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The EU as a Global Actor in Reforming the International Investment Law Regime in Light of Sustainable Development

by

Stefanie Schacherer*

Abstract

The international investment law regime is undergoing a process of reform. The guiding paradigm of this reform is the principle of sustainable development. The EU, through its exclusive competence over foreign direct investment, has become a significant actor on the stage of international investment law governance. According to recent statements of the EU institutions, the EU seeks to shape its policy to be consistent with the principle of sustainable development. In more concrete terms this means that EU investment law making shall be consistent with core labour standards, environmental protection and the conservation of natural resources as well as with sustainable and inclusive economic growth. Against this background, the present paper seeks to analyse to what extent the EU is reforming international investment law in light of sustainable development. The analysis is divided into two main parts. The first is on the legal and non-legal bases of the EU enabling it to be a global actor in the given field. The second part is on the implementation or the 'actor's performance' of the EU. In order to analyse the implementation, the post-Lisbon treaty practice of the EU in the field of international investment regulation shall be looked at, in particular the Comprehensive Economic Trade Agreement (CETA) between the EU and Canada.

Keywords: International investment law – sustainable development – EU – reform – global actor – investor-State dispute settlement – right to regulate – CETA

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The EU as a Global Actor in Reforming the International Investment Law Regime in Light of Sustainable Development

I. Context: Sustainable Development the Paradigm

The world of international investment law is in an agitated period characterised by reforms, revisions and reorientations. Criticisms against the international investment law regime had already started in 2010 mainly because of the stark rise of investment treaty arbitration cases against States. Until today, the regime is facing serious challenges concerning its substantive law and the mechanisms through which investment disputes are adjudicated: governments, civil society, parliaments and more generally the public started to question the 'traditional' approaches to international investment law.

Sustainable development became the global paradigm and guiding principle to address the shortcomings of the regime in order to better balance the economic and other societal interests at stake. The United Nations (UN) by adopting the Agenda 2030 for sustainable development,[1] and more specifically the UN Conference on Trade and Development (UNCTAD) deem the concept of sustainable development as being the most appropriate approach to guide the current reform process.[2] Other international bodies, such as the Organization for Economic Co-operation and Development (OECD) and the G20, dealing with questions of international investment also align their policy recommendations with the objective of sustainable development.[3] In this context the central message is that the role of international investment law and investor-State dispute settlement (ISDS) should be to enhance political stability needed for foreign investors to engage in economic activities without undermining a State in regulating social and environmental concerns. At the same time, sustainable development demands that foreign investment and investors are subject

[1] UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1, available at http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E (consulted on 20 May 2017).

[2] UNCTAD, *Investment Policy Framework for Sustainable Development 2015 (IPFSD),* December 2015, available at http://unctad.org/fr/PublicationsLibrary/diaepcb2012d5_en.pdf (consulted on 20 May 2017).

[3] OECD, *Better Policies for 2030 – An OECD Action Plan on the Sustainable Development Goals*, available at http://www.oecd.org/dac/Better%20Policies%20for%202030.pdf (consulted 20 May 2017); G20, *Guiding Principles for Global Investment Policymaking*, principle V, available at http://www.oecd.org/daf/inv/investment-policy/G20-Guiding-Principles-for-Global-Investment-Policymaking.pdf (consulted 20 May 2017).

to effective social and environmental regulation at both the domestic and the international levels in order to avoid harm.[4]

With the entry into force of the Lisbon Treaty in 2009, the EU gained exclusive external competence over foreign direct investment (FDI) and thus entered the governance stage of international investment law and policy.[5] According to recent statements of the EU institutions, EU investment policy and law making shall be 'responsible'[6]. This means that the EU seeks to shape its policy to be consistent with sustainable development. In more concrete terms this means that EU investment law making shall be consistent with core labour standards, environmental protection and the conservation of natural resources as well as with sustainable and inclusive economic growth.[7] Such ambition of the EU is rooted in its primary law. In fact, sustainable development is an overall objective of the EU. It is also a specific objective for the EU's external action and EU investment policy and law making is directly linked with the external objective of sustainable development.[8] Moreover, the EU considers itself 'best placed' and having a 'special responsibility to lead the reform of the global investment regime, as its founder and main actor'[9]. In the last few years, EU investment policy gained more concrete contours as the EU concluded free trade agreements (FTAs) containing comprehensive investment protection chapters.

Against this background, the present paper seeks to analyse the role the EU is playing as a global actor on the 'stage' of international investment law reform and in particular whether this role is a *leading* role in reforming the regime in light of sustainable development. The present contribution is divided into two main parts. The first is on the legal and non-legal bases of the EU enabling it to be a global actor in the given field. The second part is on the implementation or the 'actor's performance' of the EU as to be a *leading* global actor in international investment law reform. In order to analyse the implementation, the post-Lisbon treaty practice of the EU in the field of international investment regulation shall be looked at.

A last preliminary remark should be made here. Even though the relevance of sustainable development appears to be undisputed today, its content is still full of controversies. Without entering into a detailed discussion on sustainable development, it should be recalled

[4] SCHILL Stephan, *Reforming Investor-State Dispute Settlement (ISDS): Conceptual Framework and Options for the Way Forward*, E15 Task Force On Investment Policy, July 2015, p. 6, available at http://e15initiative.org/wp-content/uploads/2015/07/E15-Investment-Schill-FINAL.pdf (consulted 20 May 2017).
[5] Art. 207 (1) in combination with art. 3 (1) (e) TFEU, and as confirmed by ECJ, *Opinion 2/15*, ECLI:EU:C:2017:376, 16 May 2017, paras 33-37, and 109.
[6] European Commission, *Trade for All – Towards a More Responsible Trade and Investment Policy*, 2015, available at http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf (consulted 20 May 2017).
[7] Ibid.
[8] Arts 206 and 207 TFEU.
[9] European Commission, *supra* note 6, p. 21.

that the content of the concept originally derived from the 1987 so called Brundtland Report[10] and the 1992 Rio Declaration.[11] According to these documents, development will be sustainable when intra-generational equity (fair economic and social development) and inter-generational equity (environmental sustainability) are ensured.[12] This can namely be achieved through the integration of these factors.[13] The principle of integration is widely seen as the core principle in order to achieve sustainable development.[14] It requires, in other words, the reconciliation of environmental protection and economic and social development through their integration.[15] The EU follows the integrative approach, as it is repeatedly stating in treaties with third countries, "economic development, social development and environmental protection are interdependent and mutually reinforcing components of sustainable development".[16]

II. Legal and non-legal bases of EU action

There are three bases on which EU external action is rooted, in reforming the international investment law regime in light of sustainable development. It is first the competence of the EU in foreign direct investment (A.), and second the fact that sustainable development operates as an objective of EU external policy and law making (B.). A third basis can arguably be derived from the international commitments of the EU to promote sustainable development (C.).

