BINDING COMMITTEE INTERPRETATIONS IN THE EU'S NEW FREE TRADE AND INVESTMENT AGREEMENTS

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Abstract

The EU's new Free Trade and Investment Agreements (FTIAs) are meant to tackle many of the issues that led to the contestation of international investment law, by increasing the control of the contracting parties over the agreements. One such mechanism is allowing the contracting parties via treaty committees to adopt interpretations of the agreements that are binding on arbitral tribunals and domestic authorities. After a brief historical overview of the way in which this mechanism found its way into the EU FTIAs, the article discusses four main issues:(a) the meaning of 'serious concerns' regarding the interpretation of investment provisions; (b) the binding nature of committee interpretations from the perspective of arbitral tribunals and the CJEU; (c) the temporal application of committee interpretations; and (d) their practical operation. As a conclusion, several recommendations are provided that are meant to improve the current 'binding interpretations' clauses, before they become model clauses used in future EU FTIAs.

Keywords: EU FTIAs; Binding Committee Interpretations; Arbitral Tribunals; Serious Concerns; Binding Character; Temporal Application; Practical Operation

1. Introduction

The EU is a relative new-comer to the negotiation of investment agreements. The post-Lisbon competences over Foreign Direct Investment (FDI)[1] have just started producing a new set of Free Trade and Investment Agreements (FTIAs). Some of the agreements are still in the negotiation phase,[2] while others are currently being ratified[3] or have more recently entered into force.[4] The EU Commission has taken upon itself the role to address and possibly solve[5] in the new FTIAs some of the major issues that have led to the contestation of international investment law and investor-State dispute settlement (ISDS).[6] It is for this reason that the newest FTIAs seek to better define the terms investor and investment, provide more guidance for the definition of such vague terms as fair and equitable treatment (FET) and introduce a whole set of changes to ISDS, such as two-tier investment adjudication.[7] One could thus assume that the EU is becoming a 'shaper' of the international investment regime.[8] Nevertheless, some of the 'novel' ideas introduced in these FTIAs have existed in some form or another in other investment and trade agreements.

Such is the case of clauses that give the power to a treaty body, such as a Joint Committee, to provide interpretations of the agreement that are binding on the investor-State tribunals ('binding interpretations' clause). The most well-known example is to be found in Article 1131.2 of the North American Free Trade Agreement (NAFTA), according to which an interpretation given by the Free Trade Commission (FTC) shall be binding on an

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[1] TFEU, art 207(1). See Angelos Dimopoulos, 'The Effects of the Lisbon Treaty on the Principles and Objectives of the Common Commercial Policy' (2010) 15 EFAR 153. Chien-Huei Wu, 'Foreign Direct Investment as Common Commercial Policy: EU External Economic Competence after Lisbon' in Paul James Cardwell (ed), *EU External Relations Law and Policy in the Post-Lisbon Era* (Springer-Asser 2012); Special Issue: 'The Anatomy of the (Invisible) EU Model BIT' (2014) 15(3-4) JWIT.

[2] At the time of writing 15 rounds of negotiations have been concluded for TTIP (EU-US). Due to the recent political changes in the US the future of these negotiations is uncertain. Surprisingly, the EU and Japan have already concluded 17 rounds of negotiations for an FTA. See <https://goo.gl/orxIQ> accessed 1 April 2017.

[3] CETA (EU-Canada) has been recently ratified by the European Parliament and is awaiting Member State ratification. Belgium, however, will ask for a CJEU Opinion on the compatibility of CETA ISDS with EU law.

[4] The EU-Korea FTA entered into force in 2011, but can be considered a pre-cursor to the newer FTIAs. See <https://goo.gl/4ghP38> accessed 1 April 2017. With regard to the EU-Singapore FTA, the CJEU is to deliver an opinion on whether it should be concluded as a purely EU agreement or a mixed agreement with the EU Member States. CJEU, Case A-2/15 *pending*.

[5] EU Commission, 'Investment in TTIP and Beyond – The Path to Reform', Concept Paper (2015) <https://goo.gl/Twd2dX> accessed 1 April 2017.

[6] See Gus Van Harten, 'Public Statement on the International Investment Regime' <https://goo.gl/wPQQeO> accessed 1 April 2017.

[7] Concept Paper 2015 (n 5).

[8] For a discussion on the role of States in shaping the overall investment law regime, see Malcolm Langford, Daniel Behn and Ole Kristian Fauchald, 'Tempest in a Teapot? The International Investment Regime and State Backlash' in Thomas Gammeltoft-Hansen and Tanja E Aalberts (eds), *The Changing Practices of International Law: Sovereignty, Law and Politics in a Globalising World* (CUP 2016).

investor-State tribunal established under the agreement.[9] Similar provisions have found their way into model[10] and regular Bilateral Investment Treaties (BITs)[11] or FTIAs.[12] Nonetheless, contracting parties via the treaty bodies rarely exercise this prerogative. For example, the FTC has only used this power once[13] and the interpretation provided by it led to mixed acceptance by arbitral tribunals set up under NAFTA.[14]

The purpose of this article is to critically assess the interpretive powers of treaty committees provided for in EU FTIAs. In order to do so, the following agreements are discussed for which a text exists: the Comprehensive Economic and Trade Agreement with Canada (CETA), the Proposal for the Transatlantic Trade and Investment Partnership (TTIP Proposal) and the FT(I)As with Vietnam (EU-Vietnam) and Singapore (EU-Singapore).[15]

Structure wise, Part 2 provides a quick historical overview of the way in which the 'binding interpretations' clause found its way into the texts of the EU FTIAs and identifies four major concerns in need of further discussion. Part 3 provides the backbone of this paper and elaborates on the four major issues: (a) the meaning of a 'serious concern' regarding the interpretation of investment provisions; (b) the binding nature of committee interpretations from the perspective of arbitral tribunals and the Court of Justice of the European Union (CJEU); (c) the temporal application of committee interpretations; and (d) their practical operation. Part 4 is meant for concluding recommendations.

2. A Bit of History from the 'Beginnings' to the Present.

The EU, compared to Canada, the US or even some of its Member States, does not have a model investment agreement and the EU Commission has previously renounced the idea of a 'one-size-fits-all' model for IIAs.[16] Nonetheless, the Commission's 2015 Proposal for an

[9] According to art 1132 NAFTA the FTC can also deliver interpretations, pursuant to the request of the investor-State tribunal, on the scope of certain reservations or exceptions set out in Annexes I-IV of NAFTA. Such interpretations are also binding on the tribunal.

[10] US model BIT (2012), art 30.3; Canadian model BIT (2004), art 40.2.

[11] US-Rwanda BIT (2012), art 30.3; Canada-Benin FIPA (2014), art 35.2; Canada-Cameroon FIPA (2016), art 32.2.

[12] US-Colombia FTA (2012), art 10.22.3; US-Korea FTA (2012), art 11.22.3; ASEAN-India BIT (2014, nif), art 19; TPP, art 9.25.3; Canada-Colombia FTA (2011), art 832.2.

[13] Notes of Interpretation of Certain Chapter Eleven Provisions, NAFTA Free Trade Commission (31 July 2001) <https://goo.gl/4XSsvi> accessed 1 April 2017. The FTC can also issue joint statements, such as the 7 Oct 2003 Statement on Non-Disputing Parties <https://goo.gl/1Jlao6> accessed 1 April 2017.

[14] Gabrielle Kaufmann-Kohler, 'Interpretive Powers of the Free Trade Commission and the Rule of Law' in Emmanuel Gaillard & Frédéric Bachand (eds), *Fifteen Years of NAFTA Chapter 11 Arbitration* (JurisNet 2011) 175, 183-184 with reference to *Pope & Talbot, Inc v Canada*, UNCITRAL, Award in Respect of Damages (31 May 2002); *Mondev v United States*, ICSID Case No. ARB (AF)/99/2, Award (11 October 2002); *Merrill & Ring Forestry LP v Canada*, UNCITRAL, Award (31 Mar 2010).

[15] The FTA with Korea is not discussed, since this agreement was mainly negotiated in the pre-Lisbon era and does not contain many of the features of the newer EU FTIAs, such as ISDS. According to art 15.1.4 EU-Korea, the Trade Committee may adopt interpretations of the provisions of the agreement. However, no provisions exist on its binding character. Similarly, the FTA with Colombia and Peru (provisional application since 2013) does not contain any provisions on ISDS. Article 13.2.e allows the Trade Committee to adopt interpretations of the agreement that shall be taken into account by the State-to-State tribunals.

[16] See European Commission, Communication, 'Towards a Comprehensive European International Investment Policy' (7 July 2010) COM (2010) 343 final, 6 < https://goo.gl/3mn9FY > accessed 1 April 2017.

Investment Chapter under TTIP ('TTIP Proposal') can be considered the new model investment chapter that found its way into EU-Vietnam, has led to the renegotiation of the CETA ISDS, and will most probably result in the renegotiation of the EU-Singapore ISDS.[17] Therefore, our quest to understand the history[18] of the 'binding interpretations' clause will include communications, concept papers and other policy documents of the EU institutions, as well as the negotiating histories of the EU FTIAs.

2.1. *A Lot of Development in a Short Amount of Time (2010-2017)*

In the first couple of years following the Lisbon amendments not much information exists on the 'binding interpretations' clause. The EU Commission's 2010 Communication towards a comprehensive European international investment policy[19] is drafted in general terms[20] and contains no guidance on how the contracting parties should improve their control over the agreements. This was followed by the European Parliament's Resolution of April 2011[21] in which the Commission among others was called on to include in all future EU FTIAs specific clauses laying down the right of the treaty parties to regulate in the public interest,[22] without an express mentioning of the possibility for the contracting parties to issue binding interpretations of the agreements. Nonetheless, in the Explanatory Statement attached to the Motion based on which the resolution was adopted, the INTA Committee reasoned that a right to regulate clause was necessary, because countries such as the USA and Canada that have suffered 'as a result of vague wording in the NAFTA agreement, have adapted their BIT model in order to restrict the breadth of *interpretation* by the judiciary'.[23]

The May/June 2012 leaked draft proposals of the EU Commission on ISDS are the first documents that specifically mention the right of the treaty parties to provide binding interpretations of the agreements, worded as follows:[24]

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[17] Hans von der Burchard, 'EU Makes Big Step Toward Setting Investor Court as Global Norm' (Bilaterals, 7 February 2017) <goo.gl/Ppe8wC> accessed 22 March 2017.

[18] For a quick overview of the major steps in the development of EU investment policy see Marc Bungenberg and Catharine Titi, 'Developments in International Investment Law' in Christoph Herrmann, Markus Krajewski, Jörg P Terhechte (eds), *European Yearbook of International Economic Law* (Springer 2013) 443-47 (covered until 2012); Christian J Tams, 'Procedural Aspects of Investor-State Dispute Settlement: The Emergence of a European Approach' (2014) 15 JWIT 585, 586-591 (covered until 2013/14); Markus Burgstaller, 'Dispute Settlement in EU International Investment Agreements with Third States: Three Salient Problems' (2014) 15 JWIT 551, 551-555 (covered until 2013/14).

[19] See n 16.

[20] August Reinisch, 'Putting the Pieces Together… an EU Model BIT?' (2014) 15 JWIT 679, 681.

[21] European Parliament, 'Resolution of 6 April 2011 on the Future European International Investment Policy', P7-TA(2011) 0141 <https://goo.gl/2CjeDm> accessed 1 April 2017.

[22] ibid point 25.

[23] European Parliament, INTA Committee, 'Report on the future European Investment Policy' (22 March 2011) A7-0070/2011, 11-12 <https://goo.gl/0Stfuk> accessed 1 April 2017 [emphasis added].

[24] The document is available at World Trade Online and requires registration <https://goo.gl/qGrI37> accessed 1 April 2017. The pdf document consists of three parts in the following order: the June 2012 revised draft of the Commission, the Commission's explanations summarizing revisions and the initially leaked May 2012 document. See also Tams (n 18) fn 40.

> "The Committee for the Settlement of Investor-State Disputes *may* adopt decisions interpreting a provision of [the chapter on investment protection]. Any such interpretation *shall* be *binding* on a tribunal hearing a claim […] where the treatment on which the claim is based occurred *after* the date on which the interpretation was adopted by the Committee".[25]

In the short explanations that followed, the EU Commission argued that such interpretations would only be binding on tribunals constituted after the date these interpretations were adopted and in 'no circumstances should they interfere in ongoing cases'. Following the comments of the Member States this clause was adjusted to 'clarify that an interpretation is only binding in respect of a dispute where the treatment concerned arose *after* the interpretation was adopted'.[26] Furthermore, such interpretations could only be adopted when both parties to the agreement agreed and the EU's position would have to follow the procedure under Article 218(9) TFEU.[27]

In 2013 the EU Commission's investment policy came under growing pressure by NGOs and civil society and resulted in changes to investment protection and ISDS.[28] Among the 'improvements' was the introduction of safeguards for the contracting parties that allow countries that have signed an agreement to 'agree jointly on how they interpret the agreement'.[29] The main reason for the inclusion of the 'binding interpretations' clause was the ability of the treaty parties to correct possible erroneous interpretations of the FTIAs by the arbitral tribunals that might have a detrimental effect on the contracting parties. [30]

The newest shift in the EU Commission's approach occurred after the 2014-2015 Public Consultation on ISDS under TTIP. [31] Neither the trade unions and NGOs, nor the companies and business associations were happy with the CETA 'binding interpretations' clause being used in TTIP. Trade unions and NGOs argued that contracting parties did not have enough control over the interpretation of the agreement because the other treaty party could veto the common interpretation and in reality many tribunals would not feel bound by 'binding' interpretations. The business world, on the other hand, feared that this clause would lead to excessive party interference into the arbitral proceedings and could risk politicising on-going disputes.[32] Many of these issues will also be discussed in the upcoming Parts.

