specific state regulation that is considered not interfering with some of the elements of its investment protection.[76] In a matter of explicit expression of interpretation that does not prevent states from exercising their right to regulate, TPP only refers to measures in the environmental and public health field or other adopted to achieve regulatory objectives.[77] On the other hand, CETA consists of very similar Art to the one in the TTIP.[78] However, there are differences that raise doubts. First and foremost, it is a mode of expression of the protection of the Parties right to regulate. Namely CETAs first para of the Art 8.9 - Investment and regulatory measures, merely reaffirm of the state's right to regulate[79] whereas the analogous Art of the TTIP implies a legally binding obligation. It is that the right of Parties to regulate in defined areas shall not be affected.[80] Similarly the second para of CETA's Art 8.9 consist of more of a statement or affirmation of the already existing right of the state to regulate, rather than stipulating legally binding rule.[81] However, it is in line with the corresponding para of TTIP that also suggest serving as an interpretational guideline.[82]

Given its described proximity with the CETA's Art 8.9 and aware of stakeholders of both the CETA and the TTIP, it is of some significance to express doubts about Commission ability to uphold to this more strict and legally binding phrasing of the Art 2 of a second section of the investment chapter in the concluded version of the TTIP.[83] The scope of the protection of the Parties right to regulate covered by the term of "legitimate policy objectives" constitute

[74] TTIP Proposal (n30) Section 2 Art 2 Para 3
[75] TTIP Proposal (n30) Section 2 Art 2 Para 4 and Annex III
[76] Trans-Pacific Partnership (TPP) (Opened for signature on February 4, 2016) Chapter 9 - investment, Section A, Art 9.12: Non-Conforming Measures
[77] Ibidem Chapter 9 - investment, Section A, Art 9.16: Investment and Environmental, Health and other Regulatory Objectives
[78] Cf CETA (n58) Chap Eight Art 8.1 and TTIP Proposal (n30) Section 2 Art 2
[79] CETA (n58) Art 8.9 para 1
[80] TTIP Proposal (n30) Section 2 Art 2 Para 1
[81] CETA (n58) Art 8.9 para 2
[82] TTIP Proposal (n30) Section 2 Art 2 Para 2
[83] Cf. TTIP Proposal (n30) Section 2 Art 2 Para 2 and CETA (n58) Art 8.9 para 1

a margin of discretion in dispute settlement. The legitimacy of state's measures could be questioned through the course of the dispute and scrutiny over recognition of the states acts and policies as "legitimate" is given to the arbitrators.[84] Otherwise, the aim of preserving the state's right to regulate is noticeable[85] and carve out of this significance regarding covered subject matter is not common, as the comparison with TPP had shown.[86]

2.3.5. Partial Conclusions

The definition of the investment in the TTIP is conceptualized very broadly, but this is rather a norm in the field of FTAs.[87] With the knowledge of the previous cases, the concerns over the possibility to challenge environmental policies appear legitimate.[88]

Additionally, too broad definitions of the covered investment and the investor in TTIP may serve as a room for abuse. The findings of the study conducted by UNCTAD suggest, thanks to a too broad range of the protection and possible maneuvers undertaken by the potential investors, such provisions can enable investors with complex transnational ownership structures to gain protection under BIAs and FTAs even when they are not a notional addressee of these treaties.[89]

In contrast, the inclusion of so-called anti-circumvention clause can be evaluated positively as it, in cases of possible abusive conduct of investors that rests in the afford of gaining jurisdiction under TTIP, although they obviously do not fall within its' scope, could enable arbitrators to decline their jurisdiction.[90]

Overall the measures adopted in the investment protection section of the TTIP could be appraised relatively positively, as they imply an approach towards investment protection that

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[84] Analysis of the TTIP Proposal (n30) Section 2 Art 2 Para 1

[85] Rovine W. Arthur, *Contemporary Issues in International Arbitration and Mediation*: (The Fordham Papers, 2015: 238)

[86] TPP (76) Art 9.12

[87] EU-Vietnam Free Trade Agreement (Concluded on December 2, 2015) Chapter 1 Art Objectives, coverage and definitions Letter 4p

[88] For more see Art 2.2.2

[89] See United Nations Conference on Trade and Development. *Scope and Definition. UNCTAD Series on Issues in International Investment Agreements II.* United Nations, (2011: 163) p 66 (Accessed on February 24 2017) <http://unctad.org/en/Docs/diaeia20102_en.pdf>

[90] See Baumgartner, Jorun (n72) p 275-276.
With reference to the draft text of the TTIP and its anti-circumvention clause it states that codification of such principle "is in principle a good way to ensure arbitral tribunal will remain 'on the right track' in interpreting restructuring claims."

promotes more scrutiny over the creation of the provisions of the investment protection treaties. However, to achieve transparency and a balanced approach to the interests of states and investors a well-functioning and cautiously crafted system of dispute settlement resolution must be put in place at the same time. The description and evaluation of the reformed mechanism proposed by the EU - the ICS - is part of the Section 3 of this paper.

3. The Dispute Settlement Process under the TTIP – The ICS

Following the report on online public consultations, in May 2015 the Commission published a Concept paper that named "four areas where particular concerns were raised and where further improvements to the EU's approach should be explored." Within this context it lay out the need to ensure the right of Parties to regulate and to set up clear rules to govern establishing and functioning of arbitral tribunals, reviewing of their decision and defining a relationship between domestic judicial systems and ISDS.[91]

New Investment Court System was proposed on 16 September 2015. The press release following this proposal evidently wanted to ensure all "doubters", that the alleged "flaws" of ISDS has been tackled and the new ICS can satisfy their calls for maintaining high standards of consumer and environmental protection.[92] Still, many concerns persisted, as members of the European Parliament and European institutions commented on the announcement of proposed ICS.[93] Some of them label the ICS "a mere rebranding exercise of ISDS".[94]

The task of this Section of the paper will therefore be triple. In brief, 1), it is to analyse the proposed provisions of the dispute settlement mechanism (or the provisions of the "ICS", as initially recognised) and examined the alterations that they bring to the system of ISDS in comparison with the praxis currently used in the "standard" mechanisms of ISDS (ICSID and arbitration according to UNCITRAL Arbitration Rules). Then, 2), it is to find out if these proposed changes were initially adopted in the more recent EU FTA – the CETA – or what additional alterations they encompass. At last, 3), it is to recognize the problematic parts of the standard mechanisms of ISDS using their analysis and previous cases of ISA and determine, whether the proposed changes take them in to account and if they are sufficient to overcome them. Thus, if the proposed ICS form a quality mechanism of the settlement of the Investor-State disputes considering the presented flaws of the ISA or if it is just "rebranding of ISDS". Ultimately if it provides changes indicated in the research questions in the way that the answers are positive.

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91 European Commission (n52) p 3

92 European Commission (n11)

93 See eg Levy-Abegnoli, Julie, *TTIP: EU Commission unveils replacement for controversial ISDS*. The Parliament Magazine: (16 September 2015) (Accessed October 21, 2016) <https://www.theparliamentmagazine.eu/articles/news/ttip-eu-commission-unveils-replacement-controversial-isds>

94 Emmott, Robin, '*EU makes pitch for arbitration court to unblock U.S. trade talks*' (Reuters**:** 16 September 2015) (Accessed on 15 February 2017) <http://www.reuters.com/article/eu-usa-trade-idUSL5N11M2BB20150916>

3.1. TTIP Joint Committee

The essential part of the ICS's institutional arrangements comprises of the TTIP Joint Committee which is to be governed by rules set out in Institutional, General and Final Provisions of the TTIP.[95] Thanks to its incomplete nature, the Proposal omits to state that it is the TTIP Joint Committee itself who is responsible for appointing judges to the Tribunal (hereinafter as "Judges") and other duties when in those cases it only refers to the [...] Committee.[96] However, it can be inferred from the ratified version of the CETA agreement which, naturally, stipulates what committee it refers to in each case.[97] Other than that, there are not many differences to be found when comparing the form of the TTIP Joint Committee according to the provisions of the Proposal and CETA Joint Committee based on the concluded version of the CETA, apart from minor alterations in the systematics of the provisions.[98] When describing the competences of the Committee the same thus applies in the case of the CETA Joint Committee.

The Committee is granted many important powers in relation with the Tribunal. The majority of those relate to the competency to establish members of the ICS's bodies, and Committee thus safeguards a personal composition of the ICS. In this regard, Committee shall appoint Judges and members of the Appeal Tribunal[99] and may also, within a specified rate, modify their numbers.[100] It shall also compose a list of individuals who will serve as mediators.[101] Finally, it is also supposed to have a significant influence on the determination of the salary of the Judges and Members of the Appeal Tribunal.[102]

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[95] See EU Proposal for Institutional, General and Final Provisions in TTIP, Chapter [...] Institutional, Genaral and Final Provisions, Art X.1 (Accessed on 21 October 2016) <http://trade.ec.europa.eu/doclib/docs/2016/july/tradoc_154802.pdf>

[96] See the wording of TTIP Proposal (n30) Section 3 Art 9 para 2, "The […] Committee shall, upon the entry into force of this Agreement, appoint fifteen Judges to the Tribunal. Five of the Judges shall be nationals of a Member State of the European Union, five shall be nationals of the United States and five shall be nationals of third countries." And e.g. ibidem Art 9 para 3, para 8, para 12, para 14, para 15 and e.g. ibidem Art 10 and Art 13 and others.

[97] Cf. e.g. TTIP Proposal (n30) Section 3 Art 9 para 2 and CETA (n58) Art 8.27 para 2

[98] Cf. wording of the EU Proposal (n95) Chapter [...] Art X.1 and CETA (n58) Art 26.1

[99] TTIP Proposal (n30) Section 3 Art 9 para 2 and Art 10 para 3

[100] Ibidem Art 9 para 3, and Art 10 para 4

[101] Ibidem Art 3 para 4

[102] See ibidem Art 9 para 12 and Art 10 para 12. It is to be achieved by the competence of the Committee to render a decision on the retainer fee of the Judges and Members of the Appeal Tribunal and the daily fee of the Members of the Appeal Tribunal.

Along with those described above and other competencies of the Committee stipulated by the institutional provisions of the Agreement[103], the most significant right in relation to the ICS is set out in Art 13 which reads as follows:

"Where serious concerns arise as regards matters of interpretation relating to [the Investment Protection or the Resolution of Investment Disputes and Investment Court System Section of this Agreement], the [] Committee may adopt decisions interpreting those provisions. Any such interpretation shall be binding on the Tribunal and the Appeal Tribunal. The [] Committee may decide that an interpretation shall have binding effect from a specific date."[104]

The Committee may thus adopt a binding interpretation of the provisions of the Investment Chapter of the Agreement or, as the institutional provisions of the Proposal are designed, any other provisions of the Agreement as a whole.[105]

Competencies in the field of the nomination of the Tribunal members mark an essential shift in the mechanism of the investment arbitration when comparing the ICS Rules with the ICSID Convention Rules. This particular difference is examined further below.[106]

Committee's right to take a decision on the interpretation of the provisions of the Agreement is clearly in line with the EU's attempt to regain control over the investments disputes and its outcome[107]. In the field of the international investment law, the interpretation mechanism that is entrusted to the non-judicial body is not unique and could be likened to the NAFTA Art 2001 which vests the competency to *"resolve disputes that may arise regarding its interpretation or application"* to the Free Trade Commission.[108]

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[103] See EU Proposal (n95), Chapter [...] Art X.1 para 5 that among others set out the major role of the Committee in the process of implementation of the Agreement, its supervision of the specialised committees and the competence to seek ways to enhance trade and preventing problems and disputes in areas covered by the Agreement.

[104] Wording of the TTIP Proposal (n30) Section 3 Art 13 para 5

[105] EU Proposal (n95) Chapter [...] Art X.1 para 6e

[106] See below the text from n126

[107] As was lay down in Investment in TTIP and beyond - the path for reform (n52): *"We have given governments, not arbitrators, ultimate control over the interpretation of the rules. Under CETA, the EU and Canada can issue binding interpretations on how the provisions should be interpreted, and the ISDS Tribunal is obliged to respect those interpretations. These binding interpretations can also be made with respect to ongoing ISDS cases. The ability for the Parties to the agreement to adopt binding interpretations is a safety valve in the event of errors by the tribunals (the likelihood of which is in any event eliminated by the clear drafting of the relevant investment protection standards)."*

[108] See the wording of the North American Free Trade Agreement between the U.S.-Can.-Mex. (NAFTA) (Came into force on December 17, 1992) Chapter 20 Art 2001 Para 2

Given that the Committee should serve as integral and unifying institution in the process of implementation and application of the Agreement[109], the sole fact that the right of ultimate and binding interpretation of the Agreement is entrusted to it, as a non-judicial body of the ICS, is quite logical and it resembles a legitimate attempt to reassert control over the investment treaty mechanism. The Committee's interpretative competence was thus in principle received positively and among other reasons for that was that it might prevent some forms of abuse of the ISA such as the treaty shopping, thanks to the potential to "recalibrate" vague clauses of the Agreement without the need to adopt the legal amendment.[110]Apart from these, more or less positive reactions, others could be predicted from previous international legal practice. In the case of the interpretation of the NAFTA agreement conducted by the FTC in 2001[111], it was concluded that it as such constituted an amendment to the agreement and thus an unacceptable circumvention of the standard process of its negotiation.[112] Although in the case of the CETA, Commission has declared that "it is unlikely that any binding interpretation of CETA will be required in the near future"[113], I still find such an expanded competence in the field of interpretation of the TTIP as potentially problematic. It also raises the question of the possibility to subject an exercise of such competence to the public scrutiny.

Above all, as the excessive conception of the Art 13 suggests[114] and some have warned[115], there is a major problem accompanied with Committee's interpretative power. That is that the Committee may determine a date from which the binding effect of the interpretation takes place.[116] Moreover, given that the Agreement lacks a provision explicitly forbidding that, it implicitly grants the Committee a right to set the binding effect of the interpretation to the past.[117] That would violate the basic principles of non-retroactivity and represent a threat to the

[109] EU Proposal (n102) Chapter [...] Art X.1 para 5 (a)

[110] See Baumgartner, Jorun (n72) p 244

[111] as introduced above in n108

[112] As assessed in Brower, H. Charles, *Why the FTC Notes of Interpretation Constitute a Partial Amendment of NAFTA Article 1105* (46 Va. J. Int'l L. 2005-2006, 347) (Accessed on May 20, 2017) <http://heinonline.org/HOL/LandingPage?handle=hein.journals/vajint46&div=18&id=&page=>

[113] See Council of the European Union, *Statements to the Council minutes, 13463/1/16 REV 1* (27 October 2016) Para 18 Commission declaration (Accessed on June 9, 2017) <http://data.consilium.europa.eu/doc/document/ST-13463-2016-REV-1/en/pdf>

[114] See below n116

[115] See below n117

[116] See the wording of the TTIP Proposal (n30) Section 3 Art 13 Para 5

[117] See e.g. Kulick, Andreas, *Reassertion of Control over the Investment Treaty Regime* (1st ed Cambridge University Press 2016: 412) p 313 - 314

rule of law of the Agreement as was repeatedly concluded[118] in the case of the FTC's interpretation of the NAFTA.[119] Although such application of the TTIP provisions (setting the effect of the interpretation to the past) may contradict the basic principle of non-retroactivity of international law expressed in the Art 28 of the VCLT[120] there is still significant room for left for doubts about the practical implications and possible use. The scope of interpretation is thus something that needs to be reasserted in a way that it was formerly in the described case of NAFTA's interpretation[121] so that the interpretation of the Committee should not influence or even resolve particular disputes.

Laying out such important role of the Committee, it is going to be essential how it is composed but, neither the Proposal nor the final provisions of CETA provide us with further clues.[122] In this context, Proposal only stipulates that the Committee comprises representatives of both parties[123] and that it:

.."shall be co-chaired by the United States Trade Representative and the Member of the European Commission responsible for Trade, or their respective designees."[124]

In the case of the CETA Joint Committee and its composition, there have been only partial and non-specific claims made by EU representatives until now.[125] In the EU, the heated debate on the theme of the representation of the member states in the Committee is thus to be expected.

