A Critical Appraisal of the Investment Court System Proposed by the European Commission

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In a reaction to criticisms raised against traditional investor-state arbitration, the European Commission proposes the introduction of what it calls interchangeably an investment court system or an improved investor-to-state arbitration system. The European Commission intends to introduce this new dispute resolution mechanism under the Comprehensive Economic and Trade Agreement between the EU, including its Member States, and Canada (CETA), which was signed by the EU and Canada on 30 October 2016. This paper critiques the new dispute resolution mechanism proposed by the European Commission, drawing on challenges directed against the signing, conclusion and provisional application of CETA before the German Federal Constitutional Court. This paper also compares the proposed investment court system to traditional investor-state arbitration. It suggests that the agreement to take decisions in the CETA Joint Committee regarding matters within the Member States’ competence by agreement among the EU, its Member States and Canada might ultimately stifle effective government control over arbitrators, a result that would be contrary to the proclaimed aim of introducing greater government control over arbitrators.

Efforts to institutionalise investor-state dispute resolution have reached a new peak with the recent proposal by the European Commission to introduce an investment court system under international investment agreements such as the proposed Comprehensive Economic and Trade Agreement between the EU, its Member States, and Canada (CETA)1 and the proposed Transatlantic Trade and Investment Partnership between the EU, its Member States, and the US (TTIP).2 Canada has agreed to the proposal by the European Commission, but, to date, the US has not warmed to the idea of institutionalised investor-state dispute resolution. This paper compares the envisaged investment court system to traditional investor-state arbitration and explains why scepticism of institutionalisation is reasonable given its potential drawbacks.3

The proposal to introduce an investment court system under international investment agreements between the EU, its Member States, and a third country, carries as much weight for Ireland as it does for every other Member State of the European Union. If CETA comes to fruition as it stands now, foreign investors will be able to sue Ireland over violations of the investment protections under CETA. This paper considers whether the investment court system proposed by the European Commission is advantageous over traditional investor-state arbitration, in which the disputing parties choose their arbitrators.

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2 See Section F of CETA (Resolution of investment disputes between investors and states).


[2016] 19 (1) IJEL
arbitrators. This paper submits that, within the European Union, government control over arbitrators would not necessarily be greater under the envisaged investment court system, as has been suggested by the European Commission. Many of the new legitimacy safeguards proposed by the European Commission – qualification requirements for arbitrators, a code of ethics for arbitrators, the introduction of an appellate mechanism, and the opening of arbitral proceedings to the public – could also be implemented within the system of traditional investor-state arbitration. With the European Union already pursuing the establishment of a multilateral investment tribunal, it is time to reflect on the desirability of institutionalisation in investor-state dispute resolution in the first place. This paper proceeds in two parts. First, this paper describes the proposal by the European Commission to create an investment court system. The core innovation proposed by the European Commission is the appointment of arbitrators by the contracting parties to investment treaties (the ‘Parties’) and the quasi-tenure of these arbitrators, as opposed to the appointment of arbitrators by the disputing parties on a case-by-case basis. Second, this paper examines whether the investment court system envisaged by the European Commission is a better system of dispute resolution than traditional investor-state arbitration.

A. The European Commission’s Proposal to Create an Investment Court System

The European Commission proposes to introduce what it calls interchangeably an investment court system or an improved investor-to-state arbitration system. It envisages to introduce this system first

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4 See Article 8.29 CETA:

The Parties shall pursue with other trading partners the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes. Upon establishment of such a multilateral mechanism, the CETA Joint Committee shall adopt a decision providing that investment disputes under this Section will be decided pursuant to the multilateral mechanism and make appropriate transitional arrangements.


[CETA] lays the basis for a multilateral effort to further develop this new approach to investment dispute resolution into a Multilateral Investment Court. The EU and Canada will work expeditiously towards the creation of the Multilateral Investment Court. It should be set up once a minimum critical mass of participants is established, and immediately replace bilateral systems such as the one under CETA, and be fully open to accession by any country that subscribes to the principles underlying the Court.

5 EU internal differences over the competence to create a bilateral investment court system are likely to slow the creation of such a system. The German Federal Constitutional Court held in 2016 that the EU might not have the competence to create a bilateral investment court system. See Bundesverfassungsgericht (BVerfG) [German Federal Constitutional Court], Judgment of 13 October 2016 (2 BVr 1368/16) paras 58 and 70. Two decisions by the European Court of Justice (ECJ) in this regard are pending. The ECJ is expected to clarify the EU competence to sign and ratify the free trade agreement with Singapore, which provides for traditional investor-state arbitration under Article 9.18(1). See Official Journal of the European Union, Opinion 2/15: Request for an opinion submitted by the European Commission pursuant to Article 218(11) TFEU (3 November 2015) (2015/C 363/22). In addition, Belgium announced that it would request an opinion of the ECJ on the compatibility of the proposed investment court system with the European Treaties. See Déclaration du Royaume de Belgique relative aux conditions de pleins pouvoirs par l’Etat fédéral et les Entités fédérées pour la signature du CETA (October 2016) p 2.


7 That the European Commission considers the investor-to-state dispute resolution mechanism under CETA to be an improvement vis-à-vis traditional investor-state arbitration contradicts the European Commission’s statement that ‘CETA has ... essentially the same contents as the Free Trade Agreement with Singapore (EUFSTA).’ See European Commission, Proposal for a Council Decision on the signing of the European Union of the Comprehensive Economic and Trade Agreement between Canada of the one part, and the European Union and its Member States, of the other part (5 July 2016) (COM(2016) 444 final) p 4. The dispute resolution mechanism under EUFSTA is that of traditional investor-state arbitration. See Article 9.18(1) of the EUFSTA (authentic text as of May 2015). The Commission nonetheless assumes that ‘the Union’s competence is the same in both cases’. See European Commission, Proposal for a Council Decision on the signing of the European Union of the
under international investment agreements such as CETA and TTIP, before establishing a multilateral investment tribunal. The proposed investment court system would thus at first be confined to resolving disputes under the respective investment agreement and would only operate within the confines of that agreement. The proposed texts of both CETA and TTIP define the investment court system as comprising of a Tribunal\(^8\) and an Appellate Tribunal.\(^9\) Even though the European Commission proposes an essentially identical means of investor-state dispute resolution under CETA and TTIP, this paper, in what follows, focuses on the dispute resolution mechanism under CETA, which has been signed by the European Union and Canada on 30 October 2016.\(^10\)

The jurisdiction of the Tribunals under CETA does not differ from the jurisdiction of an arbitral tribunal in the system of traditional investor-state arbitration. In both instances, the tribunals resolve disputes under the respective investment agreement only. New under CETA is the proposed introduction of an Appellate Tribunal, which reviews awards rendered to it by the Tribunal and which has the power under Article 8.28(2) CETA to uphold, modify or reverse an arbitral award based on:

(a) errors in the application or interpretation of applicable law;
(b) manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law;
(c) the grounds set out in Article 52(1) (a) through (e) of the ICSID Convention, in so far as they are not covered by paragraphs (a) and (b).

The Appellate Tribunals would thus have greater power than an ICSID Annulment Committee, which, under Article 52(1) of the ICSID Convention,\(^11\) may only annul an arbitral award based on one more of the following grounds:

(a) that the Tribunal was not properly constituted;
(b) that the Tribunal has manifestly exceeded its powers;
(c) that there was corruption on the part of a member of the Tribunal;
(d) that there has been a serious departure from a fundamental rule of procedure; or
(e) that the award has failed to state the reasons on which it is based.

The Appellate Tribunal, as envisaged by the European Commission, would not only have the additional power to reverse an arbitral award based on an error of law and a manifest error of fact. It would also have the power to modify an arbitral award, which is a power an \textit{ad hoc} ICSID Annulment Committee does not have. If an ICSID Annulment Committee annuls an arbitral award, either of the disputing parties, however, may request the dispute to be submitted to a new arbitral tribunal.\(^12\) It is this second level of scrutiny regarding errors of law that is particularly reminiscent of national court systems. Nikos Lavranos thus also describes the international investment court system as envisaged by the European Comprehensive Economic and Trade Agreement between Canada of the one part, and the European Union and its Member States, of the other part (5 July 2016) (COM(2016) 444 final) p 4.

\(^8\) See Article 8.27(1) CETA. Article 9 of the European Commission draft text of TTIP – investment refers to the Tribunal of First Instance ('Tribunal'). The text is available at <http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf> accessed 15 December 2016.


\(^10\) cf Council of the European Union, Council Decision on the signing on behalf of the European Union of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part (Brussels, 26 October 2016).

\(^11\) The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) entered into force on 14 October 1966 and has since been ratified by 153 Contracting States.

\(^12\) See Article 52(6) of the ICSID Convention.
Commission as a court-like body.\textsuperscript{13} He adds, however, that this body is a hybrid and semi-permanent.\textsuperscript{14} The Tribunal and the Appellate Tribunal are at least hybrid bodies of dispute resolution because their decisions are characterised as arbitral awards for the purposes of the New York Convention\textsuperscript{15} and the ICSID Convention.\textsuperscript{16} Neither the Tribunal nor the Appellate Tribunal is designed as a permanent institution inasmuch as no permanent secretariat is created. What makes at least the Tribunal a semi-permanent body is that its members – initially fifteen – are appointed by the CETA Joint Committee for a term of five to six years,\textsuperscript{17} renewable once.

Even though the appointment of members is long-term, the European Commission does not envisage Members of the Tribunal to work full-time in fulfillment of their functions under CETA. Article 8.27(11) CETA only provides that ‘Members of the Tribunal shall ensure that they are available and able to perform [their] functions’ under the investment treaty. This provision is more than declaratory, for Article 8.27(12) CETA envisages the payment of a monthly retainer fee to members of the Tribunal to ensure their availability. This indicates that members of the Tribunal are not full-time employees of a permanent institution but promise to render future services as required by the Tribunal. Article 8.27(6) CETA captures the understanding that all fifteen Members are collectively referred to as the Tribunal but that individual cases are heard by a sub-division thereof. This sub-division may consist of three Members of the Tribunal or a single member.\textsuperscript{18} Article 8.27(7) CETA clarifies that it is the responsibility of the President of the Tribunal to appoint Members to cases ‘on a rotation basis, ensuring that the composition of the divisions is random and unpredictable, while giving equal opportunity to all Members of the Tribunal to serve.’ Should the circumstances require a more permanent solution, Article 8.27(15) CETA allows the CETA Joint Committee to transform the retainer fee and other fees and expenses into a regular salary and to decide applicable modalities and conditions.

This reference to a retainer agreement with the Members of the Tribunal indicates that the European Commission is not suggesting the immediate creation of a permanent institution with full-time employees. Instead, the European Commission proposes the introduction of a permanent pool of decision-makers, which it refers to collectively as the Tribunal. Membership to this pool is only open to those appointed by the CETA Joint Committee, which would reduce the number of potential decision-makers in investor-state disputes arising under CETA to those appointed by the CETA Joint Committee. What is more, disputing parties, wishing to resolve a dispute under CETA, would not be able to select their own decision-makers as is the case in the traditional format of investor-state arbitration. Even though investors might adapt to this new mode of investor-state dispute resolution,\textsuperscript{19} the merit of the proposed reform is not clear given the potential difficulties of its implementation in practice. The European Commission suggests that its improved investor-to-state arbitration system would protect democracy by introducing ‘government control over arbitrators.’\textsuperscript{20} The following paragraphs examine


\textsuperscript{15} See Article 8.41(5) CETA:
A final award issued pursuant to this Section is an arbitral award that is deemed to relate to claims arising out of a commercial relationship or transaction for the purposes of Article I of the New York Convention.