A. The EU competence over foreign direct investment

The integration of the term 'foreign direct investment' into article 207 (1) TFEU and the competence shift caused thereby led the EU to emerge as a new international actor in the field of international investment.[17] The scope of the competence used to be a source of debate for quite some time. Yet since opinion 2/15 on the FTA between the EU and Singapore, rendered on 16 May 2017, it became clear that the EU has exclusive competence

[10] World Commission on Environment and Development, *Our Common Future*, Oxford, Oxford University Press, 1987. Mrs. Gro Harlem Brudtland (former Norwegian prime minister) was the chairperson of the Commission.
[11] United Nations Conference on Environment and Development, *Rio Declaration on Environment and Development*, 14 June 1992, available at http://www.un-documents.net/rio-dec.htm (consulted on 20 May 2017).
[12] BARRAL Virginie, *Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm*, European Journal of International Law (2012), pp. 377-400, *see* pp. 380-381.
[13] Ibid. BARRAL proposes the following equation: Sustainable development = (intergenerational equity + intragenerational equity) x integration.
[14] *See* BOYLE Alan, FREESTONE David, *Introduction, in:* Boyle Alan, Freestone David (eds), "International Law and Sustainable Development: Past Achievements and Future Challenges", Oxford, Oxford University Press, 1999, pp. 10-12. It is important to mention that other principles also fall under the objective of sustainable development, such as the principle of good governance, principle of participation and the principle of common but differentiated responsibilities *see* SCHRIJVER Nico, *The Evolution of Sustainable Development in International Law: Inception, Meaning and Status*, Leiden/ Boston, Martinus Nijhoff, 2008, pp. 162-203.
[15] United Nations Conference on Environment and Development, *supra* note 11, Principle 4.
[16] *See* definitions adopted by the EU in recent FTAs, art. 22.1 (1) CETA; art. 13.1 (2) EUSFTA, *see also* ECJ, *Opinion 2/15*, *supra* note 5, para. 148.
[17] Arguably before the entry into force of the Lisbon Treaty the EU was already an actor in international investment law given the concluded FTAs that contain provisions on the admission of investments. For more details *see* DIMOPOULOS Angelos, *EU Foreign Investment Law,* Oxford, Oxford University Press, 2011.

over FDI but not over other non-direct foreign investments.[18] For non-direct investments the competence is shared with the Member States pursuant to the competence of the EU in matters of the internal market.[19]

The Court made further important clarifications in opinion 2/15 as regards the scope of the common commercial policy (CCP). It held that not only the admission of FDI but also the protection of FDI falls within the CCP because article 207 (1) TFEU does not make any such distinction.[20] By defining the scope in this way, the Court agreed with the Commission in the sense that all investment protection standards of foreign investors, such as non-discrimination, fair and equitable treatment (FET), compensation for losses, expropriation and transfer of funds are part of the CCP.[21] The Court linked such commitments to trade and thus to the CCP by stating that "[t]he establishment of such a legal framework is intended to promote, facilitate and govern trade between the European Union and the Republic of Singapore, within the meaning of [the Court's] case-law."[22]

Finally, and relevant for present purposes it that the Court ruled that ISDS through arbitration falls not within the exclusive competence of the EU, but within the shared competence of the EU and its Member States. The main reason for the Court's conclusion is the nature of the dispute settlement mechanism as it provides direct access to investment arbitration and thus allows an investor to bypass the jurisdiction of the Member States.[23] Such a regime can according to the Court not be considered ancillary and must therefore not fall within the same competence as the related substantive provisions.[24]

B. Sustainable development as an integral part of the CCP

A further change provoked by the Lisbon Treaty is that all EU external action became subject to a general set of principles and objectives, which are pertinent for EU institutions when formulating their external policies including the CCP. Sustainable development figures amongst this general set of principles and objectives and can be found in Articles 3 (5) and 21 (2) TEU.

Article 21 (2) TEU includes two aspects of sustainable development. First, the EU shall aim to "foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty".[25] Second, the EU shall aim

[18] ECJ, *Opinion 2/15*, *supra* note 5, paras 81 and 243.
[19] Non-direct investments are capital movements as regulated in art. 63 TFEU and fall under the competence for matters of the internal market, arts 4 (1) and 2 (a) TFEU.
[20] ECJ, *Opinion 2/15*, *supra* note 5, para. 87.
[21] Ibid., paras 88-93.
[22] Ibid., para. 94
[23] ECJ, *Opinion 2/15*, *supra* note 5, paras 292-293.
[24] Ibid., paras 276 and 292.
[25] Art. 21 (2) (d) TEU.

to "help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development".[26] In addition, Article 3 (5) TEU specifically states that "[i]n its relation with the wider world, the Union […] shall contribute to the sustainable development of the Earth".

The integration of sustainable development objectives in EU external action is not only reflected in the general set of external objectives but, is further enhanced in Articles 9 and 11 TFEU.[27] As the Court made clear in Opinion 2/15, these provisions respectively provide that, "in defining and implementing its policies and activities, the Union shall take into account requirements linked to […] the guarantee of adequate social protection" and also "environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development".[28]

It should be highlighted that the principle of environmental policy integration is explicitly linked to the promotion of sustainable development.[29] This principle is also enshrined in the Charter of Fundamental Rights of the EU (CFREU).[30] By also emphasizing the social aspect of sustainable development and linking Article 9 TFEU, which makes no explicit reference to the term, the Court took a very important step in further clarifying the content of sustainable development under EU law. It referred to a recent judgement of 2016, where the Court had already linked the realisation of the objective of sustainable development for the EU internal market with the promotion of a high level of employment and the guarantee of adequate social protection.[31] The Court thereby clearly points to the three pillars of sustainable development and integrates into an economic policy i.e. the CCP the other two components i.e. social protection and environmental protection.

After the entry into force of the Lisbon Treaty, while the majority considered article 21 TEU to be binding,[32] a minority of legal scholars considered the list of external EU objectives as a mere "wish list for a better world".[33] With opinion 2/15, the Court proved the

[26] Art. 21 (2) (f) TEU.
[27] ECJ, *Opinion 2/15*, *supra* note 5, para. 146.
[28] *See* arts 9 and 11 TFEU.
[29] Art. 11 TFEU: "Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development."
[30] *See* art. 37 CFREU: "A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development."
[31] ECJ, *AGET Iraklis*, C-201/15, ECLI:EU:C:2016:972, 21 December 2016, paras. 76-78. *See* para. 76: "[…] as is apparent from Article 3(3) TEU, the European Union is not only to establish an internal market but is also to work for the sustainable development of Europe, which is based, in particular, on a highly competitive social market economy aiming at full employment and social progress, and it is to promote, inter alia, social protection […]".
[32] *See* for instance, KRAJEWSKI Markus, *Normative Grundlagen der EU-Außenwirtschaftsbeziehungen : Verbindlich, umsetzbar und angewandt?*, EuR, Heft 3, 2016, pp. 235-255, p. 242.; LARIK Joris, *Foreign Policy Objectives in European Constitutional Law,* Oxford, Oxford University Press, 2016, pp. 153-173.
[33] *See* DRESCHER Wiebke, *Ziele und Zustanädigkeiten, in*: MARCHETTI Andreas, DEMESMAY Claire (eds), "Der Vertrag von Lissabon: Analyse und Bewertung", Baden-Baden, Nomos, 2010, pp. 59-70, p. 68.

latter to be utterly wrong as it declared unambiguously that the EU has an *obligation* to integrate sustainable development "into the conduct of its [CCP]".[34] In fact, the wording of articles 3 (5) and 21 (2) TEU, 'shall pursue' and 'shall contribute' already gave enough grounds to understand these provisions as an obligation for the EU.[35] The Court came to its conclusions on the binding character of the objective of sustainable development by reading article 207 (1) TFEU in conjunction with Article 21 (3) TEU and article 205 TFEU.[36]

Article 207 (1) TFEU on the CCP, makes in its second sentence a direct link between the external objective of sustainable development and EU investment law making in providing that the CCP 'shall be conducted in the context of the principles and objectives of the Union's external action.'[37] Article 205 TFEU basically includes the same obligation, stating that 'the Union's action on the international scene, pursuant to [Part Five of the TFEU], shall be guided by the principles, pursue the objectives and be conducted in accordance with the general provisions laid down in Chapter 1 of Title V of the [TEU]'. As the Court points out, Chapter 1 of Title V of the TEU enshrines Article 21 TEU.[38]

Finally, article 21 (3) first sentence TEU providing that the EU is to "pursue the objectives set out in [article 21 (1) and (2) TEU] in the development and implementation of the different areas of the Union's external action […]" such external action refers to the CCP and again establishes a link between these provisions.[39]

In sum, the exclusive external competence over FDI together with the obligation to integrate sustainable development into the CCP and thus international investment law making, provides the EU with a solid constitutional framework to be an actor in current international investment law reform in light of sustainable development.