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[118] See e.g. Kaufmann-Kohler, Gabrielle, *Interpretive Powers of the Free Trade Commission and the Rule of Law* (JurisNet, 2011) <http://www.arbitration-icca.org/media/1/13571335953400/interpretive_powers_of_the_free_trade_commission_and_the_rule_of_law_kaufmann-kohler.pdf>

[119] NAFTA Free Trade Commission, *North American Free Trade Agreement, Notes of Interpretation of Certain Chapter 11 Provisions* (Addopted on July 31, 2001) <http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp>

[120] Vienna Convention on the law of treaties (opened for signature on May 23, 1969) (came into force on January 27, 1980) Art 28

[121] See e.g. De Mestral, Armand, *Second Thoughts: Investor State Arbitration between Developed Democracies* (Centre for International Governance Innovation, 2017: 552) Part six, Final thoughts: The way Forward

[122] In this context see also the *Joint analysis of CETA's Investment Court System (ICS), Prioritising Private Investment over Public Interest* (Accessed on June 9, 2017) para 13 <http://epha.org/wp-content/uploads/2016/07/Joint-Analysis-CETA-ICS-1.pdf>

[123] EU Proposal (n95) Art X.1 Para 1

[124] The wording of Ibidem Art X.1 Para 3

[125] The answer given by Ms. Malmström on behalf of the Commission on 23 February 2017, P-009059/2016 (Accessed on June 9, 2017) <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=P-2016-009059&language=EN>
to the question under Rule 130 of the subject: Composition of the CETA Joint Committee and Committee on Geographical Designations (Accessed on June 9, 2017) <http://www.europarl.europa.eu/sides/getDoc.do?type=WQ&reference=P-2016-009059&language=EN>

3.2. Tribunal of First Instance

3.2.1. Composition of the Tribunal

The first instance of the announced two staged ICS, occupies the Tribunal, and it is designed to hear claims submitted under the procedure described further below.[126] The process of the Tribunal's constitution was hinted above,[127] and it comprises the appointment of fifteen Judges by the Committee, five of which shall be U.S. nationals, five EU member state nationals and five third countries nationals.[128] If for any reason there would be a need to increase or decrease the number of the Judges, the Committee is entitled to do so by multiples of three.[129] A lot from among the Judges who are nationals of the third countries shall determine the Judges who will henceforth serve as the President and the Vice-President of the Tribunal for a two-year term. They shall be responsible for organisational issues of the Tribunal.[130] The term of office of the Judges is six-year except the seven of those first fifteen appointed[131] and may be once renewed.[132] Regarding requirements for the office of the Judges to the Tribunal, the Proposal set out that they shall meet the qualification standards in their respective countries for the appointment to the judicial office. Also, they shall be of recognised competence and expertise in the field of public international law, most creditably in particular in the area of international investment law, international trade law and resolution of disputes arising under IIAs or ITAs.[133] Furthermore, the Code of Conduct for Members of the Tribunal sets out that Judges must be independent and impartial by all means, including the absence of any financial or other interests resulting in the reasonable appearance of bias.[134]

Apart from the decrease in length of the term to the five-year and the six-year respectively[135] and slightly extended disclosure obligations[136], what has is stated in the

[126] See below text starting at n252
[127] See above text starting at n99
[128] TTIP (n34) Section 3 Art 9 Para 2
[129] Ibidem Art 9 Para 3
[130] Ibidem Art 9 Para 8
[131] As ibidem Art 9 Para 5 stipulates, their terms of office extend to nine years.
[132] Ibidem Art 9 Para 5
[133] Ibidem Art 9 Para 4
[134] Ibidem ANNEX II Art 5
[135] CETA (n58) Art 8.27 Para 5
[136] Cf. TTIP (n30) ANNEX II Art 3 and CETA (n63), ANNEX 29-B Code of Conduct for Arbitrators and Mediators, Para 4 <http://data.consilium.europa.eu/doc/document/ST-10973-2016-ADD-5/en/pdf#page=32> which among others stipulate the obligation for candidates for the Members of the Tribunal position to disclose *"any financial interest of the candidate's*

paragraph above also applies to the tribunal constituted under the provisions of the CETA.[137] Noteworthy is the fact that the CETA adopted different terminology and titles the Judges the Members of the Tribunal instead.[138]

The Proposal sets out that Judges shall be paid a monthly retainer fee of proportions that would be determined by the decision of the Committee. In this context, the Commission went even farther, and the Proposal contains a note suggesting that the retainer fee should be a fraction of that of the WTO Appellate Body members or around 2.000,- € per month.[139] It is necessary to understand that the fee is provided for Judges to be available at service as Members of the Tribunal. When hearing the dispute, the amount of fees and expenses payable to the Judges is guided by the Regulation 14(1) of the Administrative and Financial Regulations of the ICSID Convention (hereinafter also as the "Convention").[140] Based on this fact the Tribunal could be described as the semi-permanent body of the ICS. That applies as long as the Committee adopt the decision on full employment of the Judges and transformation of their retainer fees and fees and expenses when serving as the division of the Investment tribunal into regular salary. Once such decision is rendered requirements for Judge's office broaden and they are no longer permitted to engage in any other occupation unless they are granted the exemption.[141] Otherwise, once appointed as members of the Tribunal, the Judges can no longer counsel or serve as party-appointed expert or witness in any other investment protection dispute[142]. That needs to be, with respect to the risks that existence of such phenomenon accommodates[143], assessed positively.

Once a claim is submitted to the Tribunal, the President of the Tribunal appoints three Judges on a rotation basis who compose the division of the Tribunal (hereinafter as the "Division") which hear the case. Nationals of both Parties shall be represented in the Division, and it shall be chaired by the Judge who is a nationality of a third country.[144] The proposal, as

employer, partner, business associate or family member in in the proceeding or in its outcome, and in an administrative proceeding, a domestic court proceeding or another panel or committee proceeding that involves issues that may be decided in the proceeding for which the candidate is under consideration."

[137] Cf. the wording of TTIP (n30) Section 3 Art 9 and CETA (n63) Art 8.27

[138] See e.g. CETA (n63) Art 8.27 Para 2

[139] TTIP (n34) Section 3 Art 9 Para 12

[140] Ibidem Art 9 Para 14

[141] Ibidem Art 9 Para 15

[142] See TTIP Proposal (n34) Section 3 Art 11 Para 1

[143] For further conclusions in this regard see below text at n171

[144] See ibidem Art 9 Para 6 and Para 7

well as the CETA, integrates an exception to the standard composition of the Division in case the disputing parties agree on the case to be heard by a single Judge of a nationality of a third country. This element is purposely designed to avoid increased cost of the proceeding in the case of the small or medium-sized claimant or in the case claimed damages are relatively low. In those cases, the Respondent is thus obliged to comply with the claimant's request for the solo Judge to hear the claim.[145]

Serving as a member of the Division, Judge's incompetency to hear a claim based on alleged conflict of interest could be claimed by disputing party by a notice of a challenge to the appointment sent to the President of the Tribunal.[146] This process is described further below.[147]

The actual Judge's membership of the Tribunal could be challenged in case his behaviour is not fulfilling the requirements set out in the Proposal for the performance of his office. In that case, a decision on the removal of the Judge may be rendered by the Committee after the President of the Appeal Tribunal equipped it with a reasoned recommendation.[148]

3.2.2. Comparison to the Other Forms of Tribunal-Composition

In the case of the ICSID, the constitution of the tribunal is primarily within the competence of the disputing parties which are limited only in terms of nationality when selecting the particular arbitrator for the tribunal.[149] Other than that, the Convention only sets out that arbitrators must be a persons *"of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment"* and that in their case, the competence in the field of law must be *"of particular importance"*.[150] Also, apart from prohibiting the potential arbitrator's previous service as a conciliator or an arbitrator in any proceeding for the dispute settlement, the ICSID rules does not go farther in stipulating any particular requirements for arbitrator's impartiality

[145] See ibidem Art 9 Para 9 and CETA (n63) Art 8.27 Para 9

[146] TTIP Proposal (n34) Section 3 Art 11 Para 2

[147] See below text starting at n314

[148] TTIP Proposal (n34) Section 3 Art 11 Para 5

[149] According to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Rules of Procedure for Arbitration Proceedings (Arbitration Rules) (Came into force on January 1, 1968), Rule 1 Para 3 the prevailing number of the arbitrators must not be of the nationality of one of the disputing parties. In case a sole arbitrator is appointed, he must not be of a nationality of either party. This does not apply if arbitrators or a sole arbitrator was appointed by agreement of the both parties to the dispute.

[150] See the wording of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) (Came into force on October 14, 1966), Art 14 Para 1

and independence.[151] The absence of conflict of interest is explicitly mentioned only among "Additional Considerations for Selecting Arbitrators".[152]

Left with establishing such requirements are the individual BITs and FTAs.[153] Many of them, however, do not form any additional guideline for forbidding arbitrator's potential conflict of interest.[154] UNCITRAL Arbitration Rules have set a higher standard in this regard when they govern a process of disclosure of any circumstances possibly creating arbitrator's impartiality and the process of the direct challenge of the arbitrator in any such incertitude.[155]

Analogically to the process of composition of the Tribunal, under the Convention rules, the ICSID Panels of Arbitrators are set up from the designees provided by the ICSID Contracting States and by Chairman of the Administrative Council[156]. However, parties to the dispute are not required to select the arbitrators from the Panellists.[157] However, because it is quite often that they do not come to a conclusion in the process of agreeing on the president of the Tribunal[158], as set out in Art 37 (2b) of the ICSID Convention, it is then up to the Chairman of the Administrative Council to appoint him.[159] While doing so, the Chairman is obliged to select the president from within the ICSID Panel of Arbitrators.[160]

Regarding the fees received by the Arbitrators, the ICSID rules entitle them to a flat fee of 3.000,- U.S. dollars for each day (8-hours) participating in meetings of the arbitral tribunal or at service in connection with the proceeding.[161] Other payable compensations comprise expenses incurred when travelling and staying away from their normal place of residence.[162]

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[151] Cf. the Arbitration Rules (149) Rule 1 Para 4. However, it is necessary to note that Ibidem Rule 9 provides the procedure of disqualification of an arbiter and the reason for proposed disqualification may be impossibility of the arbitrator to exercise independent judgement - thus a claimed dependence and bias of his.

[152] See ICSID, Selection and Appointment of Tribunal Members - ICSID Convention Arbitration, Additional Considerations for Selecting Arbitrators (Accessed on June 13, 2017) <https://icsid.worldbank.org/en/Pages/process/Selection-and-Appointment-of-Tribunal-Members-Convention-Arbitration.aspx>

[153] See e.g. Code of Conduct for Dispute Settlement Procedures under Chapters 19 & 20 of the NAFTA (n115), established pursuant to Art 1909 of NAFTA, Part IV >

[154] See e.g. Federal Ministry for Economics and Technology, *Germany model Treaty concerning the Encouragement and Reciprocal Protection of Investments* (2008), (Accessed on June 13, 2017) <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2865>

[155] See UNCITRAL Arbitration Rules (Adopted December 15, 1976) (with new art 1, para 4, as adopted in 2013) Art 11-13 and Dugan, Christopher, Wallace, Don, Rubins, Noah , Sabahi, Borzu, *Investor-State Arbitration* (1st ed., Oxford University Press, 2008: 818) p 219

[156] ICSID Convention (n150) Art 12-16

[157] Ibidem Art 40

[158] See Dugan, Christopher and others (n155) p 129

[159] According to the ICSID Convention (n150) Art 38

[160] Ibidem Art 40 Para 1

[161] According to Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Administrative and Financial Regulations (Amended on April 30, 1970) Regulation 14 Para 1 in connection with ICSID Secratariat, Memorandum on the Fees and Expences (July 6, 2005)

[162] Ibidem Administrative and Financial Regulations, Regulation 14 Para 1

3.2.3. Partial Conclusions

As apparent from the above-described, the traditional ICSID mechanisms strongly reflect the principle of the autonomy of the parties to the dispute in the composition of the arbitration panel. In this respect, the ICS, on the other hand, takes steps to abolish this autonomy in investor-state arbitration fully.[163] What practical impact could this have?

The ICSID mechanism of appointment of arbitrators has proven to raise doubts especially with respect to their impartiality and independence. The reason for that was, among others that arbitrator's lack of impartiality and independence is not examined under ICSID Convention rules and legitimate need for meeting these basic qualities is not strictly demanded upon parties.[164] At the same conclusion has arrived the author of this paper, given the analysis done above and the fact that the process of disqualification of arbitrators on the basis of their alleged conflict of interest[165] has proven problematic and inefficient[166], to say the least. That is because, first, the ICSID Convention requires, if the arbitrator is challenged, a manifest lack of requirements for service as an arbitrator, in contrast to the mere reasonable doubt test in the case of other arbitration rules.[167] Second, the decision on the challenge of an arbitrator falls within the competence of the remaining two arbitrators, and that puts them in a very difficult position.[168] I would even consider claiming that it puts them in a position of a potential conflict of interest.

What the above stated primarily suggests is that the ICSID Convention rules are short of the necessary instruments for guiding the ethics of arbitrators regarding their indispensable

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[163] Apart from the described above see e.g. European Commission, *Reading Guide for Draft text on Investment Protection and Investment Court System in the Transatlantic Trade and Investment Partnership (TTIP)* (Brussels, 16 September 2015) (Accessed on June 13, 2017) <http://europa.eu/rapid/press-release_MEMO-15-5652_en.htm>

[164] Strong arguments in favour of the need to fulfil the requirements of impartiality and independence of the arbitrators in the ISA were presented by Kumm, Mattias *An Empire of Capital? Transatlantic Investment Protection as the Institutionalization of Unjustified Privilege* (European Society of International Law Reflections, 2015: 8) p 7 <http://www.esil-sedi.eu/sites/default/files/ESIL%20Reflection%20KUMM%20final_0.pdf>

[165] As presented above in n146

[166] See e.g. Pantaleo, Luca, *Lights and Shadows of the TTIP Investment Court System (*CLEER Paper Series 2016/1, May 13, 2016) <http://www.academia.edu/25458336/Lights_and_Shadows_of_the_TTIP_Investment_Court_System>

[167] Cf. ICSID Convention (n150) Art 57 and e.g. UNCITRAL Arbitration Rules (n155) Art 12 Para 1

[168] Giorgetti, Chiara, *Who Decides Who Decides In International Investment Arbitration?* (University of Pennsylvania Journal of International Law 431, 2013) p 477-478 <http://scholarship.richmond.edu/cgi/viewcontent.cgi?article=1893&context=law-faculty-publications>

impartiality and independence.[169] Moreover, that under them there is a lack of manageable and independent process to determine the conflict of interest, or its' absence. Examples of the past ICSID cases[170] and conclusions drawn in the papers of some authors[171] imply that the problem of conflict of interest and therefore a possible biased decision making is rooted in the principle of parties appointing adjudicators. I would not, however, claim that to be an absolute truth and rather suggest that in the process of selecting adjudicators in the ISA, following the ethical aspect and demanding their impartiality and independence should be categorically enforced. Along, that rules governing the ICSID proceedings should contain necessary disclosure provisions.[172] Moreover, finally, "softening" the otherwise strict "manifest lack of requirements"-test through interpretation[173] could uplift otherwise inappropriate and controversial process of disqualification of the arbitrator according to the Art 57 of ICSID Convention carried out by the remaining two members of the tribunal.

From this perspective, I think that in general, it is necessary to welcome the reformative nature of the requirements that are to be brought by the ICS mechanism into the system of ISA. As regards the process of composition of the Division, the aspect that also deserves a positive response is a single Judge conduction of the proceedings and its obligatory nature in the case of small and medium size claimant.[174] This provision could significantly influence costs of Tribunal proceedings and thus make it available for a wider range of investors. However, this desired effect could be drastically reduced by the appeal procedure.

However, another important consideration needs to be undertaken when suggesting the appropriateness of the mechanism which stipulates the selection of arbitrators free of the influence of the parties to the dispute. Namely, the setting of the ICS mechanism in the EU agreements would significantly increase the level of political influence on the process of

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169 For thorough analysis concluding the importance of biased-free arbitration and risks accompanied with potential dual arbitrator-adviser relationship see Bernasconi-Osterwalder, Nathalie, *Arbitrator Independence and Impartiality: Examining the dual role of arbitrator and counsel* (Background Papers, 2010) <http://www.iisd.org/pdf/2011/dci_2010_arbitrator_independence.pdf>

170 e.g. in the case of *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. The Argentine Republic* (ICSID Case No. ARB/97/3), Annulment Committee Decision (from 20 August, 2007), Para 230-242, the arbitrator was in the position of the clear conflict of interest when at the time of service as the member of the tribunal she was a member of the board of directors of the USB Corporation which were a shareholder of the claimant.

