

## Investment Protection in TTIP: Three Feasible Proposals

**Jan Kleinheisterkamp and Lauge Poulsen**

*Investor-state dispute settlement (ISDS) through international arbitration has become a major stumbling block in negotiations of the Transatlantic Trade and Investment Partnership (TTIP). In agreements with Canada (CETA) and Singapore, the European Commission has included several modifications to the 'traditional' investment provisions found in the bilateral investment treaties of European capital exporting countries, so as to address some of the shortcomings of the traditional ISDS system. Yet, a large number of stakeholders remain unconvinced that the changes sufficiently safeguard policy space in Europe.*

*Broader political support for TTIP may be difficult unless these concerns are addressed. To contribute to this debate, this brief proposes three pragmatic solutions for the investment protection chapter in TTIP, which could be politically acceptable in Europe while still offering meaningful investment protections.*



*The European Commission and the Member States should:*

1. Insert and make applicable the fundamental principle framing the mandates on both sides of the Atlantic that TTIP will not include greater substantive investor rights than those enshrined in domestic laws.
2. Consider limiting dispute settlement to state-to-state consultations and arbitration, as this is standard in investment treaties among countries with developed legal systems.
3. If ISDS is included: condition it to a local litigation requirement; allow the parties to filter out disputes from arbitration; allow the parties to make binding interpretations; and implement an efficient appeal mechanism.

### ABOUT THE AUTHORS

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## I. THE (POLITICAL) PROBLEM

The European Parliament stated in 2013 that future EU investment agreements should only include ISDS “[i]n the cases where it is justifiable”<sup>1</sup>. Many remain skeptical that investment arbitration in an agreement with the US is in fact necessary and justifiable. For instance, since only a small minority of American investors are genuinely concerned with expropriation risks in a few EU member states, why should they not just be asked to purchase political risk insurance? Why should taxpayers have to pay for protections that multinationals to a large extent can pay for themselves through the private market?<sup>2</sup>

These concerns are important, as the intensive and growing opposition could derail the most comprehensive preferential trade agreement in history. TTIP requires ratification in the European Parliament as well as national parliaments, so policy-makers need strong justifications for not simply excluding investment protection from the agreement. Stakeholders and negotiators could then focus on the elements of the agreement expected to offer the largest gains, such as in the area of trade.<sup>3</sup>

Excluding investment protection from TTIP would allow European policy-makers to pause and rethink both the substantive and procedural rights in investment treaties “bottom up”. Much work needs to be done to assure the consistency between investment law, on the one hand, and EU law and national laws of the member states, on the other hand.<sup>4</sup> More broadly, the rise of investment arbitration has indicated that there is need to revisit some of the basic design elements of investment treaties.<sup>5</sup>

Given the political pressure to finalize TTIP (and other investment agreements), however, it seems unlikely that European governments are willing to accept a moratorium regarding the investment chapter. This raises the challenge of drafting investment provisions in TTIP that addresses the political concerns over ISDS while still providing meaningful protection to European and US investors. In this brief we propose three pragmatic options that would achieve that goal.

Our proposals are summarised in the table below.

TABLE: THREE FEASIBLE PROPOSALS FOR INVESTMENT PROTECTION IN TTIP

		DISPUTE RESOLUTION	
SUBSTANTIVE PROTECTIONS		OPTION I: THE AUSTRALIA-US MODEL	OPTION II: THE ISDS PATCHES MODEL
DEFINING FEATURES	NO GREATER RIGHTS	<ul style="list-style-type: none"> <li>■ Default reliance on domestic law and courts.</li> <li>■ State-to-state dispute settlement based on substantive investment protection provisions as benchmark.</li> <li>■ Institutionalized consultations about domestic investment regimes.</li> </ul>	<ul style="list-style-type: none"> <li>■ Local courts first decide on the illegality of public acts.</li> <li>■ Comprehensive state ‘filter’ of private claims.</li> <li>■ Binding state interpretations.</li> <li>■ Independent appeals mechanism.</li> </ul>
	ADVANTAGES	<ul style="list-style-type: none"> <li>■ Continues tradition of excluding ISDS in agreements among developed countries.</li> <li>■ On-going consultations add to TTIP as a “living agreement”.</li> <li>■ US-Australia agreement provides a precedent.</li> </ul>	<ul style="list-style-type: none"> <li>■ Avoids the ‘side-lining’ of domestic courts.</li> <li>■ States retain control.</li> <li>■ State interpretations adds to TTIP as a “living agreement”.</li> <li>■ Greater consistency and predictably.</li> <li>■ Precedents exist in comparative legal regimes.</li> </ul>