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[25] ibid page 6 of the pdf, Article 9(2) [emphasis added].

[26] ibid 8 and 31. The wording of the initial May 2012 leaked document was repeated word-by-word in Article 9 of the June 2012 amendment.

[27] ibid 31. According to art 218(9) TFEU the position of the EU in a body set up by an international agreement is to be set out in a Council decision, adopted on a proposal from the Commission or the High Representative. This concerns acts of the treaty body that have legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement.

[28] European Commission, 'Fact Sheet. Investment Protection and Investor-to-State Dispute Settlement in EU agreements' (November 2013), at 2 <https://goo.gl/yDQxMB> accessed 1 April 2017.

[29] ibid 9.

[30] ibid.

[31] European Commission, 'Online Public Consultation on Investment Protection and Investor-to-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership (TTIP)', SWD (2015) 3 final <https://goo.gl/TbfN0l> accessed 1 April 2017.

[32] ibid 23.

The EU Commission's 2015 Concept Paper on Investment in TTIP and beyond,[33] and DG Trade's 2016 Guide to TTIP[34] exhibit a more mature and detailed EU investment policy. The Concept Paper clearly mentions the right of the contracting parties to issue binding interpretations of the agreements.[35] According to the EU Commission, 'governments, not arbitrators' were given 'ultimate control over the interpretation of the rules'.[36] As to the reason behind the 'binding interpretations' clause, the EU Commission mentions the need to ensure that a safety valve exists in the event of errors by the tribunals. Nonetheless, as a departure from the 2012 leaked text, according to the Commission binding interpretations can also be made with respect to *ongoing* ISDS cases.[37] It is also worth noting that the right of the contracting parties to provide binding interpretations is discussed under the heading concerning the overall 'right to regulate'[38] of the contracting parties. This seems to indicate that the 'binding interpretations' clause is intrinsically linked with the overall 'right to regulate' of the contracting parties and it provides an extra mechanism to strengthen the treaty parties' control over the agreements.

Looking at the negotiating histories[39] of the EU FTIAs the following can be said. In the case of CETA the original April 2009 negotiating mandate did not yet include investment protection because it was issued before the entry into force of the Lisbon Treaty.[40] The 2011 modification is the first time the EU Commission obtained a mandate from the Council to negotiate an agreement with a chapter on investment protection that could include ISDS.[41] Nonetheless, it does not mention the right of the contracting parties to control the interpretation of the agreement, but does mention the need to ensure that the right to regulate of the contracting parties would not be affected.[42] The press releases of the nine rounds of negotiations leading up to October 2011 also do not mention the right of the contracting parties to provide binding interpretations.[43] The current version of the 'binding interpretations'

[33] Concept Paper 2015 (n 5).
[34] European Commission, DG Trade, 'Inside TTIP. An Overview and Chapter-by-Chapter Guide in Plain English' (February 2016) < https://goo.gl/VTzWtz> accessed 1 April 2017.
[35] The same appears in DG Trade (n 34) 43.
[36] Concept Paper 2015 (n 5) 2.
[37] ibid.
[38] For the 'right to regulate' in international investment law see Aikaterini Titi, *The Right to Regulate in International Investment Law* (Hart/Nomos 2014).
[39] On treaty negotiations see Kirsten Schmalenbach, 'Lawmaking by Treaty: Negotiation of Agreements and Adoption of Treaty Texts' in Chaterine Brölmann and Yannick Radi (eds), *Research Handbook on the Theory and Practice of International Lawmaking* (Edward Elgar 2016) 87.
[40] Council of the EU, 'Negotiating Directives CETA 2009', partially declassified 15 Dec 2015 <https://goo.gl/K08VBK> accessed 1 April 2017.
[41] House of Commons Canada, 'Negotiations Toward a Comprehensive Economic and Tarde Agreement (CETA) Between Canada and the European Union', Report of the Standing Committee on International Trade (March 2012) 16 <https://goo.gl/Bqq8F8> accessed 1 April 2017.
[42] Council of the EU 'Amendment to CETA Negotiating Directives 2011', partially declassified 15 Dec 2015 < https://goo.gl/fVikRB > accessed 1 April 2017.
[43] The press releases of the CETA negotiation rounds are available at <https://goo.gl/Qp13x0> accessed 1 April 2017.

clause appeared in the August 2014 version of CETA's text that preceded its legal revision.[44] It was then included *verbatim* in Article 8.31.3 of the final 2016 version of the agreement.

In the case of EU-Singapore and EU-Vietnam, the negotiations were originally based on the April 2007 negotiating directives for ASEAN countries[45] that did not include investment protection.[46] However, in 2009 the talks were suspended for a region-to-region FTA and bilateral negotiations were pursued.[47] Just as in the case of CETA, in 2011 and 2013 the bilateral negotiating directives were modified in order to allow the incorporation of provisions on investment protection.[48] In the case of EU-Singapore the 'binding interpretations' clause was inserted in Article 9.19.3 of the agreement by October 2014, while for EU-Vietnam the clause was included in Chapter II, Sec 3, Article 16.2.4 by January 2016.

With regard to TTIP, the reports of the first eleven rounds of negotiations indicate that ISDS was not yet on the agenda and the parties were focused on state-to-state dispute settlement.[49] The EU Commission's November 2015 Proposal for ISDS was presented for the first time during the 12th round of negotiations in February 2016. During this round the negotiating parties have also discussed 'the possibility of control by the Contracting Parties over the interpretation of the Agreement'.[50] The reports of the latest rounds do not indicate specific discussions on the 'binding interpretations' clause and the future of TTIP is uncertain.

2.2. *The Current Form of the 'Binding Interpretations' Clause*

The provisions on the right of the treaty parties to adopt binding interpretations of the EU FTIAs are set out in several parts of the agreements, mainly the parts dealing with ISDS and the agreements' final institutional provisions setting up treaty bodies.

The current form of the 'binding interpretations' clause that all four agreements share is to be found in the provisions dealing with the applicable law to the investor-State dispute. According to this clause the central committees *may* adopt decisions concerning the interpretation of the agreements (on a recommendation by the sub-committee on

[44] Chapter 10, Sec 4, Article X.27. The adoption of the treaty text is distinct from its authentication. The authentication aims at establishing the text as both authentic and definite; this version of the text forms the text to which the contracting party gives its consent to be bound. Authentication is different from the consent to be bound, but can be combined into one act, together with the adoption of the text. See Schmalenbach (n 39) 105-06.

[45] European Commission, 'Overview of FTA and Other Trade Negotiations' (updated Feb 2017) <https://goo.gl/GjdCtr> accessed 1 April 2017.

[46] EU-ASEAN FTA Negotiating Mandate <https://goo.gl/s1gDhC> accessed 1 April 2017.

[47] Council of the EU Press Release, 'Council extends mandate for free trade talks with ASEAN' (18 Oct 2013) 15000/13 <https://goo.gl/wlxA9e> accessed 1 April 2017. See also Press Release, '3266th Council Meeting, Foreign Affairs, Trade Items' (18 October 2013) 14845/13 <https://goo.gl/QIeoqi> accessed 1 April 2017.

[48] ibid. To my knowledge the negotiating directives have not yet been declassified. Therefore, the press releases are relied on.

[49] European Commission, DG Trade, 'TTIP Negotiating Rounds' <https://goo.gl/1sqm4U> accessed 1 April 2017.

[50] European Commission, 'The Twelfth Round of Negotiations for TTIP' (March 2016) <https://goo.gl/2Cx7zH> accessed 1 April 2017.

investments)[51] where 'serious concerns' arise as regards matters of interpretation that may affect investment. Such interpretations adopted by the central committees *shall* be *binding* on the investor-State tribunals established under the agreements. Furthermore, unlike the 2012 leaked text, the current 'binding interpretations clause' allows the central committees to decide that an interpretation shall have binding effect *from a specific date*.[52] The agreements do not contain any provisions on potential consequences in case the tribunals choose to disregard the interpretations.

As mentioned, the final institutional provisions on the creation of treaty bodies also need to be taken into consideration. Contracting parties can have multiple reasons to establish treaty bodies, such as to provide interpretations of the treaties[53] or supervise the international agreements.[54] With regard to their structure, most treaty bodies will include a central organ, 'but depending on their functions and relationship to other treaties, subsidiary bodies and a secretariat may also be established'.[55] CETA provides for a Joint Committee,[56] while the TTIP Proposal,[57] EU-Singapore[58] and EU-Vietnam[59] provide for a Trade Committee. The Joint/Trade Committees ('central committees') are co-chaired by the Minister responsible for Trade of the non-EU contracting party and the Member of the EU Commission responsible for Trade. The EU FTIAs also establish specialized 'sub-committees' under the auspices of the central committee, such as committees on trade in goods, customs[60] or, for the purposes of this article, committees on services and investment.[61] None of the agreements mention a secretariat that accompanies the various committees.

The types of functions and powers treaty bodies enjoy vary according to what their constitutive treaties provide. Nevertheless, in some cases they might also enjoy certain implied powers that are necessary for them to effectively discharge their purposes and functions.[62] The central committees in the EU FTIAs have a set of *mandatory* and *optional*

[51] This appears expressly in CETA and can be inferred from the afore-mentioned provisions in the case of EU-Singapore and EU-Vietnam.

[52] CETA, art 8.31.3; TTIP Proposal, Sec 3, art 13.2.5; EU-Singapore, art 9.19.3; EU-Vietnam, Ch II, Sec 3, art 16.2.4. To my knowledge the only author who has shortly touched upon the 'binding interpretations' clause under new EU FTIAs (specifically TTIP) is Ingo Venzke, 'Investor-State Dispute Settlement in TTIP from the Perspective of A Public Law Theory of International Adjudication' (2016) 17 JWIT 374, 390.

[53] See Birgit Schlütter, 'Aspects of Human Rights Interpretation by the UN Treaty Bodies' in Helen Keller and Geir Ulfstein (eds) *UN Human Rights Treaty Bodies. Law and Legitimacy* (CUP 2012) 261.

[54] Geir Ulfstein, 'Treaty Bodies and Regime' in Duncan B Hollis (ed), *The Oxford Guide to Treaties* (OUP 2012) 428, 429-430. For a classification of treaty bodies (commissions or committees) see Henry G Schermers and Niels M Blokker, *International Institutional Law* (Martinus Nijhoff, 5th Revised ed 2011) § 421-431, who classify them into functional, consultative, *ad hoc* advisory, procedural and regional commissions.

[55] Ulfstein (n 54) 430.

[56] CETA, art 26.1.

[57] The TTIP text is not yet finalized. From the Commission's November 2015 Proposal on TTIP's Investment Chapter one can assume that the central body will be the Trade Committee. See TTIP Proposal, Sec 2, art 3(3).

[58] EU-Singapore, art 17.1.

[59] EU-Vietnam, Ch XX, art X.1.

[60] CETA, art 26.2; EU-Singapore, art 17.2.1; EU-Vietnam, Ch XX, art X.2.1.

[61] CETA, art 26.2(b) 'Committee on Services and Investment'; EU-Singapore, art 17.2.1(d) 'Committee on Trade in Services, Investment and Government Procurement'; EU-Vietnam, Ch XX, art X.2.1(b) 'Committee on Services, Investment and Government Procurement'.

[62] Daniel Costelloe and Malgosia Fitzmaurice, 'Lawmaking by Treaty: Conclusion of Treaties and Evolution of Treaty Regimes in Practice' in Brölmann & Radi (n 39) 121. For a discussion on the application of the

functions enumerated in the agreements' final and institutional provisions, as well as in the investment chapters. Thus, they 'shall' supervise and facilitate the implementation of the FTIAs, supervise the work of the specialized committees, adopt decisions,[63] or appoint the judges/arbitrators to the first instance tribunals or/and the appeal tribunals[64]

The central committees 'may' also delegate responsibilities to specialized committees, consider or agree on amendments to the agreements, and communicate with all interested parties including private sector and civil society organizations.[65] Furthermore, the central committees *may* adopt interpretations of the provisions of the agreements that *shall* be binding on investor-State or State-to-State tribunals established under the agreements.[66] The interpretive powers of the various committees are further elaborated in the provisions concerning investment protection. CETA in Article 8.44, dedicated to the workings of the Committee on Services and Investment, among others provides that this sub-committee recommends to the CETA Joint Committee the adoption of interpretations of the Agreement and the adoption of any further elements of the FET clause. Similar provisions are also included in Chapter II, Sec. 3, Article 34 of EU-Vietnam and Article 9.30.2 EU-Singapore.