171 See e.g. Pantaleo, Luca (n166) Para 2.2 p 80-81 or Schwieder, W. Robert, *TTIP and the Investment Court System: A New (and Improved?) Paradigm for Investor State Adjudication* (Volume 55, Columbia Journal of Transnational Law, 2016: 178) Para 3 p 196-197 <http://jtl.columbia.edu/ttip-and-the-investment-court-system-a-new-and-improved-paradigm-for-investor-state-adjudication/>

172 As is unambiguously clear from the example described above at (n170)

173 As some authors suggested, on the basis of the historical research, the Article 57 is misinterpreted and intention of states in the process of a creation of the Convention was not to create the standard that strict for the appeal of an arbitrator. See e.g. Vasani, B. S. and Palmer, S. A., *Challenge and Disqualification of Arbitrators at ICSID: A New Dawn?* (ICSID Review, 2014) p 5 <https://doi.org/10.1093/icsidreview/siu021>

174 See above the text at n146

selecting members of the tribunal and on the ISA as a whole.[175] So it is a question of whether this element is not shifting the dispute settlement mechanism from the initially declared balancing and getting rid of the excessive influence of investors, towards certainty not beneficial opening of space for wide political influence. Thus, more than ever, it will depend on the formation of the Committee, if this and the subsequent process of appointing the Judges will be a subject of public scrutiny and to what extent will these be correct and balanced.

Moreover, as some have warned, the abolishing of the party's autonomy in the selection of the arbitrator in the ICS makes it rather a judicial than arbitral mechanism and thus, it falls outside the scope of the New York Convention on the Recognition and Enforcement of Arbitral Awards.[176]

Apart from the above stated, it is also necessary to grasp practical issues in consideration regarding the composition of the ICS Tribunal. As apparent from the Proposal[177], EU's intention was to set a retainer fee for the Judges as members of the Tribunal on about 2.000,- € a month. However, this aim was with regards to the amount heavily criticised, and concerns were expressed in the sense that it is not sufficient to secure the independence and impartiality of the Judges.[178] Suffice to say that, because of the proposed amount of the retainer fee in connection with the significant portion of requirements that need to be met and positions Judges must refrain from upon the appointment, it makes it quite hard to imagine that many more than arbitrators from among the retired lawyers and jurist come into consideration as a potential Judges. Some of the representatives of the professional community have expressed opinions in a similar manner.[179]

As the Art 9 of the Proposal stipulates[180] and is preserved as binding in the case of CETA's ICS,[181] the amount obtained when working as a part of the Division shall be that determined by the Financial Regulation of the ICSID Convention. So the same as in the case

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[175] As the author of the paper states in Pantaleo, Luca (n166) Para 2.2 p 81-82

[176] See e.g. Pantaleo, Luca (n166) Para 3.1 p 85-87

[177] See above the text at n140

[178] See e.g. Deutcher Richterbund, *Opinion on the establishment of an investment tribunal in TTIP - the proposal from the European Commission on 16.09.2015 and 11.12.2015*, No. 04/16 (Accessed June 6, 2017) <https://www.foeeurope.org/sites/default/files/eu-us_trade deal/2016/english version deutsche richterbund opinion ics feb2016.pdf>

[179] See ibidem n177 or e.g. Stockholm Chamber of Commerce, A quick read of the EU Commission's Investment Court Proposal (ICSID Blog on 17 September, 2015) (Accessed on June 11, 2017) <http://isdsblog.com/2015/09/17/a-quick-read-of-the-eu-commissions-investment-court-proposal/> or European Federation for Invesment Law and Arbitration, TASK FORCE PAPER regarding the proposed International Court System (ICS) (2016) p 56 (Accessed on June 11, 2017) <http://efila.org/wp-content/uploads/2016/02/EFILA_TASK_FORCE_on_ICS_proposal_1-2-2016.pdf>

[180] TTIP Proposal (n30) Section 3 Art 9 Para 14

[181] CETA (n58) Art 8.27 Para 14

of arbitrators in ICSID proceedings - 3.000,- U.S. $ a day.[182] When we consider that some of the lawyers with the corporate background have stated that they deem working as the arbitrator before ICSID as "pro-bono"[183], the interest of prestigious jurist to work as a Judge is not going to be easy to gain.

[182] See above the text at n162

[183] That is because the rates offered to arbitrators before ICSID are relatively low (US$375 an hour) compared to e.g. arbitrator before the London Court of International Arbitration (US$700 an hour). For more see d'Aspremont, Jean, Gazzini, Tarcisio, Nollkaemper, André, Werner, Wouter, *International Law as a Profession* (1st ed. Cambridge University Press, 2017: 484) p 331

3.3. The Appeal Tribunal

For the process of negotiation of the TTIP, the Commission received recommendations of the European Parliament which accommodate the instalment of the appellate mechanism as a part of a "permanent solution for resolving disputes between investors and states."[184] The concept documents of the EU regarding the approach towards the new planned FTAs expressed views of the similar nature.[185]

The introduction of the appellate body as a part of the investment dispute settlement institutions is one of the cornerstones of the changes that EU introduced in order to reform the ISDS and silence the critical voices which pointed out controversies that have been accompanying ISA.[186] Interestingly enough though, in the case of the Proposal, EU went as far as setting the wording of the first provision as follows: "A permanent Appeal Tribunal is hereby established to hear appeals from the awards issued by the Tribunal".[187] The reason behind this could be that the discussion on the erection of the appellate body in ISA has been around for a quite a long time[188] and the Commission intended to persuade sceptics that this time, it is actually happening. While in the case of the CETA, the first para does not insist on stipulating the permanent nature of the Appellate Tribunal.[189]

3.3.1. The Constitution of the Appeal Tribunal

The method of forming the Appeal Tribunal basically corresponds to that of the Tribunal. That is that six Members of the Appeal Tribunal (hereinafter as "Members") will be selected by the decision of the Committee from those nominated equally by the Parties for the period of six years and the period of nine years in the case of the first half of the Members appointed.[190] The nationality of the Members shall be that of the Parties from two-thirds and that of the third state from one-third. Instead of the CETA which stipulates that members of the

[184] See European Parliament (n22) Para 1d (xv)

[185] Investment in TTIP and beyond - the path for reform (n52) p 11

[186] For more see Part 2 of this paper

[187] The wording of the TTIP Proposal (n30) Section 3 Art 10 Para 1

[188] For more see e.g. Díaz, Hugo Perezcano, *Enhancing the Dispute Settlement System or much ado about nothing* (Investment Treaty Arbitration and International Law - Volume 6, October 2013: 10) p 1 (Accessed on June 13, 2017) <https://law.yale.edu/system/files/documents/pdf/Enhancing_Dispute_Settlement_of_Much_Ado_about_Nothing_FINAL.pdf>

[189] See CETA (n58) Art 8.28 Para 1

[190] TTIP Proposal (n30) Section 3 Art 10 Para 2, 3

Appellate Tribunal shall meet the same requirements as those set out for the members of the tribunal,[191] the TTIP insist that Members "shall possess the qualifications required in their respective countries for appointment to the highest judicial offices".[192] As this wording, inappropriately trying too hard to underline the significance of the Member's office, raises doubts about the meaning of the provision and practical impact it could have, it is good that final version of the ICS in the CETA left it behind. Otherwise, the qualification requirements are identical to those of the Judges.[193]

While the rules of conduct of proceedings and ethical requirements for holding the Member's office apply both on Judges and the Members, the high standard of protection against biased decisions in the event of the potential conflict of interest will also be maintained in case of the Members.[194]

As well as with the Judge's, the Proposal count with the retainer fee to be monthly paid to the Members. The suggested amount is also left to be stated in the Proposal, and it refers to that of WTO Appeal Tribunal members, so 7.000,- € a month.[195]

According to the Proposal, once an appeal procedure is initiated, it is held before the division of the Appeal Tribunal established randomly by the President of the Appeal Tribunal and consisting of three Members, each of the different nationality and chaired by the Member who is the national of the third country.[196] When hearing appeals, fees and other expenses of the Members, in contrast to those of the Judges are not stipulated and should be determined by the decision of the Committee. The aforementioned reference to the remunerations of the WTO Appeal Tribunal members is, on the other hand, made also in respect to fees acquired by them when hearing appeals.[197] However, it is highly conceivable that the resulting daily fee of the Member will differ widely from that of the WTO panellist since, under the current scheme, Judge's daily fee would exceed it more than thrice.[198]

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[191] CETA (n58) Art 8.28 Para 4

[192] The wording TTIP Proposal (n30) Section 3 Art 10 Para 7

[193] Cf. ibidem Art 10 Para 7 and ibidem Art 9 Para 4

[194] See ibidem Art 11 and ibidem ANNEX II Art 1

[195] Ibidem Art 10 Para 12

[196] Ibidem Art 10 Para 8 and Para 9

[197] Ibidem Art 10 Para 12

[198] Compare the fee of US$3000 a day of the Judge as a member of the Division (for more see above text at n183) and Member's of the WTO Appellate Body fee of approx. US$700 according to Bethlehem, Daniel L., *The Oxford Handbook of International Trade Law* (1st ed. Oxford University Press, 2009: 856) p 283

3.3.2. Comparison & Evaluation

When considering other rules of the ISDS, under the Art 52 of the Convention, ICSID accommodates the process before an ad hoc Annulment Committee.[199] It is vital to understand, however, that this annulment mechanism does not remotely exhibit all features of the appellate procedure as it is designed for the ICS. That is to say, the grounds for annulment of awards focus on the integrity and core procedural issues of the arbitral process rather than the accuracy of the tribunal findings of law or fact. The scope of the annulment committee's review is thus limited to observations of the procedural nature of the case - if it complies with the rules of constitution of the tribunal, if the tribunal acted within its' granted jurisdiction, according to the fundamental rules of procedure and if the rendered award stated the reasons on which it was based. Little aside these aspects are the corruption on the part of a member of the Tribunal as the ground for annulment.[200]

In my opinion, as corruption represents a broad range of practices, this particular reason for annulment is open to a wide range of interpretations in a sense that it could prevent potential conflict of interest of the ICSID arbitrators. However, as the case of *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. The Argentine Republic* manifests, wider space for interpretation of this para has not always been taken into consideration even when clear signs of wrongdoing emerged.[201]

Demonstrated in the above-described example, the narrow perception of the reasons for annulment under ICSID Convention forbid a correction of the factual or legal errors of a tribunal. This was also confirmed in other decisions of the annulment committee.[202] So otherwise, the pure appellate procedure for ISDS is almost a Yeti-like feature; it is widely discussed for a long period but not yet seen.

There are also other examples documented the poor range of possibilities to correct the wrongs in conclusions of the tribunal.[203] The discussion on various means to address the issue

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[199] See ICSID Convention (n150) Art 52 Para 3

[200] Ibidem Art 52 Para 1

[201] For more see text above at n176

[202] As the *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary* (ICSID Case No. ARB/07/22), Annulment Committee Decision (from 29 June, 2012), Para 17 states: *"With respect to Articles 52 and 53 the drafters have taken great care to use terms which clearly express that annulment is an exhaustive, exceptional and narrowly circumscribed remedy and not an appeal. The interpretation of the terms must take this object and purpose into consideration and avoid an approach which would result in the qualification of a tribunal's reasoning as deficient, superficial, sub-standard, wrong, bad or otherwise faulty, in other words, a re-assessment of the merits which is typical for an appeal."*

[203] See e.g. *CMS Gas Transmission Company v. The Republic of Argentina* (ICSID Case No. ARB/01/8), Annulment Committee Decision (from 25 September, 2007), Para 158 that holds: *"Throughout its consideration of the Award, the Committee has identified a series of errors and defects. The Award contained manifest errors of law. It suffered from lacunae and elisions. All this has been identified and underlined by the Committee. However the Committee is conscious that it*

was undertaken before and resulted in the idea of ICSID Appeal facility which was mentioned in a working paper of the ICSID of 2004 and even expected to be incorporated into the ICSID structure but later discarded.[204]

The WTO Appellate Body (also as "AB") has been mentioned in many cases as an example of the desired functioning of the mechanism of appeals in international law in the sense that it increases the credibility and legitimacy of the dispute settlement system under the WTO.[205] It is established under the WTO Agreement to hear appeals from cases of panels of dispute settlement body which are the first instance bodies hearing cases under the Understanding on the rules and procedures governing the settlement of dispute of the WTO Agreement.[206] The Appellate Body formulate a report in which it can "uphold, modify or reverse[207] legal findings and conclusions of the panel"[208] expressed in its report. An element that has a significant impact on the quality of the AB decision making is the collegiality principle. Under it, all members of the AB (not just the trio serving the individual case) share information about the facts, and in particular phase of each case, the meeting of the AB members is held to discuss it.[209]

Though desirable, the adoption of a comparable praxis in the case of the ICS's appellate body is unlikely, since the final, CETA's version of the ICS set out that the working procedure for the Appellate Body shall be adopted by decision of the Committee (CETA Joint Committee in this case).[210] This step was probably taken for the reason of preservation of the higher level of political control over the system of appeals, while in TTIP, the working procedures may be drawn up autonomously by the Appeal Tribunal.[211]

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exercises its jurisdiction under a narrow and limited mandate conferred by Article 52 of the ICSID Convention. The scope of this mandate allows annulment as an option only when certain specific conditions exist. As stated already (paragraph 136 above), in these circumstances the Committee cannot simply substitute its own view of the law and its own appreciation of the facts for those of the Tribunal."

204 See Tams, Christian J., *An Appealing Option? The Debate about an ICSID Appellate Structure* (No. 57, Essays in Transnational Economic Law, 2006: 50) p 6 (Accessed on June 15, 2017) <http://www.telc.uni-halle.de/sites/default/files/altbestand/Heft57.pdf>

205 See e.g. Pantaleo, Luca (n166) Para 3.2 p 89-90

206 Pursuant to the Agreement Establishing the World Trade Organisation (WTO Agreement) (Came into Force on January 1, 1995) Art III Para 3 and WTO Agreement Annex 2 Understanding on rules and procedures governing the settlement of disputes (Dispute settlement understanding or "DSU") Art 17

207 The same formulation is used in CETA (n58) Art 8.28 Para 2

208 DSU (n218) Art 17 Para 13

209 See Šturma, Pavel, Balaš, Vladimír (n4) p 259

210 CETA (n58) Art 8.28 Para 7b

211 See TTIP Proposal (n30) Art 9 Para 10 and Art 10 Para 10. According to CETA (n63) Art 8.27 Para 10 this was preserved only in case of the Tribunal and even in a "lighter" version when the Tribunal "may" and not "shall" draw up its own working procedures.

The appellate mechanism brings about two issues for consideration. First, it will have the effect which is somehow implicit and was not quite remarked in the debate within the EU representatives. It will offer a second chance for all those seeking to alter a decision of the Tribunal. Not just states, potentially challenged in matters of their perhaps fairly positive legal measures to address a public well-being. However, also, for instance, those investors whose claims are abusive when they address measures not accounting for expropriation or other similar treatment. Second, as there are different features and provisions of BITs and investment-protection parts of FTAs, conclusions that are drawn in awards of the dispute settlement bodies inherently correspond to the provisions of the IIA to which they are related. Consistency and effective control of arbitral decisions are thus achievable only partially - with respect to the protection of investments that is offered by TTIP.[212]

This aspect is crucial when trying to liken the desired functioning of the system of appeal in TTIP or CETA to Appellate Body of the WTO, because of the major line that needs to be drawn between these two. It rests in the fact that dispute settlement under WTO is the multilateral mechanism which resolves disputes arising from the "packet" of multilateral agreements.[213] The consistency of the final adjudications through the system of appeals is thus achievable for the whole system of WTO agreements not just partially as in ICS - with respect to the TTIP or the CETA or other EU FTAs.

I would also like to present other problematic circumstances. In particular, the current system of ISDS is very costly,[214] and the potential appellate procedure is likely to make it even more expensive. That diminishes the effort to make ISA under ICS more accessible.[215]

From the practical and legal point of view, I am of the opinion that the adoption of the appellate mechanism in ISA could minimalize the rate of occurrence of evidently questionable decisions, as were some of those rendered under the one-staged ICSID.[216] Likewise, it is plausible that its' introduction could bring "positive points" of governments, the academic community and the general public to the tarnished reputation of the ISDS and help legitimise

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212 Both of the above described issues were concluded in the paper of Pantaleo, Luca (n166) p90

213 See Šturma, Pavel, Balaš, Vladimír (n4) p248

214 According to Commission, Jeffery P., *How Much Does an ICSID Arbitration Cost? A Snapshot of the Last Five Years* (Kluwer Arbitration Blog, February 29, 2016) <http://kluwerarbitrationblog.com/2016/02/29/how-much-does-an-icsid-arbitration-cost-a-snapshot-of-the-last-five-years/> between 2011 and 2015, the median costs for the ICSID arbitration were US$ 2.913.786,50 for the claimant and US$3.650.252,62 for the respondent. ICSID Tribunal costs had the median of US$882.668,19.