\textsuperscript{16} See Article 8.41(6) CETA:
For greater certainty, if a claim has been submitted pursuant to Article 8.23.2(a), a final award issued pursuant to this Section shall qualify as an award under Section 6 of the ICSID Convention.

\textsuperscript{17} See Article 8.27(5) CETA, which states that the regular term of office is five years. The terms of seven of the fifteen person appointed immediately after the entry into force of the Agreement, to be determined by lot, shall extend to six years however.

\textsuperscript{18} See Article 8.27(6) and (9) CETA.


this claim, particularly whether government control over arbitrators is greater under CETA than in
traditional investor-state arbitration.

B. Is Government Control Over Arbitrators Greater under CETA?

I. The Role of the CETA Joint Committee

The text of the proposed treaty between the European Union and Canada clarifies that the control over
arbitrators envisaged under the treaty is the control exercised by the CETA Joint Committee (the ‘Joint
Committee’) established under Article 26.1 of CETA. Article 26.1(1) of CETA states that the Joint
Committee, if established, would comprise representatives of the European Union and representatives
of Canada. The Minister for International Trade of Canada and the Member of the European
Commission responsible for Trade, or their respective designees, would co-chair the Joint Committee.21
The Joint Committee, in turn, would appoint all fifteen initial Members of the Tribunal under CETA, and
would decide over all the subsequent additions, successors, or replacements to the Tribunal.22 Article
8.27 CETA and Article 8.30 CETA contain criteria for the appointment of Members of the Tribunal, for
example with regard to their nationality. Article 8.27(2) and Article 8.27(3) provide that up to one third
of the Members of the Tribunal may be nationals of a Member State of the European Union, and up to
one third of the Members may be nationals of Canada.

The footnote to Article 8.27(2) CETA confirms that the drafters of CETA considered Canada and the
European Union (and its Member States) to be the two Parties to the agreement, for the text of the
footnote allows either Party to propose to appoint Members of the Tribunal of any nationality.23 The
Members of the Tribunal so chosen are considered to be nationals of the Party that proposed his or her
appointment. This understanding of CETA as a de facto bilateral agreement, as described in the
footnote to Article 8.27(2) CETA, permeates the text of the agreement and explains why the negotiators
and drafters of the agreement granted the Joint Committee such wide-ranging powers. When
negotiating and drafting CETA, it was the understanding of the European Commission that the
European Union has the exclusive competence to conclude the agreement.24 This explains why the
Joint Committee does not include representatives of the Member States of the European Union. As the
central body of CETA, the Joint Committee was supposed to be comprised of the Parties to the
agreement. Since the European Commission considered the Member States of the European Union
not to be Parties to the agreement in their own right but only Parties to the agreement qua their

21 The CETA Joint Committee, in its aim, is reminiscent of the NAFTA Free Trade Commission, which comprises
ministerial-level representatives from Canada, the United States, and Mexico, the Parties to the North American
Free Trade Agreement (NAFTA). The NAFTA Free Trade Commission, established under Article 2001(1) of the
NAFTA, is the central, supervisory body of the NAFTA. Article 2001(2) provides, among other things, that the
Commission supervises the implementation of the Free Trade Agreement, and the work of all committees and
working groups, that it oversees the further elaboration of the agreement, and that it resolves disputes regarding
the interpretation or application of the agreement.

22 Article 8.27(3)(1) CETA provides that the CETA Joint Committee may decide to increase or to decrease the
number of the Members of the Tribunal by multiples of three. Article 8.30(4) CETA provides that the Parties, by
decision of the CETA Joint Committee, may remove Members from the Tribunal where their behaviour is
inconsistent with their obligations and incompatible with their continued membership of the Tribunal.

23 Article 30.1 CETA confirms that the protocols, annexes, declarations, joint declarations, understanding and
footnotes to the Agreement constitute integral parts thereof.

24 EU Trade Commissioner Cecilia Malmström stated: ‘From a strict legal standpoint, the Commission considers
this agreement to fall under exclusive EU competence.’ See European Commission, Press release: European
Commission proposes signature and conclusion of EU-Canada trade deal (5 July 2016) <http://europa.eu/rapid/
that the European Union has exclusive competence to conclude trade deals also in a case currently before the
European Court of Justice regarding the Free Trade Agreement between the European Union and Singapore
(EUSFTA). The European Commission requested the European Court of Justice to clarify whether the European
Union has exclusive competence to sign and ratify the EUSFTA.
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membership in the European Union, the Member States did not receive their own spot in the Joint Committee. Given the wide-ranging powers of the Joint Committee, its composition of representatives of Canada and the European Union turned out to be problematic.

II. The Powers of the CETA Joint Committee

In addition to the power of the CETA Joint Committee to appoint the Members of the Tribunal, the Joint Committee also has the power to appoint all Members of the Appellate Tribunal, and to decide over all the subsequent additions, successors, or replacements to the Appellate Tribunal. In addition, Article 8.28(7) CETA grants the Joint Committee the power to decide the following matters regarding the functioning of the Appellate Tribunal:

(a) administrative support;
(b) procedures for the initiation and the conduct of appeals, and procedures for referring issues back to the Tribunal for adjustment of the award, as appropriate;
(c) procedures for filling a vacancy on the Appellate Tribunal and on a division of the Appellate Tribunal constituted to hear a case;
(d) remuneration of the Members of the Appellate Tribunal;
(e) provisions related to the costs of appeals;
(f) the number of Members of the Appellate Tribunal; and
(g) any other elements it determines to be necessary for the effective functioning of the Appellate Tribunal.

In addition to these wide-ranging powers with regard to the Tribunal and the creation of the Appellate Tribunal, the CETA Joint Committee also has the power to adopt interpretations of the provisions of the agreement that bind both the Tribunal and the Appellate Tribunal (Article 8.31(3)(2) CETA), as well as the arbitral tribunals to be established under Chapter 29 of CETA, if a dispute arises between the Parties concerning the interpretation of the provisions of the agreement (Article 26.1(5)(e) CETA).

The Joint Committee also has the power to agree on amendments of the agreement as provided in the agreement (Article 26.1(5)(c) CETA), a power that would be less controversial, if the decisions by the Joint Committee would not be potentially binding on the Parties (Article 26.3(2) CETA). The Joint Committee further has the power to amend certain protocols and annexes of the agreement, subject to approval of the Parties who decide when the Joint Committee’s decisions regarding the amended protocols and annexes enter into force (Article 30.2(2) CETA).

III. The Judgment of the German Federal Constitutional Court

It was these wide-ranging powers of the Joint Committee, among other things, that prompted various claimants to challenge the constitutionality of the signing, provisional application, and conclusion of CETA before the German Federal Constitutional Court (Bundesverfassungsgericht – BVerfG). The claimants I.-IV. submitted that a decision in the European Council regarding the signing, provisional application and conclusion of CETA would violate their rights under Article 38(1) of the Basic Law (Grundgesetz – GG) in conjunction with Article 79(3) and Article 20(1) and (2) GG. Article 20(2) GG affirms that all state authority is derived from the people, and that it shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies. The claimants asserted that, absent an EU competence, the binding decisions by the CETA Joint Committee regarding the content of CETA would violate the autonomy of the Bundestag to make law. In addition,

25 See Article 8.28(3) and (7) CETA.
26 See Article 29.2 CETA: ‘Except as otherwise provided in this Agreement, this Chapter applies to any dispute concerning the interpretation or application of the provisions of this Agreement.’
the parliamentary group DIE LINKE submitted that the German government's non-refusal of CETA would violate the right of the Bundestag under Article 23(1)(2) GG in conjunction with Article 59(2) GG. Article 23(1)(2) GG in conjunction with Article 59(2) GG allows the transfer of sovereign powers to the European Union in the form of a federal law, which requires the consent or participation of the Bundestag. The parliamentary group DIE LINKE asserted that the absence of an EU competence regarding many aspects of CETA prohibit the conclusion of CETA. DIE LINKE further asserted that CETA would create committees that would regulate matters within the Member States’ competence, participation in which is not guaranteed for the Member States under CETA. All claimants applied for a preliminary injunction directed against the agreement of the German representative in the European Council with the impending European Council decision regarding the signing, provisional application and conclusion of CETA.

In October 2016, the BVerfG rejected to grant a preliminary injunction. In its judgment, the BVerfG elaborated to what extent the European Council decisions regarding the signing, provisional application and conclusion of CETA were in fact impending, and to what extent they would have an immediate effect on the claimants. It held that a decision by the European Council on the conclusion of CETA was not impending. Such a decision would only be taken by the Council once CETA had been ratified in all Member States of the European Union and once the European Parliament had voted for the ratification of the treaty. In addition, the BVerfG held that the impending signing of CETA had no immediate legal effect on the claimants, that CETA would be applied only once the European Parliament had voted for its provisional application, and that the impending Council decisions regarding the signing and provisional application of CETA would not warrant the preliminary injunction sought, if the following three requirements were fulfilled:

- First, the Federal Republic of Germany must not agree with the provisional application of those parts of CETA that likely fall outside the jurisdiction of the European Union such as the provisions on investment protection and investor-state dispute settlement.
- Second, the German Federal Government must ensure that the decisions of the CETA Joint Committee are of a sufficiently democratic provenance for the duration of the provisional application of the treaty.
- Third, the Federal Government must unilaterally terminate the provisional application of CETA under Article 30.7(3)(c) CETA, if it is unable to ensure that the decisions of the Joint Committee are of a sufficiently democratic provenance for the duration of the provisional application of the treaty. The Federal Government must also inform the other Parties to CETA of its understanding of Article 30.7(3)(c) and make a valid declaration to this extent under public international law.

The BVerfG did not decide whether the establishment of the CETA Joint Committee, including various potential sub-committees, would be permitted under the Grundgesetz. It held, however, that the European Union might not have the competence to agree to the establishment of these committees under Article 207, Article 216(1), and Article 218 of the Treaty on the Functioning of the European Union. It held that the delegation of sovereign rights to these committees, if any, might fall outside the

32 BVerfG, Judgment of 13 October 2016 (2 BvR 1368/16) para 73.
34 The conclusion of CETA proceeds as a so-called 'mixed agreement,' which means that the conclusion of some parts of the treaty falls within the jurisdiction of the EU, whereas the conclusion of other parts falls within the jurisdiction of the EU member states. There is no clear consensus between the European Union and its member states, and among the EU member states, on their respective competencies with respect to the conclusion of CETA.
35 BVerfG, Judgment of 13 October 2016 (2 BvR 1368/16) para 70.
36 Article 30.7(3)(c) CETA reads: A Party may terminate the provisional application of this Agreement by written notice to the other Party. Such termination shall take effect on the first day of the second month following that notification.
jurisdiction of the European Union.\textsuperscript{37} The BVerfG also held that the committee system under CETA might violate the principle of democracy, protected in Article 20(1) and (2) GG in connection with Article 79(3) GG – or at least that these violations are not entirely impossible.\textsuperscript{38} The following paragraphs focus on whether the committee system under CETA does, in fact, violate the principle of democracy.

