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Investor to State Dispute Settlement (ISDS) mechanisms:

A comparison of evolving legal approaches in Brazilian and Latin American with the European Union

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1. Introduction

The reform of Investor-to-State Dispute Settlement (ISDS) and potential alternatives to it, is a priority for the EU today. Foreign direct investment (FDI) by the European Union in Brazil and Latin America is considerable, and *vice versa*.[2] Various forms of settling disputes between investors and states are incorporated into agreements carrying FDI.

Classical ISDS mechanisms have become increasingly contentious in recent years, and with the growth in the number of ISDS agreements, public fears that investors may gain control of sensitive areas of public policy have grown

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[2] See the Europa website, *Foreign Direct Investment Statistics* updated to April 2017, to be found at http://ec.europa.eu/eurostat/statistics-explained/index.php/Foreign_direct_investment_statistics last visited on 18 December 2017. As at end-2015, EU outward FDI stocks in Latin America were EUR 490.2bn (7.1% of global EU outward FDI). In terms of inwards FDI into the EU, Brazil was in 4th place among states investing in the EU in 2015, and Mexico in 8th place, the former accounting for EUR 127.6bn and the latter, EUR 36.5bn: see Table 2, to be found at http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Top_10_countries_as_extra_EU-28_partners_for_FDI_stocks,_EU-28,_end_2012%E2%80%932015_(billion_EUR)_YB17.png, last visited on 18 December 2017.

also (see Section 2). Compared to State-to-State Dispute Settlement (SSDS) mechanisms, investor-to-state dispute settlement mechanisms are criticized for enabling companies and multinationals the potential to undermine a country's public policy objectives with the threat to national sovereignty that this implies. Justifications for ISDS boil down to states' provision for protection of investors in order to progress with their development goals. However, the core drivers of globalization are changing rapidly and the rise of countries capable of exponential growth, accentuates the negatives to ISDS, including the lack of democratic accountability of and scrutiny over third country investors, the use of private arbitrators, the secrecy of proceedings and rulings, and no participatory rights for third parties holding a direct interest in the process.

To date, investment protection has been confined to case-specific international agreements, rather than through overarching bilateral agreements. Legally speaking, these agreements span the public international law basis of the treaties and the public law nature of the relationship between the investor and sovereign state concerned, and asymmetry between states in international agreements further complicates multilateral approaches to reforming ISDS. At EU level, Foreign Direct Investment was included in the European Union's powers under the Common Commercial Policy under the Treaty of Lisbon (ToL) in 2009, but such initiatives when involving ISDS reform remain complex and must respect the EU Member States' competences[3]. Thus, the entry into force of the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada in September 2017 is preliminary: all the EU Member States must ratify it, raising again the spectre of political resistance to its ISDS clause as experienced in 2016, particularly in the Belgium State of Wallonia. The ISDS mechanisms in CETA must respect the delineation between EU and Member State competences established by the Court of Justice of the European Union (CJEU) in May 2017, and Belgium raised important questions for the CJEU in September 2017 on the compatibility of CETA with EU law, even before the preliminary entry into force of CETA[4] (see Section 3.1).

Following EU Commission President Jean Claude Juncker's State of the Union Address in September 2017, the EU is committed to making ISDS fit for

[3] See Consolidated version of the Treaty on the Functioning of the European Union [2008] *OJ* C 115/47, Art. 207(1) "The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action".

[4] See Belgian Ministry for Foreign Affairs, Foreign Trade and Development Co-operation, *Minister Reynders Submits Request for an Opinion on CETA*, of 6 September 2017, to be found at https://diplomatie.belgium.be/en/newsroom/news/2017/minister_reynders_submits_request_opinion_ceta , last visited on 19 December 2017. For the form and content of the request, see *CETA : Belgian Request for an Opinion from the European Court of Justice*, to be found at https://diplomatie.belgium.be/sites/default/files/downloads/ceta_summary.pdf, undated, last visited on 19 December 2017.

purpose both within the EU 28 Member States but also in the EU's external relations with third countries[5]. The EU is abiding by its commitment to unprecedented transparency in all its trade and investment actions[6] following the pathway set down by President Juncker. Improved democratic controls over ISDS to improve public trust at home and abroad, will also be an important yardstick. Already the UNCITRAL working group began work in November 2017 on the topic of ISDS reform and the EU has been advocating the Multilateral Investment court to this end.

This contribution focuses on ISDS in EU external relations. Section 3 explores EU policy reform of ISDS – notably proposing a new a permanent, judge-based Multilateral Investment Court (MIC) for investor-state disputes – to set a level playing field at global level for the protection of FDI while also guaranteeing states and society their democratic rights to shape public policy. Section 4 then examines the experience of Latin America, revealing a long-established refusal of any transfer of sovereignty through bilateral agreements regarding ISDS, resorting more to experimental forms of mediation based on the willingness of the state concerned.

Given that investor protection clauses have not been incorporated within the EU-MERCOSUR draft trade agreement, and the consistent refusal of Brazil's parliament to ratify agreements containing ISDS, would a multi-lateral investment court render ISDS more palatable to Brazil and other ISDS avert countries? Or is there indeed a sufficient critical mass of problem cases to justify the EU's bazooka approach in the form of the MIC. Is this solution proportionate as well as acceptable democratically and legally speaking, especially given the questions as to the compatibility of the MIC with EU law. While the European Commission can negotiate and ratify agreements containing provisions for the protection of direct foreign investments of third country nationals in the EU (and *vice versa*)[7], the EU Member States must be involved in the negotiation of clauses on dispute settlement between investors and states, as well as in relation to non-direct foreign investment ('portfolio' investments made without any intention to

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[5] See European Commission, *President Jean Claude Juncker's State of the Union Address 2017*, Brussels 13 September 2017, to be found at http://europa.eu/rapid/press-release_SPEECH-17-3165_en.htm, last visited on 19 December 2017.

[6] The initial time table foresaw agreement by end 2017. For the European Union's Europa Portal dedicated to this 13th round of EU-MERCOSUR negotiations, go to http://trade.ec.europa.eu/doclib/press/index.cfm?id=1761, last visited on 13 January 2018. See also European Commission factsheet introducing the deal so far, to be found at http://trade.ec.europa.eu/doclib/docs/2017/december/tradoc_156465.pdf, last visited on 13 January 2018. In the policy Factsheet explaining the agreement, the European Commission makes clear that the EU-MERCOSUR Agreement will include provisions for civil society's input regarding the implementation, including any environmental concerns. However, there is no provision for ISDS: transparency reporting on the negotiations mentions dispute settlement although 'investor-state dispute settlement' (ISDS) will not be dealt with in the body of the EU-MERCOSUR Agreement itself.

[7] See Opinion 2/15 of the CJEU, Press Release 52/17 of 16 May 2017, to be found at https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-05/cp170052en.pdf, last visited on 3 December 2017.

influence the management and control of an undertaking). The Member States' national constitutional procedures must be respected in the ratification of such clauses in multilateral or bilateral agreements between the European Union and third countries.

All this said, the conclusions consider whether Latin American approaches present a viable alternative that the EU might emulate – even in part – in the modernization of its ISDS system, or whether these approaches present more of a blank cartridge in addressing sovereignty and democracy concerns (see Section 5). Is there any intermediate solution in-between the European legal bazooka and the Latin American blank cartridge?

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2. ISDS: advantages, disadvantages and alternatives to ISDS

As of the late 1990's, Investor-State Dispute Settlement (ISDS) claims by investors exploded, notably in the framework of the NAFTA[8], and put the spotlight on the potential for investors to make use of it to shape sensitive public policy in a host state. The most recent UNCTAD data relating to investment cases globally from 1986 to 2016[9], show a surge over the last twenty years both in terms of the number of new cases opened every year and in the number of arbitral decisions issued every year : combined over time, the number of cases launched rose from under 50 in the mid-1990s to nearly 800 in 2015, and the combined number of decisions issued rose from under 50 in the mid-1990s to over 700 in 2015.

A few milestone examples of investor-state disputes have contributed to this snowballing in societal resistance to ISDS mechanisms. In the late 2000s, the *Vattenfall* claims against Germany awakened the public protests in Europe[10]. In Australia, the fire was started by the Philip Morris claim under UNCITRAL rules challenging Australian tobacco Advertising Restrictions[11], pushing the Australian government to announce in 2011 that it would discontinue the practice of seeking inclusion of investor state dispute settlement provisions in

[8] Jean E. Kalicki, Anna Joubin-Bret eds, *Reshaping the Investor-State Dispute Settlement System*, Brill-Nijhoff, 2015. See also *Loc. Cit.* n. 41.

[9] See above UNCITRAL document at Section 4.18, p. 7, to be found at http://trade.ec.europa.eu/doclib/docs/2017/november/tradoc_156402.pdf last visited on 2 February 2018

[10] In 2012 Vattenfall filed suit at the Washington-based International Center for Settlement of Investment Disputes (ICSID), demanding $6 billion in compensation in reaction to the « nuclear exit » program to close down all German nuclear plants by 2021.

[11] See https://www.ag.gov.au/internationalrelations/internationallaw/pages/tobacco-plainpackaging.aspx

trade agreements with developing countries[12]. Other countries are moving in the same direction[13].

The usual system of dispute settlement became increasingly contentious in the face of negative public attention and criticism, snowballing into concerted societal resistance to the system in operation, but also to proposed modernizing approaches to ISDS. Currently, ISDS relies on a court of arbitrators that decides behind closed doors and does not publish its decisions. The lack of transparency in the dispute resolution goes to the heart of public suspicions[14], giving rise to fears that ever more powerful multinationals operating globally, are thus enabled – without democratic accountability – to side-step public policies and the democratic processes that have formulated them. Large scale infrastructure investment decisions today under one government, are capable of locking a country into time frames lasting well beyond the term of office of the government undertaking the commitment, in some cases even lasting generations. The exponential growth potential of emerging economies has compounded these concerns in a globalizing world.

In October 2014 *The Economist* printed an opinion piece[15] summing up the situation in a sweeping generalisation:

> *"If you wanted to convince the public that international trade agreements are a way to let multinational companies get rich at the expense of ordinary people, this is what you would do: give foreign firms a special right to apply to a secretive tribunal of highly paid corporate lawyers for compensation whenever a government passes a law to, say, discourage smoking, protect the environment or prevent a nuclear catastrophe. Yet that is precisely what thousands of trade and investment treaties over the past half century have done, through a process known as 'investor-state dispute settlement', or ISDS".*

The Economist is a mainstream media outlet following high journalistic standards and received as a source of quality, but in this case serves rather to conflate the negative dimension of ISDS mechanisms, oversimplifying the technical legal and political challenges facing governments and policy makers seeking common ground in international negotiations to respect democratic values in line with

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[12] Australian Government, Department of Foreign Affairs & Trade, Gillard Government Trade Policy Statement: *Trading Our Way to More Jobs and Prosperity* of 14 April 2011. See Jürgen Kurtz, *The Australian Trade Policy Statement on Investor-State Dispute Settlement*, American Society of International law, Vol. 15, 2 August 2011.

[13] South Africa has stated it will withdraw from treaties with ISDS clauses, and India is also considering such a position. Indonesia plans to let treaties with ISDS clauses lapse when they need renewal. Brazil has refused any treaty with ISDS clauses; see "The arbitration game", *Loc. Cit.* n. 15.

[14] See European Ombudsman, 2015. 'Ombudsman: "Further steps to increase TTIP transparency necessary"; S. Preschal/M. E. De Leeuw, "Transparency: A General Principle of EU Law?2 in : U. Bernitz/ J. Nergelius/C. Cardner (eds.), *General Principles of EC Law in a Process of Development*, Kluwer Law International, Great Britain 2008, pp. 204 to 229 ; P. Settembri, "Transparency and the EU legislator : 'let he who is without sin cast the first stone'", *Journal of Common Market Studies* 2005, Vol. 43, n. 3, September, pp. [637]-654.

[15] See "The arbitration game", *The Economist* of 14 October 2014.

public policies while importantly also, providing the legal certainty for investors enabling development in other countries. There are indeed negative facets to ISDS mechanisms, and yet the ultimate purpose provides a legitimate justification for ISDS: investors underwriting the development of other countries need legal certainty when investing in foreign jurisdictions where domestic rule of law and governance cannot be trusted.

For some, the central rationale justifying ISDS is obvious, while for others it is less so. The main justifications for ISDS essentially rely on the procedural legitimacy of an investor to initiate claims concerning the application of an investment treaty – based on the mistrust of the judicial system of the host country – as well as political dependence in the state-to-state dispute settlement (SSDS) system.

