Foreign Investment Policy in the Post-Lisbon Common Commercial Policy; An Institutionalist Perspective

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11 Foreign investment policy in the post-Lisbon Common Commercial Policy

An institutionalist perspective

Péter Márton and Szilárd Gáspár-Szilágyi[1]

11.1 Introduction

The inclusion of non-trade values, such as labor standards, human rights, and the protection of IP rights in EU free trade agreements (FTAs) is not a novel practice. Academics have long debated the extent to which such values amount to enforceable standards or represent mere "legal inflation."[2] However, the Treaty of Lisbon brought new changes to the EU's Common Commercial Policy (CCP), extending the EU's exclusive competences over "foreign direct investment." These three, seemingly insignificant words, have caused a lot of headache to the EU Member States and the EU institutions alike, resulting in a string of new cases of the Court of Justice of the EU (Court of Justice). In *Opinion 1/17* of 2019 the Court of Justice held that the Investment Court System (ICS) included in the EU–Canada trade agreement was compatible with EU law, while in *Slovakia v. Achmea* of 2018 the Court concluded that investor–state tribunals (ISTs) under intra-EU bilateral investment treaties (BITs) were precluded by Articles 344 and 267 of the TFEU. Furthermore, on May 16, 2017 in *Opinion 2/15*, the Court of Justice *partially clarified* a nearly decade-long period of institutional flux in the EU's CCP by ruling that investor–state dispute settlement mechanisms (ISDS) and non-direct foreign investment were under shared EU-Member State competences, thus incentivizing the Commission to drop ISDS from the EU's FTA model.

With the entry into force of the Treaty of Lisbon in 2009, the contracting parties seemed to cement the path-dependent process of power delegation from Member States to the Commission that had started in the CCP prior to the

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2 Henrik Horn, Petros C. Mavroidis, and André Sapir, *Beyond the WTO? An Anatomy of EU and US Preferential Trade Agreements*, 33(11) The World Economy 1565–1588 (2010); Lorand Bartels, *Human Rights Conditionality in the EU's International Agreements* (OUP, Oxford, 2005).

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creation of the World Trade Organization (WTO).[3] This was followed by such milestones as *Opinion 1/94* and the widening of the scope of the Commission's powers under former Article 133 TEC following the Amsterdam and Nice Treaty changes.[4] However, soon after the entry into force of the Lisbon Treaty, Member States began to "claw back" their competences over investment protection from the Commission, leading to an inter-institutional competence debate. This process coincided with the increasing public salience of the EU's "new-generation" trade agenda, aiming to conclude free trade and investment agreements (FTIAs). The sudden increase in public attention seemingly caught European elites[5] off guard, who struggled to justify their vision for trade in the face of growing public criticism.[6] As with other aspects of integration, the CCP seemed to dip into a post-Lisbon impasse: unable to give convincing answers to the public, and unable to deliver on one of the core functions of the CCP – concluding FTAs.

Yet, as the Transatlantic Trade and Investment Partnership (TTIP) was "put in the freezer" with the start of the Trump presidency and several modifications were made to the Comprehensive Economic Trade Agreement (CETA), TTIP's Canadian counterpart, the political uproar subsided. Furthermore, in lieu of a satisfactory compromise on questions of power delegation between the Commission and Member States, the Court of Justice began resolving the institutional crisis of the CCP with its landmark *Opinion 2/15*. This ruling, in turn, has solidified the powers of the Commission over the trade aspects of the new-generation FTIAs, while exiling – at least for now – the most contentious aspects of the Commission's post-Lisbon international economic agenda, namely investment protection, from the remit of trade agreements.

This chapter explores the anatomy of the CCP's post-Lisbon turmoil, focusing on foreign investment policy. Based on expectations drawn from a middle-ground new institutionalist toolkit we argue that recent institutional changes here betray a "bargain" – in the sense of relatively predictable courses of action taken by EU institutions in the face of disputes over degrees and modes of power delegation – between Member States and the Commission, facilitated by the Court of Justice. Through *Opinion 2/15* this bargain made good on Member States' preference to reverse or halt the process of investment power delegation to the Commission,

3 Early cases on the scope of Community competence in the CCP: Opinion 1/75, ECLI:EU:C:1975:145; Opinion 1/78 (*Natural Rubber*), ECLI:EU:C:1979:224.

4 Sieglinde Gstöhl and Dirk de Bièvre, *The Trade Policy of the European Union* 18–46 (Palgrave, London, 2018).

5 Heidi Grainger and Rachel Cutler, *The European City: A Space for Post-National Citizenship*, in *Europeanization: Institutions, Identities and Citizenship* 239–259, 245 (R. Harmsen and T. Wilson eds., Brill Rodopi, London, 2000) ("European elites" have often been conceptualized as an in-group of technocratic and political decision-makers, as well as business people from the various European institutions and industries in Brussels, who have "more in common with each other than with the more rooted, ethnically distinct members of their own particular civil society").

6 Finn Laursen and Christilla Roederer-Rynning, *Introduction: The New EU FTAs as Contentious Market Regulation*, 39(7) Journal of European Integration 763–779 (November 10, 2017), https://doi.org/10.1080/07036337.2017.137243(

while strengthening the Union's capacity to pursue FTAs – without investment protection. Subsequently, in *Achmea* the Court left the door open for the Union to pursue a more unified and Europeanized investment protection regime in the future, which seems to have now crystalized in the landmark *Opinion 1/17* and the Court's "acceptance" of the Commission's "brainchild," the Investment Court System.

The bargain in question is reflective of both the logics of *consequentiality* and *appropriateness*. The Court of Justice's ruling in *Opinion 2/15* allows Member States to address their electorates' concerns over ISDS while also satisfying their institutionalist preference to rein in the Commission by keeping ISDS under shared and not exclusive EU competence. Taking a broader view, it can also be noted that the bargain reinforces the process of Europeanization taking place since the creation of the WTO, creating the institutional framework for pursuing a more streamlined trade policy.

The remainder of the contribution is divided into four parts. First, we provide some historical context to the development of the CCP. Secondly, we underscore the origins of the inter-institutional disagreement over investment protection. Thirdly, we highlight how the TTIP and CETA agreements' contentiousness opened the door for Member States to set a political precedent, which pushed the Court of Justice to act as a *third-party arbiter* resulting in the bargain described above. Finally, we reflect on what these developments might mean for the future of the CCP.

The contribution draws on European Studies, Political Science, and European Law literature, supplemented by (N10) semi-structured elite interviews.[7]

11.2 The Common Commercial Policy: context and crises

11.2.1 More than just the external component of a customs union

The CCP is amongst the oldest common policy areas of integration. Thus, its institutional rules and the extent of its competences have morphed several times since the Treaty of Rome. In 1958, the creation of a customs union necessitated the creation of a toolkit and an institutional structure to impose and negotiate common external tariffs on goods.[8] The CCP mirrored the aspirations of the General Agreement on Tariffs and Trade (GATT) to promote free trade as an instrument for peace and prosperity, forwarding the EU's policy priorities "that extended

7 Interviews conducted between 2016 and 2018:
- 3 Commission Officials – Deputy Heads, or Heads of Units (European Commission 1–3)
- 3 Members of the European Parliament, permanent members of the International Trade Committee (Member of European Parliament 1–3)
- 2 Members of the Council's Trade Policy Committee (TPC Member 1–2)
- 1 Former Foreign Minister of a medium-sized EU Member State. In-person, 2018.05.08
- 1 Council Official (Council Official).