2.3. *Interim Observations*

The following interim observations are made before continuing.

First, the EU's investment policy is still a 'work in progress'. Therefore, it is important that the clauses of recently negotiated agreements are critically assessed before they become cemented into model clauses.

Second, the 'binding interpretations' clause is a very recent addition to EU trade agreements. CETA is the first agreement in which the clause appears in the present form.[67] The time period for its inclusion, around the turn of 2012/2013, also coincides with the growing pressure faced by the EU Commission to reform ISDS and to provide more control of the treaty parties over the agreements. Furthermore, it seems that the experience of Canada and the USA with NAFTA also played a role in inserting a clause that allowed the contracting parties to have the last say over the interpretation of the agreements.[68]

Third, as to the reasons to include such a clause, according to the EU Commission the 'binding interpretations' clause is meant to ensure that the contracting parties are permitted 'to control and influence the interpretation of the agreement, and correct errors by the tribunals', the likelihood of which is eliminated due to the careful drafting of the investment protections

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'implied powers' doctrine to 'autonomous institutional arrangements', see Robin R Churchill and Geir Ulfstein, 'Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law' (2000) 94 AJIL 623, 632-634.

[63] CETA, art 26.1.4; EU-Singapore, art 17.1.3; EU-Vietnam, Ch XX, art X.1.3.

[64] CETA, arts 8.27.2 and 8.28.3; TTIP Proposal, Sec 3, arts 9.2 and 10.3; EU-Singapore, arts 9.18.3-4; EU-Vietnam, Ch II, Sec 3, arts 12.2-3 and 13.3-4.

[65] CETA, art 26.1.5; EU-Singapore, art 17.1.4; EU-Vietnam, Ch XX, art X.1.4.

[66] CETA, art 26.1.5(e); EU-Singapore, art 17.1.4(d); EU-Vietnam, Ch XX, art X.1.4(d).

[67] See n 15 for EU-Korea and EU-Colombia/Peru.

[68] The Twelfth Round of Negotiations for TTIP (n 50) 19.

standards.[69] The right of the contracting parties to adopt binding interpretations is also linked to the overall aim to protect the contracting parties' right to regulate[70] and it can increase the democratic legitimacy of ISDS under the new EU FTIAs.[71]

Fourth, the current version of the 'binding interpretations' clause is repeated almost word-by-word in the four FTIAs and it looks like it will become the model clause for future FTIAs. Nonetheless, the present wording of the clause is more restrictive than the 2012 leaked version and its operation raises several concerns. As a *first issue*, all the agreements provide that the central committees can issue an interpretation when 'a serious concern' arises regarding matters of interpretation that may affect an investment. There is, however, no guidance provided on what constitutes a 'serious concern' and who should decide. As a *second issue*, the 'binding' character of the interpretations comes to mind and whether arbitral tribunals and domestic courts would feel bound by them. *The third issue* concerns the temporal application of the interpretation. Unlike the 2012 leaked version that prohibited the application of an interpretation to ongoing cases, the current clauses provide the central committees with the option of deciding on the temporal application of their interpretations. The *fourth issue* concerns the practical usefulness of these interpretive powers. The following Parts elaborate on all four issues.

3. A Handful of Issues That Need Further Discussion

The practice of ISDS has proven that arbitral tribunals do not always decide in a manner that the contracting parties consider as being favourable to them. States that are dissatisfied with the decisions of international tribunals have several options to react. The most extreme is a complete 'exit' from the treaty regime, by withdrawing from the agreement.[72] Albeit a less-used option, in more recent years several developing countries have withdrawn from the ICSID Convention or from individual investment agreements.[73] Nevertheless, up to date no state has attempted a 'full' exit from the international investment regime, only partial exits occurred from certain IIAs.[74] Another option is for the contracting parties to exercise their 'voice', by retaining the power to influence the interpretation of the agreement and to exercise

[69] European Commission, 'Investment Provisions in the EU-Singapore Free Trade Agreement' (2014), 8 <https://goo.gl/cgHdaH> accessed 1 April 2017; 'Investment Provisions in the EU Canada Free Trade Agreement' (2016), 8 <https://goo.gl/Gth6oA> accessed 1 April 2017.

[70] Concept Paper 2015 (n 5) 5-6.

[71] Venzke (n 52) 387-390.

[72] Anthea Roberts, 'Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States' (2010) 104 EJIL 179, 192. See also Kathryn Gordon and Joachim Pohl, 'Investment Treaties over Time – Treaty Practice and Interpretation in a Changing World' (2015) OECD Working Paper on International Investment No 2015/028-22.

[73] Bolivia was the first state to withdraw from ICSID in 2007. Ecuador is the second state to withdraw from ICSID in 2009, while Venezuela withdrew from ICSID in 2012. In recent years South Africa decided to terminate its BITs. Alternatives to ISDS are offered by Brazil's new approach to investment agreements. See Nitish Monebhurrun, 'Novelty in International Investment Law: The Brazilian Agreement on Cooperation and Facilitation of Investments as a Different International Investment Agreement Model' (2016) 0 JIDS 1-22. See also OECD Working Paper (n 72) 7.

[74] see Langford et al (n 8) 6-7.

greater control over the decision-making process. This can be done in numerous ways, such as a subsequent modification of the agreement, intervening in arbitrations as a non-disputing party, or by providing joint interpretations of the agreement through treaty bodies.[75]

The latter option is relevant for this part in light of the following four issues: the notion of 'serious concern' (3.1.), the binding character of the interpretation (3.2), the temporal application of the interpretation (3.3) and its practical operation (3.4). During the analysis more general concerns will also be touched upon, such as the law-making powers of treaty bodies, the risk of politicizing the arbitration process or the presence of 'checks-and-balances' in the investment chapters of the EU FTIAs.

3.1.*'Serious Concerns' Regarding Matters of Interpretation*

3.1.1. Why Was It Introduced?

The current version of the 'binding interpretations' clause[76] conditions a central committee's prerogative to provide binding interpretations upon the existence of 'serious concerns' as regards matters of interpretation relating to the investment chapter. This formulation is more restrictive than the version of the clause found in the 2012 leaked Commission proposals that did not include the 'serious concern' element. The same can be said for Article 1131.2 NAFTA, which can be seen as the inspiration for the 'binding interpretations' clause in EU FTIAs, because it does not condition the FTC's interpretation of that agreement on the existence of extra conditions. A look at more recent investment agreements concluded by Singapore, Canada, Vietnam or the USA with non-EU contracting parties paints a similar picture. The Canada-Panama FTA,[77] the Canada-Korea FTA,[78] the United States-Singapore FTA,[79] and the Trans-Pacific Partnership (TPP)[80] do not contain any extra conditions in their binding interpretations clauses.

If investment agreements concluded by the non-EU parties to the recently concluded FTIAs do not include the 'serious concern' condition, what was the reason to include it in the new EU FTIAs? From the historical overview in Part 2 we know that the 'binding interpretations' clause was included into EU FTIAs after 2012 as a means of ensuring that the contracting parties are the ultimate masters of the agreements. Nevertheless, the 'serious concern' condition seems to partially undermine this effort, since it restricts the situations in which the contracting parties can use their interpretive powers.

[75] Roberts, 'Power and Persuasion' (n 72) 193-194. For more 'voice' options see OECD Working Paper (n 72) 23-39.
[76] CETA, art 8.31.3; TTIP Proposal, Sec 3, art 13.2.5; EU-Singapore, art 9.19.3; EU-Vietnam Ch II, Sec 3, art 16.2.4.
[77] Canada-Panama FTA (2013), art 9.32.
[78] Canada-Korea FTA (2015), art 8.37.
[79] US-Singapore FTA (2004), art 15.21.
[80] TPP (signed in Feb 2016), art 9.25.

One possible explanation is that by including an extra condition, the drafters sought to create some form of 'checks and balances' or 'institutional balance' between the arbitral tribunals and the central committees. As Klabbers notes, the relationship between the various bodies set up by international agreements is a mostly neglected topic in legal academia and issues such as checks and balances remain under-illuminated by a functionalist perspective on international institutions. However, if a more constitutionalist approach is taken it is soon realised that international institutions are also political actors;[81] central committees mostly exercise functions that are more akin to those of national executives or national legislatives, while the interpretation of legal norms, at least in the national context, is predominantly in the province of the judiciary. In case of the current EU FTIAs, however, the arbitral tribunals do not possess exclusive interpretive powers over the agreements, but must share them with the treaty committees.[82]

Giving interpretive powers to treaty bodies is not unusual and might have certain benefits, such as creating greater compromise between treaty parties and avoiding excessive formalisms that are characteristic to court or court-like procedures.[83] According to Roberts, the creation of an interpretive 'dialogue' between the contracting parties and the arbitral tribunals could provide a valuable tool to stop potential backlash of the contracting parties, following unfavourable arbitral awards.[84] Nevertheless, interpretations of treaty bodies are generally unsuitable when the interpretation concerns the question of whether a member to the treaty/international organization has correctly fulfilled its treaty obligations, because the treaty bodies may not be sufficiently impartial.[85] As Part 3.3 will illustrate, the possibility exists under the EU FTIAs that treaty parties could adopt an interpretation during an ongoing case in an effort to influence the decision of the tribunal, raising serious concerns for procedural fairness and party equality.

In conclusion, one of the reasons for including the 'serious concern' element could have been the need to ensure in the text of the agreements that the contracting parties would not abuse their power to provide binding interpretations of the agreements.

3.1.2. What Amounts to a 'Serious Concern'?

No indications exist in the texts of the FTIAs as to what would amount to a 'serious concern' regarding the interpretation of the agreements' investment provisions.

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[81] See Jan Klabbers, 'Checks and Balances in the Law of International Organization' in Mortimer Sellers (ed), *Autonomy in the Law* (Springer 2007) 141-163.

[82] See Anthea Roberts, 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System' (2013) 107 AJIL 45, 78-79.

[83] Schermers & Blokker (n 54) § 1355.

[84] Roberts, 'Power and Persuasion' (n 72) 193-194. 'Dialogue' is used by the author to 'capture the potential for treaty parties and tribunals to influence interpretation through repeated interactions'. Nevertheless, the imposition of a certain interpretation in ongoing proceedings would amount more to coercion and not dialogue from the part of the treaty parties.

[85] Schermers & Blokker (n 54) § 1361. The authors use the term 'policy-making' bodies instead of treaty bodies.

In its 2015 Concept Paper the EU Commission explained that the usage of the 'binding interpretations' clause would be minimal due to the clear drafting of the relevant investment protection standards as this would result in the tribunals not committing errors in interpretation.[86] According to the OECD the primary way for treaty parties 'to ensure that treaty interpretations are closely aligned with their intent' is to carefully craft the language of the treaty.[87] Whilst the language of older investment agreements tends to be vague or imprecise, there is evidence that treaty parties are including increasingly complex and more precisely defined clauses in their investment agreements.[88] Such is the case of the new EU FTIAs that provide extra safeguards, such as the exclusion of whole sectors from the investment chapters or parts of them,[89] a more thorough definition of investor and investment[90] or more guidance for such vague standards of treatment as FET.[91] Nevertheless, one must wonder whether the apparently clear-worded provisions are a sufficient guarantee that no serious problems of interpretation will arise.

First, investment protection standards change over time and even the same treaty provisions in the same period of time can be subject to differing interpretations.[92] Furthermore, central committees and through them the contracting parties would mostly have a 'reactive' role in the interpretation of the FTIAs and not a proactive one.[93] In other words, the 'damage' has to be first done by the tribunals and then the committees will react, instead of making sure that the 'damage' does not occur in the first place.[94] Therefore, more clear treaty language is not a good enough guarantee that 'serious concerns' regarding interpretation will not arise in the future, as the evolution of investment protection standards and the contracting parties' reaction to such evolution is a dynamic process.