On procedural legitimacy, it allows a foreign investor to avoid the host state's national courts where their independence, efficiency or competence is questionable. In some countries an ISDS system may be faster than domestic court procedures, for instance by removing state-immunity obstacles that might otherwise complicate domestic legal claims. Recourse to independent and experienced arbitrators under ISDS – in theory – ensures adjudication of claims by a qualified and neutral third party. Finally, it also allows for the recognition and enforcement of arbitral awards in many jurisdictions, especially if the ISDS mechanisms employed is governed by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention)[16] or the New York Convention.

In terms of the potential for political interference, the ISDS approach gives the investor a directly-actionable right to avoid recourse to diplomatic protection which would be the case under SSDS. The investor here is not reliant on its home state's willingness to bring claims or exercise diplomatic protection.

Also, whereas the dispute settlement mechanism (DSM) is undergoing an apparent "depoliticization", the ISDS confers an autonomous and actionable right to start or continue litigation that is less dependent on politics or the willingness of the investor's home country[17]. Nevertheless, certain cases of a particularly sensitive nature might prevent a state from initiating a procedure against another state, in which case a state would simply be hiding behind its investor. Another procedural argument in favour of ISDS is that in many countries, investment agreements are not directly enforceable in domestic courts. Therefore, an investor suffering discrimination, or whose investment is expropriated even, may not seek redress by invoking investment protection

[16] A. de Carvalho Ramos, "*O diálogo das cortes: o Supremo Tribunal Federal e a Corte Interamericana de Direitos Humanos*", in A. Amaral Junior and L. L. Jubilut (orgs.), *O STF e o Direito Internacional dos Direitos Humanos*, 2009 São Paulo, Quartier Latin.

[17] See J. A. F. Costa and V.D.R. Gabriel, "A Proteção dos investidores nos acordos de cooperação e favorecimento de investimentos: perspectivas e limites", in *Revista de Arbitragem e Mediação* 2016, Vol. 49, pp. 127-155.

rules before these domestic courts. Investor-to-state dispute settlement here would allow the investor to rely directly on the rules specifically designed to protect their investment.

In its 2010 Communication *Towards a Comprehensive European International Investment Policy*[18], the European Commission also sees the advantage that "an investment involves the establishment of a long-term relationship with the host state which cannot be easily diverted to another market in the event of a problem with the investment", and that the absence of an ISDS "would in fact discourage investors and make a host economy less attractive than others". However, when examining the Transatlantic Trade and Investment Partnership (TTIP), the European Parliament took the opposite view. It saw the inclusion of ISDS in the EU-negotiated agreements not as a necessity but rather as "a conscious and informed policy choice that requires political and economic justification" and that "the question whether to include ISDS should be decided for each International Investment Agreement in the light of the particular circumstances"[19].

Turning to the disadvantages of ISDS systems, it seems that the positive aspects can be neutralized by the political context in which the ISDS operates. Most obviously, by its very nature ISDS grants foreign investors greater rights than those enjoyed by domestic investors, creating unequal competitive conditions, even more so in the case of forum shopping. Multinational companies are effectively enabled to opt for "nationality planning" when resolving a dispute, choosing the most favorable location giving access to ISDS. In democratic terms, this would enable investment protection rules to be abused because it would the legitimate policy choices of countries. This is no minor fault or any simple imperfection in the current system[20].

Strong public concerns have arisen in some of the most recent cases brought by investors against states, as demonstrated in the above *Vattenfall v. Germany* and in *Philip Morris v. Australia* cases. Both implied negative impacts on national choices in sensitive public policy areas (health and energy), and both have been treated in absolute secrecy. Neither Germany nor Australia have made any changes to their public policies as a result of these investors' lawsuits, nor can either be forced to do so by the ISDS tribunals concerned. But this in no way diminishes the concerns as to the legitimacy of ISDS as a means of "rendering justice". Additionally, host states are exposed to legal and financial risks as a result of actual or threatened ISDS suits. The legitimacy of ISDS is questionable

[18] See European Commission Communication *Towards a Comprehensive European International Investment Policy*, COM (2010) 343 final of 7 July 2010.

[19] See Amendment 2, Justification in the *European Parliament Report on the Proposal for a Regulation Establishing a Framework for Managing Financial Responsibility Linked to Investor-State Dispute Settlement Tribunals Established by International Agreements to Which the European Union Is Party*, COM(2012)0335–C70155/2012–2012/0163(COD) of 26 March 2013.

[20] See Commission, *Fact sheet, Investment Protection and ISDS in EU agreements* of November 2013 at p.5.

first and foremost because it is modelled on private commercial arbitration where confidentiality reigns. Indeed, most existing Bilateral Investment Treaties (BITs) provide for disputes to be settled behind closed doors unless both Parties agree otherwise[21]. The lack of transparency raises concerns as to the independence and impartiality of both the arbitrators and process.

There are instances of companies initiating disputes as a tactic to pressurize the host state to influence or refrain from certain policy measures. While such cases are usually unsuccessful in the end, they do take up time, money and resources for the host state, implying a threat to the latter's right to regulate. Also, ISDS does not allow for the correction of an erroneous decision, as normally arbitrators' decisions are not subject to appeal. Moreover, it fails to ensure consistency between decisions adopted by different tribunals on identical or similar issues because there is no formal system for precedent setting in relation to the arbitrators' decisions, and even though they will recall the reasoning in previous cases in their rulings, they are under no obligation to do so. Ultimately also, ISDS is typically a very expensive system on both sides, and in any case in terms of outcome, because normal jurisdictions are subject to quantitative limits as regards, for instance, reimbursements that do not apply to arbitrators.

Alternative dispute resolution (ADR) mechanisms should be mentioned here: frequently combining SSDS or ISDS, they help appease the critics of the system and offer practical advantages. Typically, ADR precedes the commencement of international investment arbitration and is subject to the willingness of both parties to accept mediation instead of arbitration. While it cannot make up for all the disadvantages of ISDS, it does reduce the number of disputes taken to full-scale arbitration. The large number of cases resolved by ADR models is not in itself a guarantee of the system's success, but it does prove that parties are much more inclined to opt for clarification over litigation where there is a focal point through which to address concerns. ADR can help resolve disputes at an early stage, preventing them from severely and permanently damaging the relationship between the investor and host country. The more informal and flexible nature of ADR could similarly benefit investor-to-state arbitration, helping also to save time and money. Should the parties nevertheless go on to arbitration, they would have prepared the field and perhaps even solved some minor questions. Being familiar with the role of an Ombudsman at both

[21] The World Bank's International Centre for the Settlement of Investment Disputes (ICSID) is required by ICSID Administrative and Financial Regulation 22 to make public, information on the registration of all requests for arbitration and to indicate in due course the date and method of the termination of each proceeding. It also publishes the vast majority of awards with the consent of the parties. If the parties do not consent, ICSID publishes excerpts showing the tribunal's reasoning. The ICSID website has published awards for most completed arbitrations, and decisions in investor-state arbitrations outside of ICSID are also publicly available online. See "International Centre for the Settlement of Investment Disputes, ICSID Cases". Icsid.worldbank.org; "International Centre for the Settlement of Investment Disputes, View Decisions and Awards". For the website, go to https://icsid.worldbank.org/en/ .

European and national levels, the EU no doubt considered this when, for instance, creating an Investment Ombudsman at EU level.

As we know, the origin of BITs goes back to the post-colonization era[22] and the need to ensure protection of foreign investment in countries under political transition or where governance is weak or lacking. ISDS is difficult to justify in well-governed domestic legal systems, such as Canada or the USA, countries characterized by sound legal systems, general good governance and relevant expertise in local courts. Nevertheless, as concerns the potential for any agreement between the EU and the US, the asymmetry between the partners remains a source of concern in Europe that undermines any truly balanced agreement, particularly in terms of the degree of completion of their respective domestic markets and the unresolved extraterritorial issues of US law[23]. However, to impose a model on a case by case basis, according to a judgement on the performance of the judicial system of a sovereign country is certainly not the best way to start diplomatic relations. This was one of the reasons (perhaps the only reason) for the inclusion of an ISDS clause in the EU agreements with Canada and the USA, both of which are undoubtedly fully developed judicial systems that certainly compare to the EU Member States for the purposes of equivalence. To impose an ISDS system on Canada and the USA, might be received as implying its imposition on all other trade partners, in a kind of blanket, non-discriminatory approach.

Of course, other ways could also be explored, such as negotiating only with trade partners that provide equivalent judicial systems in vital respects. In its above 2010 Communication, the European Commission recommended only negotiating with countries that respect the rule of law. The influential Namur Declaration (see Section 3 below), it was suggested that:

> "the ratification of the key instruments for the defense of human rights, the core ILO conventions, the recommendations of the BEPS project (base erosion and profit shifting) and the Paris Climate agreement shall be obligatory for the parties"[24].

This is certainly reflected in the approach of the EU today: to ensure that so-called "new generation" economic and trade treaties do not weaken the laws

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[22] The first one recollected in the German Pakistan BIT of 1959. We are fully in the post colonialism era. Previously States had other means to protect their investments. First of all, essentially, they consisted in public investments or investment made by state owned companies or, in the simplest case, investments made by the occupants in the colony. There was no need of special protection beside the one already given by the military presence in the country and by the jurisdiction exercised by the judicial order set up by the occupant. Or, as last resort, the "gunboat diplomacy" applied. See Kenneth J. Vandevelde, "A Brief History of International Investment Agreements", *U.C. Davis Journal of International Law & Policy*, Vol. 12, No. 1, p. 157, 2005.

[23] See *Declaration of Namur* of 5 December 2016, available at http://declarationdenamur.eu/en/index.php/namur-declaration/ last visited on 12 December 2017.

[24] See *Declaration of Namur*, *Supra.*

protecting the socio-economic, sanitary and environmental values pursued by the EU and its Member States in any ways, and further, they contribute to sustainable development, the reduction of poverty and inequalities and the fight against climate change. To this can now be added "minimum corporate tax rates and verifiable targets for the reduction of greenhouse gas emissions".

Following EU Commission President Jean Claude Juncker's State of the Union Address in September 2017, the EU is committed to making ISDS fit for purpose both within the EU 28 Member States but also in its external relations with third countries[25]. Looking at inwards investment, the EU published its paper on *Welcoming Foreign Direct Investment while Protecting Essential Interests*[26]. It promises a departure from previous EU approaches to resolving disputes arising between states over foreign investments through ISDS mechanisms. As concerns ISDS and EU external relations, which is the primary focus of this paper, the pursuit of a multi-lateral investment court (MIC) is the culmination of the EU's policy research and consultations since December 2016. Any analysis and anticipation of the form and structure of the multi-lateral investment court will be affected by President Juncker's State of the Union Address, insisting on the values underpinning EU trade relations today, which significantly, includes unprecedented transparency for all the EU's trade dealings with other countries. According to the European Commission's *Reflection Paper on Harnessing Globalisation*, this means an end to ISDS as such, to be replaced by the multi-lateral investment court based on the principles of fairness and transparency in particular[27]. Ongoing negotiations at UN level have begun in November 2017 within the UNCITRAL Working Group set up for this purpose and are also demonstrating the influence of trends towards transparency[28].

In the meantime, with the imminent signature in Chile on 8 March 2018 of the Trans-Pacific Partnership Agreement (TPP) by 11 Pacific Rim countries – excepting the USA – and the inclusion of investor-state dispute settlement (ISDS) provisions[29], ISDS mechanisms are involving in parallel. The approach there is

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[25] See European Commission, *President Jean Claude Juncker's State of the Union Address 2017*, Brussels 13 September 2017, to be found at http://europa.eu/rapid/press-release_SPEECH-17-3165_en.htm

[26] See COM(2017) 494 of 13 September 2017, available at https://ec.europa.eu/transparency/regdoc/rep/1/2017/EN/COM-2017-494-F1-EN-MAIN-PART-1.PDF , last visited 9 December 2017.

[27] See European Commission *Reflection Paper on Harnessing Globalisation*, COM(2017) 240 of 10 May 2017, at p. 15, to be found at https://ec.europa.eu/commission/sites/beta-political/files/reflection-paper-globalisation_en.pdf, last visited on 18 December 2017.

