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Charting fossil fuel investment protection in the EU beyond the Energy Charter Treaty

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Table of contents

Summary	4
Sammanfattning	5
Preface	6
Abbreviations	7
1 Introduction	8
1.1 Background.....	8
1.1.1 <i>International investment law and climate action</i>	8
1.1.2 <i>The Energy Charter Treaty</i>	11
1.2 Purpose and research question.....	14
1.3 Delimitations.....	16
1.4 Terminology.....	16
1.5 Outline of the thesis	17
2 Methodology and relevant law	18
2.1 International investment law.....	18
2.1.1 <i>An overview of the international investment regime</i>	18
2.1.2 <i>Selection of clauses to study</i>	20
2.2 Extra- and intra-EU division in investment protection.....	22
2.3 Part one of the study: extra-EU BITs.....	22
2.3.1 <i>Extra-EU BITs and their applicability</i>	22
2.3.2 <i>Selection of extra-EU BITs to study</i>	23
2.4 Part two of the study: EU law	25
2.4.1 <i>EU law in this thesis</i>	25
2.4.2 <i>The end of intra-EU BITs</i>	26
2.4.3 <i>Application of EU law in investor-state arbitration</i>	29
3 Investment protection under the Energy Charter Treaty	31
3.1 Investor-state dispute settlement.....	31
3.2 Sunset clause.....	32
3.3 Fair and equitable treatment.....	34
3.3.1 <i>Relation to other standards</i>	35
3.3.2 <i>Meaning and scope</i>	36
3.3.3 <i>Legal stability and legitimate expectations</i>	37
3.4 Expropriation	40
3.4.1 <i>Indirect expropriation and other regulatory measures</i>	41
3.4.2 <i>Lawful or unlawful expropriation</i>	43
3.5 Summary	45
4 Investment protection under extra-EU BITs	46

4.1	Protection offered by selected extra-EU BITs.....	46
4.1.1	<i>Fair and equitable treatment</i>	47
4.1.2	<i>Expropriation</i>	48
4.1.3	<i>Investor-state dispute settlement</i>	48
4.1.4	<i>Sunset clauses</i>	48
4.2	Summary.....	49
5	Direct investment protection under EU law	50
5.1	General principles of EU law.....	50
5.1.1	<i>Legal certainty and legitimate expectations</i>	51
5.1.2	<i>Proportionality</i>	53
5.2	The four freedoms.....	54
5.2.1	<i>Freedom of establishment</i>	54
5.2.2	<i>Free movement of capital</i>	56
5.2.3	<i>Other free movements</i>	58
5.3	The Charter of Fundamental Rights of the European Union.....	58
5.3.1	<i>Application and limitations of the Charter of Fundamental Rights</i> ...58	
5.3.2	<i>The freedom to conduct business</i>	59
5.3.3	<i>The right to property</i>	60
5.4	Enforcing rights under EU law.....	63
5.4.1	<i>Effective remedy and national autonomy</i>	63
5.4.2	<i>State liability claims</i>	64
5.5	Summary.....	65
6	Analysis of EU law compared to the Energy Charter Treaty.....	66
6.1	General differences.....	66
6.2	Legal stability and legitimate expectations.....	67
6.3	Right to property.....	68
6.4	Procedural options.....	70
7	Conclusion.....	71
7.1	Final summary and conclusion.....	71
7.2	Further questions and research.....	72
	Annex 1, list of selected bilateral investment treaties.....	74
	Bibliography.....	77

Summary

Under international law, foreign direct investments are protected by a patchwork of bilateral or multilateral investment treaties. International investment agreements have been criticised for protecting foreign direct fossil fuel investments and limiting the regulatory space of host states, thus creating obstacles for a green transition. At the time of writing, the European Union and its member states are on the brink of withdrawing from the Energy Charter Treaty, the world's largest international investment agreement. This raises the question of what regulation takes its place once it is gone. The purpose of this thesis is to clarify the legal framework for investment protection that currently coexists with the Energy Charter Treaty. Initially, the study examines the scope of two provisions that are often invoked in investor-state arbitration, namely the fair and equitable treatment standard and provision on expropriation found in the Energy Charter Treaty. These are then compared with substantive protection offered under two different sets of legal frameworks: bilateral investment treaties and internal EU law.

In the first part of the study, it is concluded that the bilateral investment treaties that overlap geographically with the Energy Charter Treaty contain the same standards as it and offer investors equivalent protection. In the second part, the scope of the fair and equitable treatment standard and expropriation provision are compared with the direct investment protection found in EU law, especially in its general principles and Charter of Fundamental Rights. It is found that this substantive protection largely overlaps and is mainly equivalent to that of the Energy Charter Treaty. The analysis nonetheless gives reason to conclude that the space for host states to regulate for public interest purposes, such as environmental protection, is likely to be wider under EU law than under the Energy Charter Treaty. The chief difference between the frameworks, however, lies in the elimination of access to international arbitration in investor-state disputes that withdrawal from the Energy Charter Treaty will bring for internal EU investors. Without that possibility, their only recourse is to domestic judicial proceedings.

Sammanfattning

Det folkrättsliga skyddet för utländska direktinvesteringar utgörs av ett lapptäcke av multi- och bilaterala investeringsavtal. Internationella investeringsavtal kritiseras regelbundet för det skydd de ger bland annat investerare i fossila bränslen och för att de begränsar staters frihet att reglera verksamheter för allmänna intressen. Detta uppges sätta hinder för den gröna omställningen. Energy Charter Treaty är världens största investeringsavtal, men mycket tyder på att EU och dess medlemsstater inom kort kommer lämna avtalet. Det väcker frågor om vilken alternativ reglering som kommer ta dess plats. Syftet med den här uppsatsen är att klargöra de rättsliga regelverk som just nu överlappar med investeringsskyddet i Energy Charter Treaty. Studien inleds med en detaljerad överblick över två klausuler i Energy Charter Treaty som ofta åberopas i tvister mellan investerare och stater, nämligen standarden för 'fair and equitable treatment' och regleringen av expropriering. Innehållet i dessa jämförs sedan med det rättsliga skyddet som erbjuds under två andra regelverk: bilaterala investeringsavtal och intern EU-rätt.

Första delen av studien visar att bilaterala investeringsavtal som överlappar geografiskt med Energy Charter Treaty innehåller samma klausuler och erbjuder investerare motsvarande skydd. I den andra delen av studien jämförs 'fair and equitable treatment' och regleringen av expropriering i Energy Charter Treaty med skyddet för direktinvesteringar som återfinns i EU-rätten, särskilt i dess människorättsstadga och generella principer. Analysen visar att det materiella skydd som finns för direktinvesteringar i EU-rätten motsvarar det som finns i Energy Charter Treaty, och att regelverket ger ett liknande skydd. Dock ger undersökningen vid handen att anta att utrymmet för stater att reglera verksamheter till fördel för allmänna intressen är större i EU-rätten. Den huvudsakliga skillnaden mellan regelverken är dock processuell snarare än materiell. Utan Energy Charter Treaty har investerare inom EU inte längre möjlighet att lösa tvister med stater direkt i skiljedomstol, utan blir tvungna att vända sig till nationella domstolar.

Preface

I would like to express a warm thank you to my friends and family for being who you are and doing the things you do. You are a true and constant source of inspiration.

On another note, I hope that this thesis will shine a light on the fact that different legal regimes overlap and intersect in sometimes unintended ways. It is the job of legal scholars to uncover unwanted synergies.

I also hope that this contribution will, in some small way, add to the understanding that the choice of perspective matters. We need less economic law where the individual interest of a company is weighed against “general public interests”, and more economic law where environmental protection is a main aim to be balanced against other societal interests, including economic development. Environmental considerations need to be present in every economic activity, in every piece of legislation, in every treaty negotiation.

Abbreviations

ARSIWA	Draft Articles on the Responsibility of States for Internationally Wrongful Acts
BIT	Bilateral Investment Treaty
CFR	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECT	Energy Charter Treaty
EU	European Union
FET	Fair and Equitable Treatment
ICSID	International Centre for the Settlement of Investment Disputes
IIA	International Investment Agreement
ISDS	Investor-State Dispute Settlement
TFEU	Treaty on the Functioning of the European Union
TEU	Treaty of the European Union
UNCTAD	United Nations Conference of Trade and Development
UNCITRAL	United Nations Commission on International Trade Law
VCLT	Vienna Convention on the Law of Treaties

1 Introduction

1.1 Background

1.1.1 International investment law and climate action

If emissions of greenhouse gases are not drastically cut within the next few decades, the world will face consequences of catastrophic magnitudes. The UN Intergovernmental Panel on Climate Change has concluded that emissions of greenhouse gases must reach a global net zero in 2050. Otherwise, the repercussions will be irreversible and damages incalculable.¹

One of the steps that governments all over the globe have taken to meet these urgent goals is adopting aims of carbon neutrality. In total 110 states have set aims of carbon neutrality by 2050 under the Paris agreement, among them major actors including the EU, China and the US.² However, these aims are nothing if not followed by stringent policies to reduce carbon dependency and restructure industries, and even whole economies, that rely on these resources. In doing so, states must find balance among a plethora of interests. Important concerns such as individual property rights, principles of free market economy, and collective indigenous rights are not easily balanced. States find themselves torn between major industries, transnational corporations, civil society, and their own citizens.

The constant balance of legitimate interests is the mark of any regulatory effort. Given the immense importance of the objectives involved, it is pertinent to study mutually incompatible interests and how they are expressed and protected in regulations. This thesis in international law looks at different international legal frameworks for foreign direct investment protection and how they impact states' ability to legislate for environmental protection.

'Foreign direct investment' refers to investments made abroad, where the investor acquires a lasting managerial influence over the operations.³ This sets foreign direct investment apart from mere portfolio investments where there is no influence over the operations. Foreign direct investment creates a stable and long-lasting link between economies and is credited with increasing trade and economic development and integration.⁴

Foreign direct investments are subject to an international legal patchwork regime consisting of about 2500 bilateral investment treaties (BITs) and other international

¹ IPCC, 2018. Summary for Policymakers.

² Gaukrodger, 2021, p. 6, 16.

³ OECD Library, 'Foreign Direct Investment (FDI)', 2023; The World Bank Data Bank, 'Metadata Glossary: foreign direct investment'.

⁴ OECD Library, 'Foreign Direct Investment (FDI)', 2023; The World Bank Data Bank, 'Metadata Glossary: foreign direct investment'.

investment agreements (IIAs).⁵ These agreements set out the protection that foreign direct investors are entitled to when conducting business in foreign countries, such as non-discrimination and protection against expropriation. Among other things, they typically contain an investor-state dispute settlement clause, under which a foreign direct investor can bring claims against the host state in an arbitration tribunal. The modern bilateral treaties were created in the 1950's, but the concept of legal protection for foreign investments is older, and various agreements with that purpose have been concluded since the 18th century. They were originally designed by capital exporting states to afford protection to their investments abroad.⁶ BITs and IIAs have been criticised on many points over the past few decades. Critics have slandered their vagueness, their restricting impact on the regulatory power of host states, their allowing investors to bring claims in arbitral tribunals directly against host states, and the cost and lack of transparency in these litigations.⁷ A report by the United Nations Conference on Trade and Development (UNCTAD) emphasises the fact that IIA:s typically do not distinguish between carbon-intensive and low-carbon investments and that the general level of investor protection in IIA:s is high.⁸

Of particular focus in this thesis will be foreign direct investment in the fossil fuel industry. In the context of the thesis, the term 'fossil fuels' is used generically to describe non-renewable energy sources such as coal, natural gas, crude oil and petroleum products.⁹ It is estimated that 80% of all greenhouse gas emissions globally come from burning of fossil fuels.¹⁰ The fossil fuel industry is understood to include any economic activity related to the exploration, extraction, refining, production, storage, land transport, transmission, distribution, trade, marketing or sale of such products. It is inspired by the definition found in the Energy Charter Treaty.¹¹

No new investments should have been made into fossil fuels after 2021 – two years ago, that is – if net-zero emissions were to be achieved by 2050.¹² Researchers estimate that to reach the global temperature goals, a third of the oil reserves that we know of must remain in the ground. The same goes for half of the known gas reserves and 80% of coal.¹³ This means that investments already made into the exploitation of these resources will go to waste. Estimates put the value of stranded upstream investments in the oil and gas sector made between 2016-2050 at between 3-7 trillion USD, depending on at what point and how states start rolling out policies to curtail the sectors.¹⁴ These are staggering numbers, and it is difficult to fully comprehend that size of the global fossil fuel industry.

⁵ UNCTAD, International Investment Agreements Navigator, 2023.

⁶ Collins, 2023, p. 33-34.

⁷ Radi, 2020, p. 267-268. Nowrot, 2014, p. 620-624; Tienhaara & Downie, 2018, p. 461-462.

⁸ UNCTAD, The International Investment Treaty Regime and Climate Action, 2022, p. 4.

⁹ Eurostat, 'Glossary: Fossil fuel', 2019.

¹⁰ Eurostat, 'Glossary: Fossil fuel', 2019.

¹¹ Article 1(5) ECT.

¹² International Energy Agency, 2021, p. 21.

¹³ *The Economist*, 2020; McGlade & Ekin, 2015.

¹⁴ IRENA, 2017, p. 6.

However, being a global multi-trillion-dollar industry, the fossil fuel industry is not planning to go down without a fight.

One of the problems identified in the current investment protection framework is the risk of regulatory chill, especially in areas of public interest such as environmental protection. Certain regulatory measures undertaken by a host state to, let's say, enhance environmental protection standards or discourage investment in fossil fuels, can naturally have an adverse effect on investors. The investors can then bring claims against states before an arbitration tribunal and demand billions of dollars in compensation. The regulatory chill theory assumes that the threat of legal action from foreign investors will dissuade governments from implementing measures that aim at *inter alia* environmental protection.¹⁵ In a report from 2022, the UN Intergovernmental Panel for Climate Change specifically points to regulatory chill as an obstacle for reaching the climate goals.¹⁶ One author writes that “[i]n the context of the fossil fuel industry, a host state is likely to find itself facing the impossibility of simultaneously meeting its obligations under the Paris Agreement and its obligations to protect fossil fuel investments”.¹⁷

The natural question to ask at this point is to what extent this possibility to bring claims against states for measures that relate to environmental protection is used by fossil fuel investors in practice. A study by the International Institute for Sustainable Development shows that 231 cases of investor-state arbitration have been launched by actors in the fossil fuel industry, most of them relating to the early stages of exploration. This makes the industry the most litigious of all industry sectors, which is not surprising given the size and global character of the sector (mining comes in second place).¹⁸ Over half the cases involving the fossil fuel industry are confidential, meaning that there are no publicly available documents or information; all that is known is that there is a dispute taking place. The report concludes that a third of the cases launched by investors in the fossil fuel industry where public information is available have environmental components.¹⁹ The survey also identifies a growing trend to demand compensation following implementation of climate-protective measures, such as emission reduction targets.²⁰ This indicates that the fear of investor-state arbitration claims emanating from IIAs is not made up or exaggerated. Another study notes that the fossil fuel industry does not actually need to win any investor-state arbitration cases for it to be an effective method for delaying

¹⁵ Tienhaara, 2018; Viñuales, 2019; Maljean-Dubois, Ruiz Fabri & Schill, 2022.

¹⁶ IPCC, 2022, p. 2433, 2442.

¹⁷ Salvatore, 2021, p. 37.

¹⁸ Salvatore, 2021, p. 4.

¹⁹ Salvatore, 2021, p. 4; One of the big researchers on investment law and environmental protection is Jorge E. Viñuales. He defines “arbitration with environmental components” as disputes that arise “from the operations of investors (i) in environmental markets (e.g., land-filling, waste treatment, garbage collection, pesticides/chemicals, energy efficiency, emissions reduction, biodiversity compensation, etc.), and/or, (ii) in other activities, where their impact on the environment or on certain minorities is part of the dispute (e.g., tourism, extractive industries, pesticides/chemicals, water extraction or distribution), and/or (iii) to disputes where the application of domestic or international environmental law is at stake”. See also Viñuales in Miles (ed), 2019.

²⁰ Salvatore, 2021, p. 4.

and discouraging action on climate change. To deter states from taking action, they merely need to show that they are willing to launch them.²¹

The international investment agreement that has generated the highest total number of arbitral cases in the world is the Energy Charter Treaty.²² The multilateral agreement is currently facing an uncertain future. The drama unfolding around it forms the backdrop against which this thesis is set.

1.1.2 The Energy Charter Treaty

The Energy Charter Treaty (ECT) is a binding multilateral agreement from 1994 with 51 contracting parties, including the European Union and its member states.²³ It was negotiated in the 1990's and apart from the EU states, the signatories are mainly Eastern European and Central Asian countries.²⁴ In the early 2010's there were thoughts about expanding the ECT and making it a truly global treaty for energy cooperation, but the general criticism of IIAs put an end to that.²⁵ The purpose of the treaty is to “promote long-term cooperation in the energy field”.²⁶

It is the international investment agreement that has seen the highest number of investor-state dispute settlement (ISDS) cases launched under it in the world.²⁷ A total of 158 publicly known cases had been launched up until May 2023. The absolute majority of these have been intra-EU, brought by an EU-based company against another member state. The majority have been launched after 2012.²⁸ Many of the cases have been launched by actors in the fossil fuel industry, and some have been over environmentally aimed measures from host states. Some disputes have not been resolved by an arbitration tribunal but settled in extra-judicial negotiations.²⁹

One example of a case where an arbitration tribunal reached an award is the 2017 dispute between Italy and English oil company Rockhopper. The company claimed that being denied a permit that they were entitled to under Italian law constituted an indirect

²¹ Tienhaara, 2018.

²² UNCTAD, ‘Investment Dispute Settlement Navigator’. There have been 157 cases launched under the ECT to date. NAFTA comes in second place with 79 cases (16 May 2023).

²³ An additional four signatories have never ratified the treaty: Australia, Belarus, Norway and Russia. Italy withdrew from it in 2016.

²⁴ International Energy Charter, ‘Contracting Parties and Signatories of the Energy Charter Treaty’. The contracting parties that apply the treaty today are: Afghanistan, Albania, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, European Union and Euratom, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Japan, Jordan, Kazakhstan, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Mongolia, Montenegro, The Netherlands, North Macedonia, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, Switzerland, Tajikistan, Türkiye, Turkmenistan, Ukraine, United Kingdom, Uzbekistan, Yemen.

²⁵ International Energy Charter, ‘72 Countries plus the EU, Euratom and ECOWAS Adopt the International Energy Charter’; Tienhaara & Downie, 2018, p. 454-456.

²⁶ Article 2, The Energy Charter Treaty.

²⁷ UNCTAD, ‘Investment Dispute Settlement Navigator’

²⁸ International Energy Charter. ‘Statistics on ECT Cases’.

²⁹ International Energy Charter. ‘Statistics on ECT Cases’.

expropriation of their investment. The tribunal agreed, and awarded Rockhopper 190 million euro, plus interest, in damages.³⁰

There have been several examples of threats of arbitral lawsuits from investors followed by negotiated settlements. In 2015, the German government found themselves sued by Swedish company Vattenfall for the government's decision to discontinue nuclear power operations.³¹ They later reached a settlement with Vattenfall of around 2.6 billion euro.³² Germany has reached a similar settlement with Czech energy company Leag, of around 1.7 billion euro.³³ Under both of these settlements, the companies forfeit their chance to bring the case before an arbitration tribunal.³⁴ Additionally, both German company Uniper and German company RWE have directed claims against the Netherlands under the ECT for their plan to phase out coal by 2030. Uniper seems to have withdrawn their claim following a deal with the German government, whereas the RWE claim for 1.4 billion euro is still pending.³⁵

The cases and the sheer sums in the awards and settlements have evoked public and political outrage. The ECT is being pinned as a tool for oil companies to protect themselves at the expense of climate friendly investments and environmental protection legislation.³⁶ It is estimated that investments into fossil infrastructure of a value of 345 billion euro are protected by the clauses in the ECT.³⁷ If every contracting party that sets phasing-out goals for fossil fuels or aims of climate neutrality over the next few years would have to pay compensation to their foreign fossil fuel investors, the costs would be astronomical.