Second, the increasing complexity of the provisions on investment protection leads to a higher number of new terms, concepts or situations that have to be interpreted, thus increasing the chances of potential interpretive difficulties. Take for example the various areas of

[86] Concept Paper 2015 (n 5) 2.
[87] OECD Working Paper (n 72) 24.
[88] ibid 25.
[89] CETA, art 8.2 (exclusion of audio-visual services for the EU and measures with respect to cultural industries for Canada); EU-Singapore, art 9.2(3) (exclusion of audio-visual services and procurement by government agencies for government purposes); EU-Vietnam, Ch II, art 1 (exclusion of audio-visual services, mining, manufacturing and processing of nuclear material, national maritime cabotage, etc.).
[90] CETA, art 8.1; EU-Singapore, art 9.1; TTIP Proposal, Ch II-Definitions; EU-Vietnam, Ch I of 'Trade in Services, Investment and E-Commerce'.
[91] CETA, art 8.7 on MFN and art 8.10(2) on FET; EU-Singapore, art 9.3 on National Treatment and art 9.4 on FET and full protection and security; TTIP Proposal, Section 2, art 3 on FET and full protection and security; EU-Vietnam, Chapter II, art 3 (NT), art 4 (MFN), art 14 (FET, full protection and security).
[92] For a discussion on the evolving character of the FET standard and its relationship to customary international law, see Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (OUP, 2nd 2012) 134-141.
[93] In the case of agreements with a high economic impact, such as TTIP, it is possible that we will see more 'proactive' approaches as well, due to intense lobbying for a certain interpretation. Nevertheless, before the consent of the treaty parties is achieved, the EU Trade representative would first need to obtain the EU's position under art 218(9) TFEU, see n 27.
[94] For a discussion on how arbitral claims and awards impact the design of IIAs, see Wolgang Alschner, 'The Impact of Investment Arbitration on Investment Treaty Design: Myth Versus Reality' (2016) Yale Journal of International Law (forthcoming) <https://goo.gl/RQ8hEe> accessed 1 April 2017.

economic activity to which CETA's provisions on investment protection and ISDS do not apply, such as audio-visual services for the EU, measures relating to cultural industries for Canada or activities carried out in the exercise of governmental authority.[95] It is not hard to imagine possible situations in which the host State could argue that a tribunal does not have jurisdiction because a certain economic activity is covered by one of the exceptions. If a tribunal decides that the said activity is not covered by the exceptions and concludes that it has jurisdiction, a 'serious concern' regarding the interpretation of the investment provisions would arise. The contracting parties have also strengthened the FET clause by including a list of situations that amount to a breach and by creating a 'living' clause. The parties, or upon the request of one party, shall regularly review the content of the FET obligation. The investment sub-committees can make recommendations in this regard to the central committees for decision.[96] Nevertheless, some of the same issues arise as with the functioning of the 'binding interpretations' clauses: What if consensus cannot be reached? What about the temporal application of the decision on the FET standard? Is it once again a reactive, *ex post* approach?

Third, there is also another factor that needs to be taken into account when assuming that more clear treaty language will diminish potential interpretive errors by tribunals; the preferred interpretive methods and legal sources of investment tribunals. Fauchald's empirical study conducted in 2008 found that up until that point in time, the preferred interpretive citations of investment tribunals were the decisions of other arbitral tribunals, followed by legal doctrine. Sources from the contracting parties (model treaties, the treaties themselves or subsequent protocols) were only the third (!) most cited interpretive source.[97] These findings support the idea that investment tribunals interpret and apply treaty obligations in a highly self-referential manner[98] and prefer a 'dialogue' with other arbitrators or academics, instead of the contracting parties.[99] In other words, it might happen that even with the careful drafting of the investment protection provisions, some arbitrators might prefer to rely on interpretations used by other tribunals or by academics, which might not fully coincide with the will of the treaty parties.

3.1.3. Who Decides?

The language of the EU FTIAs leaves the question of who decides on the existence of a 'serious concern' unanswered. It does not take much imagination to realize that the task is probably left to one of the specialized committees - most probably the investment committee - which then refers the situation to the central committee. Nevertheless, by allowing the

[95] CETA, arts 8.2.2-3.
[96] CETA, art 8.10.3; EU-Singapore, arts 9.4.2-3; TTIP Proposal, Sec. 2, arts 3.2-3; EU-Vietnam, Ch II, arts 14.2-3.
[97] OECD Working Paper (n 72) 13 and Ole Kristian Fauchald, 'The Legal Reasoning of ICSID Tribunals – An Empirical Analysis' (2008) 19(2) EJIL 301.
[98] See Stephan W Schill, 'Deference in Investment Treaty Arbitration: Re-Conceptualizing the Standard of Review' (2012) 3(3) JIDS 577, 591.
[99] OECD Working Paper (n 72) 13-14.

committees to decide on this matter, contracting parties might undermine the apparent rationale behind the inclusion of the 'serious concern', which was to diminish the possibility of the contracting parties to abuse their interpretive powers.

In investment treaties there are no supreme judicial authorities that could exercise judicial review over the decisions of treaty bodies. Thus, it seems that contracting parties will have a free hand at deciding what amounts to a serious concern. Nonetheless, the treaty parties' freedom to decide on what constitutes a 'serious concern' is curtailed by the need to achieve consensus among them. In a multilateral setting arriving to a common decision via a treaty body is not an easy task and the need for consensus can impede the decision-making process.[100] In the bilateral context arriving to a common decision seems easier, since the number of issues that arise is smaller, fewer parties have to agree and issues can be discussed more in-depth.[101]

The number of deciding parties, however, does not always influence the outcome of the decision. In the case of the NAFTA FTC's 2001 decision Mexico, the US and Canada all agreed on the common interpretation of the FET clause because the investor claims and arbitral awards raised concerns for all of them.[102] Therefore, there was a common interest and political will to provide a uniform interpretation. On the other hand, when such a common interest is lacking, securing a common interpretation is not always achievable, even in a bilateral setting. For example, in *Chevron v. Ecuador*[103] the *ad hoc* UNCITRAL tribunal concluded that Ecuador breached Article II.7 of the US-Ecuador BIT (1997) by failing to provide 'effective means' of asserting rights and claims with respect to the US company's investment.[104] Following the tribunal's unfavourable (to Ecuador) partial award in 2010, Ecuador requested the US to confirm Ecuador's alternative interpretation of Article II.7. The US did not express a view on the interpretation by the time the diplomatic relations between the two countries deteriorated that led to State-to-State arbitration before the Permanent Court of Arbitration (PCA).[105]

Another factor that needs to be taken into account when achieving consensus is the influence and economic power of the other trading party. In a multilateral context, smaller states can counteract the influence of larger, more powerful states by creating groups of 'like-minded' states.[106] In a bilateral context this is not possible and the influence of the

[100] See Ulfstein (n 54) 437-439 with reference to the situation of Bolivia's objections during the adoption of the Cancun Agreements in 2010. See also Schmalenbach (n 39) 109.

[101] On bilateral diplomacy see Andrés Rozental and Alicia Buenrostro, 'Bilateral Diplomacy' in Andrew F Cooper *et al* (eds) *The Oxford Handbook of Modern Diplomacy* (OUP 2013) 230.

[102] Lise Johnson and Merim Razbaeva, 'State Control over Interpretation of Investment Treaties' (2014) Vale Columbia Center on Sustainable International Investment, 5 < https://goo.gl/UxIsnK > accessed 1 April 2017. The three controversial cases were: *Metalclad v Mexico*, ICSID Case No ARB(AF)/97/1, Award (30 Aug 2000); *SD Myers v Canada*, UNCITRAL, Partial Award (13 Nov 2000); *Pope & Talbot v Canada*, UNCITRAL, Interim Award (26 Jun 2000). See also Kaufmann-Kohler (n 14) 181-182.

[103] *Chevron Corp and Texaco Petroleum Co v Republic of Ecuador*, PCA/UNCITRAL, Partial Award on the Merits (30 Mar 2011).

[104] ibid para 262.

[105] *Republic of Ecuador v United States of America*, PCA Case No 2012-5, Memorial of Respondent United States of America on Objections to Jurisdiction (25 Apr 2012) 7-10.

[106] See Schmalenbach (n 39) 101.

stronger treaty party might be hard to counteract. Following interviews with Latin American treaty negotiators, Gertz and St John also found that economically less powerful countries often under-utilise the possibility to seek common interpretations of treaties due to a lack of interest from the more powerful contracting party, bureaucratic hurdles and high transaction costs.[107] Thus, it might happen that the EU will more easily impose a certain interpretation on a treaty party, such as Vietnam, compared to the more powerful US.

3.2. *Binding on Whom?*

Two important concerns are discussed in the following. First, we look at the 'binding' character of central committee interpretations on the arbitral tribunals. Second, it is important to also consider the binding character of these interpretations on domestic authorities and more specifically possible conflicts with the powers of the Court of Justice of the European Union to interpret EU law.

3.2.1. 'Binding' on the Investment Tribunals

Traditionally the interpretation of legal norms is left to adjudicative bodies. In the case of EU FTIAs, however, arbitral tribunals have to share the power to interpret the agreements with the treaty committees which raises some further questions that are discussed in the following. First, how should arbitral tribunals use these binding committee interpretations when interpreting and applying the agreements? Second, should arbitral tribunals refuse to take into consideration such interpretations when they might amount to a treaty amendment?

What Should Tribunals Do With Binding Interpretations?

All the EU FTIAs under discussion provide that the investor-state tribunals shall apply the agreements 'as interpreted in accordance with the Vienna Convention on the Law of Treaties [VCLT], and other rules and principles of international law applicable between the Parties'.[108] Under the general rules of interpretation set out in Article 31 of the VCLT, treaties shall be interpreted in good faith taking into account the ordinary meaning of the treaty terms, the context they appear in, as well as the object and purpose of the agreement (para. 1). Paragraph 3(a)-(b) also provides that together with the context (para. 2) any subsequent agreement or practice between the parties concerning the interpretation of the agreement *shall* also be taken

[107] Geoffrey Gertz and Taylor St John, 'State Interpretations of Investment Treaties: Feasible Strategies for Developing Countries' (2015) Blavatnik School of Government Policy Brief < https://goo.gl/OJTV6d> accessed 1 April 2017.

[108] CETA, art 8.31.1; EU-Singapore, art 9.19.2; EU-Vietnam, Ch II, Sec 3, art 16.3; TTIP Proposal, Sec 3, art 13.2.

into account.[109] Article 31 VCLT thus encompasses a complex exercise that begins with a multifaceted analysis of the text (grammatical, logical, linguistic, systemic), followed by the object and purpose of the treaty, the context, and the subsequent agreements and practice of the parties.[110] It needs to be understood though that paragraphs 2 and 3 of Article 31 are not subordinated to the methods of interpretation listed in paragraph 1, but represent authentic forms of interpretation[111] of equal value.[112] The VCLT thus accords the treaty parties a role in the interpretation of the legal instrument that may be uncommon in some domestic legal systems.[113]

Several questions arise when one looks at the role joint committee interpretations should play in the interpretation and application of the agreements by the arbitral tribunals. First, is a joint committee decision on the interpretation of an FTIA to be considered a subsequent agreement or practice of the parties? Second, when is a joint interpretation of the contracting parties 'binding' on the tribunals? Third, what does the 'binding' character of committee interpretations actually entail? In other words, what weight should tribunals give to committee interpretations when interpreting the FTIAs?

The *first question* essentially asks whether a joint committee interpretation can be considered a subsequent agreement under Article 31.3(a) VCLT. Subsequent agreements are not to be confused with subsequent practice, even though the distinction between the two is not always very sharp.[114] Whilst the former denotes a clear circumstance, such as a subsequent understanding explicitly interpreting the main agreement, the latter is prone to further complications and has broader interpretive potential.[115] Therefore, as a *first condition*, a subsequent agreement must explicitly concern the interpretation of the main agreement. Further conditions appear in both trade and investment arbitral decisions. The *Methanex* tribunal concluded that subsequent 'agreements' of the parties do not have to follow the same formal requirements as the conclusion of a treaty. The tribunal characterized the NAFTA FTC's interpretation of 2001 as a 'subsequent agreement' on interpretation falling under Article 31.3(a) VCLT.[116] Thus, as a *second condition* a subsequent agreement does not have to meet the same formal requirements as the underlying treaty. The WTO Appellate Body

[109] For further examples of 'subsequent agreements' that do not take the form of committee decisions, such as consultations, exchange of diplomatic notes, etc. see UNCTAD, 'Interpretation of IIAs: What States Can Do', No. 3 (Dec 2011) 11. Johnson & Razbaeva (n 102) 6.

[110] Luigi Crema, 'Subsequent Agreements and Subsequent Practice within and outside the Vienna Convention' in George Nolte (ed), *Treaties and Subsequent Practice* (OUP 2013) 17.

[111] Mark E Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff 2009) 329.

[112] ibid 435.

[113] Johnson & Razbaeva (n 102) 3 with reference to United Nations, 'Report of the International Law Commission on its Sixty-Fifth Session', A/68/10 (2013), Commentary to Conclusion 2, para 3, p 21.

[114] See Gerhard Hafner, 'Subsequent Agreements and Practice: Between Interpretation, Informal Modification, and Formal Amendment' in Nolte (n 110) fn 25.

[115] Crema (n 110) 26. The subsequent state practice must be concordant, common, and consistent. See Hafner (n 114) 112.