[28] See the UNCITRAL Working Group III website, to be found at http://www.uncitral.org/uncitral/en/commission/working_groups/3Investor_State.html, last visited on 31 January 2018. It includes submissions from 2 international intergovernmental organisations, International Centre for Settlement of Investment Disputes (ICSID) and the Permanent Court of Arbitration (PCA).). The submissions of the ICSID and the PCA can be found at https://documents-dds-ny.un.org/doc/UNDOC/LTD/V17/073/14/PDF/V1707314.pdf?OpenElement, last visited on 31 January 2018.

[29] See the website of the Australian Department of Foreign Affairs and Trade, for reporting on developments, http://dfat.gov.au/trade/agreements/tpp/Pages/trans-pacific-partnership-agreement-tpp.aspx last visited on 15 January 2018.

one of using a system of arbitrators, combined with transparency provisions making the hearings open to the public but also for experts and the public to makes submissions, as well as for the decisions of the tribunals to be made public. Japan is signatory to the TPP while at the same time, has only just concluded the Economic Partnership Agreement with the EU, the latter containing no investor protection clauses (see further). The EU has put its reformed Investment Court System on the table[30] and is reaching out to all partner countries, including Japan, to work towards the setting up of a Multilateral Investment Court. The revival of the Trans Pacific Partnership (TPP) by continuing ISDS forms, further muddies the waters for ISDS reform and the shift towards a multilateral investment court in particular, although the scope and use of ISDS clauses has been considerably narrowed within the TPP[31]. As mentioned above, no provision for investor protection is made in the EU-MERCOSUR trade agreement either.

3. The evolution in ISDS: from Bilateral Investment Treaties to a Multilateral Investment Court

To understand the policy evolution at EU level that has led to today's proposal for a Multilateral Investment Court, two European Commission Communications provide valuable insight into the evolution of the strategic negotiating course for the design of dispute settlement mechanisms involving investors and state, at EU and Member State levels.

The first is the 2010 Communication *Towards a Comprehensive European International Investment Policy*[32], where the European Commission explained why a one-size-fits-all model for investment agreements with third countries was neither feasible nor desirable. Each specific negotiating context demands that the Commission elaborate specific further comment on certain common recommendations, broad principles and parameters for future investment agreements. The first of five recommendations listed deals with basic criteria for the selection of partner countries. According to this Communication, the EU's interest in pursuing investment negotiations depends, in the first place, on:

> *"the political, institutional and economic climate of our partner countries. The 'robustness' of investor protection through either host country or international arbitration would be important determinants in defining priority countries for EU*

[30] See European Commission Memo: Key elements of the EU-Japan Economic Partnership Agreement, to be found at http://trade.ec.europa.eu/doclib/press/index.cfm?id=1687, last visited on 1 February 2018.

[31] See for examples, an interview with Minister David Parker, of the New Zealand Ministry for Foreign Affairs on 12 November 2017, in *The Standard*, to be found at https://thestandard.org.nz/the-tpp11-negotiations-isds-provisions-are-gone-almost/, last visited on 18 December 2017.

[32] See European Commission Communication *Towards a Comprehensive European International Investment Policy*, COM (2010) 343 final of 7 July 2010.

investment negotiations. In particular, the capacity and the practice of our partners in upholding the rule of law, in a manner that provides a certain and sound environment to investors, are key determinants for assessing the value of investment protection negotiations".

The second recommendation relates to the very rationale of foreign investments:

"it is important that a common international investment policy not only enables the execution of a direct investment itself – the acquisition of a foreign enterprise or the establishment of one – but also that it enables and protects all the operations that accompany that investment and make it possible in practice: payments, the protection of intangible assets such as Intellectual Property Rights".

Thirdly, the search for*:*

"balance between the different interests at stake, such as the protection of investors against unlawful expropriation or the right of each Party to regulate in the public interest, needs to be ensured".

By extension, the fourth recommendation concerns the enforcement of investment commitments, importantly without yet mentioning the notion of a permanent court as such. Equally importantly however, it stresses the key EU-motivation of ensuring the effective enforceability of investment provisions through binding dispute settlement. In its recently concluded Free Trade Agreements (FTAs), the European Union has incorporated a state-to-state dispute settlement (SSDS) system. To ensure effective enforcement, investment agreements also feature investor-to-state dispute settlement (ISDS), which permits an investor to make a claim against a government directly to binding international arbitration. Most obviously among these is the Energy Charter Treaty to which the EU is a party, and which contains investor-state dispute settlement mechanism, as do all the Member States' Bilateral Investments Treaties (BITs).

Finally, the fifth recommendation addresses international responsibility: the exclusive external competence of the European Union rests in the European Commission for the negotiation of trade agreements, and which has argued that the European Union is the sole defendant regarding any measure taken by EU institutions as well as by a Member State "which affects investments by third country nationals or companies falling within the scope of the agreement concerned". In developing its new international investment policy, "the Commission will address this issue, and in particular that of financial compensation, relying on available instruments, including, possibly, new legislation". As the next section of this paper makes clear, the so called "Singapore" ruling of the Court of Justice of the European Union of May 2017

has since clarified somewhat the tensions between Member States and the EU, but further legal questions remain outstanding and Belgium has requested clarifications from the CJEU[33].

Significantly also, in that same 2010 Communication, the Commission indicated that future EU agreements including investment protection should include investor-state dispute settlement, but that to do so would be complicated by the fact that "the Union has not historically been a significant actor in this field. Current structures are to some extent ill-adapted to the advent of the Union"[34]. Therefore, in approaching investor-state dispute settlement mechanisms, the Union should build on Member State practices to arrive "at state-of-the art investor state dispute settlement mechanisms".

In the framework of the negotiations of CETA and TTIP[35], the EU opted to retain an ISDS system but with significant improvements to transparency and institutional structure. In line with the EU's approach before the WTO, a new EU system for ISDS should ensure transparency in requests for arbitration, submissions, open hearings, *amicus curiae* briefs and publication of awards, and so forth[36]. Other improvements would involve granting public access to arbitration documents, including settlement agreements, and arbitral hearings, and allowing the participation of interested non-disputing parties such as civil society organizations in the process[37].

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[33] *Op. Cit.*, n. 4.

[34] For example, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention), is open to signature and ratification by states members of the World Bank or party to the Statute of the International Court of Justice. The European Union qualifies under neither. In its communication, the Commission indicates that it will explore with interested parties the possibility that the European Union seek to accede to the ICSID Convention (noting that this would require amendment of the ICSID Convention).

[35] The TTIP mandate on ISDS (doc 11103/13 MP/sy 8 DG C 1 RESTREINT UE/EU RESTRICTED) refers to : "Enforcement: the Agreement should aim to provide for an effective and state-of-the-art investor-to-state dispute settlement mechanism, providing for transparency, independence of arbitrators and predictability of the Agreement, including through the possibility of binding interpretation of the Agreement by the Parties. State-to-state dispute settlement should be included, but should not interfere with the right of investors to have recourse to the investor-to-state dispute settlement mechanisms. It should provide for investors as wide a range of arbitration fora as is currently available under the Member States' bilateral investment agreements. The investor-to-state dispute settlement mechanism should contain safeguards against manifestly unjustified or frivolous claims. Consideration should be given to the possibility of creating an appellate mechanism applicable to investor-to-state dispute settlement under the Agreement, and to the appropriate relationship between ISDS and domestic remedies."

[36] See also *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration*, 2014, New York: UN. The Rules are found at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency.html.

[37] See "ICSID, Arbitration Rules". Icsid.worldbank.org: "Under Art. 29 of the U.S. Model-BIT of 2004, all documents pertaining to ISDS have to be made public and amicus curiae briefs are allowed. However, no investment treaty allows other parties who have an interest in the dispute, other than the claimant investor and respondent government, to obtain standing in the adjudicative process". "Under the Trans-Pacific Strategic Economic Partnership, the tribunals shall, subject to the consent of the disputing parties, conduct hearings open to the public. The tribunal will make available to the public documents relating to the dispute such as the notice of intent, the notice of arbitration, pleadings, memorials, minutes or transcripts of the hearings of the tribunal, where available; orders, awards and decisions of the tribunal. In addition, third parties can and increasingly do participate in investor-state arbitration by submitting amicus curiae petitions".

Under public pressure, in 2014 the EU published its negotiating mandate, and as the negotiations progress, different papers are made partially available[38]. The Commission considers that improvement of ISDS is not conceivable without transparency[39]. NAFTA already gave an example of progress in transparency[40].

Whether the accusations of lack of transparency and democratic legitimacy are well-founded or not, the only answer is that of more transparency and more participation to weaken the arguments of protesters. As regards the trade agreements themselves, there can be no sense in undertaking years of negotiations only to see them thrown out in the end, with all the waste of resources and energy that implies, not to mention the loss of face with commercial partners, who would likely hesitate to embark on further negotiations where a successful outcome would be so precarious.

The need for improvement in European consultation was clear. Wide public debates surrounding the signing of CETA revealed how the EU's way of negotiating international trade agreements and their content, is being challenged by ever broader sections of public opinion. The debates on the approval process of the CETA agreement raised concerns. An attempt to find a solution led the *Declaration of Namur* of 5 December 2016 [41], which was the idea of the Belgian politician Paul Magnette, Minister-President representing the Walloon State of Belgium, who together with some 40 or more lead academics from the EU, the US and Canada. Insisting on EU values of solidarity, democracy and progress that constitute the European Union, it was certainly intended as a shot across the bows for any business as usual approach by the EU in negotiating trade agreements. It has proved highly influential on the evolution of the EU external relations today, specifically as concerns trade and investment. The approach advocated goes further than the current transparency rules and procedures envisaged at the multilateral level by UNCITRAL in December 2014[42], calling for further advances in transparency and informed debate:

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[38] Communication to the Commission concerning transparency in TTIP negotiations, 25 Nov. 2014, C(2014) 9052 final. See M. Cremona, "Guest Editorial: Negotiating the Transatlantic Trade and Investment Partnership (TTIP) : Context and scope of TTIP", *Common Market Law Review* 2015, April, Vol. 52, n. 2, pp. [351]-362.

[39] On transparency, see Ortino, 'Transparency of Investment Awards: External and Internal Dimensions', in J. Nakagawa (ed.), *Transparency in International Trade and Investment Dispute Settlement* (2013), at 119–158; C. Titi, 'International Investment Law and Good Governance', in M. Bungenberg *et al*. (eds.), *International Investment Law: A Handbook* (2015) 1768; Menétrey, 'La transparence dans l'arbitrage d'investissement', 1 *Revue de l'Arbitrage* (2012) 33; A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties* (2009).

[40] See C. Titi, 'International Investment Law and Good Governance', in M. Bungenberg *et al.* (eds.), *International Investment Law: A Handbook* (2015) 1768.

[41] See *Declaration of Namur*, *Op. Cit*. n. 23.

[42] See the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration of 10 December 2014 to be found at www.uncitral.org. The Transparency Registry is also a key feature of the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (the "Mauritius Convention on Transparency") adopted in December 2014, which extends the application of the Rules to investment treaties concluded before 1 April 2014. The Rules, the Convention and the Transparency Registry constitute the UNCITRAL standards on transparency. Original proposals to make all UNCITRAL

"Public analyses and contestation of the potential effects of a new economic and commercial treaty should be conducted before establishing a negotiating mandate, in order to guarantee that it will contribute to sustainable development, the reduction of poverty and inequality, and the fight against climate change;

The negotiating mandates regarding mixed agreements should be the object of a prior parliamentary debate in the national and European Assemblies (as well as the regional Assemblies with equivalent powers), involving as much as possible representatives of civil society;

The interim results of the negotiations should be made public and accessible in due course, so that civil society is ensured full knowledge and a parliamentary debate can take place before closing the negotiations;

The "provisional application" of agreements should not be favored, so that parliaments keep their full powers in the assent procedure of mixed agreements"[43].

There is no doubt that the CETA marked the application of a welcome new approach to transparency in trade negotiations which should help prevent the further spread of anxiety and campaigns based on rumour. Such relatively simple rules provide full respect of democratic checks and balances in the process and are inclusive of both civil society and democratic parliamentary control procedures – not forgetting the improved role for the European Parliament, which must now give its assent to trade agreements and has the right to be kept informed throughout the negotiations.

As for structural institutional aspects, this should also address ongoing concerns about the appointment of all arbitrators and potential conflicts of interest, by opting for the use of quasi-permanent arbitrators and/or appellate mechanisms. All those persons adjudicating disputes should possess the requisite skills, be fully independent, impartial, free from conflicts of interest, be "affordable" to the parties, and subject to rules on qualifications, conduct and remuneration, through a code of conduct for example.

