A Guide by the AmCham Corporate and Business Law Committee

TTIP Negotiations: Investor Protection by Arbitration: Chance or Risk?

Introduction

AmCham Germany has a clear view on TTIP, the planned Agreement on the Transatlantic Trade and Investment Partnership.

In this paper, we do not want to discuss the undisputed necessity to have TTIP at all, but only the very specific question of whether TTIP should contain provisions which aim at the protection of investors before courts of arbitration.

Initially, such a protection was considered a crucial means for investments, but in the meantime, and in view of open and public criticism (mainly by politicians or environmental organizations who claim the provision of "parallel justice" or "privileged laws for enterprises"), the European Commission has interrupted negotiations and started public consultations about whether or not TTIP should contain provisions which aim at the protection of investors before courts of arbitration.

Some of the issues are fears that American investors could sue Germany if it should enact stricter environmental laws which might incentivize American investors to sue Germany - as seen in the case Vattenfall ("Energiewende").

What were the plans originally, what was the position of the United States and what was the position of the EU, and what has changed in the meantime?

Since 2013, the European Union and the United States negotiate on TTIP. In parallel, the European Union also negotiated a similar Agreement on Free Trade with Canada, the "Comprehensive Economic and Trade Agreement", CETA. CETA provides the same guarantees for foreign investors and provides for an arbitration tribunal for investor/state disputes resulting from a violation of these guarantees.

The negotiations are not very transparent, as the wording of the provisions of both TTIP and CETA for a long time was kept confidential. Only in March 2014, the EU published a text as a reference outlining the intended regulations in its public consultation document. Perhaps this is one of the reasons for the criticism.

How is the situation presently, without TTIP and CETA?

Presently, foreign investors have the possibility to conduct investment disputes against governments before the International Center for the Settlement of Investor Disputes (ICSID). ICSID has been set up within the framework of an international Treaty on investor disputes in 1965. Germany, as well as many European and non-European states, including the United States, are member states of ICSID. The competence of ICSID requires, however, either an individual contract between the investor and the country where he wants to invest in, or, more likely, an investment protection law of the guest country.

We understand that there are presently more than 1,400 bilateral laws and treaties which provide to submit investor disputes to ICSID. ICSID Germany alone has concluded investment protection treaties with 139 foreign states, but so far none with the United States. In the absence of such a treaty, an American investor cannot sue Germany before the ICSID court.

Now, would the intended ICSID settlement procedure by way of arbitration be better – or is an arbitration procedure along the rules of UNCITRAL better?

AmChams Corporate and Business Law committee, headed by Dr. Mark C. Hilgard, partner with Mayer Brown LLP in Frankfurt am Main, held a meeting in March 2014 with Jai Motwane, the lead US TTIP negotiator on investment issues, to discuss this subject.

To better understand the issue, it is helpful to describe how the International Center for Settlement of Investment Disputes (ICSID) helps investors to protect their rights in cross border situations. Thus, the first part of this paper deals with the ICSID organization and the way how disputes are being handled under the ICSID procedures. The second part of this report gives an overview of recent ICSID cases that have been filed against the Federal Republic of Germany and against the United States of America. The third part reflects the position of AmCham Germany in this regard.

Part 1

1. ICSID

The International Center for Settlement of Investment Disputes (ICSID) is one of the five international organizations under the auspices of the World Bank Group. It was established by the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which came into force on 14 October 1966.

The main purpose of the Convention, as stated in the Preamble, is to stimulate the economic development through the promotion of private international investments. The provisions of the Convention provide for specialized international methods for investment dispute settlement, which according to the initial expectations of its “fathers”, shall remove some of the major impediments to the free international flows of private investments.

The ICSID Convention offers a system for dispute resolution with high degree of structure, standard clauses and complementary rules that make its proceedings substantially more complex than the proceedings conducted by most other arbitrational institutions.

The Centre was created as a neutral and independent forum for resolution of investment disputes between contracting states and nationals of other contracting states. Currently it is comprised of 148 member countries. The Centre is not an international court or tribunal, but merely provides an institutional framework that facilitates conciliation and arbitration. The actual settlement of the disputes takes place through arbitral tribunals or conciliation commissions that shall be constituted on an ad hoc basis for each single dispute.

ICSID is one of the few international forums to which international investors have direct access and do not need to go through governmental channels.

ICSID arbitration is entirely self-contained and independent of national law. The parties are free to choose the law applicable to the merits, but the procedure is governed by the Convention and by the Arbitration Rules. ICSID arbitration is also independent from political interference in the form of diplomatic protection. Once consent to jurisdiction has been given, the investor's state of nationality looses its right to diplomatic protection against the host state.

One of the most important advantages of ICSID is that any award issued by an ICSID tribunal is binding and cannot be appealed other than in limited annulment proceedings administered by ICSID. At the same time, each Member State is obliged to recognize an ICSID award as binding and to enforce its pecuniary obligations "as if it were a final judgment of a court in that State". The ICSID Convention has created the only arbitral system that is de-localized from national jurisdictions. National courts may not intervene in an ICSID proceeding, and the ICSID Convention provides the sole mechanism for recourse against an ICSID award.

All of these characteristics - universality, its legal framework, specialization, independence, and effectiveness, have made ICSID the main arbitration forum worldwide for the settlement of disputes between foreign investors and host States.

From only 66 registered arbitration cases for the first 35 years of the establishment of the Centre, the total number of cases has grown to over 351. Of those, 159 ICSID cases were administered by the Center during 2011. According to the *ICSID Caseload- Statistics* for 2011, ICSID registered a record 38 new cases in 2011, compared to 26 cases in 2010, 25 in 2009, and 21 in 2008. With such caseload ICSID overtook many institutional treaty arbitrations such as the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA) etc.