## II. PROPOSAL ON SUBSTANTIVE INVESTOR RIGHTS

In response to the criticisms made against ISDS, the Commission has added ‘patches’ to old investment treaty models developed before the rise of investment treaty arbitration. Many stakeholders remain unconvinced that European regulatory standards will not be lowered through ISDS, however, and some of the Commission’s efforts may even backfire by increasing the scope for creative lawyering and expansive interpretations. An example is the fair and equitable treatment clause in CETA.<sup>6</sup>

This concern could be addressed by an express general clarification in TTIP and other investment treaties that foreign investors should get the same high levels of protection as domestic investors receive in domestic law, *but not higher levels of protection*. In the EU, the benchmark would be EU law and the general principles common to the laws of the member states.<sup>7</sup> In the case of claims against the US, a relevant starting point would often be the rich US case law on the takings doctrine, which offers significant guidance for the balancing private and public rights.<sup>8</sup>

Such a clarification would set a fundamental principle for the interpretation of all substantive investment provisions in TTIP. It would force arbitral tribunals to engage with the rich national public law traditions on both sides of the Atlantic, rather than ignore them, and cap the scope of the substantive treaty rights accordingly so as not to compromise the long established balance struck between private and public interests.<sup>9</sup>

Our proposal is fully in line with the investment policy aims defined by both the European Parliament and the US Congress. The US Government informed Congress in 2013 that, as already laid down in the 2002 Trade Act, it would seek to secure in TTIP:

for U.S. investors in the EU important rights comparable to those that would be available under U.S. legal principles and practice, *while ensuring that EU investors in the United States are not accorded greater substantive rights with respect to investment protections than U.S. investors in the United States*.<sup>10</sup>

Equally, the EU Regulation 912/2014 of 23 July 2014 framing financial responsibility for ISDS expressly states that:

Union agreements should afford foreign investors the same high level of protection as Union law and the general principles common to the laws of the Member States grant to investors from within the Union, *but not a higher level of protection*. Union agreements should ensure that the Union’s legislative powers and right to regulate are respected and safeguarded.

These declarations are expressions of a democratic political consensus about the intended reach of future investment agreements and for TTIP in particular. Backing this by an operative “no greater rights” provision in TTIP would be an important step for a reformed European investment treaty policy.

## III. TWO OPTIONS FOR DISPUTE RESOLUTION

Giving all American investors the opportunity to bypass European courts is a highly controversial policy. While EU member states have signed bilateral investment treaties with developing countries for decades, a similar treaty arrangement with the United States will significantly increase the chances of claims given the amount of US investment in Europe.<sup>11</sup>

To accommodate this concern we propose two dispute resolution models for the investment protection chapter, which are both politically feasible.

### OPTION 1: THE AUSTRALIA-US MODEL

Private recourse to treaty-based investment arbitration originated as an alternative to domestic legal systems that were not considered trustworthy. Until recently, Western governments only negotiated investment treaties with transition or developing countries.<sup>12</sup> Treaty-based arbitration was considered unnecessary between countries with well-developed legal systems.

In line with this tradition our first proposal is based on the 2005 Australia-United States Free Trade Agreement, AUSFTA, which excludes ISDS.<sup>13</sup> One of the main advantages of this model is that it requires little, if any, institutional innovation as a precedent has already been provided in the Australia-US agreement. This would allow negotiators to quickly settle the investment protection chapter and instead focus on the more important elements of TTIP.

### An investment treaty tailored for countries with highly developed legal systems

AUSFTA includes a long chapter on investment protection with traditional investment treaty protections against uncompensated expropriation, discrimination, unfair and inequitable treatment, capital transfer restrictions, etc. But since both Australia and the United States have high levels of investment protection in their domestic legal regimes as well as reliable court systems, they agreed to exclude ISDS from the agreement and not make the substantive treaty provisions directly applicable in their respective courts.