The second relevant European Commission Communication, issued in September 2015, formally proposed a new Investment Court System to replace ISDS clauses[44]. This Investment Court System was intended to replace the

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arbitration under investment treaties public were not adopted after opposition by some states and by representatives of the arbitration industry who participated in the UNCITRAL working group negotiations as state representatives. See also the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration ('Mauritius Convention') which will render the UNCITRAL Rules on Transparency in Treaty-based Investor State Arbitration also applicable to disputes arising out of investment treaties that were concluded prior to 1 April 2014 if both parties to the investment treaty are also party to the Mauritius Convention, to be found at http://www.uncitral.org/pdf/english/texts/arbitration/transparency-convention/Transparency-Convention-e.pdf, last visited 12 December 2017. For the state of ratification, go to http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention_status.html, last visited on 25 January 2018. Latin American countries do not employ ISDS and are not signatories to the Mauritius Convention.

[43] See *Declaration of Namur*, *Op. Cit*. n. 23.

[44] See http://europa.eu/rapid/press-release_IP-15-5651_en.htm.

existing ISDS mechanisms in all ongoing and future EU investment negotiations, including the now failed EU-US negotiations on a Transatlantic Trade and Investment Partnership (TTIP). The ISDS chapter of the initial draft of the TTIP did not foresee such an idea. It was limited to a review of the way in which the ISDS arbitrator tribunals work, on how to appoint the arbitrators, on creating a system of appeal, and on how to strengthen EU governments' rights to regulate in the public interest by clarifying and limiting the rights that investors are granted[45].

The European Parliament's influence in shaping the proposal was substantial[46], as was that of the Member States, national parliaments and stakeholders through the public consultation[47]. On the occasion of the proposal's launch, First Vice-President of the European Commission Frans Timmermans said:

> *"With our proposals for a new Investment Court System, we are breaking new ground. The new Investment Court System will be composed of fully qualified judges, proceedings will be transparent, and cases will be decided on the basis of clear rules. In addition, the Court will be subject to review by a new Appeal Tribunal. With this new system, we protect the governments' right to regulate, and ensure that investment disputes will be adjudicated in full accordance with the rule of law."*

The then EU trade Commissioner, Cecilia Malmström, declared this "a new, modernized system of investment courts, subject to democratic principles and public scrutiny".

The reform is driven by the intent to establish trust in the system. It aimed to replace the old, traditional form of dispute resolution suffering from a fundamental lack of trust, with "a new system built around the elements that make citizens trust domestic or international courts." The Commission intended that the new system would not be allowed to override the European ban on chicken carcasses washed with chlorine, nor could companies use legal technicalities to build frivolous cases against governments. With the opening up of investment tribunals to public scrutiny, documents would be public and interested parties, including NGOs, able to make submissions. Also, the EU system would eliminate any conflicts of interest by making sure that the arbitrators deciding on EU cases be above suspicion.

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[45] On SSDS the proposal wanted to use the same method in place at WTO and to ensure that it is fully transparent.

[46] See EP Resolution(2015) 0252 of 8 July 2015 requiring "a new system for resolving disputes between investors and states which is subject to democratic principles and scrutiny, where potential cases are treated in a transparent manner by publicly appointed, independent professional judges in public hearings and which includes an appellate mechanism, where consistency of judicial decisions is ensured, the jurisdiction of courts of the EU and of the Member States is respected, and where private interests cannot undermine public policy objectives" (XV).

[47] See http://trade.ec.europa.eu/consultations/index.cfm?consul_id=179 .

The formal report on the results of the consultation, released on 13 January 2015, identified four areas of particular concern, where further improvements to the EU approach should be explored:

i) the protection of the right to regulate;
ii) the establishment and functioning of arbitral tribunals;
iii) the review of ISDS decisions through an appellate mechanism;
iv) the relationship between domestic judicial systems and ISDS.

All this progress was made before the emergence of political and societal resistance to CETA's progress or the new Trump administration in the US made short shrift of TTIP. The idea of a permanent court had been accepted by Canada once CETA had been finalized, but it is still under discussion and probably will never be accepted by the Americans within the TTIP[48].

This explains the European Commission's unexpected suggestion, on Christmas Eve 2016, to make a joint proposal with Canada exploring the introduction of a Multilateral Investment Court and to launch an impact assessment and a public consultation thereon[49]. The examples set with the CETA and TTIP – their arduous negotiation and ratification and ultimate defeat bringing to mind the metaphor of "Caudine Forks" – provide a considerable hurdle for the survival of further such mechanisms. Attempts at including such a court in future agreements face a dicey passage through the democratic processes required of an agreement's ratification.

The impact of all this on balancing values on the current policy path set for EU trade and investment is clear today, particularly in terms of transparency and inclusion of civil society and interested parties beyond the direct parties to investor protection mechanisms. These values must be seen as including the EU's respect for its international commitments, notably including the Global Compact and the Paris Agreement. Rooted in the two new 2017 Communications on *A Progressive Trade Policy to Harness Globalisation*[50] and on *Welcoming Foreign Direct Investment while Protecting Essential Interests*[51]– and not forgetting work already done under the previous 2015 *Communication on Trade for All: Towards a More Responsible Trade and Investment Policy*[52] – initiatives on trade and investment are to be balanced with global governance in human rights

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[48] See *US-EU Joint Report on TTIP Progress to Date*, 17 January 2017, available at http://trade.ec.europa.eu/doclib/docs/2017/january/tradoc_155242.pdf

[49] See http://europa.eu/rapid/press-release_MEMO-16-4350_en.htm last visited 14 February 2018.

[50] See COM(2017) 492 of 13 September 2017, to be found at https://ec.europa.eu/transparency/regdoc/rep/1/2017/EN/COM-2017-492-F1-EN-MAIN-PART-1.PDF , last visited 9 December 2017. See the European Commission Communication, *Towards a Comprehensive European International Investment Policy*, COM (2010) 343 final of 7 July 2010.

[51] See COM(2017) 494 of 13 September 2017, to be found at https://ec.europa.eu/transparency/regdoc/rep/1/2017/EN/COM-2017-494-F1-EN-MAIN-PART-1.PDF , last visited 9 December 2017.

[52] On the rational and concrete next steps for trade and investment, see COM(2015) 497 of 14 October 2015 http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf , last visited 9 December 2017.

and working conditions, food safety, public health, environmental protection and animal welfare. Very significant also is the new Advisory Group on EU trade agreements specifically designed to include civil society in trade policy formulation[53].

3.1 From a Permanent Investment Court to a Multilateral Investment Court

In theory three models offer alternatives to ISDS. The first two rely on existing models: by replacing investor to state dispute settlement (ISDS) by state to state dispute settlement (SSDS)[54], by replacing ISDS with domestic dispute resolution[55] or a combination of both[56]. With the lessons learned from the beleaguered CETA and TTIP negotiations, and CETA's ratification at EU level, the European Union has been recoiling from proposing such a system in its trade negotiations.

The third option was the creation of a permanent international investment court. Opting for this approach, in its new generation of bilateral FTAs, the EU proposed a permanent bilateral investment court: this proposed new model would apply to conflicts arising between investors and states under the implementation of bilateral investment treaties, and would be governed by a permanent court composed of judges subject to a code of conduct and working in a more transparent manner.

Initially welcomed as a novelty, there was hardly enough time for commentators to reflect upon this permanent bilateral investment court[57] before upgrading it to the even more ambitious idea of a Multilateral Investment Court (MIC)[58].

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[53] The EU civil society dialogue on trade can be followed at http://trade.ec.europa.eu/civilsoc/index.cfm, last visited 9 December 2017, and the procedure for establishing the list of trade experts was published 13 September 2017, COM(2017)6113, to be found at http://trade.ec.europa.eu/civilsoc/index.cfm , last visited 9 December 2017.

[54] This is the WTO system under its dispute settlement mechanism (DSM).

[55] This option has merits mainly in countries where reliance on ISDS is less important because of theirsound legal systems, good governance and local courts' expertise. Different will be the interest in countries with weak governance. See *supra*.

[56] For instance this is the option chosen by Australia in its recent agreements with Japan, Malaysia, New Zealand and USA, or by Brazil in its CFIAs, see *infra*. These treaties leave investment disputes subject to domestic courts but complement this process with the possibility of State-State proceedings under the treaty.

[57] Among others, see C. Titi, "The European Union's Proposal for an International Investment Court: Significance, Innovations and Challenges Ahead" in *Transnational Dispute Management*, May 2016, and I. Venzcke, "Investor-State Dispute Settlement in TTIP from the Perspective of a Public Law Theory of International Adjudication" in *Journal of World Investment & Trade* 2016, Vol. 17, pp. 374-400.

[58] Interesting to mention that this idea was already suggested by Prof. Van Harten in 2008, see *A Case for International Investment Court, Inaugural Conference of the Society for International Economic Law* of 16 July 2008, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1153424 last visited on 12 February 2018.

It is true that the idea of a MIC was already proffered during the 2014 public consultation on investment protection, where various stakeholders suggested that investment dispute resolution would best be undertaken multilaterally rather than through bilateral reforms[59]. At that time, the European Commission took a first step with the introduction of a bilateral Investment Court System (ICS), which was incorporated into the EU trade agreements with Canada and Vietnam. After the public consultation in the summer of 2014, the European Commission modified its proposal for the TTIP by proposing a permanent court instead of the traditional – even if improved – ISDS system. The new system would bring improvements on two fronts: clarify and improve investment protection rules on the one hand, and improve the operation of the dispute settlement system on the other.

On the first front, the improvements were intended to appease concerns as to the negative impact of ISDS on state's right to regulate, by actually specifying that the states' right to regulate is preserved[60] so that companies could not successfully bring claims against a state's right to regulate where these claims are based on public policy reasons.

Operationally, the new court system envisages a public system composed of a First Instance Tribunal and an Appeals Tribunal. Judgments would be issued by publicly appointed judges with high qualifications, comparable to those required for the members of permanent international courts, such as the International Court of Justice and the WTO Appellate Body. The system would be transparent, with open hearings and comments available on-line, and a right for interested parties to intervene. Rules on forum–shopping and frivolous claims would improve the current system by avoiding multiple and parallel proceedings.

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[59] See S. Hindelang; C-P Sassenrath, *The investment chapters of the EU's international trade and investment agreements in a comparative perspective* in European Parliament Directorate General for External Policies, 2015, at p. 105 *et seq*., to be found at https://publications.europa.eu/en/publication-detail/-/publication/76da6e19-7273-11e5-9317-01aa75ed71a1/language-en last visited on 12 February 2018; S. Hindelang, *Study on Investor-State Dispute Settlement (ISDS) and Alternatives of Dispute Resolution in International Investment Law*, Study for the European Parliament of September 2014, at p. 63, available at http://ssrn.com/abstract=2525063, last visited on 12 February 2018,

[60] Some arbitrators already judged on this issue: see Saluka Investments B.V. *vs*. The Czech Republic (2006) : "It is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner bona fide regulations that are aimed at the general welfare". See also, Methanex *vs*. United States (2005) : "As a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alia, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation." The EU–South Korea FTA appears to be the first EU document to explicitly refer to the right to regulate (EU–South Korea FTA, *OJ* 2011 L 127/6, Art. 7.1(4); see also the preamble and Arts 13.3, 13.4.3, 13.5.2 and 13.7). In the current FTAs under ratification or being negotiated a provision will refer to the right of Governments to take measures to achieve legitimate public policy objectives, on the basis of the level of protection that they deem appropriate. Is it enough? All depends, as in any legal order, from the way an ISDS tribunal, even if it was a properly constituted court, would interpret any legal text intended to protect public policy objectives.

The progression towards a multilateral system of investment dispute settlement was to appease the adverse national and public reactions to the CETA with Canada, and also the recent anti-EU movements that arose within the European Union itself in 2016, ranging from Brexit to the referendum on the EU Agreement with Ukraine, for example. Other countries faced the same kinds of criticism in respect of ISDS systems. On Christmas Eve 2016, the Commission launched the public consultation[61] on a multilateral reform of investment dispute resolution, including the possible establishment of a permanent Multilateral Investment Court.

There are obvious advantages to a multilateral international investment court, not least that a standing international investment court would guard against the non-transparent and non-democratic nature of ISDS. By replacing the system of multiple *ad hoc* arbitral tribunals with one single institutional structure, a standing international investment court would safeguard national sovereignty and supranational governance, as it would be composed of adjudicators (or judges)[62] appointed by States on a permanent basis and could also comprise an appeals chamber. Like any other typical international judicial body[63], but would also operate as a public institution serving the interests of investors and states alike. And more broadly speaking, it would not only strengthen the legitimacy of the investor-state regime. It would contribute to enhancing consistency and predictability in the interpretation of international treaties, especially in today's tangled and fragmented spider's web of some 3,000 BITs[64].