8 Sieglinde Gstöhl and Dirk de Bièvre, *The Trade Policy of the European Union* 18–46 (Palgrave, London, 2018).

beyond pure trade considerations."[9] In this sense, the CCP was both pragmatic, and normative in character.

With the accession of more Member States the palette of trade preferences also diversified. The CCP's initial institutional architecture remained unchanged from the 1960s to the 1980s while Europe's trade preferences varied. At different times, the EU swayed towards protectionist policies oftentimes mirroring American protectionism.[10] Yet, overall, the United States and Europe were at the forefront of efforts to make trade "freer".

As the focus of trade at the Uruguay Round shifted from tariff reductions towards services liberalization, regulatory cooperation, and the creation of the WTO, the institutional structure of the CCP needed an upgrade from its initial, limited focus. The institutional challenges facing the CCP coincided with a broader set of institutional challenges facing Integration at large. The push to complete the Single Market through the 1980s triggered a series of treaty changes, which aimed to make the EU more efficient and better equipped to deal with new challenges both internally and externally.

The CCP went through several incremental modifications to address the shifting focus of global trade, sparking substantial scholarly attention. The *principal-agent* model proved to be quite popular, as it allowed scholarship[11] to deduce which institutional actor "won" or "lost" a particular round of treaty modifications, measured in the amount of trade policy competences either delegated to the Commission, or retained by the Member States. The CCP was portrayed as a battleground where less protectionist and more protectionist Member States, as well as a power-hungry Commission struggled to find mutually acceptable outcomes. Understandably, the intergovernmentalist-supranationalist dichotomy has also been applied to these changes,[12] as have more constructivist approaches that have sought to identify the *sui generis* identity of the Commercial Policy or the bureaucratic identity of the Directorate General for Trade (DG Trade).[13]

9 Angelos Dimopoulos, *The Effects of the Lisbon Treaty on the Principles and Objectives of the Common Commercial Policy*, 15 *European Foreign Affairs Review* 153 (2010).

10 Alsdair Young and John Peterson, *Parochial Global Europe: 21st Century Trade Politics* 1–22 (OUP, Oxford, 2013)

11 Sophie Meunier and Kalypso Nicolaidis, *Who Speaks for Europe? The Delegation of Trade Authority in the EU*, 37(3) Journal of Common Market Studies 477–501 (1999); Kalypso Nicolaidis and Sophie Meunier, *Revisiting Trade Competence in the European Union: Amsterdam, Nice and Beyond*, in Institutional Challenges in the European Union 173–201 (Madeleine O. Hosli,, Mika Widgrén, and Adrian M.A. Van Deemen eds., Routledge, Oxford, 2002).

12 Manfred Elsig, *Revival: The EU's Common Commercial Policy* 25–46 (Routledge, Abingdon, Oxfordshire, 2002); Andrew Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* 18–85 (Cornell University Press, New York, 1998).

13 Gabriel Siles-Brügge, *Constructing European Union Trade Policy: A Global Idea of Europe* (MacMillan, Palgrave, 2014); Jarle Trondal, *On Bureaucratic Centre Formation in Government Institutions: Lessons from the European Commission*, 78(3) International Review of Administrative Sciences 425–446 (2012).

Successive rounds of treaty modifications between the Maastricht and Lisbon Treaties eventually ended up delegating a substantially increased amount of power to the Commission. With the entry into force of the Lisbon Treaty, the Commission became competent to negotiate comprehensive trade agreements encompassing almost all WTO areas. Furthermore, following Lisbon the European Parliament (EP) became a co-principal of the Commission. Seeing how the Parliament had been all but excluded from the CCP up until that point, this change prompted research into the role that norms of democratic transparency and accountability played in this paradigm shift as well as into the way the EP used its newfound powers in practice.[14]

Some of the new changes, however, became contested. The "battle of ideas"[15] between Member States and the Commission continued, primarily in relation to the empowerment of the Commission and particularly in the area of investment policy. While the Commission had for some time included general investment facilitation clauses in its FTAs, it had now gained competences over foreign direct investment (FDI). This meant the possibility of negotiating free trade agreements that included broad investment chapters. According to Meunier, Member States were not prepared to Europeanize these competences, yet were blindsided by the Commission's agency during the European Convention, realizing the extent of the sovereignty transfers only after the Lisbon Treaty took effect.[16]

In parallel to the unfolding institutional conflict, trade policy also became more publicly contested. Fortunately, research into the nature and causes of the increasing public salience of trade has grown, ever since the Seattle Riots in 1999 showcased just how contentious the WTO and its agenda could become. Since then, it seems clear that "free trade" – better characterized as *rules-based trade* – is often blamed for many of the perceived woes of globalization. Scholarship has identified a number of specific issues that are at the heart of Europeans' distrust towards the "new world" of trade, such as: the fear of different regulatory approaches,[17] distrust towards attempts to standardize practices

14 Guri Rosén, *The Impact of Norms on Political Decision-Making: How to Account for the European Parliament's Empowerment in EU External Trade Policy*, 24(10) Journal of European Public Policy 1450–1470 (2016); Péter Márton, *Revisiting the European Convention: The Origins of the EP Veto over International Commercial Treaties*, 19(4) European Politics and Society 396–415 (2018); Sophie Meunier, *Integration by Stealth: How the European Union Gained Competence over Foreign Direct Investment*, 55(3) Journal of Common Market Studies 593–610 (2017).

15 Sophie Meunier and Kalypso Nicolaidis, *Who Speaks for Europe? The Delegation of Trade Authority in the EU*, 37(3) Journal of Common Market Studies 497 (1999).

16 Sophie Meunier, *Integration by Stealth: How the European Union Gained Competence over Foreign Direct Investment*, 55(3) Journal of Common Market Studies 593–610 (2017).

17 Joseph Murphy, Les Levidow, and Susan Carr, *Regulatory Standards for Environmental Risks: Understanding the US-European Union Conflict over Genetically Modified Crops*, 36(1) Social Studies of Science 133–160 (2006).

for the protection of intellectual property rights,[18] and the idea of providing extra-domestic judicial remedies to foreign investors.[19]

Taken together, the institutional conflicts over investment competences and the increasing political salience of trade meant that further institutional changes would be unavoidable following the Lisbon Treaty.

11.2.2 Institutional change

At the heart of the literature studying the CCP, we find embedded one of the basic insights of new institutionalism(s):[20] actors taking part in institutional changes often have diverse and complex motivations for their actions. Gaining prominence in the 1990s and early 2000s, the *new institutionalist turn* in social sciences led to the systematic study of the role of institutions in political life, where institutions are understood to be "shared concepts used by humans in repetitive situations organized by rules, norms and strategies."[21] Rational choice, sociological and historical institutionalist lenses all provided valuable insight to understand the motivations of institutional actors in complex situations. From gaining detailed insights into how actors respond to asymmetric information,[22] to how norms can constrain pure rationality,[23] or just how sticky path-dependent trajectories can be, it is safe to say that "we are all institutionalists now."[24]

Yet, this is not to say that these insights have become trivial. Whereas much of this literature has developed in a competitive fashion, with the different "brands" of new institutionalism(s) vying for analytic superiority – oftentimes being stuck in the swamps of epistemological and ontological debates – a growing strand of literature has recognized the importance of *using* these lenses in conjunction with each other in the pursuit of empirical findings.[25] This paradigm shift is in large part based on the recognition that the new institutionalism(s) were not meant to

18 Duncan Matthews, Petra Žikovská, *The Rise and Fall of the Anti-Counterfeiting Trade Agreement (ACTA): Lessons for the European Union*, 44(6) International Review of Intellectual Property and Competition Law 626–655 (2013).