In 2017 – although the idea occurred already in 2010 – the EU initiated a process to modernise the ECT to better align with its modern investment policy and the Green Deal.³⁸ According to the Union's investment policy, the EU should promote high environmental standards and seek to protect the regulatory space of home- and host countries.³⁹ The EU is also advocating the establishment of a multilateral Investment Court System to replace current investor-state dispute settlement mechanisms in BITs.⁴⁰ The European parliament adopted a resolution in June 2022 where they highlighted that all policy areas, including investment policies, need to be designed to contribute to the battle against climate change and environmental degradation.⁴¹

³⁰ Braun, 2021; Mazzotti, 2022.

³¹ Mathiesen & Hanke Vela, 2020.

³² Braun, 2021.

³³ Braun, 2021.

³⁴ Pintzler, 2015; Braun, 2021.

³⁵ Climate Case Chart, 'The Netherlands v. RWE and Uniper (Anti-Arbitration Injunctions)'.

³⁶ Tienhaara & Dowie, 2018, p. 461-462. Brauch, 2021, p. 2; Tropper & Wagner, 2022, p. 814; European Corporate Observatory, 2020.

³⁷ Moldenhauer & Schmidt, 2021.

³⁸ Brauch, 2021; Tienhaara & Downie, 2018, p. 454-456.

³⁹ European Commission, 'Investment'.

⁴⁰ European Commission, 'Dispute settlement'; European Parliament resolution of 23 June 2022 on the future of EU international investment policy, N26.

⁴¹ European Parliament resolution of 23 June 2022 on the future of EU international investment policy, F.

Years of negotiations on the modernised ECT finally bore fruit in July 2022 and a finalised proposal for a revised ECT was presented. The plan was to adopt the new agreement in November 2022, and then for it to be ratified by all contracting parties.⁴² However, the plan did not come to pass, because there was not enough support for the modernised agreement in the European Parliament. This left the modernisation process in limbo. An *ad hoc* meeting of the members of the Energy Charter Conference was planned for April 2023 to discuss how to proceed with the modernisation after the EU's rejection of it.⁴³ As of 10 May 2023, nothing has been published indicating that such a meeting has taken place, let alone any details or decisions from it.

Instead of approving the modernised proposal of the ECT, the Parliament adopted a resolution imploring the Commission to prepare a coordinated exit from the ECT.⁴⁴ The background to the rejection of the ECT appears to be the investor claims of the past few years and subsequent public protests to the treaty. More than 400 civil-society organisations signed a petition in 2021, calling for the EU to withdraw from the ECT.⁴⁵ So far, eight member states – France, Spain, Poland, the Netherlands, Belgium, Slovenia, Germany, and Luxembourg – have declared their intention to withdraw from the ECT.⁴⁶ Italy already withdrew back in 2016.⁴⁷

In its resolution, the Parliament urges the Commission to

initiate immediately the process towards a coordinated exit of the EU from the ECT and calls on the Council to support such a proposal; believes this to be the best option for the EU to achieve legal certainty, and prevent the ECT from putting the EU's climate and energy security ambitions in further jeopardy.⁴⁸

Leaks from the European Commission in February 2023 report on a document being drafted with the purpose of preparing the withdrawal, indicating that the Commission will implement the decision of the Parliament.⁴⁹ Thus, it seems likely that the EU will withdraw from the ECT shortly.⁵⁰ This raises the question of what other legal frameworks will take its place, once it is gone.

⁴² Public Communication on Decision of the Energy Charter Conference, 24 June 2022.

⁴³ International Energy Charter, 'The 33rd Meeting of the Energy Charter Conference held under the Chairmanship of Mongolia', 2022.

⁴⁴ European Parliament resolution of 24 November 2022 on the outcome of the modernisation of the Energy Charter Treaty.

⁴⁵ European Environmental Bureau, 'Civil Society Organisations' Statement against the Energy Charter Treaty', 2021.

⁴⁶ Baldon & Dupré, 2023; IISD, 2022.

⁴⁷ International Energy Charter, 'Italy'.

⁴⁸ European Parliament resolution of 24 November 2022 on the outcome of the modernisation of the Energy Charter Treaty.

⁴⁹ Euractiv, 2023; Non-paper from the European Commission, 2023.

⁵⁰ As of 10th May 2023, the most recent activity from the EU that is publicly available is a written reply by the Council from 14 April 2023, where they say that discussions on the EU's membership in the ECT are being held in the Council. They also repeat that there will be an *ad hoc* meeting of the Conference of the Energy Charter at the end of April (reply to Parliamentary question P-003556/2022(ASW)). The

The Parliament motivates leaving the ECT with a desire to better align its investment law with aims of sustainable development. They wish to no longer be limited by the restrictions in the ECT. However, in the same resolution they highlight the

lack of consistency between some Member States' positions on the ECT and their BITs which still protect fossil fuel investments and outdated provisions contrary to EU objectives and values.⁵¹

This indicates that the BITs of member states contain the same provisions as the ECT, which raises the question if leaving the ECT has any effect on the regulatory space and threat of investor-state arbitration at all. Or will the ECT simply be replaced by the same protective standards in the BITs that it currently overlaps with?

Additionally, most of the claims under the ECT have been brought within the EU, from an investor of one member state against another member state. The EU member states cancelled their internal BITs in 2020, following debates on their incompatibility with EU law. Since then, the legal regime for investment protection for intra-Union investments is whatever is offered under EU law. It is possible that internal EU law affords similar protection standards as the ECT, and that EU law then may be used by companies to demand compensation for lost investment value when host states implement stricter environmental regulations.

1.2 Purpose and research question

The purpose of this thesis is to clarify the legal framework for investment protection that currently coexists with the Energy Charter Treaty. Focus will be on regulation that is relevant to EU member states, since it is the EU and its members that are rumoured to withdraw from the ECT. The international regulatory frameworks that overlap with the ECT and govern investment protection for EU states are BITs concluded between member states and non-member states, and internal EU law. These are the two legal frameworks that will be studied in this thesis.

The aim is not to give a full overview of the complete protection offered under the ECT, BITs or EU investment law. Focus is on the regulatory space of the host state, and the opportunity for and conditions under which investors can make legal claims for compensation arising from measures that aim at climate action or environmental protection. Therefore, the study will centre on the provisions where a balancing of interest between the individual investor and public interests is required. The provisions in the ECT that most clearly contain a balance of interests are the fair and equitable treatment standard and the provision on expropriation. Both are common occurrences in international investment law. The first sets a minimum standard of conduct for the host

Parliament Committee on International Trade also discussed the EU's position on the ECT during a meeting on the 27th of April 2023 (draft agenda INTA(2023)0426_1).

⁵¹ European Parliament resolution of 24 November 2022 on the outcome of the modernisation of the Energy Charter Treaty.

state, and the second protects property rights of investors. Incidentally, these are also the most litigated provisions in international investment law.⁵²

The question the thesis sets out to answer is: How will the legal conditions for investor-state disputes, specifically over regulatory measures for environmental protection, change if the EU and its member states withdraw from the ECT?

This has, to the best of my knowledge, not been studied before. Legal research into investment protection under EU law is surprisingly sparse. Much of what has been written on the topic of EU law and investment protection relates either to EU law in relation to investments that originate outside of the Union,⁵³ or to the scope of the Union's competence on the subject, or the IIAs signed by the EU.⁵⁴ There are two works that give a descriptive overview of direct investment protection under EU law as a whole, one by the European Commission from 2018,⁵⁵ and one by Emilie Gonin and Ronan O'Reilly in Baltag & Stanič (eds) from 2020.⁵⁶ Two other works contain direct comparisons of EU law and international investment law, namely an article by Xavier Taton and Guillaume Croisant, and a doctoral thesis by Nico Basener.⁵⁷ Neither of the studies aim at comparing the regulations' bearing on the regulatory space of host states in detail, although they both provide good overviews of the general framework. Basener's account is the more in depth and comparative of the two, and as far as it is of relevance here, he concludes that the two systems largely offer equivalent levels of protection.⁵⁸

I have found no systematic studies of the ECT and BITs concluded by EU member states with non-EU members. It has been accepted that neither the protection standards of the ECT nor the BITs divert substantially from what is conventional in international investment protection.⁵⁹

Consequently, it is motivated in this thesis to clarify the legal investment protection in internal EU law as well as extra-EU BITs compared to that of the ECT. In the context of the EU's expected withdrawal from the ECT, it is pertinent to gain better knowledge of how these other legal frameworks might change the legal conditions for investor-state disputes over regulatory measures for environmental protection.

⁵² UNCTAD, *Investment Dispute Settlement Navigator*, 2022. See section 2.1.2 below for elaboration on this point.

⁵³ See for example Hindelang, 'The Free Movement of Capital and Foreign Direct Investment', 2009 and Dimopoulos, 'EU Foreign Investment Law', 2011.

⁵⁴ See for example Baltag & Stanič (eds), 'The Future of Investment Treaty Arbitration in the EU', 2020; Bungenberg & Bohme, 'Under the Radar - The Return of Member States in EU Investment Policy', 2022; Bungenberg, Griebel & Hindelang, 'International Investment Law and EU Law', 2011.

⁵⁵ Communication from the Commission to the European Parliament and the Council, 'Protection of intra-EU investment', 2018.

⁵⁶ Gonin & O'Reilly, 2020,

⁵⁷ Basener, 2017; Taton & Croisant, 2019.

⁵⁸ The aim of the overview in Basener's thesis is to provide background for a larger analysis of the applicability of EU law in international investment arbitration, as well as charting incompatibilities between EU law and protection standards in IIAs.

⁵⁹ Schokkaert, 2002.

1.3 Delimitations

Some key delimitations had to be made for the purposes of the thesis. Firstly, national legislation is not part of the studied legal frameworks. Under the ECT today, investors can choose to pursue claims before national courts, and they may invoke national legislation. This does not change if the EU withdraws from the ECT. Consequently, this aspect of legal protection will remain the same for investors, and therefore falls outside of the scope of this thesis.

Another part of foreign direct investment protection is investment contracts which host states can enter into with individual investors. These contracts confer rights and obligations on the investor and host state, and often contain dispute resolution mechanisms. However, this is a study of international and EU law, and such contracts fall outside of the scope of the study. It is however important to note that investor claims can be launched under such contracts.⁶⁰

It is important to acknowledge that studying IIAs and EU law does not give the full picture of investment protection, and that there are other important legal documents and regulations that can be of relevance to investors and states in practice.

1.4 Terminology

Foreign direct investment under international law has the same meaning as it does in general speech where it denotes an investment made abroad with operational influence over the enterprise.⁶¹ Both the initial transaction and establishment on the foreign market, and all subsequent transfers of capital are covered by the concept.⁶² However, the scope of BITs and IIAs can be restricted in two important ways. Firstly, they are usually only applicable in the time period after establishment. Questions of if and under what conditions foreign actors have access to another state's market are usually left to the discretion of that state and regulated in other instruments and national law.⁶³ BITs usually do not aim at removing barriers to foreign direct investment, but rather at offering some basic protection post-establishment. The second important question is how the term 'investment' is defined in the treaties. It is common practice to give it a broad definition that covers as many commercial activities as possible. It is often done by means of a non-exhaustive list of activities and assets covered by the term investment.⁶⁴

Within EU law, the term foreign direct investment is primarily employed in reference to investment flows from third states into the EU or investments made from an EU member states to third states. There seems to be some reluctance to refer to EU-internal direct investment flows in terms of 'foreign', as they originate from within the common market.

⁶⁰ Salvatore, 2021, p. 4.

⁶¹ OECD Library, 'Foreign Direct Investment (FDI)', 2023; The World Bank Data Bank, 'Metadata Glossary: foreign direct investment'.

⁶² UNCTAD, World Investment Report 2007, p. 245.

⁶³ Dolzer & Schreuer, 2022, p. 132-136.

⁶⁴ Collins, 2023, p. 4.

For example, regulation 2019/452 defines a foreign investor as a national of a third country.⁶⁵

‘Direct investment’ is the term used for investments made across internal Union borders. The Court of Justice of the European Union (the CJEU or the Court) has defined direct investments as “investments by natural or legal persons which serve to establish or maintain lasting and direct links between the person providing the capital and the company to which that capital is made available in order to carry out an economic activity”.⁶⁶ However, direct investment is not subject to a cohesive set of regulation under EU law.⁶⁷ This is not synonymous with there being no such protection under EU law, it just means that direct investments are found under other terms such as ‘capital’ or ‘property’ in a number of different regulations.

1.5 Outline of the thesis

Immediately after this introduction follows Chapter 2 with a presentation of the methodology of the study, including context for the legal frameworks that are analysed in the study. It contains a detailed description of the selection of, and method used, in the study of extra-EU BITs in the thesis. It also includes an account of the relationship between EU law and the ECT, which has been something of a tumultuous affair. The substantive study then consists of three main parts. The first part, Chapter 3, gives an overview of the international investment regime and specifically some protection standards offered by the Energy Charter Treaty. The presentation will centre on the fair and equitable treatment standard and the provision on expropriation. The second part, Chapter 4, consists of a study of a selection of BITs concluded between member states and third countries, so-called extra-EU BITs, that overlap geographically with the ECT. The question this section sets out to answer is if they also overlap substantively with the ECT. Do they contain the same protective clauses? The third part of the study, Chapter 5, concerns investment protection under EU law. The question in this part is if EU law contains investment protection that is functionally equivalent to that in the ECT? The thesis continues with a comparison of the substantive protection offered under EU law and the ECT in Chapter 6. It finishes with a brief conclusion and some suggestion for further research in Chapter 7.

⁶⁵ Regulation 2019/452, article 2(2).

⁶⁶ Erlbacher & Maxian Rusche, 2019, para 18; Case C-181/12, *Welte*, para 32.

⁶⁷ Dimopoulos, 2011, p. 36.

2 Methodology and relevant law

In this part of the thesis, the methods of study will be presented, and the relevant legal frameworks contextualised. It also shines a light on the important distinction between extra- and intra-EU contexts in international investment law. The section contains three main parts: First, it gives a description of the international investment regime. Subsequently, it accounts for the selection and method used for the mapping of extra-EU BITs in this study. Third, it aims to introduce EU law and give more context to legal developments and discussions on investment protection in the EU in the past decades.

2.1 International investment law

2.1.1 An overview of the international investment regime

The international investment regime is highly fragmented. It is a medley of around 2500 bilateral investment treaties and other international investment agreements.⁶⁸ Its patchwork nature comes from the fact that no country has an agreement with every other country on the planet. Germany for example, is keen on BITs and is currently party to 114 different treaties, whereas Japan is only party to 34.⁶⁹ The different agreements are however highly uniform. They follow the same pattern and contain essentially the same clauses, which makes it possible to talk about an essentially cohesive, albeit not geographically all-encompassing, legal regime.

Bilateral investment treaties as we know them today emerged in the 1950's. The aim was to set minimum standards of treatment to attract investors, and to prevent discriminatory and arbitrary actions from host states with weaker legal systems.⁷⁰ The BITs also contain rules on expropriation and nationalisation, which was a relatively common occurrence in the late 20th century.⁷¹ Critics have underlined that BITs curtail the regulatory space of host states, sometimes forgetting that restricting the freedom of regulation of the host states is part of the purpose of the agreements – it's not a bug, it's a feature.⁷² It must be emphasised however, that an investor can not challenge nor change the validity of measures or regulations adopted by the host state. They can only demand compensation if the measure or regulation violates their rights under an IIA, but they can not repeal the regulation.

The BITs also guarantee a right to effective remedy for the investor in case of a breach. They typically contain a dispute settlement mechanism where investors can bring claims against the host state directly before an international arbitration tribunal. The transferral of individually enforceable rights to the investor makes BITs unique in international law. Investor-state arbitration under IIAs is a unique opportunity for private actors to resolve

⁶⁸ UNCTAD, International Investment Agreements Navigator, 2023.

⁶⁹ UNCTAD, International Investment Agreements Navigator, 2023.

⁷⁰ Collins, 2023, p. 10-39.

⁷¹ Nowrot, 2014, p. 621; Hobér, 2020, p. 261; Collins, 2023, p. 13.

⁷² Nowrot, 2014, p. 620-622.

claims against states without having to employ the national judicial system. Investor-state arbitration is often conducted under the framework of the International Centre for the Settlement of Investment Disputes (ICSID) or the procedural rules of the UNCITRAL.⁷³ The proceedings are characterised by a higher degree of flexibility than normal judicial proceedings.⁷⁴

The system offers many advantages in addition to circumventing the domestic judicial system which many investors consider a plus in itself.⁷⁵ Before national courts, foreign investors often feel a certain distrust towards the judiciary of other countries, and they may be disadvantaged by having to pursue a claim in a foreign legal system, especially if their counterpart has home field advantage.⁷⁶ In processes that concern previous administrative or judicial shortcomings or denial of justice claims it is likely that the investors are worried about not getting a fair trial in national courts. In arbitration on the other hand, the parties can choose the applicable legal framework, and they typically get to appoint two arbitrators out of three, which means that they are handpicked and very skilled in that specific area.⁷⁷ Arbitration also offers a better opportunity to keep information of the dispute from the public, including in many cases the claims of the parties and the decision of the tribunal.⁷⁸ Additionally, the ability to appeal such arbitration awards are limited which often makes them faster than normal court proceedings.

Nonetheless, arbitration is expensive for the parties which has attracted negative attention for states where public budgets need to be used for arbitration.⁷⁹ Another aspect of BITs and IIAs is that they often contain a so-called sunset clause.⁸⁰ A sunset clause extends the life of a treaty. Even if a contracting party terminates or withdraws from the BIT, it remains in force for investments made before the point of withdrawal. The duration of sunset clauses varies, but 10-20 years is common.

The international investment protection regime has been criticised.⁸¹ A main part of the critique has been the lack of transparency in arbitration proceedings. Others have objected to the vagueness of the substantive protective standards, and subsequent lack of predictability for disputing parties. The confidentiality of proceedings and *ad hoc* nature of the tribunals has contributed to a certain lack of coherent jurisprudence. There have also been allegations that arbitrators tend to be partial to the investor in disputes.⁸²

The criticism led to a paradigm shift and a new era of modernisation of BITs. Both UNCTAD and the OECD encourage states to renegotiate their BITs and have resources

⁷³ Radi, 2020, p. 270.

⁷⁴ Radi, 2020, p. 269; Dolzer & Schreuer, 2022, p. 340.

⁷⁵ Dolzer & Schreuer, 2022, p. 339-340.

⁷⁶ Dolzer & Schreuer, 2022, p. 339-340.

⁷⁷ Radi, 2020, p. 280-285; Dolzer & Schreuer, 2022, p. 340

⁷⁸ Radi, 2020, p. 289-294, 309; Dolzer & Schreuer, 2022, p. 412.

⁷⁹ Radi, 2020, p. 310.

⁸⁰ Reinisch & Tropper, 2022, p. 315.

⁸¹ Radi, 2020, p. 267-268. Nowrot, 2014, p. 620-624; Tienhaara & Downie, 2018, p. 461-462.

⁸² Radi, 2020, p. 16-20.

with suggestions on how to make them more transparent, effective and modern.⁸³ UNCITRAL has also introduced rules to improve the transparency in investor-state arbitration.⁸⁴ The modernisation negotiations for the ECT are part of this development.

It must be said from the outset that not all changes to legal frameworks that negatively impact investments can give rise to investor-claims under international investment law. The state retains its right to internal regulation under normal exercise of sovereign power. However, there are cases where drastic changes in regulations of immediate interest to investors have given rise to waves of disputes under international treaties. It happened when Argentina, facing an economic crisis, imposed changes relating to the energy sector and financial conditions for investors. It happened in Europe, particularly in Spain, Italy, and Czech Republic when they removed various subsidies available for renewable energy companies after the economic crisis in 2008. There were fears that both the economic crisis of 2008 and the covid-19 pandemic would give birth to more cases, but that has not yet come to pass.⁸⁵ The current trend is for oil- and coal companies to threaten with arbitration over regulatory changes made in Europe for the green transition, and researchers expect these types of claims to increase.⁸⁶

2.1.2 Selection of clauses to study

As noted previously, each BIT and IIA is a separate legal document conferring rights and obligations, and differences in wording, preambles and structure can impact the interpretation of each. However, they are characterised by considerable homogeneity and both tribunals and scholars are prone to view it as one legal regime, rather than 2500 different documents. Nearly all of them contain the same substantial rules of protection against arbitrary treatment, discrimination, and expropriation, as well as similar enforcement mechanisms. The idea in this thesis is to study the provisions that are invoked by investors to object against public interest regulation such as environmental policies undertaken by the host state.