Both states are free to consent to arbitration with individual investors on an ad-hoc basis (for instance in contracts), but the default option is to resolve investment disputes in domestic courts based on domestic law. If a home state is concerned about the treatment of its investors in the other country, however, it can file an inter-state claim both for purposes of clarification and compensation of its investors.<sup>14</sup>

This model departs from traditional investment treaties, but as noted by the United States Trade Representative:

Among other things, Australia has an open economic environment and a legal system similar to that of the United States, U.S. investors have confidence in the fairness and integrity of Australia's legal system, and the United States has a long history of close commercial relations with Australia that has flourished largely without disputes of the type addressed by international investment provisions.<sup>15</sup>

This description also corresponds with most European states and transatlantic investment flows have flourished for decades without treaty-based recourse to investment arbitration. The AUSFTA model therefore fits with TTIP as well.

### A “living” investment chapter in TTIP

Another important feature of the AUSFTA Model is that the two governments commit to meet regularly to discuss the implementation of the investment protection provisions as well as other issues pertaining to the operation of their respective investment regimes. Here, the substantive provisions of the treaty – such as fair and equitable treatment – can be used to highlight perceived deficiencies in domestic regulation of foreign investment.

Extending this part of AUSFTA for the purposes of TTIP would correspond with the aim of making TTIP a “living agreement” through a continuous process of making domestic trade and investment regimes ever more compatible. On-going monitoring and consultations about domestic regulatory regimes has been highly effective for the OECD, for instance, and seems a more appropriate model to push forward transatlantic integration than litigation.

## OPTION 2: THE ISDS ‘PATCHES’ MODEL

Our second option for dispute resolution is similar to the AUSFTA Model by including traditional investment treaty protections but differs by keeping a limited recourse to investment arbitration. To ensure ISDS is only used in exceptional cases, the proposal includes four ‘patches’ to traditional investment arbitration provisions.

### Local courts first decide on illegality of public acts

Local courts in Europe and the United States should have the chance to correct errors of local administration or legislation before international tribunals get involved. The first ‘patch’ is therefore a requirement that foreign investors seek to resolve their disputes with host states through domestic courts. This will ensure that investment arbitration is the last legal resort in an investment dispute (rather than the first).<sup>16</sup> It will also enhance legal certainty by fostering dialogue between national courts and national regulators that consolidates national administrative law and practice.

A local litigation requirement can be structured in different ways. One option would be to insist on exhaustion of local remedies. This is similar to the obligation in the European Convention of Human Rights, for instance, including for expropriation disputes. If, however, Washington finds an exhaustion requirement unacceptable due to judicial systems in some EU member states, another option would be a local litigation requirement of a minimum of 5 years, which is a reasonable time for proceedings of such complexity.<sup>17</sup>

### Comprehensive state ‘filter’ of private claims

Our second patch is that home and host states should be allowed to block individual claims, if they *both* agree the dispute should be settled by domestic judges rather than international arbitrators. A similar option is included in NAFTA for investment disputes regarding tax questions with the justification that it can block particularly controversial investor disputes from proceeding. In CETA, as well, there is a similar filter mechanism for investment disputes in financial services.

Extending such filter mechanisms to all areas covered by the investment provisions addresses fundamental concerns about safeguarding public policies. Taxation and financial stability are important issues, but so are environmental protection, health concerns, consumer protection and other public interest matters. The Hong Kong government would likely have agreed to block Phillip Morris’ recent claim against Australia, for instance, if a filter mechanism had existed in the relevant treaty.

### Binding state interpretations

Third, *joint* and prospective interpretations of TTIP’s investment provisions issued by the parties should be binding upon arbitration tribunals. Such interpretive powers are delegated to NAFTA’s Free Trade Commission (FTC) and similar provisions are included in CETA. TTIP needs more precise language than CETA to make clear that these joint interpretations are strictly binding, as a few tribunals have disregarded FTC interpretations.<sup>18</sup>

This, too, would allow states greater control over the arbitral



process by steering the development of the law created by them<sup>19</sup> It would also correspond to the logic of making TTIP a 'living agreement', as the investment protection chapter could form the basis for a constructive dialogue between the EU and the US on the content of investment treaty standards going forward.

