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A HISTORY OF INVESTMENT ARBITRATION AND INVESTOR-STATE DISPUTE SETTLEMENT IN GERMANY

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ABOUT THE INVESTOR-STATE ARBITRATION PROJECT

Launched in November 2014, this project is addressing a central policy issue of contemporary international investment protection law: is investor-state arbitration (ISA) suitable between developed liberal democratic countries?

The project will seek to establish how many agreements exist or are planned between economically developed liberal democracies. It will review legal and policy reactions to investor-state arbitrations taking place within these countries and summarize the substantive grounds upon which claims are being made and their impact on public policy making by governments.

The project will review, critically assess and critique arguments made in favour and against the growing use of ISA between developed democracies — paying particular attention to Canada, the European Union, Japan, Korea, the United States and Australia, where civil society groups and academic critics have come out against ISA. The project will examine the arguments that investor-state disputes are best left to the national courts in the subject jurisdiction. It will also examine whether domestic law in the countries examined gives the foreign investor rights of action before the domestic courts against the government, equivalent to those provided by contemporary investment protection agreements.

CIGI Senior Fellow Armand de Mestral is the lead researcher on the ISA project. Contributors to the project are Marc Bungenberg, Charles-Emmanuel Côté, David Gantz, Shotaro Hamamoto, Younsik Kim, Céline Lévesque, Csongor István Nagy, Luke Nottage, Ucheora Onwuamaegbu, Carmen Otero, Hugo Perezcano, August Reinisch and David Schneiderman. A conference was held in Ottawa on September 25, 2015. The papers presented at that conference are in the process of being issued as CIGI Papers and will ultimately appear as a collective book.

ABOUT THE AUTHOR



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Marc received his doctorate in law from the University of Hannover and wrote his habilitation treatise at the Friedrich-Schiller University Jena, where he received his *venia legendi* for public law, European law, public international law and international economic law. His main fields of research are European and international economic law, especially international investment law, EU common commercial policy, public procurement and state aids law.

ACRONYMS AND ABBREVIATIONS

BITs	bilateral investment treaties
CETA	Comprehensive Economic and Trade Agreement
ECHR	European Convention on Human Rights
FTAs	free trade agreement
FDI	foreign direct investment
ICSID	International Centre for Settlement of Investment Disputes
ICC	International Chamber of Commerce
IAs	international investment agreements
ISA	investor-state arbitration
ISDS	investor-state dispute settlement
OECD	Organisation for Economic Co-operation and Development
SCC	Stockholm Chamber of Commerce
TFEU	Treaty on the Functioning of the European Union
TTIP	Transatlantic Trade and Investment Partnership
UNCTAD	United Nations Conference on Trade and Development

EXECUTIVE SUMMARY

The paper discusses in its first part the development of investment protection via German bilateral investment treaties (BITs) and explains the main components. In its second part, the paper summarizes the ongoing critical debate in Germany that may have led to a reform of the EU approach in regard to investor-state dispute settlement (ISDS).

INTRODUCTION

As stated by other authors,¹ Germany has a long-standing tradition of commercial arbitration, and the German business community is one of the primary users of commercial arbitration, according to the figures published by international arbitration institutions. This is not only the case for commercial arbitration, but also for investment arbitration: Germany is the country with the most BITs concluded, and almost all recent German BITs contain measures for ISDS. Furthermore, German investors are among the main users of this investment arbitration system based on international treaties.

Germany, as will be discussed in detail, has concluded 135 BITs, of which approximately 130 are currently in force.² After the shift of competences for foreign direct investment (FDI) from the EU member states to the European Union since the entry into force of the Treaty of Lisbon on December 1, 2009,³ EU member states are confronted with an emerging European legal regime for foreign investment protection, but the BITs concluded by the EU member states, including Germany, will mostly remain in place for the next decade. Only a few, if any, will be replaced in the near future, as the European Union is currently negotiating or has already terminated negotiations on investment agreements with, *inter alia*, Canada, China, India, Japan, Singapore, the United States and Vietnam. But even if EU agreements containing investment protection chapters with, for example, Vietnam and Singapore, or a pure investment agreement with China, enter into force, it is not yet clear whether the respective sunset clauses of the Germany-China BIT, as well as the Germany-Vietnam BIT, would remain applicable for another 20 years, meaning that standards as well as the specific ISDS mechanism would also remain applicable.

FOREIGN INVESTMENT IN GERMANY AND GERMAN INVESTMENT ABROAD

In 2013, FDI stock in Germany (in almost all sectors) from non-EU countries was at €458 billion. Foreigners or foreign enterprises owned 15,560 firms in 2013 and foreign turnover in Germany was at €1.502 billion.⁴ As Germany is a member of the European Union, it is *per se* open for investments from non-EU states (see article 64, Treaty on the Functioning of the European Union [TFEU]). Only foreign investments above a threshold of 25 percent into German enterprises need approval by the German Ministry of Economics.⁵

Additionally, German enterprises are among the largest exporters of long-term capital in all regions of the world. In 2013, the German FDI stock abroad was €918 billion and German firms, through their investments abroad, employed 6.7 million workers in 35,143 firms, with a yearly turnover of €2.389 billion.⁶

GERMANY AS A PLACE FOR ARBITRATION?

There are several reasons why foreign private and state parties may have recourse to Germany as a place for arbitrating their disputes: German codifications of civil law, commercial law and civil procedure have influenced many countries in the world; Germany is located at the heart of Europe,

1 See Alfred Escher et al, "Investment Arbitration and the Participation of State Parties in Germany" in Karl-Heinz Bockstiegel, Stefan M Kroll & Patricia Nacimiento, eds, *Arbitration in Germany*, 2nd ed (Alphen aan den Rijn: Kluwer Law International, 2015) at 1013, 1017.

2 Federal Ministry for Economic Affairs and Energy, "Investitionsschutzverträge", online: <www.bmwi.de/DE/Themen/Aussenwirtschaft/Investitionsschutz/investitionsschutzvertraege.html>.

3 *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community*, 13 December 2007, OJ C 306 of 17 December 2007 (entered into force 1 December 2009).

4 Stormy-Annika Mildner, "Legal Stability and Predictability: The Investor Perspective" (Presentation delivered at the Investment Treaty Forum, Stockholm, 12 June 2015), slide 5, online: <www.sccinstitute.se/media/76671/mildner-stockholm-ppt-juni-2015-mil.pdf>.

5 See s 53 of the *Regulation for the External Economy (Außenwirtschaftsverordnung) of 18 April 2009*, (2009) Federal Gazette (BGBl) I, 770.

6 Mildner, *supra* note 4.

between North America and Asia; and Germany is involved in legal aid programs and offers a highly developed judicial and arbitral system. In addition, Germany provides several different arbitration facilities, including the Frankfurt Arbitration Center and the German Institution of Arbitration (*Deutsche Institution für Schiedsgerichtsbarkeit*).⁷ Furthermore, Germany is a party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) and the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) of 1958.

HISTORY OF GERMAN INTERNATIONAL INVESTMENT AGREEMENTS AND BIT PRACTICE

The German BIT program, state-investor contracts (concluded between German investors and the guest state of the investment), and the German government's guarantees protect German investment abroad. This contribution focuses on the German BIT program.

As is often mentioned, Germany signed the world's first BIT in 1959, with Pakistan.⁸ Germany's lack of international influence and of political and military power after World War II provided the backdrop for the country to become one of the first to begin setting up an international investment protection regime. The negotiation and conclusion of treaties was the only way to specifically protect German investment abroad.⁹

In the early phase after the conclusion of the first BIT between Germany and Pakistan, Germany concluded between 1959 and 1962, as shown in Figure 1, 11 BITs that guarantee to investors, *inter alia*: fair and equitable treatment, non-discriminatory treatment and just compensation in case of expropriation. This reflects that Germany's early BITs were developed alongside the so-called Abs-Shawcross Draft Convention. The German Society for the Protection of Foreign Investments, founded and led by Herman J. Abs (spokesman of the board of managing directors of the *Deutsche Bank*) supported the development of an international code of conduct for host governments in their treatment of FDI. Abs, together with former British Attorney-General Hartley Shawcross, developed the Abs-Shawcross Draft Convention in which they laid down the standards of protection that can still be found in most international investment agreements (IIAs) today.¹⁰ Since 1985, German BITs not only contain the possibility of state-to-state dispute settlement, but also foresee ISDS.