The provisions in BITs and IIAs that relate most closely to the regulatory space of the host state and its ability to implement environmental regulation are the fair and equitable treatment standard (FET) and the provision on expropriation. Both contain elements that make them relevant for regulation for public purposes. Under the fair and equitable treatment standard it is chiefly the principle of stability and legitimate expectations that are invoked to object to measures taken by host states for public purposes. Meanwhile, the provision on indirect expropriation means that tribunals often have to draw a line between prohibited expropriatory measures and acceptable regulation for public purposes.

⁸³ UNCTAD International Investment Agreements Reform Accelerator, 2020; UNCTAD. The International Investment Treaty Regime and Climate Action, 2022; OECD, The future of investment treaties - possible directions, 2021.

⁸⁴ Montoya, 2022.

⁸⁵ Sornarajah, 2021. p. 445-448.

⁸⁶ Salvatore, 2021, p. 37.

UNCTAD has a project and report entitled ‘Reform Accelerator’ in which they propose changes to BITs that states can make to increase predictability and improve conditions for environmental protection.⁸⁷ These recommendations are highly relevant for states striving to live up to their obligation under international environmental law such as the Paris Agreement. The recommendations cover changes to eight well known and often recurring clauses in BITs. Most of the suggestions relate to how the clauses can be clarified or their scope limited. The only two clauses that UNCTAD suggests excluding from BITs altogether to are the FET-clause and the provision on indirect expropriation.⁸⁸ This indicates that these two provisions are particularly problematic for states wishing to regulate for environmental protection.

These provisions are also the ones that are most frequently invoked in investor-state disputes, as will be demonstrated in the statistics presented here. Consequently, this thesis focuses on the fair and equitable treatment standard, the provision on expropriation and the possibility for investors to bring claims against states in arbitration.

According to statistics from the UNCTAD, an intergovernmental organisation under the Secretariat of the UN, there had been 1229 publicly known cases of investor-state dispute settlement launched globally until July 2022.⁸⁹ Of those 1229, 859 had been concluded, either by settlement or by award from an arbitration tribunal. The most common substantive provision to invoke is “fair and equitable treatment/minimum standard of treatment, including denial of justice claims”, which is identified in 620 cases. In second place comes expropriation clauses, which feature in 494 cases. This means that these are the two protection standards that investors typically rely on in investor-state disputes. When it comes to what the tribunals have actually decided, the picture is similar. Out of 266 cases where the case reached a final tribunal award on the merits, they found a breach of the fair and equitable treatment standard in 174 disputes.⁹⁰ The second most common breach was expropriation, which was found in 75 cases. In conclusion, FET is the most frequently used basis for investor claims in disputes. It is also invoked, sometimes in combination with other clauses, in most of the successful claims levied by investors.

For the ECT specifically, the statistics show a similar picture. Of the breaches alleged in the cases under the ECT where information is available, the claimant invoked the FET standard in 25% of the cases. Second came allegations of “unreasonable or discriminatory measures” in 18% of cases, which is a treatment standard that is closely related to and overlaps with the FET standard of the ECT.⁹¹ Hobér emphasises that “measures which are unreasonable and discriminatory will almost always constitute a violation of the FET standard”.⁹² The third most common allegation is indirect expropriation, which was invoked in 17% of cases.⁹³ Together, this accounts for the legal basis in 60% of all cases.

⁸⁷ UNCTAD International Investment Agreements Reform Accelerator, 2020.

⁸⁸ UNCTAD International Investment Agreements Reform Accelerator, 2020, p. 10.

⁸⁹ UNCTAD, Investment Dispute Settlement Navigator, 2022. It is possible that the actual number is higher than that, due to the confidential nature of arbitration proceedings.

⁹⁰ UNCTAD, Investment Dispute Settlement Navigator, 2022.

⁹¹ Hobér, 2020, p. 191; *Amtó v. Ukraine*, SCC Case No. 080/2005, Final Award, para 48.

⁹² Hobér, 2020, p. 230.

⁹³ International Energy Charter. ‘Statistics on ECT Cases’.

If we then look at the cases where the process ended in an award by the tribunal and a breach was found, we see that in 37 out of the 45 cases it was found that the FET standard had been violated.⁹⁴

Consequently, the focal point of this thesis are the FET and expropriation provisions. These are the most relevant for the question of how the risk for EU-host states of arbitral lawsuits over environmental protection measures might change with a withdrawal from the ECT. Procedural questions such as access to arbitration or other means of dispute resolution for investors will also be considered, although not analysed in detail.

2.2 Extra- and intra-EU division in investment protection

In the study of investment law in the European context, a distinction must be made between intra-EU contexts that relate to two EU member states, and extra-EU contexts relating to one EU-state and one non-EU member. For international investment protection, these relationships are subject to two distinct legal frameworks. The intra-EU context is subject to EU law, whereas the latter is regulated only to the extent that the states have concluded bilateral- or international investment agreements. These are the two distinct legal frameworks that will be the focus of this thesis. Part of the purpose of this chapter is to expand on the relationship between EU law, international investment law and the ECT. As will be demonstrated, the different legal frameworks have not always coexisted in harmony.

The remainder of this chapter, and indeed the thesis, is divided along this split between extra- and intra-EU contexts. The next immediate section relates to part one of the study, which is a mapping of extra-EU BITs that overlap geographically with the ECT. The subsequent section contains a brief overview of the relevant EU law for this thesis, as well as a more detailed overview of the development that led to the termination of intra-EU BITs in 2020.

2.3 Part one of the study: extra-EU BITs

2.3.1 Extra-EU BITs and their applicability

The Union gained competence over foreign direct investment as part of its external policy with the Lisbon Treaty in 2009, including competence to conclude investment agreements on behalf of member states.⁹⁵ Some commentators have speculated that existing extra-EU BITs were made null and void when the EU assumed power over foreign direct investment in its external relations. It was argued that the transferral of competence that previously laid with the member states also made their BITs with third states invalid. However, such a stance is not in line with public international law, as the contracting

⁹⁴ International Energy Charter. ‘Statistics on ECT Cases’.

⁹⁵ Erlbacher & Maxian Rusche, 2019, para 207.53.

parties never cancelled the BITs, and the supremacy of EU law does not apply outside of member states.⁹⁶

It has since been concluded unequivocally that the extra-EU BITs signed before the Lisbon Treaty remain in force. According to EU regulation 1219/2012, existing extra-EU BITs remain valid, but member states now need to request permission to negotiate new BITs or renegotiate old ones.⁹⁷ Meanwhile, the Union has begun to negotiate international investment agreements with third states. So far, negotiations are underway or have been concluded with *inter alia* Singapore, Vietnam, and Canada.

In extra-EU disputes, EU law does not constitute international law that is binding on the parties to the conflict, since only one of the relevant states is an EU member state.⁹⁸ In these cases, EU law is seen as part of national law in one of the states and treated as such in arbitration.⁹⁹ National law is typically not applicable in arbitration disputes under the ECT or extra-EU BITs, although it may be invoked as fact.¹⁰⁰ Whereas the Court of Justice of the EU (CJEU) has objected to intra-EU investor-state arbitration, it has not objected to extra-EU investor-state arbitration.¹⁰¹ Even if the CJEU were to find that extra-EU arbitration is contrary to EU law, it might have little practical impact on tribunals. At the end of the day, it is not up to the CJEU or national courts of the Union to decide on the jurisdiction of tribunals constituted under the ECT or BITs. It is for each tribunal to decide on their jurisdiction.

For the purposes of this thesis, there is no need to delve further into matters of material conflict between EU law and the ECT. If an issue of competing and incompatible regulations arises, it will be solved by the tribunal by application of article 16 of the ECT. Article 16 declares that nothing in the protective standards for investors or right to arbitration¹⁰² “shall be construed to derogate” from the other treaty, nor should anything in the other treaty be “construed to derogate” from the ECT, “where any such provision is more favourable to the Investor or Investment”. Put simply, where two treaties regulate the same issue, the one with more favourable terms for the investor should apply.

2.3.2 Selection of extra-EU BITs to study

This section deals with the selection of extra-EU BITs made for the purposes of this thesis, and how the mapping of them was conducted.

There are around 400 BITs that overlap geographically with the ECT, meaning that they are concluded between contracting parties to the ECT. Due to time constraints, a selection

⁹⁶ Burgstaller, 2011, p. 56.

⁹⁷ Regulation 1219/2012, articles 7-11.

⁹⁸ Hobér, 2020, p. 458. Compare VCLT article 31(3)(c).

⁹⁹ Hobér, 2020, p. 457.

¹⁰⁰ Hobér, 2020, p. 455.

¹⁰¹ *Opinion 1/17*, para 161.

¹⁰² Specifically, article 16 only relates to matters where Part III ECT, which contains all the directly enforceable rights for investors, or Part V, which contains the right to investor-state dispute settlement, are in conflict with other international law.

of BITs to study had to be made. Rather than a random sample, a deliberate selection was made to ensure the relevance of the studied BITs. Since the aim of the overview is to compare provisions in the ECT with clauses that will be applicable if the ECT is not, the eight EU countries that have announced their intention to withdraw from the ECT were taken as a starting point. These countries are France, Germany, the Netherlands, Poland, Slovenia, Spain, Belgium and Luxembourg¹⁰³. Among these countries we find the biggest economies in the EU (except Italy),¹⁰⁴ and some major sectors for fossil fuels in the Union¹⁰⁵. It also includes countries that are home to big international companies in the energy and hydrocarbon industry such as Total Energies, Uniper and RWE. The Netherlands is also an investor of some size in the fossil fuel industry in Central Asia.¹⁰⁶ Every BIT where one party is one of these eight countries and the second party is a contracting party of the ECT were chosen, which amounted to 105 BITs. Six of them were eventually excluded for practical reasons related to language, which left a final sample of 99 BITs to study. Annex 1, **list of selected bilateral investment treaties** contains a complete list with all the studied BITs.

With the 105 BITs some language barriers had to be overcome. France and Belgium mainly write BITs in French, Spain in Spanish, and Germany in German. All the BITs could be found in either English, German, French, Spanish, Russian, Polish, or Slovenian. This posed some translation challenges, and ultimately meant that six BITs had to be excluded from the study. For the Germanic and Latin languages my own language knowledge, supplemented with the DeepL translator program and some additional assistance from people with a better knowledge of the languages for identifying keywords proved sufficient. The great conformity that marks BITs meant that the translation task was surmountable with these tools. However, the six BITs that were written in either Russian, Polish, or Slovenian had to be excluded because of uncertainties regarding the accuracy of the translations offered by DeepL translation. This means that five out of eleven of the relevant Polish BITs as well as one of Slovenia's nine were excluded.

The mapping of the BITs is quantitative rather than qualitative, as there was no intention to interpret each treaty or its provisions in detail. The idea is rather to map the proliferation of relevant treaty provisions, or simply put, to count how many times each of them appeared in the 99 extra-EU BITs that were studied. By looking at the provisions included

¹⁰³ Belgium and Luxembourg have an economic union that entails that Belgium concludes BITs on behalf of both states, which means that there are no BITs to which Luxembourg without Belgium stands as party.

¹⁰⁴ Statista, 'GDP of European countries in 2021'.

¹⁰⁵ For oil refineries, Germany and Italy are both in the top 10 worldwide. Spain, France and the Netherlands also have oil refinery sectors of some size (World Energy & Climate Statistics: Yearbook 2022, 'Refined oil products production'). Germany and Poland are on the list of the top 10 producers globally if we look at coal and lignite production in 2021 (World Energy & Climate Statistics: Yearbook 2022, 'Coal and lignite production'). They are also the biggest producers for hard coal in the Union, followed by Czechia, Spain and France (Eurostat, 'Coal production and consumption statistics', 2023). The Netherlands is the biggest gas producer in the EU (International Energy Agency, 'Baseline European Union gas demand and supply in 2023').

¹⁰⁶ Embassy of the Republic of Kazakhstan in the Kingdom of Netherlands, 'Trade and economic cooperation between the Republic of Kazakhstan and the Netherlands'.

in the BITs we gain an idea of how these might afford protection to investments in fossil fuels, without going into a detailed interpretation of each treaty.

The study was conducted by reading the BITs and identifying the relevant clauses selected above, to analyse their proliferation in BITs. The relevant clauses were FET standards and clauses on expropriation, as well as clauses enabling investor-state dispute settlement. Sunset clauses were also mapped, with the aim of lending greater context to the future applicability of the extra-EU BITs. These clauses, and any exceptions or modifications to them were looked for in the study. The documents were also searched for keywords related to possible exceptions or specifications, such as ‘sustainable development’, ‘extraction’, ‘exception’, ‘regulation’ and more. The result can be found in Chapter 4 of the thesis.

2.4 Part two of the study: EU law

2.4.1 EU law in this thesis

The thesis is at its core a study of public international law, and that is the overarching perspective from which the problem is analysed. However, the study also contains a considerable overview and analysis of EU law. These separate legal areas have a slightly different methodology, although both the study of public international law and EU law require a study of the relevant legal sources.

EU law consists of primary law enshrined in the founding treaties and the fundamental rights charter, and secondary law such as regulations, directives and decisions.¹⁰⁷ Of immense importance for the understanding and interpretation of EU law is the case law from the Court of Justice of the European Union, which interprets the law. The Court is known for expansive interpretations and for taking an active part in shaping the law of the Union.¹⁰⁸ The EU legal system also contains important general principles which are identified by the Court or otherwise codified in the treaties. All of these sources, plus relevant interpretation instruments such as *travaux préparatoires* are relevant for the understanding of EU law.¹⁰⁹

Protection for foreign direct investment as an autonomous concept comes from public international law. In contrast, direct investment protection does not figure as the target of specific regulation under EU law. Instead, the regulation consists of a piecemeal protection found in different regulations. Consequently, a functional analysis of EU regulation is conducted, to find the norms that protect direct investments in a similar way as public international law does, even if they do it under other concepts or procedures.¹¹⁰ The most important sources for foreign investment protection under EU law identified for the purposes of this thesis are the general principles of EU law, the Charter of

¹⁰⁷ Reichel, 2014, p. 121-125. Article 1 and 288 TFEU.

¹⁰⁸ Reichel, 2014, p. 130.

¹⁰⁹ Reichel, 2014, p. 121-125.

¹¹⁰ Valguarnera, 2014, p. 153.

Fundamental Rights (CFR), and the four freedoms enshrined in the Treaty of the Functioning of the European Union (TFEU).

There are differing opinions on the nature of EU law. Some, including the CJEU, argue that it is part of the national law of the member states and that it is an autonomous legal system that does not neatly fit into the traditional distinctions.¹¹¹ Others, primarily scholars of public international law, argue that EU law is a part, albeit a unique part, of public international law.¹¹² However diverting it is to debate the correct classification, it is a discussion of very limited practical impact. Whether primary EU law is qualified as the constitutional framework of a semi-federate union or as treaties in the corpus of public international law does not really impact their application.¹¹³

For the purposes of this thesis, EU law is primarily viewed from the perspective of public international law and considered a part thereof. However, this approach does not mean that EU law is not a very rare animal in the public international law jungle. EU law contains elements that make it unique in public international law, including its supremacy over domestic law and direct effect of its legal acts.¹¹⁴ A basic assumption of legal scholarship is that each legal system constitutes a coherent whole with its own internal logic.¹¹⁵ By viewing EU law from the perspective of public international law the context for systematisation changes and it becomes easier to compare the two. Trying to compare apples and oranges is never easy but reconceptualising them both as simply ‘fruit’ makes it easier. Adopting the view of EU law as a part of public international law makes it more straightforward to compare its direct investment protection regime to norms under public international law with the same function.

2.4.2 The end of intra-EU BITs

Investment protection law in the EU has been a dynamic legal field in the last few decades. The possible withdrawal from the ECT must be seen both in the context of the critique that IIAs and BITs have been subject to, as outlined above, and the discussions on the intersection of EU law and international investment law, outlined below. This section serves to give an overview of the central developments that culminated with the termination of all intra-EU BITs in 2020. It also highlights a selection of questions relating to application of EU law in investor-state arbitration.

In 2018 the CJEU released a ground-breaking case on investment arbitration. The *Achmea* case is a preliminary ruling submitted by the German Federal Court of Justice, which asked the Court to rule on the compatibility of the Slovakia-Netherlands BIT, and especially its investor-state arbitration clause, with EU law.¹¹⁶ The CJEU concluded that

¹¹¹ Eleftheriadi, 2018, p. 355; *Opinion 2/13, On Accession to the ECHR*.

¹¹² De Witte, 2020, p. 192.

¹¹³ De Witte, 2020, p. 210.

¹¹⁴ De Witte, 2020, p. 202-204.

¹¹⁵ Smits, 2017, p. 210-213.

¹¹⁶ Case C-284/16 *Achmea*, para 23.

the investor-state dispute mechanism with arbitration was incompatible with EU law as it threatened the integrity of the EU legal system.

The main question was if tribunals might be called upon to interpret and apply EU law in investor-state disputes, and if that was a problem. The Court primarily based its decision on article 267 TFEU, which relates to how and when domestic courts can request preliminary rulings from the CJEU. The Court classified EU law as “law in force in every Member State and as deriving from an international agreement between the Member States”.¹¹⁷ As such, the arbitral tribunal might have to interpret EU law in its proceeding, according to the Court. The CJEU decided that arbitral tribunals can not request preliminary rulings from the CJEU since they are not domestic courts.¹¹⁸ As a consequence, the integrity of the EU legal system might be threatened, because there is no mechanism to ensure that the tribunal’s interpretation is in line with EU law. Furthermore, arbitral cases can not be appealed on material grounds which means that investor-state arbitration is not in line with member states’ obligation to ensure effective legal protection within the scope of EU law set out in article 19 TEU.¹¹⁹ The Court summarised as follows:

By concluding the BIT, the Member States parties to it established a mechanism for settling disputes between an investor and a Member State which could prevent those disputes from being resolved in a manner that ensures the full effectiveness of EU law, even though they might concern the interpretation or application of that law.¹²⁰

Achmea shook the ground under the feet of investment lawyers all over Europe.¹²¹ The ruling echoes the argument raised by the Commission for years, that investor-state arbitration in intra-EU disputes is incompatible with EU law.¹²² The Commission has repeatedly argued this point when it has been allowed to engage in proceedings through *amicus curiae* briefs.¹²³ Following *Achmea*, several domestic courts paused proceedings on enforcement of awards made by arbitration tribunals under BITs.¹²⁴ International tribunals were reluctant to accept the award however, and maintained that they did have jurisdiction over such disputes.¹²⁵ The tribunals argued that they are constituted under an international treaty and not part of the EU-law system, nor bound by its supremacy.¹²⁶ As such, they did not consider themselves bound by the decision from the CJEU. For a while,

¹¹⁷ Case C-284/16 *Achmea*, para 41.

¹¹⁸ Case C-284/16 *Achmea*, para 46.

¹¹⁹ Case C-284/16 *Achmea*, para 55.

¹²⁰ Case C-284/16 *Achmea*, para 56.

¹²¹ Triantafilou & Pusztai, 2020.

¹²² Talus & Särkänne, 2020, p. 11; Basedow, 2020.

¹²³ Eckes & Ankersmit, 2022, p. 16; *RREEF*, ICSID Case No. ARB/13/30, Decision on Jurisdiction, para 20; *Eiser*, ICSID Case No. ARB/13/36, Final Award, para 70.

¹²⁴ Stanič, 2020.