[116] *Methanex v Unites States,* UNCITRAL, Final Award (3 Aug 2005) Part II, Ch B, paras 20-21; See J Romesh Weeramantry, 'Treaty Interpretation in Investment Arbitration' (OUP 2012) 82-83 with reference to *Kasikili/Sedudu Island (Botswana v Namibia)* 1999, ICJ Rep 1, para 29.

(AB) in *Tuna II*[117] also characterized a decision[118] adopted by the Technical Barriers to Trade (TBT) Committee concerning 'principles and procedures that standardizing bodies should observe when developing international standards'[119] as a subsequent agreement within the meaning of Article 31.3(a) VCLT.[120] The AB argued that the decision was adopted after the conclusion of the TBT Agreement and the membership of the TBT Committee comprised all WTO members that have adopted the decision by consensus. In other words, the *third condition* is for the interpretation to be adopted after the entry into force of the underlying treaty, while the *fourth condition* requires that it be adopted by the consensus of the parties to which it is supposed to apply. Future joint committee decisions under the EU FTIAs will thus fall under the category of 'subsequent agreements' since they do not have to follow any formal requirements specific to the underlying treaty, they will be adopted after the entry into force of the FTIAs and are to be adopted by consensus.[121] The only true requirement is that the committee decisions explicitly concern the interpretation of a treaty provision.

The *second question* in essence relates to the legal status of joint committee interpretations. When are they to be considered 'binding'? Johnson and Razbaeva argue that just because Article 31.3 VCLT states that subsequent agreements shall be taken into account in treaty interpretation, does not mean that these interpretations are necessarily conclusive or legally binding.[122] Depending on the provisions of the primary legal instrument (the international agreement), committee decisions can have a soft-law status or a fully binding character.[123] In case of the EU FTIAs under discussion the treaties themselves are binding international instruments once they have entered into force, unlike soft-law instruments such as memoranda of understanding. The agreements also expressly state that central committee interpretations shall be binding on the arbitral tribunals.[124] Furthermore, the binding character of central committee interpretations is also strengthened by the mechanism of consent.[125] In the case of multilateral treaties that provide for majority decision-making, the imposition of the will of the majority on the minority might threaten the legitimacy and validity of the decision-making system.[126] However, in case of the bilateral EU FTIAs committee decisions are adopted by mutual consent.[127] Therefore, the decision-making mechanism strengthens the legitimacy and binding character of the central committee interpretations.

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[117] Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (Tuna II)*, WT/DS381/AB/R, adopted 13 June 2012, DSR 2012:IV, p 1837. I would like to thank one of the anonymous reviewers for referring me to this case.

[118] Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations with relation to Articles 2, 5 and Annex 3 of the Agreement, in WTO document G/TBT/1/Rev.10

[119] *Tuna II* (n 117) para 366.

[120] ibid 371.

[121] CETA, art 26.3; EU-Singapore, art 17.4; EU-Vietnam, Ch XX, art X.5.

[122] Johnson & Razbaeva (n 102) 4. The interpretive value of non-binding memoranda of understanding (MoU) is not clear. See Crema (n 110) 25.

[123] Costelloe & Fitzmaurice (n 62) 119.

[124] see 52.

[125] Costelloe & Fitzmaurice (n 62) 120.

[126] ibid.

[127] see n 121.

The *third question* requires a more nuanced answer since it relates to the weight arbitral tribunals should assign to a 'binding' joint committee interpretation. On the one hand, one could argue that the 'binding' character of committee interpretations entails that they have to be taken into consideration by the tribunals when interpreting the treaties *together* with the ordinary meaning of the treaty provisions, their context, purpose and objectives. Article 31 VCLT suggests this reading since it does not assign any hierarchy between paragraphs 3 and 1 of Article 31. Therefore, the committee interpretations will just be another tool that aids the tribunals in the interpretation of a treaty provision. On the other hand, one could also argue that the VCLT rules of interpretation are of a general nature from which parties can derogate via for example a 'binding' joint decision on the interpretation of a treaty provision. This scenario could have two problematic implications. Either, the arbitral tribunal *refrains* from interpreting a treaty provision if the contracting parties have previously interpreted it in a binding fashion or in case of a conflict between the interpretation of the tribunal and the committee, the latter *prevails*.

I do not agree with the latter scenario. As mentioned, the EU FTIAs themselves oblige the arbitral tribunals to apply the agreements as interpreted in light of the VCLT and other general principles of international law applicable between the parties. Under the General Rule of Treaty Interpretation they are to be classified as subsequent agreements or practices that have to be used *alongside* the treaty terms, object and purpose. The usage of subsequent joint interpretations by arbitral tribunals during the interpretative process does not imply that they 'override' the other methods of interpretation provided in Article 31 VCLT. This understanding is also supported by the International Law Commission, according to which a subsequent agreement represents an authentic interpretation by the parties that 'must be read *into* the treaty *for purposes of its interpretation*'.[128] Furthermore, whilst Article 31.4 VCLT allows the contracting parties to give a special meaning to a treaty term, this provision refers to a somewhat exceptional case when the contracting parties want to recognize a technical or special meaning of a specific term.[129]

The WTO AB's decision in *Tuna II* gives us a good example of how an international tribunal can go about the application of a 'subsequent agreement' between the contracting parties. As discussed, the AB qualified the TBT Committee Decision as a subsequent agreement within the meaning of Article 31.3(a) VCLT.[130] The tribunal then held that the extent to which the Decision

> 'will inform the interpretation and application of a term or provision of the *TBT Agreement* in a specific case […] will depend on the degree to which it "bears specifically" on the interpretation and application of the respective term or provision.'[131]

The WTO AB found that such was the case and endorsed the interpretation put forward by the contracting parties.[132] In other words, there is a two-step approach that the WTO AB follows

[128] Yearbook of the International Law Commission (1966) Volume II, 221, para 14 [emphasis added].
[129] ibid 222, para 17.
[130] *Tuna II* (n 117) para 371.
[131] ibid para 372.
[132] ibid para 372-378.

when using a subsequent agreement of the parties regarding the interpretation of a treaty provision. It is first up to the adjudicative body to decide whether a subsequent interpretative decision of the contracting parties is specifically connected to the interpretation and application of the treaty terms or provisions at issue. Only if the adjudicative body decides that such is the case will it then follow the interpretation put forward by the contracting parties. Therefore, the interpretative decisions of treaty committees are not to be followed blindly by the adjudicative body and they must fit into the rest of the interpretative methods and tools found in Article 31 VCLT.

In conclusion, a joint committee interpretation under the EU FTIAs that concerns the interpretation of the agreement can be considered a 'subsequent agreement' under Article 31.3(a) VCLT that has binding legal force on the investment tribunals. Nevertheless, the interpretation's binding character does not entail an override of the other methods of interpretation available to the tribunal under the General Rule. Instead it implies that the investment tribunals shall use such interpretative decisions alongside the other methods when interpreting and applying the provisions of EU FTIAs.

Circumventing Treaty Amendments. Does it Really Matter for EU FTIAs?

Joint interpretations can lead to further complications if they amount to a *de facto* amendment of the underlying treaty. In this section the following four questions are discussed shortly. What is the difference between a treaty amendment and a treaty interpretation? What implications exist for democratic legitimacy? Should arbitral tribunals refuse to take into consideration an interpretation that amounts to an amendment? Does the discussion really matter in light of the specific rules contained in the EU FTIAs?

The *first question* seems to be relatively simple, but in practice can pose some challenges. From a procedural perspective, a treaty interpretation in the form of a 'subsequent agreement' does not have to go through the same formal requirements as the adoption of the underlying treaty, while an amendment 'must be on the same legal level as the original treaty or as foreseen in the treaty'.[133] In practice, however, it is hard to say whether an interpretation *de facto* amounts to an amendment. According to Villiger the parties via subsequent agreements or practice can not only give a special meaning to the term at issue, but also amend, extend or delete a text.[134] Thus, he seems to suggest that the contracting parties are the ultimate masters of the treaties and can *de facto* amend them if they so wish, via subsequent agreement or practice. Nonetheless, the key to the question is what exactly is being done with the text of the agreement in the subsequent interpretative agreement. For example, the contracting parties could replace a specific name in a treaty with another name via a subsequent agreement. Such was the case when the members of the EU decided to rename the 'European Currency Unit' (ECU) as the 'Euro'.[135] In such a case one could hardly speak of an amendment of the treaty,

[133] Hafner (n 114) 116.
[134] Villiger (n 111) 429.
[135] Hafner (n 114) 109-110.

since no new rights or obligations were introduced in the treaty, only the name given to a term in the treaty had been changed.

One could argue that an interpretation relates to an existing term in the treaty that is further fleshed out by the contracting parties. A difference then needs to be made between committee decisions that merely detail an existing term and those committee decisions that create new obligations or rights. In case of the former, the power to detail existing obligations is formally based on the central committees' power under the treaties to interpret them. In case of the latter, however, the creation of new obligations and rights would amount to an amendment of the treaty or even the creation of a new agreement.[136]

The *second question* addresses the concern that the contracting parties might choose to 'disguise' a treaty amendment as an interpretation in order to circumvent the formal domestic and international mechanisms of treaty amendment. As mentioned, by default treaty interpretations do not have to follow any formal requirements internationally and they do not have to be submitted to national constitutional treaty-making procedures. [137] Treaty amendments on the other hand have to follow the formal requirements set out in the treaties or in the VCLT if the treaties are silent on the matter, as well as the domestic ratification procedures. Failing to abide by the latter requirement could compromise the democratic legitimacy of the 'informal' amendments, [138] since these amendments will not undergo domestic public debates and dialogue, as well as legislative scrutiny. [139] Under Article 218 TFEU EU international agreements are negotiated by the EU Commission and are concluded by the Council with the consent of the European Parliament. Nonetheless, Article 218(7) TFEU does allow the Council to authorize the EU negotiator to approve 'on the Union's behalf modifications to the agreement where it provides for them to be adopted by a simplified procedure or by a body set up by the agreement'. In other words, the EU 'domestic procedures' allow for a simplified amendment of international agreements without the usage of the domestic democratic process. As it shall be discussed in Part 3.4, the legitimacy of this process could partially be increased if the workings of the treaty committees that adopt such interpretations are made transparent to the public and members of the European Parliament could take part in them.

The *third question* in essence asks whether investment tribunals could and should refuse treaty interpretations that *de facto* amount to treaty amendments. Experience with NAFTA shows us that arbitral tribunals will not always be receptive to committee interpretations that step over the 'boundaries' [140] of interpretation. This is not a novel issue and it has been

[136] Costelloe & Fitzmaurice (n 62) 119.
[137] Hafner (n 114) 113.
[138] ibid 116.
[139] I would like to thank one of the reviewers for pointing this out.
[140] It is often difficult to know the difference between an interpretation and an amendment. See Charles H Brower, II, 'Why the FTC Notes of Interpretation Constitute a Partial Amendment of NAFTA Article 1105' (2005-2006) 46 Virginia JIL 347. Brower argues that the part of the FTC Interpretive Notice that excludes free-standing treaty obligations from the reach of Article 1105(1) NAFTA 'appear to fall within the bound of a reasonable interpretation' (356-358). On the other hand, the exclusion of general principles from the minimum

extensively discussed by academics and international organizations.[141] The reaction of the *Pope & Talbot* tribunal to the NAFTA FTC's 2001 interpretation is a well-know and discussed example of a disgruntled tribunal. In this case the tribunal, after reviewing the negotiating history of NAFTA, concluded that the FTC's action was an amendment of NAFTA and not an interpretation.[142] In the end, however, the tribunal concluded that the qualification of the FTC's action did not have any bearing on the outcomes of the damages award.[143] The tribunal in *ADF* took a different approach. It held that there was no need to discuss a distinction between an 'interpretation' and an 'amendment' because for the tribunal there was 'no more authentic and authoritative source of instruction on what the [p]arties intended to convey in a particular provision of NAFTA' than the FTC's decision.[144]

Arguments can be made in support of both tribunals. On the one hand, in support of the *Pope & Talbot* tribunal it can be argued that some interpretations, such as the ones that introduce new rights or obligations via committee interpretations, amount to a treaty amendment. Most treaties will provide in their final provisions for an amendment mechanism. If not, then the rules on treaty amendment provided for in the VCLT (Part IV combined with Part II) need to be followed. An investment tribunal could thus argue that it will not take into consideration a committee interpretation that amounts to a *de facto* treaty amendment, if the proper amendment procedures had not been followed. Nevertheless, this scenario raises the question whether the tribunal has the *power* in the first place to determine if the treaty parties have followed the proper amendment procedures.

One could argue that tribunals possess such an implied power. First, as discussed, all the EU FTIAs provide that the arbitral tribunals shall interpret the agreements in light of the VCLT, which also includes the provisions on treaty amendment. Second, under an investment agreement the tribunal is tasked to determine whether the host State treatment is in accordance with the standards of the investment agreement. This means that the tribunal has the power to interpret those standards and to take into consideration those legal sources that are in accordance with the agreement and international law. If an interpretation amounts to a *de facto* amendment, the tribunal could argue that it is not a legal source that is in accordance with the treaty and international law. From a more practical perspective a situation might occur, such as the one mentioned by Brower, where the tribunals will simply ignore parts of the committee interpretation they consider as an amendment.[145] None of the EU FTIAs include any provisions on the consequences of arbitral tribunals disregarding parts of

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standard of treatment amount to an unlawful and ineffective amendment. Most NAFTA tribunals have tacitly not followed this rule of interpretation (358-363).

