Tagungsbericht

4. The Impact of the TTIP on Europe's Investment Arbitration Architecture

Dr. *Roland Kläger*[30] analysierte im vierten Vortrag die rechtliche Einordnung des TTIP im europäischen Kontext. Artikel 207 AEUV verleihe der EU die Kompetenz bezüglich ausländischer Direktinvestitionen, jedoch sei die Reichweite dieser Kompetenz umstritten: insbesondere, ob sie nur für den Marktzugang gelte, ob sie Portfolio-Investitionen ausschließe oder ob sie Enteignungsaspekte nur teilweise berücksichtige, da die EU-Mitgliedstaaten möglicherweise weiterhin über die ausschließliche Zuständigkeit für Rechte des geistigen Eigentums verfügten. Die neuen Regelungen würden damit anders als die der bereits bestehenden bilateralen Investitionsabkommen zwischen EU-Mitgliedstaaten und den USA[31] klingen, würden sie aber nach Artikel 3 der sogenannten *„grandfathering"*-Richtlinie[32] im Zeitpunkt der Ratifizierung ersetzen. Bezüglich der Ermöglichung von Schiedsverfahren zwischen Investoren und Staaten sei die effektive Durchsetzbarkeit von Investitionsschutzansprüchen zwar ein ausdrückliches Ziel der EU – verkündet im Grundsatzpapier von 2010[33] –, doch versuche die EU-Kommission auch den gesellschaftlichen Interessen an Legitimität und Transparenz nachzugehen. Eine weitere Frage sei, wer Beklagter in einem möglichen Schiedsverfahren sein sollte – die EU-Kommission oder der Mitgliedstaat selbst. Dazu sei in 2012 ein Regelungsvorschlag zur Verteilung von finanziellen Verantwortlichkeiten unterbreitet worden[34], allerdings dauerten die Verhandlungen an. Es werde über die Möglichkeit diskutiert, konkret vor dem Beginn jedes Verfahrens zu überprüfen, wer als Beklagter in Frage komme. Eine solche Vorgehensweise würde das ganze Verfahren jedoch verzögern. Unklar bleibe auch der Ablauf bei Anträgen auf einstweiligen Rechtsschutz sowie die Frage, gegen wen als Schuldner vollstreckt werden könne – gegen die EU oder gegen die einzelnen Mitgliedstaaten, vor allem im Hinblick darauf, dass die EU weder Mitglied des NYÜ noch der *International Center for Settlement of Investment Disputes*- Konvention sei. Dr. *Kläger* beendete seinen Vortrag mit den Worten, dass die Ungewissheiten bezüglich des TTIP nicht nur auf gesellschaftliche Kritik zurückzuführen seien, sondern auch mit den unterschiedlichen Herangehensweisen der EU-Institutionen und Mitgliedstaaten verbunden seien.

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31 Bulgarien; Estonien; Kroatien; Latvien; Litauen; Polen, Rumänien; die Slovakei; Tschechische Republik.
32 Verordnung Nr. 1219/2012 des Europäischen Parlaments und Rates vom 12.12.2012 zur Einführung einer Übergangsregelung für bilaterale Investitionsabkommen zwischen Mitgliedstaaten und Drittländern, OJ L 351/40, 20.12.2012.
33 Dokument KOM (2010) 343 endgültig.
34 Dokument KOM (2012) 335 endgültig.

Dr. *Roland Kläger**

The Impact of the TTIP on Europe's Investment Arbitration Architecture

The Transatlantic Trade and Investment Partnership (TTIP) is a mega-project between the US and EU as the two largest economic players in the world. The volume of trade and investments covered by TTIP will be enormous, as in 2012 alone foreign direct investment (FDI) amounting to net USD 250 billion flowed either from the US to the EU or *vice versa*.[1] The sheer size of the investments covered already suggests that the TTIP's impact will be huge and that it will influence transatlantic and international standards.[2] Possibly due to the TTIP's prominence, the start of negotiations between the US and the EU has sparked sharp criticism relating, in particular, to the planned inclusion of a chapter on investment protection providing for the possibility of investor-state arbitration. Numerous press articles draw a dramatic picture of the envisaged investment protection rules and point to the erosion of policy space due to investor-state arbitration.[3]

However, the public debate often overlooks that international investment protection and investor-state arbitration have been integral parts of the foreign economic policies of the US and many European states for long. This article therefore aims at exploring how different the TTIP is from the current system of investment arbitration in Europe. This is, of course, a speculative exercise because the negotiations are ongoing and because not all information is publicly available. However, due to the ongoing public debate about the topic and the EU Commission's attempt to make the negotiations more transparent, a number of documents have become available adumbrating possible contours of the TTIP's future investment chapter. On that basis, this article will discuss the likely impact of the TTIP on the traditional investment arbitration architecture in Germany and Europe, and will critically review some of the open questions arising from the new approach.