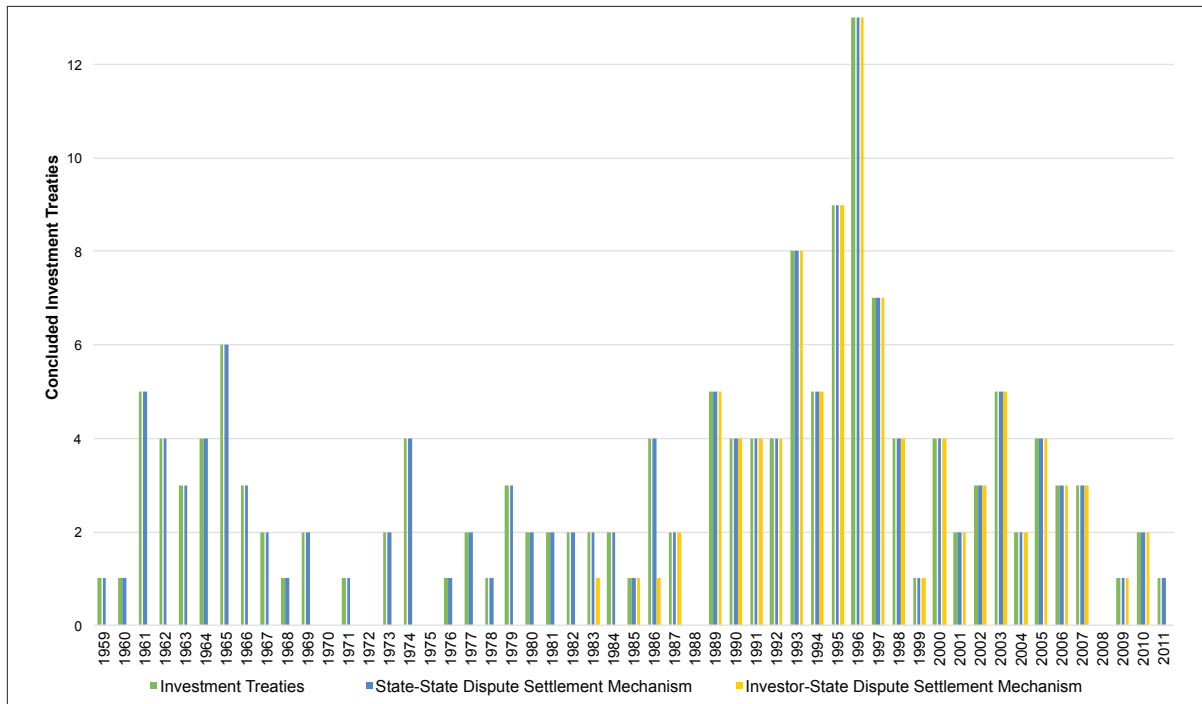
7 Escher et al, *supra* note 1 at 1013, 1020.

8 *Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments* (1962) BGBl II, 793.

9 Ralph A Lorz, "National Report on Germany" in Wenhua Shan, ed, *The Protection of Foreign Investment* (Oxford and Portland: Hart Publishing, 2012) at 359, 362.

10 "...envisaged that each party would accord fair and equitable treatment to the property of nationals of the other parties; that the property would be given the most constant protection and security and that its management, use and enjoyment would not be impaired by unreasonable or discriminatory measures; that each party would ensure the observance of any undertakings it had given in relation to investments made by nationals of any other party; and that no party would take any measures against nationals of another party to deprive them directly or indirectly of their property except under due process of law, and provided that such measures were not discriminatory or contrary to undertakings given by that part and were accompanied by the payment of just and effective compensation." The text of the Abs-Shawcross Draft Convention is available in the United Nations Conference on Trade and Development's (UNCTAD's) *International Investment Instruments: A Compendium*, vol V (New York: United Nations, 2000), 395.

Figure 1: Investment Treaties: Federal Republic of Germany



Source: Author.

Note: Chart includes all BITs concluded by the Federal Republic of Germany, irrespective if terminated; several BITs multiply in their application due to state secession or succession.

Germany not only concludes investment agreements with developing countries, but also with developed countries (as classified by the International Monetary Fund):¹¹ 13 BITs are with countries that are members of the Organisation for Economic Co-operation and Development (OECD)¹² and 13 BITs are with other EU member states.¹³ Since the transfer of competences in the field of investment law and policy making to the European Union with the Treaty of Lisbon, no new German BITs have entered into force. Germany has also never concluded a BIT with another EU member; all intra-EU BITs Germany is party to were concluded before the respective countries became member states of the European Union. While concluding BITs with other OECD countries, Germany was reluctant in regard to concluding BITs with other Group of Seven states. Germany is also a contracting state of the multilateral Energy Charter Treaty of 1994,¹⁴ the ICSID Convention since 1969¹⁵ and the New York Convention since 1961.¹⁶

As the previous paragraph shows, the German investment protection regime is interconnected with the developing EU system, a reason why one cannot be discussed without keeping the other in mind. In this regard, it must be mentioned that EU law has not, until now, contained an investment protection system comparable to the North American Free Trade Agreement's Chapter 11 on investment. Investments within the European Union (in a scenario where an investor from member state A invests in member state B) are subject to a system of multilevel protection comprising the European Convention on Human Rights (ECHR),¹⁷ the freedom of establishment and movement of capital¹⁸ and EU fundamental rights.¹⁹

11 This listing follows Mildner, *supra* note 4.

12 Chile, Czech Republic, Estonia, Greece, Hungary, Israel, Korea, Mexico, Poland, Portugal, Slovak Republic, Slovenia, Turkey.

13 Croatia, Czech Republic, Estonia, Greece, Hungary, Latvia, Lithuania, Malta, Poland, Portugal, Romania (terminated), Slovakia, Slovenia.

14 (1997) BGBl II, 5.

15 (1969) BGBl II, 1191.

16 (1961) BGBl II, 121.

17 See Christina Pfaff, "Investitionsschutz durch regionalen menschenrechtlichen Eigentumsschutz am Beispiel der Europäischen Menschenrechtskonvention (EMRK)" in Christina Knahr & August Reinisch, eds, *Aktuelle Probleme und Entwicklungen im Internationalen Investitionsrecht* (Stuttgart: Boorberg, 2008) at 163–192; Matthias Ruffert, "The Protection of Foreign Direct Investment by the ECHR" (2000) 43 GYL 116–148.

18 See Steffen Hindelang, *The Free Movement of Capital and Foreign Direct Investment: The Scope of Protection in EU Law* (Oxford: Oxford University Press, 2009).

19 *Hauer v Land Rheinland-Pfalz*, C-44/79, [1979] ECR I-3727; Christian Calliess, "The Protection of Property" in Dirk Ehlers, ed, *European Fundamental Rights and Freedoms* (Berlin: De Gruyter, 2007) at 448–465. See also article 15 of the *Charter of Fundamental Rights of the European Union* in conjunction with the *Treaty on European Union*, art 6(1).

Furthermore, customary international law,²⁰ national constitutional rights and, in certain cases, intra-EU BITs may be of relevance. As stated above, today's intra-EU BITs were concluded before both states acceded to the European Union, thus they mutated from extra-EU BITs to intra-EU BITs.

The guarantees and standards of protection included in intra-EU BITs overlap with the fundamental freedoms of the internal market, the protection of fundamental rights in EU law and the ECHR.²¹ Nevertheless, there are differences. The Treaty Establishing the European Community guaranteed, just as the TFEU does today, market access and the right to invest. As long as freedom of capital movement is applicable, this guarantee also applies to non-EU enterprises, even if they are not established in an EU member state.²² Protection against expropriation and the right to property were introduced into EU law by the Court of Justice of the European Union²³ as fundamental rights and are regarded as necessary elements of an "open market economy with free competition."²⁴

Although the European Commission has already asked EU member states, on various occasions, to terminate their existing network of intra-EU BITs,²⁵ as it sees a distortive effect of these BITs on the internal market and their potential to collide with superior EU law,²⁶ the request has so far mostly not been complied with. In April 2016, a non-paper from Austria, Finland, France, Germany and the Netherlands was forwarded to the Commission, proposing to extend a more or less traditional investment law setting, including ISDS, to *all* EU member states through an intergovernmental framework.²⁷ Nevertheless, first reactions seemed very critical, as this proposal would seem difficult to fit together with sunset clauses contained in BITs currently in force and would undermine the effectiveness of the law of the EU internal market in favour of ISDS.

Irrespective of the question of intra-EU BITs, the German BIT program in general is seen as a success story. It was motivated by the desire to support and protect German investment abroad, especially in developing countries.²⁸ German investment treaties and investor-state arbitration (ISA) regimes have institutionalized a kind of investment culture that fosters growth and development through economic exchange. These treaties have become part of the international legal order as embodiments of a global public good, of which Germany may be particularly aware.²⁹ Parallel to the negotiation of its first BIT, Germany adopted its first model BIT around 1960. It was revised repeatedly until 2009.³⁰ In the course of these revisions, changes were made in regard to, *inter alia*, the available dispute settlement system for investors.³¹

20 See Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (Oxford: Oxford University Press, 2008) at 11.

21 Hanno Wehland, "Intra-EU Investment Arbitration: Is Community Law an Obstacle?" (2009) 58(2) ICLQ 297; Christer Söderlund, "Intra-EU Investment Protection and the EC Treaty" (2007) 24 J Int'l Arb 455–468; see also Thomas Eilmannberger, "Bilateral Investment Treaties and EU Law" (2009) 46 CMLR 383, 399; and Markus Burgstaller, "European Law and Investment Treaties" (2009) 26 J Int'l Arb 181–216.

22 On the scope of application in these cases, see *Test Claimants v Commissioners of Inland Revenue*, C-524/04, [2007] ECR I-2107; *Cadbury Schweppes v Commissioners of Inland Revenue*, C-196/04, [2006] ECR I-7995.

23 *Nold v Commission*, C-4/73, [1974] ECR I-491; *Bosphorus v Minister for Transport, Energy and Communications, Ireland and the Attorney General*, C-84/95, [1996] ECR I-3953.