19 Barnali Choudhury, *Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit*, 41(3) Vanderbilt Journal of Transnational Law 775–832 (2008).

20 James March, Johan Olsen, *Elaborating the New Institutionalisms*, in *The Oxford Handbook of Political Institutions* 800 (R.A.W. Rhodes ed., OUP, Oxford, 2008).

21 Elinor Ostrom, *Institutional Rational Choice: An Assessment of the Institutional Analysis and Development Framework*, in *Theories of the Policy Process* 23 (P.A. Sabatier ed., Westview Press, Oxford, 2007).

22 Adrienne Héritier, *Explaining Institutional Change in Europe* (OUP, Oxford, 2007).

23 Berthold Rittberger, *Institutionalizing Representative Democracy in the European Union: The Case of the European Parliament: Institutionalizing Representative Democracy in the European Union*, 50 Journal of Common Market Studies 18–37 (2012).

24 Paul Pierson and Theda Skocpol, *Historical Institutionalism in Contemporary Political Science*, 3 Political Science: The State of the Discipline 706 (2002).

25 M.D. Aspinwall and G. Schneider, *Same Menu, Separate Tables: The Institutionalist Turn in Political Science and the Study of European Integration*, 38 European Journal of Political Researc*h* 1–36 (2000).

be standalone theories, but heuristic devices that enable the identification of patterns of action in repetitive situations that, if based in a thorough understanding of context, can be used with some predictive value.

Context is important to determine which aspects of new institutionalism hold analytical validity and which do not. In the case of the CCP, we should consider two things. The general context of *how* institutional change occurs in the EU, and more specifically how change has unfolded *in the* CCP throughout its existence. Given the limited scope of this paper, we avoid the debate on the compatibility of what we consider analytical lenses. This has been covered elsewhere in detail.[26] Instead, we base our analysis of recent developments in the CCP on several well-grounded new institutionalist expectations drawn from EU literature.

- (*Rational Choice* expectation) The CCP has been and continues to be at its core a functionalist policy area that Member States continue to value for its ability to deliver quantifiable, Pareto-improving benefits – the *logic of consequentiality.*
- (*Rational Choice* expectation) Questions of institutional power distribution necessarily play a role in institutional changes, both "formal" and "informal" – where formal changes are understood as treaty changes, and informal ones are understood as changes to how rules are applied or interpreted in practice. Institutional actors will aim to maximize their powers.
- (*Sociological institutionalist* expectation) Norms matter! Consequentialist bargaining does not take place in a void. Rather, bargaining is constrained by public sentiment when consequentialist action and norms collide – the *logic of appropriateness*.
- (*Rational Choice* expectation) The Court of Justice will play a fundamental role as a "third party" arbiter of inter-institutional conflicts on power delegation if bargaining does not lead to a satisfying outcome.

Armed with these expectations, we now undertake a review of the recent political and institutional changes in the CCP, with a specific focus on the role of investment protection and ISDS.

11.3 Institutional impasse and foreign investment

11.3.1 The origins of FDI in the treaties: rational choice or obfuscation?

One of the most important changes brought by the Lisbon Treaty for the CCP was the extension of the EU's exclusive competence over three, seemingly harmless words: "foreign direct investment" (FDI).[27]

26 James March, Johan Olsen, *Elaborating the New Institutionalisms*, in *The Oxford Handbook of Political Institutions* 800 (R.A.W. Rhodes ed., OUP, Oxford, 2008).

27 Furthermore, trade in services and the commercial aspects of intellectual property were transferred from former Article 133(5) TEC to Article 207(1) TFEU, and from shared to exclusive EU com-

Prior to the Lisbon Treaty, ex-Article 133 EC Treaty defined the extent of the CCP, without mentioning FDI.[28] The story of how these words made their way into Article 207 TFEU is one of obfuscation and skillful agency. Meunier argues that this competence shift, which ran counter to the preferences of the Member States, occurred by *stealth* "as a result of Commission entrepreneurship and historical serendipity," instead of intergovernmental bargaining and pressure groups.[29]

The Commission's attempts to include the protection of foreign investment on the negotiating agendas for the Maastricht, Amsterdam, and Nice Treaties ended in failure. Yet, the European Convention on the Future of Europe opened a window of opportunity for the Commission to include FDI in the text of the Constitutional Treaty (Article III 315) with the help of the Secretariat of the Praesidium of the Convention, obfuscating these changes past national delegates.[30]

Whilst the Constitution did not materialize, in the ensuing political fervor to adopt some new treaty modification, the inclusion of FDI once again "slipped through the cracks." According to a former member of the influential Amato Group,[31] in the process of repackaging the failed Constitution as the Lisbon Treaty, the Group:

> Did not consider modifying the actual substance of the agreement (…) We probably didn't notice investment. Even though we should have, since it is such an outlier. Investment is clearly a domestic economic instrument. So, it makes no sense to include it based on the argument that it has to do with trade.[32]

The significance of this change is hard to overstate, given that the EU Member States combined account for almost half of all concluded international investment agreements (IIAs) in the world. Member States soon realized that they might have handed over more competences that they had wished.

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petence. See Gonzalo Villalta Puig and Bader Al-Haddab, *The Common Commercial Policy after Lisbon: An Analysis of the Reforms*, 36(2) European Law Review 292 (2011); Philip Strik, *Shaping the Single European Market in the Field of Foreign Direct Investment* 72–73 (Hart, Oxford, 2014).

28 Prior to Lisbon a number of EU external agreements contained investment related provisions that were meant to complement Member State BITs. However, these agreements concerned investment liberalization and market access, not the treatment of investors/investments in the post-establishment phase and ISDS. The outlier is the Energy Charter Treaty. See Philip Strik, *Shaping the Single European Market in the Field of Foreign Direct Investment* 67–73, 90–100 (Hart, Oxford, 2014).

29 Sophie Meunier, *Integration by Stealth: How the European Union Gained Competence over Foreign Direct Investment*, 55(3) Journal of Common Market Studies 594 (2017).

30 *Id.* 601–603.

31 This group led by Giuliano Amato, former Vice-President of the Constitutional Convention consisted of some of the most prominent European political elites of the day. The Group took it upon itself to "reboot" the failed Constitutional Treaty. Their proposal laid the foundation of the Lisbon Treaty.

32 Interview with "Minister."

11.3.2 Member States want to continue concluding their own BITs

Writing shortly after the Lisbon amendments, Puig and Al-Haddab argued that the inclusion of FDI within the scope of the CCP restructures the division of powers between the EU and the Member States and "simplifies a once complex set of rules and contributes significantly to the development of a common foreign investment policy."[33] In hindsight, one could argue that the inclusion of FDI is indeed contributing to the ongoing development of a common foreign investment policy. However, in no way is this development simple.