¹²⁵ Talus & Särkänne, 2020, p. 12.

¹²⁶ Talus & Särkänne, 2020, p. 12.

investment protection and the future of BITs under EU law was stuck in limbo, neither completely dead nor alive and fully protecting investors.

The final nail in the coffin for intra-EU investor-state arbitration came in 2020 when the member states jointly signed a treaty terminating all intra-EU BITs in one swift stroke.¹²⁷ According to the agreement this includes the sunset clauses.¹²⁸ However, the ECT is expressly exempt from the agreement, and therefore remains binding on the member states, including article 26 ECT that establishes access to investor-state arbitration.¹²⁹

Some authors were nonetheless quick to argue that *Achmea* meant that investor-state arbitration under the ECT was equally incompatible with EU law as the BIT in the case.¹³⁰ From the perspective of EU law, it makes sense to extend the application of *Achmea* to the ECT, as the arguments against the Slovakia-Netherlands BIT hold up against the ECT as well. Moreover, the Commission had argued for years that it was never intended that the ISDS-clause of the ECT should apply intra-EU, as it would undermine the dispute resolution and application of EU law.¹³¹ The Commission has argued that this was clear during the negotiations of the ECT, even if it is not clear from the letter of the final treaty.¹³² EU member states had attempted to invoke various clauses and arguments against the jurisdiction of arbitration tribunals in intra-EU disputes long before *Achmea*.¹³³

In 2019 the CJEU ruled unequivocally in *Komstroy* that intra-EU investor-state arbitration under the ECT is equally incompatible with EU law as the BITs were found to be.¹³⁴ The arbitration clause in article 26 ECT removes such disputes from the jurisdiction of national courts, and thereby from review from the CJEU. It is not in line with the guarantee of full effectiveness or the autonomy of EU law.¹³⁵

From an international law perspective, on the other hand, the conclusion is not as clear. Tribunals' argument that they are constituted under an international agreement and not the EU legal regime has merit. Arbitration tribunals have competence to decide on their own jurisdiction, so-called kompetenz-kompetenz, and therefore final say in whether to continue proceedings in intra-EU investor-state arbitration.

It must be concluded that from an EU law perspective, the incompatibility of investor-state arbitration under the ECT has been ruled on by the CJEU in *Komstroy*. However,

¹²⁷ Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union, 29 May 2020.

¹²⁸ Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union, 29 May 2020, Article 3.

¹²⁹ Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union, 29 May 2020, Preamble.

¹³⁰ Talus & Särkänne, 2020, p. 18.

¹³¹ Basedow, 2020.

¹³² Basedow, 2020, p. 276-287.

¹³³ Alvarez, 2018, paras 25.13-14; *Isolux*, SCC Case no V2013/153, Award, para 639.

¹³⁴ Case C-741/19 *Komstroy*, para 66.

¹³⁵ Eckes & Ankersmit, 2022, p. 16-17; Case C-741/19 *Komstroy*, paras 60-62.

much as tribunals were reluctant to accept the outcome of *Achmea*, the same is true regarding *Komstroy*. Ultimately, it is up to each arbitral tribunal to decide on its jurisdiction. As such, the possibility to initiate arbitration under the ECT in intra-EU disputes remains. The next section will deal briefly with the matters of applicable law in such proceedings and how norm conflicts are solved in intra-EU disputes.

2.4.3 Application of EU law in investor-state arbitration

What law is applicable in investor-state disputes, and to what extent are tribunals bound to apply EU law in intra-EU disputes? The question is not of immediate relevance to the thesis, but nonetheless enlightening as to the relationship between EU law and investor-state arbitration.

The applicable law in ECT investor-state arbitration is regulated in article 26(6) ECT where it states that a tribunal “shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law”. As such, the relevant legal sources are the ECT and other international law that is binding between the parties.¹³⁶ National law is generally not applied directly in arbitration proceedings and is not part of the applicable law under the ECT.¹³⁷ On a related note, it is accepted in international law that states can not excuse violations of international obligations by reference to national law.¹³⁸ It does not matter if a measure is allowed or required under national law, it can still be unlawful under international law.

The question is then if EU law should be considered international or national law under article 26 of the ECT. Plenty has been written on the nature of EU law in investor-state disputes, and only a brief account will be made here. Some argue that EU law comprises international law binding on both parties and is therefore applicable in the dispute. In *Electrabel*, the tribunal characterised EU law as both national and international law and decided that it was applicable as international law in the dispute.¹³⁹ Other tribunals have been more reluctant to accept that. The tribunal in the *AES* case characterised EU law as part of the internal law of the member states, as it forms an integral part of each state’s legal system and demands supremacy over domestic law and effective implementation.¹⁴⁰ Case law is not clear on how to classify EU law at this point.

If a tribunal decides to consider EU law a part of international law applicable between the parties and therefore applicable in the conflict, EU law takes precedence over the ECT in case of a material conflict between the two.¹⁴¹ From the perspective of EU law, this is a simple consequence of the supremacy and autonomy of EU law. From the public international law perspective, it is because the mutual membership in the EU can be seen as an *inter se* agreement concluded between the parties, where they agree to grant

¹³⁶ Hobér, 2020, p. 454.

¹³⁷ Mejía-Lemos, 2018, para 10.14; Hobér, 2020, p. 455.

¹³⁸ Compare VCLT article 27 and ARSIWA article 32: “The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this part”.

¹³⁹ Hobér, 2020, p. 461; *Electrabel*, ICSID Case No. ARB/07/19, para 4.126.

¹⁴⁰ Mejía-Lemos, 2018, para 10.14; *AES*, ICSID Case No. ARB/07/22, paras 7.5.2, 7.6.6.

¹⁴¹ *Electrabel*, ICSID Case No. ARB/07/19, para 4.191.

precedence to EU law.¹⁴² This is however only relevant in case of an i) intra-EU dispute, in which ii) the tribunal has classified EU law as international law, and iii) the material provisions of the ECT are in conflict with material provisions of EU law. So far, there has been no case where a tribunal found material contradictions between the ECT and EU law.¹⁴³

¹⁴² *Electrabel*, ICSID Case No. ARB/07/19, paras 4.189, 4.174-4.191.

¹⁴³ Hobér, 2020, p. 460-461. The question was raised in both *AES* and *Electrabel*, and neither tribunal found any contradictions between the two.

3 Investment protection under the Energy Charter Treaty

Knowing that the European Union and some of its member states are aspiring to withdraw from the Energy Charter Treaty raises the natural question of what they are withdrawing from. What does the multilateral treaty contain? The aim here is not to give a comprehensive overview of the whole treaty. Focus is on fair and equitable treatment, expropriation, investor-state dispute settlement and the sunset clause.

As presented in section 2.1.2 above, statistics show that the provisions that most claims, including most successful claims, in investor-state disputes are based on the fair and equitable treatment provision and the provision on expropriation.¹⁴⁴ This pattern is true both in general international investment law and for disputes under the ECT.¹⁴⁵ These provisions are found in article 10(1) and article 13 of the ECT, and they will be given extra attention in the overview below. As the aim and research question of this thesis relate to investor-state arbitration in particular, the application of article 26(2) that provides for ISDS in the ECT will also be outlined below. It is also relevant to highlight the sunset clause in article 47(3) which extends the time that the ECT remains in force even after a withdrawal. Because of the homogeneity that characterises BITs and IIAs, the analysis and detailed description of the ECT below refers both to case law from other BITs and scholarly works on international investment law in general.¹⁴⁶

3.1 Investor-state dispute settlement

Under article 26(3) ECT, each of the contracting parties give their “unconditional consent to submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article”. Under article 26(2), any investor is entitled to submit a dispute either to the courts of the host state, to dispute resolution under an investment contract, or to international arbitration. Three important aspects of the ISDS clause found in article 26 ECT will be touched upon here. Firstly, who is an investor? Secondly, what disputes can be submitted for arbitration? Thirdly, are there any conditions attached to such a submission?

The term ‘investor’ is given a broad definition in article 1(7) ECT and includes natural persons with citizenship or permanent residence in a contracting party, as well as companies and other organisations organised in accordance with applicable law of a contracting party. The term ‘investment’ is likewise given a broad meaning in article 1(6)

¹⁴⁴ UNCTAD, Investment Dispute Settlement Navigator, 2022.

¹⁴⁵ International Energy Charter. ‘Statistics on ECT Cases’.

¹⁴⁶ See *Plama*, ICSID Case No. ARB/03/24, para 164, where the tribunal expressly looks to case law from tribunals constituted under other IIAs for interpretation of the ECT.

ECT to include “every kind of asset, owned or controlled directly or indirectly by an Investor”, complemented by an exemplifying list.¹⁴⁷

This is helpful to determine what disputes can be submitted for arbitration under article 26 ECT. According to the ISDS-provision it is only “disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III” that can be submitted for arbitration. Since both ‘investor’ and ‘investment’ are interpreted broadly, it is chiefly the restriction to disputes relating to Part III of the ECT that limits what disputes can be brought before a tribunal. Part III relates to investment promotion and protection and covers articles 10-17 ECT. Among these we find the typical investment protection clauses, including non-discrimination, fair and equitable treatment, full protection and security, and expropriation. Disputes relating to Part II on market access, which serves to align the ECT with the standards of the WTO are excluded from arbitration.¹⁴⁸ The same goes for the “miscellaneous provisions” of Part IV, some of which create binding obligations between states, and some which are mere encouragement.¹⁴⁹ These are of limited interest for individual investors.

Article 26 encourages amicable dispute settlement and prescribes a three-month cooling off period before a dispute is submitted for trial. However, there is no general requirement that the investor must exhaust local remedies before they can submit the dispute to international arbitration. Interestingly, investors can submit a dispute for arbitration even if they have signed an investment contract that sets out a different dispute resolution path, as the ECT’s regulation takes precedence.¹⁵⁰ It is possible for states to adopt a limited exception to article 26 though. The exception means that *if* the investor has submitted the dispute to a local court, then it has forfeited its right to submit the same dispute to arbitration later, article 26(3)(b).¹⁵¹

3.2 Sunset clause

Article 47(3) of the ECT contains the so-called ‘sunset clause’, which entails that the treaty remains in force for investments made up until that point for another 20 years after

¹⁴⁷ Article 1(6) mom 1 ECT: ‘Investment’ means every kind of asset, owned or controlled directly or indirectly by an Investor and includes: (a) tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges; (b) a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise; (c) claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment; (d) Intellectual Property; (e) Returns; (f) any right conferred by law or contract or by virtue of any licences and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector.

¹⁴⁸ Hobér, 2020, p. 145.

¹⁴⁹ Dias Simões, 2018, para 26.04.

¹⁵⁰ Dias Simões, 2018, paras 26.13-16.

¹⁵¹ Dias Simões, 2018, paras 26.13-16.

a state withdraws. Sunset clauses are common in BITs and IIAs and serve as a further guarantee of stability for investors.¹⁵²

Italy left the ECT in 2016 after having been subject to several arbitration disputes related to renewable energy incentives.¹⁵³ Despite the withdrawal, the ECT, including article 26 on investor-state dispute resolution, remains in force for investments made before 2016 until 2036. Rockhopper, a British oil company filed a claim in 2017, and in 2022 the tribunal awarded the company 190 million euro in compensation for unlawful expropriation.¹⁵⁴

The sunset clause of the ECT has been subject to plenty of critique from commentators that are in favour of a European withdrawal.¹⁵⁵ It is suggested that the EU states can conclude an *inter se* agreement to cancel the effect of the sunset clause between themselves if they withdraw from the ECT. This is in line with article 41 of the Vienna Convention on the Law of Treaties, which entails that contracting parties can alter a treaty by subsequent agreement amongst themselves. However, some commentators are sceptical towards the ability to cancel sunset clauses and argue that they can not be cancelled by subsequent agreement between the parties.¹⁵⁶ When the EU members concluded a treaty that terminated all the EU-internal BITs, they simultaneously agreed to cancel all sunset clauses in the agreements.¹⁵⁷ The validity of that agreement has yet to be tried before a court of law or tribunal. The main argument against the cancellation of sunset clauses is that the BITs or IIAs confer rights onto a third party – the investor – which can not be revoked by an agreement that they are not party to. Stripping them of those rights might be a breach of the general principle of vested rights under international law.¹⁵⁸ The concept of vested rights has been found applicable between states and individuals. However, its scope remains unclear, and it is questionable if it extends to sunset clauses.¹⁵⁹

Consequently, it is uncertain whether the sunset clause can be cancelled by a subsequent *inter se* agreement between withdrawing parties. In any case, such an agreement will only apply between those parties. The sunset clause remains in effect in relation to the remaining ECT contracting parties, for example in the relationship between EU members and the UK, or any other state that remains a party to the ECT and does not sign an *inter se* agreement to modify it.

¹⁵² Reinisch & Tropper, 2022, p. 315.

¹⁵³ Hobér, 2020, p. 195.

¹⁵⁴ Mazzotti, P., 2022.

¹⁵⁵ Eckes, Main-Klingst, & Schaugg, 2023; Corporate Europe Observatory, 2020.

¹⁵⁶ Triantafilou & Pusztai, 2020, p. 57.

¹⁵⁷ Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union, 29 May 2020.

¹⁵⁸ Reinisch & Tropper, 2022, p. 321.

¹⁵⁹ Reinisch & Tropper, 2022, p. 324-326.

3.3 Fair and equitable treatment

In this part, a detailed overview of the fair and equitable treatment standard will be given. The aim is to present the overall scope and application of the FET standard of the ECT. The standard contains several different elements, and the focus in this presentation will be on one of these, namely the principle of stability and legitimate expectations. The fair and equitable treatment standard is one of the most commonly occurring standards of treatment in IIAs. The standard has been found breached in 37 out of 45 ECT disputes that have reached a final award.¹⁶⁰

In the ECT we find fair and equitable treatment included in a longer paragraph in article 10(1):

Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. *Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment.* Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party. [emphasis added]

It is not uncommon to include the fair and equitable treatment clause in an enumeration with other related standards, as is done in the ECT. When it happens it raises the question if fair and equitable treatment is an autonomous standard that can be separated from the rest of article 10(1) or not.¹⁶¹ There is agreement that the different treatments laid out in article 10(1) overlap to considerable extent.¹⁶² That has not prevented several tribunals from viewing them as autonomous and separate, although related, standards.¹⁶³ This is also common practice among scholars in the study of international investment law.¹⁶⁴ Hobér identifies five specific standards of treatment in article 10(1) ECT, of which the FET standard is one.¹⁶⁵

¹⁶⁰ International Energy Charter, ‘Statistics on ECT Cases’.

¹⁶¹ Mejía-Lemos, 2018, paras 10.22-10.28.

¹⁶² Mejía-Lemos, 2018, paras 10.22-10.28.

¹⁶³ Mejía-Lemos, 2018, para 10.26; *Plama*, ICSID Case No. ARB/03/24; *Electrabel*, ICSID Case No. ARB/07/19.

¹⁶⁴ Mejía-Lemos, 2018, paras 10.22-10.28; Hobér, 2020, p. 183, 187; Miljenić, 2018, p. 55; Dolzer & Schreuer, 2022, p. 195-198.

¹⁶⁵ Hobér, 2020, p. 183.

3.3.1 Relation to other standards

A quick comment on the FET standard relation to some of the other distinct standards of treatment will be made.

It is sometimes debated if the FET standard in international investment law is equivalent to the ‘minimum standard of treatment’ of aliens that is recognised under customary international law.¹⁶⁶ It is an old concept under customary law that a minimum level of non-arbitrariness and non-discrimination must apply to foreigners at all times. It prohibits state behaviour that is “unjust, arbitrary, unfair, discriminatory or in violation of due process”.¹⁶⁷ Additionally, it prohibits unjust expropriation. The concept is accepted under international investment law in the absence of treaties protecting foreign investors. It is sometimes argued by commentators and arbitrators that the FET standard is the same as the minimum protection standard of customary law. While the fair and equitable treatment standard may have its origin in customary law, there is nothing in the wording of article 10(1) ECT to indicate that they are identical today. Rather, the FET standard of the ECT “has been found to have a separate and ‘higher’ content than treatment under [customary] international law”.¹⁶⁸

Fair and equitable treatment is also separate from the deceptively similar “constant protection and security” guarantee also found in article 10(1) ECT.¹⁶⁹ It is sometimes known as full protection and security in international investment law, and generally understood as an obligation of host states to protect the physical integrity of investors.¹⁷⁰ While constant protection and security is a positive obligation to afford a minimum level of protection, FET is mainly a negative obligation for the host state to refrain from interfering with the running of the business.¹⁷¹

The sentence in article 10 that prohibits unreasonable or discriminatory measures also overlaps considerably with the FET standard, but remains a distinct provision in its own right, according to case law.¹⁷² Where unreasonable or discriminatory measures are found, it will almost always constitute a breach of FET as well.¹⁷³ An unreasonable measure is one that is based on “caprice, prejudice or personal preference”.¹⁷⁴ Together with fair and equitable treatment and expropriation it is one of the most commonly invoked standards in investor-state dispute settlement under the ECT.¹⁷⁵

¹⁶⁶ Radi, 2020, p. 70-74; Hobér p. 188; Sornarajah, 2021, p. 438-439.

¹⁶⁷ Unión Fenosa Gas, ICSID Case No. ARB/14/4, para 9.51.

¹⁶⁸ Mejía-Lemos, 2018, para 10.33.

¹⁶⁹ Mejía-Lemos, 2018, para 10.41; Hobér, 2020, p. 227.

¹⁷⁰ Hobér, 2020, p. 227.

¹⁷¹ Mejía-Lemos, 2018, para 10.41.

¹⁷² Mejía-Lemos, 2018, para 10.42.

¹⁷³ Hobér, 2020, p. 230.

¹⁷⁴ Hobér, 2020, p. 232. *Plama*, ICSID Case No. ARB/03/24, para 184.

¹⁷⁵ International Energy Charter, ‘Statistics on ECT Cases’.

3.3.2 Meaning and scope

The fair and equitable treatment standard is (in)famous for being vague and difficult to define.¹⁷⁶ According to article 31(1) of the Vienna Convention on the Law of Treaties, treaties should be interpreted in good faith in accordance with the ordinary meaning of the text. But with two terms like “fair” and “equitable” a mere reading of the text does not go far in ascertaining the meaning of the provision. The content of the standard has, according to one author, “caused much anxiety”.¹⁷⁷ It leaves plenty of room for the tribunal in disputes to decide on its scope, and nearly any action by the host state could potentially be subsumed under the vague provision, which explains why it is frequently invoked in disputes. The vagueness is at least partially by design, as the FET clause is meant to “fill gaps not covered by other standards of treatment”.¹⁷⁸

Ultimately, the provision has come to be understood as a fundamental guarantee of stability, due process, right to information and transparency. It is a procedural, not material, standard that refers to the conduct of the host state rather than substantive regulations a host might implement.¹⁷⁹ Even if it is frequently invoked in disputes, the threshold for a breach has been set rather high in practice. The International Court of Justice has stated that the FET standard covers cases of “willful disregard for due process of law, an act which shocks or at least surprises a sense of judicial propriety”.¹⁸⁰ It is also agreed that even if domestic companies are subject to the same treatment, there can still be a case for claims under the FET-principle for foreign investors.¹⁸¹

Fair and equitable treatment consists of different elements, which sometimes overlap both with each other and with other protective standards in BITs.¹⁸² UNCTAD specifies the five elements of FET as protecting legitimate expectations, and a freedom from arbitrariness, denial of justice, discrimination, and otherwise abusive treatment.¹⁸³ Dolzer & Schreuer highlight its close relationship to principles of rule of law and good faith.¹⁸⁴ Hobér refers to the elements under the ECT as stability and predictability, transparency and freedom from harassment, discrimination, and denial of due process.¹⁸⁵

Of these elements, the most relevant for this thesis is the principle of stability. The purpose here is to give an idea of to what extent fossil fuels investors would be able to make claims based on state measures or changes in regulation related to environmental protection under the ECT. The stability component of fair and equitable treatment entails considerations of public interest, which makes it the most relevant here.