The greatest number of cases registered before the Centre in 2011 arose in the oil, gas, and mining sector (25%), followed by electric power and energy sector (13%), and the transportation sector (11%). South America saw the largest number of cases (30%), followed by Eastern Europe and Central Asia (23%), and Sub-Saharan Africa (16%).

Today, the majority of ICSID disputes arise out of bilateral investment treaties (BITs). The total number of BITs exceeds 2,500 and is continuing to grow. According to the *ICSID Caseload- Statistics* for 2011, in the reported period jurisdiction was granted mainly through bilateral investment treaties (63%), followed by investor-state contracts (20%).

2. Main legal documents

The arbitration under ICSID is governed by two legal instruments, the ICSID Convention and the ICSID Arbitral Rules. The ICSID Regulations and Rules comprise Administrative and Financial Regulations; Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules); Rules of Procedure for Conciliation Proceedings (Conciliation Rules); and Rules of Procedure for Arbitration Proceedings (Arbitration Rules).

In 1978 ICSID adopted Additional Facility Rules, which allowed the Centre to administer certain categories of proceedings between States and nationals of other States that fall outside the scope of the ICSID Convention. They comprise a principal set of Rules governing the additional facilities for fact-finding, conciliation and arbitration.

3. Membership

As of April 18, 2012, 158 States were signatory to the ICSID Convention. Of these, 148 States are ICSID Contracting States by virtue of their deposited instruments of ratification, acceptance or approval of the ICSID Convention.

The Convention is open for signature by all Member States of the World Bank as well as by any other State, which is a party to the Statute of the International Court of Justice, after invitation on behalf of the Administrative Council of ICSID for signiture (ICSID Convention, Article 67).

The Federal Republic of Germany and the United States of America are both States Parties to the ICSID Convention. In Germany it entered into force on May 18, 1969, while in the US it did so on October 14, 1966.

4. Organizational Structure of ICSID

ICSID has a simple organizational structure consisting of an Administrative Council and a Secretariat.

A) Administrative Council

The Administrative Council is the governing body of ICSID. It is comprised of one representative of each of the ICSID Contracting States. The Administrative Council convenes annually in conjunction with the joint World Bank/International Monetary Fund annual meetings. All representatives have equal voting powers. The President of the World Bank is ex officio Chairman of the ICSID Administrative Council but has no vote.

Principal functions of the Administrative Council include the election of the Secretary-General and the Deputy Secretary-General, the adoption of regulations and rules for the institution and conduct of ICSID proceedings, the adoption of the ICSID budget, and the approval of the annual report on the operation of ICSID.

B) Secretariat

The Secretariat is led by the Secretary-General, who is the legal representative of ICSID, the registrar of ICSID proceedings, and the principal officer of the Center. In fact, the Secretary-General is the first one empowered to examine the admissibility of the initiated procedure and to authenticate and certify copies of ICSID awards.

Principal functions of the Secretariat include providing institutional support for the initiation and conduct of ICSID proceedings; assistance in the constitution of conciliation commissions, arbitral tribunals and *ad hoc* committees and supporting their operations; and administering the proceedings and finances of each case. The Secretariat also provides support to the Administrative Council and ensures the functioning of ICSID as an international institution and a center for publication of information and scholarship.

The Secretariat's administrative costs are funded by the World Bank; the costs of ICSID proceedings are borne by the disputing parties.

C) Panels of Conciliators and of Arbitrators

The Secretariat maintains the ICSID Panels of Conciliators and of Arbitrators to which each Contracting State may designate four persons and the Chairman of the Administrative Council may designate 10 persons. All Panels conciliators and arbitrators must be persons of high moral character and recognized experience in the fields of law, commerce, industry and/or finance.

The creation of the Panels serves two purposes. First, it provides a source from which the parties to ICSID proceedings may select conciliators and arbitrators. Secondly, in the event the Chairman of the Administrative Council is called upon to appoint conciliators, arbitrators or *ad hoc* committee members in ICSID proceedings, the Chair may draw its appointees from the Panels.

5. ICSID's Jurisdiction

In accordance with the provisions of the Convention, ICSID provides facilities for conciliation and arbitration of investment disputes between states and foreign investors. Article 25 stipulates that the jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. In other words, the provision contains two cumulative jurisdictional requirements – *ratione materiae* and *ratione personae.*

As to *ratione materiae*, the Convention provides that the ICSID jurisdiction extends to any legal dispute arising out of an investment. Neither the provisions of the ICSID Convention or the Additional Facility Rules define the term "investment" and the ICSID tribunals must determine on a case by case basis whether this requirement is met. The concept of an "investment" protected by investment treaties usually extends beyond what might be considered by the traditional notion of "foreign direct investment". Several ICSID cases have highlighted how the notion of "investment" under Article 25(1) of the Convention should be interpreted. (*Salini Costruttori S.p.A. v. Morocco* ICSID Case No. ARB/00/4, Decision on Jurisdiction of 23 July 2001, para 52; *Saipem S.p.A.* v. *The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, para. 99). According to the cited decisions, "the notion of investment implies the presence of the following elements: (a) a contribution of money or other assets of economic value, (b) a certain duration, (c) an element of risk, and (d) a contribution to the host State's development".

As to *ratione personae*, Article 25 ICSID Convention requires that parties to ICSID proceedings to be "a Contracting State and a national of another Contracting State". Contracting Parties are those which have either ratified, accepted or approved the Convention in compliance with their constitutional procedures. Nationals, on the other hand, may be natural or legal persons. Natural

persons have to possess the nationality of another Contracting State both on the date on which the parties consented to submit their dispute to the Centre and on the date on which the request for arbitration is registered. If the investor was a national of the State party to the dispute, he is not eligible to be a party in the ICSID proceedings, even if at the same time he has a nationality of another state (see Art.25 (2)). As to the legal persons, they are also required to have the nationality of a Contracting State other than the State party to the dispute on the date the parties consent to submit their dispute to the Centre, but not on the date of registration. However, an exception is included in Article 25 (2) (b), which provides that, if the parties agreed so, legal entities of the host State may also be treated as a nationals of another Contracting State because of control by nationals of another Contracting State.