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1 See *Cooper*, EU-U.S. Economic Ties: Framework, Scope and Magnitude, Congressional Research Service Report RL20609 (21 February 2014), available at: www.fas.org/sgp/crs/row/RL30608.pdf (last accessed on 7 April 2014).
2 On the TTIP impact on the rest of the world, see e.g. *EU Commission*, Transatlantic Trade and Investment Partnership: The Economic Analysis Explained (September 2013), p. 10 et seq., available at: trade.ec.europa.eu/doclib/docs/2013/september/tradoc_151787.pdf#world (last accessed on 7 April 2014).
3 See e.g. "Paralleljustiz am Pranger: Schiedsverfahren sind Knackpunkt in Handelsgesprächen", FAZ (4 March 2014); "Durch die Hintertür", Der Spiegel (8/2014).

I. The Old World of BITs

The Old World of investment protection was characterized by highly specialized bilateral investment treaties (BITs), which were traditionally concluded between a developed state as capital exporter and a developing state as capital importer. These treaties focused exclusively on the promotion and protection of foreign investment without establishing any express linkages to trade topics or other aspects relevant for the regulation of foreign investments. The advent of bilateral treaties focussing on foreign investments only is explained by historic

ideological conflicts on the protection of foreign property and the failure of multilateral efforts for the establishment of an international legal framework in this regard.[4]

To protect its investments abroad and to foster the economic relations with other countries, Germany invented the traditional model of a bilateral investment treaty when it concluded the first BIT with Pakistan in 1959. The initial BITs followed the example of treaties on friendship, commerce and navigation (FCN treaties) that were used by the US since the 19th century. Germany is still the country with the highest number of BITs in place, and it has concluded BITs with 131 other countries being currently in force.[5] At a global level, around 3000 BITs exist, whereby EU Member States account for 1400 of these BITs.

Initially, the aim of BITs was to promote foreign investment in mostly developing countries by providing legal guarantees and legal protection to investors going abroad. This should serve as an international back up for the sometimes weak institutional or legal framework existing in the host country. To this end, German Model BITs and the BITs of many other countries usually provide for a concise list of legal guarantees formulated in very general terms with no or few exceptions, and covering investments in a broad sense.[6] Such guarantees include, for example, fair and equitable treatment, full protection and security, non-discrimination, full compensation in case of expropriation, and the free transfer of funds. In addition, in order to make the investors independent of the cumbersome means of diplomatic protection, BITs usually contain a dispute settlement clause enabling investors to initiate arbitration proceedings in case of a violation of any of these guarantees.

II. The EU as a new player: a question of competence

With the start of the negotiations on the TTIP, the traditional system of BITs is changing. The negotiations by the EU and the planned inclusion of chapters on the protection of foreign investments into free trade agreements are clear signs of the departure into a New World of international investment protection. This is because the TTIP is in essence a free trade agreement which incorporates an investment chapter. Of course, the conclusion of integrative free trade agreements is not an entirely new trend, as such agreements are concluded in increasing numbers in many regions of the world. The North American Free Trade Agreement (NAFTA) was the front-runner for this new type of agreement which has now also reached Europe.

Moreover, the TTIP is negotiated not by an individual state but by the EU as a new player in the field. Even though the EU has been active in international trade law for long, it is a late starter in international investment law. This is because the EU has acquired a competence for foreign investments only in 2009 with the entry into force of the Treaty of Lisbon. However, the scope of the EU's new competence is highly controversial and it is questioned whether it covers the investment rules envisaged in the TTIP. According to the EU negotiation mandate,[7] the TTIP shall contain, in principle, all the aspects of a traditional BIT and include guarantees and dispute settlement clauses similar to those usually contained international investment agreements.