¹⁷⁶ Miljenić, 2018, 54.

¹⁷⁷ Sornarajah, 2021, p. 248.

¹⁷⁸ Hober, 2020, p. 187.

¹⁷⁹ Collins, 2023, p. 125.

¹⁸⁰ Collins, 2023, p. 129; *Elettronica Sicula SpA*, para 128.

¹⁸¹ Collins, 2023, p. 128.

¹⁸² Radi, 2020, p. 86-87.

¹⁸³ Sornarajah, 2021, p. 445; UNCTAD, *Fair and Equitable Treatment*, 2012, p. 29.

¹⁸⁴ Dolzer & Schreuer, 2022, p. 187.

¹⁸⁵ Hobér, 2020, p. 191.

3.3.3 Legal stability and legitimate expectations

The concept of stability is fundamental to the purpose of IIAs and BITs. The idea is that investors are risk-averse actors, and these agreements strive to create a sense of security for them. A lack of legal predictability, volatile regulation, or reluctance to honour contractual obligations on the part of host states will thus discourage investment. In sectors where the initial investment is high and the payback period long, it is particularly important for investors to know that they are operating in a stable legal environment. This is true for the energy sector, where investments also tend to be “highly political, which in turn affects their risk profile”.¹⁸⁶ Consequently, the *Electrabel* tribunal pronounced that the legal stability and legitimate expectations principle is the “most important function of the FET standard” under the ECT.¹⁸⁷ It should be noted that legitimate expectations is not part of the customary minimum standard of treatment, but is an invention by tribunals who have interpreted it under the FET standard.¹⁸⁸

A stable legal environment entails a basic level of predictability in the legal framework, and rules out *inter alia* retroactive legislation. It also entails basic levels of transparency in legislation and entails that regulations need to be readily available and clear.¹⁸⁹ These are also all basic components of the principle of legality.

The stable legal environment-concept is closely connected to the idea of legitimate expectations of the investor. Fair and equitable treatment includes that if a state undertakes measures that violate the legitimate expectations of the investor, they may have a claim for damages. A prerequisite is that the expectation is objectively reasonable, and a requirement of due diligence is placed on the investor. Not every naive and poorly informed assumption can lead to a protected legitimate expectation.¹⁹⁰ If legitimate expectations are violated, the state has breached an international obligation and must pay damages to the investor. These are typically calculated based on the market value of the investment, in line with customary international law.¹⁹¹

One example is the *Bilcon* case, where a company had their application for a quarry and marine terminal denied since the review panel had found that the project would be inconsistent with “core community values”, including environmental considerations. The tribunal found that the decision violated the legitimate expectations of the company, because the local authorities had made repeated assurances to the benefit of the project, and the investor had no reason to suspect that “core community values” – a new, arbitrarily introduced standard of assessment Bilcon had no way of meeting – might triumph such assurances.¹⁹²

¹⁸⁶ Talus & Särkänne, 2020, p. 21.

¹⁸⁷ Mejía-Lemos, 2018, para 10.3.1; *Electrabel* Jurisdiction, Applicable Law and Liability, para 7.75.

¹⁸⁸ Sornarajah, p. 445-446; Radi, p. 88.

¹⁸⁹ Dolzer & Schreuer, 2022, p. 205-212.

¹⁹⁰ Víg, 2021, p. 119.

¹⁹¹ Radi, 2020, p. 459-460.

¹⁹² Brown & Cucinotta, 2023, p. 201; *Bilcon*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, para 590.

In the development of the principle, tribunals have had to determine what the relevant legal environment is for legitimate expectations. Arbitrational case law is not consistent on this point. Some arbitrators have accepted that the entire legal framework of the host state is relevant for setting the legitimate expectations of the investor.¹⁹³ Others have limited the relevant legal environment to contracts and semi-contractual arrangements between the host state and the investor (such as licences and concessions), as well as one-sided insurances or specific representations made by the host state.¹⁹⁴ This is connected to the principle of good faith; a state may not encourage an investor to make investments under one set of conditions, only to then retreat from that position.¹⁹⁵ Here, a closer examination of a selection of recent case law from investor-state disputes involving Spain will be conducted. This case law highlights the inconsistent approach of tribunals and gives insight into the application of the principle of legitimate expectations.

Spain introduced a number of different regulations in the late 1990's and early 2000's with the aim of promoting investment into renewable energy production. They created a system of premiums and guaranteed minimum profits aimed at ensuring that investment into solar power was profitable, recognising that these would otherwise be unable to compete with non-renewable sources on the open market. However, in a series of regulations starting in 2007, these subsidies were dismantled and the prospects for the solar power industry changed radically.¹⁹⁶ This prompted several investors to bring claims against Spain for breaching their legitimate expectations, alternatively for indirect expropriation. These claims have given rise to an interesting collection of case law, where some tribunals have found legitimate expectations breached, and others have not. The inconsistency of the case law invites questions about the legitimacy of the investor-state arbitration system.¹⁹⁷

Charanne v. Spain was the first of many cases to reach an award. The tribunal concluded that no specific commitments had been made to the investor in the case.¹⁹⁸ Moreover, they rejected that the company had legitimate expectations that the framework of the incentives would remain unchanged, as no specific commitments to that effect had been made.¹⁹⁹ The tribunal further rejected that the regulatory framework in place at the time the investment was made could itself generate any legitimate expectations that it would remain unchanged.²⁰⁰ They did however conclude that regulatory changes as a rule have to be “reasonable, proportionate and in line with public interest” to be acceptable, and found that they had been in case of *Charanne*.²⁰¹ One of the arbitrators dissented, and argued that the legal framework itself could give rise to legitimate expectations.²⁰² In

¹⁹³ Dolzer & Schreuer, 2022, p. 206; *Tecmed*, ICSID Case No. ARB (AF)/00/2, Award, para 154.

¹⁹⁴ Hirsch, 2011; Sornarajah, 2021, p. 448-450.

¹⁹⁵ *Charanne*, SCC Case No. V 062/2012, Award, para 486.

¹⁹⁶ Hobér, 2020, p. 195-202.

¹⁹⁷ Sornarajah, 2021, p. 448.

¹⁹⁸ Özgür, E, 2016; *Charanne*, SCC Case No. V 062/2012, Award, para 493.

¹⁹⁹ Özgür, E, 2016; *Charanne*, SCC Case No. V 062/2012.

²⁰⁰ *Charanne*, SCC Case No. V 062/2012, Award, paras 503-504.

²⁰¹ *Charanne*, SCC Case No. V 062/2012, Award, paras 513-514, paras 527-532.

²⁰² *Charanne*, SCC Case No. V 062/2012, Award, dissenting opinion, para 5.

Isolux, the tribunal reached a similar conclusion as in *Charanne*, but one of the arbitrators dissented along the same lines as his colleague previously.²⁰³

In a subsequent case, *Eiser*, the tribunal found that the changes in regulations in fact had violated the company's legitimate expectations. The case was submitted after *Charanne*, and encompassed additional, later changes in the legislation. The tribunal did not find that any specific commitments had been made to the investor, but based their legitimate expectations on the legal framework at the time the investment was made. The tribunal said that the ECT protects investors against fundamental changes that do not take existing investments that rely on the previous regulation into account. The tribunal found that the changes were so “total and unreasonable” and almost completely stripped the investment of its value, and therefore violated the investor’s legitimate expectations.²⁰⁴

Interestingly in *Eiser*, the tribunal conducted a more detailed interpretation of the ECT in the light of its preamble and surrounding treaties, to gain better understanding of the fair and equitable treatment standard. The tribunal concluded that an important part of the overall purpose of the ECT is stability, transparency, and long term cooperation, thus making stability a very important part of the FET standard.²⁰⁵ The tribunal concluded that fair and equitable treatment entails that “that regulatory regimes cannot be radically altered as applied to existing investments in ways that deprive investors who invested in reliance on those regimes of their investment’s value”.²⁰⁶ Similar lines of reasoning can be found in other arbitration cases such as *Micula v. Romania*,²⁰⁷ *El Paso v. Argentina*²⁰⁸, *CMS v. Argentina*²⁰⁹ and *BG Group Plc. v. Argentina*^{210, 211} They are however careful to emphasise that states are free to regulate, but if changes are too drastic or unreasonable, they might breach legitimate expectations of an investor.²¹² Nonetheless, it is a contentious discussion and one author writes that “[t]he only way to explain these awards is that the tribunals which made them were predisposed to emphasising investment protection as the sole basis of the treaty”.²¹³

It seems that most tribunals would agree that changes in the general legal framework of the host state only in exceptional circumstances can constitute violations of the legitimate expectations of investors. In *Electrabel*, the tribunal found no legitimate expectations had arisen because no specific commitments to maintaining the current legal framework had been made.²¹⁴ Similarly in *AES v Hungary*, the tribunal emphasised that legal frameworks are subject to change and that the respondent state had made no commitments to limit the

²⁰³ Hobér, 2020, p. 205; *Isolux*, SCC Case No. V2013/153, dissenting opinion.

²⁰⁴ *Eiser*, ICSID Case No. ARB/13/36, Final Award, paras 363-365.

²⁰⁵ *Eiser*, ICSID Case No. ARB/13/36, Final Award, paras 375-382.

²⁰⁶ *Eiser*, ICSID Case No. ARB/13/36, Final Award, para 382.

²⁰⁷ *Micula v. Romania*, ICSID Case No. ARB/05/20, Final Award, para 684.

²⁰⁸ *El Paso v. Argentina*, ICSID Case No. ARB/03/15, Award, para 517.

²⁰⁹ *CMS v. Argentina*, ICSID Case No. ARB/01/8, Award, para 275.

²¹⁰ *BG v. Argentina*, UNCITRAL, Award, para 307.

²¹¹ *Eiser*, ICSID Case No. ARB/13/36, Final Award, paras 383-386.

²¹² *Eiser*, ICSID Case No. ARB/13/36, Final Award, para 382.

²¹³ Sornarajah, 2021, p. 452.

²¹⁴ *Electrabel*, ICSID Case No. ARB/07/19, Award, para 155.

exercise of its legislative powers.²¹⁵ Neither tribunal found a violation of legitimate expectations. Tribunals have nonetheless concluded that drastic changes to the framework under which investors operate may violate the principles of stability and legitimate expectations.²¹⁶ They have attempted to strike a balance between the investor's legitimate expectations against the state's obligation to act for public purposes.²¹⁷

3.4 Expropriation

Most jurisdictions have established conditions under which a state is allowed to expropriate private property. Under customary international law, unlawful expropriation can fall under the scope of the minimum standard of treatment of aliens. The prohibition of unlawful expropriation is the second most invoked clause in investor-state dispute settlements under BITs globally, and third under the ECT.²¹⁸ Its scope and application are detailed in this section. Special attention is paid to the distinction between an expropriatory regulatory measure and other regulation not deemed to constitute expropriation. Expropriation is regulated in article 13(1) of the ECT:

Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalised, expropriated or subjected to a measure or measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "Expropriation") except where such Expropriation is:

- a) for a purpose which is in the public interest;
- b) not discriminatory;
- c) carried out under due process of law; and
- d) accompanied by the payment of prompt, adequate and effective compensation.

Any expropriation may only be conducted if it is non-discriminatory and with adherence to due process, for a public purpose and against due compensation.²¹⁹ If the expropriation does not meet these conditions, it will be considered unlawful expropriation.²²⁰ 'Lawful' in this context is not an evaluation of whether the measure is legal under the national law of the host country. Even a measure that is legally required under national law can constitute a violation of international obligations. The term is used to describe whether a breach of the international treaty has taken place or not. Before a tribunal turns to distinguishing between lawful and unlawful expropriation, they must first determine whether expropriation has taken place at all. This can prove rather tricky.

²¹⁵ *AES v Hungary*, ICSID Case No. ARB/07/22, Award, para 9.3.31.

²¹⁶ Dolzer & Schreuer, 2022, p. 205-207.

²¹⁷ Dolzer & Schreuer, 2022, p. 207. See for example *Saluka Investments*, Partial Award, para 306; *Plama*, ICSID Case No. ARB/03/24, Award, para 177; *Electrabel*, Decision on Jurisdiction, Applicable Law and Liability, para 7.77.

²¹⁸ International Energy Charter. 'Statistics on ECT Cases'; UNCTAD, Investment Dispute Settlement Navigator, 2022.

²¹⁹ Hobér, 2020, p. 260-262.

²²⁰ Hobér, 2020, p. 262.

3.4.1 Indirect expropriation and other regulatory measures

Article 13 covers both direct expropriation and measures having equivalent effect, so-called indirect expropriation. Direct expropriation is the transfer of title from the investor to the state or someone else. It has grown increasingly rare in recent times.

Indirect expropriation on the other hand, is an expansive concept under which an investment, following interference by the state, loses its value as an asset to the owner without being subject to a transfer of title.²²¹ It is not required that the host state's intention behind the measure was to deprive the investor of their ownership.²²² Both individual measures directed at a specific investment, and regulatory measures that change the general legal landscape for all investments can constitute indirect expropriation. Indirect expropriation under international investment law has included, *inter alia*, cases of “confiscatory taxation, denial of access to infrastructure or necessary raw materials and imposition of unreasonable regulatory regimes”.²²³

The main criteria to determine if a measure – which should be interpreted broadly – constitute indirect expropriation are the intensity of the effect, the types of effect and the duration of the effect.²²⁴ Typically, the investment is analysed as a whole, and impacts on singled out parts is not enough to constitute indirect expropriation.²²⁵ The duration of the effect is considered, as a temporary deprivation is not sufficient to amount to indirect expropriation.²²⁶

Tribunals look both to the “effect of the State measure(s) upon the economic benefit and value” and “the control over the investment” to determine if expropriation has happened.²²⁷ Both the owner's practical exercise of control or deprivation thereof, and the economic loss that the measure causes are thus considered. Uncertainty reigns regarding the relative weight of each of these factors.²²⁸ UNCTAD, for example, highlights “the erosion of rights associated with ownership by State interference” and some tribunals look at the investors practical ability to conduct its normal business.²²⁹ Dolzer & Schreuer on the other hand, claims that tribunals are inclined to base their examinations primarily on economic considerations.²³⁰ The tribunal in *Electrabel* stated that the entire investment must “lose all significant economic value” for it to be classified as indirect expropriation.²³¹ The tribunal in *Cherrenne* maintained that economic loss only amounts to indirect expropriation where it is of such magnitude that it is an effective

²²¹ Collins, 2023, p. 162.

²²² Collins, 2023, p. 164.

²²³ *Feldman*, ICSID Case No. ARB(AF)/99/1, Award, para 103.

²²⁴ Radi, 2020, p. 167.

²²⁵ Mejía-Lemos, 2018, para s13.17-18.

²²⁶ Radi, 2020, p. 167-170.

²²⁷ Dolzer & Schreuer, 2022, p. 163.

²²⁸ Radi, 2020, p. 167-170.

²²⁹ Collins, 2023, p. 162-166; UNCTAD, ‘Taking of property’, p. 20; *LG&E*, ICSID Case No. ARB/02/1, Decision on Liability.

²³⁰ Dolzer & Schreuer, 2022, p. 163.

²³¹ Mejía-Lemos, 2018, para 13.18. *Electrabel*, ICSID Case No. ARB/07/19, Jurisdiction, Applicable Law and Liability, para 7.75.

deprivation of ownership. A mere reduction in profitability was not considered enough.²³² The investor had invoked indirect expropriation, arguing that by removing the incentives, Spain “caused a brutal economic impact” on its profitability.²³³ The tribunal consequently rejected this claim. Case law is inconsistent on how to weigh the two elements.

Especially with regard to regulatory measures, tribunals must distinguish between indirect expropriation and ordinary regulatory changes. A regulation that “only incidentally affects the foreigner investor’s property and the intent serves the public interest” does not typically amount to indirect expropriation.²³⁴ Tribunals tend to leave the host state a wide breadth to determine what constitutes a public interest.²³⁵ It is recognised that states are free to regulate in their territory, and that too invasive infringement of that right can not be accepted.²³⁶ A wide assortment of legislation and measures, anything from tax policies to chemical regulation to labour law, can negatively affect a foreign investment. It would be absurd if all regulation that negatively affects an investor would amount to indirect expropriation. This is sometimes referred to as the police powers doctrine, which allows states to adopt non-discriminatory measures of “*bona fide* character for the general welfare.”²³⁷

The significance of a measure taken for a public purpose, specifically environmental protection, came up in *Santa Elena*. Costa Rica had expropriated a piece of land belonging to a US company to extend a national park for protection of unique flora and fauna.²³⁸ The dispute was on how much compensation was owed (not whether expropriation had taken place, since the parties were in agreement on that point) and Costa Rica tried to argue that their liability should be limited because of their international obligations to protect biodiversity.²³⁹ The tribunal concluded that it had no bearing on Costa Rica’s obligation to pay compensation that the taking was done for environmental protection obligated under international law.²⁴⁰

The tribunal in *Methanex* came to a different conclusion. The case concerned a ban on a certain chemical used in gasoline production, following concerns of water-, ground- and air pollution.²⁴¹ Methanex, one of the world’s largest producers of the chemical, argued that the ban constituted indirect expropriation. The tribunal rejected the claim, stating that

²³² *Charanne*, SCC Case No. V 062/2012, Award, paras 461-467.

²³³ *Charanne*, SCC Case No. V 062/2012, Award, para 284.

²³⁴ Collins, 2023, p. 165.

²³⁵ Hobér, 2020, p. 262; *Sedco*, Interlocutory Award No 55, at 248.

²³⁶ Dolzer & Schreuer, 2022, p. 174-180; Hobér, 2020, p. 271-272; See, among others, the tribunals in *S.D. Myers*, Partial Award, para 281; *Feldman*, ICSID Case No. ARB(AF)/99/1, Award, para 103; *Methanex*, Final Award of the Tribunal on Jurisdiction and Merits IV, D, para 7; *Saluka Investments*, Partial Award, para 262.

²³⁷ Brown & Cucinotta, 2023, p. 179; *Saluka Investments*, Partial Award, paras 254-255; Dolzer & Schreuer, 2022, p. 175.

²³⁸ *Santa Elena*, ICSID Case No. ARB/96/1, Award, para 18.

²³⁹ Brown & Cucinotta, 2023, p. 195; *Santa Elena*, ICSID Case No. ARB/96/1, Award, para 71.

²⁴⁰ *Santa Elena*, ICSID Case No. ARB/96/1, Award, paras 71-72.

²⁴¹ *Methanex*, Final Award of the Tribunal on Jurisdiction and Merits, pt II ch D paras 3-25.

it was within the police powers doctrine for the government to enact non-discriminatory policies for public purposes, including environmental protection.²⁴²

It is becoming increasingly common to specify the width of this regulatory freedom in BITs and IIAs, but the ECT does not contain any such specifications.²⁴³ Some tribunals have applied a proportionality test to ensure an adequate balance between regulatory freedom and investment protection, although it is far from uniform practice.²⁴⁴ The *Azurix* tribunal took inspiration from the ECHR and found that the public interest regulation must be proportionally balanced with the individual's property rights.²⁴⁵ A similar approach was employed in *Marfin v Cyprus*²⁴⁶, *LG&E v Argentina*²⁴⁷, and *PL Holdings v Poland* where the tribunal specified that the measure must be suitable, necessary and non-excessive.²⁴⁸ This is however not a cohesive or generally established practice.

3.4.2 Lawful or unlawful expropriation

If it has been established that a measure amounts to indirect expropriation of an asset, it must be decided if it is lawful or unlawful expropriation. As stated earlier, for the expropriation to be lawful, the measure must be a) for a purpose which is in the public interest, b) non-discriminatory, c) carried out under due process of law, and d) accompanied by the payment of prompt, adequate and effective compensation.

Tribunals tend to accept a host state's decision on what constitutes a public interest or not, and environmental protection measures would typically be accepted.²⁴⁹ For the measure to be lawful, it must in addition be non-discriminatory and have legal basis, but most importantly here, the investor must be given "prompt, adequate and effective" compensation. This is known as the *Hull*-formula. If no compensation is paid, then the expropriation is deemed unlawful under international law.