215 With measures as those described above at n175

216 As apparent from e.g. the Annulment committee decisions in cases mentioned above in n202 and n203

the whole process. As the experience after the Uruguay Round of multilateral talks that brought the establishment of WTO Appellate Body had shown.[217] However, it is most likely that these effects take place in a multiannual range. Moreover, again, it will, as with the Tribunal, much depend on the adjustment of the institutional and personal matters of the whole system.

As I pointed out further above, there are serious questions for consideration when weighing up the overall possible outcome of the appeal procedure under one FTA as TTIP or CETA. Therefore, the ending conclusion is as that as some authors have drawn. The appropriate means to most strengthen the positive outcome of the appellate procedure in ISA so as to safeguard the consistency of the decision-making properly would be to erect a centralised multilateral investment dispute settlement body.[218] Apparently, the idea of a similar nature was upheld among representatives of the EU as they equipped the TTIP and the CETA with provisions coping with conventional transitional arrangements.[219] In the case of the CETA, it even embraces the idea to the point that parties "shall pursue the establishment of a multilateral investment tribunal and appellate mechanism",[220] which corresponds to the previous recommendations of the EU Parliament.[221]

[217] See Ehlermann, Claus-Dieter, *Experiences from the WTO Appellate Body* (vol. 38, Texas International Law Journal, 2013) p 474 <http://www.tilj.org/content/journal/38/num3/Ehlermann469.pdf>

[218] As Pantaleo, Luca (n166) Para 3.2 p 90-91 points out. Also, the link between the calls for the appeal procedure in ISA and the multilateral investment agreement is drawn in Sauvant, Karl P., *Appeals Mechanism in International Investment Disputes* (1st ed., Oxford University Press, 2008: 472) p 272

[219] See the wording of the TTIP Proposal (n30) Section 3 Art 12: *"Upon the entry into force between the Parties of an international agreement providing for a multilateral investment tribunal and/or a multilateral appellate mechanism applicable to disputes under this Agreement, the relevant parts of this section shall cease to apply. The [] Committee may adopt a decision specifying any necessary transitional arrangements*"

[220] The wording of CETA (n58) Art 8.29

[221] See European Parliament (n22) Para 1d (xv) as it states: *"In the medium term, a public International Investment Court could be the most appropriate means to address investment disputes"*

3.4. Alternative Dispute Resolution in the ICS

A great deal of attention in the Proposal is dedicated to the institutionalisation of mechanisms that do not involve resolution of the formal claims by arbitrators. These mechanisms are in this case mediation and consultation. Preference of such a way of settĺing the potential disputes is hinted in the Art 1 of the Subsection 2.[222] Art 2 establishes the facilitation of the non-formal reconciliation by the Committee.[223]

3.4.1. Mediation

The mediation procedure is by its nature dependent on the expression of a free will of the disputing party to initiate it. Written request addressed to the other party then expresses the free will.[224] Unlike the EU's most recently concluded FTA, Proposal does not stipulate any formal requirements for the mediation request and its content.[225] Given this fact and otherwise close resemblance of these contracts,[226] it is most likely that final version would accommodate such demands.

If the other party accepts the request, both parties then have to come to an agreement about an appointment of a mediator.[227] The proposal sets out Committee's competence to provide a list of six individuals, who will henceforth serve as mediators.[228] At the same time, it refers to requirements that potential mediators should meet.[229]

During the course of mediation, the task of the mediator is to facilitate the process of reaching a mutually agreed solution for disputing parties.[230] By the nature of the process, mediator's effort to do so is not widely restricted. After being acquainted with the detailed description of the problem submitted by the party that invoked the mediation and possible

[222] See TTIP Proposal (n30) Section 3 Art 2 Para 1

[223] See TTIP Proposal (n30) Sectiom 3 Art 2 Para 2 that stipulates the Committee's surveillance of the implementation of the agreement and obligation of the party to the agreed solution to keep the Committee updated on the process

[224] TTIP Proposal (n30) Annex 1 Art 2 Para 1

[225] Cf. CETA (n58) Annex 29-C Section A Art 2 Para 1

[226] Which is repeatedly examined in this paper, for details see e.g. n58

[227] See TTIP Proposal (n30) Section 3 Art 3 Para 5

[228] Ibidem Para 4

[229] Ibidem mentioned requirements are: High moral character, recognised competence in the fields of law, commerce, industry or finance and reliability in terms of exercise of independent judgement.

[230] TTIP (n34) Annex 1 Art 3 Para 3

comments to it provided by the second party,[231] the mediator may organise consultation between the parties, consult them separately or propose a consultation with relevant experts and stakeholders.[232] He may offer advice to the parties or propose a solution to the presented problem upon which parties may or may not agree. An explicit limitation of this effort is that the mediator shall not advise or even comment on the matter of consistency of the measure in question with the Proposal.[233] In the ideal scenario, parties may reach a mutually agreed solution as the outcome of the mediation procedure[234], and they shall endeavour to do so within 60 days from the mediator's appointment.[235] However, this and other stipulated time limits may be lifted by the agreement of the parties.[236] If the solution is agreed, both sides shall take steps to implement it and inform the second of adopted measures.[237]

In relation to the dispute settlement process, it is emphasized that the mediation procedure may not be deemed as a basis for it and that any position taken during mediation or stance taken on the proposed solution may not be taken into consideration during the potential dispute settlement procedure.[238]

3.4.2. Consultation

Being the part of alternatives to the arbitral way of settling investment disputes, consultation is a forerunner of initiation of an investment dispute settlement procedure. They should be undertaken when neither the parties settled a conflict themselves nor in the participation of the mediator.[239]

Consultation process could only be initiated within the period of three years after the party claiming a breach of the investment chapter first acquire, or should have first acquired, knowledge of such a conduct and damages it incurred.[240] The period of two years applies after

[231] Ibidem Art 4 Para 1
[232] Ibidem Art 4 Para 2
[233] Ibidem Art 4 Para 3
[234] Ibidem Art 4 Para 7a
[235] Ibidem Art 4 Para 5
[236] Ibidem Art 7
[237] Ibidem Art 5 Para 1, 2
[238] Ibidem Art 6 Para 1
[239] TTIP Proposal (n30) Section 3 Art 4 Para 1
[240] TTIP Proposal (n30) Section 3 Art 4 Para 5a

a date when injured side withdraw its' claims pursued before a tribunal or court and, in any case, no later than ten years after alleged unlawful treatment take place and caused damages.[241]

The consultation is designed to closely precede a potential submission of a claim by the party requesting the consultation to proceed. Thus if the party does not act accordingly within eighteen months of submitting the request for consultations, the request shall be deemed as withdrawn and that party lose an authority to submit a claim. However, this period may be extended when both parties approve it.[242]

3.4.3. Partial Conclusions

In comparison with systems for settling investment disputes used to this day, ICS is one of the few to come up with institutionalised ADR as the first obligatory stage before any claim may be submitted to arbitration.[243] The ICSID Convention encompasses rules governing a process of conciliation that serves as the alternative to arbitration.[244] ICSID Conciliation, however, ends up being tragically unused.[245] The common feature of cases before ICSID involving conciliation is that they arose under IIA's dispute resolution clauses stipulating obligatory conciliation before invoking a dispute procedure.[246] In the eyes of the fact that voluntary recourse to conciliation as a form of ADR has been barely taken, the introduction of the obligatory ADR stage of arbitration appears as a single useful instrument to promote the use of ADR mechanisms under FTAs and other IIAs.

Correspondingly, authors Nancy A. Welsch and Andrea K. Schneider in their paper "Becoming Investor-state mediation" remarked propositions of some stakeholders to make investor-state mediation mandatory and recommendations of scholars to introduce procedures that reduce a probability of an emergence of the investor-state dispute. Such an outcry is relevant given the facts they put on the table - The costs of the investor-state arbitration are enormous both from the financial and political point of view. These costs may in certain cases,

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241 TTIP Proposal (n30) Section 3 Art 4 Para 5b

242 TTIP Proposal (n30) Section 3 Art 4 Para 6

243 As stipulated in TTIP Proposal (n30) Section 3 Art 6 Para 1, this only applies for the consultation procedure as specificated ibidem in Art 4

244 The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Rules of Procedure for Conciliation and proceedings (Consiliation rules) (Came into force on January 1, 1968)

245 See eg McIlwrath, M., Savage, J., *International Arbitration and Mediation, A Practical Guide* (1st ed Kluwer Law International 2010: 515) p. 387

246 See Parra, R. Antonio, *The History of ICSID* (1st ed Oxford University Press 2012: 435) p 257

as one particular investor expressed, significantly exceed the gains that are associated with a favourable award.[247] It is therefore predictable that in many cases investors would much rather try to avoid costly arbitration to the ADR option. Apart from the lower cost comparing to arbitration, UNCTAD's paper on alternatives to arbitration sums up other advantages of alternative approaches to ISDS. In brief, it is a flexibility of ADR - regarding possible result that is not limited to a mere financial compensation, and that does not entail unsought precedent that might favour others to challenge related state regulations. Correspondingly, it allows states and investors to reshape their existing ties and commitments. [248]

However, as the study identify further, possible adverse connotations that ADR may invoke are also significant, and their general implication is that the use of ADR might not be suitable in all cases of investment disputes and that they vary depending on the nature of the dispute. Also, the significant challenge in the process of establishing ADR is the assurance of transparency in the procedure.[249] From this perspective ICS establishes, a mandatory ADR only in connection with a mutually agreed solution and even that holds a significant exception.[250]

What the paper also implies is that some of the challenges that the ADR poses are due to the previous lack of its' practical application.[251] Given all the above mentioned I conclude that the promotion of such alternative approaches in ICS is a step in the right direction. However, the likely positive impact of such an approach is to be seen in a long-term.

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[247] Welsh, A. Nancy and Schneider, K. Andrea, *Becoming "Investor-State Mediation"* (Penn St. J.L. & Int'l Aff. 2012: 86) p 87 <http://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1003&context=jlia>

[248] United Nations Conference on Trade and Development, *Investor–State Disputes: Prevention and Alternatives to Arbitration* (2010: 129) p 31-35 <http://unctad.org/en/docs/diaeia200911_en.pdf>

[249] Ibidem, p 35 - 39

[250] As stipulated in TTIP Proposal (n30) Annex 1 Art 4 Para 6, Disputing parties can designate any information as confidential and thus omitted from public version of the mutually agreed solution.

[251] Most notable in this context is the unfamiliarity and the lack of experience with the techniques involved and a deficit of the suitable mediators and other neutrals. Further, the time-consuming nature of ADR and waste-of-time-and-funds-argument might also be given to relation. For more see United Nations Conference on Trade and Development (n123) p35-39

3.5. The Course of Proceedings

3.5.1. Submission of the Claim & Rules of Proceedings

To initiate the investment arbitration process according to the provisions of the Proposal, a claimant may submit a claim to the Tribunal either at least six months after submission of the request for consultations or at least three months after requesting a determination of the respondent.[252]

Request for determination of the respondent is the process which applies mandatorily in the case the alleged breach of the Agreement is identifiable with the EU or a Member State. Then, a claimant determined to initiate proceedings before the Tribunal is obliged to deliver a notice to the EU requesting the determination of the respondent (The EU or a Member State of the EU). The EU thus determine the respondent for the whole arbitration proceedings, and it serves henceforth as the basis for the claimant's claim. It is also binding on the Tribunal as well as on the Appeal Tribunal, and neither the EU nor a Member State may question the determination through procedural means in the course of the proceedings.[253]

As the rules of dispute settlement provided under the Chapter II of the TTIP do not fully cover the whole process of ISDS proceedings, there are sets of rules stipulated, under which the claim may be submitted. They are ICSID Convention Rules, ICSID Rules on the Additional Facility and UNCITRAL Arbitration Rules.[254] For the determination of these rules as rules of proceeding, the Claimant is only limited by that the rules must be applicable between the Parties.[255] After their designation as the rules governing the ICS proceedings, they apply subject to the provisions of the ISDS set out in the Proposal. At this point, the Proposal also leaves perceptible space for future supplementation of the dispute settlement rules of the Proposal and its' future binding effect, as the Proposal directly imposes it. As such, the adoption of the supplementing rules of proceedings can be carried out by the Committee, the Tribunal or the Appeal Tribunal.[256] Unlike the TTIP, the CETA does not allow such wide range of bodies

[252] TTIP Proposal (n30) Section 3 Art 6 Para 1
[253] See ibidem Art 5
[254] Ibidem Art 6 Para 2
[255] Ibidem Art 13 para 2
[256] Ibidem Art 6 Para 3

to adopt the binding supplementing rules and leaves this privilege only to the Committee on Services and Investment after the agreement of the parties.[257] This perhabs, as in previous cases,[258] marks the efforts of maintaining the significant degree of political influence on the ICS proceedings and its outcome. That again shifts the issue of sufficient level of independence of the Tribunal and the process of dispute settlement to the other side of the spectre. From the potential to be investor-biased to the potential to be government-biased.[259]

Apart from the above mentioned ISDS rules[260], the agreement of the disputing parties may designate any other rules to serve as rules of the dispute settlement process after the claimant requested it.[261] As some had pointed out, there is thus a noticeable unevenness in the degree to which parties to the dispute may manifest their autonomy in the proceedings. On the one hand, they have no say in the process of the constitution of the Tribunal.[262] However, on the other, they may manifest their independence through the selection of various sets of arbitration rules.[263]

The envisaged application of ICSID Rules in the ICS proceedings raises some legal questions. First and foremost, there is yet unresolved problem arising from the EU 'quasi-state-status' as it is not a signatory to the ICSID Convention.[264] This issue was brought into the debate over ICS multiple times[265] and subsequently mentioned paper provides an entirely conceivable solution. Given the apparent and intended modifications of the arbitral process that ICS brings about and that necessarily deviate it from the arbitration provided under the ICSID Convention, the second question is whether it would generate decisions that may be considered enforceable arbitral awards. In this regard, the author of a study that analyses the issue drawn

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257 See CETA (n58) Art 8.23 Para 6 and Art 8.44 Para 3b

258 See e.g. above the text from n217

259 For more see above the text from n176

260 See n266

261 TTIP Proposal (n30) Section 3 Art 6 Para 2d

262 Ibidem Art 9 Para 6, 7

263 As pointed out in Titi, Cathrine, *The European Union's Proposal for an International Investment Court: Significance, Innovations and Challenges Ahead* (Forthcoming, Transnational Dispute Management, advanced publication on 25 May 2016: 44) p29 (Accessed on May 15, 2017) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2711943>

264 See ICSID Documents, *List of Contracting States and other Signatories of the Convention* (as of April 12, 2016), (Accessed on May 16, 2017) <https://icsid.worldbank.org/en/Documents/icsiddocs/List%20of%20Contracting%20States%20and%20Other%20Signatories%20of%20the%20Convention%20-%20Latest.pdf>

265 See eg. European Commision, *Questionnaire: European Trade Policy 2020, Answer to Question 9: Given that the Lisbon Treaty gives the EU greater competences in international investment policy, how should we contribute to facilitating crossborder direct investment (both outward and inward)? What are the key issues to be addressed in agreements governing investment?* given by Investment Law Group of the University of Vienna, Austria, (Accessed on May 16 2017) <http://trade.ec.europa.eu/doclib/docs/2010/september/tradoc_146566.pdf> or Woods,Louise, *Fit for purpose? The EU's Investment Court System* (Kluwer Arbitration Blog, 2016) (Accessed on May 16 2017) <http://kluwerarbitrationblog.com/2016/03/23/to-be-decided/>

the conclusion of the higher plausibility of consideration the ICS awards as being enforceable under the ICSID Convention.[266] The reasoning of the paper is based on the realisation that for the successful application of the ICSID set of rules in ICS, it is necessary to achieve modification of ICSID Convention. However, that is not conceivably attainable through the revision of the Convention. Thus the possibility of *inter se* modification contained in the Vienna Convention on the Law of Treaties is carefully examined. A thorough inspection of individual ICS's modifications of ISA and their possible application in the context of ICSID Convention creates stronger arguments in favour of the conclusion of enforceability of ICS awards than the other way round. Also necessarily, the mentioned inspection is done with regard to requirements provided for *inter se* modification under the Art 41 VCLT and its findings consider them as predominantly fulfilled.