The new EU competence is laid down in Articles 206 and 207 of the Treaty on the Functioning of the European Union (TFEU). These provisions stipulate that the Common Commercial Policy of the EU shall also aim at the abolition of restrictions on "foreign direct investments" and establishes an EU competence for the conclusion of trade agreements relating *inter alia* to the commercial aspects of "foreign direct investments". Insofar, Article 207 (1) and (4) TFEU state the following:

> *"1. The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.*
>
> *4. […] For the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property, as well as foreign direct investment, the Council shall act unanimously where such agreements include provisions for which unanimity is required for the adoption of internal rules."*

The wording of this Article and the embedding into the EU Common Commercial Policy have triggered a vivid debate about the scope of the competence and whether it allows the EU to conclude international investment agreements.[8] In this debate, one argument is that the EU competence would only relate to aspects of market access of foreign investment. This would be insufficient for the EU to conclude international investment agreements, as the guarantees contained therein primarily aim at the protection of the investment after it is established in a host country. Another argument expressed, for example, by the German Constitutional Court places emphasis on the express wording of Article 207 TFEU that is limited to "foreign direct investments".[9] Accordingly, the EU competence would exclude other types of investments such as portfolio investments even though BITs usually cover investments in a comprehensive sense.[10] Further, it is doubted that the EU competence covers expropriation aspects as European primary law provides in Article 345 TFEU that the Member States' rules concerning property ownership shall not be affected by the European Treaties.

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4 See *Vandevelde*, A Brief History of International Investment Agreements, U.C. Davis Journal of International Law and Policy 12 (2005), 157 (at 161 et seq.).

5 For a list of all German BITs, see: http://www.bmwi.de/BMWi/Redaktion/PDF/B/bilaterale-investitionsfoerderungs-und-schutzvertraege-IFV,property=pdf,bereich=bmwi,sprache=de,rwb=true.pdf (last accessed on 7 April 2014).

6 See e.g. *Füracker*, Relevance and Structure of Bilateral Investment Treaties – The German Approach, SchiedsVZ 2006, 236 (at 240 et seq.).

7 See *EU Commission*, Text of EU Draft Mandate, COM (2013) 136 final (12 March 2013).

8 For further references on this discussion, see the articles in Bungenberg/Griebel/Hindelang (eds), Internationaler Investitionsschutz und Europarecht (2010); Bungenberg/Herrmann (eds), Common Commercial Policy After Lisbon, European Yearbook of International Economic Law (2013), Part V; see also *Angelos Dimopoulos*, EU Foreign Investment Law (2011), p. 65 et seq.

9 See German Constitutional Court, 2 BvE 2/08 (30 June 2009), para. 379.

10 For instance, Article 1 (1) of the 2008 German Model BIT provides: "*the term 'investments' comprises every kind of asset which is directly or indirectly invested by investors of one Contracting State in the territory of the other Contracting State*".

The practical consequence of this debate concerns the question of whether the TTIP remains within the exclusive competence of the EU or whether it is a mixed agreement that also needs to be ratified by the Member States. Unsurprisingly, the EU Commission takes a broad view and asserts the existence of an exclusive EU competence for all matters relating to foreign investment. By recourse to Articles 3 (2) and 63 TFEU, the EU Commission also claims the existence of an exclusive competence for portfolio investments as the rules envisaged in the TTIP may affect the common rules on the free movement of capital between Member States and third countries.[11] The Council and some Members States are more restrictive and favour the approach of mixed agreements.[12] Which view ultimately prevails remains an open question that, most likely, will have to be answered by the European Court of Justice at some point in time. For the time being, the political influence of the Member States is secured through the requirement of an unanimous Council decision for the conclusion of agreements in the field of foreign investments as foreseen in Article 207 (4) TFEU.

III. The effect of the TTIP on existing BITs between EU Member States and the US

Another aspect concerns the question of what happens with already existing BITs concluded between the US and a number of EU Member States. Based on the original idea of BITs to protect foreign investments in mainly developing countries, many founding members of the OECD have not concluded investment agreements between each other. Accordingly, Germany and other Western European countries have no BITs in place with the US. Nevertheless, BITs exist between the US and nine Eastern European countries that have entered into these treaties before their accession to the EU.[13] The fate of BITs between Member States and third countries (extra EU-BITs) has been uncertain since the entry into force of the Treaty of Lisbon.