The consent usually exists in different types of instruments such as investor-state contracts, investment laws, bilateral investment agreements (BIT) or multilateral investment treaties (MITs). Dispute settlement clauses referring to ICSID are very common in contracts between States and foreign investors. To facilitate the drafting of these contracts ICSID has even prepared and published a set of model clauses. However, the most common way give consent to ICSID jurisdiction is through a treaty between the host State and the investor's State of nationality. Most of BITs contain clauses offering access to ICSID to the nationals of one of the parties to the treaty against the other party to the treaty. The same method is employed by numerous existing regional multilateral treaties as well (see e.g the Energy Charter Treaty (ECT), the North American Free Trade Agreement (NAFTA), the Southern Common Market Treaty (MERCOSUR), The Association of Southeast Asian Nations Treaty (ASEAN) etc.).

Finally, the Additional Facility Rules allowed the Center to administer the following proceedings between States and nationals of other States that fall outside the scope of the ICSID Convention: (i) fact-finding proceedings; (ii) conciliation or arbitration proceedings for the settlement of investment disputes between parties one of which is not a Contracting State or a national of a Contracting State; and (iii) conciliation and arbitration proceedings between parties at least one of which is a Contracting State or a national of a Contracting State for the settlement of disputes that do not arise directly out of an investment, provided that the underlying transaction is not an ordinary commercial transaction.

6. Procedure

The Convention provides for two methods for dispute settlement – arbitration and conciliation. Although these instruments are equally placed, the conciliation procedures are of less practical importance.

A) Conciliation

- ✓ *Required documents*

Any Contracting State or any national of a Contracting State wishing to institute conciliation proceedings shall address a request to that effect in writing to the Secretary-General. The request must be signed and dated, and must be accompanied by the payment to the Center of a non-refundable fee, which is US$25,000 under the current ICSID Schedule of Fees. The fee is payable by the party filing the request or by both parties if the request is made jointly. The request must indicate the date of consent to ICSID conciliation and the instruments this consent

is based on. It shall be drawn up in an official language of the Center. It also shall designate the parties of the dispute, inc. their nationality and state the issues of the dispute, on the basis of which information the Secretariat will decide whether to register the request.

The requesting party should submit five additional copies of the request to the Secretariat, which thereafter shall transmit a copy of the request and all the accompanying documentation to the other party.

✓ *Admissibility examination and registration of the request*

The Secretary – General is empowered to make a preliminary examination of the request for the conciliation after its receipt in order to ensure that the dispute falls within the jurisdiction of the Center. Provided that the request is admissible, the Secretary- General will then register the request, notifying the parties the same day. Only after registration of the conciliation request the proceedings shall be deemed to have been commenced (Article 28 ICSID Convention).

✓ *Constitution of the Conciliation Commission*

After the registration of the request, the parties may proceed with the constitution of the Conciliation Commission. Depending on what the parties agree, the Commission can consist of a sole conciliator or any uneven number of conciliators. If the parties, at the time of the registration of the request for conciliation, have not agreed upon the number of conciliators and the method of their appointment, they shall follow the procedure under the Conciliation Rule 2.

First, the requesting party shall, within 10 days after the registration of the request, propose to the other party the number and the method of appointment of the conciliation. The other party has 20 days to accept the proposal or to make counter-proposal. Thereafter, the requesting party has 20 days to notify the other party whether it accepts or rejects the counter-proposal. Where the parties do not agree upon the number of conciliators and the method of their appointment, the Commission shall consist of three conciliators, one conciliator appointed by each party and the third, who shall be the president of the Commission, appointed by agreement of the parties. (Article 29, para 2 (b) ICSID Convention). The conciliators are normally appointed from the ICSID Panel of Conciliators, but this is not necessary. Finally, if the tribunal is not constituted within 90 days of the registration of the request for conciliation, or such other period the parties may agree, the Chairman of the Administrative Council will complete the appointing procedure (in accordance with the provisions of Article 30 ICSID Convention and Conciliation Rule 4). In this case the Chairman has to make the nominations only among the members of the standing Panel of Arbitration. Further rules regarding the replacement and disqualification of the arbitrators are contained in the Conciliation Rules 7-12.

✓ *Language*

The parties may agree to use one or two languages for the proceedings provided that any language that is not official of the Center (i.e. other than English, French or Spanish) must be approved by the Conciliation Commission after consultation with the ICSID Secretary-General.

✓ *Place of the proceedings*

The Commission shall meet at the seat of the ICSID in Washington, D.C or at such other place as may have been agreed by the parties in accordance with Article 63 of the ICSID Convention. If the parties agree that the proceeding shall be held at a place other than the Center or an institution with which the Center has made the necessary arrangements, they shall consult with the Secretary-General and request the approval of the Commission (Conciliation Rule 13, para. 3). An agreement to hold hearings and meetings elsewhere does not have the effect of moving the formal seat of the arbitration, which remains Washington, D.C.

✓ Procedure

The Commission shall meet for its first session within 60 days after its constitution or any other period the parties may agree upon. The procedure is divided in two parts – a written phase and an oral phase. Unless otherwise agreed, each party shall file a written statement of relevant facts and law that may be accompanied by supporting documentation for argumentation of their positions. During the oral phase the Commission hears the parties, their agents, counsel and advocates, and eventually witnesses and experts.