### Independent appeals mechanism

One of the key concerns with investment arbitration raised in recent decades has been the lack of coherence, and occasional contradiction, in the decisions by tribunals. This makes it harder for states and investors to assess their rights and liabilities under an investment treaty. With respect to claims pursued under TTIP such uncertainty could be diminished if investors and states are given an opportunity to appeal through an independent appellate body similar to the one included in the WTO. Both the US Government and the European Commission have suggested an appellate body solution, but have so far failed to implement it.<sup>20</sup>

## IV. RESPONDING TO POTENTIAL CONCERNS

### CONCERN 1: NOT ALL EUROPEAN AND AMERICAN COURTS ARE TRUSTWORTHY

#### Domestic courts and the AUSFTA Model

Concerns have been raised by proponents of ISDS that some European and American courts are untrustworthy. First, it needs to be noted that judicial reform is a challenging but important part of EU policy; it is for the EU internally to establish the necessary mutual trust in the equivalence of the judiciaries of the member states. ISDS is arguably counter-productive to these reform efforts. Second, under the AUSFTA Model, countries like Romania and Bulgaria would still be free to offer broad and binding consent to investment arbitration in their domestic laws or in contracts backed up by the ICSID and New York Conventions. Even without such measures, most critics would probably find it unpersuasive that American investors should be allowed to avoid all European courts, including those of the majority of countries with excellent rule of law records, because of concerns with the legal system in a few member states in Eastern Europe. Finally, it is worth recalling that individual American (and European) investors are always free to purchase political risk insurance, which covers many of the same risks as an investment treaty.

Similarly, few would seriously argue that a few anecdotes from American judicial proceedings, for instance in Mississippi, are sufficient to make the case that American courts are biased against foreigners.<sup>21</sup> Commissioner De Gucht noted that the

basic justification for ISDS is when investors are faced with host states that do "not have a properly-functioning judicial system, where one can have doubts about the rule of law."<sup>22</sup> The United States clearly does not fit that description.

#### Domestic courts and the ISDS Patches Model

One concern against local litigation requirements is that it would allow international arbitrators to overrule highest national court decisions. This argument is unpersuasive. Moreover, the Commission's solution to include fork-in-the-road provisions that force investors to choose exclusively between national courts and international arbitration is potentially damaging. First of all, it is a common principle in Europe that domestic court decisions can be scrutinized by supra-national courts, such as the European Court of Justice and the European Court of Human Rights. So given all the other areas of sovereign activity that the Commission is comfortable to entrust to arbitration under TTIP and other investment agreements, it is not clear why domestic court decisions should not be. Moreover, domestic courts primarily will decide (first) on whether domestic law provides for a remedy; investors who question the solutions found by domestic courts can (then) request arbitrators to determine whether there is a violation of the protection standards under *international* law. Secondly, under most BITs, as well as under EU law and the ECHR, national court decisions themselves can qualify as state measures that may be considered to violate treaty obligations. Third, fork-in-the road provisions *force* investors to avoid domestic courts if they want to be able to use international arbitration to resolve disputes. This is again in direct contradiction to established legal principles in Europe, for instance in the ECHR, where supra-national courts are the last resort.

### CONCERN 2: PRECEDENTIAL VALUE FOR AGREEMENTS WITH DEVELOPING COUNTRIES

#### Precedence and the AUSFTA Model

One concern with the AUSFTA Model is that it might set an unfavourable precedent and prevent policy-makers from pursuing 'traditional' ISDS provisions in future negotiations with countries, where there is a lack of trust in domestic legal systems. Yet, even if we assume that ISDS is a valid governance instrument in those cases, which is beyond the scope of this brief to address, we would caution against taking this precedent-setting argument too far. China, for instance, is a staunch proponent of ISDS and recently agreed to include ISDS in its agreement with Australia, even though there was no ISDS provision in the US-Australia agreement. India is currently revisiting its investment treaty policy and has never been shy of blocking agreements that it considers to unduly infringe on India's sovereign rights. Brazil has never ratified

an investment treaty with ISDS and has no plans of doing so. Ultimately, the ‘TTIP as precedence’ argument may only hold for much smaller states, like Myanmar, and most would probably find this is an insufficient reason to have investment arbitration cover investor-state relations in most of the Western world.