Since December 2012, the effect of the new EU competence and the conclusion of new investment agreements by the EU on existing extra EU-BITs is determined by the so-called grandfathering regulation.[14] This regulation provides in its Articles 3 that BITs between Member States and third countries remain in force "*until a bilateral investment agreement between the Union and the same third country enters into force*." Apart from that, the regulation stipulates in Article 5 the right of the EU Commission to evaluate whether BITs of Member States constitute a serious obstacle to the negotiation or conclusion of investment agreements by the EU. According to Article 6, the Member States are under a duty to cooperate and to take the appropriate measures to remove such obstacles. The EU Commission may also request the Member State to take certain measures in case any such obstacle is identified.

This means, in principle, that there is no gap in the protection of investments already covered by investment agreements, but that the TTIP will replace existing BITs with the US as soon as it enters into force. Moreover, it is not apparent that any serious obstacles exist in relation to the negotiations concerning the TTIP. Nevertheless, it makes a difference for an investor whether the investment is still protected by the old BIT or whether, and from what exact point in time, the TTIP applies. This is because the guarantees and the dispute settlement mechanism foreseen in the TTIP deviate materially from the provisions of the old BITs. In case of a looming investment dispute, it will therefore be necessary for an investor to scrutinize closely the final text of the TTIP and to evaluate whether it appears beneficial to bring an investment claim still under an old BIT.

IV. Substantive guarantees for foreign investors

A matter at the heart of the current public debate about investment protection in the TTIP is the shape and scope of the substantive guarantees for foreign investors. In this context, critical voices predict a flood of investment claims based on the presumed violation of such guarantees by state measures even though the measures pursue legitimate public interests, such as the protection of the environment, health, labour rights etc. Reference is frequently made to the ongoing arbitrations in the *Vattenfall* case arising out of the phase out of nuclear power plants by Germany,[15] or the *Philip Morris* cases in which plain packaging or anti-smoking legislations enacted by Australia and Uruguay are challenged.[16] As these examples show, such claims are possible under traditional BITs, but it is, of course, an entirely different question whether the investment claims prove to be successful and, if so, on what grounds. In contrast to these examples, the body of arbitral case law rather shows that tribunals pay increasing attention to the public policy implications of investor-state disputes. Statistics demonstrate that from the overall number of concluded cases 43 per cent were decided in favour of the host state, 26 per cent were settled, and only 31 per cent of cases were (at least partially) decided in favour of the foreign investor.[17] Moreover, considering the huge amount of BITs existing worldwide and the innumerable investors and investments protected by these agreements, the total number of 568 known investment disputes until the end of 2013[18] appears not to support fears of a flood of investment claims under the TTIP.

Nevertheless, the EU Commission has come under increasing pressure, and has currently stopped the negotiations on the investment chapter in order to consult the European public on the appropriate scope of the provisions concerning investment protection.[19] In this consultation phase that has been opened on 27 March 2014 for a period of three months, the EU Commission has compiled an online questionnaire allowing everybody to comment on the EU's plans for the investment chapter.[20] However, this consultation is not only an unprecedented move of the EU Commission to make the negotiations of an investment agreement transparent, it is also a sign that the EU Com-

11 See *EU Commission*, Towards a Comprehensive European International Investment Policy, COM(2010) 343 final, p. 8.
12 See *Reinisch*, The EU on the Investment Path – Quo Vadis Europe? The Future of EU BITs and Other Investment Agreements, Santa Clara Journal of International Law 12 (2014), 111 (at 136).
13 BITs exist between the US and Bulgaria; Croatia; Czech Republic; Estonia; Latvia; Lithuania; Poland; Romania; and Slovakia.
14 Regulation (EU) establishing Transitional Arrangements for Bilateral Investment Agreements between Member States and Third Countries, No. 1219/2012, O.J. L 351/40 (20 December 2012).
15 *Vattenfall AB and others v. Germany*, ICSID Case No. ARB/12/12.
16 *Philip Morris Asia Limited v. Australia*, UNCITRAL, PCA Case No. 12-12; *Philip Morris Brands Sarl and others v. Uruguay*, ICSID Case No. ARB/10/7.
17 *UNCTAD*, Recent Developments in Investor-State Dispute Settlement (ISDS), IIA Issues Note, No. 1/2014, p. 10.
18 *UNCTAD*, ibid, p. 1.
19 *EU Commission*, press release IP/14/56 (21 January 2014).
20 The questionnaire may be accessed via the website of the EU Commission DG Trade: http://trade.ec.europa.eu/consultations/index.cfm?consul_id=179 (last accessed on 7 April 2014).