Such findings are relevant and could prove as highly valuable, given the path it took to determine a credibility of a suggested procedure of the modification of the ICSID Convention by rules on *inter se* modification of treaties contained in the 1969 VCLT.[267]

3.5.2. Consent as Requirement for Settlement of the Dispute

According to the Article 7 of the Proposal at the latest along with the submission of the claim the claimant is required to give consent.[268] Also, according to the para 1 of the Art 7, the adherence of the Parties to the whole TTIP establishes their consent with the submission of a claim under ICS rules.[269] The consent in question satisfy requirements of Article 25 of the ICSID Convention[270] and thus in the wording adapted to the ICS[271] establishes a basis for the jurisdiction of the Tribunal. After giving his consent, the claimant is required to abstain from

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[266] Reinisch, August, *Will the EU's Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards?—The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration* (Journal of International Economic Law, 2016, 19, 761–786) p 786 (Accessed on May 20, 2017) <https://oup.silverchair-cdn.com/oup/backfile/Content_public/Journal/jiel/19/4/10.1093_jiel_jgw072/3/jgw072.pdf?Expires=1494343886&Signature=Th5GTBSSZhCNUvNKwdkp-OXpyZdshuOZ0vL-dLSTcknQ0PCg3FnhVjuM4kLzj~VPCaR54fHq1mFzGADkjuGMlR~t7ge~ht9qXCDHNv7FcZb6xrsaJu0CAxN5jeDJIxCZRC5juFy~aXX35L-gxIdFgzbd-z0RQ19cm~W4VRNQfq2dBEcmJlwkw1uN5p~tlgC5ym9TTJiWIrrslYVJELGxuUR2CzZWIk7BtXo3Ytu~K~fhxEx8SzMcwQie7stS9jEbEc7aL5AOoQNmHQ2k4~7f0iqqLj2AYBh5ACttH5sxCYtJdQAH4K7k5NhgsWP7rfXgJB8SE4wG1aHLCVM-bHt90A__&Key-Pair-Id=APKAIUCZBIA4LVPAVW3Q>

[267] See ibidem p 761 - 786.

[268] TTIP Proposal (n30) Section 3 Art 7 para 3

[269] Ibidem Section 3 Art 7 para 1

[270] Ibidem Section 3 Art 7 para 2a

[271] cf. ibidem Section 3 Art 7 and The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Came into force on October 14, 1966)

enforcing an award before it becomes final and, correspondingly, the respondent is obliged to refrain from seeking to anyhow annul or review the award before other domestic or international judicial institution.[272]

In contrast to the above mentioned, as for systematics, a more appropriate placement of 'the consent' requirement was adopted in the case of the CETA agreement. Accordingly, its' Art 8.22 accommodates all requirements for the submission of a claim to the Tribunal. Thus, it, concerning the legal certainty, more suitably set out the consent as the requirement without which the Tribunal shall decline jurisdiction over the dispute.[273] Moreover, following para stipulates the necessity of a termination of all proceedings that have the same legal basis and are pending before the domestic or international judicial institution and a renunciation of the right to initiate them. Otherwise, the declination of the jurisdiction is due to occur.[274] This para corresponds to the Art 14 of the TTIP's investment chapter which, however, place these provisions less appropriately among rules of conduct of proceedings and failure to proceed accordingly results in the dismissal of the claim[275] which seems less suitable as noted below.

Concerning an initiation of the proceedings, it is to say that requirement for the consent formulated the way as in CETA and subsequent obligation to terminate the proceedings of a similar nature needs to be assessed very positively. Prevailing argument is that such wording of the procedural requirements clause could minimise issues relating to the jurisdiction of the Tribunal or other judicial bodies.[276]

Let's hope for the results predicted elsewhere,[277] namely that such a wording will be adopted for the TTIP agreement as well.

3.5.3. Transparency & Third-Party Funding

The problem of the "closed doors approach" in the ISDS was recognised years before the TTIP negotiations started and accordingly, states have in the meantime adopted various

[272] TTIP Proposal (n30) Section 3 Art 7 para 4
[273] CETA (n58) Art 8.22 Para 1a and in conjunction with the similar Art 8.22 Para 4
[274] Ibidem Art 8.22 Para 1f and 1g and in conjunction with the similar Art 8.22 Para 4
[275] TTIP (n30) Section 3 Art 14 para 1, 2
[276] Controversy and inconsistency in decision-making in the regard of jurisdiction of the ICSID is, for example, evident from Schreuer H., Christoph, *The ICSID Convention: A Commentary* (2nd ed Cambridge University Press 2009: 1596) p 221-222, para 485, 486 and further
[277] See above text starting at n106

measures governing transparency of the ISA in the BITs and FTAs in particular.[278] One of the achievements of the effort to make the ISDS proceedings more transparent was the adoption of the UNCITRAL Rules on Transparency in the Treaty-based Investor-State Arbitration which came into effect in 2014. They form the set of rules that supplement the UNCITRAL Arbitration Rules and obligatorily applies to the disputes initiated under them after the date of coming into effect. The significant drawback is, however, that such investor-state arbitration must originate under an Investment protection treaty that was concluded after 1 April 2014.[279] Parties to the treaties concluded before that date could also agree on adopting these rules, but thanks to the length of the re-negotiation process, it still leaves the vast majority of treaties "uncovered".

The provisions of these Transparency Rules set out a mandatory publication of all the key documents that are formulated through the course of the arbitration.[280] Perhaps the most innovative feature is the introduction of the hearings accessible to the public.[281] Naturally, these are subject to exceptions which are categories of information that shall remain confidential and the arbitral tribunal is obliged to determine necessary measurements to secure their non-disclosure.[282] Otherwise, it is mandatory to provide the rest of the medium carrying information (Applies both for documents and for hearings) to be made publicly available.[283] It also provides the option for a third person to file a submission with the arbitral tribunal regarding a matter of the current dispute.[284] From the non-disputing party to related investment treaty, the submission can be made concerning the interpretation of the treaty.[285]

The provisions of the TTIP, in this respect, take a full advantage of the Art 1 of the UNCITRAL Rules on Transparency[286] when they adopt them completely as governing the transparency of the ICS disputes. Otherwise, not much modification was made in connection with their original wording, apart from those accommodating it to the specific terminology of the TTIP.[287] Interestingly enough CETA, which otherwise accommodates almost the same

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[278] See OECD International Investment Law: A Changing Landscape (A Companion Volume to International Investment Perspectives, 2005: 42) Chapter 1 p14 (Accessed on June 15, 2017) <https://www.oecd.org/investment/internationalinvestmentagreements/40077817.pdf>

[279] UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (UNCITRAL Rules on Transparency) (Came into effect on April 1, 2014) Art 1 Para 1

[280] Ibidem Art 3

[281] Ibidem Art 6

[282] Ibidem Art 7

[283] Ibidem Art 3 Para 4 and Art 6 Para 2, 3

[284] Ibidem Art 4

[285] Ibidem Art 5

[286] See the wording of Ibidem Art 1 Para 9 when it designate the rules as available for basically all ISAs

[287] See TTIP Proposal (n30) Section 3 Art 18

rules of transparency, insist on stipulating that hearings shall be carried out as open to the public.[288] As mentioned earlier, this already applies thanks to provisions of UNCITRAL Transparency Rules.[289] However, this helps to ensure the obedience of the "open court principle" even in cases that could be previously regarded as subject to exceptions.[290]

Some scholars characterised the introduction of the "transparency standard" of the TTIP that is above the level provided under the UNCITRAL Rules on Transparency as a revolutionary development. Considering the evidence put on the table, that is that from more than 1.200 IIAs concluded by EU member states not a single one contained any provisions determining transparency obligations, it is appropriate to claim that.[291]

The issue closely relating to that of the transparency of the proceedings, treaty-shopping and the abuse of the vested rights by investors[292] is a third-party funding. Recently, it has received quite an attention among the arbitration community[293] and conducted close examinations of this trend has revealed severe consequences that it entails and how significant the room for abuse that it creates is.[294] Therefore there are strong arguments presented in favour of a disclosure of such external party's funding.[295] In light of these findings, ranging, of course, based on the width of the financing and the influence it grants, in principle, such disputes could have very little to do with the protection of investors against the conduct of states that violate their legitimate rights. Rather, sometimes, it could represent an attempt to abuse such vested rights to maximise profit.[296] Mandatory disclosure of all third-party funding as stipulated in the

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[288] CETA (n58) Art 8.36 Para 5

[289] See p 48

[290] E.g. according to UNCITRAL Rules on Transparency (279) Art 6 Para 3

[291] For more see Calamita, Jansen N., *Dispute Settlement Transparency in Europe's Evolving Investment Treaty Policy, Adopting the uncitral Transparency Rules Approach* (vol. 15, The Journal of World Investment & Trade, 2014) p 672 (Accessed on May 17 2017) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2598354>

[292] See part 2 of this Paper

[293] See e.g. Vernon, E. James, *Taming the "Mercantile Adventurers": Third Party Funding and Investment Arbitration – A Report from the 14th Annual ITA-ASIL Conference* (Kluwer Arbitration Blog, 2017) (Accessed on May 17 2017) <http://kluwerarbitrationblog.com/2017/04/21/taming-the-mercantile-adventurers-third-party-funding-and-investment-arbitration-a-report-from-the-14th-annual-ita-asil-conference/>

[294] See e.g. Shaw, J., Gary, *Third-party funding in investment arbitration: how non-disclosure can cause harm for the sake of profit* (Arbitr Int 2017; 33) p 109-110 (Accessed on May 20, 2017) <https://doi.org/10.1093/arbint/aiw007>

[295] Ibidem, p 109-110 among others states that there is a serious and justified risk of frivolous, time consuming and therefore, expensive procedural delays. Also, a knowledge of parties backgrounds may provide a clue for seeking a security for costs of proceeding. It could also help to prevent a conflict of interest. Ultimately the study suggests a range of financial operations, representing in fact a financial derivatives, that could possibly stand in the background and that could be the expression of the form of the third party funding.

[296] As, moreover, is resulting from the title of the third part of the ibidem, part 3. Argument:: Non-disclosure allows third-party funders to take advantage of the parties for the sake of profit

ICS rules[297] may thus bring more light into aspects of usage of this institute and provides that attempts as those above stated[298] could be minimized.

3.5.4. Preliminary Objections

The rules of proceeding under the TTIP stipulate that a respondent has a right to "file an objection that a claim is manifestly without legal merit."[299] The objection shall be specified to the extent of a possible precision,[300] and there is a period set out for the objection to be submitted.[301] Given its provisional aspect, the Tribunal shall render a decision or provisional award on the objection in short time after it grants the right to parties to give consideration of the objection.[302] It is specifically stipulated that the right to file the preliminary objection not affect the right of disputing party to object to legal nature of the claim during the course of proceedings.[303]

In addition to the above, the respondent has a right to raise an objection that the claim lacks legal basis and potential award in its favour may not be rendered. The alleged inadmissibility of the claim is addressed by the Tribunal as a preliminary question.[304]

Identically to the above described, the CETA provides the competency to raise objections that shall be addressed as preliminary questions.[305] The grounds for their submission are similar to those of objections under provisions of the TTIP.[306] However, CETA solves more conveniently interconnection between these two objections when it expressly stipulates that

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[297] TTIP Proposal (n30) Section 3 Art 8 reads as follows:
"1. Where there is third party funding, the disputing party benefiting from it shall notify to the other disputing party and to the division of the Tribunal, or where the division of the Tribunal is not established, to the President of the Tribunal, the name and address of the third party funder.
2. Such notification shall be made at the time of submission of a claim, or, where the financing agreement is concluded or the donation or grant is made after the submission of a claim, without delay as soon as the agreement is concluded or the donation or grant is made."

[298] See above p 48

[299] The wording of TTIP Proposal (n30) Section 3 Art 16 Para 1

[300] Ibidem Para 2

[301] Ibidem Para 1 set out the period for the submission of 30 days after the constitution of the division of the Tribunal and in any case before the first session of the division of the Tribunal, or 30 days after the respondent acknowledge the reasons on which the objection is based.

[302] Ibidem Para 3 stipulates that Tribunal shall issue the objection decision at the first meeting of the division of the Tribunal or promptly after. In any case no later than 120 after the submission of the objection.

[303] Ibidem Para 4

[304] TTIP Proposal (n30) Section 3 Art 17 Para 1

[305] See CETA (n58) Art 8.32 and Art 8.33

[306] Cf. TTIP Proposal (n30) Section 3 Art 16, Art 17 and ibidem Art 8.32, Art 8.33

they must not be filed simultaneously.[307] On the other hand, provisions of the TTIP implies the simultaneous submission of both objections[308], which may seem redundant and could in practice lead to delays in the proceedings.

Within the development of the dispute settlement mechanism, the attempts to address possible frivolous claims have given rise to provisions of IIAs setting out the right to file preliminary objections.[309] Under the ICSID Arbitration Rules, the Arbitration Rule 41 (5), which was adopted in 2006, provides the formal conditions for the procedure of an early dismissal.[310] Some IIAs stipulates procedures similar to that of ICSID Arbitration Rule 41 (5).[311] Both TTIP and CETA have adopted these new mechanisms to prevent the abuse of the investment dispute settlement mechanism.

However as the examples of applications of the preliminary objections before ICSID have shown, tribunals have set a high standard for their success. Also as the author of the very recent study, earlier concluding that successful application under ICSID Arbitration Rule 41(5) may only be favourable under "limited circumstances", suggests, that limits the potential to use such mechanisms as the anti-abuse measures.[312]

3.5.5. The Course of Proceedings before the Tribunal

After the submission of the claim, the President of the Tribunal appoints three Judges to constitute the Division hearing the claim. The system of appointment needs to be random and unpredictable and respect the principle of both parties to the dispute nationalities representation, while the Judge of the citizenship of a third party chair the Division.[313] A disputing party may challenge the composition of the Division within 15 days after it is notified of the Divisions' composition or 15 days after relevant facts came into its' knowledge. The

307 CETA (n58) Art 8.32 Para 2 and Art 8.33 Para 3

308 TTIP Proposal (n30) Section 3 Art 16 Para 4 and Art 17 Para 2

309 See United Nations Conference on Trade and Development, *Investor-state Dispute Settlement and Impact on Investment Rulemaking* (United Nations, 2007: 111) p 82

310 See Kulick, Andreas *Reassertion of Control over the Investment Treaty Regime* (Cambridge University Press, 2017: 397) p 85 or ICSID, *Manifest Lack of Legal Merit - ICSID Convention Arbitration,* Accessed on May 26 2017 <https://icsid.worldbank.org/en/Pages/process/Manifest-Lack-of-Legal-Merit.aspx>

311 United Nations Conference on Trade and Development (n170) mentions the Art 10.19, Para 4 and 5 of the USA-Chile FTA

312 See above Kulick, Andreas (n310) p 92

313 TTIP Proposal (n30) Section 3 Art 9 Para 6, 7

reason for the "notice of the challenge to the appointment" to be submitted could be a considered conflict of interest of the appointed Judge, and decision on the challenge shall be rendered by the President of the Tribunal.[314]

During the proceedings, the Division is called to determine whether the conduct of the respondent which is the subject of the claim is consistent with the provisions of Section 1 and Section 2 of the TTIP Investment Chapter setting out the protection of investment.[315] As described further above,[316] the process of decision making of the Division is governed by the provisions of the Proposal, international rules of ISA applicable between the Parties, determined by the decision of the claimant[317] and other rules of international law applicable between the parties. Interpretation of the Proposal shall be carried out in accordance with VCLT's codification of the customary rules of interpretation of the public international law.[318] On the contrary, the Proposal carefully forbids the possible use of the domestic law of the Parties as applicable in the dispute settlement process as well as it prohibits the Tribunal to rule on the legality of the measure allegedly in conflict with the Proposal under the domestic law of the party to the dispute.[319]

The CETA in this regard does not make any significant adjustments so the same should apply in the case of the arbitration initiated under its provisions.[320]

The textual proposal of the TTIP, as well as CETAs provisions, accommodate rules that deal with claims which are of a similar nature concerning questions of law or fact and originate in the "same events and circumstances".[321] The process of consolidation of the claims rests in the constitution of a consolidating division of the Tribunal which has a jurisdiction over all or part of the consolidated claims by the President of the Tribunal. The jurisdiction is either granted by the joint request for consolidation from the disputing parties or, in case parties fail to reach the agreement, the consolidating division assumes it by order.[322] When doing so,

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[314] Ibidem Art 11 Para 2, 3

[315] According to ibidem Art 1 the consistency of the alleged treatment is determined specifically with respect to: *"...Section 2 [Investment Protection] or Article 2-3(2) [National Treatment] or Article 2-4(2) [Most-Favoured Nation] of Section 1 [Liberalisation of Investments]..."*

[316] See above the Section 3.4.1

[317] TTIP Proposal (n30) Section 3 Art 6 Para 2

[318] Ibidem Art 13 Para 2

[319] Ibidem Art 13 Para 3

[320] Cf. ibidem Art 13 and CETA (n58) Art 8.31

[321] See TTIP Proposal (n30) Section 3 Art 27 Para 1 and CETA (n58) Art 8.43 Para 1

[322] TTIP Proposal (n30) Section 3 Art 27 Para 2, 3 and CETA (n58) Art 8.43 Para 7, 8

claims must meet the requirements outlined above, and the consolidating division should consider if it "would best serve the interest of fair and efficient resolution of the claims, including the interest of consistency of awards."[323]

As this wording of the consolidating provision indicates, arguments in favour of the possibility to consolidate claims within the ISA are predominantly: achievement of the efficiency of the process and the consistency of awards. While both of them are surely worthwhile, the following text examines the later closely as it has significant connotations. During the discussion on the appellate mechanism in the ISA, scholars have closely analysed the issue and suggested alternatives to the appeal procedure. One of those could rest in the introduction of the convenient way to consolidate claims in the arbitration process. As the author of one study identified, especially when multiple claims concern the same measure of state, the consolidated proceedings seem like a suitable alternative[324] and, as it could be put, it guarantees an equal assessment and appreciation of law and fact among disputing parties. Thus it surely helps to strengthen the consistency of the arbitral adjudication. On the other hand, however, it makes the question of the necessity of the appellate procedure in the TTIP and CETA ever more urgent.