24 Art 119 TFEU.

25 Economic and Financial Committee, *Annual EFC Report to the Commission and the Council on the Movement of Capital and the Freedom of Payments*, 15 November 2006 at 7: the EFC invited the member states "to review the need for such BITs agreements and inform the Commission about the actions taken in this context so that progress can be reviewed by the EFC by the end of 2007."

26 See Frank Hoffmeister & Günes Ünüvar, "From BITS and Pieces towards European Investment Agreements" in Marc Bungenberg, August Reinisch & Christian Tietje, eds, *EU and Investment Agreements* (Nomos and Hart, 2013) at 57, 58; see also Eilmannberger, *supra* note 21 at 383–429, 426.

27 Council of the European Union, General Secretariat, Trade Policy Committee (Services and Investment), "Intra-EU Investment Treaties: Non-paper from Austria, Finland, France, Germany and the Netherlands", online: <www.bmwi.de/BMWi/Redaktion/PDF/1/intra-eu-investment-treaties.property=pdf,bereich=bmwi2012,sprache=de,rwb=true.pdf>.

28 Jan K Schäfer, "BB-Forum: Domröschenschlaf – Schiedsverfahren nach deutschen Investitionsförderungsabkommen" (2004) 59 Betriebs-Berater 1069, 1070.

29 Lorz, *supra* note 9.

30 Rudolf Dolzer & Yun-I Kim, "Germany" in Chester Brown, ed, *Commentaries on Selected Model Investment Treaties* (Oxford: Oxford University Press, 2013) at 289, 301.

31 See also Lorz, *supra* note 9 at 359, 366; Jörn Griebel, "Einführung in den Deutschen Mustervertrag über die Förderung und den gegenseitigen Schutz von Kapitalanlagen von 2009" (2010) 5 IPRax 414.

MODES OF DISPUTE SETTLEMENT IN GERMAN BITS AND RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARDS

State-to-State Dispute Settlement

All German BITs provide for the possibility of state-to-state dispute settlement. This can be seen, for example, in article 9 of the German Model Treaty 2009 regarding the settlement of disputes between the contracting states:

Disputes between the Contracting States concerning the interpretation or application of this Treaty should as far as possible be settled by the Governments of the two Contracting States.

If a dispute cannot thus be settled, it shall upon the request of either Contracting State be submitted to an arbitral tribunal.

The arbitral tribunal shall be constituted for each case as follows: each Contracting State shall appoint one member, and these two members shall agree upon a national of a third State as their chairman to be appointed by the Governments of the two Contracting States. The members shall be appointed within two months, and the chairman within three months, from the date on which either Contracting State has informed the other Contracting State that it wants to submit the dispute to an arbitral tribunal.

If the periods specified in paragraph (3) have not been observed, either Contracting State may, in the absence of any other relevant agreement, invite the President of the International Court of Justice to make the necessary appointments. If the President is a national of either Contracting State or if he is otherwise prevented from discharging the said function, the Vice-President should make the necessary appointments. If the Vice-President is a national of either Contracting State or if he, too, is prevented from discharging the said function, the Member of the Court next in seniority who is not a national of either Contracting State should make the necessary appointments.

The arbitral tribunal shall reach its decisions by a majority of votes. Its decisions shall be binding. Each Contracting State shall bear the cost of its own member and of its representatives in the arbitration proceedings; the cost of the chairman and the remaining costs shall be borne in equal parts by the Contracting States. The arbitral tribunal may make a different regulation concerning costs. In all other respects, the arbitral tribunal shall determine its own procedure.³²

State-to-state dispute settlement was already foreseen in the first German BIT concluded with Pakistan in 1959 and has been part of German BITs ever since.

Investor-State Dispute Settlement in German BITs

Generalities

German enterprises as investors in third countries have been frequent users of ISA under the auspices of the International Centre for Settlement of Investment Disputes (ICSID), the Stockholm Chamber of Commerce (SCC), or the International Chamber of Commerce (ICC) (see below for exact numbers). Contrary to what is commonly thought, German BITs did not contain any provisions on ISDS until

32 German Model Treaty 2009, online at: <iilcc.uni-koeln.de/fileadmin/institute/iilcc/Dokumente/matrechtinvest/VIS_Mustervertrag.pdf>.

the mid-1980s.³³ The BITs with Haiti³⁴ (August 14, 1973), Benin³⁵ (June 29, 1978), Bangladesh³⁶ (May 8, 1981), Burundi³⁷ (September 10, 1984) and Dominica³⁸ (October 1, 1984) illustrate this, even though the aforementioned Abs-Shawcross Draft Convention of April 1959 had already come up with a first proposal for an ISDS mechanism in its article VII:

2. A national of one of the Parties claiming that he has been injured by measures in breach of this Convention may institute proceedings against the Party responsible for such measures before the Arbitral Tribunal referred to in paragraph 1 of this Article, provided that the Party against which the claim is made has declared that it accepts the jurisdiction of the said Arbitral Tribunal in respect of claims by nationals of one or more Parties, including the Party concerned.³⁹

Nevertheless, it also has to be pointed out that this paragraph does not contain the necessary consent to arbitration as we see it in later German BITs. Therefore, although the early generations of German BITs were intended to protect all investments made in accordance with the law, they only provided for state-to-state arbitration as a means of dispute settlement. Fifty of Germany's approximately 130 BITs currently in force do not foresee any ISDS. This might be explained by the fact that the ICSID Convention did not even exist until 1965, but nevertheless ad hoc arbitration would, in theory, have been possible to include.

The BITs with Saint Lucia (March 16, 1985),⁴⁰ Saint Vincent and the Grenadines (March 25, 1986),⁴¹ Nepal (October 20, 1986),⁴² Uruguay (May 4, 1987)⁴³ and Bolivia (March 23, 1987)⁴⁴ were the first German BITs that included a "new" extra article on ISDS.

Today, the German Model Treaty also contains an article on ISDS. The German Model Treaty on the Reciprocal Encouragement and Protection of Foreign Investment (German Model Treaty 2009) provides for the "Settlement of disputes between a Contracting State and an investor of the other Contracting State" in article 10:

Disputes concerning investments between a Contracting State and an investor of the other Contracting State should as far as possible be settled amicably between the parties to the dispute. To help them reach an amicable settlement, the parties to the dispute also have the option of agreeing to institute conciliation proceedings under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 (ICSID).

33 See for example *Agreement between the Federal Republic of Germany and Central African Republic concerning the Promotion and Reciprocal Protection of Investments* (1967) BGBl II, 1657 (entered into force 21 January 1968); see also Antonio R Parra, *The History of ICSID* (Oxford: Oxford University Press, 2012) at 323.

34 *Treaty between the Federal Republic of Germany and the Republic of Haiti concerning the Promotion and Reciprocal Protection of Capital Investment* (1975) BGBl II, 102.

35 *Treaty between the Federal Republic of Germany and the Republic of Benin concerning the Promotion and Reciprocal Protection of Capital Investment* (1985) BGBl II, 3.

36 *Agreement between the Federal Republic of Germany and the People's Republic of Bangladesh concerning the Promotion and Reciprocal Protection of Investments* (1984) BGBl II, 839.

37 *Treaty between the Federal Republic of Germany and the Republic of Burundi concerning the Encouragement and Reciprocal Protection of Investments* (1985) BGBl II, 1163.

38 *Treaty between the Commonwealth of Dominica and the Federal Republic of Germany concerning the Encouragement and Reciprocal Protection of Investments* (1985) BGBl II, 1171.

39 *German Model Treaty 2009*, online at: <ilcc.uni-koeln.de/fileadmin/institute/ilcc/Dokumente/matrechinvest/VIS_Mustervertrag.pdf>.

40 *Treaty between St. Lucia and the Federal Republic of Germany concerning the Encouragement and Reciprocal Protection of Investments* (1987) BGBl II, 14.

41 *Treaty between Saint Vincent and the Grenadines and the Federal Republic of Germany concerning the Encouragement and Reciprocal Protection of Investments* (1987) BGBl II, 775.

42 *Treaty between the Federal Republic of Germany and the Kingdom of Nepal concerning the Encouragement and Reciprocal Protection of Investments* (1988) BGBl II, 263.

43 *Treaty between the Federal Republic of Germany and the Republic of Uruguay concerning the Encouragement and Reciprocal Protection of Investments* (1988) BGBl II, 273.

44 *Treaty between the Federal Republic of Germany and the Republic of Bolivia concerning the Promotion and Mutual Protection of Investments* (1988) BGBl II, 255.

If the dispute cannot be settled within six months of the date on which it was raised by one of the parties to the dispute, it shall, at the request of the investor of the other Contracting State, be submitted to arbitration.⁴⁵

In the following, some of the most important ISDS procedural issues in regard to German BITs will be discussed.

Consent to Arbitration

As a result of article 10 of the Model BIT and the respective German BITs with non-EU countries, disputes between an investor (either German or an investor from the other contracting party) and a state (Germany or the other contracting party to the BIT) are to be solved amicably. In case this is not successful, the parties may submit the dispute to arbitration. By including a mechanism similar to article 10 into the BIT, the contracting states declare their necessary consent to submitting investment disputes to arbitration.⁴⁶ These clauses (“The two Contracting States hereby declare that they unreservedly and bindingly consent to the dispute being submitted to one of the following dispute settlement mechanisms of the investor’s choosing”⁴⁷) of the German BITs are considered to be a binding irrevocable offer of and consent to arbitration of the two contracting states of the BIT; the contracting states accept arbitration initiated by the foreign investor.⁴⁸

Investors’ Selection of Applicable Procedure

The more recent German BITs regularly name different procedural possibilities from which the foreign investor can choose when initiating a claim. BITs concluded by Germany generally list the following:

- ICSID;⁴⁹
- ICSID Rules on the Additional Facility for the Administration of Proceedings;⁵⁰
- ad hoc arbitration in accordance with UNCITRAL rules;⁵¹
- an arbitral tribunal established under the Dispute Resolution Rules of the ICC, the London Court of International Arbitration or the SCC;⁵² and
- any other form of dispute settlement agreed by the parties to the dispute.