Soon after the transfer of competences over FDI, Member States realized that they would no longer be able to act in this area.[34] Furthermore, a multitude of issues remained unsolved, which lead to heated debates regarding the scope of the new competences, engaging the EU institutions, national ministries, academia,[35] and with the appearance of TTIP and CETA also civil society. Did the EU's new competences extend to non-foreign direct investment or only foreign direct investment? Would the Member States also have to conclude the new FTIAs? Could Member States keep in force almost 200 Bilateral Investment Treaties (BITs) concluded between each other? Moreover, what would happen to existing Member State BITs with third countries and could the Member States continue concluding such new BITs?

Concerning the latter issue, the rational choice expectation that Member States would value the continued functionalist nature of the CCP – by allowing the EU Commission to take full control over the fate of existing and future Member State BITs with third countries – did not materialize. Instead, following the new power redistribution Member States focused on making the best of their remaining powers over investment protection, while the Commission aimed to consolidate its new position.

The pushback of Member States materialized during the conclusion of Regulation 1219/2012 (the "Grandfathering Regulation"), meant to set up transitional arrangements for BITs with third countries.[36] The Commission's original proposal was met by the Council's resistance, as the continued existence of Member State BITs was conditioned upon the Commission's authorization. However, Member States did not view the transfer of their FDI competences to the EU as a complete transfer of all their BIT competences, especially "not with

33 Gonzalo Villalta Puig and Bader Al-Haddab, *The Common Commercial Policy after Lisbon: An Analysis of the Reforms*, 36(2) European Law Review 294 (2011).

34 *Id.* 293–294.

35 Catharine Titi, *International Investment Law and the European Union: Towards a New Generation of International Investment Agreements*, 26(3) European Journal of International Law 641 (2015).

36 Friedrich Erlbacher, *Recent Case Law on External Competences of the European Union: How Member States Can Embrace Their Own Treaty* (Asser Institute, CLEER Papers, 2017/2); Philip Strik, *Shaping the Single European Market in the Field of Foreign Direct Investment* 167–185 (Hart, Oxford, 2014).

regard to their existing pre-Lisbon BITs."[37] The pushback is understandable seeing how rather "than pooling sovereignty in this field" from the early years of integration, Member States opted to protect their investments abroad through a web of separately concluded BITs with third countries.[38]

The final version of the Regulation maintains the status quo for *existing* Member State BITs with third countries, "catering for their continued existence,"[39] making it clear that Member States were not ready to transfer all investment competences to the supranational level. Even if FDI now falls under the EU's exclusive competence, which means that in *principle* only the EU can conclude an international agreement covering FDI, Article 2(1) TFEU allows Member States to legislate also in an area of exclusive EU competence, "if so empowered by the Union." The Grandfathering Regulation does exactly this. On the one hand, it "grandfathers" the Member States' pre-Lisbon powers over BITs with third countries into the post-Lisbon period, by allowing them to maintain in force BITs signed before the Lisbon Treaty (numbering close to 1200), until a subsequent bilateral agreement between the EU and the third state enters into force.[40] On the other hand, Member States can continue concluding *new* BITs in the post-Lisbon era as well, provided the conditions in Articles 9(1) and (2) of the Regulation are met. In practice, the default rule is that the Commission *cannot* refuse the authorization of Member States to negotiate the amendment of an existing BIT or the conclusion of a new BIT, even if this means that the Member State competences would overlap with the exclusive EU competences.

The Regulation embodies the Member States' desire to continue concluding international agreements that cover FDI, outside the supranational framework set forth in Article 218 TFEU. Thus, instead of the Commission negotiating an agreement on behalf of the EU by way of a negotiating mandate with the end result being approved by the Council and the EP, the Regulation circumvents this process. It almost completely removes the supranational institutions and allows individual Member States to decide whether to conclude new BITs. This fits into the rational choice expectation that institutional actors will aim to maximize their powers, or more correctly said, they will aim to claw back previously lost powers.

37 Nikos Lavranos, *In Defence of Member States' BITs Gold Standard: The Regulation 1219/2012 Establishing a Transitional Regime for Existing Extra-EU BITs – A Member States' Perspective*, 10(2) Transnational Dispute Management 6 (2013).

38 Philip Strik, *Shaping the Single European Market in the Field of Foreign Direct Investment* 9 (Hart, Oxford, 2014).

39 *Id.* 167.

40 Freya Baetens, Gerard Kreijen, and Andrea Varga, *Determining International Responsibility Under the New Extra-EU Investment Agreements: What Foreign Investors in the EU Should Know*, 47(5) Vanderbilt Journal of Transnational Law 1203–1260 (2014).

11.3.3 What about intra-EU BITs?

The Grandfathering Regulation only concerns the existence and conclusion of Member State BITs with third countries and not that of BITs concluded between EU Member States (intra-EU BITs). After Lisbon, it became apparent that once again the Commission and a *part* of the Member States found themselves on opposite sides, both trying to maximize their powers. However, unlike in the case of the Grandfathering Regulation, not all Member States were against the Commission's position on intra-EU BITs. The mostly capital-exporting states, which initiated the conclusion of intra-EU BITs and whose investors have used the ISDS mechanisms under these agreements, were in favor of keeping them in force. Conversely, mostly those Member States that have faced investor-state arbitration were against the continued existence of these agreements.[41]

Historically, most intra-EU BITs were concluded in the 1990s between the then EU Member States and candidate Central and Eastern European countries, prior to the latter's accession. Following the subsequent enlargements, the Commission argued that these agreements had largely become superfluous and incompatible with EU law, prompting it to launch infringement proceedings against several Member States to terminate their intra–EU BITs.[42]

As expected, the debate over the relationship between intra-EU BITs and EU law found its way before the Court of Justice. In the *Slovakia v. Achmea* case the German Federal Court of Justice referred a preliminary question to the Court on whether the investor-state arbitration mechanism found in the Netherlands–Slovakia BIT was compatible with EU law. Whilst the Court of Justice sided with the Commission and held that arbitration "such as" the one under the NL-SK BIT was *incompatible* with EU law, the Advocate General,[43] several Member States, the referring German courts,[44] and the investor-state tribunal[45] that handled the original dispute between the Dutch investor and Slovakia, all argued that this was not the case. The Court's judgment will be assessed in Section 11.5.2. For now, it is important to point out the different sides some of the Member States and the Commission took.

41 Opinion AG Wathelet in Case 2-284/16, *Slovak Republic v Achmea* BV, ECLI:EU:C:2017:699, para. 34. 16 Member States submitted oral observations, divided into two groups. Those against incompatibility: Germany, France, the Netherlands, Austria, and Finland. Those in favor of incompatibility: the Czech Republic, Estonia, Greece, Spain, Italy, Cyprus, Latvia, Hungary, Poland, Romania, and Slovakia.