The shared interest on this project was also evident in the exploratory talks held at the technical level by the EU with third countries on 13 and 14 December 2016 in Geneva[65]. On that occasion the European Commission and

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[61] The consultation was open until 15 March 2017, to be found at http://trade.ec.europa.eu/consultations/index.cfm?consul_id=233 last visited December 2017.

[62] For being different from current arbitrate procedures and guarantee independence and impartiality of adjudicators, it should be composed by judges with security of tenure and exclusivity of function, i.e. judges, unlike arbitrators in the present regime, would not be permitted to continue serving as counsel or expert witnesses.

[63] According to Christian Tomuschat, an international judicial body, to be classified as such, must meet five basic criteria: (i) it must be permanent; (ii) it must have been established by an international legal instrument; (iii) it must resort to international law in order to decide the cases submitted to it; (iv) it must decide the cases on the basis of pre-existing rules of procedure; and (v) its decisions must be legally binding. Christian Tomuschat, International Courts and Tribunals with Regionally Restricted and/or Specialized Jurisdiction, in Judicial Settlement of International Disputes: International Court of Justice, Other Courts and Tribunals, Arbitration and Conciliation: And International Symposium, 1987 Max-Planck Institute at pp. 285-416. Cesare Romano adds two other criteria: (i) the judicial body must be composed (at least in its majority) of judges who have not been appointed ad hoc by the parties, but rather who have been chosen before a case is submitted through an impartial mechanism; (ii) among the parties to the dispute, at least one must be a sovereign state or an international organization, see C. Romano, "The proliferation of international judicial bodies: the pieces of the puzzle" in *International Law and Politics*, 1999, Vol. 21, at pp. 713-715.

[64] *Loc. Cit.* n. 77.

[65] To be found at www.trade.ec.europa.eu/doclib/press/index.cfm?id=1606, last visited on 12 February 2018.

Canadian Government[66] co-hosted discussions on a multilateral investment court. Reporting on this event, the European Commission found that the:

> *"very positive attendance (almost 170 delegates from more than 60 countries and eight international organizations representing all major trade and investment world actors) is evidence that there is an appetite for reforming the current system of investor-state dispute settlement and significant interest in the idea of establishing a permanent multilateral investment dispute settlement mechanism".*

Discussions continued among trade ministers on the margins of the World Economic Forum in Davos in January 2017. Meanwhile at European Commission level, an impact assessment process on the option of establishing a multilateral investment court was ongoing. A twelve-week online public consultation process was launched in December 2016 and a stakeholder meeting held in Brussels in February 2017. In July 2017, the United Nations Commission on International Trade Law (UNCITRAL) agreed to work on the possible reform of investor-to-state dispute settlement (ISDS)[67] and actual work at UNCITRAL level on the proposal began on 27 November 2017[68]. In line with the European Commission's commitment to transparency, all activities and related documentation are published on the Europa website[69], including videos of public consultations, of which the last was held on 20 November 2017.

Certainly, the current proposal for a permanent bilateral court – even though not yet operational – provides food for thought on what an multilateral investment court might look like. The first instance and the appeal level will be retained, but for multilateral negotiations various issues arise for which the bilateral context cannot provide answers, such as the scope of the tribunal, its membership, the appointment of its adjudicators, geographical balance, whether

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[66] In the EU-Canada Joint Interpretative Instrument is stated: "Therefore, CETA represents an important and radical change in investment rules and dispute resolution. It lays the basis for a multilateral effort to develop further this new approach to investment dispute resolution into a Multilateral Investment Court. The EU and Canada will work expeditiously towards the creation of the Multilateral Investment Court. It should be set up once a minimum critical mass of participants is established, and immediately replace bilateral systems such as the one in CETA, and be fully open to accession by any country that subscribes to the principles underlying the Court."

[67] See press release at http://www.unis.unvienna.org/unis/en/pressrels/2017/unisl250.html

[68] See Note by the UNCITRAL Secretariat, "Possible reform of investor-State dispute settlement (ISDS)" A/CN.9/WG.III/WP.142 of 18 September 2017, to be found at http://www.uncitral.org/pdf/english/workinggroups/wg_3/142-e.pdf last visited on 19 December 2017. For the EU response to the UNCITRAL, see *The identification and consideration of concerns as regards investor to state dispute settlement of* 20 November 2017, to be found at http://trade.ec.europa.eu/doclib/docs/2017/november/tradoc_156402.pdf, last visited on 19 December 2017. See also United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform) Thirty-fourth session Vienna, 27 November-1 December 2017 to be found at http://www.uncitral.org/uncitral/en/commission/working_groups/3Investor_State.html, last visited on 19 December 2017.

[69] To be found at http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608, last visited on 31 January 2018, for comprehensive links to EU and UN documents, including explanatory information and videos.

it will be permanent, provision for enforcement, cost allocation[70]. At the same time, whether a permanent multilateral investment court can become be part of an already existing international organization is a matter that has been kept open.

Among crucial outstanding questions to be addressed will be the compatibility of such courts with the EU legal order[71]. The question on the nature of such agreements is now solved[72], and it is clear now that the Member States retain control over investor-to-state dispute settlement mechanisms. A public consultation and an impact assessment are also relevant but the opinion of the Court of Justice, especially after its opinion on the accession to ECHR[73], on such a controversial and crucial issue[74] becomes all the more necessary.

The investment court system provisions under CETA did not take effect as part of the provisional entry into force of the CETA, and further measures have to be taken to give effect to CETA investment court system provisions. The Council of the European Union, comprising all the EU Member States of course, remains competent to decide these rules, upon proposals from the European

[70] Projected costs would be comparable to those of other international tribunals, such as the International Law of the Sea Tribunal, which costs around USD 10 million per year to run or the WTO Appellate Body costs around USD 7 million to operate per year.

[71] See L. Ankersmit, "The Compatibility of Investment Arbitration in EU Trade Agreements with the EU Judicial System" in *Journal for European Environmental & Planning Law*, 2016, Vol. 13, Issue 1, pp. 46 – 63; I. Govaere, "TTIP and Dispute Settlement: Potential Consequences for the Autonomous EU Legal Order" in *College of Europe Legal Studies* 2016 Vol. 1.; J. Kokott and C. Sobotta 'Investment Arbitration and EU Law' in *Cambridge Yearbook of European Legal Studies*, 2016, Vol. 18, pp. 3–19; M. Cremona, "Guest Editorial: Negotiating the Transatlantic Trade and Investment Partnership (TTIP) : Context and scope of TTIP" in *Common Market Law Review* 2015, Vol. 52, n. 2, p. [351]-362.

[72] See case A-2/15 on the Singapore Free Trade Agreement. The Opinion of Advocate General Sharpston in Opinion 2/15, was delivered on 21 December, the same day of the launching of the public consultation on the MIC. AG Sharpston concludes on the mixed nature of the agreement. The ECJ, in its opinion delivered on 16 May 2017, largely confirmed it. In the opinion on the nature of the Singapore agreement, see Opinion of the ECJ of 16 May 2017, Case A-2/15, the Court made clear that the opinion relates only to the issue of whether the EU has exclusive competence and not to whether the content of the agreement is compatible with EU law. See also EUCJ, Opinion 2/13, paragraphs. 145-146: "It must be borne in mind in that regard that, under Article 218(11) TFEU, the Parliament, the Council, the Commission or a Member State may obtain the Opinion of the Court of Justice as to whether an envisaged agreement is compatible with the provisions of the Treaties. That provision has the aim of forestalling complications which would result from legal disputes concerning the compatibility with the Treaties of international agreements binding upon the EU (see Opinions 2/94, EU: C: 1996:140, paragraph 3; 1/08, EU: C: 2009:739, paragraph 107; and 1/09, EU: C: 2011:123, paragraph 47). see Opinions 3/94, EU:C:1995:436, paragraph 17, and 1/09, EU:C:2011:123, paragraph 48: "A possible decision of the Court of Justice, after the conclusion of an international agreement binding upon the EU, to the effect that such an agreement is, by reason either of its content or of the procedure adopted for its conclusion, incompatible with the provisions of the Treaties could not fail to provoke, not only in the internal EU context, but also in that of international relations, serious difficulties and might give rise to adverse consequences for all interested parties, including third countries".

[73] See EUCJ Opinion 2/13 on the draft agreement on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 13 December 2014.

[74] Among others, the European Association of Judges (representing 44 national associations of judges), the German Association of Judges (representing 16 0000 German judges and public prosecutors), 101 law professors in an open letter, have objected to ICS inter alia on the ground that the system might not be compatible with EU law.

Commission. Moreover, national constitutional provisions must be respected for the ratification and entry into force of these dispute settlement provisions.

With all this in mind, the preliminary opinion of the CJEU requested by Belgium on 6 September 2017[75] promises answers on the matter of compatibility with European Union law. Specific reference to the investment court system provided for in the CETA (which will be as a precursor to a multilateral court), Belgium has put four questions on its compatibility with:

1) The exclusive competence of the CJEU to provide the definitive interpretation
   of European Union law;
2) The general principle of equality and the 'practical effect' requirement of
   European Union law;
3) The right of access to the courts;
4) The right to an independent and impartial judiciary[76].

Answers to these questions should, surely, ease a repeat of the difficult ratification process for CETA that Belgium experienced in 2016.

Nevertheless, is this belts and braces approach really necessary? Would the creation of a multilateral International Investment Court be tantamount to using a bazooka to kill a mosquito? Does the current 10% of problem cases[77] provide the critical mass to justify such an independent international jurisdiction? How many States would have to participate for it to be workable? Would only new BITs refer to it explicitly or should it be subject to consensus of the parties and be competent to adjudicate over other investments treaties? Would the eventual court be competent to adjudicate on investment disputes under a BIT involving both investor-State and State-State proceedings? Why create such a new body where others already exist?

In the international arena in particular, how would the multilateral investment coexist with well-established supranational Courts? An outright negative answer would make the MIC redundant before it could take concrete form.

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[75] *Op. Cit.* n. 4.

[76] See the *CETA : Belgian Request for an Opinion from the CJEU* at p. 2, *Op. Cit*. n. 4. On the matter of the right to an independent and impartial judiciary, further sub-questions address : the conditions regarding the remuneration of the members of the Tribunal and the Appeals Body ; the appointment of members of the Tribunal and the Appeals Body ; the release of members of the Tribunal and the Appeals Body ; the guidelines of the International Bar Association regarding conflicts of interest in international arbitration and the introduction of a code of conduct for the members of the Tribunal and the Appeals Body ; the external professional activities related to investment disputes of members of the Tribunal and the Appeals Body.

[77] According to the United Nations Conference on Trade and Development (UNCTAD), there are 2953 Bilateral Investment Treaties of which 2322 in force, and to which should be added 362 Treaties with Investment Provisions (TIPs) of which 294 in force. Around 1,400 concern EU Member States. Of the ones in force, 90% operated without a single investor claim of a treaty breach. According to the figures of UNCTAD, there are 608 known treaty-based ISDS cases (decided and pending).

Nevertheless, recent practice bears out how the Juncker Commission is fundamentally reforming the existing system for settling investment-related disputes. In a fact sheet published on 1 July 2017[78], the European Commission clearly stated that "for the EU ISDS is dead". Moreover, the same fact sheet mentions that, "Investment is part of the Commission's negotiating mandate: EU governments want the Commission to improve the access of EU investors to the Japanese market and negotiate rules to promote and protect EU investors". It states that this is "the EU's agreed approach that it is pursuing from now on in its trade agreements. This is also the case with Japan". Anything less ambitious, including a return to the old Investor-to-State Dispute Settlement, is no longer acceptable.

This is the approach reflected in the new EU-Japan Economic Partnership Agreement. The partners only announced the agreement at the conclusion of the 2017 EU-Japan Summit on 6 July 2017[79], and on the eve of the G20 summit. It was concluded on 8 December 2017 and has been hailed as the most important bilateral trade agreement ever concluded by the EU. The Commission continues with legal verification and translation of the agreement into all EU official languages[80] and then submitting it for the approval of EU Member States and the European Parliament.