The Conciliation Commission is a neutral and independent, impartial and non-judgmental facilitator, it directs and controls the process but not the content of the conciliation. While hearing the parties, the Commission shall endeavour to obtain any information that might serve clarifying the dispute between parties and may at any stage of the proceedings recommend terms of settlements to the parties in order to help and encourage participants to reach an agreement.

✓ *Closure of the proceedings and preparation of report by the Commission*

If the parties reach agreement on the issues in dispute, the Commission shall close the proceeding and draw up its report noting the issues in dispute and recording that the parties have reached agreement. At the request of the parties, the report records the detailed terms and conditions of their agreement. If at any stage of the proceedings it appears to the Commission that there is no likelihood of agreement between the parties, it shall again close the proceedings and shall draw up a report noting the submission of the dispute and recording the failure of the parties to reach agreement (Art.34, para 2 ICSID Convention).

The original of the report is kept in archives of the Center. The Secretary-General is not authorized to publish the report without the consent of the parties.

B) Arbitration

✓ *Required documents*

Any Contracting State or any national of a Contracting State wishing to institute arbitration proceedings shall address a request to that effect in writing to the Secretary-General. The request must be signed and dated, and must be accompanied by the payment to the Center of a non-refundable fee, which is US$25,000 under the current ICSID Schedule of Fees. The fee is payable by the party filing the request or by both parties if the request is made jointly. The request must indicate the date of consent to ICSID arbitration and the instruments this consent is based on. Likewise the request for conciliation, it shall be drawn up in an official language of the

Center and designate the parties of the dispute, inc. their nationality. The request should also state the issues in the dispute indicating that the dispute arises directly out of an investment.

Similar as to the conciliation proceedings, the requesting party should submit five additional copies of the request to the Secretariat, which thereafter shall transmit a copy of the request and all the accompanying documentation to the other party.

✓ *Admissibility examination and registration of the request*

The Secretary-General has to conduct the same preliminary examination with respect to registration of the request for arbitration as the examination of the request for conciliation. Only when the request meets all the formal requirements and gets registered, the proceedings under ICSID shall be deemed to have commenced.

✓ *Constitution of the Arbitral Tribunal*

According to Article 37 of the ICSID Convention, the arbitrational tribunal must be constituted as soon as possible after registration of the request.

ICSID tribunals can be comprised of a sole or any uneven number of arbitrators, which is usually three. In absence of agreement between the parties as to the process of constituting an ICSID tribunal, the process of appointment is that set out in Arbitration Rule 2. First, the requesting party shall, within 10 days after the registration of the request, propose to the other party the number and the method of appointment of the arbitration. The other party has 20 days to accept the proposal or to make counter-proposal. Thereafter, the requesting party has 20 days to notify the other party whether it accepts or rejects the counter-proposal. When the parties are not able to agree upon the number of arbitrators and the method of their appointment, the Tribunal shall consist of three arbitrators, one arbitrator appointed by each party and the third, who shall be the president of the Tribunal, appointed by agreement of the parties (Article 37 (2) ICSID Convention). Finally, if the tribunal is not constituted within 90 days of the registration of the request for arbitration, or such other period the parties may agree, the Chairman of the Administrative Council will complete the appointing procedure (in accordance with the provisions of Article 38 ICSID Convention and Arbitration Rule 4). In this case the Chairmen makes the nominations among the members of the standing Panel of Arbitration. Detailed rules regarding the replacement and disqualification of the arbitrators are contained in the ICSID Convention (Article 56-58) and the Arbitration Rules (Rules 7-12).

✓ *Place of the proceedings*

Hearing and meetings of the tribunal shall take place at the Center's office in Washington, D.C or at any other place agreed by the parties provided that such place is approved by the tribunal. It is important to note, that an agreement to hold hearings and meetings elsewhere does not have the effect of moving the formal seat of the arbitration, which remains Washington, D.C.

✓ *Language*

The parties may agree to use one or two languages for the proceedings provided that any language that is not official of the Center (i.e. other than English, French or Spanish) must be approved by the tribunal after consultation with the ICSID Secretary-General.

✓ *Procedure*

Once the tribunal is fully constituted, ICSID proceeding follows a scheme that is common to other commercial arbitration proceedings. The procedure is divided in two parts – a written phase and an oral phase.

In addition to the request for arbitration, the written procedure shall consist of a memorial from the requesting party, counter-memorial of the claimant party; thereafter, if the parties agree so or the tribunal deems it necessary, the production by the claimant of a reply and by the respondent of rejoinder (Rule 31).

The oral procedure shall consist of the hearing by the Tribunal of the parties, their agents, counsel and advocates, and of witnesses and experts (Rule. 32). During the hearings the tribunal may put questions to the witnesses and experts and the parties representatives.

The Convention and the Arbitrational Rule also provide detailed procedural rule with regard to such issues like the examination of the witnesses and experts, admissibility of evidence, memorials, confidentiality, costs of the procedure, etc.

Failure to appear or to present a case will not abort the proceedings (Article 15 ICSID Convention). The cooperating party may request the tribunal either to discontinue the proceedings or to render an award. Before rendering an award the tribunal must give the defaulting party a period of grace unless it is convinced that there is no intention to cooperate. In addition, the tribunal may impose a sanction on the non-cooperating party in its decision on the cost of proceedings.

✓ *Closure of ICSID Proceedings*

Formal closure of the ICSID arbitration procedure occurs after the parties have concluded the presentation of their respective cases (Rule 38). However, the Tribunal do have the power to reopen the proceeding if “new evidence is forthcoming of such a nature as to constitute a decisive factor” or “there is a vital need for clarification on certain specific points”.

✓ *Award*

The award must be drawn up and signed within 120 days after closure of the proceeding. It must contain a precise designation of each party; the name of the members of the tribunal and description of the method of its constitution, the names of the agents, counsel and advocates of the parties, a summary of the proceedings, a statement of the fact as found by the tribunal, the submissions of the parties and any decision regarding the costs. The award must contain the decision of the Tribunal on every question submitted to it and also must state the reasons for the tribunal’s decision.