[141] Brower (n 140); Johnson & Razbaeva (n 102) 12-13; Kaufmann-Kohler (n 14) 183-184; Roberts (n 72); UNCTAD (n 109) 13; OECD Working Paper (n 72) 28.

[142] *Pope & Talbot v Canada*, UNCITRAL, Award in Respect of Damages (31 May 2002), paras 41-47.

[143] ibid paras 48-52. For a discussion on the reasons behind this holding, see UNCTAD (n 109) 13.

[144] *ADF Group Inc v United States*, ICSID Case No ARB (AF)/00/1, Final Award (9 January 2003), para 177. Nevertheless, Brower argues that the ADF tribunal has simply ignored the part of the Interpretive Notice which restricted the meaning of 'international law' to customary international law when evaluating a claim under Article 1105(1) NAFTA. See Brower (n 140) 362.

[145] Brower (n 140) 362.

committee interpretations. Therefore, it is possible that a 'rebellious' tribunal that ignores a committee interpretation that amounts to a *de facto* amendment of the treaty, will not face any practical repercussions.

On the other hand, several arguments can also be made in support of the *ADF* tribunal. First, the contracting parties are the ultimate masters of the treaty and treaty law is based on state consent.[146] Therefore, there is no more authentic source of party intent and treaty interpretation than a subsequent understanding of the parties, regardless of its form. Second, it is arguable whether an *ad hoc* arbitral tribunal has the implied power to police whether the treaty parties have followed the proper procedures to amend the treaty. This would amount to a judicial review of the *ultra vires* character of a legal act that is normally a power assigned to national constitutional and supreme courts or rarely to standing international/regional courts that have more far reaching powers than arbitral tribunals.

As Roberts notes, the differing opinions of the *Pope & Talbot* and *ADF* tribunals can also be explained through the public and private international law paradigms which have diverging implications for the authority of states to interpret investment agreements. A tribunal favouring a private international law understanding of investment law, such as the *Pope & Talbot* one, will focus on the disputing parties and their relationship based on procedural equality. Consequently, they will view the interpretation adopted during ongoing proceedings as illegitimate. In comparison, tribunals favouring a public international law understanding, such as the *ADF* one, will view the treaty parties as the masters of their own treaties with the decisive power to define and redefine treaty obligations.[147]

The *fourth question* asks whether such a detailed discussion is needed if one looks at the EU FTIAs. As mentioned, Article 218(7) TFEU allows the Council of the EU to circumvent the more democratic domestic procedures for the amendment of international agreements by authorizing the EU Commission to negotiate simplified treaty amendment mechanisms, such as those done by treaty committee. And this is exactly what has happened in the EU FTIAs.

The rules on treaty amendment contained in CETA are *lex specialis* compared to the rules of the VCLT. For example, Article 8.44.3(b) CETA provides that the Committee on Services and Investment may, on agreement of the treaty parties, and after the completion of their respective internal requirements and procedures, 'adopt and amend rules supplementing the applicable dispute settlement rules, and amend the applicable rules on transparency'. These rules and amendments are binding' on the investment tribunal. Furthermore, Article 26.1.5(c) provides that the Joint Committee may consider or agree on amendments as provided in the Agreement. Under Article 30.2.1 CETA the treaty parties may agree to amend the agreement in writing and the procedure to be followed is a simple one that only requires an exchange of written notifications concerning internal ratification. Nevertheless, Article 30.2.2 CETA provides that this procedure does *not* apply to the Joint Committee's amendment of the protocols and annexes of CETA and a subsequent procedure provided in this paragraph does not apply to amendments of the annexes to the Investment Chapter. These

[146] See Wouter G Werner, 'State Consent as Foundational Myth' in Brölmann & Radi (n 39) 13.
[147] Roberts, 'Clash of Paradigms' (n 72) 58-60.

annexes include Annex 8-A on Expropriation. In other words, the amendment of certain parts of the agreement and its annexes, which constitute an integral part of it,[148] is done through a very simple procedure that *only* needs the decision of the Joint Committee. Thus, the practical difference between a Joint Committee decision concerning the interpretation of the agreement and one on the amendment of certain investment protection provisions will be virtually inexistent.

3.2.2. Binding on Domestic Courts. The CJEU's Perspective

In a previous article, in which I have discussed the relationship between the CJEU and the proposed ISDS mechanism under TTIP, I have also briefly touched upon the CJEU's perspective on binding decisions of treaty bodies.[149] As explained in that article, much of the 'uneasy' relationship between the CJEU and international courts or bodies is a result of the CJEU's interpretation of the 'autonomy' of the EU legal order that also encompasses the CJEU's exclusive power to deliver interpretations of EU law that are binding on the EU institutions in the exercise of their internal powers.[150]

One might ask how the CJEU's power to interpret EU law is relevant to the interpretation of international agreements by committees or other treaty bodies. The answer lies in the way in which the CJEU defines the relationship between international agreements and the EU legal order. According to the CJEU international agreements that are binding on the EU ('EU agreements') are considered to be acts of the EU institutions and form an integral part of the EU legal order from the moment they entered into force.[151] In other words, in the eyes of the CJEU, EU FTIAs are also considered EU law. The CJEU held that an international agreement that sets up a court or a committee with interpretive powers over the agreement is in principle compatible with EU law.[152] Nevertheless, in the case of joint committee interpretations that are binding on the contracting parties, the drafters of the treaty need to make sure that the decisions of the joint committee are in conformity with the CJEU's case-law.[153] In other words, the CJEU will not feel bound by a decision of a central committee that is at odds with its own case-law. As Lock notes, the CJEU has reserved itself the monopoly to provide interpretations of EU law that are binding on the EU and its institutions.[154]

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[148] CETA, art 30.1.

[149] Szilárd Gáspár-Szilágyi, 'A Standing Investment Court under TTIP from the Perspective of the CJEU' (2016) 17(5) JWIT 701.

[150] ibid 727-731. See also CJEU, *Opinion 1/91(EEA I)* [1991] ECR I-60709, paras 41-46; *Opinion 1/00 (ECAA)* [2002] ECR I-3493, para 45; C-131/03 P, *Reynolds v Commission* [2006] ECR I-7795, para 98; *Opinion 2/13 (Accession to the ECHR)* EU:C:2014:2454, para 184.

[151] CJEU, Case 181/73, *Haegeman v Belgium* [1974] ECR 00449, paras 4-5; *Opinion 1/91* (n 138) paras 38-41; Case C-366/10, *Air Transport Association of America* [2011] ECR I-13755, para 73. See also Szilárd Gáspár-Szilágyi, 'A Look at EU International Agreements through a US Lens: Different Methods of Interpretation, Tests and the Issue of 'Rights'' (2014) 39(5) ELR 601, 604-607.

[152] *Opinion 1/91* (n 150) paras 41-46; *Opinion 2/13* (n 150) para 182.

[153] *Opinion 1/00* (n 150) para 39.

[154] Tobias Lock, *The European Court of Justice and International Courts* (Routledge 2015) 80.

This discussion is relevant for several reasons. The provisions of EU-Vietnam and EU-Singapore dealing with the optional powers of the Trade Committee provide that interpretations adopted by it shall be binding on the *contracting parties* as well, not just the investor-to-State or State-to-State tribunals.[155] CETA's equivalent provisions on the Joint Committee only mention the arbitral tribunals, but not the contracting parties.[156] Nevertheless, in the provisions on institutional decision-making all three agreements provide that the decisions taken by the central committees, via mutual consent or agreement, shall be binding on the contracting parties, which shall take the necessary measures to implement them.[157] This means that the CJEU, as an institution belonging to one of the contracting parties, will also be bound by the interpretive decisions of the central committees.

This in itself does not yet affect the autonomy of EU law and the CJEU's exclusive jurisdiction to provide binding interpretations of EU law. Problems occur if the central committees' interpretive decisions conflict with the CJEU's case-law. One area where this could happen is state aid law. All the new EU FTIAs include a safeguard according to which the decision of a contracting party not to issue, renew or maintain a subsidy shall not constitute a breach of the provisions on investment protection.[158] Therefore, any future committee interpretation of notions such as 'subsidy', 'state aid' would have to take into consideration the CJEU's case-law dealing with competition law and state aid.

In *Opinions 1/92 (EEA II)* and *1/00 (ECAA)* the CJEU found the set-up and functions of the Joint Committees in question to be compatible with EU law due to certain safeguards found in the second European Economic Area Agreement (EEA) and the Agreement for a European Common Aviation Area (ECAA).[159] The first safeguard consisted of a statement that the decisions of the Joint Committees would not affect the CJEU's case-law.[160] Such a statement in the EU FTIAs is lacking and could have been included. The second safeguard flowed from the decision-making process of the Joint Committees based on mutual consent. According the CJEU, the EU Commission could safeguard the CJEU's case-law during Joint Committee deliberations because it could veto any proposal that contravened the CJEU's case-law.[161] This safeguard is also found in the EU FTIAs, because they all provide for committee decisions adopted by mutual consent. Thus, the representatives of DG Trade could simply not express their consent to an interpretation of the agreement that might contravene the case-law of the CJEU. Such a power also comes with the responsibility of DG Trade to be up-to-date and well versed in the CJEU's jurisprudence.

[155] EU-Singapore, art 17.1.4(d); EU-Vietnam, Ch XX, art X.1.4(d).
[156] CETA, art 26.1.5(e). The institutional provisions for TTIP are not yet available.
[157] CETA, art 26.3; EU-Singapore, art 17.4 ; EU-Vietnam, Ch XX, art X.5.
[158] CETA, art 8.9.4; EU-Singapore, art 9.2.2; EU-Vietnam, Ch II, art 13 bis.3 ; TTIP Proposal, Sec 2, art 2.3.
[159] CJEU, *Opinion 1/92* (*EEA II)* [1992] ECR I-02821, paras 21-25; *Opinion 1/00* (n 150) paras 37-41.
[160] ibid.
[161] ibid.

3.3. *Binding From When?*

In the previous Part I have hinted at some of the problems that might arise due to the temporal effects of the central committees' binding interpretations. There are three temporal points that need further discussion: (a) the moment when the alleged breach of the investment protection provisions occurred; (b) the moment when the investment tribunal is constituted; and (c) the date when the award is handed down. Depending on when the interpretation is adopted relative to these three points in time, various problems can arise.

3.3.1. The Date the Alleged Breach Occurred

The claim of an investor has to be based on an alleged breach of the investment protection provisions that resulted from the treatment afforded to it by the host State. Depending on the situation, this can be for example the moment when an asset was expropriated,[162] a contract was terminated[163] or it can be a longer period of time, as in the case of denial of justice.[164]

The question that arises is whether the interpretation of the central committee should apply to host State treatment that occurred before the interpretation was adopted or to treatment that occurred after the interpretation. The May 2012 leaked proposal was in favour of the latter approach. Article 9(2) of the leaked proposal provided that any committee interpretation shall be binding on a tribunal hearing the claim 'where the treatment on which the claim is based occurred after the date on which the interpretation was adopted'.[165] Following the Member States' comments, the EU Commission clarified that the provision 'meant that from the moment an investor starts to contemplate a claim the legal environment should remain stable'.[166] Therefore, in its initial proposals the EU Commission favoured legal stability over possible uncertainties that could result in the opposition of arbitral tribunals, such as the *Pope & Talbot* or the *Merril & Ring*[167] tribunals.

Treaty parties tend to have a 'reactive' approach when they choose to use committee interpretations. When an arbitral award is handed down that is contrary to their interests or if an alleged breach occurs which was initially not contemplated in the agreement, the contracting parties will hand down an interpretation that narrows down a possible expansive

[162] See *Quiborax SA v Bolivia*, ICSID Case No ARB/062, Award (16 Sept 2015) the tribunal found that Bolivia's revocation of mining licenses amounted to direct expropriation because the Revocation Decree (a) deprived the company of its investment (b) the deprivation of property was permanent and (c) the deprivation could not be justified under the police powers doctrine (paras 201-234) which was unlawful under the BIT (paras 240-256).

[163] See *Almås v Poland*, UNCITRAL, Award (27 June 2016). The Claimants alleged that the termination of a lease agreement of agricultural land by the Polish Agricultural Property Agency (ANR) was in breach of the Norway-Poland BIT's provisions on expropriation, equitable and reasonable treatment, and non-discrimination. The tribunal found that the actions of the ANR were not attributable to the Polish State.

[164] See *Chevron v Ecuador* (n 103) paras 142-149.

[165] Word Trade Online pdf (n 24) 40, art 9.