mission attempts to limit the scope of investment protection guarantees by increasingly emphasizing the right to regulate of states. This trend is also expressed in official EU documents. For instance, the EU Commission's negotiation mandate initially aimed at the "*highest standards of protection that both Parties have negotiated to date*",[21] whereas the EU Commission's fact sheet of November 2013 highlighted that the system of investment arbitration needs improvements "*to finding a better balance between the right of states to regulate and the need to protect investors*".[22]

The materials provided with the online questionnaire set out the EU's objective and approach to the substantive elements of the future TTIP investment chapter.[23] In this regard, the EU Commission plans to have a rather narrow scope of the investment protection provisions by limiting the definitions of the terms "investment" and "investor" to such investments made in accordance with the applicable law and to investors having substantial business activities in the host state. The national treatment and most-favoured nation treatment (MFN) standards of the TTIP are intended to include public policy exceptions, for instance, for the protection of health, the environment and consumers, and to carve out certain sectors. The EU Commission also seeks to clarify the language of the MFN clause to avoid the importation of procedural or substantive provisions of other investment agreements.

With regard to the most controversial guarantees of fair and equitable treatment and protection against indirect expropriation, the EU Commission intends to clarify in detailed terms the meaning and the elements of these guarantees in order to avoid expansive or unpredictable interpretations by arbitral tribunals. For instance, the elements to be included under fair and equitable treatment are: denial of justice, due process, manifest arbitrariness, targeted discrimination, and abusive treatment. Thereby, the EU Commission considers the legitimate expectations of the investor to be relevant only where specific representations have been made, upon which the investor relied. As further safeguards, the EU Commission plans to incorporate a mechanism allowing the contracting states to issue binding notes on how to interpret the investment protection provisions of the TTIP, as well as to include the right to regulate as a basic underlying principle into the treaty text.

This approach shows the clear intention of the EU to restrict the scope of investment protection under the TTIP, to raise the liability threshold for foreign investors and to limit the exposure to investment claims. This is certainly legitimate with regard to certain subject matters or sectors which the EU and the US do not want to be covered by the TTIP. Another question is whether textual clarifications or interpretations guidelines of fair and equitable treatment and other provisions are useful or needed to tame arbitral tribunals. This is to be doubted as arbitral case law is continuously concretizing the contours of investment guarantees and as the textual clarifications mainly retrace these developments. On the other hand, the EU fails to encourage arbitral tribunals to further explore the concept of proportionality, which would help to increase the persuasiveness of arbitral decisions.[24] It therefore remains to be seen whether and how the exact formulation of the treaty clauses will influence the application of such guarantees by arbitral tribunals in a particular case. Clearly, however, the EU Commission's approach deviates considerably from the highest standards of investment protection negotiated so far by EU Member States such as Germany, which has traditionally used very concise and general provisions.[25] The EU approach is more similar to the American or NAFTA model having very detailed treaty clauses.

V. Dispute settlement mechanism

The dispute settlement mechanism to be included in the TTIP is equally controversial. In the past, the EU Commission emphasized in a 2010 policy paper that effective enforceability of investment provisions by means of investor-state dispute settlement is a key objective of the EU in negotiating investment agreements.[26] As is common practice in international investment agreements, the EU thus plans to incorporate a clause providing investors the right to initiate arbitral proceedings into the TTIP allowing investors to claim for compensation in case of a violation of an investment protection guarantee. This notwithstanding, the EU institutions mistrust investor-state arbitration, which is perceived as a possible threat to the supremacy of EU law. Accordingly, the EU Commission's fact sheet and the public consultation material contain a number of proposals to try to improve the dispute settlement mechanism.[27]