**IV. Does the Committee System under CETA Violate the Principle of Democracy?**

The principle of democracy, in its basic form, requires that a system of governance is a system of self-governance.\textsuperscript{39} This does not mean that every government decision must be taken by the people or an elected representative of the people, but that government decisions must be of a sufficiently democratic provenance. To the extent that the decisions of the Joint Committee are authoritative and legally binding on the Parties to the agreement – either directly or indirectly – the Joint Committee can be said to have the authority to govern.\textsuperscript{40} The first question therefore is whether the CETA Joint Committee has the power to adopt decisions that are authoritative and legally binding on the Parties. The second question is whether the decisions of the Joint Committee are of a sufficiently democratic provenance.

1. Are the Decisions Made by the CETA Joint Committee Binding on the Parties?

Article 26.1(5)(c) CETA states the general rule that the CETA Joint Committee may agree on amendments of the agreement as provided in the agreement. Article 8.1 CETA provides, for example, that the Joint Committee may enlarge the group of intellectual property rights protected under CETA.\textsuperscript{41} The Joint Committee also has the power to adopt interpretations of the agreement that bind the arbitral tribunals established under CETA (Article 26.1(5)(e) of CETA). If these interpretations qualify as decisions for the purposes of the agreement, the interpretations of the agreement are directly binding on the Parties to the extent that decisions made by the Joint Committee are binding on the Parties. Whether the decisions by the Joint Committee are, in fact, binding on the Parties is unclear. Article 26.3(2) CETA provides that ‘[t]he decisions made by the CETA Joint Committee shall be binding on the Parties, subject to the completion of any necessary internal requirements and procedures.’ The German Federal Government interprets the wording of this provision to mean that the Parties have an explicit right to veto decisions by the CETA Joint Committee.\textsuperscript{42} The German Federal Government therefore interprets the contradiction between the binding nature of the Joint Committee’s decisions and their binding nature being subject to the completion of internal requirements and procedures in favour of the latter. Yet, the wording of Article 26.3(2) CETA does not support such a far-reaching interpretation. Article 26.3(2) CETA does not mention that Party approval is required, nor does the phrase completion of any necessary internal requirements and procedures allude to a right of the Parties to veto decisions by the Joint Committee. If anything, the addendum in Article 26.3(2) CETA that the Parties shall implement the decisions made by the Joint Committee indicates that the Parties do not have a right to veto these decisions.\textsuperscript{43} Given the wording of Article 26.3(2) CETA, it is more likely that the drafters of

\textsuperscript{37} BVerfG, Judgment of 13 October 2016 (2 BvR 1368/16) para 58.

\textsuperscript{38} BVerfG, Judgment of 13 October 2016 (2 BvR 1368/16) para 59.

\textsuperscript{39} Günther Frankenberg, ‘Democracy’ in Michael Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 250-268, at 250 (equating democracy with ‘popular (or self-) rule’ and tracing its mainstream historiographical origin to the Greek ‘concept of démokratia, a composite of demos (people) and kratos (power) or kratiein (rule’).


\textsuperscript{41} See the entry on ‘intellectual property rights’ under Article 8.1 CETA: For the purposes of this Chapter […] intellectual property rights means copyright and related rights, trademark rights, right in geographical indications, rights in industrial designs, patent rights, rights in layout designs of integrated circuits, rights in relation to protection of undisclosed information, and plant breeders’ rights; and, if such rights are provided by a Party’s law, utility model rights. The CETA Joint Committee may, by decision, add other categories of intellectual property to this definition.

\textsuperscript{42} BVerfG, Judgment of 13 October 2016 (2 BvR 1368/16) para 30.

\textsuperscript{43} Article 26.3(2) CETA reads: ‘The decisions made by the CETA Joint Committee shall be binding on the Parties, subject to the completion of any necessary internal requirements and procedures, and the Parties shall implement them. The CETA Joint Committee may also make appropriate recommendations.’
the agreement envisaged decisions made by the Joint Committee to be binding on the Parties in general.

Article 30.2(2) CETA\(^{44}\) supports this interpretation. Article 30.2(2) CETA could be interpreted as introducing an exception to the general rule that the Joint Committee’s decisions are binding on the Parties. Article 30.2(2) CETA could therefore be interpreted as supporting the existence of the general rule itself.\(^{45}\) Instead of providing that the Parties shall implement the CETA Joint Committee’s decision to amend the protocols and annexes of CETA, Article 30.2(2)(2) CETA states that the Parties may approve the Joint Committee’s decision to amend the protocols and annexes of the agreement in accordance with their respective internal requirements and procedures necessary for the entry into force of the amendment. Article 30.2(2)(3) CETA adds that the decision to amend the protocols and annexes shall enter into force on a date agreed by the Parties. This leaves open the option of the Parties not agreeing on a date and the amendment of the protocols or annexes not entering into force. Party approval could thus be required for the amendment of the protocols and annexes of CETA.\(^{46}\)

The possible distinction between amendments of the agreement itself, on the one hand, and amendments of protocols and annexes, on the other hand, regarding the requirement of Party approval, could be rationalised as the reduction of Party approval to instances in which the agreement itself does not empower the Joint Committee to introduce a specific amendment. As has been stated before, the Joint Committee may amend the text of the agreement, \textit{if the agreement so provides} (Article 26.1(5)(c) of CETA). In contrast, the Joint Committee may decide to amend all protocols and annexes – with the exception of Annexes I, II and III, and the annexes of Chapters Eight (Investment), Nine (Cross-Border Trade and Services), Ten (Temporary Entry and State of Natural Persons for Business Purposes) and Thirteen (Financial Services), except for Annex 10-A (List of Contact Points of the Member States of the European Union) – even in the absence of a specific provision empowering it to do so.\(^{47}\) Since the Joint Committee has greater discretion with regard to the amendment of protocols and annexes than with regard to the amendment of the agreement itself, a requirement of Party approval would make more sense with regard to the amendment of protocols and annexes.

The wording of Article 8.44 CETA further supports the view that decisions by the Joint Committee regarding the amendment and interpretation of the agreement itself are, in fact, binding on the Parties. Article 8.44 CETA describes the functions of the Committee on Services and Investment. The Committee on Services and Investment is a specialised committee, established under Article 26.2(1)(b) CETA and dependant on the Joint Committee.\(^{48}\) As a specialised committee, the Committee on Services and Investment may propose draft decisions for adoptions by the Joint Committee, or take decisions when the agreement so provides.\(^{49}\)

As is the case with the CETA Joint Committee, specialised committees are co-chaired by representatives of Canada and the European Union. The overall composition of specialised committees, however, is not restricted to representatives of Canada and the European Union – as is the case with the CETA Joint Committee. Article 26.2(2) CETA provides that each Party shall ensure that when a specialised committee meets, all the competent authorities for each issue on the agenda are represented, as each Party deems appropriate. The specialised committees thus leave room for

\(^{44}\) Article 30.2(1) and (2) CETA read: ‘Notwithstanding paragraph 1, the CETA Joint Committee may decide to amend the protocols and annexes of this Agreement. The Parties may approve the CETA Joint Committee’s decision in accordance with their respective internal requirements and procedures necessary for the entry into force of the amendment.’

\(^{45}\) Contra the German Federal Government, which interprets Article 30.2(2) CETA as a clarification of the general rule that the Joint Committee’s decisions require Party approval. For the view of the German Federal Government, see \textit{BVerfG}, Judgment of 13 October 2016 (2 BvR 1368/16) para 30.

\(^{46}\) But see \textit{BVerfG}, Judgment of 13 October 2016 (2 BvR 1368/16) para 61 (opinion of the Court) (finding Article 30.2(2)(2) and Article 30.2(2)(3) CETA to be too imprecise to preclude that the CETA Joint Committee’s decision to amend the protocols and annexes of CETA \textit{does not require} Party approval).

\(^{47}\) See Article 30.2(2) CETA.

\(^{48}\) See Article 26.1(5)(g) CETA: The CETA Joint Committee may change or undertake the tasks assigned to specialised committee established pursuant to Article 26.2 or dissolve any of these specialised committees.

\(^{49}\) See Article 26.2(4) CETA.

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the participation of representatives of the Member States of the European Union, for Member States of the European Union at least qualify as competent authorities, if not as Parties in their own right.

Article 8.44 CETA then describes the function of the Committee on Services and Investment. Its first paragraph sets out the committee's general function as a forum for the Parties to consult on issues related to the chapter on investment. Article 8.44(3) CETA provides, *inter alia*, that the Committee on Services and Investment may, on agreement of the Parties, and after completion of their respective international requirements and procedures:

- recommend to the CETA Joint Committee the adoption of interpretations of the agreement pursuant to Article 8.31(3) of CETA\(^{50}\) (Article 8.44(3)(a) of CETA),
- recommend to the CETA Joint Committee the adoption of any further elements of the fair and equitable treatment obligation pursuant to Article 8.10(3) of CETA\(^{51}\) (Article 8.44(3)(d) of CETA), and
- make recommendations to the CETA Joint Committee on the functioning of the Appellate Tribunal pursuant to Article 8.28(8) of CETA\(^{52}\) (Article 8.44(3)(e) of CETA).

These provisions demonstrate that the Committee on Services and Investment may recommend specific changes to the Joint Committee, but that it is the Joint Committee which makes the decision whether to adopt a specific change. Article 8.10(3) CETA best describes the hierarchy between the two committees; it states that the Committee on Services and Investment 'may develop recommendations [for the adoption of further elements of the fair and equitable treatment obligation] and submit them to the CETA Joint Committee for decision.' Article 26.1 CETA underlines the general role of the Joint Committee as a decision-making forum and a supervisory body. Article 26.1(3) CETA states that the Joint Committee is responsible for all questions concerning trade and investment between the Parties and the implementation and application of the agreement, and the Parties may refer any issues in this regard to the Joint Committee. Article 26.1(4)(a) CETA adds that the Joint Committee shall supervise and facilitate the implementation and application of the agreement. This supervisory function of the CETA Joint Committee extends to the work of all specialised committees and other bodies established under the agreement (Article 26.1(4)(b) CETA).

The fact that the role of the Joint Committee is a supervisory one matches the proviso in Article 26.3(1) CETA that the decisions made by the Joint Committee shall be binding on the Parties. If the decisions by the Joint Committee were not binding on the Parties, their added value would be minimal. Article 8.44(3) CETA envisages a possible system of decision-making, in which the Committee on Services and Investment, on agreement of the Parties – Canada and the European Union and its Member States – submits recommendations for the amendment and interpretation of the agreement to the Joint Committee for a decision. If the Parties were then free not to implement the decision taken by the Joint Committee, the Joint Committee would not have a decision-making function but merely an advisory function. A decision-making function is useful, however. The Joint Committee could issue binding decisions as to whether recommendations fit into the overall framework of the agreement. The

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\(^{50}\) Article 8.31(3) CETA: Where serious concern arise as regards matters of interpretation that may affect investment, the Committee on Services and Investment may, pursuant to Article 8.44.3(a), recommend to the CETA Joint Committee the adoption of interpretations of this Agreement. An interpretation adopted by the CETA Joint Committee shall be binding on a Tribunal established under this Section. The CETA Joint Committee may decide that an interpretation shall have binding effect from a specific date.