Some German BITs, for example the one with China, assign dispute settlement to ICSID if the other contracting state is a member of the ICSID Convention, unless the parties in dispute agree on an ad hoc tribunal.⁵³ If Germany is an ICSID member and the other state is not, the ICSID Additional Facility Rules can apply as well as the aforementioned dispute resolution mechanisms.

Place of Arbitration

While ICSID arbitration proceedings in general take place at the seat of the Centre (see article 62 ICSID Convention), the Centre has made arrangements with appropriate institutions for the purpose of arbitration proceedings being held at their respective seats. In Germany’s case, such an arrangement has been made between ICSID and the German Institution of Arbitration (*Deutsche Institution für*

45 *German Model Treaty 2009*, online at: <iilcc.uni-koeln.de/fileadmin/institute/iilcc/Dokumente/matrechtinvest/VIS_Mustervertrag.pdf>.

46 Lorz, *supra* note 9 at 359, 368.

47 *German Model Treaty 2009*, online at: <iilcc.uni-koeln.de/fileadmin/institute/iilcc/Dokumente/matrechtinvest/VIS_Mustervertrag.pdf>.

48 Jörn Griebel, “Die Einbeziehung von „contract claims” in internationale Investitionsstreitigkeiten über Streitbeilegungsklauseln in Investitionsschutzabkommen” (2006) 5 Zeitschrift für Schiedsverfahren at 306.

49 “arbitration under the auspices of the International Centre for Settlement of Investment Disputes pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 (ICSID), provided both Contracting States are members of this Convention.”

50 “arbitration under the auspices of the International Centre for Settlement of Investment Disputes pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 (ICSID) in accordance with the Rules on the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre, where the personal or factual preconditions for proceedings pursuant to figure 1 do not apply, but at least one Contracting State is a member of the Convention referred to therein.”

51 “an individual arbitrator or an ad-hoc arbitral tribunal which is established in accordance with the rules of the United Nations Commission on International Trade Law (UNCITRAL) as in force at the commencement of the proceedings.”

52 “an arbitral tribunal which is established pursuant to the Dispute Resolution Rules of the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA) or the Arbitration Institute of the Stockholm Chamber of Commerce.”

53 See art 9(3) of the *Agreement between the Federal Republic of Germany and the People’s Republic of China on the Encouragement and Reciprocal Protection of Investments* (2005) BGBl II, 733.

Schiedsgerichtsbarkeit).⁵⁴ Thus, ICSID arbitration can occur at the Frankfurt International Arbitration Centre.⁵⁵

General Procedural Issues

During arbitration proceedings or the enforcement of an award, German BITs usually prohibit the contracting states involved in the dispute from raising the objection that the investor of the other contracting state has received compensation under an insurance contract in respect to all or part of the damage.

German BITs do not contain any articles on transparency or possibility of *amicus curiae* briefs or of hearings open to the public. This is only partially reflected when new approaches to ISDS by the European Commission that can be seen as major improvements in the field of transparency are criticized in public debate.

As most German BITs do not mention the requirement of exhausting local remedies in domestic courts prior to initiating arbitral proceedings, the exhaustion of local remedies is not required. Thus, most German BITs liberate the investor from the requirement under customary international law of exhausting local remedies.⁵⁶

Nevertheless, some German BITs request that the dispute must be submitted to a national administrative review procedure (see Germany-China BIT of 2003⁵⁷). Others foresee that national courts of the host state have to be addressed first (see the Germany-Argentina BIT of 1993⁵⁸) and that an international arbitration can only be initiated if a decision on the merits has not been rendered within 18 months, or if the dispute persists after such a judicial decision.⁵⁹

The German Model BIT 2009, as well as most of the more recent German BITs, require a six-month waiting period. If this period elapses without conflict resolution, the investor is free to start arbitration proceedings. This right is clear and leaves no room for any necessity of exhaustion of local remedies.

Some German BITs provide for the right of an investor to submit a dispute to arbitration even after domestic courts of a host state have rendered a final judgement. Other German BITs restrict the right to take a final judgement to arbitration; investors from Germany have to decide whether they want to submit a dispute to arbitration before a final decision is rendered by the host state's judiciary (see, for example, the Germany-Angola BIT 2003).⁶⁰ The German Model BIT 2009 is silent on this issue. It also does not address the problem of conflicting judgments of domestic courts or arbitral tribunals and does not include a "fork-in-the-road" clause.⁶¹ A German investor may, under the Model BIT, thus start with

54 German Institution of Arbitration, online: <www.disarb.org>.

55 Frankfurt International Arbitration Centre of DIS and CCI Frankfurt, online: <www.frankfurt-main.ihk.de/english/legal_matters/disputeregulation/fiac>.

56 Matthias Füracker, "Relevance and Structure of Bilateral Investment Agreements – The German Approach", 5 *Zeitschrift für Schiedsverfahren* (2006) 236, 244; see e.g. art 9 of the *Agreement between the People's Republic of China and the Federal Republic of Germany on the Encouragement and Reciprocal Protection of Investments* (2005) BGBl II, 733 (entered into force 11 November 2005).

57 See *ibid*, art 9(4).

58 *Treaty between the Federal Republic of Germany and the Argentine Republic on the Promotion and Reciprocal Protection of Investment* (1993) BGBl II, 1244 (entered into force 8 November 1993).

59 *Ibid*, art 10(3) (a): "The dispute may be submitted to an international arbitral tribunal in any of the following circumstances: (a) At the request of one of the parties to the dispute where, after a period of 18 months has elapsed from the moment when the judicial process provided for by paragraph 2 of this article was initiated, no final decision has been given or where a decision has been made but the parties are still in dispute"; see also art 10(3) of the *Vertrag zwischen der Bundesrepublik Deutschland und der Republik Chile über die Förderung und den gegenseitigen Schutz von Kapitalanlagen* (1998) BGBl II, 1427 (entered into force 8 May 1999): "Auf Verlangen einer Streitpartei wird die Meinungsverschiedenheit einem internationalen Schiedsgericht unterbreitet, a) wenn binnen 18 Monaten seit Einleitung des gerichtlichen Verfahrens gemäß Absatz 2 eine Sachentscheidung des angerufenen Gerichts nicht vorliegt oder b) wenn eine derartige Entscheidung vorliegt, aber eine der Streitparteien der Auffassung ist, daß diese gegen Bestimmungen des vorliegenden Vertrages verstößt; das Schiedsverfahren ist innerhalb eines Jahres nach Zustellung der schriftlichen Entscheidung einzuleiten."); see also Lorz, *supra* note 9 at 359, 383.

60 Füracker, *supra* note 56; see for a recent example art 9(4) of the *Vertrag zwischen der Bundesrepublik Deutschland und der Republik Angola über die Förderung und den gegenseitigen Schutz von Kapitalanlagen*, (2005) BGBl II, 708 (entered into force 1 March 2007): "Ein Investor der Republik Angola, der in der Bundesrepublik Deutschland eine Kapitalanlage besitzt, kann vor oder nach der Sachentscheidung der Meinungsverschiedenheit durch ein deutsches Gericht ein Internationales Schiedsgericht anrufen."

61 But see a fork in the road clause in art 10(2) of the *Agreement between the Federal Republic of Germany and the Republic of Indonesia concerning the Promotion and Reciprocal Protection of Investments* (2005) BGBl II, 514 (entered into force 2 June 2007): "If the dispute cannot be settled within six months of the date when it has been raised by one of the parties in dispute, it shall, at the request of the investor of the other Contracting Party, be submitted to the competent court of the Contracting Party in whose territory the investment is made, or to arbitration by the International Centre for Settlement of Investment Disputes (ICSID), established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, opened for signature at Washington D.C. on 18 March 1965."

domestic jurisdiction and then at any time — after the waiting period has expired — take the dispute to arbitration.

Consequently, for foreign investors there is a possibility to “appeal by arbitration.” There is no reason to reject such a possibility; the developed German legal system is well suited to compete with any other decision by an arbitral tribunal; it is not very likely that the outcome on the merits will be significantly different from the arbitral award.⁶²

There are no special requirements regarding the selection of arbitrators. Each party appoints one arbitrator and the third is jointly agreed upon. The German Model BIT does not mention any procedures with respect to frivolous claims, consolidating claims or (possibly creating) an appellate mechanism.

Arbitration proceedings take place at the request of one of the parties to the dispute in a state that is a contracting party to the New York Convention of 1958.

Enforcement

In general, German BITs require that the award be binding and not be subject to any appeal or remedy other than those provided for in the convention or the arbitral rules on which the investor bases the arbitral proceedings. The award shall be enforced by the contracting states as a final and absolute ruling under domestic law.⁶³ Since German BITs generally do not include any kind of specific enforcement regimes, it is important to be aware of other possibilities of enforcement of arbitral awards via instruments and mechanisms outside the respective BIT. In relation to recognition and enforcement of arbitral awards, Germany is a contracting state of the ICSID Convention and of the New York Convention.