The awards rendered under the Convention are final and binding and not subject to any review extraneous to the Convention (Article. 53 ICSID Convention). This provision provides that the parties to a dispute may not appeal an ICSID award or pursue any other remedy, except for measures contained in the ICSID Convention itself, such as interpretation of the award (Article 50), rectification of the award (Article 51) and annulment of the award (Article 52).

Of these procedures, the annulment procedure comes the closest to full supervisory review. Article 52(1) of the ICSID Convention authorizes a disappointed party to seek to seek the establishment of a an *ad hoc* Committee under Article 52(3) to consider the annulment of the ICSID award for the grounds set out in Article 52(1): (a) the tribunal was not properly constituted; (b) the tribunal manifestly exceeded its powers; (c) there was corruption on the part of a tribunal member; (d) there was a serious departure from a fundamental rule of procedure; or (e) the award failed to state the reasons upon which it was based. If the ICSID annulment panel finds that one of these grounds exists, then the ICSID award will be annulled and a new ICSID tribunal will be established to rehear the case.

The ICSID Convention further requires each contracting State to recognize and enforce the award within its territory as it was a final judgment of the local domestic court. According to Article 54, (3) of the ICSID Convention, the execution of the award shall be governed by the laws concerning the execution of judgments in force in that state in whose territory such execution is sought. This means, that local law will determine whether particular assets may be seized to satisfy an ICSID award and in some cases the execution of ICSID award against particular assets could confront with sovereign immunity defenses of the losing state in the dispute. There is a very small number of cases, where the compliance with the ICSID award is put into question and the award was challenge in national courts. The reasons can be seen merely in the strong institutional link of the Center to the World Bank. Most States find it unwise to jeopardize their good standing with the Bank through noncompliance with an ICSID award. On the other hand, failure to comply would also lead to a revival of the right to diplomatic protection by the investor's state of nationality.

ICSID awards may not be published without the consent of the parties. Nevertheless, such consent is given in the majority of the cases and in such cases the award is published on the ICSID's website. But regardless of the consent of the parties, information about the existence of each ICSID case, together with brief description of the dispute and its status, can be found on the ICSID website.

Part 2

1. Cases filed against Germany

1.1 Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany (ICSID Case Nr. ARB/ 09/6)

On April 2, 2009, Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG submitted a request for arbitration against the Federal Republic of Germany. The challenge took place at the ICSID under the terms of the Energy Charter Treaty. Vattenfall, Swedish energy company, was demanding compensation over the introduction of environmental restrictions on a 2.6 billion Euros coal-fired power plant the company was constructing along the banks of the Elbe River.

In 2007 the City of Hamburg has agreed to a provisional contract with Vattenfall for the construction of a new power plant near Hamburg. The terms of the contract were made dependant on the final permit, which had to be issued by the Authority for Urban Development and Environment in Hamburg. Final approval was granted in September 2008, which was nearly one year after previously

indicated. However, the permit included additional restrictions on the power plant's impact on the Elbe River (restrictions with regard to the volume of cooling water, temperature and oxygen levels).

Vattenfall found the water use permit extremely severe. It stated that it clearly deviated from what had been agreed on in the 2007 contract with the City of Hamburg and what Vattenfall had reason to expect. According to the City of Hamburg, the restrictions are a result of an EU's Water Framework Directive adopted in 2000, which affects all industries along Germany rivers. Vattenfall alleged that Germany, by imposing more stringent standards in the final construction permit, had violated its obligations under Chapter III of the Energy Charter Treaty.

On August 25, 2010, the parties signed an agreement for the final and binding resolution of their dispute and discontinuance of the proceedings. In the beginning of February 2011, after having fulfilled the conditions for a full settlement of the dispute contained in the agreement, the parties requested the Tribunal to embody the terms of the agreement in an award pursuant to the ICSID Arbitration Rules. The tribunal rendered the award on March 11, 2011.

1.2 Vattenfall AB and others v. Federal Republic of Germany, ICSID Case nr. ARB/12/12

On May 31, 2012, the Secretary-General of ICSID registered a new request of Vattenfall for the institution of arbitration proceedings against Germany. The suit challenges the German nuclear phase-out law and the nuclear fuel tax law, that were adopted in 2011. The exact amount of Vattenfall's compensation claim against Germany is unknown. Press reports in late 2011 put Vattenfall's lost investments in nuclear power plants at 700 million euro. In the spring of 2012, in its financial report for 2011, the company estimated the damages from the nuclear phase-out over the preceding financial year at 1.18 billion euro.

The conflict between Vattenfall and the German federal government was triggered by the summer 2011 decision of the German Parliament to abandon the use of nuclear energy by the year 2022. Following the nuclear disaster in Fukushima, the decision was taken only few months after the government decided to extend the lives of Germany's nuclear reactors beyond the deadline for nuclear phase-out set by the previous government. The new legislative amendments ruled the immediate closure for the oldest of the 17 nuclear power plants (among others Brunsbüttel which is owned by Vattenfall) and gradually closure of the remaining power plants by 2022.

Vattenfall operates two nuclear plants near Hamburg, both of which are currently out of service. Vattenfall has 66.7 percent ownership of the Brunsbüttel nuclear plant, and 50 percent ownership of the Krümmel nuclear plant. Believing that the government would stick with its plan to lengthen the operating lives of older plants, the company said it invested 700 million euro in both facilities and From Vattenfall's point of view, the German government's decision to abandon nuclear power has destroyed the value of its assets and made the investment worthless.