\(^{51}\) Article 8.44(3)(d) of CETA, in fact, refers erroneously to Article 8.10(4). The relevant provision, however, is Article 8.10(3) of CETA, which states: The Parties shall regularly, or upon request of a Party, review the content of the obligation to provide fair and equitable treatment. The Committee on Services and Investment, established under Article 26.2(1)(b) (Specialised committees), may develop recommendations in this regard and submit them to the CETA Joint Committee for decision.

\(^{52}\) Article 8.28(8) of CETA: The Committee on Services and Investment shall periodically review the functioning of the Appellate Tribunal and may make recommendations to the CETA Joint Committee. The CETA Joint Committee may revise the decision referred to in paragraph 7 [regarding the functioning of the Appellate Tribunal], if necessary.
Committee on Services and Investment might also recommend different options to the CETA Joint Committee for the CETA Joint Committee to choose from.

In addition to its supervisory function, the Joint Committee also enjoys an elevated status regarding the appointment of the Members of the Tribunal and the establishment of a list of at least fifteen individuals, willing and able to serve as arbitrators in the resolution of disputes between the Parties. In both scenarios, the Parties may each propose a third of all individuals to be selected. This also means that it is within the power of the Joint Committee, within the applicable rules for the appointment of arbitrators, to select a third of all arbitrators at its discretion, i.e. those arbitrators who are not considered to be a national of Canada or a national of a Member State of the European Union for the purposes of the agreement. If the decision of the Joint Committee to appoint arbitrators was not binding on Canada and the European Union and its Member States, the exercise of appointing arbitrators in advance would be futile in the first place.

In fact, the European Commission has expressed the view that one of the benefits of the proposed dispute resolution mechanism under CETA is that the arbitrators are not chosen by the disputing parties as is the case in traditional investor-state arbitration. The European Commission points out that, under CETA, arbitrators are ‘no longer being appointed ad hoc by the investor and the state involved in a dispute but in advance by the Parties to the agreement – the EU and Canada.’ This means not only that the disputing parties’ loss of control over the selection of arbitrators is intentional under CETA but it also means that the European Commission envisaged the European Union and Canada to appoint all arbitrators in advance. This procedure is not problematic regarding the European Union and Canada, both possible respondents in investor-state disputes under CETA, but the procedure could be problematic regarding Member States of the European Union, which are also possible respondents in investor-state disputes under CETA. The Member States’ relative loss of control under CETA in comparison to traditional investor-state arbitration is further discussed below in the context of the discussion on government control over arbitrators.

The wording of the proposed agreement between Canada and the European Union (and its Member States) allows the conclusion that the decisions made by the CETA Joint Committee are binding on the Parties, except for the Joint Committee’s decisions on the amendment of the annexes and protocols, which must be approved by the Parties. In sum, the Joint Committee is designed as the central institution of CETA with supervisory and decision-making functions. It has the power to create an Appellate Tribunal, as well as to appoint all arbitrators of the Tribunal. The wide-ranging powers of CETA, which is comprised of representatives of Canada and the European Union, reflect the understanding of CETA as a bilateral agreement between Canada and the European Union. This understanding permeates the text of the agreement and explains why the Joint Committee was granted such wide-ranging powers in the first place. Because the European Union and Canada considered CETA to be a bilateral agreement, they considered it adequate to staff the Joint Committee with their representatives and to equip these representatives with wide-ranging powers. The CETA Joint Committee follows the example of the NAFTA Free Trade Commission in this regard, only that the CETA Joint Committee has additional functions due to the proposed introduction of the so-called investment court system.

Yet, even if the German Federal Government was correct in its interpretation of CETA that all decisions made by the Joint Committee are subject to Party approval, the decisions made by the Joint Committee regarding the interpretation of the agreement itself would at least bind the Parties indirectly.

53 See Articles 8.27 and 8.30 of CETA.
54 European Commission, CETA – Summary of the final negotiating results (February 2016) 12 (‘In particular, under CETA, cases will be heard by a permanent tribunal, with members of the tribunal no longer being appointed ad hoc by the investor and the state involved in a dispute but in advance by the Parties to the agreement – the EU and Canada.’) <http://trade.ec.europa.eu/doclib/docs/2014/december/tradoc_152982.pdf> accessed 15 December 2016.
55 See Article 8.21 CETA (Determination of the respondent for disputes with the European Union or its Member States).
56 See BVerfG, Judgment of 13 October 2016 (2 BvR 1368/16) para 30 (‘Bindende Beschlüsse des in CETA vorgesehenen Gemischten Ausschusses stünden zudem unter dem Zustimmungsvorbehalt der Vertragsparteien.’).
Article 26.1(5)(e) CETA states that the Joint Committee may adopt interpretations of the provisions of the agreement, which shall be binding on the Tribunal, the Appellate Tribunal, and arbitral tribunals established under Chapter Twenty-Nine of the agreement.\(^{57}\) If, however, the interpretations of the provisions of the agreement adopted by the Joint Committee are binding on the various tribunals under CETA,\(^{58}\) the interpretations adopted by the Joint Committee are binding on the Parties as well, at least indirectly, for any award issued in light of the interpretation adopted by the Joint Committee is enforceable against the respondent.\(^{59}\) Even though the Joint Committee may adopt an interpretation of the provisions of the agreement upon recommendation of the Committee on Services and Investment,\(^{60}\) or upon referral from either Party,\(^{61}\) it is neither bound by the recommendation nor dependant on the referral. Instead, the CETA Joint Committee may adopt interpretations of the provisions of the agreement also out of its own volition (Article 26.1(5)(e) CETA).

Since the decisions made by the Joint Committee are authoritative and legally binding on Canada and the European Union and its Member States as the Parties to CETA, the Joint Committee has the authority to govern\(^{62}\) – either directly or indirectly. In light of this power, the provenance of the decisions made by the CETA Joint Committee must be sufficiently democratic for the principle of democracy not to be violated. The following paragraphs analyse what might constitute a sufficiently democratic provenance.

2. Are the Decisions Made by the CETA Joint Committee Sufficiently Democratic?

The question on whether decisions made by the Joint Committee are sufficiently democratic can be subdivided into the question whether the European Union has the competence to create the Joint Committee under the European Treaties, and – failing that\(^{63}\) – whether the democratic provenance of

\(^{57}\) See also Article 8.31(3)(2) of CETA: An interpretation adopted by the CETA Joint Committee shall be binding on a Tribunal established under this Section [ie Section F: Resolution of investment disputes between investors and states]; Council of the European Union, Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States (Brussels, 27 October 2016) (Document No 13541/16) Section 6(e):

In order to ensure that Tribunals in all circumstances respect the intent of the Parties as set out in the Agreement, CETA includes provisions that allow Parties to issue binding notes of interpretation. Canada and the European Union and its Member States are committed to using these provisions to avoid and correct any misinterpretation of CETA by Tribunals.

\(^{58}\) Article 26.1(5)(e) CETA.

\(^{59}\) See Article 8.41 CETA.

\(^{60}\) See Article 8.31(3) CETA: ‘Where serious concerns arise as regards matters of interpretation that may affect investment, the Committee on Services and Investment may, pursuant to Article 8.44.3(a), recommend to the CETA Joint Committee the adoption of interpretations of this Agreement. An interpretation adopted by the CETA Joint Committee shall be binding on a Tribunal established under this Section. The CETA Joint Committee may decide that an interpretation shall have binding effect from a specific date.’

\(^{61}\) See Article 26.1(3)(2) CETA: A Party may refer to the CETA Joint Committee any issue relating to the implementation and interpretation of this Agreement, or any other issue concerning trade and investment between the Parties.


\(^{63}\) The BVerfG questioned the competence of the European Union to agree on the establishment of the Joint Committee. It questioned in particular the interpretation of the Treaty on the Functioning of the European Union to this extent. In addition, the BVerfG questioned whether Article 23(1) of the Grundgesetz would allow such a delegation of power to the European Union in the first place. It reasoned that a possible law-making function of the CETA Joint Committee is difficult to reconcile with the fact that the influence of the Bundestag on the Joint Committee is twice removed under CETA. In addition, the BVerfG raised doubts as to whether it is sufficiently democratic to delegate to the European Union the power to establish a body that has a law-making function with regard to the content of CETA. Because the BVerfG was sceptical in this regard, and because the BVerfG viewed CETA as a mixed agreement, and the Joint Committee to be deciding matters of Member-States-competence, it held that the European Union must represent the unanimous view of the Member States of the European Union in

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the decisions taken by the Joint Committee can otherwise be established. The following paragraphs first examine first whether the European Union has a competence to create the Joint Committee. Because the Joint Committee has the power to authoritatively interpret the provisions on investment protection under CETA, the European Union must also have a competence to conclude the provisions on investment protection under CETA, for otherwise it would not be able to delegate the power to authoritatively interpret these provisions to the CETA Joint Committee. If the European Union lacked the competence to conclude the provisions on investment protection under the CETA, the decisions by the Joint Committee regarding these provisions would lack a democratic provenance. In other words, the Joint Committee would be deciding matters in the realm of the Member States’ competence in this scenario without the Member States having granted the European Union the competence to authorise the Joint Committee to do so.

Second, the following paragraphs comment on whether a missing EU competence could be compensated without an interinstitutional agreement on decision-making by mutual consent among the European Union and its Member States. Answering this question in the negative, this paper turns to the solution proposed by the BVerfG for the duration of the provisional application of CETA, and adopted by the EU and its Member States, ie an interinstitutional agreement that all decisions in the Joint Committee regarding matters within the Member States’ competence must be taken by mutual consent. Such an interinstitutional agreement, while rendering the decisions of the CETA Joint Committee of democratic provenance, might ultimately stifle the exercise of government control over investor-state arbitrators in practice.

a. Competence

The European Commission and some of its Member States are in a disagreement over the issue of competence.64 The European Commission is of the opinion that it has exclusive competence under the European Treaties to conclude international investment agreements.65 The following paragraphs analyse the provisions of the Treaty on the Functioning of the European Union (TFEU) with regard to the competence of the European Union to conclude international investment agreements, in particular with regard to CETA. The following paragraphs focus on a potential EU competence to conclude provisions on investment protection.