Rockhopper vs Italy concerned an unlawful indirect expropriation. Due to technicalities in Italian administrative law, Rockhopper was deemed to have possessed a *right to a production concession* (not to be confused with actual possession of a concession), which it was deprived of when its application was denied, thus stripping it of its investment.²⁵⁰ The tribunal also noted that Rockhopper's environmental impact assessment had been positively received, undermining the claim by Italy that the action was motivated by

²⁴² Brown & Cucinotta, 2023, p. 199; *Methanex*, Final Award of the Tribunal on Jurisdiction and Merits, pt IV ch D para 7.

²⁴³ Radi, 2020, p. 162.

²⁴⁴ Sornarajah, 2021, p. 483-485.

²⁴⁵ *Azurix*, ICSID Case No. ARB/01/12, Award, para 311.

²⁴⁶ *Marfin*, ICSID Case No. ARB/13/27, paras 823-826.

²⁴⁷ *LG&E*, ICSID Case No. ARB/02/1, Decision on Liability, paras 189, 195.

²⁴⁸ *PL Holdings*, SCC Case No. V 2014/163, Final Award, paras 320–323, 355.

²⁴⁹ Dolzer & Schreuer, 2022, p. 183; Sornarajah, 2021, p. 483-485.

²⁵⁰ *Rockhopper*, ICSID Case No. ARB/17/14, Final Award, at 194.

environmental concerns and should not be considered expropriation.²⁵¹ Because Italy had not compensated Rockhopper for the indirect expropriation, it was found unlawful.²⁵²

‘Adequate’ compensation – a prerequisite for lawful expropriation – is understood as compensation that matches the market value of the expropriated asset.²⁵³ The market value in investment disputes can be calculated in different ways. Some of the methods look at the market price, which requires that an appropriate market or other comparable transactions exist. Sometimes the book value may be relevant. Others look at the cost of replacing the investment, which of course assumes that it can be replaced.²⁵⁴ One of the most common methods of valuation is the discounted cash flow method. It is a calculation used to estimate the value of an investment today, based on predictions of how much money it will generate in the future.²⁵⁵ Like all attempts at predicting the future, it is not an exact science and it may not be appropriate for investments where it is impossible to estimate the future cash flows, if the project is very complex or operates on a risk-filled or unpredictable market.²⁵⁶

Unlawful expropriation on the other hand, falls under the scope of internationally wrongful acts for which states must take responsibility. Customary law, as reflected in the Draft Articles on Responsibility of States for Internationally Wrongful Acts, entails that states must rectify damages that they cause when violating international law. According to the *Chorzow Factory Case*, which is still considered a leading case on state liability, “reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed”.²⁵⁷ That means that the claimant should as far as possible be put in the position it would have been if there had been no breach. For unlawful expropriation, it often means that the amount is calculated based on the expected future earnings of the injured business. This does not include expected future earnings that are merely speculative or where there is no history of profitability.²⁵⁸ The reparation can also be calculated on the basis of invested costs and incurred expenses, or the price for replacing the expropriated property.²⁵⁹

This is the difference between conducting lawful expropriation, including paying the rightfully owed compensation, or being guilty of unlawful expropriation. In the eyes of the public, the difference between paying compensation as a prerequisite for lawful expropriation or paying for injury caused by a treaty violation may not seem all that important. However, given the different basis of calculation, the amount of money involved may very well be different.

²⁵¹ *Rockhopper*, ICSID Case No. ARB/17/14, Final Award, at 198.

²⁵² *Rockhopper*, ICSID Case No. ARB/17/14, Final Award, at 199.

²⁵³ Hobér, 2020, p. 277-280.

²⁵⁴ Radi, 2020, p. 461-462; Hobér, 2020, p. 277-280; Dolzer & Schreuer, 2022, p. 429-430.

²⁵⁵ Fernando, 2023.

²⁵⁶ Fernando, 2023.

²⁵⁷ Dolzer & Schreuer, 2022, p. 184. *Factory at Chorzów*.

²⁵⁸ Dolzer & Schreuer, 2022, p. 427.

²⁵⁹ Dolzer & Schreuer, 2022, p. 427.

3.5 Summary

In summary, the ISDS clause in the ECT allows for investor-state arbitration for any dispute relating to an investment, without any demand for previous exhaustion of local remedies. The sunset clause in the ECT may extend its period of application, although the withdrawing parties may attempt to modify its application between themselves.

Regarding the fair and equitable treatment standard, it is a procedural standard rather than material, and one of its chief elements relates to legal stability and legitimate expectations. The main rule seems to be that specific representations and contractual undertakings give rise to protected legitimate expectations. However, case law is far from consistent on this point, and drastic changes in general legislation have been found to violate legitimate expectations.

For expropriation, an important question for tribunals is often where to draw the line between normal regulation falling within the discretion of the state, and invasive measures that amount to indirect expropriation. There is no conclusive practice on how to draw this line. When it comes to determining if a measure amounts to expropriatory effect, the case law is also inconclusive as to the relative weight that should be assigned to economic impact and substantive deprivation of control. Moreover, it is clear that any measure that constitutes expropriation will generate an obligation to compensate the owner. The difference between lawful and unlawful expropriation under the ECT lies mainly in how the appropriate amount is calculated.

4 Investment protection under extra-EU BITs

4.1 Protection offered by selected extra-EU BITs

This part consists of a quantitative analysis of 99 extra EU-BITs (for more details on the selection and method, see section 2.3.2 above). A list of the BITs can be found in Annex 1. The absolute majority of the treaties were concluded between 1986 and 2006. The aim in this part is to see what protective standards found in the ECT are echoed in extra-EU BITs between contracting parties to the ECT. In focus are the fair and equitable treatment standard, provision on expropriation, investor-state dispute settlement and sunset clauses.

In short, the reading shows that the BITs are incredibly uniform. Close to fully homogenic, nearly every single BIT contained a fair and equitable treatment standard, a provision on expropriation, an ISDS-provision, and a sunset clause. The wordings do differ, both within one country's BITs (i.e. not all of France's BITs have identical wording), and between different contracting parties, but essentially the BITs follow the same pattern and contain the same clauses. This is shown in Table 1. The result is presented below, clause by clause, including a closer look at the few outliers.

	FET-standard	Expropriation	ISDS-clause	Sunset-clause
Yes	99	99	98	98
No	0	0	1	1

Table 1: Proliferation of relevant clauses in the extra EU BITs.

Since the subject of the thesis is fossil fuel investments, it was also relevant to determine if any of the BITs contained any references to sustainable development or anything else that might change the interpretation of the traditional protection standards to lessen the protection for carbon heavy industries. However, it was found that none of the treaties contained any reference to sustainable development, environmental protection, or any relevant exceptions, neither in the preamble or in the substantive provisions. Nor did any treaty mention the fossil fuel industry or anything that might exclude such investments from the protection of the treaty or increase the regulatory space of the host state for environmental purposes. In fact, only one treaty contained a reference to the regulatory space of the host state at all. The BIT between France and Bosnia & Herzegovina from 2003 contains a provision that widens the regulatory space for promotion of cultural and linguistic diversity.²⁶⁰

²⁶⁰ Article 2(2): "Nothing in this Agreement shall be construed in a way to prevent any Contracting Party to take any measure to regulate investment of foreign companies and the conditions of activities of these companies as part of measures which are designed to maintain and promote cultural and linguistic diversity".

4.1.1 Fair and equitable treatment

All the BITs contained a fair and equitable treatment standard. It varies over the BITs whether it is contained in its own article, in a sub-article, or in enumeration with other treatment standards. However, this should not impact the interpretation of the standard. As demonstrated above, the FET provision in the ECT is included in a longer paragraph that also covers other types of protection. That does not preclude the FET standard from being an autonomous concept.²⁶¹ Some of the BITs specify that fair and equitable treatment should be granted “in accordance with the principles of international law”. Depending on the exact wording, this can be an attempt by the drafters to connect it to the minimum standard of treatment in customary law, but no precise conclusion can be drawn.

In some BITs that France is a party to, the FET clause is accompanied by a non-exhaustive list of measures that can constitute a breach. In article 3(1) in the BIT between France and Armenia, the FET clause is specified as follows:

In particular, although not exclusively, any restriction on the purchase and transport of raw and auxiliary materials, energy and fuel, as well as means of production and operation of any kind, any obstacle to the sale and transport of products within the country and abroad, as well as any other measure having a similar effect shall be considered as *de jure* or *de facto* obstacles to fair and equitable treatment. [my translation]

In the France-Mongolia BIT from 1991, it is not explicitly specified that the list is non-exclusive.

A similar list is sometimes included in a protocol attached to German BITs.²⁶² However, in the German BITs, the list is not related to fair and equitable treatment. Instead, it is connected to provisions that prohibit host states from affording foreign investors less favourable treatment than that afforded to national companies or investors from other states. This is an indication and good example of how much the different standards of treatment in BITs overlap and underlines the fact that the treaties should not be read clause by clause, but rather as a whole.

²⁶¹ Mejía-Lemos, 2018, para 10.26; Hobér, 2020, p. 183, 187; Miljenić, 2018, p. 55.: *Plama*, ICSID Case No. ARB/03/24; *Electrabel*, ICSID Case No. ARB/07/19.

²⁶² See for example Protocol to the Agreement of the Germany - Bosnia & Herzegovina BIT (1987), (2) Ad Article 3(1): “Limitation of receiving raw and auxiliary materials, energy and fuel, any kind of means of production or operation, interference with the turnover of goods, utilisation of loan and employment of workers, as well as other measures having similar effect shall in particular be considered to be treatment less favourable within the meaning of Article 3”.

4.1.2 Expropriation

Clauses prohibiting expropriation were found in all the reviewed BITs, and they showed a striking level of similarity in both wording and content. For example, article 5(1) in the BIT between Spain and Ukraine from 2003 states that

Investments of investors of either Contracting Party in the territory of the other Contracting Party shall not be nationalised, expropriated or subjected to measures having equivalent effect to nationalisation or expropriation (hereinafter referred to as ‘expropriation’) except for public interest, in accordance with due process of law, on a non discriminatory basis and against the payment of prompt, adequate and effective compensation.

This reflects a very typical anti-expropriation clause and is almost identical to the equivalent provision of the ECT.

4.1.3 Investor-state dispute settlement

Only one treaty lacked an investor-state dispute settlement clause. Under the German-Turkish BIT from 1962, investors can not bring claims against host states for breaches of investment protection. The treaty does nonetheless contain the typical protective clauses, as well as a sunset clause of 20 years. The BIT is also the oldest of the agreements by far, which is a factor that can explain the lack of arbitration clause. None of the other agreements that either Türkiye or Germany is party to lacked an ISDS-clause.

Among the remaining 98 BITs, nine had ISDS clauses that stood out. These provisions made it possible for states to pursue claims against the host state before international arbitration tribunals, but only for disputes over the payment of compensation for expropriation. These limited ISDS-clauses can be found in three Belgium-Luxembourg Economic Union BITs with Kyrgyzstan, Tajikistan, and Turkmenistan, respectively, as well as the BIT originally concluded between Spain and the Soviet Union in 1990, which Armenia, Azerbaijan, Georgia, Kyrgyzstan, Tajikistan, and Turkmenistan have superseded to. This means that investors can not instigate proceedings invoking any other ground than expropriation. For instance, the investor can not invoke the FET standard. The remaining BITs allowed for investor-state arbitration for any disputes under the treaty, alternatively any dispute related to an investment, both of which encompass a far wider field of complaints.

4.1.4 Sunset clauses

Sunset clauses were found in all BITs except one. The average time of duration for the sunset clauses was about 15 years. No sunset clause prescribed an extended application period of more than 20 years, and only one, the Moldova-Slovenia BIT, had a period shorter than 10 years.

The only treaty that lacked a sunset clause completely is the BIT between Albania and Belgium-Luxembourg Economic Union from 1999. The protective standards of the treaty cease to apply at the same time as the treaty if it is cancelled. Otherwise, the treaty contains the same provisions as are found in the majority of BITs, including a ISDS clause.

The France-Montenegro BIT contains a sunset clause that does not set any end date for the applicability of the treaty on investments made during its time of validity. This is of course very favourable for investors. The agreement further stands out among the rest of the BITs because its protective standards only apply to French investors in Montenegro and not vice versa. The same is true for the investor-state dispute settlement clause, which only allows for French investors to bring claims against Montenegro. All the other extra-EU BITs that were studied contained mutually applicable provisions.

4.2 Summary

In conclusion, with only very few exceptions, the extra-EU BITs of the member states contain the same protective provisions as the ECT for fossil fuel investments and provide for investor-state arbitration according to the same conditions. The high proliferation of sunset clauses in the BITs means additional temporal protection for investments. This result should be representable for all extra-EU BITs that currently overlap and coexist with the ECT. Given the selection made and the high number of BITs studied – nearly one fourth of all the extra-EU BITs currently in force – the result should be reliable and have high generalisability.

The only recurring disparity was found in BITs between Belgium/Luxembourg and Spain with some central Asian countries. These contained a more limited ISDS clause, so that only disputes relating to due compensation for expropriation are covered. Any other exceptions found were limited to single treaties.

The most glaring shortcoming in the coverage offered by BITs is their geographical scope. In the end, the protection is not circumscribed substantively, but rather geographically. For geographical protective coverage to an equivalent level as that of the ECT, there would need to be a BIT between each EU member state with each contracting party outside of the Union. If every EU member state (except Italy; 26 states) had a BIT with every extra-EU contracting party (24 states) then there would be a net of 624 extra-EU BITs overlapping with the ECT. However, there are only around 400 such BITs.

5 Direct investment protection under EU law

This chapter gives an overview of direct investment protection in EU law. The aim is to identify and clarify the regulations that offer similar substantive protection as the fair and equitable treatment standard and the provision on expropriation in the ECT. Some attention will also be paid to the judicial means for pursuing individual claims under EU law. Does EU law offer equivalent protection and conditions for investors to bring claims of compensation based on environmental measures and regulation as the ECT does?

The European Union aims at economic integration and removal of barriers to trade, work and business establishment across borders. It started as a limited free trade and customs union and has since both widened and deepened its scope.²⁶³ As noted previously, EU law does not regulate specifically the treatment of direct investment across its internal borders. Instead, as noted by Dimopoulos, the regulation protects the different components and activities that constitute a direct investment.²⁶⁴ Where public international law conceives of investment as a sum of assets which are protected as a single entity, EU law instead protects the distinct activities and rights that together form a direct investment.²⁶⁵ In EU law, investment protection is connected to the wider area of economic integration and making of the common market, whereas in international law it is protected as a distinct concept. EU law adopts a holistic view of economic integration.

Naturally, the four freedoms offer protection to foreign investors, especially under the free movement of capital and the free establishment. The general principles of EU law aim to ensure standards of legality, proportionality, and effective remedy. Adherence to the rule of law is a tenet of EU law.²⁶⁶ These are principles that apply in any given situation under EU law, and they can *inter alia* be invoked to protect investors from arbitrary and harmful treatment by host states. In addition to the general principles and the freedoms regulated in the founding treaties, the Charter of Fundamental Rights (CFR) offers protection for established businesses. The most important protection found in the CFR is article 17, the right to property, and article 16, the right to conduct business.

5.1 General principles of EU law

EU law contains plenty of general principles that the CJEU has identified in the legal orders of the member states or else found in the founding treaties of the Union.²⁶⁷ Some are now codified, while others have only been identified in case law from the Court. These general principles are important for the structure and enforceability of EU law and for maintaining the rule of law. They can be used as aid when interpreting sources of EU law, to review the legality of other legal acts, or to independently base claims on.²⁶⁸ Basener

²⁶³ Craig, 2020, p. 10-38.

²⁶⁴ Dimopoulos, 2011, p. 47.

²⁶⁵ Dimopoulos, 2011, p. 47.

²⁶⁶ Hofmann, 2020, p. 222; Case 294/83, *Les Verts*, para 23.

²⁶⁷ Gonin & O'Reilly, 2020, p. 79; Hofmann, 2020, p. 241; Usher, 1998, p. 2; Case C-4-73 *Nold*; Case C-11/70 *Internationale Handelsgesellschaft*.

²⁶⁸ Cuyvers, 2017, p. 219-220.

writes that these principles can “considerably limit the discretion of a host state to interfere with individuals and legal entities outside a reasonable, justified degree”.²⁶⁹ Of most relevance here are the principles that an investor might invoke in a dispute regarding a purported unjust measure taken by a host state.

Of principal interest are those that grant similar protection as the fair and equitable treatment standard, or else might be invoked in similar situations as that provision. The fair and equitable treatment standard is, as outlined above, primarily a standard of conduct. Focus in this overview will thus be on general principles that relate to the rule of law, chiefly the principle of legal certainty and protection of legitimate expectations, as well as the principle of proportionality. These principles are sub-particles of the overarching norms of access to justice and fair process in EU law, which in turn are fundamental parts of the rule of law.²⁷⁰

5.1.1 Legal certainty and legitimate expectations

The principle of legal certainty and the protection of legitimate expectations relate to ideas about legality, transparency and predictability that are commonly found in writings on the rule of law. Legal certainty is recognised as a general principle under EU law.²⁷¹ The principle establishes both that regulations must be clear, precise and have a certain predictability, and that an individual should be able to reasonably ascertain their rights and obligations.²⁷² It is closely related to transparency in legislation. The principle of legal certainty precludes retroactive and ambiguous regulations. In practice, this means *inter alia* that laws must not have retroactive effect, and that rules that are “inconsistent or contradictory” should not be applied.²⁷³ The CJEU has declared that retroactive legislation may exceptionally be permissible. It can be justified only when there is a legitimate public interest to motivate it, and the legitimate expectations of those affected have been duly considered.²⁷⁴

The principle of legal certainty also entails that favourable administrative decisions should not be revoked, and certainly not with retroactive effect.²⁷⁵ However, this was tried in one case relating to state aid, where the Commission had declared a national grant incompatible with EU law and the question arose whether the recipient had to repay the subsidy.²⁷⁶ The Court decided that the subsidy would need to be paid back, because otherwise the effectiveness of the EU-wide rules on state aid would be undermined. The

²⁶⁹ Basener, 2017, p. 137.

²⁷⁰ Basener, 2017, p. 137-139; Hofmann, 2020, p. 222.

²⁷¹ Hofmann, 2020, p. 225; Case C 55/91, *Italy vs Commission*, para 66; Case C-43-75, *Defrenne v SA-BENA*, paras 69f; Case C-143/93, *Gebroeders*, para 27; Joined cases C-205 to C-215/82, *Deutsche Milchkontor*.

²⁷² Hofmann, 2020, p. 225.

²⁷³ Hofmann, 2020, p. 225; Case T-115/94, *Opel Austria*, para 125; Case C-143/93, *Gebroeders*, para 27.

²⁷⁴ Usher, 1998, p. 53; Hofmann, 2020, p. 226.

²⁷⁵ Hofmann, 2020, p. 227.

²⁷⁶ Hofmann, 2020, p. 226-227; Case C-24/95, *Rheinland-Pfalz v Alcan Deutschland*, paras 83-84.

objective of protecting the effectiveness of EU law overrode the principle that a beneficial measure should not be revoked retroactively.