It would be difficult not to interpret the official press releases quoting Commissioner Malmström as saying "we believe in building bridges, not walls", as anything other than a direct answer to President Trump's unhappy declarations. Similarly, the inclusion of an express reference to the Paris Agreement on Climate Change in the draft text demonstrates the determination of both parties to go ahead with such multilateral initiatives in spite of President Trump's recent declaration of the US withdrawal from the Paris Agreement. However, in spite of the innovative provisions concerning sustainable development, environmental protection and corporate governance, there is one blatant omission that may signal a longer-term problem for the EU's trade negotiators: investment protection remains outside the scope of the agreement. The EU has put its reformed Investment Court System on the table[81] and is reaching out to all partner countries, including Japan, to work towards the setting up of a Multilateral Investment Court.

With the absence of any substantive investment protection or investor-state dispute settlement ("ISDS") mechanism in the EU-Japan Agreement, nor any explicit reference to the MIC as a potential future option, it remains to be seen

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[78] European Commission, "A new EU trade agreement with Japan", fact sheet, 1 July 2017.

[79] Japan-EU Economic Partnership Agreement ("JEEPA"), to be found at http://ec.europa.eu/trade/policy/in-focus/eu-japan-economic-partnership-agreement/ last visited on 1 February 2018.

[80] The preliminary text is already available in respect of the transparency commitments of the EU. See the web address *ibid*. The dispute settlement provisions do not include investor protection disputes

[81] See European Commission *Memo: Key elements of the EU-Japan Economic Partnership Agreement*, of 6 July 2017 to be found at http://trade.ec.europa.eu/doclib/press/index.cfm?id=1687, last visited on 1 February 2018.

whether the EU and Japan might eventually be able to reach agreement on investment protection and an alternative dispute resolution process for investor-state disputes[82]. We are left in the dark as to the future of investor protection and investor state dispute settlement. An overcautious interpretation of the ECJ's opinion on Singapore agreement[83] could plead in favour of a separate agreement (or protocol) on investments perhaps even including a reference to the multilateral court as a system for resolution of disputes.

4. The Latin American experience

Without attempting to study in detail all the mechanisms dealing with solving investment disputes worldwide, it is possible to focus on Latin America in order to evaluate implementation of these mechanisms in bilateral or multilateral trade agreements. The American continent is the EU's main trading partner, while MERCOSUR alone is the fourth largest regional economy in the world after NAFTA, the European Union and Japan. Brazil has traditionally been a leader in the inter-American community and plays an important role in economic cooperation, is a founding member of the Organization of American States (OAS) and the Inter-American Treaty of Reciprocal Assistance (Rio Treaty), and Brazil gives high priority to expanding relations with its South American neighbours and strengthening regional bodies such as the Latin American Integration Association (ALADI), the Union of South American Nations (UNASUR) and MERCOSUR.

EU-Mercosur negotiations were relaunched in 2010 and aim at concluding an overall trade agreement. In 2011, Brazil signed a trade agreement with the US which included regulatory issues affecting trade and investment. In recent years[84], traditional Latin American resistance to the participation in an international system of investment protection has undergone some rethinking relating to investment standards and the elaboration of new models. This is evident in Brazil's cooperation and facilitation investment agreements (CFIAs), the negotiations on the creation of a regional dispute settlement center under the

[82] However, the vast majority of Japan's international investment agreements contain traditional ISDS mechanisms and it recently supported the inclusion of such a mechanism in the context of the Trans-Pacific Partnership ("TPP"). In the Australia-Japan economic partnership agreement in 2015, the ISDS was substituted by a reference to the domestic courts, pending future agreement on an appropriate dispute resolution mechanism.

[83] See EUCJ Opinion A-2/15of 16 May 2017, the Court focused its criticisms on the inclusion of portfolio investment, which it considered to be outside the scope of the EU's exclusive competence. However, there is no reason why the EU should be hesitant to include pure foreign direct investment within the scope of the agreement.

[84] See K. Fach Gómez and C. Titi (eds), "The Latin American Challenge to the Current System of Investor-State Dispute Settlement" in *Journal of World Investment & Trade: Special Issue* 17 (4), 2016, to be found at https://ssrn.com/abstract=2784722, last visited 12 February 2018.

aegis of the Union of South American Nations (UNASUR)[85], and in some political positions and amendments to national arbitration laws for disputes involving the State in other Latin American countries.

Only in 2014 and 2015[86] at least 13 international investment agreements were negotiated and signed by countries in the region. Half of these agreements are intra-Latin American. Four among them were bilateral investment treaties (BITs). Brazil was the most active negotiator, with six cooperation and facilitation investment agreements (CFIAs) being signed, all in 2015. Colombia and Mexico came next with four each. Moreover, the recently revived Trans-Pacific Partnership (TPP)[87] (not now including the US) involves several southern America countries (Chile, Mexico and Peru), and incorporates dispute settlement guidelines between governments and foreign investors[88].

Common to these agreements is the dual provision made for arbitration together with alternative dispute resolution or investor-state mechanisms that are less-adversarial than their predecessors. Some Latin American countries have even developed preventive mechanisms aimed at reducing the number of conflicts in relation to international investment[89].

However, it would be a misconception to consider Latin America as one 'continent' insofar as ISDS is concerned. The picture is much more complex and

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[85] See M. J. Luque Macías, 'Reliance on Alternative Methods for Investment Protection through National Laws, Investment Contracts, and Regional Institutions in Latin America', in S. Hindelang and M. Krajewski (eds.), *Shifting Paradigms in International Investment Law. More Balanced, Less Isolated, Increasingly Diversified*, Oxford, OUP 2016, at p. 291; see also V. Villaruel, "Estados del Sur ponen en marcha Observatorio sobre Inversiones Transnacionales" in *Revista Diplomacia ciudadana* 2014, Vol. 10 at p.18. To be found at https://issuu.com/cancilleriaec/docs/revista_diplomacia_ciudadana_d__cim

[86] See M. J. Luque Macías "Current Approaches to the International Investment Regime in South America" in C. Herrmann, M. Krajewski and J. P. Terhechte (eds.), *European Yearbook of International Economic Law*, Heidelberg, Springer-Verlag Berlin 2013, at p. 285.

[87] See most recent version of the full text is dated 26 January 2018 and can be found at http://tpp.mfat.govt.nz/text, last visited on 26 January 2018. See Chapter 9, *Investment*, to be found at https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/investor-state-dispute-settlement-isds last visited on 26 January 2018.

[88] For the version of the TPP prior to the US' Trump Presidency, see https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/investor-state-dispute-settlement-isds: "Despite having 50 ISDS agreements in place, the United States has never lost a case and nothing in our agreements has inhibited our response to the 2008 financial crisis, diluted the financial reforms we put in place, or has challenged signature reforms like the Affordable Care Act or any of the other new regulations that have been put in place over the last 30 years." President Trump signed a merely symbolic (as the agreement was never ratified by the US Congress) Presidential memorandum to withdraw the U.S. from the TPP on 23 January 2017, leaving open the ratification among the remaining in the absence of the US.

[89] See the Colombian National Agency for the Legal Defence of the State (Agencia nacional de defensa jurídica del Estado (ANDJE)) to be found at http://www.defensajuridica.gov.co/Paginas/Default.aspx, last visited on 17 December 2017, and the Peruvian Coordination and Response System for International Investment Disputes (Sistema de Coordinación y Respuesta del Estado en Controversias Internacionales de Inversión–SICRECI, to be found at https://www.mef.gob.pe/index.php?option=com_content&view=article&id=3970&Itemid=100906&lang=es) last visited on 17 December 2017.

fragmented in terms of regional approaches to the investor-state dispute settlement mechanism[90] because:

- the (minority of) countries that, in the last decade, took significant actions against investment arbitration, and countries working on shaping transversal and long-term models for ISDS;
- the revival of inter-state mechanisms in the settlement of disputes in recent regional agreements and national laws (with the imposition of local litigation requirements and the promotion of less-adversarial investor-State mechanisms), and;
- the flourishing of regional or regionally-designed mechanisms for the Settlement of Investment Disputes (the UNASUR Centre[91] or the intra-MERCOSUR investment agreement[92]).

This testifies as to the progressive transformation of some Latin American countries' approaches to ISDS, which will undoubtedly have important consequences for the region – provided, that is, "its liberation from the tutelage exercised by the industrialized world"[93] is not to be compromised by the economic crisis, and which for Brazil extends to the political turmoil linked to its Presidency. This supports the conclusion that "numerous signs predict that Latin America may play a decisive role in the worldwide design of the future investment dispute settlement system"[94], especially in the event that the new models should eventually be implemented and – successfully – tested.

4.1 The Brazilian case

Brazil is one of the most popular destinations for foreign direct investment, despite being entrenched in desisting from the international system of investment protection[95]. Brazil's reluctance is not the fruit of some leftwing ideology but rather, a consistent position defended by governments of both left and right, from the beginning of the Twentieth Century when at The Hague Conference of 1907, Brazil already expressed its reluctance to giving up any kind of sovereignty[96]. Based on the Calvo Doctrine – named after its author, the Argentinian diplomat, Carlos Calvo –

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[90] See K. Fach Gómez and C. Titi (eds.), *Op. Cit.* n. 84 at p. 357.

[91] An English unofficial translation of the texts can be found in M. G. Sarmiento, *The 2012 Draft Constitutive Agreement of the Centre for the Settlement of Investment Disputes of the UNASUR* to be found at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2698574 , and in M. G. Sarmiento, *The 2014 Draft Constitutive Agreement of the Centre for the Settlement of Investment Disputes of the UNASUR*, http://ssrn.com/abstract=2703651

[92] See *infra*.

[93] See K. Fach Gómez and C. Titi (eds.), *Op. Cit.* n. 84.

[94] *Supra.*

[95] See in general D. de Andrade Levy, A. Gerdau de Borja and A. Noemi Pucci (eds.), *Investment Protection in Brazil,* Alphen aan den Rijn: Kluwer Law International, 2014.

[96] C. H. Cardim, *A raiz das coisas: Rui Barbosa: o Brasil no mundo*, Rio de Janeiro: Civilização Brasileira, 2007, at p. 153.

those who live in a foreign country must introduce their demands or complaints to the jurisdiction of the local courts there, avoiding recourse to diplomatic pressure or armed intervention of its own State or Government[97]. It has since been adopted in several Latin American countries.

Based on this doctrine, Brazil has neither been party to any bilateral investment treaties (BITs), nor has it ever ratified the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention)[98]. The Brazilian delegate in the negotiations of the ICSID Washington Convention, argued that the text of the Convention not only raised constitutional questions but also conferred upon investors a privileged position in relation to the host state, for only the investor enjoyed the prerogative of commencing arbitral proceedings, which would disadvantage Brazil[99].

Nonetheless, Brazil went on to sign the Convention that established the Multilateral Investment Guaranty Agency (MIGA) in 1985[100]. In the 1990s Brazil signed several BITs[101] that were never ratified by the Brazilian Parliament, in spite of the fact that Brazil had signed the two protocols of the Mercosur Agreement on foreign investments (the Protocols of Colonia and of Buenos Aires)[102], both of which provide for investor-state arbitration. None of these, unsurprisingly, were ratified by the Brazilian Parliament.

The arguments invoked in the Brazilian parliamentary debates are similar to those invoked in world-wide debates on CETA and TTIP: disagreements over submitting to an international arbitration tribunal; questions of a constitutional nature that should normally be reserved to a national judge, and; the possibility of creating a system that might privilege foreign investors' nationals[103], as well as; restrictions on the right to regulate and the ability of the host states to adopt public policies. Other arguments relate to the high economic and political cost of the

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[97] *Derecho internacional teórico y practico de Europa y América* (1868).

[98] See A. de Carvalho Ramos, *Op. Cit.* n. 16.

[99] See, *History of the ICSID Convention*, Vol. II-1, 306, *apud* J. Kalicki and S. Medeiros, "Investment arbitration in Brazil: revisiting Brazil's traditional reluctance towards ICSID, BITs and investor-state arbitration", in *14 Revista de Arbitragem e Mediação*, at pp. 57 and 68.

[100] Decree No. 698 of 8 December 1992, http://www.planalto.gov.br/ccivil_03/decreto/1990-1994/D0698.htm. The text of the Convention is available at http://www.miga.org/quickref/index_sv.cfm?stid=1583 .

[101] Brazilian BITs with the Belgian-Luxembourg Economic Union (6 January 1999), Chile (22 March 1994), Cuba (26 June 1997), Denmark (4 May 1995), Finland (28 March 1995), France (21 March 1995), Germany (21 September 1995), Italy (3 April 1995), Korea (1 September 1995), Netherlands (25 November 1998), Portugal (9 February 1994), Switzerland (11 November 1994), United Kingdom (19 July 1994) and Venezuela (4 July 1995). Information available at http://www.unctad.org/sections/dite_pcbb/docs/bits_brazil.pdf .