The investment protections under CETA include the standard provisions on national treatment (Article 8.6), most-favoured-nation treatment (Article 8.7), fair and equitable treatment and full protection and security (Article 8.10(1)), expropriation (Article 8.12(1)), and free transfer of means (Article 8.13(1)). The European Union could have the competence to conclude an agreement including these promises to foreign investors under Article 2(4) TFEU, Article 3(1)(e) TFEU, and Article 3(2) TFEU in conjunction with Articles 207, 216(a) and 218 TFEU. Article 2(4) TFEU provides that the European Union shall have competence to define and implement a common foreign policy. Article 3(1)(e) TFEU provides that the European Union shall have exclusive competence over the common commercial policy.66 Article 216(1) TFEU adds that the European Union may conclude an international agreement with one or more third

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65 European Commission, European Commission proposes signature and conclusion of EU-Canada trade deal (Strasbourg, 5 July 2016) (citing EU Trade Commissioner Cecilia Malmström: ‘[T]he open issue of competence for such trade agreements will be for the European Court of Justice to clarify, in the near future. From a strict legal standpoint, the Commission considers this agreement to fall under exclusive EU competence.’).


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countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union’s policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.\(^{67}\) Article 207(1) TFEU explicitly allows the European Union to conclude trade agreements relating to the commercial aspects of foreign direct investment.

Even though the competence of the European Union to conclude trade agreements is designed to be exclusive in character, it is not without its limits. The European Union particularly might not have the competence to regulate the expropriation of investments (Article 8.12 CETA). This is the case, if the TFEU, despite granting the European Union the competence to regulate commercial aspects of foreign direct investment, left the sub-category of regulating the expropriation of investments to the Member States of the European Union. Article 345 TFEU could contain such an exception to the general rule that the European Union has the competence to regulate commercial aspects of foreign direct investment.\(^{68}\) Article 345 TFEU provides that the TFEU and the TEU shall in no way prejudice the rules in Member States governing the system of property ownership. The historical background of this provision demonstrates that it was designed to protect the prerogative of the Member States to nationalise private property, particularly the means of production.\(^{69}\) During the process of ratifying the Treaty establishing the European Economic Community (EEC Treaty), the Federal Government of Germany commented on Article 222 of the EEC Treaty,\(^{70}\) a provision which was later to become Article 345 TFEU:

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\text{[K]}\text{leine Maßnahme der Organe der Gemeinschaft darf zum Ziele haben, ein Unter-nehmen in Gemeinwirtschaft zu überführen oder umgekehrt ein im Gemeineigentum stehendes Unternehmen zu privatisieren.}^{71}\text{ }
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The Federal Government of Germany therefore clarified that no Community measure must be directed at nationalising a private company or, in the alternative, at privatising a company under public ownership. The Federal Government did not limit its interpretation of Article 222 of the EEC Treaty to the Member States’ competence regarding the nationalisations and the privatisations of companies. It also stated that the EEC Treaty shall in no way prejudice the rules in Member States governing property ownership, particularly the ownership of companies.\(^{72}\) Article 345 TFEU reiterates the rule that the

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\(^{67}\) See also Article 3(2) TFEU: The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.

\(^{68}\) cf BVerfG, Judgment of 13 October 2016 (2 BvR 1368/16) para 54 (arguing that the European Union does not have a competence to regulate the expropriation of investments; noting Article 345 TFEU in this context). But see Kühling in Streinz (ed), EUV/AEUV-Commentary (2nd edn, C.H. Beck 2012) Article 345 AEUV, para 1:

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\text{In dogmatischer Hinsicht ist darüber hinaus zu präzisieren, dass es sich um einen Kompetenzausübungs-}
\text{vorbehalt handelt, d.h. dass die Unionorgane bei der Ausübung ihrer Kompetenzen verpflichtet sind,}
\text{die Eigentumsordnung der Mitgliedstaaten unberührt zu lassen.}
\]

Kühling submits that Article 345 TFEU does not create an exception to a competence of the European Union. He submits that Article 345 TFEU instead requires the European Union not to prejudice the rules in Member States governing the system of property ownership when exercising their competences. Likewise, Kingreen in Calliess/Ruffert (eds), EUV/AEUV-Kommentar (5th edn, C.H. Beck 2016) Article 345 AEUV, para 5. – The difference between the approach of the BVerfG and that of Kühling and Kingreen is minimal. The Member States have the power to create rules governing their systems of ownership, irrespective of whether the European Union has no competence in this regard, or whether the European Union has a competence in this regard but lacks the power to exercise it.


\(^{70}\) Article 222 of the EEC Treaty: ‘This Treaty shall in no way prejudice the system existing in Member States in respect of property.’

\(^{71}\) ‘No measure adopted by institutions of the Community must be directed at nationalising a private company or, in the alternative, at privatising a company under public ownership.’ BT-Drs 2/3440, Annex C, p 154, Article 222.

\(^{72}\) BT-Drs 2/3440, Annex C, p 154, Article 222: ‘Durch den Vertrag soll nicht in die rechtlichen Bestimmungen der Mitgliedstaaten eingegriffen werden, durch die das Eigentum geregelt wird. Das gilt besonders für das Eigentum an Unternehmen.’

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Member States have a competence to regulate the system of property ownership. This does not mean, however, that the Member States are not bound by European Law when exercising this competence. The European Court of Justice has confirmed that the expropriation of private property under national law must be compatible with European Law. It held, in particular, that the expropriation under national law must not be discriminatory. Just as Member States of the European Union, under Article 37(1) of the TFEU, must adjust any State monopolies of a commercial character so as to ensure that no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States, so must the expropriation of private property be non-discriminatory.

This rule was introduced in Fearon v. Irish Land Commission, where the European Court of Justice held that, although Article 222 of the EEC Treaty ‘does not call into question the Member States’ right to establish a system of compulsory acquisition by public bodies, such a system remains subject to the fundamental rule of non-discrimination which underlies the chapter of the Treaty relating to the right of establishment.’ In Fearon, the Supreme Court of Ireland had asked the European Court of Justice for a preliminary ruling with respect to the compatibility of a residence requirement under Section 32(3) of the Irish Land Act 1933 as amended by Section 35 of the Irish Land Act 1965 with European law. Section 32(3) limited the power of compulsory acquisition of the Irish Land Commission; it stated that the Irish Land Commission cannot exercise its powers of compulsory acquisition against persons who have resided for more than one year within three miles of the law or against bodies corporate all of whose shareholders meet the same residence requirement. The European Court of Justice held that, since Ireland imposed the residence requirement ‘both on its own nationals and on those of the other Member States and is applied to them equally,’ the residence requirement was non-discriminatory and thus did not violate European law.

This understanding that the Member States have the competence to regulate the system of property ownership but must exercise this competence in a way that is compatible with European law is as valid under the TFEU as it was under the EEC Treaty. What follows from this is that the Member States of the European Union remain competent to regulate the system of property ownership; Member States particularly remain competent to delineate between private and public ownership, i.e. to define public and private ownership, and sub-categories thereof, in the first place. The European Union thus does not have a competence to conclude a provision as extensive as Article 8.12(1) CETA, which prohibits expropriations except if exercised (a) for a public purpose, (b) under due process of law, (c) in a non-discriminatory manner, and (d) on payment of prompt, adequate and effective compensation. Although expropriations must be non-discriminatory, and the European Union has the power to scrutinise expropriations under the national law of Member States in this regard also under CETA, the European Union does not have the competence to define ‘public purpose’ or what constitutes adequate compensation in general. Since the decision for or against expropriation as well as the definition of what constitutes private ownership and public ownership is within the power of the Member States, it is also within the exclusive competence of the Member States to define ‘public purpose’ or to delegate this decision to investor-state arbitral tribunals. The European Union thus lacks the competence to conclude Article 8.12 CETA, because the European Union lacks the competence to conclude Article 8.12 CETA.

79 European law applies to foreign investors under CETA. See Article 8.6(1) of CETA (National treatment): Each Party shall accord to an investor of the other Party and to a covered investment, treatment no less favourable than the treatment it accords, in like situations to its own investors and to their investments with respect to the establishment, acquisition, expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of their investments in its territory.
it also lacks the competence to grant the CETA Joint Committee the power to amend or authoritatively interpret Article 8.12 CETA and such other provisions of CETA that may fall, at least in part, within the competence of the Member States. Since the European Union lacks the competence to delegate these powers to the Joint Committee, the decisions of the Joint Committee in this regard would not be of democratic provenance. If the European Union ratified CETA on its own, it would act *ultra vires* and thus violate the principle of democracy.

With the European Union’s possible lack of competence regarding the conclusion of CETA in mind, the Federal Government of Germany argued before the *BVerfG* that the European Union would not be acting *ultra vires* insofar as CETA is being concluded as a mixed agreement. The Member States’ agreement to CETA would compensate any lack of competence on behalf of the European Union. The following paragraphs consider the possible nature of this compensation. First, the Member States’ agreement to CETA in the European Council and the national and regional parliaments does not add to the general competences of the European Union as defined under TFEU. If the Member States wished to grant the European Union the exclusive competences it is lacking to conclude CETA on its own, the Member States would have to amend the TFEU. Short of an amendment of the TFEU, *ie* instead of delegating powers to the European Union, the Member States could exercise these powers themselves. This could be done by the Member States’ participation in the Joint Committee, which is designed as the central body of CETA. For the decisions made by the Joint Committee to be of democratic provenance, the Member States must have a meaningful means of participation in the Joint Committee, where the Committee does not derive its competences from the European Union.

b. Decision-Making Process in the CETA Joint Committee

Article 26.1(1) CETA states that the CETA Joint Committee, if established, would comprise representatives of the European Union and representatives of Canada. The Minister for International Trade of Canada and the Member of the European Commission responsible for Trade, or their respective designees, would co-chair the Committee. CETA does not envisage Member States of the European Union to have a seat or vote in the Joint Committee. Article 26.3(3) CETA states that the Joint Committee shall make its decisions and recommendations by mutual consent. Even though this means that representatives of the European Union in the Joint Committee can veto decisions by the Joint Committee, this does not guarantee that the European Union represents the views of the Member States when participating in the Joint Committee. The *BVerfG* points out that the Member States of the European Union could agree on a common point of view in the European Council under Article 218(9) TFEU to be followed by the EU representative in the Joint Committee. The Member States of the European Council, unless otherwise specified, does not take its decisions by mutual consent. Article 218(8) TFEU clarifies that the European Council, unless otherwise specified, takes its decision by a qualified majority. Since there is no provision mandating the European Council to take its decisions regarding the CETA Joint Committee by mutual consent, the default mechanism of decision-taking by

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80 *BVerfG*, Judgment of 13 October 2016 (2 BvR 1368/16) para 27:
Eine qualifizierte Kompetenzüberschreitung auf europäischer Ebene sei nicht erkennbar. Da CETA als gemischtes Abkommen geschlossen werde, sei jedenfalls sichergestellt, dass eine Kompetenzlücke der Europäischen Union durch die Mitgliedsstaaten und ihre Beteiligung an dem Abkommen als vollwertige Vertragsparteien aufgefangen werde.


82 cf *BVerfG*, Judgment of 13 October 2016 (2 BvR 1368/16) para 63:
Mit Blick auf das Entscheidungsverfahren sieht das Abkommen vor, dass der Gemischte CETA-Ausschuss seine Beschlüsse einvernehmlich trifft (Art. 26.3 Abs. 3 CETA-E). Auch wenn er Beschlüsse daher nicht gegen die Stimme der Europäischen Union fassen kann, gibt es insoweit keine gesicherte Einwirkungsmöglichkeit der Bundesrepublik Deutschland.