42 European Commission, *Commission Asks Member States to Terminate Their Intra-EU Bilateral Investment Treaties* (2015a), http://europa.eu/rapid/press-release_IP-15-5198_en.htm (last visited November 20, 2018); Joel Dahlquist, Hannes Lenk, and Love Rönnelid, *The Infringement Proceedings Over Intra-EU Investment Treaties – An Analysis of the Case Against Sweden*, 4 Swedish Institute for European Policy Studies 1–12 (2016).

43 Opinion AG Wathelet in Case 2-284/16, *Slovak Republic v Achmea* BV, ECLI:EU:C:2017:699, para. 34.

44 OLG Frankfurt am Main, decision of 10 May 2012, case 26 SchH 11/10, 10291; Bundesgerichtshof, decision of 3 March 2016, case I ZB 2/15, paras. 30–39.

45 PCA, Award on Jurisdiction, *Achmea v. Slovakia*, UNCITRAL, Case No. 2008-13, para. 276.

Even if Advocate General Whatelet opined that the said ISDS mechanism is compatible with EU law,[46] he was highly critical of the actions of the Member States and the Commission concerning intra-EU BITs. According to him, none of the Member States that have argued for the incompatibility between intra-EU BITs and EU law (except for Italy) have made any efforts to terminate their intra-EU BITs. Moreover, Slovakia admitted that it wanted to keep its own intra-EU BITs in force, since they benefited its own investors.[47] The AG was also critical of the Commission's arguments that these agreements were incompatible with EU law, since it originally argued that "far from being incompatible with EU law, BITs were instruments necessary to prepare for the accession to the Union of the countries of Central and Eastern Europe."[48]

In conclusion, this episode showcases the efforts of the Commission to maximize its powers over every aspect of foreign investment policy – including the power to compel Member States to terminate intra-EU BITs – and the desire of some Member States to retain their lost powers. However, the latter were not a unified group and their positions were influenced by their fears to relinquish their sovereignty over investment protection[49] as well as their own shifting interests over ISDS.

11.4 The increasing public contestation of investment

11.4.1 The road to contestation and reform: TTIP and CETA

Beyond the tug of war over BITs, CETA and TTIP became the symbols of public concerns over the politicization of the CCP in general and the politicization of European investment competences in particular. On the one hand, both agreements embraced the new trading agenda, seeking regulatory cooperation beyond tariff reductions. On the other hand, the agreements were representative of a global trend in investment policy to include ISDS mechanisms in agreements between developed economies, despite the warning in 2015[50] that the economic benefits

46 Andrea Carta, Laurens Ankersmit, *AG Whatelet in C-284/16 Achmea: Saving ISDS?* (European Law Blog, 2018), http://europeanlawblog.eu/2018/01/08/ag-wathelet-in-c-28416-achmea-saving-isds/ (last visited November 20, 2018).

47 Opinion AG Wathelet in Case 2-284/16, *Slovak Republic v Achmea* BV, ECLI:EU:C:2017:699, paras. 34–39

48 Opinion AG Wathelet in Case 2-284/16, *Slovak Republic v Achmea* BV, ECLI:EU:C:2017:699, para. 40. For a more critical view see Philip Strik, *Shaping the Single European Market in the Field of Foreign Direct Investment* (Hart, Oxford, 2014).

49 Sophie Meunier, *Integration by Stealth: How the European Union Gained Competence over Foreign Direct Investment*, 55(3) Journal of Common Market Studies 599 (2017).

50 Lauge Poulsen, Jonathan Bonnitcha, and Jason Yackee, *Transatlantic Investment Treaty Protection, in Rule-Makers or Rule-Takers? Exploring the Translantic Trade and Investment Partnership* 139–187 (Daniel S. Hamilton, Jacques Pelkmans eds., Rowman & Littlefield International, Washington DC, 2015).

of including ISDS in CETA and TTIP would likely be negligible and possibly politically harmful.

Investment treaty arbitration (ITA), as a mechanism to settle disputes between foreign investors and host states (ISDS), began proliferating in IIAs, as a means to protect the investment flows from developed economies into countries with precarious legal systems.[51] Today, ISDS can be found in virtually all BITs as well as a high number of preferential trade agreements.[52] The North American Free Trade Agreement (NAFTA) had also set a precedent,[53] as it allowed for the effective use of ISDS between developed economies, opening the possibility of investors pursuing extra-domestic legal remedies *vis-à-vis* stable democracies. This became one of the reasons why ISDS became so contentious in the European context. As TTIP and CETA gained publicity, opponents of the deals pointed out the opaque nature that arbitration often took, its effects on the right to regulate in the public interest, and the disproportionate advantage that large multinational corporations often had *vis-à-vis* small- and medium-sized economies.[54]

The Commission was eager to put into use its new post-Lisbon competences and aimed to include ISDS in both CETA and TTIP. Whilst Member States had initially supported these ambitions – being responsible for setting the Commission's negotiating mandate – as public contestation of ISDS flared, the Commission's ambitions gradually lost Member States' support.

The negotiations of CETA were concluded in 2014. Yet by this time, European capitals started witnessing the first large-scale protests against CETA and TTIP, which for all practical intents and purposes became intertwined in the public eye.[55] With the help of the highly effective organization and coordination efforts of German anti-TTIP and anti-CETA NGOs, protests gradually spread throughout Europe.[56] The message was clear: do not include ISDS in CETA and TTIP!

To address this surge of public contestation, in 2014 the Commission launched a public consultation on ISDS in TTIP garnering the largest number of responses to any public consultation. However, 98% of the responses were sent via anti-TTIP and CETA websites, allowing activists to submit precomposed negative responses. Member States stayed mostly silent about their preferences at this

51 Taylor St John, *The Rise of Investor-State Arbitration* (OUP, Oxford, 2018).

52 Szilárd Gáspár-Szilágyi and Maksim Usynin, *The Rising Trend of Including Investment Chapters into PTAs*, 48 Netherlands Yearbook of International Law 267–304 (2018).

53 Filippo Fontanelli and Giuseppe Bianco, *Converging towards NAFTA: An Analysis of FTA Investment Chapters in the European Union and the United States*, 50 Stanford Journal of International Law 211–246 (2014).

54 Elvrie Fabry and Giorgio Garbasso, *"ISDS" In the TTIP The Devil is in the Details* 122 (Policy Paper, Notre Europe, 2016), http://www.institutdelors.eu/wp-content/uploads/2018/01/ttipisds-fabrygarbasso-nejdi-jan15.pdf?pdf=ok (last visited November 20, 2018).

55 Kurt Hübner and Anne-Sophie Deman, Tugce Balik, *EU and Trade Policy-making: The Contentious Case of CETA*, 39(7) Journal of European Integration 843–857 (2017).

56 Matthias Bauer, *Manufacturing Discontent: The Rise to Power of Anti-TTIP Groups* (Occasional Paper, European Center for International Political Economy, 2016), http://ecipe.org/app/uploads/2016/11/Manufacturing-Discontent.pdf (last visited November 20, 2018).

point, while the Commission focused its limited public engagement resources on organized public forums to try to counter falsehoods and exaggerations made by NGOs in Germany and Austria. The arbitral claim brought by Philip Morris against the Australian Government was often brought up as a cautionary example of how ISDS could effectively hamper a government's ability to protect its citizens from public health risks, all because of lost corporate profits.