Additionally to the consolidation option, the Proposal introduces other feature that concern similar interests of multiple persons. It is the possibility to intervene as the third party to the dispute. It is to be approached with caution and as potentially highly problematic, offering the room for abuse. An example of such could be the congestion of the Division with the unjustified applications to intervene. Moreover, the process of consolidation offers a sufficient way to satisfy needs of parallel claims while also provide protection of the arbitration system against possible abuse. For these and number of other reasons, which are not within the scope of this work to be explored, it is right that the CETA, accommodating the definitive and revised version of the ICS, does not contain this component.[325]

3.5.6. The Award & The Appellate Procedure

[323] See the wording of TTIP Proposal (n30) Section 3 Art 27 Para 3 and CETA (n63) Art 8.43 Para 8
[324] See Tams, Christian J. (204) p 38
[325] Cf. TTIP Proposal (n30) Section 3 Art 23 and CETA (n58) Chapter Eight, Section F

Both of the EU FTAs in question accommodate provisions for the maximum length of the proceedings, though it may be prolonged, providing the Tribunal presents reasons for such a delay. It is 18 months after the submission of the claim in case of the TTIP and 24 months in total in case of the CETA.[326] In this regard, the wording of the CETAs provisions gives the impression that this time limit encompasses both the first and second instance proceedings. Such solution may not have been appropriate, as not being secluded for both levels, the time limit may be completely used up by the Tribunal. Moreover, this reflects the issue of a different concept of rendering final awards in the TTIP and the CETA, as described further below.

The rules concerning the award of the Tribunal otherwise set out the requirements for what it may encompass and limits its scope regarding the damages sought by the claimant. There are also provisions for the costs of the proceedings which, apart from the traditional concept of unsuccessful party liability, bring the possibility of the Tribunal to consider an appropriateness of the expenses given the circumstances of the claim. Plus, the committee shall adopt as implementing regulations, the rules which should be designed to reduce the costs of proceedings for the small and medium size companies when they lay down their maximum amount.[327]

As is evident from the structure of the newly designed ICS, the possibility to challenge the award rendered by the Tribunal is provided in the form of the appeal procedure.
Either disputing party may thus appeal the provisional award, as is an award not yet coming into effect titled,[328] within 90 days of its issuance. The grounds for appeal are, according to the provisions of the Art 29 of the Proposal, as follows:

"(a) that the Tribunal has erred in the interpretation or application of the applicable law;
(b) that the Tribunal has manifestly erred in the appreciation of the facts, including the appreciation of relevant domestic law; or,
(c) those provided for in Article 52 of the ICSID Convention, in so far as they are not covered by (a) and (b)."[329]

[326] Cf. TTIP Proposal (n30) Section 3 Art 28 Para 6 and CETA (n63) Art 8.39 Para 7
[327] See TTIP Proposal (n30) Section 3 Art 28
[328] Ibidem Art 29 Para 7
[329] The wording of ibidem Art 29 Para 1

The following paragraph stipulates that the appeal tribunal may reject the appeal or dismiss it when it is manifestly unfounded. When well founded, the Appeal Tribunal shall modify or reverse the provisional award while authorised to do so only with respect to the legal findings of the Tribunal.[330]

As for the procedural aspects of the appellate mechanism, TTIP Proposal dedicates it rather appropriately, a sole Art of 29[331] whereas CETA leaves them in Art 8.28 along with provisions of institutional nature.[332] After going through a closer examination, there is the much more significant difference between the rules of appellate procedure according to the Proposal and according to the CETA which is evident from the introductory provisions of the individual articles.[333] In Particular, the TTIP version of the ICS adheres to the precept of the Tribunal rendering the final awards,[334] whereas, in the case of the CETA, potentially modified awards are deemed final.[335] When, however, also laying down the option to refer the matter back to the Tribunal relevant rules of which shall be adopted by the Committee as procedural regulations. The procedure referring the case back is worth appreciation for the reason above mentioned. That is that the Appellate Tribunal is not allowed to challenge the award of the Tribunal on the basis of facts and change its' factual conclusions.

The prospects and characteristics of the of this system of the appellation in the international arbitration are provided above.[336]

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330 Ibidem Art 29 Para 2

331 See ibidem Art 29

332 See CETA (n58) Art 8.28

333 Cf. wording of TTIP Proposal (n30) Art 29 Para 1: *"A permanent Appeal Tribunal is hereby established to hear appeals from the awards issued by the Tribunal."* and wording of CETA (n63) Art 8.28 Para 1: *"An Appellate Tribunal is hereby established to review awards rendered under this Section."*

334 According to TTIP Proposal (n30) Art 28 Para 7, and after the provisional award being reversed or modified by the Appeal Tribunal.

335 According to CETA (n58) Art 8.28 Para 9d. In case the Appellate Tribunal does not strictly refer the matter back to the Tribunal based on ibidem Art 8.28 Para 9c(iii).

336 See above text from p 34

Conclusions

EU representatives repeatedly expressed their positive views on the whole TTIP's investment chapter, in particular in the way it preserves the state's right to regulate, and they emphasised that the treaty is secure against abuse of the vested rights of investors.[337] Such statements were in most cases part of the wider topic following the Commission's decision to implement the new ICS to the provisions of TTIP.[338] Some authors likened this approach to a so-called Calvo doctrine with its' calls for downgrade of the foreign investor's rights and rejection of their privileges and benefits.[339] Some have pointed out that the practice of investment arbitration itself, even in "standard" cases - ISA before the ICSID without further enhancement regarding the possibilities to abuse the vested rights or ensuring the right of parties to regulate - has developed so much that it provides sufficient guarantees against possible attempts to abuse it.[340] Although there have been signs of positive change regarding the room for abuse in the field of ISA and rendered decisions, it is not possible to predict future development. At the same time, it is necessary to insist on the partial starting points consequent from the presented examples. It is that some of the decisions rendered by the ISA tribunals were obviously problematic[341] and, therefore, the decision-making and applicable provisions of investment treaties have become the target of legitimate criticism. Consequently, calls for a change of the approach to resolving disputes and protection of investments resonate recently among the general public[342]. At a level of professional discourse, a significant claim of resentment to the investor protection was made public by members of the legal academic society.[343]

The examination of the extent to which the individual provisions of the Proposal reflect these reactions and the answer to the research question is provided further below.

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337 European Commission (n11)

338 Ibidem (n11)

339 See eg. Herdegen, Matthias (n25) p 486

340 See eg. Desierto, Diane, *Arbitral Controls and Policing the Gates to Investment Treaty Claims against States in Transglobal Green Energy v. Panama and Philip Morris v. Australia* (Accessed on June 25, 2017) <https://www.ejiltalk.org/arbitral-controls-and-policing-the-gates-to-investment-treaty-claims-against-states-in-transglobal-green-energy-v-panama-and-philip-morris-v-australia/>

341 See e.g. *CMS Gas Transmission Company v. The Republic of Argentina* (ICSID Case No. ARB/01/8) (n203) Para 158

342 See eg. Provost Claire and Kennard Matt (n49)

343 See Public Statement on the International Investment Regime, 31 August 2010, Accessed on February 24 2017. <http://www.osgoode.yorku.ca/public-statement-international-investment-regime-31-august-2010/>

With regard to the research question that was adopted for this paper and its rather general character, it needs to validate that the purpose of the methodology of this Paper and thus given a description of the individual institutes of the Proposal was to achieve the general consideration before providing the answer. Institutes, which are described and evaluated in the various parts of the thesis, are to be viewed jointly since one of the reasons for their introduction for the TTIP Proposal is to avoid cases of abuse of the ISDS. Outline of conclusions reached in separate parts of this paper is thus given below.

As for the measures of the investment protection section of the Proposal that are of a substantive nature, it is possible to say that the effort of balancing the mentioned asymmetry between the rights of investors and states' rights to regulate the matters of public, has been quite widely applied. As well as measures protecting the system from misconduct.[344]

As for the requirements of the proceedings, the Proposal set out that the disputing is obliged to provide a consent and to terminate the proceedings with claims of a similar nature before another forum. Whereas inconsistency of provisions stipulating jurisdictional requirements was often a case of other IIAs[345] and could lead to legal uncertainty and open a room for abuse of the ISDS, that is fortunately not a case of the Proposal and neither of the CETA, which goes even farther in ensuring the legal certainty in this respect.

Insufficient transparency in the ISA could be viewed as the initial problematic moment. This is what the proposal seeks to react to through the mandatory adoption of UNCITRAL Rules on Transparency. These among other provisions stipulate that the proceedings will be heard publicly. In the similar vein, such rules that further enhance the democratic principles and provide a public oversight of the ISDS, previously negatively marked by the lack of both thereof, deserves to be welcomed.

Provisions related to the transparency of proceedings are those according to which the party to the dispute is required to disclose third party funding. Given the significance and scope of implications of such hidden financial incentives,[346] it is necessary to conclude a beneficiary nature of such mandatory disclosure

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344 For more see Chapter 2.2. and 2.3 of this Paper

345 see Wehland, Hanno, *Jurisdiction and Admissibility in Proceedings under the ICSID Convention and the ICSID Additional Facility Rules* in Beltag, Crina, *ICSID Convention After 50 Years: Unsettled Issues* (Kluwer Law International 2017: 640) p 244 (Accessed on June 25, 2017) <http://www.lenzstaehelin.com/uploads/tx_netvlsldb/Hanno_Wehland_Jurisdiction_and_Admissibility.pdf>

346 See e.g. Shaw, J., Gary (n294)

In the initial part of the proceedings, there is an of the possibility of the party to dispute to challenge the claim by the objection that it is "manifestly without legal merit". Given positive responses accompanying the introduction of these procedural rules,[347] it is right to appreciate ICS norms in both TTIP and CETA. There has been, however, in the cases of their interpretation, set a high standard for their successful application which limits their potential use.

On the other hand, the institution viewed as potentially problematic is a right of the third persons to intervene in proceedings before the Tribunal. Fortunately, this option has not been incorporated into the accepted form of the CETA agreement as it opens up the scope for abuse as outlined above.

During the proceedings, the significant impact would have had two major alterations of the traditional ISA – system of the appointment of Judges and the Appellate procedure. Related provisions are also to be prefaced.

The requirements of the arbitrators' impartiality and its' enforceability in the context of ISA, or the frequent absence of both, were one of the fundamental arguments against ISA and, above all, the ICSID system. Given some of the cases examined and the conclusions of some academics, the shortcomings of the ICSID Convention must be confirmed in this respect. In the context of this previous practice, ICS provisions are very advanced in that they lay down requirements of ethics and impartiality of members of both instances, which could exclude interconnection between them and the claimant. At the same time, they also establish the possibility of parties to the dispute to challenge the appointment of arbitrators in the form of an objection. These, therefore, constitute important procedural guarantees against the abuse of rights in the form of conflict of interest of the appointed Judges.

The system of the appellation is designed, among other things, to secure a consistency of the decision-making of the tribunal (as mentioned above – predominantly in the context of the TTIP). This could serve, in the context of the protection against frivolous claims, the ultimate goal of a confirmation of such protection in cases Judges divert from the provided safeguards outlined above. In the case of an initiation of the appeal, it is also possible to enjoy a certain limit design against unjustified claims. Under such a limit, Members may reject these.

[347] See United Nations Conference on Trade and Development (n248) which draws a positive conclusion on the benefits of these applied measures after an example from an earlier arbitration practice, as in some cases it was not possible to reject the claim early on the grounds of its proposed inadmissibility.

With some exceptions (the possibility of the third party to intervene in the proceedings) and certain limitations (scope of the preliminary objection) considering the changes that the individual provisions of TTIP bring into ISDS, one may conclude that these could, to the degree of high probability avoid attempts of investors to abuse their vested rights of protection of investments. Given the summary above, it is to be concluded that the investment chapter of the TTIP Agreement contains a significant number of insurance policies which are aimed at preclusion of the potential misuse of the ISA procedure. Additionally, these mechanisms and their adoption, as for the clear majority of them, correspond to the conclusions of academics drawn based on previous ISDS practices and calling for the adoption of similar rules to avoid cases of abuse.

The way they will be used in practice, of course, depends to a certain extent on their application by adjudicators in individual proceedings.
However, given the achieved and above stated arguments in favour of these adopted measures, the prevailing rationale is that they form a sufficient basis for the prevention of the possible abuse of the system of the investment arbitration. The answer to the research question,
"*Is the proposed Investment-Protection Chapter of the TTIP along with the newly introduced Investor-Court System capable of securing the protection against the abuse of the process of investment arbitration initiated under its' provisions?",*
is thus: Yes, it is.

Further, given the current development in the field of EU-US relations, it is necessary to express doubts about the possibility of adopting the TTIP agreement, notably in the form in which it was published as a Proposal and with which the EU came into bilateral negotiations. Despite this, the conclusions of this work are relevant in the light of the provided analysis and comparison with the provisions adopted for the CETA investment chapter. The provisions of these two agreements do not differ significantly in their sub-elements, so it is in principle possible to apply the reached conclusions on the case of CETA. In addition, the most fundamental changes of individual institutes are described in the subchapters of the thesis and the connotations of such adopted changes are provided.

Resumé

Transatlantická obchodní a investiční dohoda je navrhovaná dvoustranná mezinárodní smlouva o volném obchodu dojednávaná mezi Evropskou Unií a Spojenými Státy Americkými. Svým charakterem spadá do oblasti tzv. nové generace mezinárodních dohod o volném obchodu, tedy těch, které v sobě inkorporují i ustanovení o ochranně investic. Vývoj tohoto typu pramenů mezinárodního práva je možné pozorovat od roku 1994, kdy vstoupila v platnost Severoamerická dohoda o volném obchodu, která poprvé propojila prvky charakteristické pro dohody o volném obchodu.[348]

Skutečnost, že takto široký okruh pravidel je možné dojednávat na poli EU, a nikoliv pouze jejích členských států, vyplývá z přijetí Lisabonské smlouvy, která oblast společné obchodní politiky zařadila mezi kompetence EU.[349]

Samotný proces vyjednávání TTIP byl zahájen v červenci roku 2013 a jeho průběh byl poznamenán značnými kontroverzemi. Za zlomové se dá pokládat období dubna 2014, kdy došlo k úniku utajených dokumentů z těchto dvoustranných jednání, ze kterých bylo patrné, že dle představ smluvních stran by měla dohoda obsahovat standartní mechanismus řešení investičních sporů.[350] Tato skutečnost vyvolala především v prostředí EU velkou vlnu odporu, která vygradovala poté, co byl ze strany Evropské komise zahájen proces veřejných konzultací, do kterého bylo podáno více než 150 000 příspěvků.[351]

Veřejné Konzultace na Téma Investiční Ochrany na Půdě EU

Proces konzultací spočíval v prezentaci 13 témat, na které měli možnost participující vyjádřit svůj názor prostřednictvím vyplnění online formuláře. Charakter jednotlivých témat byl zaměřen především na jednotlivé aspekty dohod o ochraně investic. Šlo tedy například o rozsah samotné investiční ochrany poskytované v dohodách, problematiku vyvlastnění a zachování práva smluvních států na přijímání zákonů, které mohou být posuzovány jako v rozporu s ochranou poskytovanou investorům. Další témata byla zaměřena na samotné instituty investiční arbitráže jako etika a kvalifikace arbitrů, transparence v řízení, možnost

348 Šturma, Pavel, Balaš Vladimír (n4) p 326
349 Ibidem p 332
350 Draft (n8)
351 Preliminary report (n10)

omezení neopodstatněných návrhů a odvolací mechanismus v souvislosti s konzistencí v rozhodování tribunálu.