### Precedence and the ISDS Patches Model

The main concern regarding precedence for the ISDS Patches Model regards the local litigation requirement. While this is an entirely reasonable requirement in Europe and the United States, it is less attractive in countries with less developed court systems. Again, we find the precedent-setting argument unpersuasive. Developed countries already negotiate different (or no) investment treaties among themselves. We are unpersuaded that a country like China, for instance, would find it controversial that countries with very high rule of law standards negotiate different agreements among themselves compared to treaties with other countries.<sup>23</sup>

Moreover, it is worth recalling that a positive case can be made for a local litigation requirement also in treaties with developing countries. This would incentivise foreign investors to lobby for more efficient and independent domestic courts, allow the necessary dialogue between administration and courts, and reduce the risk of investment arbitration ‘substituting’ for local court reforms. It is beyond this brief to assess this argument in detail, but it is often forgotten in current policy debates about the long-term implications of investment treaties.<sup>24</sup>

## CONCERN 3: EXCESSIVE INVOLVEMENT OF HOME STATES / PRIVATE ARBITRATORS

### Home states and the AUSFTA Model

Proponents of ISDS occasionally argue that state-to-state dispute resolution ‘politicize’ investment disputes by having investors rely on home states to file a claim. They therefore advocate ISDS on the ground that it is “apolitical”. This argument is often taken too far however. All investment disputes can be regarded as inherently political – whether resolved through investment arbitration, domestic courts, or inter-state discussions or adjudication. Moreover, there is no credible evidence that home state involvement does in fact decrease as a result of arbitration.<sup>25</sup>

Secondly, it is inherently difficult to see why TTIP should place companies that are ‘investors’ rather than ‘exporters’ on a different legal footing when running into disputes with host governments. If it is acceptable to rely on state-to-state adjudication for disputes involving ‘behind-the-border’ trade regulations, why would it be unacceptable when disputes involve investment regulations?

More generally, transatlantic diplomatic ties have remained strong for decades without an investment treaty in place: there is no evidence that they have been affected by somehow politicized transatlantic disputes. The existing differences in the context of the WTO confirm this view. Also, if a specific investment dispute were threatening to compromise broader political relations – which is exceedingly unlikely – the AUSFTA Model does not prevent the parties from consenting to arbitration with investors on an ad-hoc basis.

### Arbitrators and the ISDS Patches Model

While the AUSFTA Model may be poorly received by proponents of investment arbitration, critics of ISDS could argue our Patches Model does not go far enough in curtailing the power of private arbitrators. It does not even add to the (incomplete) steps taken by the Commission in CETA to avoid conflicts of interests among arbitrators.

This brief, however, merely addresses the situation in which policymakers decide to keep investment arbitration in TTIP. In that case, the combination of

- (i) an express ‘no greater rights’ clause,
- (ii) a meaningful local litigation requirement,
- (iii) a generalized state filters mechanism,
- (iv) binding state interpretations, and
- (v) an appellate body,

will not only lower the number of potential ISDS claims to those actually carrying merit. It will also increase the incentives for arbitrators to show greater judicial constraint compared to some of the more adventurous decisions made in the past. While this approach will not eliminate the use of arbitration from the system, it will bring ISDS in line with the public law standards developed in the EU over the last five decades.