Protection of legitimate expectations has been recognised as part of Union law.²⁷⁷ At its core it entails that individuals should be able to rely on the validity of legal acts. It protects the legitimate expectation of agents acting within the legal framework and provides for a minimum degree of legal stability.²⁷⁸ It only protects *legitimate* expectations, which may arise from a legislative act or specific assurances.²⁷⁹ Legitimate expectations can not arise from a legal act or assurance that is unlawful.²⁸⁰ The Court has placed a relatively high degree of due diligence to stay informed on the businessman, at a level expected of a reasonable person in their respective field.²⁸¹ The CJEU has placed emphasis on the foreseeability of important or major regulatory changes that impact market actors negatively. The Court asks whether it is possible for a “prudent and well-informed trader” to predict that there may be changes in the law but does not demand that exact extent or content of future changes are predictable.²⁸²

In one case, milk farmers had temporarily stopped their milk production when encouraged to do so under a “Community scheme” in 1983. When a later regulation introduced a system of milk quotas, those farmers were not granted any quotas, because they had no milk production (having halted it following the previous Union regulation). It was found to breach the farmers legitimate expectations that it ultimately had negative impact, implemented by the Commission, for them to adhere to the first scheme.²⁸³

The condition of foreseeability also entails that regulatory changes with immediate application can sometimes hurt legitimate expectations. These are cases where changes in regulation apply to an act or transaction already in progress, making it impossible for the individual to counter any negative repercussions.²⁸⁴ An example is a ban on import of a type of apple, where it was deemed that it would frustrate legitimate expectations if it applied to apples already in the process of being transported from Chile.²⁸⁵ Nonetheless, the Court held that the principle “cannot be extended to the point of generally preventing new rules from applying to the future effects of situations which arose under earlier rules”. Sometimes the CJEU has required a transition period for important or drastic changes.²⁸⁶

In one example from case law where the CJEU found that the Commission had violated the legitimate expectations of individual farmers, the Commission changed the rules relating to pricing of tobacco products. The change took effect after the time of planting

²⁷⁷ Hofmann, 2020, p. 227; Case 111/63, *Lemmerz-Werke*, para 239; Joined Cases 7/56 and 3-7/57, *Alegria*, para 118; Joined Cases 42/59 and 49/59 *SNUPAT*, paras 103, 11, 172.

²⁷⁸ Gonin & O'Reilly, 2020, p. 80.

²⁷⁹ Hofmann, 2020, p. 227; Case 120/86, *Mulder*; Case T-283/02, *EnBW*.

²⁸⁰ Hofmann, 2020, p. 227; Case T-283/02, *EnBW*; Case T-13/99 *Pfizer*.

²⁸¹ Usher, 1998, p. 60.

²⁸² Tridimas, 1999, p. 179.

²⁸³ Usher, 1998, p. 57; Case 120/86, *Mulder*.

²⁸⁴ Tridimas, 1999, p. 180.

²⁸⁵ Tridimas, 1999, p. 186.; Case C-152/88, *Sofrimport*.

²⁸⁶ Tridimas, 1999, p. 181.

had passed that year, which meant that the farmers could not take the new pricing into account and had to repay advance payment they had received from processors. The Court found that the regulation in practice had retroactive effect and violated the legitimate expectations of the tobacco farmers.²⁸⁷

Much of the case law on immediate application comes from the agricultural sector where regulations to maintain a balanced and open market are common and subject to change. Tridimas highlights that the case law demonstrates a certain lack of consistency.²⁸⁸ He does nonetheless conclude that changes in these rules, also for pending transactions, “forms an integral part of the commercial risks to which economic operators are subject”.²⁸⁹ For instance, in markets which operate under quotas, there is no obligation of the EU to consult or notify the traders before implementing changes.²⁹⁰ A possible reduction of profit is not enough to breach the principle of legitimate expectations. It has been found that a market share can not be protected under the principle of legitimate expectation, as it is inherent in a free market that market positions change over time.²⁹¹ Ultimately, “traders cannot have a legitimate expectation that an existing situation which is capable of being altered by the Community institutions in the exercise of their discretionary power will be maintained”.²⁹²

5.1.2 Proportionality

The principle of proportionality is one of the most widely used general principles under EU law.²⁹³ It applies in any number of situations, both in the relationship between legal acts of the Union and the member states, and between measures and implementations by member states in relation to individuals. In its most fundamental form, it states that the content and form of an action shall not exceed what is necessary to achieve the objectives for it.²⁹⁴ The proportionality principle is part and parcel of any restrictive measure limiting rights and freedoms under EU law. It can be used to challenge curtailing regulation and measures. It demands that measures are appropriate for ensuring the achievement of the legitimate objective pursued and do not go beyond what is necessary for it to be attained.²⁹⁵ It also requires an overall reasonable balance between the sought aim and the mean for it.²⁹⁶

²⁸⁷ Hofmann, 2020, p. 227-228. Case C-368/89, *Crispoltoni*.

²⁸⁸ Tridimas, 1999, p. 185.

²⁸⁹ Tridimas, 1999, p. 182.

²⁹⁰ Tridimas, 1999, p. 183.

²⁹¹ Peers et al, 2021, para 17(1).19.

²⁹² Tridimas, 1999, p. 183; Usher, 1998, p. 59.

²⁹³ Tridimas, 1999, p. 90; Usher, 1998, p. 36.

²⁹⁴ Hofmann, 2020, p. 220.

²⁹⁵ Gonin & O'Reilly, 2020, p. 80.

²⁹⁶ Hofmann, 2020, p. 220.

5.2 The four freedoms

The four freedoms under EU law are the free movement of goods, services, capital and persons across borders. The free movement of persons includes the freedom of establishment. For this thesis, the most relevant are the free movement of capital and the freedom of establishments. The remaining freedoms will only be given very brief consideration.

Together they cover every activity that characterises a direct investment.²⁹⁷ However, as will be demonstrated in the next section, these rules aim primarily at removing obstacles to initial establishment across borders, which in international investment law would fall in the pre-establishment phase typically not covered by IIAs. The freedoms do not primarily aim at protecting the individual rights of an investor, but rather the effective implementation and functioning of the EU single market. While not their primary purpose, the four freedoms can nonetheless be invoked by investors against state regulation that entail unfair conditions or prevents their exercise of economic activity in another host state. This motivates their inclusion in this thesis, even if they are not of highest practical relevance for a comparison with the investment protection of the ECT.

5.2.1 Freedom of establishment

The freedom of establishment is part of the free movement of persons under EU law. It creates the right to set up and run a business in a different member state. It is primarily regulated in article 49(1) TFEU, where it is written that:

Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

The right to establishment also includes the right to “take up and pursue activities as self-employed persons” as well as to “set up and manage undertakings”, according to article 49(2) TFEU. The article has direct effect.²⁹⁸

The primary aim is to ensure that foreign investors get the same treatment as nationals of the host state.²⁹⁹ However, it is not only discriminatory restrictions that are prohibited, but rather any measure that is “liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty”, according to case law.³⁰⁰ This does not

²⁹⁷ Communication from the Commission to the European Parliament and the Council, ‘Protection of intra-EU investment’, 2018, p. 5.

²⁹⁸ Tomkin, 2019, para 49.4; Case 2/74 *Reyners*.

²⁹⁹ Tomkin, 2019, para 49.28.

³⁰⁰ C-55/94, *Gebhard*, para 37.

only cover directly and indirectly discriminatory measures, but any regulation or decision that might deter persons from exercising their freedom to conduct business.³⁰¹

The concept of ‘establishment’ covers any form of “actual pursuit of an economic activity through a fixed establishment in another Member State for an indefinite period”.³⁰² Its material scope is interpreted broadly.³⁰³ It includes both the setting up of a new business or subsidiary, as well as relocation of an existing business. It also covers purchases and mergers of existing businesses across borders.³⁰⁴ The investor’s expectation of profit and the permanent link that is established with the host country are important aspects of a protected establishment.³⁰⁵ Very temporary projects and mere portfolio investments fall outside of the scope of the article. Short-term projects or business endeavours are covered by the freedom to provide services in article 56 TFEU. The provision has a broad personal scope and extends protection to any legal entity that has its business or general administration within a member state.³⁰⁶

Secondary legislation on the implementation of the freedom of establishment will not be covered here, due to time and space constraints. A short note on the Services Directive from 2006 is nonetheless motivated, as it highlights the primary aim of article 49 TFEU. The directive is primarily concerned with streamlining the pre-establishment phase of a cross-border establishment, and it does not offer any additional protection to companies once they are established.³⁰⁷ This reflects the primary purpose of article 49 TFEU, which is to remove barriers in cross-border establishment.³⁰⁸

Restrictions to the freedom of establishment can be justified in two different ways, depending on if they are discriminatory or non-discriminatory.

Any discriminatory restriction of the freedom of establishment for non-nationals can only be justified in accordance with article 52(1) TFEU. States are only allowed to take such measures that are laid down in law, regulation, or administrative action, for grounds of “public policy, public security or public health”. The CJEU has decided that, in accordance with general principles of EU law, such measures have to be proportionate to the aim they are trying to achieve.³⁰⁹ Consequently, it has been decided that discriminatory measures are only justified when there is a genuine, sufficiently serious threat to a fundamental societal interest.³¹⁰ In the Service Directive, environmental protection is added to the public concerns that can justify a discriminatory restriction of

³⁰¹ Basener, 2017, p. 113.

³⁰² C-221/89, *Factortame*, para 20.

³⁰³ Tomkin, para 49.14; Case C-384/08, *Attanasio Group*, para 36.

³⁰⁴ Dimopoulos, 2011, p. 40.

³⁰⁵ Tomkin, 2019, para 49.2.

³⁰⁶ Basener, 2017, p. 116.

³⁰⁷ Directive 2006/123/EC; Tomkin, 2019, para 49.4.

³⁰⁸ Tomkin, 2019, para 49.37.

³⁰⁹ Tomkin 2019, para 52.9.

³¹⁰ Tomkin 2019, para 52.10; C-546/07, *Commission v Germany*, para 51.

the freedom of establishment.³¹¹ The case law on article 52 TFEU is rather limited and has mainly concerned regulation of gambling and medical services.³¹²

For non-discriminatory measures that still restrict the exercise of freedom of establishment, there is an alternative way of justification to make them acceptable under EU law. It was established by the CJEU and is known as the Cassis de Dijon-formula, principle of overriding interests, or the rule of reason.³¹³ The exception can be levied on all four free movements. Restrictions can be acceptable if they are justified “by imperative requirements in the general interest; [...] suitable for securing the attainment of the objective which they pursue; and [...] not go beyond what is necessary in order to attain it”.³¹⁴ The test asks if a restriction is necessary for an important public interest, if it is suitable to achieve that aim, and if there are less invasive options. An overall balance of interests between the aim and the right to establishment is also conducted.³¹⁵

The case law relating to these non-discriminatory measures is richer. The Court has found that objectives of environmental protection and safeguarding fundamental rights can justify derogation from the freedom of establishment.³¹⁶ Much of the case law on limitations relate to demands of certain qualifications to operate a specific business and prior authorisation, all of which typically fall in the pre-establishment period.³¹⁷ Measures relating to taxation are on the other hand more likely to fall within the post-establishment period.

5.2.2 Free movement of capital

The free movement of capital is chiefly regulated in articles 63-66 of the TFEU. Article 63(1) sets out the main rule, which is that: “Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited”. The provision gives rise to direct effect.³¹⁸

There is no exclusive definition of what constitutes movement of capital, but ‘capital’ has been interpreted rather broadly. It does not only cover cash or other monetary assets. According to the Directive for the implementation of Article 67 of the TFEU, movement of capital covers direct investment activities such as establishing new enterprises or extensions of existing ones.³¹⁹ Other types of property transfers, for example the acquisition, use or disposal of immovable property can also be covered by the

³¹¹ Directive 2006/123/EC, article 16(1)(b).

³¹² Tomkin, 2019, paras 52.13-14.

³¹³ Tomkin, 2019, paras 49.31-32; Schütze, 2018, p. 534; Case 120/78, *Cassis de Dijon*.

³¹⁴ C-55/94, *Gebhard*, para 37.

³¹⁵ Schütze, 2018, p. 647.

³¹⁶ Tomkin 2019, para 49.32; Case C-384/08, *Attanasio Group*; C-302/86, *Commission v Denmark*, para 9; Case C-309/02, *Radlberger*, para 31; Case C-438/05, *Viking Line*, para 45.

³¹⁷ Tomkin, 2019, paras 49.38-61.

³¹⁸ Flynn, 2020, p. 488; Tomkin & Steiblytė, 2019, para 63.4; Joined cases C-163/94, C-165/94 and C-250/94, *Sanz de Lera*.

³¹⁹ Directive 88/361/EEC, Annex 1.

provision.³²⁰ Acquisition of property can fall either under the under the scope of the freedom of establishment or the free movement of capital, depending on its function in the specific case.³²¹ Except in cases where property rights fall under the freedom of establishment, there is no need to doubt that all assets understood under ‘investment’ in international law can fall within the scope of the free movement of capital, according to Basener.³²²

Article 63(1) TFEU states that all restrictions on the free movement of capital shall be prohibited. The provision aims both at market access and at any measures that might limit post-investment transfer of capital. It includes all restrictions, not only those that are discriminatory.³²³ The space for member states to limit the free movement of capital is restricted to the specific exceptions carved out in articles 64-66 TFEU, which relate to capital transfers to or from third countries and to tax law exceptions. These specific restrictions are not of high relevance for this thesis.

Moreover, the member state may limit the free movement of capital according to the *Cassis de Dijon*-formula created by the CJEU, same as the freedom of establishment.³²⁴ Non-discriminatory restrictions can be justified if they are undertaken in the public interest, the measure is suitable for the aim and not unnecessarily intruding, and there is a general balance between the public interest and the freedom it curtails.³²⁵ This means that a member state can impose measures that restrict the free movement of capital, if the measure is proportionate to the public purpose they wish to achieve, and there is no less restrictive way of achieving the same thing. Some typical categories of measures that restrict the free movement of capital are limitations on the in- or outflow of capital, and various fiscal- and taxation regulations.³²⁶ It seems that many of the restrictions caught in the net cast by the free movement of capital relate more to questions of market access than the treatment of investments post-establishment.

Measures adopted to protect the environment have been accepted under the *Cassis* formula in past case law.³²⁷ In *Reisch*, the CJEU noted that a system that required prior authorisation before the acquisition of immovable property could constitute a violation of the free movement of capital.³²⁸ The Court decided in the end that the measure was proportional and that environmental protection constituted an overriding interest to justify circumscribing the free movement of capital.

³²⁰ Flynn, 2020, p. 486; Joined cases C-515/99 et al, *Reisch*, para 29.

³²¹ Tomkin & Steiblytė, 2019, paras 63.12-15, 63.39. Whether such a measure is considered under capital or establishment depends on if it mainly impairs the ability to run and establish a business or if it primarily relates to capital flows. “As a rule, the former freedom will be relevant where the purchase is an investment, the latter where the purchase is connected with the creation of a base for the purposes of pursuing an economic activity in another MS”. (para 63.39).

³²² Basener, 2017, p. 119.

³²³ Tomkin & Steiblytė, 2019, para 63.24.

³²⁴ Tomkin & Steiblytė, 2019, para 63.28.

³²⁵ Flynn, 2020, p. 498.

³²⁶ Tomkin & Steiblytė, 2019, paras 63.31-54.

³²⁷ Tomkin & Steiblytė, 2019, para 63.28; Joined cases C-515/99 et al, *Reisch*, para 35.

³²⁸ Flynn, 2020, p. 486-493; Tomkin & Steiblytė, 2019, para 63.25.

5.2.3 Other free movements

The free movement of goods and services laid down in articles 34, 35 and 56 of the TFEU can sometimes be relevant for direct investment protection. The free movement of services is written to catch economic activities that are not covered by any of the other three freedoms.³²⁹ It will sometimes cover situations where the long-term component required to fall under the scope of freedom of establishment is missing.³³⁰ Economic operations that consist of contractual services and concessions would fall under the definition of ‘investment’ in international law. In EU law, such activities are protected by the freedom to provide services, according to case law from the CJEU.³³¹ In those situations, the free movement of services offers investment protection equivalent to that under the freedom of establishment.

5.3 The Charter of Fundamental Rights of the European Union

5.3.1 Application and limitations of the Charter of Fundamental Rights

The Charter of Fundamental Rights of the European Union (CFR) came into full effect in 2009 with the Treaty of Lisbon, although it was drafted in 2000. It lists basic human rights that the institutions and bodies of the EU must adhere to at all times.³³² It also applies to member states, but “only when they are implementing Union law”, according to article 51(1). This has been given a broad meaning in practice. ‘Union law’ means any legislative act of the Union.³³³ The CJEU has decided that member states are “implementing” Union law any time they implement or apply a piece of EU legislation, but also any time they apply a rule that curtails a right or freedom established in EU law, even the rule is laid down in national law in an area of national competence.³³⁴ The last instance where a member state is “implementing” EU law is when the subject matter or objective of the national act means that it can affect or be affected by EU law.³³⁵ In the area of investment protection, which is closely related to economic integration and the four freedoms, it is difficult to conceive of a situation where a state measure that negatively impacts an investor does not fall within the scope of application of the CFR. Consequently, it will be assumed that the CFR is applicable in these instances.

It is possible for states to derogate from and place limitations on the rights enshrined in the CFR. Rather than having each article detailing the conditions for derogation of each

³²⁹ Article 57 TFEU, “Services shall be considered to be ‘services’ within the meaning of the Treaties where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons”.

³³⁰ Basener, 2017, p. 122-123.

³³¹ Dimopoulos, 2011, p. 45; Case C-231/03 *Coname*; Case C-358/00 *Die Deutsche Bibliothek*; Case C-324/98 *Telaustria Verlags*.

³³² Article 51 CFR.

³³³ Basener, 2017, p. 125.

³³⁴ Spaventa, 2020, p. 262-263.

³³⁵ Cuyvers, 2017, p. 227.

right, the legislators choose a universal limitation provision in article 52(1). The article reads as follows:

Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

The provision sets out conditions of legality and proportionality, as well as a minimum protection for the “essence of the right” in question. The legality requirement means that the restricting measure must have its basis in law. It also demands a basic level of clarity and accessibility for the relevant legislation.³³⁶ The idea of the “essence” of the right is more unclear. Some have suggested that it is the minimum core of the right that must be protected, over which “one can say with a very high degree of certainty that no countervailing principle will take authority”.³³⁷ In practice, this criterion has been treated with varying degrees of rigour.³³⁸

The proportionality test of article 52(1) consists of four different elements. The restriction must be made in the general interest, and there must be a rational connection between the measure and the aim it serves. It must furthermore be necessary to impose that measure, e.g., there is no less infringing measure available. Lastly, it includes a typical proportionality test, whereby a greater detriment to freedom must be outweighed by a greater gain or more important purpose in the public interest.³³⁹

Any state wishing to limit a freedom or right that the CFR sets out will have to justify the infringement with reference to the conditions set out in article 52(1). The relevant freedoms for investment protection are the freedom to conduct business and the right to property.

5.3.2 The freedom to conduct business

The freedom to conduct business can be found in article 16 of the CFR, where it simply says that “The freedom to conduct a business in accordance with Community law and national laws and practices is recognised”. It applies to both natural and legal persons.³⁴⁰ Lock says that the right does not offer any protection not already covered by the four freedoms of movement, and that an individual who has reason to invoke one of the four freedoms will often also have reason to invoke article 16.³⁴¹

³³⁶ Lock, 2019, para 52.6.

³³⁷ Lock, 2019, para 52.9.

³³⁸ Lock, 2019, para 52.9.

³³⁹ Lock, 2019, paras 52.11-17.

³⁴⁰ Basener, 2017, p. 127.

³⁴¹ Lock, 2019, para 16.4.

Its main components are the freedom to engage in business (to start, conduct and end it), contractual autonomy and freedom of competition.³⁴² In *UPC Telekabel*, the CJEU included in the scope of protection the right for businesses to freely use the economic, technical and financial resources available.³⁴³ Furthermore, some degree of legal certainty for the economic planning of an undertaking is protected under the provision.³⁴⁴ The right requires a certain level of “conformity, transparency and stability” in the financial and strategic planning of the companies.³⁴⁵ If a measure imposes unfair costs or alters the business to its core, it might be an infringement of article 16.³⁴⁶ The right even extends to protect the established market position of a company, which means that a regulation by a member state that hurts the market position of a company to a considerable degree might be a violation of article 16 CFR.³⁴⁷

The CJEU has found that a demand for a certain clinical trial before marketing of a pharmaceutical product constituted a restriction on the right to conduct business freely.³⁴⁸ Furthermore, the Court has found that imposing undue costs on companies, “where not justified by the Community interests”, can impair the right to conduct business.³⁴⁹ There is no case law on what compensation or specific legal remedies are offered to companies in cases where the right has been unduly infringed.³⁵⁰

Derogations or restrictions to the right must be introduced in accordance with the conditions in article 52(1) outlined above. The CJEU has highlighted the social and societal function of article 16 when it comes to restricting it. It must be recognised that the right to conduct a business is a cornerstone of a free market society, but that it may be “subject to a broad range of interventions” in the public interest.³⁵¹ In some ways it constitutes a very soft right, which may be derogated from for a wide range of public purposes. The Court has concluded that “the importance of the objectives pursued may justify restrictions which bring about even substantial negative consequences for certain economic operators”.³⁵² Peers et al emphasise the need for courts to make normative decisions when the right to business is weighed against other interests of society.³⁵³

5.3.3 The right to property

The right to property was a general principle of EU law before it was codified in article 17 of the CFR.³⁵⁴ The codification in CFR is based on article 1 of Protocol 1 to the

³⁴² Lock, 2019, paras 16.1-6; Basener, 2017, p. 127; Case C-134/15, *Lidl*, para 28.