In cases where the parties have chosen a place of arbitration outside Germany, the award is enforceable in Germany absent any other applicable international treaty, such as the ICSID Convention, under the rules of the Code of Civil Procedure (CCP (ZPO)) section 1061) in connection with the New York Convention. Section 1061(1) CCP incorporates the international regime of the New York Convention into German law.⁶⁴ The enforcement requires a declaration of enforceability by a national court. The enforcement declaration is granted pursuant to article III of the New York Convention, unless grounds to resist enforcement listed in article V of the New York Convention are applicable.⁶⁵

The recognition and enforcement of ICSID awards in Germany is governed by articles 54 and 55 of the ICSID Convention in connection with the German statute approving and implementing the ICSID Convention.⁶⁶ This statute stipulates that the enforcement of an ICSID award can only be denied if this award has been revised or annulled in the respective proceedings prescribed by articles 51 and 52 of the ICSID Convention.

ISDS outside BITs

Foreign investors and the Federal Republic of Germany, as well as its 16 *Länder* (federal states), may conclude investor-state (investment) contracts with explicit arbitration clauses. Also, German state enterprises (“local purpose companies” or local municipalities) may contract with a foreign investor.⁶⁷ Generally, these contracts also provide for ISDS. Nevertheless, in areas such as tax issues, arbitration is not permitted. Competent German courts may exclusively settle certain areas of law. Thus, for example, only German tax courts (*Finanzgerichte*) may settle tax issues (see below).

62 Füracker, *supra* note 56 at 236, 245.

63 See Stefan Kröll, “Recognition and Enforcement of Foreign Arbitral Awards in Germany” (2002) 5 Int ALR 160.

64 Section 1061: Foreign awards

1. Recognition and enforcement of foreign arbitral awards follows the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (Bundesgesetzblatt [BGBl.] 1961 Part II p. 121). The provisions of other treaties on the recognition and enforcement of arbitral awards shall remain unaffected.

2. If the declaration of enforceability is to be refused, the court shall rule that the arbitral award is not to be recognized in Germany.

3. If the award is set aside abroad after having been declared enforceable, application for setting aside the declaration of enforceability may be made.

65 See Lorz, *supra* note 9 at 359, 384.

66 Law approving the Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of other States of 25 February 1969 (1969) BGBl II, 369.

67 Escher et al, *supra* note 1 at 1013, 1024.

Invoking BITs before National Courts

Typical BIT standards of treatment, such as national treatment, fair and equitable treatment or prohibition of arbitrary and discriminatory measures, are at first sight vague and need clarification. But this can be a task for domestic authorities and courts when engaged in issues of foreign investment. Hence, single provisions of BITs should be directly applicable in general and can be invoked if they contain individual rights, as is the case in protection standards of BITs. These individual rights can therefore also be invoked by foreign investors in German courts.⁶⁸

GERMAN INVESTORS AS CLAIMANTS IN INTERNATIONAL LAW/ISDS

German investors are among the most active complainants in international investment law and have been claimants in approximately 45 cases. Most of these cases were directed against other EU countries.⁶⁹ A case-by-case summary of 10 cases can be found in a contribution by Rudolf Dolzer and Yun-I Kim.⁷⁰

The outcome of these cases is the following.

68 See Lorz, *supra* note 9 at 359, 370.

69 See Mildner, *supra* note 4; based on UNCTAD, Database of Investor-State Dispute Settlement (ISDS) (reduced version), online: <<http://unctad.org/en/pages/DIAE/DIAE.aspx>>.

70 Dolzer & Kim, *supra* note 30 at 289, 296.

Table 1: Disputes Initiated by German Investors

Disputes decided in favour of a German investor	9
Disputes initiated by German investors and decided in favour of the state	15
Settled or discontinued disputes initiated by German investors	5
Pending disputes initiated by German investors	19
Disputes initiated by German investors with no data on outcome available	1

Source: Author.

Table 2: Disputes Decided in Favour of a German Investor

Claimant	Respondent	Year	Legal Instrument	Arbitration Rules
Saar Papier Vertriebs GmbH	Poland	1994	Germany-Poland BIT	UNCITRAL
Franz Sedelmayer	Russia	1996	Germany-Russia BIT	SCC
Siemens AG	Argentina	2002	Germany-Argentina BIT	ICSID
Walter Bau AG	Thailand	2005	Germany-Thailand BIT	UNCITRAL
Inmaris Perestroika Sailing Maritime Services GmbH et al.	Ukraine	2008	Germany-Ukraine BIT	ICSID
Marion Unglaube	Costa Rica	2008	Germany-Costa Rica BIT	ICSID
Adem Dogan	Turkmenistan	2009	Germany-Turkmenistan BIT	ICSID
Deutsche Bank AG	Sri Lanka	2009	Germany-Sri Lanka BIT	ICSID
Von Pezold and others	Zimbabwe	2010	Germany-Zimbabwe BIT Switzerland-Zimbabwe BIT	ICSID

Source: Author.

Table 3: Disputes Initiated by German Investors and Decided in Favour of the State

Claimant	Respondent	Year	Legal Instrument	Arbitration Rules
Saar Papier Vertriebs GmbH	Poland	1996	Germany-Poland BIT	UNCITRAL
Fraport AG	Philippines	2003	Germany-Philippines BIT	ICSID
Wintershall AG	Argentina	2004	Germany-Argentina BIT	ICSID
Daimler Financial Services AG	Argentina	2005	Germany-Argentina BIT	ICSID
R.J. Binder	Czech Republic	2005	Germany-Czech Republic BIT	UNCITRAL
Gustav F.W. Hamester GmbH u. Co. KG	Ghana	2007	Germany-Ghana BIT	ICSID
TRACO Deutsche Tratinwerke GmbH	Poland	2008	Germany-Poland BIT	UNCITRAL
GEA Group AG	Ukraine	2008	Germany-Ukraine BIT	ICSID
InterTrade	Czech Republic	2008	Germany-Czech Republic BIT	UNCITRAL
Peter Franz Vocklinghaus	Czech Republic	2009	Germany-Czech Republic BIT	UNCITRAL
Reinhard Unglaube	Costa Rica	2009	Germany-Costa Rica BIT	ICSID
ECE Projektmanagement	Czech Republic	2009	Germany-Czech Republic BIT	UNCITRAL
ST-AD GmbH	Bulgaria	2010	Germany-Bulgaria BIT	UNCITRAL
Fraport AG	Philippines	2011	Germany-Philippines BIT	ICSID
Sana Consulting	Russia	2012	Germany-Russian Federation BIT	None (ad hoc)

Source: Author.

Table 4: Settled or Discontinued Disputes Initiated by German Investors

Claimant	Respondent	Year	Legal Instrument	Arbitration Rules
Ed. Züblin AG	Saudi Arabia	2003	Germany-Saudi Arabia BIT	ICSID
Nepolsky	Czech Republic	2008	Germany-Czech Republic BIT	UNCITRAL
Oiltanking	Bolivia	2010	Germany-Plurinational State of Bolivia BIT Peru-Plurinational State of Bolivia BIT	UNCITRAL
Slovak Gas	Slovakia	2012	Energy Charter Treaty	ICSID
Gelsenwasser AG	Algeria	2012	Germany-Algeria BIT	ICSID

Source: Author.

Table 5: Pending Disputes Initiated by German Investors

Claimant	Respondent	Year	Legal Instrument	Arbitration Rules
Hochtief	Argentina	2007	Germany-Argentina BIT	ICSID
The PV Investors	Spain	2011	Energy Charter Treaty	UNCITRAL
Ampal-American Israel Corp. et al.	Egypt	2012	Germany-Egypt BIT (Egypt-United States of America BIT)	ICSID
Antaris Solar GmbH, Dr. Michael Göde	Czech Republic	2013	Germany-Czech Republic BIT/Energy Charter Treaty	UNCITRAL
Deutsche Telekom	India	2013	Germany-India BIT	UNCITRAL
Jürgen Wirtgen, Stefan Wirtgen, JSW Solar (zwei) GmbH u. Co. KG	Czech Republic	2013	Germany-Czech Republic BIT/Energy Charter Treaty	UNCITRAL
Photovoltaik Knopf Betriebs-GmbH	Czech Republic	2013	Germany-Czech Republic BIT/Energy Charter Treaty	UNCITRAL
Utsch M.O.V.E.R.S. International GmbH, Erich Utsch AG, Helmut Jungbluth	Egypt	2013	Germany-Egypt BIT	ICSID
Voltaic Network GmbH	Czech Republic	2013	Germany-Czech Republic BIT/Energy Charter Treaty	UNCITRAL
Bluesun S.A., Jean-Pierre Locorcier, Michael Stein	Italy	2014	Energy Charter Treaty	ICSID
RWE Innogy GmbH et al.	Spain	2014	Energy Charter Treaty	ICSID
BayWa r.e. Renewable Energy GmbH et al.	Spain	2015	Energy Charter Treaty	ICSID
Stadtwerke München GmbH, RWE Innogy GmbH et al.	Spain	2015	Energy Charter Treaty	ICSID
EON SE and others	Spain	2015	Energy Charter Treaty	ICSID
El Jaouni	Lebanon	2015	Germany-Lebanon BIT	ICSID
Kruck and others	Spain	2015	Energy Charter Treaty	ICSID
KS and TLS Invest	Spain	2015	Energy Charter Treaty	ICSID
Landesbank Baden-Württemberg and others	Spain	2015	Energy Charter Treaty	ICSID
SolEs Badajoz	Spain	2015	Energy Charter Treaty	ICSID

Source: Author.