## END NOTES:

- 1 European Parliament (Plenary), text adopted on 23 May 2013 in Procedure 2012/0163(COD), P7\_TAPROV(2013)0219, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2013-0219+0+DOC+XML+V0//EN> (amendment 3).
- 2 Political risk insurance covers many of the risks protected by investment treaties, such as uncompensated expropriation and contract breach. See generally; Lauge Poulsen, "The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence." In: Karl Sauvant (ed.), *Yearbook on International Investment Law & Policy* 2009/2010 (Oxford: Oxford University Press, 2010). On the use of insurance to mitigate against political risks, see generally Gerald West, "Political Risk Investment Insurance: A Renaissance," (1999) 5:2 *Journal of Project Finance*, 27/36.
- 3 See Daniel Ikenson, "A Compromise to Advance the Trade Agenda: Purge Negotiations of Investor-State Dispute Settlement," *CATO Institute Free Trade Bulletin* No. 57, March 4, 2014.
- 4 See Jan Kleinheisterkamp, "Financial Responsibility in the European International Investment Policy," (2014) 63:2 *International and Comparative Law Quarterly*, 449-476; Jan Kleinheisterkamp, "Investment Treaty Law and Fears for Sovereignty: Transnational Challenges and Solutions," (2015) 78(2) *Modern Law Review* (forthcoming).
- 5 Several design elements could be reconsidered:  
 On the consolidation of investment disputes through the possibility of treaty claims against investors see Gustavo Laborde, "The Case for Host State Claims in Investment Arbitration," (2010) 1:1 *Journal of International Dispute Settlement*, 1-26; and Andrea Bjorklund, "The Emerging Civilization of Investment Arbitration," (2013) 113:4 *Penn State Law Review*, 1269-1300.  
 For concerns with using arbitration to resolve investment treaty disputes see Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford: Oxford University Press, 2007); Simon Lester, "Liberalization or Litigation? Time to Rethink the International Investment Regime," *CATO Policy Analysis* No. 730, July 8, 2013.  
 For the different use of remedies in investment treaty law compared with most advanced legal systems see David Gaukrodger and Kathryn Gordon (2012), "Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community," *OECD Working Papers on International Investment*, 2012/03, OECD Publishing. <http://dx.doi.org/10.1787/5k46b1r85j6f-en>.  
 For the inconsistency of investment law with corporate law in the most advanced legal systems see David Gaukrodger (2013), "Investment treaties as corporate law: Shareholder claims and issues of consistency. A preliminary framework for policy analysis," *OECD working papers on International Investment*, No. 2013/3, OECD Investment Division, [www.oecd.org/investment/working-papers.htm](http://www.oecd.org/investment/working-papers.htm); see generally Michael Waibel, *Sovereign Defaults before International Courts and Tribunals* (Cambridge: Cambridge University Press, 2013).  
 For UNCTAD's work on sustainability concerns in the existing international investment regime, see [http://unctad.org/en/PublicationsLibrary/diaepcb2012d5\\_en.pdf](http://unctad.org/en/PublicationsLibrary/diaepcb2012d5_en.pdf).
- 6 See e.g. Nathalie Bernasconi-Osterwalder and Howard Mann, "A Response to the European Commission's December 2013 Document 'Investment Provisions in the EU-Canada Free Trade Agreement (CETA)'," *IISD Report, February 2014, International Institute for Sustainable Development*. A more useful formulation is offered in; Jonathan Bonnitcha, *Substantive Protection Under Investment Treaties* (Cambridge: Cambridge University Press, 2014), 343-344.
- 7 See, e.g., the decision of the Court of Justice of the EU in the *FIAMM* and *Fedon* case, Joined Cases C-120 & 121/06 P, [2008] ECR I-6513. The need to refer to the general principles common to the laws of the member states for determining state liability under EU law is explicitly enshrined in Article 340(2) TFEU.
- 8 See e.g., Ethan Shenkman, "Could principles of fifth amendment takings jurisprudence be helpful in analysing regulatory expropriation claims under international law?," (2002) 11 *NYU Environmental Law Journal*, 174-197. For a comparison of US domestic law and international investment law on contract breach, see; Lise Johnson and Oleksandr Volkov, "Investor-state contracts, host-state "commitments" and the myth of stability in international law," (2013) 24:3, *American Review of International Arbitration*, 361-415.
- 9 Santiago Montt, *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation* (Portland: Hart Publishing, 2009). See also, Stefan Schill, "Deference in Investment Treaty Arbitration: Re-conceptualizing the Standard of Review," (2012) 3:3 *Journal of International Dispute Settlement*, 577-607.
- 10 Letter by US Trade Representative Marantis to the Speaker of the House of Representatives of 20 March 2013, <http://www.ustr.gov/sites/default/files/O3202013%20TTIP%20Notification%20Letter.PDF>.
- 11 See Lauge Poulsen, Jonathan Bonnitcha, and Jason Yackee, "Costs and Benefits of an EU-USA Investment Protection Treaty," report to the British Department for Business, Innovation, and Skills, April 2013. [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/260380/bis-13-1284-costs-and-benefits-of-an-eu-usa-investment-protection-treaty.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/260380/bis-13-1284-costs-and-benefits-of-an-eu-usa-investment-protection-treaty.pdf).
- 12 An exception to this rule is the North American Free-Trade Agreement (NAFTA), but both the US and Canadian governments did not expect its investment chapter to apply to their own regulatory acts but primarily to Mexico. Another partial exception is the Energy Charter Treaty (ECT), but here again the investment protection chapter was primarily intended as a shield against political risks in the least developed parties (Eastern Europe and Russia). Note also that ECT was concluded as a mixed agreement including the European Union and its member states, yet without any possible intention to modify the existing rules for the internal EU energy market as amongst the then member states, which would have required a modification of the EU Treaties.
- 13 Text can be found at: [www.ustr.gov/trade-agreements/free-trade-agreements/australian-fta](http://www.ustr.gov/trade-agreements/free-trade-agreements/australian-fta).
- 14 For example, if a European investor in the United States were denied access to justice, as in the *Loewen* case, this would be undermine the common understanding about the equivalence of the court systems and the European Commission could take up this issue and even bring a state-to-state arbitration against the United States, both for a declaration of the violation of the substantive investment provisions and for damages of the European investor. On the often overlooked promises of state-to-state dispute settlement in international investment law, see; Anthea Roberts, "State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority," (2014) 55:1 *Harvard Journal of International Law*, 1-70.
- 15 Text can be found at: [www.ustr.gov/webfm\\_send/2624](http://www.ustr.gov/webfm_send/2624).
- 16 For a discussion, see Pieter Kuijper, Ingolf Pernice, Steffen Hindelang, Michael Schwarz, and Martin Reuling, "Investor-State Dispute Settlement (ISDS) Provisions in the EU's International Investment Agreements, Volume 2 – Studies," report for Directorate-General for External Policies of the European Union, September 2014. <http://www.jura.fu-berlin.de/fachbereich/einrichtungen/oeffentliches-recht/lehrende/hindelang/Studie-fuer-Europaeisches-Parlament/Hindelang.pdf?1411545510>.