First, to accommodate concerns about the secrecy of investment arbitration, the EU Commission plans to make the arbitration system more transparent. To this end, the EU has played a substantial role in negotiating the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration,[28] and will push for the inclusion of these or similar rules into the TTIP. The UNCITRAL Transparency Rules apply to all investor-state arbitration proceedings according to the UNCITRAL Arbitration Rules initiated under an international investment agreement concluded after 1 April 2014.[29] The rules considerably increase the openness of arbitral proceedings and require, for instance, that the parties notify that an arbitration has been initiated and that all key documents of the proceedings including written pleadings and exhibits are published.[30] Further, the oral hearings are accessible to the public,[31] and the arbitral tribunal shall allow interested third persons and non-disputing parties to the investment agreement to submit briefs

21 *EU Commission*, Recommendation for a Council Decision authorizing the Opening of Negotiations on a Comprehensive Trade and Investment Agreement, called the Transatlantic Trade and Investment Partnership, between the European Union and the United States of America, COM(2013) 136 final (12 March 2013).

22 *EU Commission*, Investment Protection and Investor-to-State Dispute Settlement in EU Agreements – Fact Sheet (26 November 2013).

23 See *EU Commission*, Public Consultation on Modalities for Investment Protection and ISDS in TTIP (27 March 2014), available at: http://trade.ec.europa.eu/consultations/index.cfm?consul_id=179 (last accessed on 7 April 2014).

24 See *Kläger*, 'Fair and Equitable Treatment' in International Investment Law (2011), p. 236 et seq.

25 See e.g. the provisions of the 2008 German Model BIT.

26 See *EU Commission*, Towards a Comprehensive European International Investment Policy, COM(2010) 343 final, p. 9.

27 See *EU Commission*, Public Consultation on Modalities for Investment Protection and ISDS in TTIP (27 March 2014), available at: http://trade.ec.europa.eu/consultations/index.cfm?consul_id=179 (last accessed on 7 April 2014); *EU Commission*, Investment Protection and Investor-to-State Dispute Settlement in EU Agreements – Fact Sheet (26 November 2013).

28 The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration are available at: https://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency.html (last accessed on 7 April 2014).

29 Article 1 (1) UNCITRAL Transparency Rules.

30 See Articles 2 and 3 UNCITRAL Transparency Rules. The documents will be made available on the UNCITRAL homepage in a transparency registry.

31 Article 6 (1) UNCITRAL Transparency Rules.

to address matters within the scope of the arbitral dispute.[32] The introduction of rules fostering transparency in the special area of investment arbitration is to be welcomed.[33] Traditional arbitration rules are often deficient in this regard, as they were originally tailored for commercial arbitration, in which confidentiality is an important aspect. At the same time, greater transparency should not hinder an arbitral tribunal to conduct the proceedings in an efficient manner and to protect business secrets.[34]

Second, the EU Commission tries to encourage the use of domestic courts by envisaging a "fork in the road" clause for the TTIP. This is a mechanism which is known from many BITs and which hinders the investor (or an affiliated company) to bring a claim on the same matter at the same time before domestic courts and arbitral tribunals. The investor will therefore have to choose whether it seeks to repeal the state measure before a domestic court or whether it (only) requests compensation before an international tribunal.

Third, the EU Commission also plans to introduce a code of conduct for arbitrators dealing with conflicts of interests as well as broader questions about the ethics of arbitrators. This will arguably be done by including a binding reference to the IBA Guidelines on Conflicts of Interest in International Arbitration[35] into the dispute settlement clause of the TTIP. Moreover, the EU also plans to set up a list of qualified arbitrators from which arbitrators are appointed by an independent institution in case the parties cannot agree on the composition of the arbitral tribunal.

Fourth, to prevent frivolous claims, the EU Commission seeks to include provisions into the TTIP encouraging a bifurcation of proceedings in case a claim is manifestly without legal merit or unfounded as a matter of law. However, as a prudent investor will be very careful not to initiate arbitration without an urgent need to do so, the need and practical application of precautionary measures to dismiss quickly unfounded claims remains to be seen. In addition to that, the dispute settlement clause shall contain a "costs follow the event" rule so that the losing party will be obliged to bear the costs of the arbitral proceedings. This rule largely corresponds to German civil procedural law[36] and appears, from this perspective, as a helpful and practically relevant limitation of the discretionary power of arbitrators.