Because of confidentiality of the proceedings, the legal grounds of the dispute remain unknown. It is likely that Vattenfall is suing the Federal Republic of Germany by primarily, but not exclusively, invoking the provisions of the Energy Charter Treaty for protection against expropriation without compensation, fair and equitable treatment and also the umbrella clause, which obliges the host country in general to observe all obligations that it has entered into with an investor or an investment by an investor of another Contracting Party.

According to the ICSID website, the proceedings are pending. The Tribunal has not yet been constituted.

2. Cases filed against the United States of America

2.1 Apotex Inc. v. United States of America / ICSID CASE No. ARB(AF)/12

The request for arbitration was filed on 29 February 2012 under the ICSID Additional Facility Rules and registered by the ICSID Secretary-General on 16 March 2012.

Apotex Holdings Inc. ("Apotex Holdings") is a Canadian investor in the generic pharmaceutical industry. Over the past two decades it has made substantial investments in Apotex Corp. ("Apotex-US"), a US company that it indirectly owns and controls. Apotex-US's business is the sale in the United States of drugs produced by other Apotex companies, notably Apotex Inc. ("Apotex-Canada"), a Canadian generic drug manufacturer that Apotex Holdings also indirectly owns and controls. Due to the substantial investment of capital, know-how and expertise by Apotex Holdings, Apotex-US at the beginning of 2009 was one of the top generic drug companies in the United States in terms of sales volume.

The US Food and Drug Administration ("FDA" or the "Agency") adopted a measure with respect to two Canadian facilities operated by Apotex Canada on August 28, 2009. Together these two facilities produced about 80 percent of the products sold by Apotex-US. The measure, called an import alert, prevented Apotex-US from receiving any drugs produced at these two facilities. FDA did not fully lift the import alert until the end of July 2011.

Apotex Inc. claims, that because of the import alert Apotex Holdings, Apotex-Canada and Apotex-US suffered substantial damage as a result of the measure. As stated in the request for arbitration, Apotex-US's business lost hundreds of millions of dollars of sales and was prevented from bringing any new drug to the US market. The request also stated that during the relevant time period, FDA accorded more favorable treatment to US investors and US-owned investments in similar circumstances.

According to the claim, the import alert violated NAFTA Article 1102 (National Treatment), Article 1103 (Most-Favored-Nation Treatment) and Article 1105 (Minimum Standard of Treatment). Damages to the Claimants and Apotex-US through August 2011 resulting from the alleged violations exceed USD 520 million.

The arbitration procedure is still pending. According to the information on the ICSID web site, the Secretary-General has accepted the arbitrator appointments made by either the claimant and the respondent side in March 2012. The constitution of the tribunal is still ongoing.

2.2 Glamis Gold, Ltd. v. The United States of America, NAFTA/UNCITRAL, Award, 8 June 2009,

Glamis Gold Ltd was a publicly-held Canadian company which conducted mining operations in the United States and Latin America. It formed the Glamis Imperial Corporation to develop and operate a mine in the Californian desert. The Corporation acquired mining claims to the area in 1987 and soon thereafter began mineral exploration activities. In 1994 the company submitted a proposed plan in order to obtain permission from the US authorities to develop and operate the Imperial Mine.

Through open-pit mining techniques, Glamis planned to mine gold and silver with the expectation of removing 150 million tons of ore, and 300 million tons of waste rock, of which 55 million tons would have been from three large open pits during the Project's projected 19-year life (from 1998 to 2017).

The project met severe opposition from the Quenchan Indian Nation due to its location in an area sacred to the Native American tribe. Environmental groups were also extremely critical, charging that the company's project would destroy a largely pristine area near to a designated desert wilderness area and require massive amounts of water from the desert groundwater aquifer.

While at the federal level the project was granted a green light, the State of California adopted legislation and regulations in 2001 that required, inter alia, backfilling of all open pits and recontouring of the land once mining operations have been completed.

Glamis Gold Ltd. filed a suit against the U.S. government in 2003 on behalf of its enterprises Glamis Gold, Inc. and Glamis Imperial Corporation, stating that its investments had been injured by the American authority's denial of the authorization to proceed with mining in Southeastern California. This case has been initiated under Chapter Eleven of the NAFTA and is governed by the UNCITRAL Arbitration Rules. The parties chose ICSID to administer the proceedings in this case with Washington DC, as the place of arbitration.

Glamis claimed damages of not less than 50 million dollars, charging the United States with breach of obligations owed to it under Chapter 11 of the North American Free Trade Agreement ("NAFTA"). In particular, Glamis argued that the action of the federal government and of the Californian authorities constituted a violation of Art. 1110 of the NAFTA which prohibits expropriation and that the United States had breached the fair and equitable treatment standard under Article 1105 of the NAFTA.

The US argued that these measures were intended to: (a) ensure that mined lands are returned to a usable condition and pose no danger to public health and safety; and (b) provide protection to Native American sacred sites.

The Tribunal released the Award, dismissing Glamis's claim in its entirety and ordering Glamis to pay two-thirds of the arbitration costs in the case on June 8, 2009,. The arbitral decision recognized that the conservation of environmental quality and of the cultural values attached to the specific area were legitimate aims of the United States justifying the limitation of property rights and other economic interests of the investor.

2.3 ADF Group Inc. v. United States, ICSID Case No. ARB (AF)/00/1

The case relates to a construction of the Springfield Interchange project, a highway located in North Virginia. Starting in the early 1990's, Virginia state officials and U.S. federal officials held a series of meetings and hearings relating to changing the original design of the Interchange highway in order to improve its safety and efficiency. The construction was awarded to a corporation named Shirley Contracting Corporation (VDOT-Shirley Main Contract). The Corporation, as a main contractor, issued a request for bids for the construction of certain parts of the project. The part regarding the supply of steel was awarded to ADF International Inc., for which a sub-contract was signed in March 1999 between them (Shirley-ADF International Sub-Contract).