[102] Protocol of Colonia for the Promotion and Reciprocal Protection of Investments within MERCOSUR, which applies to investment within the MERCOSUR zone (*Common Market Council's Decision* No. 11/93 of 17 January 1994, available at http://www.sice.oas.org/trade/mrcsr/colonia/pcolonia_p.asp). Buenos Aires Protocol for the Promotion and Protection of Investment made by Countries that are not Parties to MERCOSUR (*Common Market Council's Decision* No. 11/94 of 5 August 1994, available at http://www.sice.oas.org/Trade/MRCSRS/Decisions/dec1194p.pdf).

[103] See C. Tiburcio, "A Arbitragem de Investimento no Brasil" in RIBEIRO, M. Rosado de Sá (org.), *Direito Internacional dos Investimentos.*, Rio de Janeiro: Renovar 2014, at p. 237.

arbitration procedure, the imposition of onerous reparations, and the lack of transparency of arbitration awards. But importantly, this has not prevented Brazil from developing alternative negotiating models both at the multilateral level (MERCOSUR) or at the bilateral level (cooperation and investment facilitation agreements, CFIAs)[104]. However, even though the Brazilian government negotiates such agreements, typically they are shot down by the Parliament at ratification, in objection to the ISDS provisions.

Nevertheless, it is relevant to now consider whether is Brazil might become a land of the future[105] in the field of investment protection?

4.1.1 Brazilian Cooperation and Facilitation Investment Agreements: an innovative model for dispute prevention

Given its traditional opposition to ISDS, the Ministry of Trade of Brazil developed some guidelines and an innovative model[106] that are followed in the negotiations of BITs. Even the name of the agreements is different, as they are called *Acordo de Cooperação e Facilitação de Investimentos* (ACFI), which translates into English as "Cooperation and Investment Facilitation Agreements", (CFIAs)[107]. The word "protection" does not appear, which is certainly intended. This is a complete departure from traditional BITs because CFIAs are characterized by the absence of any ISDS mechanism and in general also, by a recognition of a reduced set of guarantees, advantages or benefits for the investor compared to bilateral treaties[108]. The investor is clearly subordinate to the willingness of its state of

[104] See M. L. Lopes Parente, *O modelo brasileiro de acordo de cooperação e facilitação de investimentos 2015: considerações a respeito do impacto dos acordos internacionais de investimentos estrangeiros sobre o ordenamento jurídico interno*, available at http://www.conpedi.org.br/publicacoes/c178h0tg/p2qwwuu8/7018K6Lq63OTKYbP

[105] Reference is here made to Stefan Zweig's *Brazil, Land of the Future*, New York, Viking Press 1941, at p. 282.

[106] To be found at http://www.mdic.gov.br/comercio-exterior/negociacoes-internacionais/218-negociacoes-internacionais-de-investimentos/1949-nii-acfi

[107] See V. Gabriel, "The New Brazilian Cooperation and Facilitation Investment Agreement: An Analysis of the Conflict Resolution Mechanism in Light of the Theory of the Shadow of the Law" in *Conflict Resolution Quarterly* 2016, Vol. 34, at p. 1. V. D. R. Gabriel and J. A. F. Costa, "O Mercosul e as Controvérsias sobre Investimentos" in *Revista da Secretaria do Tribunal Permanente de Revisão* , Vol. 3, at p. 267-284, 2015. See also J. A. F. Costa and V. D. R. Gabriel, "O Brasil, ACFIs e a arbitragem de investimentos", *Revista Internacional de Arbitragem e Conciliação - Ano VIII*, 1 ed. Associação Portuguesa de Arbitragem (Org.) Lisboa: Almedina, 2015, Vol. 1, pp. 63-82. See also V. D. R. Gabriel *O Brasil e a Regulamentação Jurídica Internacional dos Investimentos Estrangeiros: Uma Análise Comparada com a Proteção Jurídica Americana e Argentina*, in V. Oliveira da Silveira, K. de Souza Silva and R. Angelin (Orgs.), in *Direito internacional. I. Encontro Nacional do CONPEDI/UFSC*, Florianópolis: CONPEDI , 2014, Vol. I, at pp. 374-397. See also R. Souza, 'Cooperation and Facilitation Investment Agreement – CFI', Presentation, *UNCTAD Expert Meeting on The Transformation of the International Investment Agreement Regime* of 25 February 2015, to be found at http://unctad-worldinvestmentforum.org/wp-content/uploads/2015/03/Brazil_side-event-Wednesday_model-agreements.pdf

[108] See J. A. F. Costa and V. D. R. Gabriel, *Op. Cit*. n. 17 at pp. 127-155.

origin – not having any autonomous, legitimate procedural *locus standi* – as well as to the laws and institutions of the host state benefiting from the investment.

Brazil's new model is intended to remove the internal legal barriers that had prevented the ratification of earlier BITs, which had been deemed incompatible with the Brazilian Constitution due to their provisions on expropriation and ISDS. The CFIA is based on three pillars:

a) risk mitigation;

b) institutional governance;

c) thematic agendas for cooperation and facilitation of investments[109].

It provides a set of measures aimed at reducing investor exposure to risks, avoiding the creation of situations that could lead to controversy before the host State. Thus, *inter alia*, the instrument expressly establishes guarantees of non-discrimination, including the principles of national treatment and most-favoured-nation treatment, together with transparency provisions and specific conditions to deal with direct expropriation, compensation in case of conflicts and currency transfer.

The philosophy underlying the new model clearly differs from the traditional model of BITs. It no longer focuses on investment protection and dispute settlement. ISDS is not possible on the basis of the CFIAs. The focus has shifted to investment promotion and dispute prevention, objectives which are expressly cited in the recent agreements. Dispute prevention in particular, involves "extensive planning in order to reduce the number of conflicts that escalate or crystallize into formal disputes"[110].

In this respect, the innovative element of CFIAs in terms of governance and dispute settlement mechanisms, is the establishment of focal points or Ombudsmen (Art. 5), in each of the states parties, in addition to the creation of a Joint Committee. These instances can be considered the institutional core of the agreement because they contribute to the achievement of the commitments and the strengthening of the dialogue between the parties on the investments. The focal point of each party serves as a facilitator in the technical relationship between investors.

It should function as an additional channel of dialogue and governmental support in order to improve the environment for the attraction and maintenance of investment. In Brazil, the CAMEX[111] – an inter-ministerial body linked to the Presidency of the Republic – will act as the Ombudsman for the agreement, with the purpose of prevention and amicable settlement of disputes involving bilateral investments.

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[109] On the three pillars of Brazilian CFIAs, see generally C. Titi, 'International Investment Law and the Protection of Foreign Investment in Brazil', in *Transnational Dispute Management*, advance publication on 13 July 2015, (forthcoming in Transnational Dispute Management Special Issue on Latin America, I. Torterola and Q.. Smith (eds.)), 9 *et seq.*

[110] See UNCTAD, *Investor–State Disputes: Prevention and Alternatives to Arbitration, 2010, xxviii*, at p. 129.

[111] To be found at http://www.camex.gov.br/ last visited on 15 February 2018.

There is no provision for ISDS in line with the Calvo doctrine. Investors need to go through their investors' state of origin in order to introduce any complaints and start the dialogue foreseen with the other Party.

The Brazilian approach emphasizes the prevention of disputes based on dialogue and bilateral consultation prior to initiating an arbitration procedure, thus encouraging a more dynamic interaction between the parties (Art.15). Such instruments include the direct and permanent activities of the aforementioned focal points, in addition to extensive discussions within the Joint Committee (Art. 4), which is composed of representatives of both governments and is responsible for the preliminary examination of specific issues demanded by the signatories.

As a starting point, the investor directly addresses the Ombudsman to seek an amicable solution for both. The focal points serve as communication channels between foreign investors and the host state, *inter alia* to propose improvements to the business environment, prevent disputes and facilitate their resolution. However, should this be unsuccessful, it will then be up to the investor's state of origin to assess the situation and then to forward the demand for a Joint Committee analysis, in which representatives of both Governments discuss and review the implementation of the CFIAs. The Joint Committee is responsible for sharing opportunities for the expansion of mutual investment, monitoring the implementation of the Agreement, preventing disputes and solving possible disagreements in an amicable manner.

This system seeks to prevent disputes through "dialogue and bilateral consultation, prior to the initiation of State-State arbitration procedures". It is only in the event that this procedure does not culminate in a solution, that arbitration between states is reverted to *ultima ratio*, as this is the only option available as a juridical mechanism in CFIAs.

The Brazilian Focal Point is inspired by the Office of the Foreign Investment Ombudsman (OFIO)[112] that was created as a grievance-settlement body within the South Korea Trade-Investment Promotion Agency (KOTRA) to help improve the investment environment there by providing assistance in resolving difficulties that foreign companies might face when investing in South Korea, whether in business activities and day-to-day management[113]. Operating on the basis of a "Home Doctor" system – under which specialists from various fields such as labour, taxation, finance, law, etc. provide service to foreign-invested companies – according to their data from 1999 to 2015, the OFIO has resolved 4,976 grievance cases (with an annual average of 311 cases) while a total

[112] See *South Korea Foreign Investment Ombudsman Annual Report 2014* of 2015, available at: http://125.131.31.47/Solars7DMME/004/15Foreign_Investment_Ombudsman_Annual_Report2014.pdf and http://english.kotra.or.kr/foreign/biz/KHENKO140M.html?TOP_MENU_CD=INVEST, both last visited on 15 February 2018.

[113] See Hi-Taek Shin, "Republic of Korea", in C. Brown, (ed.) *Commentaries on selected model investment treaties*. Oxford, OUP 2013, at p. 1018.

of 360 cases were handled as a result of the OFIO's contribution to system improvements[114].

However, the Brazilian model differs from the South Korean one on certain substantial points that could serve to undermine its success. The South Korean OFIO is an independent office created by law and directed by a high-level civil servant appointed by the President of the Republic, and seconded experts in the different areas related to investments. The OFIO is accessible to all trade partners and free of charge. As in the Brazilian model, should this stage prove unsuccessful, the investor may then begin the arbitration procedure.

In the South Korean case, the ICSID procedure applies. Protection by means of arbitration between states is reserved for extremely serious situations, such as those caused by nationalization, or those affecting companies or individuals holding powerful influence over the Government. Enshrining it in treaty form prevents access to the system by foreign investors not covered by the agreements as is envisaged in the Brazilian model. Moreover, the OFIO is more than simply a facilitator for dispute settlement as it cooperates with the South Korean trade agency and has the power to make recommendations[115]. Another substantial difference is the traditional independence of the office of an ombudsman. The Brazilian focal point – the CAMEX, *Câmara de Comércio Exterior* – is an inter-ministerial body linked to the Presidency of the Republic.

In summary, the Brazilian alternative model compared to traditional investment agreements, recognizes the essential role of Governments[116] in fostering an enabling environment for investment that meets both the concerns of the private sector and the development needs of the countries that are signatories to the agreement. Currently, the following CFIAs have been signed: in 2015, the first ACFIs with Mozambique followed by Angola, Malawi, Mexico, Colombia and Chile, and in 2016, with Peru[117]. The aim pursued – a balanced outcome combining the promotion of an attractive environment for investors while preserving space for public policies – is certainly achievable in the case of

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[114] South Korea. Foreign Investment Promotion Act (Republic of Korea). Art. 15-2(1), available at: http://legal.un.org/avl/pdf/ls/Shin_RelDocs.pdf last visited on 15 February 2018..

[115] See F. Nicolas, S. Thomsen and M. Bang (2013), "Lessons from Investment Policy Reform in Korea", in *OECD Working Papers on International Investment*, OECD Publishing 2013/02, to be found at http://dx.doi.org/10.1787/5k4376zqcpf1-en .

[116] For some considerations on inter-state arbitration on the basis of Brazil's CFIAs, see M. J. Luque Macías, 'Inter-State Investment Dispute Settlement in Latin America: Is There Space for Transparency?' in K. Fach Gómez and C. Titi (eds.), *Op. Cit*. n. 84; See also N. Bernasconi-Osterwalder and M. D. Brauch, *Comparative commentary to Brazil's cooperation and investment facilitation agreements (CIFAs) with Mozambique, Angola, Mexico, and Malawi*, September 2015, available at http://www.iisd.org/library/comparative-commentary-brazil-cooperation-and-investment-facilitation-agreements-cifas ; See also F. Morosini and M. R. Sanchez Badin "The Brazilian agreement on cooperation and facilitation of investments (ACFI): A new formula for international investment agreements?", in *Investment Treaty* News, August 2015, 6(3), 3–5, available at https://www.iisd.org/itn/2015/08/04/the-brazilian-agreement-on-cooperation-and-facilitation-of-investments-acfi-a-new-formula-for-international-investment-agreements .