C. International commitments of the EU in order to implement the objective of sustainable development

A third basis of the EU for reforming international investment law in light of sustainable development is its international commitments. These commitments certainly are predominantly of a political nature, but they establish a general framework within which the EU should act. In particular when considering that either the EU is (or all of its Member States individually are) a member of the organisations or entities, which in the last few years

[34] ECJ, *Opinion 2/15*, *supra* note 5, para. 143.
[35] DIMOPOULOS Angelos, *Integrating environmental law principles and objectives in EU investment policy: challenges and opportunities, in Levashova Yulia, Lambooy Tineke, Dekker Ige (eds), "Bridging the gap between international investment law and the environment",* The Hague, Eleven International Publishing (2016) pp. 247-272, p. 253.
[36] ECJ, *Opinion 2/15*, *supra* note 5, paras 143-145.
[37] Art. 207 (1) last sentence TFEU.
[38] ECJ, *Opinion 2/15*, *supra* note 5, para. 145.
[39] Ibid., para. 144.

adopted instruments that are dealing specifically with the integration of sustainable development into international investment law.

The main organisation is without any doubt the UN when it comes to the promotion of sustainable development. The UN Agenda 2030 for sustainable development is composed of 17 Sustainable Development Goals (SDGs) and 169 targets.[40] The EU is one of its main supporters and formulated several EU initiatives related to the achievement of Agenda 2030.[41] The Agenda recognises the vital need of private investment in order to finance the realisation of sustainable development globally.[42] Increasing private investments is primarily a means to help mobilize additional financial resources for developing countries.[43] But interestingly, Agenda 2030 also confirms each country's policy space to establish and implement policies for sustainable development.[44] Lastly, the Agenda promotes a multi-stakeholder partnership, which in particular seeks to also share "knowledge, expertise, technology and financial resources", this seems to encompass multinational enterprises investing in foreign countries.[45]

UNCTAD, which was established by the UN General Assembly, is the organ dealing with trade, investment and development. UNCTAD adopted the 'Investment Policy Framework for Sustainable Development (IPFSD)' in 2012.[46] The instrument became an important instrument of reference in the ongoing reform process. It shows that the objective of sustainable development can translate into concrete provisions of investment protection. Even though the EU did not officially state its intention to take inspiration from this document, it can be deduced from the most recent EU treaties that they incorporate similar reform ideas as contained in the UNCTAD policy framework.[47]

Moreover, the EU is part of the G20, which in 2016 adopted 'Guiding Principles for Global Investment Policymaking' which provide that investment policies should be "consistent with the objective of sustainable development".[48] Even though the EU is not a member, the European Commission takes part in the work of the organisation. The OECD has a number of policy instruments on investment and sustainable development such as its Policy

[40] UN General Assembly, *supra* note 1.
[41] European Commission, *Commission Staff Working Document, Key European Action supporting the 2030 Agenda and the Sustainable Development Goals*, SWD(2016) 390 final, p. 29: "The EU is at the forefront of using its trade and investment policy to support inclusive growth and sustainable development in developing countries."
[42] UN General Assembly, *supra* note 1, *see* Goal 17: 'Strengthen the means of implementation and revitalize the Global Partnership for Sustainable Development'.
[43] Targets 17.3 and 17.5.
[44] Target 17.15.
[45] Targets 17.16 and 17.17.
[46] UNCTAD, *supra* note 2.
[47] HOFFMEISTER Frank, *The Contribution of EU Trade Agreements to the Development of International Investment Law, in* KRAJEWSKI Markus, HINDENLANG Steffen (eds), "Shifting Paradigms in International Investment Law – More Balanced, Less Isolated, Increasingly Diversified", Oxford, Oxford University Press, 2015, pp. 357-376.
[48] G20, *supra* note 3, Principle V.

Framework having as objective "to mobilise private investment that supports steady economic growth and sustainable development".[49] The OECD was also one of the first organisations to adopt principles and guidelines on corporate social responsibility (CSR) with its Guidelines for Multinational Enterprises that were first adopted in 1976.[50]

This short survey lets us understand that the EU committed itself internationally to integrate sustainable development concerns into its investment law making and thus to make its investment policy compatible with it. In order to appear as a responsible global actor, the EU could not depart from such a politico-legal setting.

III. The Actor's *Performance*: Implementation in recent EU treaty practice

There are three core aspects of the ongoing reform that touch upon sustainable development concerns:[51] First, the need to address the imbalance between the rights and obligations of foreign investors by giving investors obligations and responsibilities; second, the need for better ensuring that the State's right to regulate for the public purpose is not undermined and third, the need to systemically reform the investor-State dispute settlement (ISDS) system. The EU has different legal tools in order to address these issues. This section shall focus on the specific legal tools by looking at the adoption of sustainable development chapters in FTAs (A.); followed by two less obvious tools of ensuring the objective of sustainable development in investment law making, such as drafting investment protection provisions in a way to better ensure the regulatory autonomy of the EU and its Member States (B.); and to systematically reform the ISDS mechanism by adopting a so-called Investment Court System (ICS) (C.). The three FTAs under scrutiny here are the Comprehensive Economic and Trade Agreement (CETA)[52] between the EU and Canada, as well as the FTAs with Vietnam[53] and Singapore.[54]

A. Sustainable development chapters

The first tool we will look at is how the EU integrates sustainable development into investment law making by including sustainable development chapters into FTAs. The practice of sustainable development chapters has already been used by the EU in various FTAs prior

[49] OECD, *Policy Framework for Investment*, available at http://www.oecd.org/daf/inv/investment-policy/Policy-Framework-for-Investment-2015-CMIN2015-5.pdf (consulted 20 May 2017). The OECD is furthermore fully committed to the SDGs, *see supra* note 3.
[50] OECD, *Guidelines for Multinational Enterprises*, 2011, available at http://mneguidelines.oecd.org/guidelines/ (consulted 18 May 2017).
[51] UNCTAD, *supra* note 2, pp. 74-76.
[52] CETA, concluded February 2016 (not yet entered into force), available at http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf (consulted 20 May 2017).
[53] EU-Vietnam FTA (EUVFTA), concluded January 2016 (not yet entered into force), available at http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437 (consulted 20 May 2017).
[54] EU-Singapore FTA (EUSFTA), concluded May 2015 (not yet entered into force), available at http://trade.ec.europa.eu/doclib/press/index.cfm?id=961 (consulted 20 May 2017).

to the Lisbon Treaty,[55] but the focus here shall be on the so described 'new generation' of comprehensive EU FTAs adopted post-Lisbon. These FTAs, which contain, "in addition to the classical provisions on the reduction of customs duties and of non-tariff barriers to trade in goods and services, provisions on various matters related to trade, such as intellectual property protection, investment, public procurement, competition and sustainable development".[56]