In April 1999, the ADF International Inc. proposed to perform its obligations by using U.S.-produced steel and by subsequently carrying out certain fabrication work in Canada, in facilities owned by the

parent ADF Group Inc., a Canadian corporation that designs, engineers, fabricates and erects structural steel. The federal authorities shared the opinion that all the manufacturing operations have to be conducted on the territory of the USA and any other agreements are not in compliance with the provisions of both contracts (VDOT-Shirley Main Contract and Shirley-ADF International Sub-Contract). ADF International then proceeded to attempt fulfilling its obligations under the Sub-Contract partially by using its own facilities located in the State of Florida, but mostly by sub-contracting the fabricating work to structural steel fabricators in the U.S. According to ADF, it had to fabricate its steel at five different subcontracting facilities with the result of "massively increasing" the cost of the project."

ADF Group Inc. filed a claim under the ICSID Additional Facility Rules on its own behalf and on behalf of its subsidiary, ADF International Inc. ADF Group Inc. claimed 90 million dollars in damages for alleged injuries resulting from the federal Surface Transportation Assistance Act of 1982 and the Department of Transportation's implementing regulations, which require that federally-funded state highway projects use only domestically produced steel on March 1, 2000. ADF claimed violations of the national treatment requirement of Article 1102 NAFTA, the minimum standard of treatment requirement of Article 1105(1) NAFTA, and the prohibition against performance requirements contained in Article 1106 NAFTA.

The tribunal dismissed ADF's claims against the United States in their entirety on January 9, 2003.

2.4 Mondev International Ltd vs. United States of America, ICSID case No. ARB(AF)/99/2

On September 1, 1999, Mondev International Ltd., a Canadian real-estate development corporation, has submitted a claim under the ICSID Additional Facility Rules on its own behalf for losses allegedly suffered by Lafayette Place Associates ("LPA"), a Massachusetts limited partnership it owns and controls. The case was registered by the Secretary Council of ICSID on September 20, 1999.

This dispute arises out of a commercial real estate development contract concluded between the City of Boston, the Boston Redevelopment Authority and the Lafayette Place Associates in December 1978. The subject of the contract was construction of department store, a retail mall, and a hotel in an area downtown Boston, called "the Combat Zone". After various delays and difficulties in proceeding with the project, the LPA had brought a lawsuit against the City of Boston and the Boston Redevelopment Authority for breach of the contract. The Massachusetts court decided in favour of the LPA. However, the State's Supreme Judicial Court reversed the judgment in 1998.

By filing the claim before ICSID, Mondev sought compensation from the United States of no less than US$50 million, plus interest and costs, arguing that these losses had arisen from a decision by the Supreme Judicial Court of Massachusetts and from Massachusetts state law. Mondev claimed that Massachusetts's statutory immunization from intentional tort liability of the Boston Redevelopment Authority was incompatible with international law and that the decision of the Supreme Judicial Court was arbitrary and capricious and amounted to denial of justice.

Mondev also claimed that due to the Supreme Judicial Court's decision and the acts of the City and BRA, the United States breached its obligations under Chapter Eleven, Section A of NAFTA. In particular, Mondev claimed violations of NAFTA Articles 1102 (National Treatment), 1105 (Minimum Standard of Treatment), and 1110 (Expropriation and Compensation).

The tribunal issued an award dismissing all claims against the United States on October 11, 2002.

2.5 Loewen Group, Inc. v. United States, ICSID Case No. ARB(AF)/98/3

The "Loewen case" grew out of a business dispute between Jeremiah O'Keefe, an owner of a funeral home in Mississippi, and Loewen Group Inc. (Loewen), a Canadian chain of funeral homes, that was expanding its operations in the United States. After attempts to reach a settlement failed, O'Keefe began a lawsuit against Loewen. After the trial, the Mississippi jury awarded the claimant 500 million dollars in damages. Loewen intended to appeal, but it was confronted with an application of an appellate bond requirement of 125% of the judgment. When the Mississippi Supreme Court refused to lower the bond, Loewen settled the case for 174 million dollars.

In November 1998, Loewen filed its claim under NAFTA Chapter 11, currently before a panel of arbitrators under the auspices of the ICSID Additional Facility. Loewen alleged violations of three provisions of NAFTA - the anti-discrimination principles set forth in Article 1102, the minimum standard of treatment required under Article 1105, and the prohibition against uncompensated expropriation set forth in Article 1110. In fact, the Loewen Claim was the first Chapter 11 arbitration based on allegations that judicial proceedings were so deficient as to amount to a denial of justice under NAFTA and international law. Loewen requested damages in excess of 725 million dollars for alleged injuries arising out of litigation in which the company was involved in Mississippi state courts in 1995-96.

The tribunal dismissed the claims against the United States in their entirety on June 26, 2003.

2.6 Methanex Corporation v. United States of America, UNCITRAL (NAFTA)

The Methanex case is an investment dispute between Canadian-based Methanex Corporation and the United States, arising from the provisions of the NAFTA's Chapter XI on investment. Methanex is a leading producer of methanol, a key component of MTBE (methyl tertiary butyl ether), which is used to increase oxygen content and act as an octane enhancer in unleaded gasoline. Methanex launched its international arbitration against the United States in response to the March 1999 order by the State of California to ban the use of MTBE by the end of 2002.

California argued that banning MTBE was necessary because the additive is contaminating drinking water supplies, and is therefore posing a significant risk to human health and safety, and the environment. Methanex argued in its original submission that the ineffective regulation and non-enforcement of domestic environmental laws, including the U.S. Clean Water Act, is responsible for the presence of MTBE in California water supplies. Methanex argued that California's ban on MTBE was not based on legitimate regulatory concerns, but was instead motivated by an interest in protecting and advancing the interests of competing US suppliers of ethanol, including the interests of Archer-Daniels-Midland ('ADM'), which it alleged impermissibly sought to influence the decisions of California's then governor.