[117] For the full text of each agreements see http://www.mdic.gov.br/comercio-exterior/negociacoes-internacionais/218-negociacoes-internacionais-de-investimentos/1949-nii-acfi

those partners involved. On one hand they are certainly more dependent on Brazilian investments than *vice versa*, and, on the other hand, they have an economical or less developed structure, either because they have no big potential investors, or the investors potentially involved have no power to put pressure on local governments.

By preferring the Governmental role and SSDS, it is clear that Brazil takes control over any eventual disputes arising. But the system is completed by a dialogue mechanism, which is something of novelty. The efficiency and success of this model will depend on the room for maneuver that the focal points will have to seek a fair solution. The fact that it is directly dependent on the government will probably reduce its appeal[118] because it has no juridical authority or any possibility to adjudicate the case, even *ex aequo e bono*. Its role will simply be to help clarify the situation, analyze the questions of the investor, and forward them to the relevant authorities responsible for addressing specific doubts or difficulties facing the investor.

Then again, is this Brazilian resistance to investor-State arbitration a critical issue? It appears simply to be another way of solving the issue of the regulatory freedom and alternative institutional mechanisms created by ISDS mechanisms, which is, apparently, so problematic in the CETA or TTIP.

4.1.2 Brazil proposal within Intra-MERCOSUR negotiations

Brazil has traditionally always been against any transfer of competence on investment protection to foreign organizations or arbitral systems. Interestingly, in the framework of MERCOSUR, it proposed[119] the negotiation of an intra-MERCOSUR investment agreement including a system for settling disputes between states instead of the traditional scheme under which private investors may sue states before international courts.

It is worthwhile mentioning that MERCOSUR has its own dispute settlement mechanism[120] and Brazil proposes to apply that system with some

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[118] See See J. A. F. Costa and V. D. R. Gabriel, *Op. Cit*. n. 17.

[119] On September 22 and 23, 2015 at the 99th Regular Meeting of the Common Market Group (GMC) which took place in Asunción, Paraguay.

[120] See G. G. Lucarelli de Salvio and J. Gama Sá Cabral, "Considerations on the Mercosur dispute settlement mechanism and the impact of its decision in the WTO dispute resolution system", in *CEBRI Papers*, Brazilian Center for International Relations (CEBRI), Vol. 4, Year I, 2006. See also F. Domingues and M. Guedes de Oliveira (eds.), *Mercosur: Between Integration and Democracy*, Bern: Peter Lang AG, 2004, and in particular T. Vigevani *et al*, *Mercosur: Democracy and Political Actor* at p. 103; L. O. Baptista, *Mercosur, its institutions and juridical structure. Foreign Trade Information System*, available at http://ctrc.sice.oas.org/geograph/south/mstit2_e.pdf ; N. Araujo, "O Tribunal Permanente de Revisão do MERCOSUL e as Opiniões Consultivas: análise dos laudos arbitrais, sua ligação com o common law e algumas idéias para o future", in L. da Gama e Souza Junior (ed.) in *Revista de Direito da Associação dos Procuradores do Novo Estado do Rio de Janeiro Vol. XV – Direito Internacional*, Rio de Janeiro, Lumen Juris 2005, at p. 111; W. Fernandesz, "El Nuevo Tribunal Arbitral del Mercosur" in *Anuario de Derecho*

differences. The aim is to negotiate an "Intra-MERCOSUR Cooperation and Investment Facilitation Protocol," which is currently being discussed by Working Subgroup No.12 (Investments). In the past, in 1993, the MERCOSUR signed an agreement for the promotion and mutual protection of intra-bloc investments, and another for the treatment of investment flows with the rest of the world in 1994 (the Colonia and Buenos Aires Protocols, respectively): neither have ever entered into force[121].

The proposal put forward by Brazil is modelled on the Cooperation and Facilitation Investment Agreements (CFIAs) that it has signed with Mexico, Colombia, Mozambique, Malawi, and Angola in recent years[122]. The agreement will cover direct investments and will establish commitments regarding non-discrimination, conditions of expropriation and compensation for losses, transparency, exchange of information between states, cooperation between investment promotion agencies, a regional agenda for further cooperation and investment facilitation, the free transfer of investment-related resources in local or convertible foreign currencies, with the possibility of temporarily restricting these flows in the event of a balance of payments crises, provided certain conditions are met.

However, the most relevant difference in comparison with previous protocols and the bilateral investment agreements already signed by the MERCOSUR countries, is the provision for a dispute settlement system. While all the MERCOSUR countries have signed agreements of this kind, they have never entered into force in Brazil as they have not been ratified by the Parliament[123] precisely because of the inclusion of ISDS.

Brazil's proposal provides for dispute settlement between states within the framework of the provisions set out in the Olivos Protocol[124] – instead of the traditional system in which private investors may sue states before national and international courts. Nevertheless, before applying the dispute settlement system of the Olivos Protocol, a solution must be found under the auspices of a system of prevention of disputes based on the appointment of an ombudsman, one for each counterpart who will act as national focal point. The principal function of these ombudsmen will be to provide support to investors of the counterparts on its territory. Clearly modeled on the CFIAs however, the system will suffer the same disadvantages already commented upon above. The central element will of course be the preventative mood inspiring such proposals. Ultimately however, two important questions remain. Would it be enough for

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Constitucional Latinoamericano – 2006, available at http://www.juridicas.unam.mx/publica/librev/rev/dconstla/cont/20061/pr/pr27.pdf

[121] See *Decisão do Conselho do Mercado Comum* n.º 11/93 of 17 January 1994, available at http://www.sice.oas.org/trade/mrcsr/colonia/pcolonia_p.asp .

[122] See S*upra*.

[123] See S*upra*.

[124] See *Infra*.

and acceptable to all trading partners within MERCOSUR? And is it really an exportable model? Does this model effectively amount to a blank cartridge in the ISDS debate?

5. Conclusions: Bazookas and Blank Cartridges

With the inclusion of Foreign Direct Investment in the European Union's powers under the Common Commercial Policy under the Treaty of Lisbon in 2009, the EU is leading the push to revolutionize the antiquated, secretive and politicized arbitrator system that has characterized foreign investment protection globally for centuries[125]. The EU's reform will institutionalize the procedure and fill out its substantive juridical scope and content. Procedurally this means establishing a permanent court and formally providing an appellate mechanism. In terms of substantive content, this means guaranteeing a state's right to regulate, as well as defining principles and/or indirect expropriation, transparency, ethics, appointments of judges, costs, rules on procedure, forum shopping, frivolous claims, as well as specific provisions for SMEs. This addresses the threats to states' governance as well as negative political and public opinion on international trade and investment agreements.

However, it remains valid to question whether this reform is sufficient, adequate and necessary to address the negative dimensions of ISDS as such: *cui prodest*? Given the strength of current political and societal opposition to investment treaties, doubts remain as to the true usefulness of such agreements. Who do they truly serve? Is their global economic impact in terms of GDP and employment growth meaningful? While ISDS mechanisms are not questioned *per se* in the EU – and considered part of the framework for the various reasons examined – in other parts of the world, different models are being developed.

Brazil, paradoxically, continues to be the recipient of considerable foreign investment, despite its long-standing refusal to sign any treaty containing an ISDS mechanism. Recent experience shows attempts to promote a SSDS system with strong elements of mediation. Other EU international agreements specifically provide for voluntary mediation[126] to solve disputes amicably before initiating formal steps for dispute settlement. Comparably, this is not central to the EU approach, which focuses on creating a permanent court. Simply put, once the right to a fair compensation in case of expropriation is recognized, all remaining questions remain unresolved, including when such a right should be recognized, in respect of whom, as well as how and by whom the right to compensation should be quantified.

[125] This explains the strong opposition of all of the associations of arbitrators against the new model, seemingly more motivated by the fear of losing their monopoly and huge fees than by sound argument.
[126] Relevant CETA Provisions: Art. 8.20 "Mediation"; Art. 8.19.3, Art. 8.23.5 "Submission of a Claim to the Tribunal"; Art. 8.39.6 "Final award".

Whether a stronger mediation model would be more advantageous and more viable to meeting investor state disputes over foreign investments involves, first, addressing whether the idea of a permanent - bilateral or multilateral - investment court compares to using a bazooka to kill a mosquito Secondly, is mediation under the control of the host state a real alternative, or would the undeniable political interest of the host state in itself prejudice such mediation from the outset, rendering mediation an "empty cartridge" in ISDS?

Neither model is settled in practice, making definitive answers difficult. Both approaches highlight national and supranational considerations when taking account of public opinion before venturing into complex international negotiations. Directly or indirectly, these negotiations affect fundamental rights and national sovereignty issues, and will impact on the way people live and interact. Analysis of the origin of these models and their historical evolution, reveals differing underlying ideologies. The historical reluctance of Brazil or other Latin American countries towards ISDS is more than the rhetoric of recent left-wing governments. By trying to introduce a compulsory mediation step, even if under State control, the State maintains full control over private litigation on investments. The same can be said of the EU's idea of a permanent court, based on other ideological and historical reasons, especially given the limited number of investor disputes[127] and the western countries' jurisdictions involved.

The ongoing process is rushing towards providing partial and supplementary answers to questions arising. Incidental factors seem to have dictated the process of reforming ISDS, rather than any long-term vision. The problems already started with the Treaty of Lisbon, which raised a further barrage of questions that the Singapore judgment has not laid to rest, and for which the Belgian request for an Opinion from the CJEU is seeking answers. Is investment protection exclusive or mixed? What should one do with existing intra-Member States Bilateral Investment Treaties? Should Member States be allowed to continue to negotiate BITs? Should there be a presumption of inheritance of existing BITs containing ISDS rather than continuing with SSDS? And if so, how should criticisms of existing ISDS systems be addressed?

The saga turned epic first of all with TTIP, providing more transparency concerning arbitrators' choices, and then with the push to create a bilateral permanent court. CETA remains silent on this, as do other recent agreements. The arbitrators are to become "quasi-permanent" judges adhering to a code of conduct, and rules on their independence before, during and after their appointment. Still, in the CETA situation, the Belgian region of Wallonia pressed for more, securing a new "code of conduct" for the judges before the creation of the tribunal itself. Judges not respecting the rules would be subject to sanction, forced to reveal their activities prior to their appointment, and banned from professions and specific duties for a certain amount of time after the end of their

[127] *Op. Cit.* n. 16.

mandate. The provisional entry into force of CETA (without ISDS) was finally concluded but the definitive entry into force with ISDS must traverse 38 unforeseeable national and regional ratifications and/or referendums. Meanwhile, public opinion protests against the threat to states' right to regulate, with the risk that US companies or even EU companies will have access to the ISDS via their Canadian companies. New rules or declarations have been drafted, but the system as such is not a public court: the court does has no staff, is open only to investors' claims against the States, and is extremely costly in spite of measures to make access easier for SMEs.

With this said, why go the whole hog and set up a multilateral investment court? It would seem logical in the case of a failure of the current bilateral negotiations, to save, the idea of a permanent court in a multilateral context when it is not even clear if the system would be compatible with the EU legal order[128]? How many cases should justify the creation of the "bazooka" MIC? Would it be enough to inflate continuous "improvements" in what seems to be a fragile big balloon, the "explosion" of which would put at risk not only the EU's trade policy under the common commercial policy, but might also be hijacked for the purposes of anti-Europeanism spreading all over Europe.

Consequently, there are still many open questions, both on core and minor issues. It is probably idealistic, but to pursue common values as opposed to common economic interests may well be the way to establish strategic alliances between countries – not merely a geographic or economic union but a model based on values and principles, a last defense against terrorism, dictatorship and undemocratic regimes. A community of values founded on mutual trust that does not require an extra-national jurisdiction for its own nationals, whether they are investors or not.

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[128] In the framework of the *compromis* that the Belgian authorities reached to "save" the ratification of CETA, the Belgian Federal Government undertook the commitment to ask the opinion of the Court of Justice of the European Union concerning the compatibility of the ICS mechanism with the European Treaties, particularly in the light of the Opinion 2/2015 of the ECJ.