83 *BVerfG*, Judgment of 13 October 2016 (2 BvR 1368/16) para 64:
Soweit die Mitgliedsstaaten in den Ausschüssen nicht vertreten sind, können sie lediglich mittelbar auf deren Verfahren und Entscheidungen einwirken, indem sie nach Art. 218 Abs. 9 AEUV in einem Beschluss des Rates den Gemeinsamen Standpunkt festlegen, den der Vertreter der Europäischen Union in den CETA-Ausschüssen zu vertreten hat.

84 *BVerfG*, Judgment of 13 October 2016 (2 BvR 1368/16) para 64.
a qualified majority would be applicable. Member States hence do not have a guaranteed voice in the Joint Committee under the current applicable rules; individual Member States could be overruled in the Council and their voice not heard in the Joint Committee. If Member States are overruled in the European Council, the resultant decisions taken by the Joint Committee would not be of sufficient democratic provenance since the EU representative would not represent the views of all Member States in the Joint Committee. The reason for the democratic deficiency is not that decision-making by a qualified majority is undemocratic as such but that the Joint Committee is designed to be making decisions in the realm of the Member States' competency without the Member States having granted the Joint Committee the competence to do so.

c. The Proposal of an Interinstitutional Agreement on Mutual Consent

A possible solution to the problem of democratic deficiency could be an interinstitutional agreement between the European Union and its Member States, requiring the decisions of the Joint Committee to be based on a common point of view formed in the European Council by mutual consent, when the Joint Committee takes decisions relevant to matters within the Member States' competence. The BVerfG proposed this solution for the duration of the provisional application of CETa, and the intra-EU negotiators have, in fact, adopted this approach. As part of its effort to reassure the Belgian region of Wallonia of the legitimacy of CETa, the European Commission proposed a draft declaration entitled Déclaration du Royaume de la Belgique (et des Etats membres […] avec le soutien de la Commission européenne, sur la protection des investissements et la Cour d'investissement (“ICS”). This declaration asserts the right of the Member States and the European institutions to jointly control the selection of judges of the Tribunal and the Appellate Tribunal. In addition, the European Council and its Member States prepared a declaration, confirming that the Joint Committee’s decisions relevant to matters within the Member States’ competence must be based on mutual consent between the European Council and its Member States.

d. The Potential Drawbacks of the Requirement of Mutual Consent

The drawbacks to such a solution are possibly manifold. The question is whether government control over arbitrators, considering the added requirement of mutual consent between the European Council and its Member States, is greater under CETa than in traditional investor-state arbitration. The following paragraphs answer this question, after having considered the proximity requirement under Article 1(2) of the Treaty on European Union (TEU).

(1) The Proximity Requirement under Article 1(2) TEU

\[\text{(1) The Proximity Requirement under Article 1(2) TEU}\]

85 cf BVerfG, Judgment of 13 October 2016 (2 BvR 1368/16) para 71 (suggesting such an interinstitutional agreement for the duration of the provisional application of CETa regarding decisions taken by the CETa Joint Committee under Article 30.2(2) of CETa, which regulates the procedure for the amendment of the protocols and annexes of the agreement).


87 Déclaration du Royaume de la Belgique (et des Etats membres […] avec le soutien de la Commission européenne, sur la protection des investissements et la Cour d'investissement (“ICS”):

[L]a sélection des tous les juges du Tribunal et du Tribunal d'appel sera faite, sous le contrôle des institutions européennes et des Etats membres, d'une façon rigoureuse, avec l'objectif d'en garantir l'indépendance et l'impartialité, ainsi que la plus haute compétence.


La déclaration du Conseil et des Etats membres traitant des décisions du Comité conjoint du CETA en matière de coopération réglementaire pour des compétences relevant des Etats membres confirme que ces décisions devront être prises de commun accord par le Conseil et ses Etats-membres.

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Article 1(2) TEU provides that the Treaty on European Union marks a new stage in the process of creating an even closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen. This often-overlooked mandate of proximity, inserted upon request by the UK, does not require decisions within the European Union to be taken by national or regional parliaments, or even by the citizens themselves. But it reflects the notion that the proximity to citizens legitimises the European Union. This was also the original intention of the parties to the TEU. Pechstein suggests that the contracting parties inserted the mandate of proximity on foot of their intention to sustain an interest in the workings of the European Union, which can be done both by allowing citizens to participate and by deciding issues at a level that is geographically accessible to citizens as possible. That decisions are to be taken at the lowest level possible already follows from the principle of subsidiarity, expressed in the preamble and defined in Article 5(3) TEU, which states:

Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

The principle of subsidiarity ties in with the principle of proportionality, which requires the exercise of restraint on behalf of the Union. Article 5(4) TEU defines that, under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. Given the principles of proximity, subsidiarity, and proportionality, this paper, in what follows next, analyses whether the centralised system of investor-state dispute resolution under CETA is better than the decentralised mechanism of traditional investor-state arbitration regarding the selection of arbitrators, their appointment, and the removal of arbitrators.

(2) The Selection of Arbitrators, their Appointment, and the Removal of Arbitrators

In traditional investor-state arbitration, the disputing parties select and appoint their own arbitrators, subject to any applicable rules the underlying investment agreement may stipulate. Unless the disputing parties agree to appoint a sole arbitrator, arbitral tribunals usually consist of three arbitrators, one arbitrator appointed by each disputing party and the presiding arbitrator appointed by agreement

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89 See also TEU, Protocol (No. 2) on the Application of the Principles of Subsidiarity and Proportionality, Preamble, where the contracting parties express their wish ‘to ensure that decisions are taken as closely as possible to the citizens of the Union’.


Die Grundintention der Vertragsstaaten dürfte gewesen sein, die Anteilnahme und das Interesse der Bürger an den europäischen Entwicklungen aufrechtzuerhalten oder zu beleben, wozu sowohl ihre Partizipation an Entscheidungsprozessen geeignet ist, als auch die Bekräftigung des Prinzips, dass die Entscheidungsebenen – Union, Staaten, Länder, Kommunen – möglichst problemnah bei Bürger liegen sollten. (Footnote omitted).

92 The parties to the TEU are ‘resolved to continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity’. See Preamble to the TEU.


94 See, for example, Article 9.15(8) of the Australia-China FTA 2015:

All arbitrators appointed pursuant to this Section shall have expertise or experience in public international law, international trade or international investment rules, or the resolution of disputes arising under international trade or international investment agreements. They shall be independent, serve in their individual capacities and not take instructions from any organisation or government with regard to matters related to the dispute, or be affiliated with the government of either Party or any disputing party, and shall comply with Annex 9-A. Arbitrators who serve on the list established pursuant to paragraph 5 shall not, for that reason alone, be deemed to be affiliated with the government of either Party.
of the disputing parties.\textsuperscript{95} There are two options for disputing parties to control arbitrators. First, disputing parties may choose to challenge arbitrators. Under the ICSID framework,\textsuperscript{96} parties may propose the disqualification of an arbitrator, \textit{inter alia}, on account of any fact indicating a manifest lack of independence. Similarly, under Article 12(1) of the UNCITRAL Arbitration Rules, a party may challenge an arbitrator, if circumstances exist that give rise to justifiable doubts as to the arbitrator’s impartiality or independence.\textsuperscript{97} Second, disputing parties may choose not to reappoint arbitrators in future disputes. This \textit{ad hoc} system of dispute resolution is dynamic because it is designed as a constant feedback loop; disputing parties choose to appoint or reappoint arbitrators based on their prior performances within and without the system of investor-state arbitration. The users of the system thus shape the evolution of the system by selecting and appointing their own arbitrators. This solution is pragmatic because it only requires a consensus between the disputing parties on the choice of the presiding arbitrator in a single dispute, important as that decision is and as long as it may take the disputing parties to reach that consensus.

To reiterate, the system of investor-state dispute resolution under CETA is different. Article 8.27(2) CETA provides that the Joint Committee shall, upon the entry into force of CETA, appoint fifteen quasi-tenured Members of the Tribunal. Five Members of the Tribunal shall be nationals of a Member State of the European Union; five Members shall be nationals of Canada and five members shall be nationals of third countries. The footnote accompanying Article 8.27(2) CETA, read in conjunction with the preamble to the proposed agreement, clarifies that the European Union, including its Member States, and Canada are considered to be the two Parties to CETA and, as such, may each propose the appointment of five Members of the Tribunal. The European Union, including its Member States, may propose the appointment of five Members who are nationals of a Member State of the European Union, or it may propose the appointment of ‘up to five members of the Tribunal of any nationality.’\textsuperscript{98} The equivalent is true for Canada. The Members of the Tribunal are appointed for a duration of five to six years,\textsuperscript{99} and it is the responsibility of the President of the Tribunal to appoint the Members of the Tribunal to arbitrate disputes on a random rotation basis (Article 8.27(7) CETA). In a joint declaration, the European Council and its Member States recently specified that the decisions taken by the Joint Committee concerning matters within the Member States’ competence must be taken by agreement between the European Council and its Member States.\textsuperscript{100} The declaration also clarified that the European Union and its Member States share their control over the selection of investor-state arbitrators under CETA:

\[\text{[La] la sélection des tous les juges du Tribunal et du Tribunal d'appel sera faite, sous le contrôle des institutions européennes et des États membres, d'une façon rigoureuse, avec l'objectif d'en garantir l'indépendance et l'impartialité, ainsi que la plus haute compétence.}\textsuperscript{101}\]

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\textsuperscript{95} See, for example, Article 37(2)(b) of the ICSID Convention, which provides that the default number of arbitrators is three, ‘one arbitrator appointed by each party and the third, who shall be president of the Tribunal, appointed by agreement of the parties.’ See also Rules 2 and 3 of the ICSID Arbitration Rules. The default number of arbitrators is also three under Article 7(1) of the UNCITRAL Arbitration Rules. Even though Article 9(1) of the UNCITRAL Arbitration Rules provides that the two party-appointed arbitrators ‘shall choose the third arbitrator who will act as the presiding arbitrator of the arbitral tribunal’, the party-appointed arbitrators will not do so without the parties’ consent.

\textsuperscript{96} See Articles 14(1), 40(2), and 57 of the ICSID Convention, and Rule 9 of the ICSID Arbitration Rules.

\textsuperscript{97} See also Article 15(1) of the SCC Arbitration Rules 2010; Article 10.1 of the LCIA Arbitration Rules 2014; Article 14(1) of the ICC Arbitration Rules 2012.

\textsuperscript{98} See Footnote 9 to Article 8.27(2) of CETA.

\textsuperscript{99} See Article 8.27(5) of CETA.


La déclaration du Conseil et des Etats membres traitant des décisions du Comité conjoint du CETA en matière de coopération réglementaire pour des compétences relevant des Etats membres confirme que ces décisions devront être prises de commun accord par le Conseil et ses Etats-membres.