The Commission made it clear that it had heard the criticisms. Over the course of 2015–16 it started working closely with the EP to address the main concerns over ISDS.[57] Conversely, Member States continued to show little interest in engaging with the debate head on. It is quite telling that in the case of Germany – the most fervently contested national arena– government officials neglected to show up for public forums organized by the Commission engagements.[58]

In mid-2015, the Commission proposed what was branded as a more transparent and accountable model for investor–state arbitration: the Investment Court System (ICS). It included an appellate mechanism and explicit guarantees for states to regulate in the public interest.[59] The changes were proposed just as the parties were preparing to sign the CETA agreement, following its "legal scrubbing." In what was seen as an act of Canadian generosity, the ICS was accepted as a substitute to the more traditional ISDS, even though negotiations had already ended, and the text had been finalized. The Commission implied that it would push for ICS in TTIP as well. Yet, the public contestation of the agreements persisted with the "StopTTIP/CETA" civil society campaign mobilizing tens of thousands of people in protests across EU capitals, explicitly problematizing the ICS proposal as "the Zombie of ISDS".[60] Anti-trade NGOs clearly saw the efforts on behalf of the EP and the Commission as not going far enough to address their concerns.

The EP's and the Commission's intent to quell the public contestation of these agreements betrays a preference for a strongly Europeanized trade and investment policy, following the path set by the Lisbon Treaty; one where public concerns are resolved at the EU level. However, as will be discussed, Member States used what was perceived to be the *failure* of the Commission and the EP's proposed modifications as a window of opportunity to further question the post-Lisbon conferral of investment competences to the EU, as well as to address what were increasingly seen as legitimate public concerns. In this sense, the debate over ISDS became the focal point of the inter-institutional conflict between the Commission and Member States over investment competences, with politicization tipping the

57 Commission Official 2, 2016.

58 Commission Official 1, 2017.

59 European Commission, *Commission Proposes new Investment Court System for TTIP and other EU Trade and Investment Negotiations* (Press Release, 2015b), http://europa.eu/rapid/press-release_IP-15-5651_en.htm (last visited November 20, 2018).

60 Pia Eberhardt, *The Zombie ISDS Rebranded as ICS, Rights for Corporations to Sue States Refuse to Die* (Corporate Europe Observatory, 2016), https://corporateeurope.org/sites/default/files/attachments/the_zombie_isds _0.pdf (last visited November 20, 2018).

scale in favor of the Member States' ambition to reassert national ownership over investment. Yet, the Court's role as a *third-party arbiter* would nonetheless be crucial to strike a bargain.

11.4.2 How to conclude FTIAs?

Member States began questioning the viability of a supranational solution, signaling their dissatisfaction with the proposed ICS fix and publicly questioning the legitimacy of the delegation of investment competences to the EU. Whilst in the EP the center-left Socialist group had been a key player in hashing out the ICS compromise,[61] in Germany the Social Democratic coalition partners of Angela Merkel reiterated previous concerns voiced by NGOs in relation to the very concept of arbitration.[62] Furthermore, the French government signaled its preference for involving national parliaments in the ratification process.[63] Within the Council's Trade Policy Committee (TPC) – a standing Council formation where most major CCP decisions are prepared – there was an increasing feeling that national parliaments would need to be involved in the ratification of CETA to boost its legitimacy and give credence to these public concerns.[64]

The more vocal expression of Member States' preferences came at a crucial time, acting as a political signal to the Court of Justice, which at the time had to rule on the demarcation of competences within the post-Lisbon CCP. Even though the Treaty of Lisbon had made foreign direct investment an exclusive EU competence, it had not made it clear whether non-direct foreign investment formed a part of the EU's newfound exclusive competences. To resolve this legal uncertainty, the Commission had requested an Opinion from the Court of Justice to clarify whether the EU had the requisite competences to conclude the EU–Singapore FTA (EUSFTA) alone, without the Member States.

At the time when Member States were considering how best to ratify CETA amidst the political turmoil, the Court had not yet settled the EUSFTA dispute. Given the preference of Member States for national parliamentary involvement, the Council pressured the Commission to submit CETA for signature as a *mixed* agreement – requiring the approval of 38 national and regional parliaments. The Commission saw this move as the Council sending a strong signal to the Court about the preference of Member States as to what should be considered mixed and

61 Member of European Parliament 1, 2.

62 EU Observer, *EU-Canada Pact Faces German Opposition Over Investor Clauses* (2014), https://euobserver.com/news/125764 (last visited November 20, 2018); Doru Peter Frantescu, *TTIP Under Pressure; What are the Forecasts* (Votewatch, 2016), http://www.votewatch.eu/blog/ttip-under-pressure-what-are-the-forecasts/ (last visited November 20, 2018).

63 Euractiv, *France Seeks Guarantees for National Sovereignty in Adoption of TTIP* (2016), https://www.euractiv.com/section/trade-society/news/france-seeks-guarantees-for-national-sovereignty-in-adoption-of-ttip/ (last visited November 20, 2018).

64 TPC Member 1, 2016.

what not.[65] As Carrubba et al. note, the Court is usually not oblivious to politically sensitive subject matter.[66] Talking to members of the TPC the locus of this message seems clear:

> Politically, it's also rather evident that there (…) was so much public intention and debate, and so many questions of transparency, questions of accountability in the process… [that there was a] greater need, let's say, for parliamentary debate, also at the national level. [If] we have the national parliaments on board, (…) there's very deep and overall democratic scrutiny.[67]

Others from the TPC confirm that the shift from tacitly condoning the Commission's and the EP's efforts to deal with the sustained public contestation to actively questioning them came about following the public response to the ICS.[68]

These preferences were made even more explicit during the run-up to the signature of the final CETA agreement. The Walloon Regional Parliament, whose signature was required for the Belgian Government to be able to *sign* the agreement, effectively held CETA hostage. They did so pending additional assurances against the perceived perils of ISDS in the form of a statement made by Belgium (subsequently 37 other such statements were made on behalf of the Union's members and an interpretative instrument on behalf of the EU). Furthermore, on their insistence, the Belgian federal government had to request an Opinion from the Court of Justice (*Opinion 1/17*, Sec. 5.3) on whether the ICS model included in CETA is compatible with EU law.[69]

Following the "Wallonia incident," CETA was eventually signed in late 2016. It was now up to the Court to make sense of this chaotic episode and tensions over investment competences in *Opinion 2/15* and to sort out the relationship between the ICS and intra-EU ISDS in *Opinion 1/17* and in *Achmea*.

11.5 The Court of Justice steps in

When bargaining between the Commission and the Member States does not result in a satisfying outcome, it is expected that the Court of Justice will play a fundamental role as a 'third party arbiter'[70] in inter-institutional conflicts. The last two

65 Commission Official 3, 2017.

66 Clifford Carrubba, Matthew Gabel, and Charles Hankla, *Judicial Behaviour under Political Constraints: Evidence from the European Court of Justice*, 103(4) American Political Science Review 435–452 (2008).