Fifth, the EU Commission further plans the introduction of a mechanism to filter claims concerning the stability and integrity of the financial system in times of crisis. This mechanism would grant a special defence for host states to carve out state measures such as the ones related to the European sovereign debt crisis after the arbitration has been commenced. This is problematic as delicate sectors or measures should rather be identified independent of and before the initiation of a particular claim in order to avoid the politicisation of investment disputes.

Sixth, the EU Commission has also expressed its sympathy for the creation of an appellate body for the review of arbitral awards, and seems to push for such reforms by arbitral institutions.

Altogether, these proposals clearly display the intention of the EU Commission to accommodate the concerns about the consistency and legitimacy of arbitral awards. It also shows that the critique questioning investment arbitration as a whole is not justified. Many of the EU proposals are not new but rely on innovative developments and guidelines established by the arbitration community itself or by international institutions dealing with arbitration issues. The proposals are mainly helpful clarifications of the tools that are already available and used by arbitrators. However, other EU proposals appear as a step backwards with regard to the independence and reliability of international arbitration as they give rise to concerns that states may politically interfere with inconvenient claims of foreign investors. This neglects that the system has made great progress in the last decade and that the consistency and predictability of awards is constantly increasing.

A very different question is, however, whether international arbitration and investment protection is needed at all in agreements between highly developed parties such as the EU and the US. Traditionally, founding members of the OECD have rarely concluded BITs between each other. Accordingly, the German government recently announced that the domestic legal systems on both sides of the Atlantic provide sufficient protection to foreign investors and that, therefore, it does not support the provisions on investment protection and investment arbitration envisaged in the TTIP.[37] Germany's opposition to investment arbitration in the TTIP is surprising, as it has strongly advocated international investment protection in the past.

VI. Respondent status of EU and Member States

Apart from the concrete shape of the TTIP's investment chapter, the emergence of the EU as a contracting party of investment agreements gives rise to the question of whether the EU or an individual Member State is the right respondent in an investment dispute. This is particularly problematic, as the measure affecting the foreign investment is usually not enacted by the EU itself but by a Member State that has not (necessarily) signed the investment agreement. The situation is even more complicated if EU law predetermines the state measure interfering with the investment. This involves intricate questions concerning the international responsibility of the EU and its Member States under international law and different international dispute settlement fora.[38] Under the Energy Charter Treaty, only EU Member States acted as respondents so far, even though both EU and Member States signed the agreement.[39]

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32 Articles 4 and 5 UNCITRAL Transparency Rules.

33 See also *Buntenbroich/Kaul*, Transparenz in Investitionsschiedsverfahren – Der Fall Vattenfall und die UNCITRAL-Transparenzregeln, SchiedsVZ 2014, 1.

34 This is addressed in Article 7 UNCITRAL Transparency Rules.

35 The 2004 IBA Guidelines on Conflicts of Interest in International Arbitration are available at: http://www.ibanet.org/ENews_Archive/IBA_July_2008_ENews_ArbitrationMultipleLang.aspx (last accessed on 7 April 2014).

36 See Sections 91 (1), 1057 (1) German Code of Civil Procedure.

37 See the letter of the German Minister of Economic Affairs Sigmar Gabriel to the EU Trade Commissioner Karel De Gucht of 26 March 2014, available at: http://www.bmwi.de/DE/Themen/aussenwirtschaft,did=631980.html (last accessed on 7 April 2014); the same opinion was already expressed under the former German government, see BT-Drucksache 17/14787, p. 2.

38 See *Hoffmeister*, Litigating against the European Union and Its Member States – Who Responds under the ILC's Draft Articles on International Responsibility of International Organizations?, EJIL 21 (2010), 723.

39 The possibility to raise an investment claim against the EU and the clarification of the respondent status of the EU and its Member States is laid down in the Statement submitted by the European Communities to the Secretariat of the Energy Charter Treaty pursuant to Art. 26 (3) (b) (ii) of the Energy Charter Treaty, O.J. (1998) L69/115.