[166] ibid 31, Comments on Article 9.

[167] *Merrill & Ring Forestry LP v Canada*, UNCITRAL, Award (31 Mar 2010). In para 161 the tribunal stated 'To the extent that the FTC Interpretation [of 2001] narrows down Article 1105(1) to only one source of international law, there is an amendment of the NAFTA and not just an interpretation'.

reading and application of the agreement. Such a practice could have positive effects, such as enhancing legal certainty by guiding the tribunals' interpretation of vague treaty provisions. Nonetheless, the arbitral awards that followed the NAFTA FTC's 2001 decision do not seem to follow a coherent and predictable interpretation of the FET standard and the Minimum Standard of Treatment.[168]

Furthermore, when contracting parties choose to apply the interpretation retroactively to treatment that has occurred prior to the issuing of the interpretation, the risk arises that the treaty parties will try influencing the investors' possibility to bring arbitral claims. In such a case, if the post-treatment interpretation narrows down the protection offered by the investment agreement, the interpretation will act as a possible deterrent for an investor to bring a claim. For example, the host State can go through a financial crisis, similar to the one Argentina faced in 1998-2002, and institute certain measures concerning capital flows and the usage of foreign currency. If the other treaty party agrees, then a joint interpretation (amendment?) could be passed that the emergency measures do not amount to a breach of the FET standard. The interpretation would then deter possible investor claims based on a breach of the FET clause.

3.3.2. The Date The Tribunal Is Constituted

Another important point in time is the moment the tribunal is constituted. In such a case it is evident that the treatment of the investor occurred before the constitution of the tribunal. The committee interpretation could have been adopted prior to the constitution of the tribunal or after it. If it was adopted *prior* to the constitution of the tribunal, but after the treatment of the investor and the investor still ended up bringing its claim, then the interpretation did not have a deterrent effect. Moreover, in such a case the tribunal is aware of the will of the treaty parties to have a certain provision interpreted according to their joint interpretation, before it arrives to any interim, partial or final awards.

The situation gets more complicated though if the committee interpretation is adopted *after* the constitution of the tribunal, while the procedure is *ongoing*.[169] Some authors classify the strategies and tactics of states according to whether they act in the capacity of treaty makers (*principals*) or *litigants* in an investor-State dispute. Thus, if the respondent state tries to modify or influence the treaty language after a particular dispute has been initiated, the state is using litigant tactics in order to gain advantage in a dispute to which it is a party.[170]

ISDS cases can last for several years from the constitution of the tribunal to the handing down of the final award. In the meantime interim orders or partial awards are often handed

[168] For an overview of the various arbitral awards following the 2001 FTC decision, see UNCTAD, 'Fair and Equitable Treatment' (2012), 47-57 <https://goo.gl/7l1s0M> accessed 12 Sept 2016.
[169] It might happen that several cases are ongoing when an interpretation is adopted, such as in the case of the FTC's interpretation.
[170] Langford et al (n 8) 2-3, 14.

down.[171] According to Paulsson, all states will find it 'intolerable, or at least inconvenient that an external authority could be allowed to determine what is lawful or unlawful in their territory'.[172] This explains why an unfavourable interim or partial award might prompt the contracting parties to adopt a common interpretation while the arbitration is still ongoing. The FTC's interpretation of 2001 is a good example since it was handed down while several cases were ongoing.[173] Such type of interference in ongoing cases raises important concerns regarding the conduct of the arbitral proceedings. It is probably one of the reasons why in the comments to the May 2012 leaked proposal, the EU Commission explained that 'in no circumstance should [contracting parties] interfere in ongoing cases'.[174] Nevertheless, as will be discussed in Part 3.3.4, the current version of the 'binding interpretations' clause foresees the possibility of retroactive application of the committee interpretation.

The major concern, however, is not with retroactivity, because it is difficult to argue that non-retroactivity is a general principle of international law or a principle shared by most representative legal systems. First, Article 28 VCLT only sets out a presumption against the retroactive application of treaties that can be rebutted by a clear intention of the parties in the treaty text to the contrary. Furthermore, it would be difficult to argue that treaty body interpretations can be equated to treaties and thus the law of treaties should apply to them.[175] Second, most major legal systems will recognize the prohibition of the retroactive application of unfavourable criminal laws, but will often create retroactive laws in the fields of civil, tax or commercial law.[176] Instead, the major problem is allowing a disputing party (the host State) to interfere in ongoing proceedings via its membership in treaty committees. This raises issues of fairness, procedural equality and the politicization of ongoing proceedings. Several observations are needed.

First, one of the reasons behind the creation of ISDS was the removal of investor-host State claims from domestic systems that could not provide for basic standards of fairness, due process and could not uphold the rule of law. In exchange, investors were given the choice to

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[171] For a discussion on the various types of arbitral 'awards' and 'orders' see Margaret L Moses, 'The Principles and Practice of International Commercial Arbitration' (CUP, 2nd ed 2012) 190-193. Orders generally deal with procedural issues (discovery issues, evidence, place and time of hearings) while awards normally resolve substantive rights of the parties.

[172] Charles T Kotuby Jr, 'General Principles of Law, International Due Process, and the Modern Role of Private International Law' (2013) 23 Duke Journal of Comp & Int Law 411, 414 with reference to Jan Paulsson, 'Unlawful Laws and the Authority of International Tribunals' (2008) 23 ICSID Rev – Foreign Investment LJ 215, 222.

[173] See Kaufmann-Kohler (n 14) 182. *Pope & Talbot* was in the damages phase and in *Mondev v United States* (ICSID Case No ARB (AF)/99/2, Award, 11 October 2002), *ADF* (n 144), *Waste Management v Mexcio* (ICSID Case No ARB (AF)/00/3, Award, 30 Apr 2004), *Methanex* (n 116) notices of arbitration had been filed.

[174] Word Trade Online pdf (n 24) 31.

[175] See Churchill and Ulfstein (n 62) 633 on the non-application of treaty law to the 'internal' decisions of treaty bodies.

[176] For the US see Daniel E Troy, *Retroactive Legislation* (AEI Press 1998). In the field of tax law the retroactive application of tax legislation is recognized in some systems (France, Argentina), subject to certain conditions, while other systems protect the tax payer under existing legislation (Germany). See Victor Turonyi, *Comparative Tax Law* (Kluwer International 2003) 76-81. For the retroactive effects of annulled ('void') secondary EU legislation, see F G Wilman, 'The End of the Absence? The Growing Body of EU Legislation on Private Enforcement and the Main Remedies it Provides For' (2016) 53 CMLR 887, 919-920.

use an international platform of adjudication that provided higher standards.[177] However, if an arbitral tribunal is obliged to take into consideration a committee interpretation in ongoing proceedings, basic tenets of adjudication are compromised. A counter argument to this could be that a joint interpretation is in fact a testimony to the original intent of the contracting parties and such an interpretation had been a 'part' of the treaty since its inception. Nevertheless, as discussed, the contracting parties through joint committees mostly have a 'reactive' approach and adopt *ex post* joint interpretations, after the delivery of unfavourable arbitral orders or awards. Therefore, the element of bias and influence over ongoing proceedings is hard to deny.

Second, such interference will breach some basic procedural principles[178] of international adjudication. Some authors have argued that a rudimentary code of 'international due process' exists consisting of 'certain minimum standards in the administration of justice of such elementary fairness and general application in the legal systems of the world that they have become international legal standards'.[179] In the case of ISDS, which can be best classified as a hybrid mechanism of dispute settlement sharing common elements with public international law and private commercial arbitration,[180] certain procedural principles of private and public international adjudication and arbitration can be identified. Such would be the principles of *fairness* and *equality* between the parties.

Even if one might argue that such basic principles do not form part of the general principles of international adjudication,[181] the text of the EU FTIAs shows otherwise. All the EU FTIAs in question allow the investors to bring a claim under the UNCITRAL Arbitration Rules or the ICSID Convention or the ICSID Additional Facility Rules.[182] According to Article 17.1 of the UNCITRAL Arbitration Rules of 2010 the disputing parties need to be treated with equality. Furthermore, the arbitral tribunal needs to provide a fair process for resolving the dispute. The ICSID Arbitration Rules also refer to the concept of fairness. For example, the declaration that needs to be signed by all arbitrators under Rule 6 provides that arbitrators 'shall judge fairly as between the parties'. Other general principles appear

[177] See Antonio R Parra, *The History of ICSID* (OUP 2012) 12.

[178] A principle or general principle does not amount to a rule, but underlies a rule and explains or provides the reasons for it. 'In the event of any dispute as to what the correct rule is, the solution will often depend on what principle is regarded as underlying the rule'. See Sir Gerald Fitzmaurice, 'The General Principles of International Law. Considered from the Standpoint of the Rule of Law' (Extract of the 'Recueil des Courts' 1957) 7.

[179] Kotuby (n 172) 425-426.

[180] Stephan W Schill, 'International Investment Law and Comparative Public Law – An Introduction' in Stephan W Schill (ed), *International Investment Law and Comparative Public Law* (OUP 2010) 4, 11-12. For a critical discussion on the usage of public law approaches to international investment law see José E Alvarez, '"Beware: Boundary Crossings" – A Critical Appraisal of Public Law Approaches to International Investment Law' (2016) 17(2) JWIT 171. See also Roberts, 'Clash of Paradigms' (n 82).

[181] No consensus exists on the correct methodology for identifying and applying general principles in international law. International principles have been found in domestic legal systems, in the underpinnings of the international legal system as a whole, in natural law, as inchoate custom, etc. International investment law has strictly adhered to the domestic approach when identifying general principles. See Michelle Biddulph and Dwight Newman, 'A Contextualized Account of General Principles of International Law' (2014) 26 Pace Int'l L Rev 286, 290-291 and 314.

[182] CETA, art 8.36.

throughout the ALI/UNIDROIT Principles.[183] For example, courts should have independence, including the freedom from improper internal and external influence. An external influence would emanate from members of the executive or legislative branch.[184] The excessive interference of the political branches in the adjudicative process could also be viewed as running against 'basic due process'.[185] The principle of party equality is also mentioned as a duty of the court to ensure equal treatment of the litigants.[186] Nevertheless, according to Nollkaemper 'procedural fairness, informed by equality of the parties, may conflict with what may be necessary for the protection of global public goods'.[187]

In conclusion, a tribunal could argue that it will not consider a committee interpretation delivered in ongoing proceedings as binding on it, because it represents and undue interference by the respondent that would breach the principles of fairness and party equality. As previously discussed, the EU FTIAs are silent on the practical consequences of a tribunal not considering a binding committee interpretation.

3.3.3. The Date The Award Is Handed Down

The third important moment is the date the award is handed down. If the interpretation is delivered after this moment, no real issues arise concerning fairness or equality of the disputing parties. Moreover, interpretations adopted from this point onwards can increase legal certainty by giving guidance to future arbitral tribunals on how to interpret a certain concept under the agreement. Nevertheless, in practice it might happen that the interpretation becomes outdated and future arbitral tribunals will disregard it.

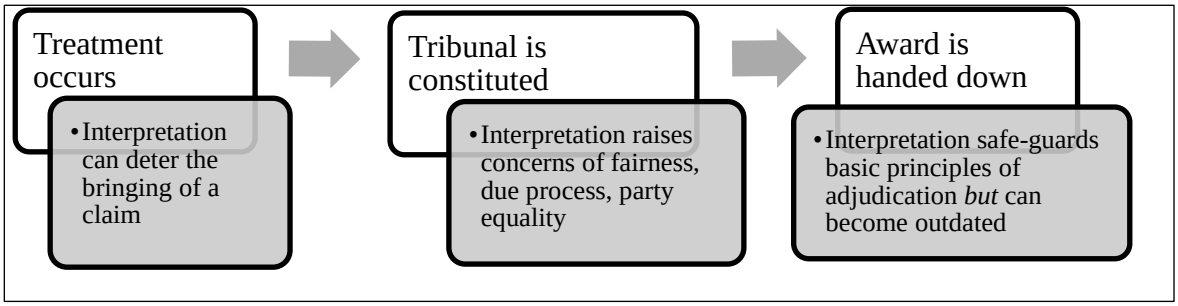

Fig.1. Interpretations delivered at various moments of the proceedings

[183] Kobuty (n 172) 429.

[184] ALI/UNIDROIT Principles of Transnational Civil Procedure (2004), art 1.1 and commentary. Unlike in domestic systems, in IIAs the domestic 'separation of powers' concerns do not arise or are not present in such clear fashion. Therefore, one could argue that the contracting parties can interfere in the arbitral process if arbitrators are viewed as 'agents' of the treaty parties. For a short discussion on the 'principal-agent' and 'principal-trustee' theories see Roberts (n 72) 186 and Karen J Alter 'The Multiple Roles of International Courts and Tribunals: Enforcement, Dispute Settlement, Constitutional and Administrative Review' in Jeffrey Dunoff and Mark Pollack (eds) *International Law and International Relations* (CUP 2012) 344, 357-361 and 367.