Sustainable development chapters analysed as a tool have various functions with respect to the regulation of foreign investment. The very first and fundamental purpose of sustainable development chapters is that they provide for non-economic standards, on environmental and social protection, and are contained in an economic instrument. Sustainable development chapters and investment chapters in EU FTAs are part of the same treaty and should be read together.[57] According to the Court, the sustainable development chapter plays an essential role in an FTA.[58] Thus, non-economic components are integrated into a trade agreement. Such integration is a logical consequence of the stated interrelationship between the three pillars of sustainable development. The legal consequence is that the rest of the FTA, including its provisions on foreign investment, has to be read and understood in light also of these non-economic values and principles. When an investment tribunal has to interpret investment protection standards such as fair and equitable treatment, the sustainable development chapter will most likely be relevant. In fact some tribunals have already done so.[59]

Second, sustainable development chapters include relatively precise provisions on labour standards and environmental standards. The obligations in this respect are twofold.[60] On the one hand, the parties are obliged to implement certain international minimum standards. In recent EU treaties, the parties set as minimum standards for their respective domestic regulations the obligations of the members of the International Labour Organization (ILO) and the commitments under the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up of 1998,[61] as well as either generally their commitments under Multilateral Environmental Agreements (MEAs)[62] or more explicitly under the UN Framework Convention on Climate Change (UNFCC) for instance.[63] On the other hand,

[55] HOFFMEISTER, *supra* note 47, p. 361.
[56] ECJ, *Opinion 2/15*, *supra* note 5, paras 17 and 140.
[57] HOFFMEISTER, *supra* note 47, p. 361. *Consider S.D. Myers v Canada*, UNCITRAL, Partial Award 13 November 2000, paras. 220-221.
[58] ECJ, *Opinion 2/15*, *supra* note 5, para. 162: "Indeed, [the sustainable development] Chapter plays an essential role in the envisaged agreement".
[59] *See Adel A. Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, paras 388-390. *S.D. Myers v Canada*, *supra* note 57.
[60] *See also* BARTELS Lorand, *Human Rights and Sustainable Development Obligations in EU Free Trade Agreements*, Legal Issues of Economic Integration (2013), pp. 297-314, pp. 306-307.
[61] ILO, *Declaration on Fundamental Principles and Rights at Work and its Follow-up of 1998 adopted by the ILC at its 86th session*, Geneva, 1998, available at http://blue.lim.ilo.org/cariblex/pdfs/ILO_Declaration_Work.pdf (consulted 26 May 2017). *See* art. 23.3 CETA; art. 3 (Ch. 15) EUVFTA; art. 13.3 EUSFTA.
[62] Art. 24.4. CETA; art. 4 (Ch. 15) EUVFTA.
[63] Art. 5 (Ch. 15) EUVFTA, art. 13.6 EUSFTA.

provisions on labour and environmental standards also oblige the parties not to weaken their standards in order to attract trade or investment.[64] The function of these provisions is thus to avoid a situation where international competition for foreign investment leads to a lowering of environmental, human rights and labour standards.

Third, sustainable development chapters contain provisions explicitly stating the right of the parties to regulate with respect to social and environmental protection. Such provisions generally read "The Parties recognise the right of each Party to set its [environmental or labour] priorities, to establish its levels of [environmental or labour] protection and to adopt or modify its laws and policies accordingly".[65] The sensitivity of the issue of safeguarding the right to regulate shall be further highlighted in the next section.

Fourth, the issue of corporate social responsibility (CSR) can also be found in sustainable development chapters.[66] Yet, these provisions are only best endeavour provisions in which the Parties undertake to make special efforts to promote CSR practices. Parties should thus encourage multinational corporations i.e. investors to comply with relevant universal principles or CSR standards. Usually referred to are, the OECD Guidelines for Multinational Enterprises,[67] the UN Global Compact,[68] and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy.[69] The EU opted here for a very soft approach in holding multinational enterprises more accountable for their conduct. It has been argued that the inclusion of such CSR programmes and voluntary codes will gradually become the expected minimum standard of conduct and might ultimately develop into binding principles.[70] As has been mentioned in the context of the Agenda 2030,[71] private international actors should also ensure their part of the responsibility in order to achieve the objective of sustainable development.

B. Greater precision in the drafting of investment protection provisions

As it has just been mentioned, the right to regulate has become one of the most sensitive issues in current investment law reform. The reason is that international investment agreements traditionally contain broadly worded obligations for States. This occasionally led to the result that States were unduly held liable to compensate investors for "*bona fide*" laws,

[64] Arts 23.4 (labour) and 24.5 (environment) CETA; art. 10 (Ch. 15) EUVFTA; art. 13.12 EUSFTA.
[65] Citation of arts. 23.2. (labour) and 24.3 (environment) CETA. *See also* art. 2(1) (Ch. 15) EUVFTA; art. 13.2 (1) EUSFTA.
[66] Art. 22.3 CETA; art. 9(e) (Ch. 15) EUVFTA; art. 13.11(4) EUSFTA.
[67] OECD, *supra* note 50.
[68] UN, *UN Global Compact*, available at https://www.unglobalcompact.org/ (consulted 26 May 2017).
[69] ILO, *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, last version of March 2017, available at http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf (consulted 26 may 2017).
[70] MILES Kate, *The Origins of International Investment Law - Empire, Environment and the Safeguarding of Capital*, Cambridge, Cambridge University Press, 2013, p. 213.
[71] UN General Assembly, *supra* note 1.

regulations and administrative decisions adopted to promote public welfare and sustainable development.[72]

The traditional open-textured provisions give investment tribunals significant discretion in the interpretation of the protection standards in question. Thus, one of the tools the EU has adopted to better safeguard its regulatory autonomy and that of its Member States, is to draft the protection standards with greater precision.[73] The two arguably most relevant standards, of which the wording should be more precise in order to leave less room for unwarranted interpretations, are the fair and equitable treatment standard and the notion of 'indirect expropriation' in the expropriation provision.[74] The following discussion focuses on the provisions of CETA as it seems that the fair and equitable treatment provision as well as the one on expropriation as contained in CETA best reflect the current approach of the EU.[75]

1. Fair and equitable treatment (FET)

FET is the most frequently invoked standard and the most often successfully argued standard.[76] At the same time, the FET standard is probably the least clear promise a State makes to an investor. The notions of 'fairness' and 'equity' do not connote a clear legal prescription.[77] It is true that despite clear textual guidance, investment tribunals have developed core elements constituting a breach of FET but the risk of overly extensive interpretations remain.[78]

A typical bilateral investment treaty (BIT) of an EU Member State for instance merely provides on FET that "[each] Contracting State shall in its territory in every case accord investments by investors of the other Contracting State fair and equitable treatment as well as full protection under this Treaty".[79] In contrast hereto, the EU adopted an approach by which

[72] HENCKELS Caroline, *Protecting Regulatory Autonomy through Greater Precision in Investment Treaties: The TPP, CETA, and TTIP*, Journal of International Economic Law (2016), pp. 27-50, p. 28.
[73] It is important to note that the EU also implemented other ways to safeguard the right to regulate: a) it included a reference to the right to regulate in the preambles of CETA, EUVFTA and EUSFTA; b) as regards CETA, the EU also included a specific provision on the right to regulate in the investment chapter *see* art. 8.9 CETA. *See also* DIMOPOULOS, *supra* note 35, p. 265.
[74] European Commission, *Concept Paper: Investment in TTIP and beyond – The Path for Reform Enhancing the Right to Regulate and Moving from Current Ad Hoc Arbitration towards and Investment Court*, 12 May 2015, p. 6, available at http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF (consulted 26 May 2017).
[75] The provisions on FET and expropriation evolved from the EUSFTA (the first EU FTA with an investment chapter); consider for instance art. 9.4.2 (e) EUSFTA where "legitimate expectations" constitute a proper breach of the FET standard. The later elaborated EUVFTA follows the CETA drafting of the two provisions in question, see art. 14 (Section 2, Ch. II of Ch. 8) EUVFTA.
[76] HENCKELS, *supra* note 72, p. 33.
[77] UNCTAD, *supra* note 2, p. 94.
[78] HENCKELS, *supra* note 72, pp. 33-34. For instance *see Occidental Exploration and Prod. Co. v. Republic of Ecuador*, UNCITRAL, LCIA Case No. UN3467, Final Award, 1 July 2004, para. 18: Where the tribunal found that "The stability of the legal and business framework is thus an essential element of fair and equitable treatment". Similarly, *CMS Gas Transmission Company v Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005, para. 274.
[79] Art. 2 (2) German Model BIT (2008), available at http://investmentpolicyhub.unctad.org/Download/TreatyFile/2865 (consulted 20 May 2017).