Methanex contended that a Califiornia Executive Order and the regulations banning MTBE expropriated parts of its investments in the United States in violation of Article 1110, denied it fair and equitable treatment in accordance with international law in violation of Article 1105, and denied it national treatment in violation of Article 1102. Methanex claimed damages of 970 million dollars.

On August 9, 2005, the Tribunal released the Final Award, dismissing all of the claims. It found that the California legislature and executive had acted on the basis of substantial scientific evidence, and that California had a justified legislative interest in posing the ban. The Tribunal comes to the conclusion that regulatory measures that are for a public purpose, non-discriminatory and enacted in accordance with due process are not, by definition under international law, expropriations and therefore are not subject to any compensation.

The Tribunal also ordered Methanex to pay the United States' legal fees and arbitral expenses in the amount of approximately 4 million dollars.

Part 3

The position of AmCham Germany

What exactly does investor protection and investor-state dispute settlement under TTIP provide for? The European Commission has emphasized its intention to establish provisions in TTIP which aim at avoiding an abuse of the protection by foreign investors in order to pursue their economical interests. These provisions concern the area of indirect expropriation which under certain circumstances can lead to a protection being too broad. According to the intended rules, not every measure taken by the State in the public interest leading to a loss of turnover shall qualify as indirect expropriation and constitute claims of the investor. The right of the State to regulate shall have priority over the economical interests of the investor. Furthermore, the Treaty shall contain definitions and explicit provisions with regard to the question what is to be understood under a “fair and equitable treatment” of the investor.

The Treaty further aims to establish more transparency of potential investment arbitrations. For this purpose, any document in the arbitral proceedings is to be accessible for the public, oral hearings are to be held publicly and concerned stakeholders are to be involved in the arbitral proceedings. As in CETA, this may be achieved by reference to the UNCITRAL Rules on Transparency in Treaty-based investor-State Arbitration effective as of 1 April 2014. These rules comprise a set of procedural regulations which provide for transparency and accessibility to the public of treaty-based investor-state arbitration.

In fact, as a consequence of a disclosure of any order of the arbitral tribunal and written submission of the parties, arbitral proceedings would be much more transparent than litigation before German state courts in which only the oral hearing provides insight in the proceedings to the public. In addition, an appeal mechanism is envisaged under which arbitral awards may be reviewed.

It is therefore questionable whether by establishment of such regulations the States’ sovereignty and moreover democracy in fact would be endangered because the German State as of now would not be able to adopt any legislation that would be detrimental to the business community investing in Germany.

Hearing of AmCham Germany

The Corporate and Business Law Committee of AmCham organized a discussion with Jai Motwane, the U.S. Trade Representative leading the U.S. TTIP negotiations on investment on 18 March 2014 in which the issue of investment protection and arbitration was considered and discussed. Jai

Motwane explained the motivation of the US for establishing investor protection and stated that TTIP without investor dispute settlement procedure would question the legitimacy of the entire system. In consideration of the conclusions reached in that meeting as well as discussions with different communities, the Committee has reached the following

Opinion

The Corporate and Business Law Committee of AmCham holds that the concerns of the public that investment arbitration will endanger the states' sovereignty and democracy are unfounded as long as the European Commission accomplishes the incorporation of the suggested measures for protection of the states sovereignty and the functionality and transparency of arbitration in the Treaty. The following reasons support the Committee's opinion:

- **International arbitration as an appropriate forum for the enforcement of the granted guarantees**

  Free trade agreements usually provide guarantees for the protection of investors; without these guarantees companies may hesitate to invest despite high standards in the guest country. With view to the enforcement of these guarantees, international arbitral tribunals are an appropriate and neutral forum for cross-border disputes arising out of these guarantees.

- **TTIP aims at a proper balance between the right of regulation and investor protection**

  The envisaged regulations aim at an adequate balance between the states' right of regulation and the economic interests and needs of foreign investors. As such, it is planned to exclude sensible and important areas of environment and consumer protection from the scope of the agreement and its guarantees in order to secure the sovereignty of the states.

- **Efficiency and transparency of arbitral proceedings as a result of explicit rules**

  Explicit rules for the conduct of arbitration can guarantee efficiency and transparency of arbitration which can go beyond the public participation in litigation before state courts.

- **No dispute resolution by way of a "parallel justice"**

  In case the final wording of the Treaty contains an appeal mechanism for the assessment of arbitral awards by state courts, the concern of the establishment of a parallel justice or arbitrary dispute resolution by international arbitral tribunals outside of the legal system may become obsolete.

- **Same level of protection for the own economy and foreign investors**

  Finally, in case the German state wishes to have investments in its country, it will have to grant the same level of protection to foreign investors which it wishes to have for German investors abroad. This may also be the background of the outrage against the above

mentioned Vattenfall claim in which no developing or emerging country, but surprisingly the German state finds itself sitting in the dock.

Conclusion and outlook

For the above mentioned reasons, the Corporate and Business Law Committee of AmCham does not hold the envisaged investor protection and investment arbitration to be a dangerous or new mechanism which will lead to a flood of claims of US investors against the German state. Interestingly, the planned Treaty does not appear to have been criticized as extensive as in the recent German press in other EU Member States. This may be the case because some of the EU Member States already have concluded bilateral investment treaties with the US which include the possibility of investment arbitration so that TTIP would not constitute a great reform in those states. However, it is also possible that in Germany, the public mistrust in the US and its corporations has recently increased. In the end, the results of the public consultation launched by the European Commission may be decisive for the outcome of the TTIP negotiations on investment arbitration, if not even the signing of TTIP at all so that it is necessary and desirable that those profiting from TTIP and the possibilities granted by that treaty raise their voices and suggestions by participating in the consultation.

In case of questions please contact

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