67 TPC Member 1, 2016.

68 TPC Member 2, 2016

69 Request for an opinion submitted by the Kingdom of Belgium pursuant to Article 218(11) TFEU (Opinion 1/17).

70 Here our understanding follows that of Sweet, 1999, and that of Héritier, 2007. This conceptualization sees the Court of Justice as a forum for inter-institutional dispute resolution where the European institutions have different and conflicting interpretations of how formal rules should be applied. See Alec Stone Sweet, *Judicialization and the Construction of Governance*, 31 Com-

years have seen the Court taking up this role over three important post-Lisbon issues: Who concludes the new-generation EU free trade agreements that include investment protection and ISDS? What will be the faith of intra-EU BITs? What will be the faith of the Investment Court System?

11.5.1 The Court mediates: Member States are still needed for ISDS and non-FDI

Opinion 2/15 had very important implications, and once again the Commission's and the Member States' preferences for the outcome of the opinion were at odds with each other.[71]

The outcome of the Opinion is bittersweet, depending on whose perspective one takes. For those hoping for an end to mixed agreements concluded under the CCP, several center-left and center-right parliamentarians, and the Commission,[72] the Opinion did not fulfill their wishes. Both the AG and the Court of Justice held that for the conclusion of the EUSFTA, Member States had to be included. Nonetheless, the Court's decision seems to have struck a more conciliatory note in an effort to unblock the stagnation of the CCP caused by the tumultuous post-Lisbon period.

> [The Opinion] follows the trend after Lisbon (…) The Court probably thinks that there is no real possibility of having Treaty Change any time soon. As such, this opinion is meant to be authoritative. (…) [The Court] provided clarity.[73]

The Court facilitated the separation of the investment-related chapters of the agreement from the trade-related parts. In practice, this already resulted in the splitting of the EUSFTA into a separate trade agreement (to be concluded by the EU alone) and an investment agreement (to be concluded as a mixed agreement).[74] According to the Court, all the traditional trade-related areas – market access for goods, trade remedies, barriers to trade, customs, and tariffs – fell under *exclusive* EU competence. To this, the Court also added services (including all five means of transport services), public procurement, intellectual property, sustainable development, and competition, as well as those parts of the EUSFTA's chapters on dispute settlement between the parties and transparency that do not relate to areas of shared competence. This means that the EU can conclude a far-reaching trade agreement alone, without the involvement of the Member States.

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parative Political Studies 147–184 (1999); Adrienne Héritier, *Explaining Institutional Change in Europe* (OUP, Oxford, 2007).

71 Council Official, 2017.

72 Member of European Parliament 3, 2017; Commission Official 3, 2017.

73 Commission Official 3, 2017.

74 European Commission, *EU-Singapore Trade and Investment Agreements* (2018), http://trade.ec.europa.eu/doclib/press/index.cfm?id=961 (last visited November 20, 2018).

Nevertheless, even if FDI fell under exclusive EU competence, the Court concluded that non-direct foreign investment and ISDS still fall under shared competence. According to the Court, such a dispute settlement mechanism (ISDS) "cannot […] be established without the Member States' consent,"[75] suggesting that Member States would also need to conclude a trade agreement, if parts of it fall under shared competences.[76] In practice, this would mean the approval of 38 national and regional parliaments, besides the Article 218 TFEU procedure.[77]

The Opinion reflects the Court's efforts to undo the deadlock in which the CCP found itself. It helped the Commission and the Member States to strike a bargain. On the one hand, the Court granted the Commission the possibility to negotiate very far-reaching trade agreements that can be concluded by the EU alone. Thus, the EU's trade policy can be pursued in a more efficient manner. On the other hand, the Commission was not granted its wish to have EU-only investment agreements. The Court considered the Member States' preference to take part in the conclusion of agreements that include ISDS and non-FDI. However, this also means that, unlike the EU's trade policy, its investment policy is not yet a settled field, where the Court sidelined the need for efficiency in favor of Member State involvement.

11.5.2 The Court protects its own powers in Achmea

In *Achmea* the Court had to once again reconcile Commission and Member State differences, this time over the fate of intra-EU BITs.

Contrary to the arguments of the Advocate General, the referring German Courts, investor–state tribunals, and part of the Member States, the Court concluded that investor–state tribunals (ISTs), such as the one in the Netherlands–Slovakia BIT, were incompatible with EU law. Using its approach consolidated in *Opinion 2/13* on the EU's accession to the European Convention on Human Rights, the Court focused on the autonomy of the EU legal order, a cornerstone of which is Article 344 TFEU, followed by the importance to respect the principles of mutual trust and sincere cooperation. The Court concluded that Articles 267 and 344 TFEU precluded ISTs, such as the one under the Netherlands–Slovakia BIT,

75 Opinion 2/15 (EU-Singapore FTA), ECLI:EU:C:2017:376, para. 292.

76 Council Official 3, 2017.

77 Some authors thus wondered, whether this meant the end of "facultative mixity," in the sense that the EU legislator has no discretion, no political choice over "whether to conclude an international agreement as an EU-only or a mixed agreement when parts of it fall under *shared* competences." See Laurens Ankersmit, *Opinion 2/15 and the Future of Mixity and ISDS*, (European Law Blog, 2017), http://europeanlawblog.eu/2017/05/18/opinion-215-and-the-future-of-mixity-and-isds/ (last visited November 20, 2018). In C-600/14, *Germany v Council (OTIF)*, ECLI:EU:C:2017:935 the Court of Justice decided to clarify the situation over facultative mixity. For a commentary, see Hannes Lenk, Szilárd Gáspár-Szilágyi, *Case C-600/14, Germany v Council. More Clarity over "Facultative Mixity"?*, (European Law Blog, 2017), http://europeanlawblog.eu/2017/12/11/case-c-60014-germany-v-council-otif-more-clarity-over-facultative-mixity/ (last visited November 20, 2018).

since they could apply and interpret EU law and they were situated outside the EU judicial system. Thus, there was no control mechanism that would ensure that "questions of EU law which the tribunal may have to address can be submitted to the Court."[78]

Commentators have highlighted both the EU law and the international law implications of the ruling, such as the new limits set to Article 344 TFEU, the effects on ongoing investor–state arbitration pursuant to intra-EU BITs, or the effects of the ruling on the Investment Court System (ICS) and the proposed Multilateral Investment Court (MIC).[79] One can also assess the ruling considering the expectations put forward by this chapter. On the face of it, it does not seem that the Court helped the Member States and the Commission reach a bargain over the fate of intra-EU BITs, because only the Commission got what it wanted: a Court ruling acknowledging that intra-EU BITs are incompatible with EU law. However, some nuances are warranted.

Firstly, unlike *Opinion 2/15*, *Achmea* had far-reaching implications for not only the effectiveness and uniformity of EU law, but also for the powers of the Court to have the final say over the application and interpretation of EU law. From a rational choice perspective, the Court did nothing more than consolidate its own powers over the interpretation and application of EU law. It so happened that the interests of the Commission and the Court largely coincided.

Secondly, one could argue that in *Achmea* the Court does not strike a bargain comparable to the one in *Opinion 2/15*, because the Member States did not have a unified voice.[80] Instead, capital-exporting Member States argued in favor of

78 Case 2-284/16, *Slovak Republic v Achmea* BV, ECLI:EU:C:2018:158, para. 50. Szilárd Gáspár-Szilágyi, *It is Not Just About Investor-State Arbitration. A Look at Case-284/16, Achmea BV*, 3(1) European Papers 357–373 (2018).