a specific content is given to the FET standard and introduced a list of elements.[80] The EU approach constitutes a novelty.[81] It sets out a State's obligations as a list of prescribed behaviours as exemplified by the CETA provision on 'Treatment of investor and of covered investments':

Article 8.10 (1-2) CETA:

1. Each Party shall accord in its territory to covered investments of the other Party and to investors with respect to their covered investments fair and equitable treatment and full protection and security in accordance with paragraphs 2 through 6.
2. A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if a measure or series of measures constitutes:
    a. denial of justice in criminal, civil or administrative proceedings;
    b. fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings;
    c. manifest arbitrariness;
    d. targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;
    e. abusive treatment of investors, such as coercion, duress and harassment; or
    f. a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article.

This list is exhaustive.[82] According to UNCTAD, far-reaching interpretations can be avoided through such an approach.[83] Others, on the contrary, argue that this only adds more uncertainty.[84] Assessing the provision in light of better safeguarding the regulatory space of the EU and its Member States, it should be stressed that in regulatory disputes between a State and an investor, the elements of "manifest arbitrariness" (let. c) and "due process and transparency" (let. b) are the ones likely to arise.[85] "Manifest arbitrariness" can namely come up in a claim relating to the substance of a regulatory measure. Consequently, the adoption of a non-discriminatory public welfare measure seems to be difficult to argue as a breach of the FET standard. However, a word of caution should be given since the terms "manifest" and "arbitrariness" are in turn imprecise concepts.[86] The due process and transparency requirement applies *inter alia* to administrative proceedings, which can be relevant in a regulatory dispute as well. The reference to a "fundamental breach" suggests that there must be a certain level of seriousness in order to be in breach of the obligation.[87] Yet, again this term is also of an evaluative nature and gives discretion to the tribunal.[88] It has been argued in this respect that the terms "manifest" and "fundamental" are designed as a "safety-belt" for investors in defending themselves against State's conduct.[89]

[80] DE BRABANDERE Eric, *States' Reassertion of Control over International Investment Law (Re)Defining 'Fair and Equitable Treatment and Indirect Expropriation, in*: KULICK Andreas, "Reassertion of Control over the Investment Treaty Regime", Cambridge, Cambridge University Press, 2017, pp. 285-308, p. 298.
[81] *See* art. 8.10 CETA; art. 14 (Ch. II of Ch. 8) EUVFTA; art. 9.4 EUSFTA.
[82] HOFFMEISTER, *supra* note 47, p. 366.
[83] UNCTAD, *supra* note 2, p. 95.
[84] KRIEBAUM Ursula, *FET and Expropriation in the (Invisible) EU Model BIT*, The Journal of World Investment & Trade (2014), pp. 481-482.
[85] HENCKELS, *supra* note 72, p. 36.
[86] HENCKELS, *supra* note 72, p. 37.
[87] Ibid.
[88] Ibid.
[89] HOFFMEISTER, *supra* note 47, pp. 366-367.

The concept of "legitimate expectations" of investors is also regularly at stake when investors seek to scrutinize regulatory changes by States. Therefore, the CETA text clarifies the concept of legitimate expectations.

Article 8.10 (4) CETA

4. When applying the above fair and equitable treatment obligation, a Tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated.

The EU approach thus consists in clarifying the circumstances in which legitimate expectations can arise. Legitimate expectations are no longer a core element of the FET standard but appear to be rather supplementary issues that a tribunal can take into account when assessing the main elements as stated in paragraph 2.[90] It can be argued that this approach introduces constraints on the discretion of an investment tribunal because the condition of actual representation made to induce investments is rather clear. Expectations that are merely based on the existent regulatory environment or vague promises should not be protected under this provision.[91] The wording could be further clarified, for instance stating whether the specific representation must be written or verbal or both and whether an exception can ever be inferred or not.[92]

2. Indirect Expropriation

The other notion, which led to extensive interpretations by investment tribunals, is the provision on the prohibition of indirect expropriation.[93] The standard includes both direct expropriations (involving transfer of title to States) and indirect expropriations (measures that substantially deprive the investor of the investment or that result in the effective loss of the investor's enjoyment of or control over their property).[94] Indirect expropriation has also been described as "regulatory taking". Thus in order to better safeguard the right to regulate and to avoid unwarranted interpretation of what constitutes an indirect expropriation, the EU adopted the approach of explaining the term in a specific annex to the treaty.[95] Such an approach is different from the FET approach, not a novelty but is inspired by typical Canadian BITs.[96]

Under the recently concluded EU treaties, "indirect expropriation occurs if a measure or series of measures of a Party has an effect equivalent to direct expropriation, in that it

[90] DE BRABANDERE, *supra* note 80, p. 301.
[91] HENCKELS, *supra* note 72, p. 38.
[92] Ibid.
[93] Such as *Compania del Desarrollo de Santa Elena v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Final Award, 17 February 2000, para. 72.
[94] HENCKELS, *supra* note 72, p. 40.
[95] Annex 8-A CETA; Annex X (Ch. II of Ch. 8) EUVFTA; Annex 9-A EUSFTA.
[96] *Canadian Model BIT of 2004*, Annex B.13, available at http://www.iisd.org/toolkits/sustainability-toolkit-for-trade-negotiators/wp-content/uploads/2016/06/Canadian2004-FIPA-model-en.pdf (consulted 26 May 2017).

substantially deprives the investor of the fundamental attributes of property in its investment, including the right to use, enjoy and dispose of its investment, without formal transfer of title or outright seizure".[97] The annex then further clarifies the situations in which an indirect expropriation is given.

Annex 8-A (2) CETA

2. The determination of whether a measure or series of measures of a Party, in a specific fact situation, constitutes an indirect expropriation requires a case-by-case, fact-based inquiry that takes into consideration, among other factors:
   a. the economic impact of the measure or series of measures, although the sole fact that a measure or series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred;
   b. the duration of the measure or series of measures of measures of a Party;
   c. the extent to which the measure ore series of measures interferes with distinct, reasonable investment-backed expectations; and
   d. the character of the measure or series of measure, notably their object, context and intent.

This list provides a set of criteria[98] that need to be taken into account and therefore certainly gives guidance to an investment tribunal. However, the criteria are non-exhaustive ("among other factors") and give no guidance as to the weight that should be given to the various factors by an investment tribunal.[99] The provision also makes reference to the extent of interference with the investor's "distinct, reasonable investment-backed expectations" (let. c), which is rather vague because it is not clear whether this also includes subjective expectations of the investor. A positive factor is the fact that paragraph 2 (d) by adding "notably their object, context and intent" dismisses the 'sole effects' doctrine. This doctrine had become very controversial since it takes no account of the State's intent for the adoption of a regulatory measure when assessing an indirect expropriation claim.[100]

Lastly, the EU introduced a further provision or more precisely an exception through which, it hoped to again enhance legitimate public welfare regulations.