\textsuperscript{101} ‘The selection of all judges of the Tribunal and the Appellate Tribunal will be carried out under the supervision of the European institutions and the Member States in a rigorous manner with the aim of guaranteeing the judges’ independence and impartiality, as well as their highest competence.’ CETA: le texte de la Commission
What was intended as a reassurance that the selection of arbitrators remains also within the control of the Member States, could be described as too much too late, for the control now envisaged under CETA is that of the European Union and its Member States agreeing with Canada in advance on the appointment of all fifteen initial Members of the Tribunal for a quasi-tenure of five to six years. The European Commission states that the investment court system under CETA is inspired by the International Court of Justice and the European Court of Human Rights. Yet, both the Statute of the International Court of Justice and the European Convention on Human Rights require judges to be elected rather than appointed by agreement. If investor-state arbitrators under CETA are to be appointed by consensus between the European Union, its Member States and Canada, the appointment process could turn out to be rather impractical as the difficulties to reach an EU-wide consensus on the provisional application of CETA have shown.

If the European Union, its Member States and Canada reach a consensus as to the selection of all investor-state arbitrators under CETA, nothing is said therewith about government control over arbitrators after their appointment to the Tribunal or the Appellate Tribunal under CETA. Nothing is said either about a potential greater degree of government control over arbitrators under CETA in comparison to traditional investor-state arbitration. While disputing parties may challenge arbitrators under CETA just as in traditional investor-state arbitration and thereby remove arbitrators from an arbitral tribunal, the removal of arbitrators from the group of quasi-tenured arbitrators, ie the Tribunal itself, is more difficult. Article 8.30(4) CETA provides that the Parties, by decision of the CETA Joint Committee, may remove Members from the Tribunal where their behaviour is inconsistent with their obligations and incompatible with their continued membership of the Tribunal. If the creation of the Tribunal falls within the competence of the Member States of the European Union, the decision to remove Members from the Tribunal would require an agreement among the European Union, its Member States and Canada. The removal of arbitrators from the Tribunal is thus another area where the impracticability of a required consensus might stifle change. The requirement of a consensus might also stifle the issuance of authoritative interpretations by the CETA Joint Committee, when the interpretation concerns matters within the Member States’ competence. The European Commission suggests that the Joint Committee can adopt binding interpretations also regarding ongoing cases before arbitral tribunals under CETA. Given the time required to find a consensus on CETA between the European Union, its Member States, and Canada, this power seems particularly difficult to realise when the interpretation concerns matters within the Member States’ competence.

The fact that Members of the Tribunal are to be appointed for a duration of five to six years, that both their removal from the Tribunal and the authoritative interpretation of CETA by the Joint Committee may require a consensus among the European Union, its Member States and Canada, and that the Members of the Tribunal are appointed at random to resolve investor-state disputes under CETA, makes governments seem less powerful under CETA in comparison to traditional investor-state arbitration,


103 See Article 4(1) of the Statute of the International Court of Justice: The members of the Court shall be elected by the General Assembly and by the Security Council from a list of person nominated by the national groups in the Permanent Court of Arbitration, in accordance with the following provisions.

104 See Article 22 of the European Convention on Human Rights: The judges shall be elected by the Parliamentary Assembly with respect to each High Contracting Party by a majority of votes cast from a list of three candidates nominated by the High Contracting Party.

105 Given that the Tribunal and the Appellate Tribunal would interpret the investment protection provisions of CETA and would have the power to issue binding awards based on their determinations, the result cannot be different for the dispute resolution mechanism than for the CETA Joint Committee, namely, that the European Union does not have the exclusive competence to delegate powers to other bodies it does not possess itself. If the European Union does not have the competence to conclude Article 8.12 CETA on expropriation, it does not have the competence either to grant arbitral tribunals the power to interpret and apply that provision.

where respondent governments have control over the appointment of two out of three arbitrators on a case-by-case basis, where the challenge of arbitrators by the disputing parties may lead to their disqualification for good, and where the disputing parties may exert control over arbitrators by not reappointing them in future disputes. The self-imposed requirement to take decisions in the Joint Committee regarding matters within the Member States’ competence by agreement among the European Union, its Member States and Canada, if realised, might haunt all actors involved for years to come. Once the Tribunal and Appellate Tribunal are established, it is unlikely that the European Union, its Member States and Canada, are in a strong position to supervise them, if that supervision requires mutual consent. This might eventually lead to the investment court system under CETA growing ever more independent in the absence of effective government control.

(3) Qualification Requirements for Arbitrators and the Rules on Interpretation

Maybe the qualification requirements for arbitrators and the rules on interpretation included in the agreement balance the ineffective government control mechanism that is the CETA Joint Committee in matters of the Member States’ competence. Article 8.27(4) CETA provides that Members of the Tribunal shall possess the qualifications required in their respective countries for appointment to judicial office, or be jurists of recognised competence; decision-makers must also have demonstrated expertise in public international law. It is further desirable under Article 8.27(4)(3) CETA that decision-makers have expertise in international investment law, international trade law and the resolution of disputes arising under international investment or international trade agreements. The Members of the Appellate Tribunal must meet the same requirements (Article 8.28(4) of CETA). The intended consequence of these qualification requirements is that arbitrators will ‘have the necessary impartiality, expertise and knowledge to assess cases.’ Their introduction is a reaction to the criticism that some arbitrators in traditional ad hoc investor-state arbitration are biased towards investors or the system of investor-state arbitration more generally. The link between the qualification requirements and the intended outcome of greater impartiality is not easily apparent, however. Someone with a demonstrated expertise in public international law may still interpret the investment protections under CETA favourable to investors, if the circumstances so require. The idea that a particular set of expertise or disciplinary background determines a particular viewpoint and influences the outcome of a dispute is speculative.

What is more, the degree of uncertainty as to an arbitrator’s point of view is even greater under CETA as opposed to traditional investor-state arbitration; under CETA, arbitrators are appointed by the Joint Committee to the Tribunal or the Appellate Tribunal well in advance of a dispute arising, and the arbitrators’ point of view may change over time. In traditional investor-state arbitration, arbitrators are appointed by the disputing parties once a dispute has arisen based on up-to-date information regarding the arbitrators’ expertise and stand. That the disputing parties cannot select their arbitrators is an intentional feature of the dispute resolution mechanism proposed under CETA. Article 8.27(7) CETA details that it is the President of the Tribunal who appoints the Members of the Tribunal hearing a particular case on a rotation basis, ensuring that the composition of each arbitral tribunal is random and unpredictable, while giving equal opportunity to all Members of the Tribunal to serve.

The random composition of tribunals under CETA eliminates the opportunity for the disputing parties to create a truly party-neutral arbitral tribunal. Since the disputing parties in traditional investor-state arbitration each choose one arbitrator and these party-appointed arbitrators, with the agreement of the disputing parties, agree on a presiding arbitrator, the tribunal’s composition reflects the wishes of the disputing parties equally. The random composition of arbitral tribunals under CETA, on the other hand, does not guarantee that the resultant arbitral tribunal is equally neutral towards investors and states. The argument that arbitral tribunals under CETA are more impartial than party-appointed arbitral

107 cf BVerfG, Judgment of 13 October 2016 (2 BvR 1368/16) para 70 (noting its understanding that the German Federal Government considers the dispute resolution mechanism under CETA to fall under the Member States’ competence).

108 European Commission, CETA – Summary of the final negotiating result (February 2019) p 12.

109 cf European Commission, Concept Paper: Investment in TTIP and beyond – the path for reform: Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court, pp 6-7 ('The ad hoc nature of their appointment […] has led to perceptions that this provides financial incentives to arbitrators to multiply ISDS cases.' <https://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF> accessed 15 December 2016.

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tribunals places undue weight on the assumption that arbitrators appointed by the Joint Committee are more impartial as such, without CETA granting the disputing parties the power to safeguard the neutrality of the arbitral tribunal by granting the disputing parties equal say in the appointment process of arbitrators.

Inasmuch as Article 8.31(1) CETA states that the Tribunal shall interpret CETA in accordance with the Vienna Convention on the Law of Treaties (the ‘Vienna Convention’) and other rules and principles of international law applicable between the Parties, this statement does not deviate from rules otherwise applicable in traditional investor-state arbitration. The Vienna Convention is applicable to treaties between States (Article 1 of the Vienna Convention). That includes international investment agreements. Article 31(3)(c) of the Vienna Convention further states that, when interpreting a treaty, any relevant rules of international law applicable in the relations between the Parties shall be taken into account. Article 8.31(1) CETA does not go beyond what is already established in the Vienna Convention and is therefore merely declaratory in nature.

(4) The Code of Ethics

Just as the qualification requirements for arbitrators and the rules of interpretation under CETA are not specific to the proposed investment court system, the Code of Ethics is not specific to the proposed investment court system either. Article 8.30 CETA introduces a Code of Ethics, laying out rules for Members of the Tribunal and the Appellate Tribunal. These rules may be replaced or supplemented by the Committee on Services and Investment (Article 8.30(1) CETA in conjunction with Article 8.44(2) CETA). Article 8.30.1(1) and (2) of CETA state that arbitrators shall be independent and must not be affiliated with any government. Footnote 10 to Article 8.30(1)(2) CETA specifies that the receipt of remuneration from a government does not in itself make that person ineligible, which generally allows Members of the Tribunal and the Appellate Tribunal, in addition to their duties under CETA, to act as arbitrators in commercial arbitral proceedings and as arbitrators in investor-state arbitral proceedings other than those under CETA. Article 8.30(1)(6) CETA only prohibits Members of the Tribunal and the Appellate Tribunal to act as counsel, party-appointed expert or witness in any pending or new investment dispute under CETA or any other international agreement. Article 8.30(1)(3) to (5) CETA imposes further restrictions: investor-state arbitrators must not take instructions from any organisation, or government, with regard to matters related to the dispute before them. Nor must they participate in the consideration of any disputes that would create a direct or indirect conflict of interest, in compliance with the International Bar Association Guidelines on Conflicts of Interest in International Arbitration.

The Code of Ethics is detailed but not specific to investor-state dispute resolution under CETA. Article 8.30(2) CETA is reminiscent of similar provision in the ICSID Convention and the UNCITRAL Arbitration Rules; it allows a disputing party to challenge an arbitrator, if the disputing party considers the arbitrator to have a conflict of interest. The disputing party may submit a notice of challenge to the President of the International Court of Justice (Article 8.30(2)(1) CETA), who issues a decision in the matter, if the challenged arbitrator has chosen not to resign, and after having heard the disputing parties and considered any observations submitted by the challenged arbitrator (Article 8.30(3)(1) CETA). Similar provisions exist in the ICSID Convention and in institutional arbitration rules. Under the ICSID framework, parties may propose the disqualification of an arbitrator, inter alia, on account of any fact indicating a manifest lack of independence. Similarly, under Article 12(1) of the UNCITRAL Arbitration

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110 See also the definition of the term ‘treaty’ under Article 2(1)(a) of the Vienna Convention:

“[T]reaty” means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.

111 Article 2(1)(g) of the Vienna Convention:

“[P]arty” means a State which has consented to be bound by the treaty and for which the treaty is in force.

112 Article 8.30 CETA refers to the Members of the Tribunal. Article 8.28(4) CETA provides that the Members of the Appellate Tribunal shall also meet the requirements of Article 8.30 CETA.