79 Harm Schepel, *From Conflicts-Rules to Field Preemption: Achmea and the Relationship Between EU Law and International Investment Law and Arbitration*, (European Law Blog, 2018), https://europeanlawblog.eu/2018/03/23/from-conflicts-rules-to-field-preemption-achmea-and-the-relationship-between-eu-law-and-international-investment-law-and-arbitration/ (last visited November 20, 2018); Christina Eckes, *Don't Lead with Your Chin! If Member States Continue with the Ratification of CETA, they Violate European Union Law* (European Law Blog, 2018), https://europeanlawblog.eu/2018/03/13/dont-lead-with-your-chin-if-member-states-continue-with-the-ratification-of-ceta-they-violate-european-union-law/ (last visited November 20, 2018); Pekka Niemelä, *Achmea – A Perspective from International (Investment) Law*, (European Law Blog, 2018), https://europeanlawblog.eu/2018/03/15/achmea-a-perspective-from-international-investment-law/ (last visited November 20, 2018); Nikos Lavranos, *Black Tuesday: The End of Intra-EU BITs* (Arbitration Blog, 2018), http://arbitrationblog.practicallaw.com/black-tuesday-the-end-of-intra-eu-bits/ (last visited November 20, 2018); Szilárd Gáspár-Szilágyi, *It is Not Just About Investor-State Arbitration. A Look at Case-284/16, Achmea BV*, 3(1) *European Papers* 357–373 (2018); Nicolas De Sadeleer, *The End of the Game: The Autonomy of the EU Legal Order Opposes Arbitral Tribunals under Bilateral Investment Treaties Concluded between Two Member States*, 9(2) European Journal of Risk Regulation 355–371 (2018).

80 Nicolas De Sadeleer, *The End of the Game: The Autonomy of the EU Legal Order Opposes Arbitral Tribunals under Bilateral Investment Treaties Concluded between Two Member States*, 9(2) European Journal of Risk Regulation 6 (2018).

the compatibility of intra-EU BITs with EU law, while Member States that were respondents in intra-EU investor-state cases were in favor of incompatibility.

Thirdly, one could still view *Achmea* as a mild bargain. On a closer look, the Court only found an incompatibility between the provisions on ISTs, such as the one in the Netherlands–Slovakia BIT, and EU law. On the one hand, this can mean that only ISTs under intra-EU BITs might be affected. On the other hand, one can also argue that ISTs under Member State BITs with third countries are also potentially incompatible with EU law.

In conclusion, the Court's ruling in the long run might not be that favorable for either the Commission or the Member States, as ISDS mechanisms found in Member State BITs with third countries could be potentially incompatible with EU law. Such an outcome would not be that surprising if one accepts that the Court is also an institution that wishes to maximize its own powers over disputes that involve EU investors and EU law.

11.5.3 The Court sides with the Commission in Opinion 1/17

Since we began writing this chapter, the Court continued its quest to stabilize the CCP and the EU's investment policy within it. In the recent *Opinion 1/17*, Belgium asked the Court whether the ICS under CETA was compatible with EU law and fundamental rights. The Court, quite surprisingly, if one looks at the string of cases in which it held that numerous outside-EU dispute settlement mechanisms were incompatible with EU law, held that the ICS was compatible with the autonomy of EU law, with the principle of equal treatment, and the right of access to an independent tribunal. Whilst one may question whether the Court's conclusions adequately followed the stringent conditions of prior cases, it is highly probable that it had also considered the broader implications of the Opinion on the EU's investment law and policy, the effects of the ICS on its own powers, and the interests of the Commission and the Member States.[81]

Firstly, starting with the latter, unlike in *Opinion 2/15* there was no major disgruntlement between the Member States on the one side and the Commission on the other. Whilst the ICS is a creation of the Commission, the 16 intervening Member States overwhelmingly supported the creation of the ICS, apart from Belgium on the insistences of Wallonia. Thus, in this case the Court was not faced with striking a "bargain" between the Commission and the Member States, as they were more or less "on the same side."

Secondly, from the perspective of the ICS affecting the Court's powers to interpret and apply EU law, one could argue that the Court considered the strength and prestige of the future ICS. Unlike the regional European Court of Human Rights (*Opinion 2/13*), which handles cases from 47 countries and is the most reputable regional human rights court, the ICS is less "threatening": it is a bilateral court,

81 Szilárd Gáspár-Szilágyi, *Between Fiction and Reality. The External Autonomy of EU Law as a "Shapeshifter" after Opinion 1/17*, 6(1) European Papers 675–692 (2021),).

which can only decide on issues of compensation. Thus, one might argue that the ICS, negotiated by the Commission, was less threatening than the ECHR or intra-EU ISDS, over which the Commission had no real power.

Thirdly, the Court most certainly knew that the consequences of a negative opinion would have been disastrous not only for the conclusion of CETA, but overall for the EU's investment policy. Thus, the success of the post-Lisbon policy area hinged on the success of the ICS.

In conclusion, taking into consideration the mostly similar views of the Commission and the Member States, and the less threatening nature of the ICS on its own powers, one can see *Opinion 1/17* as a case in which the Court focused on the overall survival of the EU's investment policy, thus pleasing both the Commission and most of the Member States.

11.6 Conclusions

The CCP has undergone significant institutional change since the entry into force of the Lisbon Treaty owing to the Court of Justice's intervention in the unfolding inter-institutional conflict between the Commission and Member States. As a result of *Opinion 2/15*, the Commission can now pursue deep and comprehensive trade agreements, the scope of which go beyond what was envisioned at Lisbon. On the flipside, Member States have been successful at clawing back the most contentious investment competences from the Union's purview.

This outcome is reflective of both *rational choice* and *sociological institutionalist* dynamics. On the one hand, the outcome is consequentialist insofar as it reaffirms the tendency of empowering the Commission – while being mindful of Member States' red lines. On the other hand, it is appropriate insofar as it provides a response to the public contestation of investment competences. In other words, the bargain satisfies the innate functionalist logic of the CCP as well as the need for political expediency at a time of waning public trust in European trade policy.

The resulting situation allows European elites to continue to pursue more free trade without having to deal with the politically toxic issue of ISDS. This has made it more difficult for anti-free trade NGOs to problematize FTAs, as illustrated by the EU–Japan trade agreement which, lacking ISDS or the ICS, has received little public attention despite NGOs' attempts at politicization.

In *Achmea* the bargain facilitated by the Court of Justice is less visible. On the face of it, the Court of Justice has sided with the Commission to the detriment of several Member States. On a more careful analysis, however, the Commission seems to have won a Pyrrhic victory. The ultimate beneficiary of *Achmea* might be the Court itself, having further consolidated its own powers over the interpretation and application of EU law, sidelining intra-EU investor–State arbitral tribunals.

Unlike in *Opinion 2/15*, in *Opinion 1/17* the Court was not faced with a real split between the Commission and the Member States. Thus, there was no need to act as an arbiter to secure a "bargain." Instead, the Court focused on the overall

survival of the EU's investment policy, pleasing both the Commission and most of the Member States.

Perhaps one of the most interesting takeaways from these events is that despite the changing scope of European Integration, with more public attention being paid to EU politics, the Court had a pivotal role in preserving some of the core functions of what is still a fundamentally economic union.

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