Annex 8-A (3) CETA

For greater certainty, except in the rare circumstance when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations.

For the EU this additional exception shall further safeguard the right to regulate by stating that measures that are designed and applied to protect legitimate public welfare objectives do not constitute indirect expropriation. This is not a general carve-out but requires a case-by-case assessment by a tribunal since there might also be "rare circumstances" where the impact of the measure is "so severe in the light of its purpose that it appears manifestly

[97] Annex 8-A (1) (b) CETA; Annex X (1) (b) (Ch. II of Ch. 8) EUVFTA; Annex 9-A (1) (b) EUSFTA.
[98] These criteria first appeared in international investment agreements of the United States. Originally, the criteria derive from a leading US case on regulatory takings, *Penn Central Transport v City of New York*, 438 US 104, 123-125 (1978) quoted in HENCKELS, *supra* note 72, p. 41.
[99] HENCKELS, *supra* note 72, p. 42.
[100] HOFFMEISTER, *supra* note 47, p. 369; DE BRABANBERE, *supra* note 80, p. 304. A tribunal that applied the sole effect doctrine without paying attention to the government's intent, *see for instance Telenor Mobile Communications AS v The Republic of Hungary*, ICSID Case No. ARB/04/15, Award, 13 September 2006, para. 70.

excessive". It suggests thus that a tribunal should weigh the importance of the measure's objective against its impact on the investment.[101] Such balancing exercise is ultimately a value judgment and lies within the discretion of a tribunal. The treaty text does not provide for any further guidance in order to scrutinize a government's justifications for its actions.[102] The qualifier 'manifestly' however can be seen as putting a high threshold for a breach by a State when adopting the measure.[103]

It is still too early to see how investment tribunals will interpret these standards. The present analysis shows at any rate that the EU is keen on adopting concrete legal tools in order to render international investment law more predictable and to better safeguard measures that have been adopted for the purpose of sustainable development objectives.

C. Investor-State Dispute Settlement

ISDS through arbitration was in the last few years at the centre of criticism. It has been perceived as a threat to general societal interests giving special procedural rights to foreign investors and undermining public policies including those policies that relate to sustainable development concerns. The traditional investment arbitral system has been set-up like a private dispute settlement mechanism that is modelled on how disputes between private parties are settled in commercial arbitration. However, arbitral tribunals review regulatory acts and policy, and thus rather fulfil public governance functions.[104] The private character of investment arbitration plays a major part in the legitimacy crisis of the system as a whole as it is for many not the proper mechanism for reviewing regulatory measures that often touch upon sustainable development concerns.[105]

Thus the reform endeavour with respect to the ISDS mechanism is to render the procedure more like a public law dispute settlement system by taking inspiration from domestic court systems arguably making the mechanism more compatible with sustainable development objectives. Some of the tools in order to achieve this task have already been successfully incorporated into the arbitral system. On the one hand, proceedings are by now transparent. The EU for instance subjects the ISDS mechanism to the UNCITRAL Transparency Rules in its recent treaties.[106] On the other hand, investment arbitration rules generally accept

[101] HENCKELS, *supra* note 72, p. 43.
[102] Ibid.
[103] Ibid.
[104] SCHILL Stephan, *Authority, Legitimacy and Fragmentation in the (Envisaged) Dispute Settlement Disciplines in Mega-Regionals*, Amsterdam Law School Legal Studies Research Paper No. 2017-05, p. 26, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2932810 (consulted on 20 May 2017).
[105] WOUTERS Jan, HACHEZ Nicolas, *The Institutionalization of Investment Arbitration*, in: CORDONIER SEGGER Marie-Claire, GEHRING Markus, NEWCOMBE Andrew (eds), "Sustainable Development and World Investment Law", Kluwer Law International, 2011, pp. 615-639, p. 627.
[106] UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, New York 2014, available at https://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf (consulted on 4 September 2017). See art. 8.36 CETA and art. 20 (sub-section 5, Ch. II of Ch. 8) EUVFTA.

amicus curiae participation.[107] Both, transparency and *amicus curiae* participation are relevant with respect to issues that related to sustainable development as third parties need to be informed about the proceedings and, if the requirements are met, they also need to be able to submit their written observations.

The EU sought to systemically reform the ISDS mechanism and went a step further. The EU is today the first in institutionalising ISDS by introducing an investment court system (ICS), which is intended to make the dispute settlement more court-like. The CETA as well as the EU-Vietnam FTA already contain this mechanism.[108] The goal of this institutionalisation is to enhance the legitimacy of the mechanism by rendering it more suitable for investment cases touching upon the regulatory space of the State and thus issues of sustainable development.[109]

The ICS is characterised by a two-tier court mechanism composed of a standing tribunal as well as an appellate tribunal. [110] The Tribunal of first instance (hereafter: the Tribunal) is composed of a set of permanent Members[111] that are elected by a joint committee.[112] One third of the Tribunal Members are to be nationals of an EU Member State, one third are to be nationals of Canada/ Vietnam and another third are to be nationals of third countries.[113]

Cases will be heard in divisions of three members.[114] The chairperson of the division has to be a third country national.[115] The assignment of cases to divisions operates in a "random and unpredictable" manner.[116] Members of the Tribunal shall be available and be able to perform their functions.[117] For the work performed in relation to a case, the amount of fees and expenses will be determined according to the rules applicable under the ICSID Convention.[118] This short presentation of the main features of the ICS makes it clear that the ICS is of a hybrid nature constituting a mix of arbitration and a proper permanent court.

[107] ICSID Convention, Amendment of 2006, *see* "new" art. 37 (2).
[108] For more details on the CETA ICS *see* SCHACHERER Stefanie, *TPP, CETA and TTIP Between Innovation and Consolidation—Resolving Investor–State Disputes under Mega-Regionals*, Journal of International Dispute Settlement (2016), pp. 628-653.
[109] UNCTAD, *supra* note 2, p. 101.
[110] Arts 8.27 and 8.28 CETA; arts 12 and 13 (Sub-section 4, Ch. II of Ch. 8) EUVFTA.
[111] 15 in total under CETA and 9 in total under the EUVFTA.
[112] The CETA Joint Committee is the main organ of the CETA comprising representatives of the EU and Canada, *see* art. 26.1 CETA. The equivalent under the EUVFTA is the Trade Committee *see* art. X.1 (Ch. 17) EUVFTA.
[113] Art. 8.27 (2) CETA; art. 12 (2) (Sub-section 4, Ch. II of Ch. 8) EUVFTA. The number of the member of the AT still needs to be determined under CETA *see* art. 28.7 (f) CETA. Under the EUVFTA the number is of six, *see* art. 13 (2) (Sub-section 4, Ch. II of Ch. 8) EUVFTA.
[114] Art. 8.27 (6) CETA. This also the case for the AT, *see* art. 8.28 (5) CETA; arts 12 (6) and 13 (8) (Sub-section 4, Ch. II of Ch. 8) EUVFTA.
[115] Ibid.
[116] Art. 8.27 (7) CETA; art. 12 (7) (Sub-section 4, Ch. II of Ch. 8) EUVFTA.
[117] Art. 8.27 (11) CETA; art. 12 (14) (Sub-section 4, Ch. II of Ch. 8) EUVFTA.
[118] Art. 8.27 (14) CETA; art. 12 (15) (Sub-section 4, Ch. II of Ch. 8) EUVFTA.