- 17 Note that in the light of the recent US Supreme Court decision in *BG Group v Argentina*, it would be necessary to clearly formulate the local litigation requirement of 5 years as a genuine condition precedent for the EU's consent to arbitration under the investment agreement. In this case, the US Supreme Court defined the local litigation requirement in the US–Argentina BIT as a mere question of admissibility. This would therefore fall within the exclusive jurisdiction of the arbitral tribunal as a procedural question and thus outside the scope of judicial review of the tribunal's jurisdiction, thus potentially allowing arbitrators to dispense with local litigation requirements. For another adjustment of the local litigation requirement, see discussion in Kuijper et al. in supra note 21.
- 18 On the legality and practice of state interpretation of investment treaty obligations, see; Anthea Roberts, "Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States," (2010) 104 *American Journal of International Law*, 179–225.
- 19 This proposal is supported even by strong defenders of investment arbitration; see e.g. commissioned report to the Dutch government by Christian Tietje and Freya Baytens, "The Impact of Investor–State–Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership", 24 June 2014.
- 20 See contributions in; Karl Sauvant (ed.) *Appeals Mechanisms in International Investment Law* (Oxford: Oxford University Press, 2008).
- 21 See in more detail Jan Kleinheisterkamp, "Is there a Need for Investor–State Arbitration in the Transatlantic Trade and Investment Partnership (TTIP)?" (14 February 2014), <http://ssrn.com/abstract=2410188>.
- 22 <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20130522+ITEM-019+DOC+XML+V0//EN>.
- 23 In the specific case of China note also that Beijing already require investors to go through a domestic administrative review procedure before taking claims to arbitration. See; Norah Gallagher and Wenhua Shan, *Chinese Investment Treaties: Policies and Practise* (Oxford: Oxford University Press, 2009), ch. 8.
- 24 See; Tom Ginsburg, "International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance," (2005) 25:1 *International Review of Law and Economics* 107–123.
- 25 For a critical discussion, see Martins Paparinskis, "Limits of Depolitization in Contemporary Investor–State Arbitration," (2010) 3 *Select Proceedings of the European Society of International Law*.



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