113 See Articles 14(1), 40(2), and 57 of the ICSID Convention, and Rule 9 of the ICSID Arbitration Rules.
Rules, a party may challenge an arbitrator, if circumstances exist that give rise to justifiable doubts as to the arbitrator’s impartiality or independence.\(^{114}\)

The fact that disputing parties may challenge arbitrators is thus not unique to CETA, but CETA provides in greater detail what might be considered a conflict of interest. CETA also imposes greater explicit restrictions on arbitrators, prohibiting them from acting as counsel or party-appointed expert or witness in investor-state arbitration. The Code of Ethics under CETA is nonetheless not specific to investor-state dispute resolution under CETA; it could equally be introduced in traditional investor-state arbitration. Since the Code of Ethics is not dependant on the investor-state dispute resolution system under CETA, its restrictions on arbitrators are not an example of greater government control over arbitrators under that system.

(5) Conclusion

Given that the dispute resolution process proposed under CETA offers little,\(^{115}\) if any, advantages over traditional investor-state arbitration in a European context, it is understandable that the United States is so far unwilling to agree to an investment court system under TTIP. The core question for the European Union and its Member States should be whether the additional government control over the appointment of quasi-tenured arbitrators under an investment court system balances the subsequent difficulty to control these quasi-tenured arbitrators. The appointment of arbitrators by the Parties does not guarantee that these government-appointed arbitrators are more party-neutral than party-appointed arbitrators. The quasi-tenure of Party-appointed arbitrators under CETA, while meant to mirror the tenure of judges in national court systems, also takes away the power of the disputing parties to appoint their own adjudicators in investor-state arbitration. This also takes away the power of the respondent government to appoint their own arbitrator and agree with the claimant investor on the presiding arbitrator on a case-by-case basis.

In the European Union, this relative loss of government control over the appointment of arbitrators is not mitigated by the fact the CETA Joint Committee appoints all arbitrators in advance with the agreement of the European Union, its Member States, and Canada. That is because the subsequent control by the Joint Committee over investor-state arbitrators may require a consensus among the European Union, its Member States and Canada, which might be difficult to reach given the great number of actors involved. The removal of arbitrators from the Tribunal under CETA seems thus more difficult to accomplish than the removal or non-reappointment of arbitrators in traditional investor-state arbitration, where the disputing parties have the power to challenge and choose arbitrators. One perceived advantage of the Joint Committee is its power to issue binding decisions regarding the interpretation of CETA. But this authority is not unique to the CETA Joint Committee. Article 31(3)(a) of the Vienna Convention on the Law of Treaties provides that treaties are to be interpreted in light of any subsequent agreement between the Parties regarding the interpretation of the treaty or the application of its provisions. Nor would an authoritative interpretation issued by the Parties bind a permanent tribunal differently than ad hoc arbitral tribunals.\(^{116}\)

In conclusion, the CETA Joint Committee does not violate the principle of democracy, for the European Union and its Member States agreed that, in the absence of an EU competence, decisions taken by the Joint Committee must be based on a consensus among the European Union, its Member States and Canada. With this agreement, the Parties to CETA maneuvered themselves into a deadlock, if the European Court of Justice decides, as this paper submits, that the European Union does not have a competence to conclude at least some of the provisions on investment protection and to delegate the power to authoritatively interpret these provisions to the CETA Joint Committee. What is more, decision-making by consensus regarding the envisaged investment court system, does not provide for efficient, and more importantly, greater government control over arbitrators than in traditional investor-state arbitration.

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\(^{114}\) See also Article 15(1) of the SCC Arbitration Rules 2010; Article 10.1 of the LCIA Arbitration Rules 2014; Article 14(1) of the ICC Arbitration Rules 2012.


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arbitration. The difficulties to reach a consensus on CETA within the European Union continue, with Belgium not willing to ratify CETA in its current form, unless all regional governments except for the Flemish government decide otherwise.\textsuperscript{117} Those intra-EU differences make government control over arbitrators based on consensus seem less efficient than government control over arbitrators by respondent states in traditional investor-state arbitration. The mandate of the proximity of decision-making under the TEU further tips the balance towards a decentralised investor-state dispute resolution mechanism, which could incorporate many of the reforms proposed under CETA such as qualification requirements and the code of ethics for arbitrators.

\textbf{C. Outlook}

The future of CETA remains unclear with Belgium intending to ask the European Court of Justice whether the proposed international investment court system proposed under CETA is compatible with the TEU and the TFEU.\textsuperscript{118} One argument that will likely be brought forward by Belgium before the European Court of Justice (ECJ) is that the ECJ is designed to be the only final arbiter in EU law matters. The ECJ belongs to the Court of Justice of the European Union, which includes the ECJ, the General Court and specialised courts (Article 19(1)(1) TEU). Even though all sub-branches of the Court of Justice of the European Union shall ensure that in the interpretation and application of the Treaties the law is observed (Article 19(1)(2) TEU),\textsuperscript{119} it is the ECJ which is designed to be the final arbiter in the European Union.

The Protocol to the TEU on the Statute of the Court of Justice of the European Union\textsuperscript{120} determines that an appeal may be brought on points of law before the ECJ against decisions of the General Court.\textsuperscript{121} The ECJ may then quash the decision of the General Court and give final judgment in the matter, or it may refer the case back to the General Court for judgment, which is then bound by the decision of the ECJ on points of law.\textsuperscript{122} The First Advocate-General may also propose that the ECJ review the decisions of the General Court under Article 256(2) and (3) TFEU, if the First Advocate-General considers there to be a serious risk of the unity or consistency of Union law being affected.\textsuperscript{123} In addition to its elevated role with in relation to the General Court, the ECJ also has jurisdiction to hear cases brought before it by the European Commission or a Member State regarding another Member State’s possible Treaty violations (Articles 258 and 259 TFEU), and to give preliminary rulings upon

\textsuperscript{117} See Déclaration du Royaume de Belgique relative aux conditions de pleins pouvoirs par l’Etat fédéral et les Entités fédérées pour la signature du CETA (27 October 2016) p 2 <http://ds.static.rtbf.be/article/pdf/declaration-be-fr-nl-271016-9h00-clean-watermark-1477566706.pdf> accessed 15 December 2016: Sauf décision contraire de leurs Parlements respectifs, la Région wallonne, la Communauté française, la Communauté germanophone, la Commission communautaire francophone et la Région de Bruxelles-Capitale n’entendent pas ratifier le CETA sur la base du système de règlement des différends entre investisseurs et Parties, prévu au chapitre 8 du CETA, tel qu’il existe au jour de la signature du CETA.


A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised.

\textsuperscript{119} See also Article 17(1)(3) TEU: ‘[The Commission] shall oversee the application of Union law under the control of the Court of Justice of the European Union.’

\textsuperscript{120} TEU, Protocol (No. 3) on the Statute of the Court of Justice of the European Union.

\textsuperscript{121} See TEU, Article 56(1) and Article 58(1) of the Protocol (No. 3) on the Statute of the Court of Justice of the European Union (Protocol to the TEU).

\textsuperscript{122} TEU, Article 61 of the Protocol (No. 3) on the Statute of the Court of Justice of the European Union.

\textsuperscript{123} TEU, Article 62 of the Protocol (No. 3) on the Statute of the Court of Justice of the European Union.

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request from national courts (Article 267 TFEU). The role of the ECJ as final arbiter of EU law is thus firmly established.

Since the Tribunal and Appellate Tribunal to be established under CETA would have the power to decide whether EU law violates the investment protections under CETA, the jurisdiction of the international investment court system under CETA and that of the ECJ could overlap. This overlap, if any, could be incompatible with the European legal order. This is the case, if arbitral tribunals interpret EU law differently from the European Court of Justice, and if this resultant inconsistency risks the unity of EU law. Article 8.31(2) CETA seeks to mitigate that risk. Its second sentence provides that the Tribunal, in determining the consistency of a measure with CETA, may consider, as appropriate, the domestic law of the disputing Party as a matter of fact. In doing so, the Tribunal shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party and any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party (Article 8.31(2)(3) CETA). This requirement of treating domestic law as a matter of fact is designed to protect the monopoly of the competent authorities of the EU and its Member States, and of Canada, to determine the legality of a measure, alleged to constitute a breach of CETA, under the applicable domestic law.

It remains to be seen whether the European Court of Justice considers Article 8.31(2) CETA to be a sufficient safeguard against the fragmentation of EU law. Article 8.31(2) CETA does not mention the Appellate Tribunal, and how it fits in. Article 8.28(2)(b) CETA only provides that the Appellate Tribunal may uphold, modify or reverse a Tribunal’s award based on manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law. The text of CETA itself thus envisages that the Tribunal and the Appellate Tribunal may differ with respect to their determination of the prevailing interpretation given to the domestic law by the courts or authorities of the relevant Party. That is only realistic. The determination of the prevailing interpretation is bound to be difficult, where no particular interpretation prevails, for example, where two or more dominant interpretations exist without one interpretation prevailing over the other.

That the Appellate Tribunal may review a Tribunal’s award based on manifest errors in the appreciation of relevant domestic law, however, assumes that the Appellate Tribunal knows better than the Tribunal, which interpretation of domestic law prevails over another – a competence that seems alien to an arbitral tribunal such as the Appellate Tribunal. Since neither the Tribunal nor the Appellate Tribunal are embedded in the domestic court systems of the Parties, their respective views of the prevailing interpretation of domestic law can only be equally authoritative, or equally unauthoritative, in relation to the views of domestic courts or authorities of the Parties. Since any meaning given to domestic law by the Tribunal is not binding upon the courts or the authorities of the Party (Article 8.31(2)(3) CETA), the same must be true for awards by the Appellate Tribunal. That is not to say that the Appellate Tribunal, if established, will not develop its own jurisprudence constante regarding the prevailing interpretation of domestic law, and it is this power that the ECJ might object against. The singular power to render authoritative decisions on the prevailing interpretation of EU law, even if only in relation to the Tribunal,

124 See also Article 260(2) TFEU.
126 European Commission, Investment provisions in the EU-Canada free trade agreement (CETA) p 6 <http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151918.pdf/> accessed 15 December 2016. See also Article 8.31(2)(1) CETA.
127 The ECJ’s Opinion 2/13 is clear regarding the inadmissibility under Article 344 TFEU of submitting ‘a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein’. See ECJ, Opinion 2/13, Accession to the ECHR ECLI:EU:C:2014:2454, [2014] para 201. The ECJ will thus have to decide whether it qualifies investor-state dispute settlement under CETA, and the treatment of EU law as a matter of fact, as a dispute concerning the interpretation or application of the Treaties.

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becomes more forceful when the Appellate Tribunal decides to follow its own previous decisions.\footnote {cf Kyle Dylan Dickson-Smith, ‘Does the European Union Have New Clothes?: Understanding the EU’s New Investment Treaty Model’ (2016) 17(5) Journal of World Investment & Trade 773-822, at 777 (noting that ‘it is not unreasonable to suggest that where […] legal norms are determined by a single institution, over time there may be an influence of convergence of the substantive legal norms’).} The ECJ might find that this power to determine the prevailing interpretation of domestic law over time risks the unity of EU law inasmuch as CETA does not safeguard against differences between the ECJ and the Appellate Tribunal over the relative weight of differing interpretations of EU la