1. The "Sociological" Factor: Independence and Qualifications of Adjudicators

The ICS might at first seem less relevant for concerns of sustainable development yet the way in which the ISDS mechanism is shaped can have an impact on the way in which questions of sustainable development are considered in a given investment dispute. Arbitrators used to be criticised for not sufficiently taking into perspective broader societal values or the host State's right to regulate. Some criticism even went so far as to say that arbitrators would be pro-investor biased. The EU, by institutionalising the ISDS mechanism sought to improve the requirements on the independence and qualifications of adjudicators under the ICS and worked on what is sometimes called the "sociological factor" of a given tribunal.

Under the ICS, investors have no say in the determination of the Tribunal Members deciding their claim. This is so with respect to the election process of the Members of the Tribunal and with respect to the appointment or assignment of the elected Members to a division deciding a dispute.[119] Firstly, a joint committee elects the Tribunal Members.[120] Decisions of this committee are taken on the basis of mutual consent of the contracting parties.[121] Second, in the event of an investor's claim, it is the competence of the President of the Tribunal to assign cases to the Members on a rotating basis ensuring that the composition of a division is random and unpredictable, while giving equal opportunity to all Tribunal Members to serve.[122]

This new mechanism of case assignment ensures that there is no link between the Tribunal Members and the disputing parties as well as that there is no link between them and the specific issues of the case. It is more suitable to clearing suspicions of bias than used to be the case under the case-by-case appointment by the disputing parties.

A further issue that has received a lot of attention in the debate on the independence of arbitrators is the interplay of roles or the "changing of hats", the situation in which an individual acts both as counsel and arbitrator in different proceedings.[123] The EU addressed this issue in its recent treaties,[124] providing for an exclusion for Tribunal Members to act as counsel or as party-appointed expert or witness in any pending or new investment dispute

[119] For the sake of clarity, the following analysis will only refer to "Tribunal Members". This is without prejudice to the fact that some of the aspects will apply *mutatis mutandis* to the Appellate Tribunal.
[120] *See supra* note 110.
[121] In the case of CETA *see* art. 26.3 CETA.
[122] *See supra* note 113.
[123] SANDS Philip, *Conflict of Interests for Arbitrator and/or Counsel, in:* M Kinnear et al (eds), "Building International Investment Law – The First 50 Years of ICSID", New York, Wolters Kluwer Legal, 2016, pp. 655-668.
[124] European Commission, *Report, Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)*, Brussels, 13 January 2015, p. 103, available at http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf (consulted 20 May 2017).

under the treaty under application or any other international agreement.[125] This new restriction is a positive development since situations where the '*dédoublement fonctionnel*' of an individual as an adjudicator in one case and as counsel (or expert or witness) in another case can give rise to a perception of bias, in the sense that his or her role in one case might be perceived to inform actions in the other case.[126]

The provisions on the ICS foresee a number of qualifications and ethical requirements that apply to the Tribunal Members.[127] They shall have the qualifications required in their respective countries for appointment to judicial office, or have to be jurists of recognised competence.[128] In particular, they have to demonstrate expertise in public international law.[129] The express reference to public international law is also a very good innovation since it underlines the fundamental character of investment treaties as inter-State agreements as well as the public character of the dispute.[130] This latter element is again important with respect to sustainable development issues as they might require taking into account other branches of international law such as international environmental law or human rights.

2. *Jurisprudence Constante* on Sustainable Development Issues?

As mentioned before, the EU also introduced an appeals mechanism. Even though the purposes of such mechanism are controversial, an argument can be made that through the Appellate Tribunal a constant and consistent case law will be established – a *jurisprudence constante* – at least for the treaty applicable. Such jurisprudence can lead to also develop case law on sustainable development issues.

The appeals mechanism works in the following way: The Appellate Tribunal has jurisdiction over awards issued by the Tribunal.[131] The scope of jurisdiction is to uphold, modify or reverse a Tribunal's award based on three different grounds.[132] First, an award can be appealed for errors in the application or interpretation of applicable law. Second, an award can be appealed on manifest errors in the appreciation of the facts including the appreciation of relevant domestic law. For both grounds, it is not explicitly stated, whether the Appellate Tribunal reviews these issues *de novo* or whether it has to accord some degree of

[125] Art. 8.30 (1) CETA; art. 14 (1) (Sub-section 4, Ch. II of Ch. 8) EUVFTA.
[126] SANDS, *supra* note 123, pp. 655-656; Sands refers to such a situation as "role confusion".
[127] The same requirements will apply to the Members of the Appellate Tribunal, art. 8.28 (4) CETA.
[128] Art. 8.27 (4) CETA; art. 12 (4) (Sub-section 4, Ch. II of Ch. 8) EUVFTA.
[129] Ibid., art. 8.27 (4) CETA: "It is also desirable that Members of the Tribunal have expertise in international investment law, in international trade law and the respective dispute resolution."
[130] VENZKE Ingo, *Investor-State Dispute Settlement in TTIP from the Perspective of a Public Law Theory of International Adjudication*, The Journal of World Investment & Trade (2016), pp. 374-400, *see* pp. 393-394. An example of a very problematic BIT interpretation of arbitrators: "The Arbitral Tribunals agree in this regard with the Claimants that the reference to "such rules of general international law as may be applicable" in the BITs does not incorporate the universe of international law into the BITs or into disputes arising under the BIT." *Von Pezold v Zimbabwe*, ICSID Case No. ARB/10/25, Procedural Order No 2, 26 June 2012, para. 57.
[131] Art. 8.28 (1) and (2) CETA; art. 13 (1) (Sub-section 4, Ch. II of Ch. 8) EUVFTA.
[132] Art. 8.28 (2) CETA; art. 28 (1) (Sub-section 4, Ch. II of Ch. 8) EUVFTA.

deference to the findings of the Tribunal.[133] The reference to "manifest" errors regarding the appreciation of the facts, suggests that the Appellate Tribunal should accord some deference to the factual assessment of the Tribunal. As a third category of ground of appeal, the treaty texts explicitly refer to the grounds for annulment under the ICSID Convention.[134]

An aspect of the ICS as a whole is that in principle it should better ensure consistency because a group of the same adjudicators will decide the cases.[135] This has been referred to as personal and institutional continuity, which is generally beneficial for more consistency in the case law. [136] Linked to the question of consistency is the question of precedent. Interestingly, provisions on the ICS do not specifically provided that the decisions of the Appellate Tribunal would have the force of binding precedent or *stare decisis* on subsequent awards rendered by the Tribunal of first instance.[137] Whether a clear rule of precedent would have been preferable can be discussed. It is true that judges of other permanent international courts and tribunals usually stick closely to precedent for the purpose of legal certainty. [138]

The EU approach on an Appellate Tribunal has the potential to better guarantee that a *jurisprudence constante* will be developed for the treaty applicable. Also, the decisions of the Appellate Tribunal are likely to have a quasi *stare decisis* effect since it can be assumed that each time the Tribunal of first instance is not following previous decisions of the Appellate Tribunal, the loosing party will immediately appeal against the award and the award has then good chances to be overturned by the Appellate Tribunal.[139]

In sum, with the introduction of an ICS, the EU responds to the legitimacy crisis by rendering the arbitral process more "institutional". In particular the fact that the Members of the Tribunal and the Appellate Tribunal will be part of a permanent institution as well as the fact that they are assigned to a given case on a random basis, should please those that consider ISDS through arbitration as too "private". A bilateral appeals mechanism is also likely to ensure more consistency in the interpretation of the respective investment chapter

[133] For a definition of the standard of review and its distinction from grounds for review and method of review *see* HENCKELS Caroline, *Proportionality and Deference in Investor-State Arbitration: Balancing Investment Protection and Regulatory Autonomy*, Cambridge, Cambridge University Press (2015), pp. 29-34.
[134] Art. 8.28 (2) (c) CETA; art. 14 (1) (c) (Sub-section 4, Ch. II of Ch. 8) EUVFTA. *See* art. 52 ICSID Convention: the Tribunal was not properly constituted, the Tribunal has manifestly exceeded its powers, there was corruption on the part of the Tribunal members, there was serious departure from fundamental rules of procedure or the award failed to state reasons on which it is based.
[135] TAMS Christian, *An Appealing Option? The Debate About an ICSID Appellate Structure*, Essays in Transnational Economic Law Working Paper No. 57, 2006, p. 26.
[136] Ibid.
[137] See on enforcement of awards art. 8.41 (1) CETA and art. 29 (Sub-section 5, Ch. II of Ch. 8) EUVFTA.
[138] GUILLAUME Gilbert, *The Use of Precedent by International Judges and Arbitrators*, Journal of International Dispute Settlement (2011), Vol. 2, No. 1, pp. 5-23.
[139] TAMS, *supra* note 135, p. 24.

contained in CETA or the EU-Vietnam FTA. All these elements have the potential to better taking into account boarder societal values and thus are more compatible with the objective of sustainable development.