Table 6: Disputes Initiated by German Investors with No Data Available on Outcome

Claimant	Respondent	Year	Legal Instrument	Arbitration Rules
Lutz Ingo Schaper	Poland	1998	Germany-Poland BIT	UNCITRAL

Source: Author.

Table 7: Settled or Discontinued Disputes against Germany

Claimant	Respondent	Year	Legal Instrument	Arbitration Rules
Ashok Sancheti	Germany	2000	Germany-India BIT	Data not available
Vattenfall Europe AG et al.	Germany	2009	Energy Charter Treaty	ICSID

Source: Author.

In April 2009, the Swedish energy company Vattenfall brought the German government to international arbitration.⁷¹ The arbitration challenged environmental restrictions imposed on a coal-fired power plant under construction along the banks of the Elbe River. The case was settled.⁷²

In the *Sancheti* case, proceedings were terminated because the claimant failed to pay advances on costs.⁷³ This case did not receive any attention and no public debate occurred.

Table 8: Pending Disputes against Germany

Claimant	Respondent	Year	Legal Instrument	Arbitration Rules
Vattenfall Europe AG et al.	Germany	2012	Energy Charter Treaty	ICSID

Source: Author.

This pending case⁷⁴ is among the most cited in the current anti-ISDS critique. In May 2012, the previously mentioned Vattenfall filed a request for arbitration against Germany at ICSID because of Germany's decision to phase out nuclear energy. Vattenfall relies on its rights under the Energy Charter Treaty. One of the main points of criticism in these cases is that ISDS would lead to better treatment of foreign investors in comparison to German enterprises ("*Inländerdiskriminierung*": reverse discrimination). This argument tends to leave undiscussed the fact that German investors abroad are guaranteed extra protection based on BITs. Furthermore, in the national system, nationals may have different and more extensive rights in comparison to foreign investors.

Contract-based Claims

There are at least three additional investor-state disputes with German involvement on the basis of contracts:

Klückner Industrie-Anlagen GmbH and others v Cameroon (ICSID Case No. ARB/81/2);

SEDITEX Engineering Beratungsgesellschaft für die Textilindustrie m.b.H. v Madagascar (ICSID Case No. CONC/82/1); and

SEDITEX Engineering Beratungsgesellschaft für die Textilindustrie m.b.H. v Madagascar (ICSID Case No. CONC/94/1).

71 *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v Federal Republic of Germany*, ICSID Case No ARB/09/6.

72 Award of 11 May 2011, ICSID Case No ARB/09/6.

73 *Sancheti v Federal Republic of Germany*, UNCITRAL, award of 6 June 2001.

74 *Vattenfall AB and others v Federal Republic of Germany*, ICSID Case No ARB/12/12 (registered 31 May 2012).

CURRENT GERMAN DISCUSSION IN REGARD TO IIAS IN GENERAL AND ISDS IN PARTICULAR

The inclusion of an investment chapter in general, and of ISDS in particular, in the Canada-EU Comprehensive Economic and Trade Agreement (CETA) as well as in the Transatlantic Trade and Investment Partnership (TTIP), has caused considerable public concern in Germany. The German public seems to be among the strongest opponents of ISDS in the European Union with respect to these two trade and investment agreements. This discussion, which only started when the TTIP negotiations became an issue, has not spread to the European Union's negotiations with Asian countries.

In the spring of 2014, a heavy and one-sided public debate began in the German media, not only in some of the leading newspapers, such as *Sueddeutsche Zeitung*, *Die Zeit*, *Der Spiegel* and *Frankfurter Allgemeine Zeitung*, but also on talk shows such as *Anne Will* and the *Heute Show*. Most articles described ISDS in very negative terms, usually mentioning the still undecided *Vattenfall* and *Philip Morris* cases. Most articles insisted on the exclusion of ISDS in TTIP and CETA.⁷⁵ In July 2014, two of the leading German newspapers, *Sueddeutsche Zeitung* and *Die Zeit*, wrote that Germany opposed CETA over concerns relating to ISDS.⁷⁶ One article titled *Im Namen des Geldes*⁷⁷ (“In the name of money”) was even awarded the Otto-Brenner-Preis für kritischen Journalismus (Otto Brenner Award for Critical Journalism).⁷⁸ Opponents of international trade have also edited broader books on international economic relations to include chapters against the inclusion of investment protection in free trade agreements (FTAs).⁷⁹

Parallel to this development, various law professors⁸⁰ and a former judge at the Federal Constitutional Court⁸¹ have published opinions regarding the non-conformity of ISDS with German constitutional law. It is argued that ISDS chapters in CETA and TTIP would violate the constitutional rule of law principle, and that awards by arbitral tribunals would lack democratic legitimacy.

It has to be noted that some of the aforementioned people had worked little on issues relating to international trade law, EU common commercial policy or international investment law prior to the anti-ISDS campaign in Germany, even though ISDS in German BITs and in the Energy Charter Treaty have existed for almost 30 years. It must be remarked at this point that Herta Däubler-Gmelin, German minister of justice from 1998 to 2002, strongly criticized ISDS as not being in line with German constitutional law.⁸² However, during her time as minister of justice, more than 12 German BITs with third countries were concluded.⁸³

As stated in a Canadian blog article, the German Deputy Economy Minister Stefan Kapferer argued that “the German government does not view as necessary stipulations on investor protection, including on arbitration cases between investors and the state with states that guarantee a resilient legal system and

75 Shawn Donnan & Stefan Wagstyl, “Transatlantic Trade Talks Hit German Snag”, *Financial Times* (14 March 2014); Markus Burgstaller, Michael Jacobson & Jonathan Stoel, “Germany Reverses its Support for Investor-State Dispute Settlement in the Transatlantic Trade and Investment Partnership (TTIP)”, *Hogan Lovells ARBlog: International Arbitration News, Trends and Cases* (1 April 2014), online: <www.hlarbitrationlaw.com/2014/04/germany-reverses-its-support-for-investor-state-dispute-settlement-in-the-transatlantic-trade-and-investment-partnership-ttip/>.

76 Silvia Liebrich, “Bremst CETA”, *Sueddeutsche Zeitung* (28 July 2014); [name unknown], “Deutschland lehnt Freihandelsabkommen vorerst ab”, *Die Zeit* (26 July 2014).

77 Petra Pinzler, Kerstin Kohlenberg & Wolfgang Uchatius, “Im Namen des Geldes”, *Die Zeit*, Dossier No 10 (27 February 2014).

78 Criticized by Jörn Griebel, “Im Namen der Wahrheit? – Kritische Anmerkungen zu der mit Otto-Brenner-Preis geehrten Berichterstattung zu TTIP und CETA”, November 2014, online: <verfassungsblog.de/im-namen-der-wahrheit-kritische-anmerkungen-zu-der-mit-otto-brenner-preis-geehrten-berichterstattung-zu-ttip-und-ceta/>.

79 See for example Thilo Bode, *Die Freihandelslüge: Warum TTIP nur den Konzernen nützt – und uns allen schadet* (Munich: Deutsche Verlags-Anstalt, 2015) esp. at 75; Harald Klimenta & Andreas Fisahn, *Die Freihandelsfalle: Transatlantische Industriepolitik ohne Bürgerbeteiligung – das TTIP* (Hamburg: VSA, 2014) see esp. at 64.

80 Andreas Fischer-Lescano & Johan Horst, “Europa- und verfassungsrechtliche Vorgaben für das Comprehensive Economic and Trade Agreement der EU und Kanada (CETA)” (October 2014), online: <www.eesc.europa.eu/resources/docs/04-gutachten_ceta_171014_final-fischer-lescانو.pdf>; Axel Flessner, “TTIP und Verfassungsrecht” (May 2014), *VerfBlog*, online: <verfassungsblog.de/ttip-und-das-verfassungsrecht/>; Kathrin Groh & Daniel-Erasmus Khan, “Sind die Regelungen zur Schiedsgerichtsbarkeit ... verfassungswidrig, ...?”, online: <www.bund-naturschutz.de/fileadmin/download/Umweltpolitik/Gutachten_zu_TTIP-Schiedsgerichten.pdf>.

81 Siegfried Broß, *Freihandelsabkommen, einige Anmerkungen zur Problematik der privaten Schiedsgerichtsbarkeit*, Dusseldorf: Hans-Böckler-Stiftung, Report No 4, January 2015, online: <www.boeckler.de/pdf/p_mbf_report_2015_4.pdf>.

82 Herta Däubler-Gmelin, “Verstoßen die TTIP-Schiedsgerichte gegen das GG?”, (2015) 51 *Recht und Politik* 10.

83 Federal Ministry for Economic Affairs and Energy, “Investitionsschutzverträge”, online: <www.bmwi.de/DE/Themen/Aussenwirtschaft/Investitionsschutz/investitionsschutzvertraege.html>.

sufficient legal protection from independent national courts.”⁸⁴ For the first time since 1985, Germany has moved away from its (until then) constant state practice of questioning the inclusion of ISDS in investment agreements, and, as will be discussed below, has changed this in recent documents and proposals.