To address the respondent status under EU investment agreements, the EU Commission has proposed in 2012 a regulation establishing a framework for managing financial responsibility arising out of investment agreements concluded by the EU.[40] The negotiations on this regulation are still ongoing and it is not clear whether it will enter into force at any time soon. The draft regulation provides in its Article 4 that "*the Union shall act as respondent where the dispute concerns treatment afforded by the institutions, bodies or agencies of the Union*." The respondent status of the Member States is defined in Article 8, which foresees a consultation period of 30 days after the filing of the notice of arbitration. In this period, the Commission may decide to act as respondent in case a number of EU interests are affected. Pursuant to Article 3 of this proposal, the ultimate financial responsibility of an investment claim is allocated between the EU and the Member States according to whether the state measure has its origin in the EU's or the Member State's sphere. The draft regulation shows the tendency of the EU Commission to take a leading role and to actively participate in the conduct of investment disputes, even if a Member State finally acts as respondent.

For the investor, this means that there will be a need to ask before submitting a claim whether the EU or the Member State will act as respondent. The necessary consultations between the EU and the Member State will protract the initiation and possibly the entire course of arbitral proceedings. Moreover, there are a number of open questions related to this mechanism, for instance: Is the decision of the EU and the Member State on the right respondent binding to the investor? Does an arbitral award or an order on provisional measures rendered in an arbitration between an investor and the EU have binding force in relation to the Member State? Is an investor hindered to bring a claim against the Member State even though a claim against the EU concerning the same subject matter is pending or has been decided?

Further to that, an arbitral award obtained by an investor may need to be enforced against the responding party. However, the rules applicable to the enforcement of arbitral awards against the EU are unclear since the EU is neither a member of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards nor a member of the ICSID Convention. It is not even possible that the EU becomes a member of ICSID in the near future, as only member states of the World Bank or other states having signed the ICJ Statute are eligible to join.[41] Despite the declared intention of the EU to replace the Member States as the leading European players in the field of investment arbitration, these uncertainties may considerably hamper the EU's efforts.

VII. Conclusion

After all, it is obvious that the TTIP negotiations have far-reaching implications for the current system of investment arbitration in Europe. This is even more so as the TTIP is not the only investment agreement negotiated by the EU. Currently, the EU is in talks to conclude free trade agreements covering investment issues, *inter alia*, with Canada, Singapore, Thailand as well as Morocco; and there are plans to negotiate a BIT with China.[42] This shows that the EU is an increasingly active player in the field of investment protection. The positions taken by the EU in its first investment agreements to be concluded will certainly shape the EU's approach to investment arbitration for future investment agreements. This can be seen in relation to the negotiations between the EU and Canada on the Comprehensive Economic and Trade Agreement (CETA), which are more advanced than the TTIP negotiations and which have considerably influenced the EU's positions.

The documents available so far demonstrate that the EU pursues an investment policy that strongly resembles the approach known from NAFTA and its member states. This is because investment agreements concluded by the EU, as a supranational organisation with currently 28 Member States, have a regional instead of a purely bilateral dimension. Moreover, the old system of highly specialized BITs is gradually replaced by free trade agreements containing investment protection rules as only one element alongside trade and other topics. Probably the most important sign is, however, that many elements such as the wording of substantive investment protection guarantees, as foreseen in future European investment agreements, are taken from the NAFTA context or experiences.

The ultimate effects of this approach on the further development of international investment law will have to be evaluated in the long term. For the time being, this analysis has revealed that there are still considerable uncertainties as to the concrete shape of the TTIP's investment chapter and the numerous further problems connected with the conclusion of investment agreements by the EU. It is also not certain that the TTIP will include provisions on investment protection at all, as the German government's opposition to such rules shows. These uncertainties notwithstanding, the ongoing consultation of the public on modalities for investment protection and investor-state arbitration provides a unique forum for interested persons to participate in the genesis of this New World of international investment arbitration. It may also be a tool to resolve or mitigate existing controversies in different EU institutions and Member States and, hopefully, to create a better understanding of the basic principles of investment arbitration in the public.

40 *EU Commission*, Proposal for a Regulation Establishing a Framework for Managing Financial Responsibility linked to Investor-State Dispute Settlement Tribunals established by International Agreements to the European Union is Party, COM(2012) 335 final (21 June 2012).

41 See Article 67 ICSID Convention.

42 An overview of the current EU negotiations is provided on the EU Commission's website: http://ec.europa.eu/enterprise/policies/international/facilitating-trade/free-trade/index_en.htm#h2-2 (last accessed on 7 April 2014).