Z odpovědí, které byli na tato daná témata poskytnuta bylo možné vyčíst jednoznačně negativní postoj přispěvatelů vůči systému řešení investičních sporů jako takovému. Důvodem k takovémuto postoji byla především obava z možného oslabení práva státu na regulaci ve věcech veřejného pořádku, zdraví, ochrany přírody a lidských práv. V přímém kontrastu k těmto veskrze negativním postojům bylo podpora, kterou se myšlence zahrnutí systému řešení sporů z investic dostalo ze strany představitelů obchodních společností. Ty se vyjádřili v tom smyslu, že takovéto kompletní pojetí ochrany investic v TTIP je zásadní s ohledem na velice positivní ekonomický dopad takovéhoto kroku.[352]

Ochrana Investic Podle Návrhu Dohody TTIP

Z hlediska rozsahu investic, kterým je v rámci jednotlivých BIT poskytována ochrana je možné pozorovat, že tyto jsou sobě často velice podobné. Ačkoliv je toto východisko do značné míry pravdivé nedá se říci, že by byli důsledky toho, v jakém rozsahu je investiční ochrana poskytována nevýznamné.

Co se týče návrhu investiční kapitoly TTIP, tak ta je co do určení rozsahu investic, které jsou označeny jako "chráněné investice" a je jim tak poskytována ochrana, poměrně velkorysá. Takto tedy podle Návrhu zahrnuje pojem chráněná investice jakékoliv aktivum, které je vlastněno nebo kontrolováno ze strany investora jedné Smluvní strany v území druhé Smluvní strany. Je třeba poukázat na poněkud problematické momenty, které takto rozsáhlá ochrana investic přináší. Je tím především argument, že takovýto rozsah chráněných investic, který zahrnuje i "podíl na koncesi poskytnutou za účelem vyhledání, kultivaci a extrakci přírodních zdrojů",[353] představuje potencionální riziko v rovině enviromentální ochrany. Tím se totiž do rozsahu chráněných investic dostává i těžba metodou tzv. frackingu, s jejímž potencionálním uplatňováním jsou spojeny velká environmentální rizika.[354] Ambicí této práce samozřejmě není zkoumat veškeré možné konotace takového rozsahu ochrany investic, v tomto případě je však třeba uvážit ještě argument, vycházející z předchozích případů posuzovaných v rámci arbitráže u ICSID. Jedná se o případ Vattenfall AB v. BRD, kterým se navrhovatel domáhá náhrady škody, která mu vznikla z důvodu přijetí zákona o Mírovém Využití Atomové Energie

[352] European Commission, Report (n14)
[353] TTIP Proposal (n34) Section 2 Para x2
[354] Viz. European Commission (n36)

žalovaným. Úmluvu ECT, na základě které byl návrh k zahájení řízení podán, tedy v tomto smyslu poskytuje evidentně významnou ochranu investic, kterou by bylo možné posoudit jako nad rámec žádoucího právě s ohledem na vyvážení investiční ochrany ve prospěch práva státu na možnost regulovat záležitosti veřejného pořádku a ochrany přírody. Takto když uvážíme, že, jednak, samotná ECT obsahuje ujištění o "enviromentálních posouzeních"[355] zaváděných opatření a dále, že změna koncepce energetické politiky spojená s Atomovým zákonem se ze strany veřejnosti v BDR těší mimořádné oblibě.[356] V tomto smyslu je tedy na místě zvýšená obezřetnost ve vztahu k možnému budoucímu uplatnění rozsáhlým způsobem stanovených práv investorů podle TTIP. Podobné případy je totiž nutno hodnotit jako potenciálně snižující právo státu činit zákonodárství v záležitostech svěřené správy.

Výše představený proces veřejných konzultací k dohodě TTIP, debata provázející samotné vyjednávání dohody, práce některých akademiků, a nakonec také samotné kontroverzní případy rozhodované v rámci ISA odhalili některé zásadní nedostatky celého systému investiční arbitráže. V tomto smyslu si práce dává za cíl určit, jestli je Návrh v tomto ohledu inovativní a přijímá dostatečná opatření, které umožní zamezit některým případům zneužití arbitrážního procesu (příklady *treaty-shoppingu*) a jestli inkorporuje dostatečné záruky pro zabezpečení práva Smluvních stran na přijímání pravidel ve věcech veřejného pořádku (*protecion of the right to regulate*).

Jedním z opatření, které je určeno k zamezení zneužití mechanismu řešení sporů prostřednictvím *treaty-shoppingu* (nebo také výběru fóra) je v TTIP tzv. *substantive business operation test*. Z hlediska definice investora je totiž dle TTIP za potřebí, aby tento byl "podstatným způsobem zapojen v obchodních operacích" ve státě, ve kterém je registrován. Toto pravidlo cílí na příklady zneužívání ISDS známé z minulosti, kdy byl například ze strany některých společností, proveden účelový postup majetku na společnost registrovanou podle práva druhé smluvní strany dohody o ochraně investic a takto byla investoru přiznána investiční ochrana a mohl napadnout postup druhé smluvní strany dohody u arbitrážního tribunálu.[357] Jak v případě TTIP, tak v CETA, která obdobný mechanismus také přijala, však není termín "významných obchodních operací" dále specifikován.

[355] Energy Charter Treaty (n40) Part IV Art 19(1)(a)
[356] Amelang, Sören, Wettengel, Julian (n43)
[357] Viz. Transglobal Green Energy, LLC and Transglobal Green Energy de Panama, S.A. v. The Republic of Panama, ICSID Case No. ARB/13/28 (n57)

Souvisejícím opatřením je v dohodě TTIP takzvaná klausule odepření výhod nebo také *denial of benefits (DOB)*, na jejímž základě je Smluvní strana oprávněna odepřít investiční ochranu kterou poskytuje investoru z druhého smluvního státu. Avšak způsob, jakým je klauzule navržená v případě TTIP je zaměřen spíše na případy opatření, které směřují k zachování mezinárodní bezpečnosti než předejití případům zneužití přiznané investiční ochrany. Avšak, v rovině obecné, odhlédneme-li od TTIP, samotný prvek zakotvující možnost odepření výhod nemusí představovat účinný nástroj ochrany před zneužitím investiční arbitráže, což může být nejlépe ilustrováno na příkladu ECT a její klausule odepření výhod. Jeden z jejích signatářů, Bulharsko, se snažil odepření výhod uplatnit v rámci řízení před arbitrážním orgánem, nebyl v tom však úspěšný z toho důvodu, že tribunál přijal velice striktní interpretaci klausule a možnosti jejího formálního uplatnění.[358] Takovýto postup tribunálu a interpretace *DOB* kterou přijal, se jeví, i s ohledem na to, jak významnou mezinárodní úmluvu ECT představuje, jako velice problematické.[359]

Opatření, které dále souvisí s možností zamezení zneužití ISDS je přijatá klausule *Anti-Circumvention*, která spadá již do procedurálního rámce ICS a umožňuje tribunálu, aby mohl v první fázi řízení odmítnout svoji příslušnost k rozhodnutí ve věci. Může tak učinit v případě, že investor získal investici nebo kontrolu nad ní pouze za účelem toho, aby mohl podat návrh na zahájení arbitráže.

Právo státu na regulování záležitostí, které jsou "potřebné z hlediska dosažení legitimních cílů" je explicitně stanoveno v Článku 2 Investiční Části TTIP. Za takovéto legitimní cíle je možné považovat ochranu zdraví, bezpečnosti, ochrany přírody a veřejné morálky. Dále také ochrany v oblasti sociální, spotřebitelské a v oblasti kulturní diverzity. Z článku navíc vyplývá, že tento výčet není konečný.[360] Ve srovnání s jinou FTA (TPP) je rozsah opatření, pro která je takto přijata záruka jejich dalšího udržení, v TTIP širší. Nadto, v rámci srovnání s podobou dohody CETA je patrno, že TTIP přináší významnější záruky práva státu na přijímání případné legislativy v těchto oblastech, když toto právo legálně vynucuje a CETA naproti tomu činí jeho pouhé utvrzení.[361] Je tedy otázkou, jaké znění by se pro finální podobu dohody TTIP přijalo, lze ale spíše odhadovat, že by to byla varianta přijatá v ustanoveních CETA. I tak je však nutné, s ohledem na případnou možnost některé aktivity státu tímto způsobem posoudit, tedy jako nespadající mezi porušení investiční ochrany

[358] Viz. *Plama Consortium Limited v. Republic of Bulgaria* (n50) para 240 B
[359] Viz. Vandevelde, J. Kenneth (n66) p 279
[360] European Commission (n28) Section 2 Art 2 Para 1
[361] CETA (n58) Art 8.9 para 2

poskytované TTIP, a tak vyvážit v procesu investiční arbitráže zájmy investorů a zájmy státu, navrhovanou podobu těchto ustanovení v zásadě uvítat.

Navrhovaný Mechanismus Řešení Investičních Sporů – ICS

V úvodu této části je třeba nejprve představit jednotlivé institucionální prvky nového systému ICS. Vzhledem k tomu, že právě změny ve struktuře a fungování jednotlivých arbitrážních orgánů jsou z těch nejvýznamnějších, které návrh dohody TTIP do systému ISA přináší, je jim třeba věnovat zvýšenou pozornost. Důraz je zde kladen především na to, jestli přinášejí do systému kvalitativní změnu s ohledem na prezentované nedostatky doposud užívaných mechanismů investiční arbitráže a jaká podoba nebo případné změny v jejich fungování se uplatní v případě dohody CETA. Současně je podroben výzkumu také proces samotné arbitráže, tak jak by měl probíhat podle navrhovaných ustanovení TTIP.

Orgánem, který je pro fungování celého mechanismu poměrně zásadní je Společná Komise TTIP (dále také jako "Komise"). S ohledem na srovnání s textem dohody CETA to bude totiž právě ona, která bude mít zásadní kompetence ve vztahu k jiným orgánům ICS – Tribunálu a Odvolacímu Tribunálu. Bude totiž formou jmenování na stálé pozice Tribunálu a Odvolacího Tribunálu určovat jejich personální složení a také finanční zabezpečení. Tento prvek značí, že došlo k zásadní změně oproti předchozím případům fungování investičních tribunálu, když v těchto případech byla dána stranám sporu možnost nominovat "své" arbitry. Kromě výše uvedených kompetencí lze za tu nejvýznamnější ve vztahu k fungování ICS označit možnost přijmout závaznou interpretaci ustanovení investiční části TTIP.[362] Jako takové je toto oprávnění v přímé souvislosti se snahou EU o větší kontrolu nad fungováním systému investiční arbitráže a výsledky jeho fungování. Navíc není toto oprávnění v dohodách o ochraně investic ničím novým, příkladem čehož může být oprávnění podle dohody NAFTA.[363] Co však je třeba vnímat se zvýšenou opatrností je rozsah, ve kterém může Komise svoje interpretační oprávnění uplatnit, tedy možnost stanovit účinnost takové interpretace do minulosti. Rozsah tohoto oprávnění je tak nepochybně, s ohledem na zásadní implikace, které sebou potencionální možnost stanovení účinnosti interpretace do minulosti přináší, nutné znovu revidovat. S ohledem na takováto zásadní oprávnění bude důležitý proces, jakým dojde

362 TTIP Proposal (n30) Section 3 Art 13 para 5
363 NAFTA (n108) Chapter 20 Art 2001 Para 2

k vytvoření Komise. Proces jejího utváření a případné personální složení však není, až na výjimky, v TTIP obsažen[364] a ani v případě přijaté dohody CETA a složení její Společné Komise není k dnešnímu dni více známo.

Dalším orgánem, jehož fungování Návrh upravuje je Tribunál První Instance, který má, jak už název dle ustanovení napovídá, jednat v první instanci o přijatých návrzích na zahájení řízení. Proces ustavení tohoto Tribunálu je vlastní právě ICS, když prvkem "standartní" investiční arbitráže je tradičně volnost ustavování členů tribunálu ze strany stran sporu. Tribunál má tedy tvořit stálý orgán jehož členové budou jmenováni komisí na předem stanovené funkční období. Návrh je, s ohledem na personální složení Tribunálu poměrně striktní, když upravuje jeho podobu, co se týče zastoupení národností Smluvních Stran a také stanovuje formální i jiné požadavky na výkon funkce,[365] v čemž se liší od systému ICSID, který je v tomto ohledu volnější.[366] V případě, že dojde k zahájení řízení podle TTIP, prezident Tribunálu z tohoto na základě náhodného systému ustanoví tři arbitry (podle znění dohody TTIP *Judges*, tedy Soudci), kteří poté jednají ve věci a tvoří takto *division* Tribunálu, nebo divizi. Je dobře, že došlo k zakomponování ustanovení, díky kterému je množné počet takto sloužících Soudců snížit v případě, že žalobcem je malá či střední obchodní společnost. Takto je možné snížit celkové náklady arbitráže, avšak zároveň je nutné počítat s náklady navíc danými případným procesem odvolání. Soudci mají v případě, že jsou ustanoveny do funkce v rámci divize nastaveny přísné etické normy, aby byla zaručena jejich nestrannost v řízení o návrhu. Na samotné ustanovení tribunálu se však může naopak ve zvýšené míře uplatňovat politický vliv. Z hlediska uvážení praktického charakteru je otázkou, s ohledem na v Návrhu vyjádřenou výši odměny za členství v tribunálu, která se stala předmětem kritiky jako nedostatečná,[367] jestli je šance, že se některý z kvalifikovaných a ve světě arbitráže respektovaných právníků nechá nominovat na členství v Tribunálu.

Institucionalizace dalšího orgánu ICS je známkou další zásadní změny, ke které by mělo v případě arbitráže dle TTIP dojít. Je jím stálý *Appeal Tribunal* (Odvolací Tribunál), který by měl rozhodovat o odvoláních proti rozhodnutím přijatých v prvním stupni Tribunálem. Jeho ustavení v zásadě odpovídá tomu u Tribunálu, kdy se liší počty členů a jedním z dílčích

[364] EU Proposal (n102) Art X.1 Para 1, 3
[365] TTIP Proposal (n30) Section 3 Art 9 Para 4
[366] ICSID Convention (n150) Art 14 Para 1
[367] Deutcher Richterbund (n178)

požadavků na jejich dosažené kompetence, který však nebyl, naštěstí, pro svůj problematický výklad, do znění ustanovení Odvolacího Tribunálu dle CETA přijat. Pokud je iniciován samotný proces odvolání, Členové Odvolacího Tribunálu rozhodují v tříčlenném složení. Na rozdíl od Tribunálu (určeno odkazem na pravidla ICSID)[368] Návrh neurčuje, jaká je odměna Členů Odvolacího Tribunálu za výkon funkce v rámci slyšení odvolání a tato má být později určena rozhodnutím Komise. Návrh pouze stanoví, tak jako výše, představu o tom, jaká by měla být výše odměny *(ratainer fee)* za členství v Odvolacím Tribunálu.

Odvolací proces byl v kontextu mezinárodní investiční arbitráže dlouho předmětem debat na akademickém poli, a kromě toho bylo s přijetím mechanismu jeho fungování v jeden moment počítáno i jako součást novelizace úmluvy ICSID.[369] Tato dohodu totiž komponuje ve svém článku 52 určitou variantu napravení nesprávného rozhodnutí arbitrážního tribunálu, tato je však do značné míry omezena rozsahem svého zkoumání a možného napravení nedostatku v postupu tribunálu, rozhodně se tak v případě jejího rozhodování nejedná o variantu řízení odvolacího. Formální omezení v možnosti zasahovat do rozhodnutí přijatých tribunálem v prvním stupni bylo dokonce v některých případech jednání *Annulment Committee*, podle článku 52 ICSID, dokonce v jejich rozhodnutích potvrzeno.[370]

Na poli mezinárodní arbitráže je však možné najít orgán, prvky řízení před nímž, jsou v podstatě odvolacího charakteru. Jedná se o WTO *Appellate Body* rozhodující odvolání proti zprávám prvoinstančního DSB v řízeních mezi státy podle pravidel WTO. Fungování tohoto mechanismu je dlouhodobě mezi akademickou obcí chváleno jako příznačné a oceňovány především některé jeho prvky jako je princip kolegiality.[371]

V rámci diskuze o odvolacím fóru v rámci investiční arbitráže je třeba zohlednit dva zásadní momenty. Zaprvé, tento prvek přináší možnost zhojení v investičních řízeních pro všechny zúčastněné – tedy jak státy, tak investory. Tedy i ty, kteří povahou svého nároku evidentně překračují ochranu, která je jim v rámci investiční kapitoly přiznána, a tedy se snaží svým způsobem systém arbitráže přesáhnout – a tedy zneužít. Tento argument samozřejmě nelze vnímat tím způsobem, že systém apelace v ISDS umožní v konečném důsledku prosazení jeho zneužívání. Vezmeme-li totiž jako východisko v úvahu pravděpodobnou erudici a kompetenci jejích členů v oboru mezinárodního práva, tak případným možnostem zneužití by prostřednictvím tohoto mechanismu mělo být do míry velké pravděpodobnosti spíše zamezeno.