In 2014 and early 2015, on several occasions, Sigmar Gabriel, the leader of Germany’s Social Democratic Party (SPD), vice-chancellor and federal minister for economic affairs and energy (responsible for investment protection policy since the German Ministry of Economics is responsible for investment politics and negotiating German BITs), argued openly against investor protection in the form of ISDS in CETA as well as TTIP. He used explicitly negative language such as “*Geheimgerichtsbarkeit*” (secret courts) and mentioned the possibility of “regulatory chill,” i.e., that the fear of legal action by foreign investors might hinder Germany from enacting necessary regulatory projects and legislation.⁸⁵ He also stated that Germany would reject investment protection agreements with ISDS and try to change the ISDS clause in CETA.⁸⁶

Even though different motions against ISDS were put forward in the German Bundestag, they were generally rejected.⁸⁷ As is concluded by one author,⁸⁸ CETA and ISDS were a non-topic in the German Bundestag until the broader media coverage of this topic started during spring 2014. The first time CETA and TTIP were mentioned as part of the Bundestag proceedings was on January 27, 2014,⁸⁹ and on June 19, 2013 they were mentioned on the German government website.⁹⁰ From this it can be concluded that “these results strengthen the observation that ISDS throughout the CETA negotiations themselves was largely a non-issue for Germany and that it was not until the TTIP negotiations started that the first debates on CETA and ISDS emerged within Germany’s parliamentary and government circles; nobody in Germany was worried about the idea of investment protection with Canada or the inclusion of ISDS in a FTA with Canada.”⁹¹ ISDS in CETA has thus become a matter of concern in Germany only because CETA is seen as a blueprint for TTIP.

The German Bundesrat (Federal Council) adopted a resolution against making ISDS part of TTIP. It rejected the inclusion of a specific ISDS mechanism in TTIP in a resolution on July 11, 2014, and argued that foreign investors should generally seek judicial remedies before national courts.⁹²

In January 2015, Germany and France issued a common declaration stating, *inter alia*, that the Commission’s consultation results should inspire more changes in CETA when it comes to ISDS and

84 Peter Clark, “Germany Throws down Gauntlet in CETA Investor-State Negotiations”, *IPolitics* (27 July 2014), online: <www.ipolitics.ca/2014/07/27/germany-throws-down-gauntlet-in-ceta-investor-state-negotiations>.

85 EurActiv, “CETA: Bundesregierung Lehnt Investitionsschutz fuer EU-Kanada-Abkommen Ab” (23 September 2014), online: <www.euractiv.de/sections/eu-aussenpolitik/ceta-bundesregierung-lehnt-investitionsschutz-fuer-eu-kanada-abkommen-ab>.

86 EurActiv, “Germany Wants Investment Clause Scrapped in EU-Canada Trade Deal” (26 September 2014), online: <www.euractiv.com/sections/trade-industry/germany-wants-investment-clause-scrapped-eu-kanada-trade-deal-308717>.

87 Katharina Dröge, Katja Keul & Bärbel Höhn, “Antrag – Keine Klageprivilegien fuer Konzerne – CETA Vertragsentwurf Ablehnen”, German Bundestag, 18. Wahlperiode, Drucksache 18/2620 (24 September 2014), online: <dipbt.bundestag.de/dip21/btd/18/026/1802620.pdf>; Klaus Ernst et al, “Antrag – Freihandelsabkommen zwischen der EU und Kanada CETA zurueckweisen”, German Bundestag, 18. Wahlperiode, Drucksache 18/2604 (23 September 2014), online: <dipbt.bundestag.de/dip21/btd/18/026/1802604.pdf>; Katharina Dröge et al, “Antrag – Konsultationsergebnisse Beherzigen – Klageprivilegien zurueckweisen”, German Bundestag, 18. Wahlperiode, Drucksache 18/3747 (14 January 2015), online: <dipbt.bundestag.de/dip21/btd/18/037/1803747.pdf>.

88 Stefanie Roskopf, “Investor-State Dispute Settlement (ISDS), Germany and the Transatlantic Relationship”, Paper Submitted to the EUSA 14th Biennial Conference, Boston, 5-7 March 2015.

89 German Bundestag, “Schriftliche Fragen mit den in der Woche vom 27. Januar 2014 eingegangenen Antworten der Bundesregierung”, 18. Wahlperiode, Drucksache 18/412 (31 January 2014), online: <dipbt.bundestag.de/doc/btd/18/004/1800412.pdf>.

90 German Federal Government, Pressekonferenz von Bundeskanzlerin Merkel und US-Präsident Obama (19 June 2013), online: <www.bundesregierung.de/Content/Archiv/DE/Archiv17/Mitschrift/Pressekonferenzen/2013/06/2013-06-19-pk-merkel-obama.html>.

91 Roskopf, *supra* note 88.

92 German Federal Council, “Entschließung des Bundesrates anlässlich des öffentlichen Konsultationsverfahrens der Europäischen Kommission über die Modalitäten eines Investitionsschutzabkommens mit Investor-Staat-Schiedsgerichtsverfahren im Rahmen der Verhandlungen über eine Transatlantische Handels- und Investitionspartnerschaft zwischen der EU und den USA”, Drucksache 295/14 (11 July 2014), online: <[www.bundesrat.de/SharedDocs/drucksachen/2014/0201-0300/295-14\(B\).pdf?__blob=publication_File&v=1](http://www.bundesrat.de/SharedDocs/drucksachen/2014/0201-0300/295-14(B).pdf?__blob=publication_File&v=1)>: “9. Der Bundesrat hält spezielle Investitionsschutzvorschriften und Streitbeilegungsmechanismen im Verhältnis Investor und Staat zwischen der EU und den USA für verzichtbar und mit hohen Risiken verbunden. Gründe dafür sind insbesondere: - Beide Partner gewährleisten für Investoren einen hinreichenden Rechtsschutz vor unabhängigen nationalen Gerichten. - Durch Investor-Staat-Schiedsverfahren können allgemeine und angemessene Regelungen zum Schutz von Gemeinwohlzielen, die in demokratischen Entscheidungen rechtsstaatlich zustande gekommen und rechtmäßig angewandt wurden, ausgehebelt oder umgangen werden.”.

that together with the European Union and the other EU member states, Germany and France should explore any options for changes in CETA.⁹³

In May 2015, Germany proposed the inclusion of a permanent international investment court — and the discontinuance of any kind of ad hoc arbitration tribunal — in TTIP. The proposal of a permanent international investment court was first put forward in the Socialists and Democrats’ position paper of February 24, 2015.⁹⁴ The position paper “supports the creation of a new mechanism with a permanent secretariat,” adding that a “Trade and Investment Court [...] could constitute such a new mechanism.” According to the position paper, the “choice of arbitrators should be limited to fixed pools of highly qualified arbitrators appointed by the EU, Canada and EU member states.”⁹⁵

The Federal Ministry for Economic Affairs and Energy asked Markus Krajewski, professor of public law, public international law and European law at Germany’s Erlangen University, for an extended proposal on what such a new mechanism could look like.⁹⁶ Krajewski submitted his proposal to the ministry in May 2015, which then introduced this work into the European debate.⁹⁷

Krajewski proposed limiting the material standards. Foreign investors should not be granted more rights than nationals; indirect expropriation and fair and equitable treatment should be concretized and the right to regulate explicitly strengthened. As a dispute settlement mechanism, he proposed a permanent bilateral investment tribunal with permanent judges and a secretariat; the disputing parties would not have any influence on which judges would be selected for a specific case. Furthermore, his proposal suggested an appellate mechanism for each specific agreement for a review of questions of law and, to a limited degree, also of facts of decisions of the Permanent Investment Tribunal. This tribunal would not decide on any of the usual procedural rules such as UNCITRAL or ICSID, but adopt its own procedural rules. The decisions of the PIT would be enforceable in the states party to the specific agreement only, as neither the New York Convention nor the ICSID Convention would be applicable. In regard to procedural aspects, Krajewski suggested including either a local remedies rule or a strict fork-in-the-road clause.

The introduction of a modified version of a permanent investment court in TTIP was proposed to the United States in November 2015, and is contained in the recently negotiated EU-Vietnam FTA,⁹⁸ as well as (after the legal scrubbing) in the CETA text.⁹⁹

Finally, in April 2015, five EU member states, including Germany, put forward a non-paper on the future of intra-EU treaties and proposed an agreement among all EU member states that would include material rights comparable to the ones in CETA, as well as an ISDS mechanism.

93 German Federal Ministry for Economic Affairs and Energy and the French Ministry for Trade, Tourism and the Foreign French, “Gemeinsame Erklärung” (21 January 2015), online: <matthias-fekl.fr/negotiations-commerciales-declaration-commune-avec-sigmar-gabriel-et-matthias-machnig>; see also Euractiv, “France and Germany to form united front against ISDS” (15 January 2015), online: <www.euractiv.com/sections/trade-society/france-and-germany-form-united-front-against-isds-311267>.

94 Group of the Progressive Alliance of Socialists & Democrats in the European Parliament, “S&D Position Paper on Investor-state dispute settlement mechanisms in ongoing trade negotiations” (4 March 2015), online: <www.socialistsanddemocrats.eu/sites/default/files/position_paper_investor_state_dispute_settlement_ISDS_en_150304.pdf>.