IV. Conclusions: the EU a *leading* actor?

The present analysis has unmistakably made clear that the EU is a global actor in the ongoing international investment law reform. We first saw that the EU is through its exclusive competence over FDI well equipped to participate in international investment law governance. As the Court made it further clear in opinion 2/15, the objective of sustainable development is an integral part of the EU's CCP[140] and therefore the EU is obliged to comply with this objective *inter alia* as far as its investment law making is concerned. We secondly looked at most recent EU treaty practice. This analysis also showed that the EU integrates sustainable development concerns through the adoption of chapters on sustainable development that figure next to the chapters on investment in the same FTAs. In addition, the EU is very keen on redrafting traditional investment protection standards in order to better safeguard the policy space of the EU and its Member States. The FET standard as developed by the EU is quite innovative, whether it will lead to different outcomes than under traditional provisions is, however, at this point in time too early to assess. Finally, the EU ICS is today a unique ISDS mechanism that seeks to better safeguard that issues of sustainable development are taken into account.

Taking account of all these elements, the EU as a global actor is actively contributing to international law making here in the field of foreign investment. But – the EU does not want to be just *a* global actor. The EU's ambition is to lead this reform process. According to the European Commission: "The EU is best placed – and has a special responsibility – to lead the reform of the global investment regime, as its founder and main actor"[141].

As a comment on this statement, it seems that yes, the EU is very well placed as it succeeded the position of its Member States, which mainly consist of capital-exporting countries and have traditionally been leading actors in international investment law governance, such as Germany, the Netherlands and France. It also seems that the EU has a special responsibility in the ongoing reform process. On the one hand the EU is the biggest FDI exporter,[142] thus the sustainable development of - in particular - developing countries is dependent on EU multinational enterprises; on the other hand, the EU is the biggest receiver of FDI,[143] the EU thus has the responsibility to accord those investments a stable framework but has

[140] ECJ, *Opinion 2/15*, *supra* note 5, para. 147.
[141] European Commission, *supra* note 6, p. 21.
[142] OECD, *OECD Data – FDI Flows*, available at https://data.oecd.org/fdi/fdi-flows.htm (consulted 26 May 2017).
[143] Ibid.

also to guarantee that the other non-economic values of European societies are not being threated or undermined by foreign investors.

But does this imply that the EU is leading the reform? This question could ultimately only be answered by also looking at *other* actors and their reform approaches. In fact, the majority of countries and regions are engaged in a process of reform and revision of their respective investment policies and have adopted new approaches. This is the case for instance for Africa and its Regional Economic Communities, for Asia and for Latin America, as well as countries such as India, South Africa, Brazil and Indonesia to name here just a few.[144] Also for these regions and countries sustainable development has become the guiding principle in shaping new investment law.[145] A *momentum* for assessing the leadership of the EU in putting forward its reform approaches could have been the outcome of the negotiations on the Transatlantic Trade and Investment Partnership (TTIP) with the United States, which is another comprehensive FTA containing an investment chapter. If TTIP would have incorporated the new EU approaches, it could have been spoken of a sort of Europeanisation. The TTIP would be the biggest trade and investment agreement with a share of 45 % of global GDP.[146] It has been argued that the TTIP would thus lay the new international standards also with respect to the regulation of foreign investment.[147] However, the new US administration stalled for the time being any hope that TTIP will ever be concluded.

Interestingly, the EU is now suggesting the establishment of a permanent multilateral investment tribunal, which likely will follow the EU ICS. Again, if this succeeds, we could speak of the EU as a leader in the current reform process. But again, the chances of such success are rather limited. Some countries such as India and some Latin American countries already expressed their reluctance towards a project proposed by the EU.[148] Furthermore, it should be mentioned that also the United Nations Commission on International Trade Law (UNCITRAL) is keen to set up a working group, which could work on a different proposal of a multilateral court.[149]

In conclusion, whether the EU is actually and ultimately leading the reform seems less relevant, what counts is that the EU certainly is an important actor and that it implemented important reform elements into its recent investment law making. The particular constitutional framework of the EU with its general set of foreign policy objectives that apply to all

[144] For an overview *see* UNCTAD, *World Investment Report 2016 – Investor Nationality: Policy Challenges*, p. 108-116.
[145] Ibid.
[146] UNCTAD, *World Investment Report 2014 – Investing in the SDGs: An Action Plan*, p.120.
[147] Ibid., pp. 119-120.
[148] International Institute for Sustainable Development (IISD), *European Union and Canada co-host discussions on multilateral investment court*, Investment Treaty News, News in brief of 13 March 2017, available at http://www.iisd.org/itn/2017/03/13/news-in-brief-26/ (consulted 26 May 2017).
[149] A decision will be taken at UNCITRAL in July. *See also* KAUFMANN-KOHLER Gabrielle, POTESTÀ Michele, *Can the Mauritius Convention serve as a model for the reform of investor-State arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism? - Analysis and roadmap*, CIDS - Geneva Centre for International Dispute Settlement, 3 June 2016, 61, available at http://www.uncitral.org/pdf/english/commissionsessions/unc/unc-49/CIDS_Research_Paper_-_Can_the_Mauritius_Convention_serve_as_a_model.pdf (consulted 26 May 2017).

EU external policies, allows the EU as far as its CCP is concerned to pursue not only economic objectives but also the broader sustainable development objectives.

* * *

List of abbreviations

BIT	Bilateral investment treaty
CCP	Common commercial policy
CETA	Comprehensive Economic Trade Agreement
CFREU	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
CSR	Corporate social responsibility
ECJ	European Court of Justice
EU	European Union
EUSFTA	EU-Singapore Free Trade Agreement
EUVFTA	EU-Vietnam Free Trade Agreement
FDI	Foreign direct investment
FET	Fair and equitable treatment
FTA	Free trade agreement
G20	Group of Twenty
ICJ	International Court of Justice
ICS	Investment Court System
ICSID	International Centre for the Settlement of Investment Disputes
ILO	International Labour Organization
IPFSD	Investment Policy Framework for Sustainable Development
ISDS	investor-State dispute settlement
MEA	Multilateral environmental agreement
OECD	Organization for Economic Cooperation and Development
SDGs	Sustainable Development Goals
TFEU	Treaty on the Functioning of the European Union

TEU	Treaty on European Union
TTIP	Transatlantic Trade and Investment Partnership
UN	United Nations
UNCITRAL	United National Commission on International Trade Law
UNCTAD	United Nations Conference for Trade and Development
UNFCCC	United Nations Framework Convention on Climate Change
US	United States

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