[368] TTIP Proposal (n30) Section 3 Art 9 Para 14
[369] Viz. Tams, Christian J. (n204) p 6
[370] *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary* (n202) Para 17
[371] Viz. Šturma, Pavel, Balaš, Vladimír (n4) p 259

Je třeba však zároveň vnímat, že možnostem o pokus jejího zneužití bude tímto otevřena nová cesta.

Druhým bodem ke zvážení je argument, který se týká konsistence v rozhodování tribunálu a její zajištění prostřednictvím procesu odvolání. Tato konsistence v rozhodování byla přitom často uváděna jako důvod pro přijetí odvolacího mechanismu. Vzhledem k tomu, že se zkoumání závěrů prvoinstančních rozhodnutí vždy týká nutně kontextu jedné mezinárodní smlouvy, je argument ke zvážení takový, že i v případě udržení konsistence TTIP tomu nebude v případě navrhovaného odvolacího mechanismu jinak – tedy k udržení konsistence dojde případně pouze ve vztahu k dohodě TTIP.

I vzhledem k tomuto argumentu by se jako nejvhodnější zdálo řešení, které Návrh ostatně předvídá[372] a sice, že dojde k přijetí vícestranné dohody o zřízení stálého mezinárodního arbitrážního tribunálu, který by mohl i kombinovat prvky kladně hodnocené u apelačního orgánu WTO.

Alternativní řešení sporů

Podle návrhu se jsou možnosti alternativního řešení v zásadě dvojí – Mediace a Konsultace. Pro proces mediace nejsou v zásadě stanoveny striktní pravidla možná až na to, že uznanými mediátory budou pouze ti, které navrhne Komise. Jinak dává Návrh dohody těmto institutům poměrně velký prostor, a to především když je preferuje před zahájením řízení návrhem a především stanovuje, že metoda Konsultace bude nutno povinně podstoupit před tím, než bude možné zahájit arbitrážní řízení před divizí Tribunálu.[373]

Jak vyplývá jednak z dřívějších případů a také doporučení některých akademiků, může systém obligatorně stanovující ADR jako první krok v rámci iniciace investiční arbitráže přinést významné výhody. S ohledem na možné časové hledisko, které systém povinných konzultací zahrnuje, že pro účely východiska práce slouží spíše positivně, tedy jako jeden z mechanismů, který možnost zneužití systému snižuje.

Proces Řízení o Návrhu

[372] Viz. TTIP Proposal (n30) Section 3 Art 12
[373] TTIP Proposal (n30) Section 3 Art 6 Para 1

Samotný proces investičního řízení je iniciován na Návrh investora druhé smluvní strany. Pravidly, která budou v řízení figurovat jako procesní mohou být arbitrážní pravidla podle Úmluvy ICSID, pravidla ICSID *Additional Facility* anebo arbitrážní pravidla UNCITRAL. Také se může jednat o jakákoliv jiná pravidla, která jsou mezi stranami aplikovatelná a jsou určena dohodou stran sporu.[374] Je tomu tak s ohledem na to, že Návrh neřešení celý proces investiční arbitráže, ale v podstatě jen dílčí změny oproti těmto pravidlům vícestranných mezinárodních dohod.

V případě zahájení sporu je žalobce povinen dát souhlas s tím, že se podrobuje jurisdikci tribunálu. Z hlediska právní jistoty adresátů se jako vhodnější jeví řešení, které bylo přijato v dohodě CETA a stanovuje, že souhlas je jeden z požadavků na zahájení řízení. Takto pojaté zařazení souhlasu totiž vyloučí možný odlišný výklad. Součástí těchto úvodních požadavků dle dohody CETA je i to, že se navrhovatel vzdá uplatňování svých práv před jiným fórem, jinak je jurisdikce tribunálu vyloučena.

Nedostatečná transparence v řízeních před ISDS byla často terčem kritiky. Na tu se snaží Návrh reagovat obligatorním přijetím pravidel transparentního řízení dle Úmluvy UNCITRAL. Významná je pak z hlediska praktického především implikace tohoto vývoje a sice že řízení budou napříště slyšena veřejně, což navíc text dohody CETA výslovně stanovuje. Institutem příbuzným transparenci řízení jsou v Návrhu zakotvená pravidla, podle kterých je strana sporu povinna odhalit financování třetí stranou. Vzhledem k významu a rozsahu implikací, které výskyt takovýchto skrytých finančních incentiv má, je opět třeba uzavřít, že potřeba pro jejich obligatorní odhalení v ISA zde rozhodně existuje. Jeho zakotvení dále posiluje možnosti zamezit zneužití investiční arbitráže.

Mezi další možnosti, které jsou poskytovány evidentně za účelem zamezení zneužití ISA jsou prostředky předběžných námitek, *preliminary objections.* Žalovaná strana jich může uplatnit v případě, že návrh je zjevně bez právního důvodu. Z příkladů jejich dřívějšího uplatnění však vyplývá, že tribunály zaujali poměrně striktní výklad jejich použití, což přirozeně snižuje možnost jejich praktického uplatnění i v rámci dohody TTIP.

Samotné řízení o žalobě se vede, jak už bylo řečeno před divizí Tribunálu složenou ze tří Soudců. V rámci první fáze je rovněž třeba zmínit možnost, na základě které je strana sporu oprávněna namítat podjatost Soudce, který byl jmenován do funkce v rámci Divize a jsou u něj tvrzeny nedostatky oproti požadavkům, které jsou dány etickými normami čl. 11. Tento institut

[374] TTIP Proposal (n30) Art 6 Para 2

běžný z prostředí vnitrostátního soudního řízení tvoří další z možností stran sporu, jak se ohradit proti možnému zneužití ISA spočívajících v tom, že zde existuje konflikt zájmů, a tedy by přijaté rozhodnutí nemuselo být nestranné.

Procesní pravidla pro průběh řízení jsou stanovena žalobcem v návrhu, jak bylo řečeno výše. Nadto je dáno na jisto, že interpretace příslušných aplikovatelných ustanovení TTIP je nutno činit v souladu s mezinárodními pravidly pro interpretaci mezinárodního práva veřejného kodifikovaných ve VCLT.

Za určitých podmínek obligatorní proces konsolidace, *consolidation*, je zaměřen na příklady sporů, které mají shodný právní základ. Jak uvádí jeden z autorů, jedná se o určitou alternativu řízení o odvolání, když může ve svém důsledku přinést zvýšení konzistence rozhodování, jak je ostatně uvedeno i v ustanovení tohoto institutu v Návrhu.[375]

Institutem naopak potencionálně problematickým je možnost třetích stran vystupovat jako *intervener* v řízeních před Tribunálem. Tato varianta naštěstí nebyla do přijaté podoby dohody CETA včleněna, když otevírá prostor pro zneužití, jak je uvedeno výše.

Mezi pravidly stanovujícími požadavky na formální podobu Rozhodnutí a jeho výroku je včleněno ustanovení, které umožňuje Tribunálu použít diskreci v případě stanovení přiznaných nákladů řízení. Pokud totiž nejsou "odůvodněné" je možné je po předchozím uvážení v rámci rozhodnutí nepřiznat. S ohledem na možnost případného druho-instančního přezkoumání takovéhoto kroku je třeba uzavřít, že tento institut je ku prospěchu věci a může zamezit zneužití představované neúměrnými náklady, a to i když byl jinak navrhovatel ve věci úspěšný což vyplývá ze zakotvené zásady, že náklady jdou k tíži neúspěšné strany sporu.[376]

V případě odvolacího mechanismu je zde taktéž možné užít určitou pojistku před neopodstatněnými návrhy, a to sice možnost odvolacího tribunálu v takovýchto případech odvolání odmítnout bez dalšího.

Závěr

Všechny jak hmotněprávní, tak procesní výše uvedené prvky v zásadě respektují přijaté východisko a jejich uplatnění může vzhledem k provedenému výzkumu znamenat kvalitativní změnu systému investiční arbitráže, a tedy minimalizovat případy zneužití tohoto procesu. Více viz. kapitola Conclusions této práce.

[375] Viz. TTIP Proposal (n30) Section 3 Art 27 Para 3
[376] Viz. TTIP Proposal (n30) Section 3 Art 28

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Abstrakt (Czech)

Na poli mezinárodního práva upravujícího obchodní spolupráci států představuje dojednávaná dohoda o volném obchodu mezi EU a USA – TTIP – významný pramen práva. Její zamýšlený rozsah má navíc pokrývat i ustanovení o ochraně investic. Když však dojde k uvolnění informací z dvoustranných jednání o její podobě, je z nich patrno, že dohoda má v této části obsahovat mechanismus řešení sporů, který se svými aspekty příliš neliší od těch, které jsou a byli inkorporovány do bilaterálních dohod o ochranně investic mezi státy. Významnou roli by tak v případě investičních sporů z dohody TTIP hráli ustanovení mezinárodních úmluv vícestranných, která zakotvují pravidla pro fungování mezinárodních investičních tribunálů – Úmluva Mezinárodního Centra pro Řešení Sporů z Investic a Arbitrážní Pravidla Komise Organizace Spojených Národů pro Mezinárodní Obchodní Právo. Avšak jak v okruhu laické, tak odborné veřejnosti již delší dobu rezonovali některé obavy, které legitimitu mezinárodní investiční arbitráže zpochybňují a tento fakt byl tak přijat s velkou nevolí. Bylo tomu tak především s ohledem na předchozí praxi rozhodování sporů z investic, která sebou přinesla někdy poměrně významně problematická rozhodnutí a vzhledem k významným souvislostem v oblasti ochrany práv státu na zabezpečování jejich základních funkcí, která sebou praxe investiční ochrany přináší. Výskyt takovýchto případů je tak třeba minimalizovat. Pro revidovanou podobu dohody, která byla ze strany EU přijata a do pozdějších fází vyjednávání TTIP vnesena, tak bylo přijato východisko v tom smyslu, že je třeba výskyt takovýchto problematických případů do budoucna minimalizovat. Takto přijatý Návrh ustanovení investiční kapitoly TTIP tak obsahuje množství mechanismů, které toto východisko zohledňují. Pro rozsah, v jakém byla především v části věnované mechanismu řešení sporů dohoda "revoluční" a lišila se od standartních mechanismů ISDS, byl tento systém překřtěn ze strany představitelů EU na *Investor Court System*, tedy Systém Investičního Soudu.

Úkolem práce je tedy jednotlivé části Návrhu investiční části dohody TTIP analyzovat a vyhodnotit, jestli jejich praktické uplatnění může přinést v rovině ochrany investic kvalitativní změnu – tedy zamezení zneužití práva na ochranu investic ze strany investorů jako žalobců, kteří by se porušení svých práv mohli domáhat cestou iniciace investiční arbitráže. Jednotlivé prvky je přitom třeba rozdělit do dvou rovin – hmotněprávní a procesní. Toto rozdělení v zásadě zohledňuje i text práce, když nejprve analyzuje a s ohledem na úkol, který si dala za cíl, hodnotí kapitoly, na základě kterých je investorům druhé smluvní strany přiznána investiční ochrana. Jako je její rozsah, možnosti výjimek jejího přiznání a instituty, které

korigují jednání států tím způsobem, že není považováno za porušení chráněných investic. V druhé části pak práce analyzuje systém řešení sporů z investic, tedy ICS, který byl do Návrhu TTIP přijat a který se vyznačuje velkým množstvím dílčích změn, ve kterých upravuje a koriguje fungování investiční arbitráže. Je tomu tak s ohledem na to, že řízení neupravuje komplexně, a tak toto probíhá podle výše uvedených "standartních" pravidel, ale s nezbytným zohledněním těchto dílčích změn. Těmito jsou především změny ve fungování tribunálu a jeho ustavování, zavedení odvolacího mechanismu a taktéž množství dílčích procedurálních prvků jako jsou předběžné námitky ve věci.

Všechny jak hmotněprávní, tak procesní výše uvedené prvky v zásadě respektují přijaté východisko a jejich uplatnění může vzhledem k provedenému výzkumu znamenat kvalitativní změnu systému investiční arbitráže.

Vzhledem k aktuálnímu vývoji na poli jednání o dohodě TTIP, respektive jeho absenci, je součástí práce v jednotlivých částech i srovnání s podobou přijatou pro text dohody CETA, tedy pro Komplexní Hospodářskou a Obchodní Dohodu mezi EU a Kanadou. Učiněné srovnání tak činí závěry práce platné i v kontextu aktuálního vývoje na poli mezinárodní obchodní spolupráce.

Abstract (English)

In the field of international law, the negotiated agreement between the EU and the US - TTIP - is a major source of law. In addition, its intended scope should encompass the provisions on investment protection. However, during the course of the bilateral negotiations, there was a leak of information which revealed that the agreement should include provisions of the dispute settlement mechanism that do not differ in its substantial aspects from those which are and have been incorporated into bilateral investment agreements between States. Therefore, in the process of investment disputes initiated under the TTIP agreement, the major influence would have had the provisions of international conventions which set out the rules for the functioning of the International Investment Tribunals - the Convention of the International Centre for the Settlement of Investment Disputes and the Arbitration Rules of the United Nations Commission on International Trade Law. However, given that both the general public and professional circles have long expressed concerns that question the very legitimacy of the international investment arbitration, this fact have been accepted with great disrespect. This was particularly, because of the previous practice of decision-making in the investment disputes, which sometimes brought rather problematic awards. Moreover, also, given the significant implications that practice of investment protection had in the area of protection of the rights of states to secure their basic functions. Starting point following the expressed opposition to the ISDS was, therefore, that occurrence of such problematic cases should be minimised. The revised form of the TTIP proposal that was brought by the EU at the later stages of the negotiations takes this starting point into account. Thus, the Draft Proposal for a TTIP Investment Chapter contains a number of mechanisms that are designed to prevent the misuse of its' investment protection. For the extent to which it was a "revolutionary" in amending the traditional ISDS, it was renamed by EU officials as the "Investor Court System".

The task of the Paper is therefore to analyse and evaluate the individual parts of the investment chapter of the TTIP proposal for to purpose of the assessment whether their practical application can bring about a qualitative change in the field of investment protection - i.e. avoiding abuse of the rights of investors as those who could claim the violation of their rights and initiate the investment arbitration. The individual elements of the Proposal must be divided into two levels - substantive and procedural. In principle, this separation is respected within the text of the Paper. It first analyses and, on the task, it pursues, evaluates the investment protection chapters. Such as the scope of investment protection, the exceptions of

such vested rights and provisions reasserting the right of states to regulate. In the second part, the thesis analyses the ICS system, which was introduced in the TTIP Proposal and which is to be characterised by a large number of partial changes in which it differs from the traditional models of ISDS. This analysis is done with respect to the fact that ICS does not comprehensively regulate the procedure, and therefore the ISA under the TTIP would be conducted according to the above-mentioned "standard" rules, but with the necessary consideration of these partial changes. These are mainly in the functioning of the Tribunal and its establishment, the introduction of an appeal mechanism and also a number of procedural elements such as preliminary objections.

All the substantive and procedural elements of the Proposal above outlined respect the adopted hypothesis, and their application may, due to the carried-out research, mean a qualitative change in the system of investment arbitrage.

Given the current development in the TTIP negotiations and its absence, respectively, the individual parts of the Paper also encompasses a comparison with the related provisions adopted for the text of the CETA agreement, i.e. the EU-Canada Comprehensive Economic and Trade Agreement. This comparison makes the conclusions of the work valid also in the context of the current development in the field of international law of treaties.

Key Words

TTIP, CETA, ICS, ISDS, ICSID, Investment Treaty Arbitration, Abuse of Investors‘ Rights

Klíčová slova

TTIP, CETA, ICS, ISDS, ICSID, Mezinárodní Investiční Arbitráž, Zneužití práv investorů