95 *Ibid.*

96 Markus Krajewski, “Modell-Investitionsschutzvertrag mit Investor-Staat-Schiedsverfahren für Industriestaaten unter Berücksichtigung der USA” (2012) German Federal Ministry for Economic Affairs and Energy, online: <www.bmwi.de/BMWi/Redaktion/PDF/M-O/modell-investitionsschutzvertrag-mit-investor-staat-schiedsverfahren-gutachten,property=pdf,bereich=bmwi2012,sprache=de,rwb=true.pdf>.

97 *Ibid.*

98 For further information, consult the *EU-Vietnam Free Trade Agreement: Agreed text as of January 2016*, online: <trade.ec.europa.eu/doclib/press/index.cfm?id=1437>.

99 *Comprehensive Economic and Trade Agreement (CETA) between Canada, of the One Part, and the European Union and its Member States* (February 2016), online: <trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf>, especially art 8.18.

OVERALL NEEDS OF ISDS IN GERMAN AND EUROPEAN IIAS

It must be noted that there have been more than 130 investment disputes against EU member states before the end of 2015. The Czech Republic, Hungary, Poland and Romania were each respondent in between 10 and 20 known cases. Recently, Spain has been respondent in at least eight cases. This high aggregate number of claims, especially against Central and Eastern European countries, shows the mistrust of the judicial system of these countries, even though they are part of the European Union. Legal protection is necessary when obligations are not complied with. The fact that certain types of obligations are habitually complied with, because the domestic legal system of a host state conforms to rule of law requirements and offers adequate rule of law guarantees in case of violations, does not mean that there should not be a fallback protection option available in the rare instances where this is not the case. The legal protection of foreign investors does not always live up to the demands of the rule of law.

Foreign investors may be subject to discrimination,¹⁰⁰ may not receive a fair trial in domestic courts,¹⁰¹ or may otherwise be deprived of fundamental rule of law guarantees even in highly developed OECD countries.¹⁰² Furthermore, corruption is taking place not only in developing countries but also in OECD member states,¹⁰³ as evidenced by the results of the Corruption Perception Index 2014 of Transparency International.¹⁰⁴ Judicial independence in particular is a requirement stemming from the right to an effective remedy (also enshrined in article 47 of the Charter of Fundamental Rights of the European Union¹⁰⁵) assuring the fairness, predictability, certainty and stability of the legal system in which businesses operate.¹⁰⁶ Thirteen EU member states rank in the World Economic Forum Global Competitiveness Index at number 54 or below for judicial independence among the 148 countries listed; nine of the member states are even listed below number 70, and four EU states are ranked below number 90.¹⁰⁷ For example, the Slovak Republic ranks number 133 (Bulgaria being number 123 and Romania number 114) in regard to the criterion of judicial independence.¹⁰⁸ The United States ranks number 32 on this index of judicial independence.¹⁰⁹ Various reports undertaken by the European Commission also show general doubt about the fairness and impartiality of the judicial systems of Romania and Bulgaria.¹¹⁰

Different modes of dispute settlement, also foreseen in investment agreements, strengthen the degree of compliance in general, and the availability of any means of legal recourse for the individual serves the protection of legal rights. Ideally, such availability alone will contribute to compliance.¹¹¹

100 *SD Myers v Canada*, UNCITRAL (NAFTA), Award (Merits), 13 November 2000, para 252: “The Tribunal takes the view that, in assessing whether a measure is contrary to a national treatment norm, the following factors should be taken into account: whether the practical effect of the measure is to create a disproportionate benefit for nationals over non nationals; whether the measure, on its face, appears to favour its nationals over non-nationals who are protected by the relevant treaty”. See also in regard to favouritism in decisions of government officials: Klaus Schwab, “The Global Competitiveness Report 2013-2014” (2013), World Economic Forum, 416, online: <www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2013-14.pdf>. On this index, the United States lists as number 54, behind Turkey, Iran, Costa Rica and Serbia.

101 *Loewen Group v USA*, ICSID Case No ARB(AF)/98/3, para 137: “[T]he whole trial [before a Mississippi court] and its resultant verdict were clearly improper and discreditable and cannot be squared with minimum standards of international law and fair and equitable treatment”.

102 See references and examples for misconduct in Stratos Pabis, “Corruption in Our Courts: What It Looks Like and Where It Is Hidden” (2009) 118 Yale LJ 1900, online: <www.yalelawjournal.org/note/corruption-in-our-courts-what-it-looks-like-and-where-it-is-hidden>.

103 Cheol Liu & John L Mikesell, “The Impact of Public Officials’ Corruption on the Size and Allocation of US State Spending” (2014) 74:3 PAR 346, online: <onlinelibrary.wiley.com/doi/10.1111/puar.12212/full>.

104 For results of Transparency International’s Corruption Perceptions Index 2014, online: <www.transparency.org/cpi2014/results>.

105 *Charter of Fundamental Rights of the EU* (2000) OJ C364/01 art 47: “(1) Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. (2) Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.”

106 European Commission, “Communication: The 2015 EU Justice Scoreboard”, COM(2015) 116 final, 9 March 2015, at 37, online: <ec.europa.eu/justice/effective-justice/files/justice_scoreboard_2015_en.pdf>.

107 Klaus Schwab, “The Global Competitiveness Report 2013-2014”, World Economic Forum, 415, online: <www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2013-14.pdf>.

108 *Ibid*, 343.

109 *Ibid*, 383.

110 See European Commission, “Report from the Commission to the European Parliament and the Council, On Progress in Bulgaria under the Co-operation and Verification Mechanism the Report from the Commission”, COM(2015) 36 final, 28 January 2015, online: <ec.europa.eu/cvm/docs/com_2015_36_en.pdf>; European Commission, “Report from the Commission to the European Parliament and the Council, On Progress in Romania under the Co-operation and Verification Mechanism the Report from the Commission”, COM(2015) 35 final, 28 January 2015 online: <ec.europa.eu/cvm/docs/com_2015_35en.pdf>.

111 See also David Gaukrodger & Kathryn Gordon, “Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community”, OECD Working Paper on International Investment No 2012/03 (2012) 10, online: <http://dx.doi.org/10.1787/5k46b1r85j6f-en>.

This is also one of the main ideas of strong individual (subjective) rights in EU economic law in, for example, procurement or state aid law, as well as in the entire area of fundamental freedoms and their enforcement.¹¹²

Furthermore, the fact that obligations are usually complied with in the United States or most member states of the European Union (or the EU itself) does not mean that an additional compliance mechanism should be abolished. Therefore, it seems difficult to argue that ISDS would not be necessary in any kind of transatlantic free trade and investment agreement. It is not guaranteed that foreign investors in general receive equal and fair treatment from foreign national courts. Even sophisticated legal systems in Canada, the United States and most parts of the European Union do not guarantee that non-commercial risk presented by government action will be dealt with in a non-discriminatory and fair manner by national courts. Therefore, ISDS can serve as a last resort for foreign investors. Often the mere availability of legal recourse for individual investors will deter host states from acting in violation of basic due process principles and will thus contribute to compliance.¹¹³ A functioning legal system complying with basic rule-of-law criteria will in turn be more attractive to foreign investors than a system devoid of such attributes.

Furthermore, abolishing ISDS would be a sign of mistrust toward those countries of whom ISDS would still be asked by the European Union in future negotiations, as this would imply that those states do not, from an EU perspective, comply with international rule of law.

A non-paper by five EU member states — *inter alia* Germany — from April 2016 argues that a decrease of investment protection by terminating intra-EU BITs could create a competitive advantage for foreign investors, who can then rely on clearly defined and uniform protection standards.¹¹⁴

CONCLUSION AND OUTLOOK

This report aimed at summarizing the history of investment protection via BITs and the main components of ISDS in German BITs, as well as the current ongoing debate in Germany, with the most recent developments that may have led to a reform of the EU approach in regard to ISDS. Finally, it must be remarked that there do not seem to be any different arguments against the ISDS mechanism between developed states on the one hand and North-South agreements on the other hand. One might argue that ISDS is not necessary, in general, in BITs and IIAs between developed countries. However, it can be remarked that situations and political circumstances can change within only a few months, as is currently the case in Poland, Hungary and especially Turkey, to name only a few OECD countries. The establishment of a mechanism whose awards would also be enforceable under the ICSID Convention or the New York Convention might, in the cases mentioned, prove very helpful in the coming years.

112 Johannes Masing, *Die Mobilisierung des Bürgers zur Durchsetzung des Rechts* (Berlin: Duncker & Humblot, 1997); Ulrich Everling, “Durchführung und Umsetzung des europäischen Gemeinschaftsrechts im Bereich des Umweltschutzes”, *Neue Zeitschrift für Verwaltungsrecht* (Munich: C.H. Beck, 2009) at 209, 215.

113 See *supra* note 98.

114 Seattle-to-Brussels Network, “The non-paper on Intra-EU investment treaties tabled by Austria, France, Finland, Germany and the Netherlands, dated 7 April 2016: Preliminary analysis by the Seattle-to-Brussels Network” (18 May 2016), online: <www.s2bnetwork.org/wp-content/uploads/2016/05/The-AFFGN-non-paper-160515-1.pdf>.

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