[185] Kotuby (n 1172) 427.

[186] art 3.1 ALI/UNIDROIT (n 184).

[187] André Nollkaemper, 'International Adjudication of Global Public Goods: The Intersection of Substance and Procedure' (2012) 23(3) EJIL 770, 782.

3.3.4. The Approach Chosen in the EU FTIAs

Between the 2012 leaked version and the 2014 version of CETA and EU-Singapore something happened. The previous clause, on the application of committee interpretations to host State treatment that occurred *after* the interpretation had been adopted, was dropped. All the EU FTIAs under discussion now provide that the central committees *may* decide that the interpretation shall have binding effect from a specific date. In other words, it is up to the committee to decide whether an interpretation is applicable to a treatment that has occurred prior to its adoption, whether it is applicable in ongoing cases or, whether it is only to be applied to treatment and cases that occur after its adoption. This means that under EU FTIAs central committee interpretations can become a deterrent to an investor to bring a claim, can pose a threat to basic principles of adjudication or can respect such basic principles.

In a situation similar to the one that led to the adoption of the FTC's 2001 notes of interpretation, in which both treaty parties might be facing pending cases concerning the same standard of treatment, reaching a consensus on the interpretation of the clause and on its temporal application could be fairly easy. On the other hand, in a situation such as the one in *Chevron v. Ecuador*[188] several possible scenarios can arise. First, the non-respondent treaty party could simply not agree to the interpretation proposed by the disputing treaty party. Second, it could agree to such an interpretation, provided that it shall only apply to future cases.

It is hard to know why the EU ended up changing a fairly robust clause that safeguarded basic principles of international adjudication in favour of a clause that can cause future uncertainties and possible backlash from arbitral tribunals. One possible explanation might be that Canada pushed the current version through and it was later used as a standard clause in the other FTIAs. This possibility seems unlikely, since 'binding interpretation' clauses found in Canadian investment agreements do not contain a temporal element.[189] Another, more plausible explanation, is that following the 2012 leaks the Member States of the EU pushed for the inclusion of the current version of the clause. This way, the prerogatives of the Member States to influence even ongoing proceedings via the Council of the EU is kept, while the optional character of the procedure means that the possibility to safeguard the basic principles is also present.

3.4. *What About Its Practical Application?*

The last major issue that needs to be discussed is of a more practical nature and asks the question whether the whole procedure to adopt binding committee interpretations is not in

[188] See n 103-105.

[189] See TPP, art 9.25.3 (the US, Vietnam, Singapore and Canada are contracting parties); Canada-China (2014), art 30.1; Canada-Benin (2014), art 35.2; Canada-Côte d'Ivoire (2015), art 32.2.

itself so cumbersome as to diminish the usage of this interpretive mechanism. Several observations are needed.

First, the steps that need to be followed until an interpretation is reached might hamper the practical application of this procedure. As explained in Part 2.2, the EU FTIAs set up a central Joint or Trade Committee and various specialized sub-committees, including those dealing with investment issues. The specialized committees on investment are the ones that *may* propose a certain interpretation to the central committees that *may* then adopt it. CETA and EU-Vietnam only refer to the central committees' decision-making which has to be done by consent.[190] EU-Singapore is more elaborate and provides that both the decisions of the Trade Committee and those of the specialised sub-committees must be reached by agreement between the parties.[191] If the same rule applies to CETA and EU-Vietnam as well, then it follows that in order for an interpretation to be adopted consent has to be reached at both sub-committee and central committee levels.

This procedure is further hampered by the EU's complex internal machinery and the frequency of committee meetings. With regard to the EU representative's participation in committee meetings, according to the commentaries to the 2012 leaked Commission proposal, before the consent of the treaty parties is achieved the EU Trade representative would first need to obtain the EU's position.[192] Under Article 218(9) TFEU[193] this would require a proposal from the EU Commission and a qualified majority[194] vote of the Council of the EU. Nevertheless, a blocking minority[195] might hamper the adoption of a common EU position. This could happen if an investor brings a claim against the measure of one EU Member State that is not condoned by all Member States. Concerning the frequency of committee meetings, the default rule is that the central committees and the sub-committees meet once a year in the case of CETA [196] and EU-Vietnam, [197] and once every two years in the case of EU-Singapore.[198] At the request of one of the treaty parties, meetings can be convened on other dates as well. Nevertheless, since these committees and sub-committees need to be convened well in advance, the possibility of the treaty parties to react in a timely fashion to certain unfavourable interpretations of arbitral tribunals is diminished.

Second, reaching a consensus will depend a lot on the relationship between the treaty parties, their interests in a certain case or their economic might. According to Gertz and

[190] CETA, art 26.3; EU-Vietnam, Ch XX, art X.5.
[191] EU-Singapore, art 17.4.
[192] Word Trade Online pdf (n 24) 31, Comments on Article 9(2).
[193] Article 218(9) TFEU has limits. In Case C-73/14, *Council v Commission (ITLOS)* EU:C:2015:663 the CJEU held that the Commission could submit written observations on behalf of the EU to ITLOS, without the prior authorization of the Council, because the Commission was not participating 'in' the international body's decision making (paras 63-67). See also From the Board, 'Litigation on External Relations Powers after Lisbon: The Member States Reject Their Own Treaty' (2016) 43(1) LIEI 1, 9-10 and CJEU, Case C-399/12, *Germany v Council (OIV)* EU:C:2014:2258.
[194] From 1 November 2014 a qualified majority needs 55% of Member States representing at least 65% of the EU population. See < https://goo.gl/MwKsPj> accessed 1 April 2017.
[195] It must include at least four Council members representing more than 35% of the EU's population.
[196] CETA, arts 26.1.2 and 26.2.4.
[197] EU-Vietnam, Ch XX, arts X.1.2 and X.2.3.
[198] EU-Singapore, arts17.1.2 and 17.2.3.

St John, several factors can influence states' unwillingness to interpret their investment treaties, such as a lack of knowledge on legal standing, reputational risks, the difficulty of cooperating with partner states, transaction costs, bureaucratic constraints, the perceived relative importance of the interpretation, and a low perceived impact on tribunals.[199] From the EU's perspective, bureaucratic constraints and inter-institutional struggles [200] under Article 218(9) TFEU will be a reality as explained in the previous paragraph. Furthermore, in a case of a treaty party such as Vietnam, which will mostly be in the position of the capital importer, arriving to a mutual agreement might be difficult if Vietnam seeks an interpretation that is not favourable to an EU investor in a pending case.

Third, even though binding interpretations clauses are becoming more common place in newly concluded investment agreements, experience with NAFTA shows us that it is an underutilized mechanism. The same holds true for WTO law.[201] However, in the case of the WTO the lack of a common political will and the difficulty of reaching consensus among the vast number of treaty parties can hamper joint interpretations.

Fourth, further challenges might arise from civil society and NGOs. Whilst the EU drafters are under a lot of pressure to increase transparency in ISDS proceedings, it seems that transparency in the workings of treaty committees is neglected. If interpretive powers are shared between arbitral tribunals and treaty parties, then the workings of the various treaty committees should also be transparent. As I have argued in another article that will appear in this journal,[202] in order to increase the perceived legitimacy of EU FTIAs, the following changes concerning treaty committees should be included in existing and future EU FTIAs: the public should have access to information concerning the workings of treaty committees, prior to committee meetings public consultations should be organised if the issue is highly contentious, and members of the European Parliament, as representatives of the EU electorate, should be allowed to act as observers in such committees. Furthermore, the question of public participation is also not addressed, and whether civil interest groups and NGOs could make proposals[203] or object to certain interpretations. The EU FTIAs do not seem to prohibit such a possibility, since the internal working procedures are to be set up by the various committees.[204]

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[199] Gertz & St John (n 107) 3-4.

[200] See n 193.

[201] See art IX(2) WTO Agreement. 'The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreement'. See also Claus-Dieter Ehlermann and Lothar Ehring, 'The Authoritative Interpretation Under Article IX:2 of the Agreement Establishing the World Trade Organization: Current Law, Practice and Possible Improvement' (2005) 8(4) JIEL 803.

[202] Szilárd Gáspár-Szilágyi, 'Transparency, Investment Protection and the Role of the European Parliament' (2017) EILAR (forthcoming) <https://goo.gl/Z7btbl>, accessed 1 April 2017.

[203] See Maria Tignino, 'Quasi-judicial bodies' in Brölmann & Radi (n 39) 249-252.

[204] CETA, art 26.2.4 '[Specialized committees] shall set and modify their own rules of procedures, if they deem it appropriate'. EU-Vietnam, Ch XX, art X.2.3 'Each specialised committee may decide its own rules of procedures in the absence of which the rules of procedure of the Trade Committee shall apply *mutatis mutandis*'. EU-Singapore, Art. 17.2.2 'The composition, remit, tasks and, as the case may be, functioning of the specialised committees shall be as defined in the relevant provisions of this Agreement or by the Trade Committee'.

4. Concluding Recommendations

The EU's exercise of its recently conferred powers in the field of investment law is an excellent opportunity to address some of the legitimacy concerns facing investment law and ISDS. Whilst the future of some of the agreements, such as TTIP, is still uncertain the debate surrounding ISDS is already producing results. The new EU FTIAs represent a move towards a more state centric approach to investment law. Express clauses on the right to regulate, better defined standards of treatment and the power of the treaty parties to influence the interpretation of the new agreements are all developments that are meant to increase the control of the treaty parties over the agreements. Nevertheless, designing 'bulletproof' clauses is hard to achieve and some of the clauses in the current agreements, such as the ones on binding committee interpretations, are prone to significant criticism. Therefore, recommendations are needed on how to improve these clauses before they become cemented as model clauses. As a recent study shows, the tendency of imitation via 'copy-pasting' between preferential trade and investment agreements is very high, part of it being due to institutional inertia.[205] We see this already occurring in the current EU FTIAs that include almost verbatim the same 'binding interpretations' clauses. Let us look at some of these recommendations.

First, the 'serious concern' element could be kept in future clauses as well. In its current form it seems to be self-judging and arbitral tribunals will have no say in what the treaty parties consider as being a serious concern related to the interpretation of the investment provisions. Nevertheless, the presence of this qualification might prompt the treaty parties to exercise more caution before adopting a binding interpretation and evaluate whether in reality a common binding interpretation is needed. Furthermore, both treaty parties will have to agree on whether a 'serious concern' is present. Consequently, this qualification can provide some 'checks and balances' between the arbitral tribunals and the treaty committees, as well as between the treaty parties.

Second, in order not to have possible conflicts with domestic courts, and most importantly the CJEU, a short passage could be inserted according to which the committee interpretations shall not affect the case-law of domestic courts. This way the CJEU's case-law is covered and the autonomy of the EU legal order is safeguarded. Nevertheless, the insertion of such a passage will also create an obligation of the EU representatives in the committees to be up-to-date with the intricacies of the CJEU's case-law and signal any possible conflicts.

Third, the possibility that the interpretation can have retroactive application is a regrettable development compared to the 2012 leaked proposal. The EU Commission, in the interest of creating a stable legal environment, should have kept the proposed version of the 'binding interpretations' clause according to which interpretations would only apply to

[205] Todd Allee, Manfred Elsig, 'Are the Content of International Treaties Copied-and-Pasted? Evidence from Preferential Trade Agreements' (2016) Word Trade Institute Working Paper 2016/8 <https://goo.gl/thaClb> accessed 1 April 2017.

treatment that occurred *after* the committee's interpretation had been adopted. As explained, the major concern is not with retroactivity as such, but with safeguarding certain basic principles of international adjudication, such as fairness and party equality. By giving the respondent state party the chance to influence a committee decision on interpretation that is adopted during an ongoing case, the committees will risk creating a backlash from the tribunals. As the NAFTA experience illustrates, it might simply happen that tribunals will ignore the interpretation and under the EU FTIAs such a move cannot be sanctioned by the contracting parties.

Fourth, the EU drafters could have looked more thoroughly at other investment agreements for inspiration in order to enhance the 'dialogue' between the tribunals and the treaty parties. For example, Article 1132.1 NAFTA and several new Canadian investment agreements oblige the arbitral tribunal to request a joint interpretation from the parties when the respondent State raises as a defence one of the reservations or exceptions set out in the agreements or their annexes.[206] A modified version of this clause could be included in the new EU FTIAs giving the chance or requiring the tribunals, depending on the issue, to ask for a joint interpretation.

Fifth, the treaty parties should strive to increase transparency and public participation when it comes to the workings of the various treaty committees. Interpretive issues could thus be recognised and addressed more promptly. This would result in the possibility to deliver also *ex ante* interpretations, thus circumventing the concerns arising from the temporal application of the interpretive committee decision.[207]

[206] Canada-China (2014), art 30.2; Canada-Benin (2014), art 35.3; Canada-Côte d'Ivoire (2015), art 32.2.
[207] See Johnson and Razbaeva (n 107) 11.