³⁴³ Case C-314/12, *UPC Telekabel*, para 49.

³⁴⁴ Peers et al, 2021, para 16.38.

³⁴⁵ Basener, 2017, p. 128.

³⁴⁶ Basener, 2017, p. 128.

³⁴⁷ Peers et al, 2021, para 16.06.

³⁴⁸ Peers et al., 2021, para 16.36; Case T-52/09, *Nycomed Danmark v EMA*, para 91.

³⁴⁹ Peers et al., 2021, para 16.41; Case C-283/11 *Sky Österreich*, para 59.

³⁵⁰ Peers et al, 2021, para 16.64.

³⁵¹ Gonin & O'Reilly, 2020, p. 73; Peers et al, 2021, para 16.2; Lock, 2019, para 16.6; Case C-544/10, *Deutsches Weintor*, para 54; Case C-283/11 *Sky Österreich*.

³⁵² Case T-52/09, *Nycomed Danmark v EMA*, para 89.

³⁵³ Peers et al., 2021, paras 16.25-34.

³⁵⁴ Lock, 2019, para 17(1).1; Usher, 1998, p. 93; Case 44/79, *Hauer*.

European Convention on Human Rights, which means that case law from the European Court of Human Rights is of relevance to the interpretation of article CFR, although it is not excluded that the Union interpretation may offer more comprehensive protection.³⁵⁵ Where article 16 is more concerned with the acquisition of assets, the right to property aims at the protection of ownership.³⁵⁶

Article 17(1) CFR is worded as follows:

Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.

The provision is similar to the prohibition against unlawful expropriation found in most IIAs, including the ECT. It provides that no one shall be deprived of their property, unless properly compensated and for a public interest. However, the last sentence in article 17 CFR expressly recognises the right for states to regulate the use of property for public purposes. A similar provision is missing from the ECT.

The term property covers already acquired possessions. Property is understood as “rights with an asset value creating an established legal position under the legal system, enabling the holder to exercise those rights autonomously and for his benefit”.³⁵⁷ It includes every kind of imaginable asset, including immovable and movable property, contract-based claims for money, licences and permits. The CJEU has written that:

benefits from social securities or concessions, authorizations or back-payments of taxes, [...] are qualified as property in the sense of Art. 17 of the Charter. This requires however that either those rights were granted in return for any (monetary or non-monetary) contribution or, alternatively, protected by legitimate expectations of the owner (protection of acquired rights).³⁵⁸

However, it does not cover market shares or commercial interest and opportunities.³⁵⁹ These types of assets “reflect only a momentary economic position exposed to the risk of changing circumstances” and are protected under the freedom to conduct business as outlined above.³⁶⁰ The property that is protected by CFR also includes “economic interests that are a principal condition for carrying on business activities”, and

³⁵⁵ Article 52(3) CFR, “In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection”.

³⁵⁶ Lock, 2019, para 17(1).3.

³⁵⁷ Gonin & O'Reilly, 2020, p. 74.

³⁵⁸ Joined cases 154/78, 205/78 et al, *SpA Ferriera Valsabbia*, para 89.

³⁵⁹ Gonin & O'Reilly, 2020, p. 74; Joined cases 154/78, 205/78 et al, *SpA Ferriera Valsabbia*, para 89.

³⁶⁰ Gonin & O'Reilly, 2020, p. 74; Case 280/93, *Germany vs Council*.

withdrawing an alcohol licence was found in one case to be an interference with the right to peaceful enjoyment of possessions.³⁶¹ A company's clientele and good-will can also fall within the scope of protection, but expected future income does not.³⁶²

Article 17(1) provides for two types of protection for property: firstly, against expropriation and secondly against other types of regulation.

Firstly, it protects against expropriation, both direct and indirect. The purpose of including *de facto* expropriation in the scope of protection is to ensure practical and effective enjoyment of the right, not to expand the meaning of expropriation.³⁶³ Case law from the ECtHR indicates that indirect expropriation refers to situations where the property has in effect been taken from the owner, not where it has merely lost value or been subject of regulation. Case law includes cases where the state has taken possession of land for military purposes without any remedy, where it started a public road construction project without formal expropriation, and where private land was dedicated as a public forest.³⁶⁴ A reduction from 45% to 0,4% of stock shares in a capital company following increases in capital was also indirect expropriation.³⁶⁵ These are all cases where the element of deprivation is evident.

The CJEU identifies indirect expropriation by assessing if the “remaining legal position of a proprietor still allows a meaningful use of the property in question”.³⁶⁶ While economic value might be an indication of the opportunity to make use of the property, it does not seem to be an independent part of the test of deprivation. Indirect expropriation is described in the literature as being an “exceptional” finding under article 17 CFR. The court has not specified any criteria for the identification of indirect expropriation.³⁶⁷

For expropriation to be lawful it must have a legal basis, be in the public interest and performed against due compensation.³⁶⁸ The measure also needs to strike a suitable balance between the infringed right and the interest it serves, in line with article 52(1) and the general principle of proportionality.³⁶⁹ Under the ECHR and CFR, the question of compensation for expropriation relates to the proportionality of the measure. Without due compensation it is likely that the damage for the individual is too great to pass the proportionality test.³⁷⁰ The compensation must be fair, which the CJEU has equated with the market value of the property.³⁷¹

³⁶¹ Grabenwarter, 2013, p. 369.

³⁶² Grabenwarter, 2013, p. 369; *Van Marle and Others v. the Netherlands*, No. 8543/79 et al, para 41.

³⁶³ Schabas, 2015, p. 975.

³⁶⁴ Grabenwarter, 2013, p. 372; *Papamichalopoulos and Others v Greece*, No. 14556/89, paras 43f; *Gianni and others v Italy*, No. 35941/03, paras 81f; *Köktepe v. Turkey*, No. 35785/03, para 84.

³⁶⁵ *Olczak v. Poland*, No. 30417/96, para 61.

³⁶⁶ Grabenwarter, 2013, p. 371-372.

³⁶⁷ Peers et al., 2021, para 17(1).36.

³⁶⁸ Basener, 2017, p. 130.

³⁶⁹ Basener, p. 134-135; Usher, 1998, p. 95; *Sporrong and Lönnroth v. Sweden*, No. 7151/75, para 69; Case C-84/95, *Bosphorus Hava*.

³⁷⁰ Grabenwarter, 2013, p. 378.

³⁷¹ Peers et al., 2021, para 17(1).41.

Secondly, article 17 CFR covers other types of regulation of the use of property. These are the situations where a regulation or measure does not amount to expropriation. There are plenty of commonplace norms that regulate the use of property, such as inheritance laws, licensing requirements and planning laws. Nonetheless, construction bans³⁷², restrictions under planning law³⁷³ and measures affecting the possibility of engaging in the activity corresponding to a licence³⁷⁴ are all examples of regulation that have breached the right to property without constituting indirect expropriation.

Regulations of the use of property are allowed if they are “necessary for the general interest”. That means that there needs to be a proportionate balance between the right and the purpose the regulation serves.³⁷⁵ Legitimate general interests can often be derived from Union law.³⁷⁶ The CJEU has *inter alia* accepted regulations on the use of property for reasons of environmental protection.³⁷⁷ The CJEU has generally granted the member states a broad margin of appreciation to set their policies.³⁷⁸ Under the general principle of right to property, the CJEU has established that when the regulation does not amount to expropriation, it is not inherent in the protection that the state must pay compensation.³⁷⁹

5.4 Enforcing rights under EU law

5.4.1 Effective remedy and national autonomy

EU law guarantees every natural or legal person subject to EU law access to an effective judicial remedy. It is both a general principle and codified in article 47 of the CFR, as well as articles 6 and 13 of the European Convention on Human Rights.³⁸⁰ The right includes both a procedural element of access to judicial remedy, and a substantive right to adequate relief.³⁸¹ The right to an effective remedy is an element of the rule of law and concepts of legality and right to a fair trial. Everyone should have equal access to court and equal opportunity to pursue a claim before a national court.³⁸² This does not mean that EU contains a right for individuals to pursue claims before the CJEU directly. Nor does it mean that EU law regulates the specific remedies that must be available to rectify

³⁷² *Allan Jacobsson v. Sweden*, No. 10842/84, para 53.

³⁷³ *Pine Valley v. Ireland*, No. 12742/87, para 56.

³⁷⁴ Grabenwarter, 2013, p. 372-373; *Centro Europa v. Italy*, No. 38433/09, para 186. Measures were implemented that affected a licence for nationwide terrestrial television broadcasting, which delayed the start-up date for the business.

³⁷⁵ Gonin & O'Reilly, 2020, p. 75-76; Schabas, 2015, p. 972; *Sporrong and Lönnroth v. Sweden*, No. 7151/75.

³⁷⁶ Peers et al., 2021, para 17(1).46.

³⁷⁷ Peers et al., 2021, para 17(1).46; *Bayer CropScience*, Case C-442/14.

³⁷⁸ Peers et al., 2021, para 17(1).54; Gonin & O'Reilly, 2020, p. 75.

³⁷⁹ Usher, 1998, p. 93; Case 44/79 *Hauer*.

³⁸⁰ Case 85/76, *Hoffmann-La Roche*, para 9; Case 222/84, *Johnston*, para 95.

³⁸¹ Gonin & O'Reilly, 2020, p. 77.

³⁸² Lock & Martin, 2019, paras 47.1-5.

breaches of EU law. Instead, the right to effective remedy is satisfied by access to national courts, and the remedies decided in national law.

EU law is applicable and enforceable in the domestic courts of the member states.³⁸³ Many legal acts of the Union have direct effect and can be invoked directly before national courts. The four freedoms and the rights in the CFR all have direct effect.³⁸⁴ Some of the most fundamental principles found in EU law serve to make sure that the legal framework enjoys effective and coherent implementation in all of the Union. The principle of effectiveness means that it may not be practically impossible, nor excessively difficult to enforce a claim based on EU law.³⁸⁵ Every court in EU member states is obliged to apply EU law loyally and ensure the effective implementation of Union law. They are also empowered by the CJEU to set aside and not apply national law that is contrary to EU law, to maintain the primacy of EU law.³⁸⁶

If a member state enacts legislation that is contrary to EU law, or violates an individual right enshrined in the CFR, an individual can make a claim before a national court on the basis of EU law. It is largely left to the discretion of each member state to decide on procedural rules and decide on adequate means for redress.³⁸⁷ If a national court is unsure about the interpretation of a legal act of the EU, it may request a preliminary ruling from the CJEU under article 267 TFEU. The idea is to ensure consistent application of EU law in all member states. Requesting a preliminary ruling is left to the discretion of the domestic court in each case, and there is no way for an individual claimant to compel a court to do it.

5.4.2 State liability claims

As noted here, EU law does not prescribe the specific procedures or means of redress that must be available in order to fulfil the right to effective remedy. One salient exception to this national autonomy is state liability for violations of EU law in cases of individual injury. In *Francovich*, the CJEU stated that “the principle of State liability for harm caused to individuals by breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty”.³⁸⁸ This is similar to the general obligation in public international law of state responsibility for internationally wrongful acts, as well as the general principle frequently found in private law that a person who causes harm to another shall repair the damages.

In later case law it has been specified that the right to reparation for harm exists in cases where a member state has i) committed a sufficiently serious breach, ii) of a legal provision that confers rights to individuals.³⁸⁹ Consequently, not all breaches of EU law give rise to a claim for reparations for an individual. Only in instances where the violated

³⁸³ Bobek, 2020, p. 182; Schütze, 2018, p. 403-407.

³⁸⁴ Schütze, 2018, p. 81-88.

³⁸⁵ Bobek, 2020, p. 180-183; Schütze, 2018, p. 403-407.

³⁸⁶ Bobek, 2020, p. 175-177; Schütze, 2018, p. 403-407.

³⁸⁷ Schütze, 2018, p. 403-407.

³⁸⁸ Bobek, 2020, p. 183; Joined cases C-6/90 and C-9/90, *Francovich*, para 35.

³⁸⁹ Bobek, 2020, p. 184.

rule confers individual rights and has been seriously breached to the detriment of an individual does EU law force the state to pay reparation. Claims for reparation under the principle of state liability are, like any claims relating to breaches of EU law, pursued before national courts.

5.5 Summary

To sum up this chapter, it appears that investment protection equivalent to that in the ECT figure mainly in the general principles of EU law and the CFR. Additionally, the four freedoms for the single market cover direct investment activities, although their practical relevance is primarily in the pre-establishment period. Individual rights are enforced in national courts, and there is no way to bring a claim directly before the CJEU. EU law guarantees everyone access to an effective judicial remedy, but it is up to member states to ensure the implementation and execution of that right.

Proportionality and adherence to the rule of law are important principles in EU law. The general principles of legal certainty and legitimate expectations in EU law preclude unclear legislation and retroactive application, and sometimes require a transition period for dramatic changes in legislation. Meanwhile, the right to property shows great overlap with the provision on expropriation found in the ECT. However, under article 17 CFR, states are explicitly allowed to regulate the use of property for public purposes, as long as the restriction is proportionate to the aim. Some aspects of property rights are protected under the right to establishment in article 16 CFR rather than article 17 CFR. Moreover, the right to conduct a business covers various infringements in the running of the business, although such infringements may be justified if they are proportionate to their aim.

6 Analysis of EU law compared to the Energy Charter Treaty

This chapter contains the challenging task of conducting a functional comparison of the standards of treatment offered under the ECT with the investment protection offered under EU law. It is not possible to give an exhaustive account of the differences between the frameworks. Guided by the research question and aim of the thesis, the presentation focuses on the instances where the frameworks appear to offer differing conditions for states to defend environmental measures or for investors to bring claims against states for implementing them. This will give us an idea of how the legal conditions for investor-state disputes, specifically over environmental protection measures, changes if the EU and its member states withdraw from the ECT. The chapter is divided into four parts: the first touches on some general differences, the second on the principle of legitimate expectations and related concerns of legality and transparency, third on the right to property and fourth on the procedural options for investors.

6.1 General differences

Substantive standards in international investment law are sometimes criticised for being vague and unpredictable. The protection offered under EU law suffers from a similar yet distinct issue of inadequate transparency. There, the issue is not that the principles are vague, but rather that they are not found in one cohesive context. Protective standards of similar function as those found in international investment treaties are spread out in a wide patchwork of general principles, case law and fundamental rights. This makes it difficult to penetrate and get an overview of the different norms and principles, which is another way to impede predictability.

Another difference lies in the aim of the respective judicial organs, but also in the diverging nature of the legal frameworks. The CJEU aims at the protection of individual rights enshrined in EU law, of course, but also at the protection of the integrity and effectiveness of EU law. They are therefore more likely to take into account if a regulation or measure will undermine the effective implementation of EU law. In one case it was decided that a wrongfully paid subsidy had to be repaid, because otherwise it would undermine the Union rules on state aid.³⁹⁰ It is likely that a similar case before an arbitration tribunal would have had a different outcome, and that reclaiming the subsidy would constitute a breach of the investor's legitimate expectations. This is intimately connected to the fact that EU law is a complete legal system. The general principles and other norms that aim at protecting investors are part of the same legal systems as e.g. rules on state aid and EU legislation on environmental protection. These mutually incompatible norms are equally applicable, and the interests must be weighed by the CJEU. An arbitration tribunal under the ECT does not apply national law in the process, and obligations under i.e. national environmental law can not justify violations of international obligations. Tribunals do not typically take other areas of international law,

³⁹⁰ Hofmann, 2020, p. 226; Case C-24/95, *Rheinland-Pfalz v Alcan Deutschland*, paras 83-84.

for examples obligations under international environmental law, into account to justify infringing measures. The balancing of interests is inherent in EU law, whereas it is lacking in the ECT.

This is related to the prominent role that the proportionality principle plays in EU law. It saturates the legal system and the implementation of regulation, especially in cases where a right or freedom is circumscribed. Proportionality is the basic conditions for infringing all the fundamental freedoms and the entire Charter of Fundamental Rights. The ultimate purpose of EU law may be an integrated market, but the invasive nature of EU law over member state's sovereignty has created an inherent demand for balancing of interests. The ECT on the other hand, is one legal document with a single purpose: the protection and promotion of investments. The balancing of interests that marks rights in EU law are not as explicit in the ECT or BITs. This is not to say that proportionality is not relevant for both expropriation and for possible breaches of the FET standard in the ECT, but the proportionality principle plays a far less prominent role.

6.2 Legal stability and legitimate expectations

Initially, it must be recognised that both the free movement of capital and freedom of establishment in the TFEU may be invoked against essentially any measure that infringe the cross-border running of an economic enterprise. Any substantive or procedural restriction that is “liable to hinder or make less attractive the exercise of fundamental freedoms” may be caught.³⁹¹ This likely means that many measures and restrictions that fall within the scope of the FET standard might also be caught by one of the fundamental freedoms. However, the fundamental freedoms are typically invoked to challenge measures that restrict market access, i.e. measures and regulations that apply pre-establishment, which makes them less appropriate for a comparison with the FET standard.

Various measures that infringe the running a business or that damage the market position of an enterprise may also fall under the scope of the right to conduct a business in article 16 CFR. However, the right to conduct a business is a somewhat “soft” fundamental right, and the CJEU is prepared to accept infringements with “substantial negative consequences” if they are justified by public interests.³⁹² This indicates that the right to conduct business does not infringe the state's regulatory space to any great extent.

Against the backdrop of the detailed descriptions above, it is easy to conclude that the fair and equitable treatment standard in the ECT and the general principle of stability in EU law are a good fit for a comparison. The legitimate expectations element of FET serves the same overarching purpose its cousin in EU law, and both are closely connected to transparency in legislation, predictability, and the rule of law. A perfunctory comparison of the principles leaves the impression that in cases where changes in regulation are levied to justify claims by companies or investors, the CJEU is more prone than arbitration

³⁹¹ C-55/94, *Gebhard*, para 37.

³⁹² Case T-52/09, *Nycomed Danmark v EMA*, para 89.

tribunals to protect the regulatory space of host states. A more detailed comparison of some specific points follows here.

The first point relates to legitimate expectations and what can create such legitimate expectations. The CJEU has been very clear that the general legal framework of a state on its own can not give rise to a legitimate expectation that it will not be changed in the future. The approach taken in arbitral tribunals has been less consistent, and there are several cases where the entire legal framework of the host state has been deemed relevant for the legitimate expectations of the investor. In *Eiser*, for example, major changes in the subsidies program were deemed to violate the legitimate expectations of the investor, even in the absence of any specific representations. Many commentators and tribunals do however agree that specific assurances or contractual commitments from the host state are required to establish legitimate expectations, which is more in line with the CJEU's position.

Both systems recognise that sudden and unpredictable changes in legislation that essentially prevent a company from conducting its business can constitute a violation of the legal stability of the undertaking. This is talked about in terms of “reasonable and proportionate” changes under the ECT, whereas the CJEU has subsumed similar cases under the concept of immediate application, which is closely related to retroactive effect. The CJEU has sometimes highlighted the need for transition periods where changes are drastic and negatively impact businesses. Both systems, although the CJEU more rigorously than arbitration tribunals, highlights that the company has an obligation of due diligence to find out about potential changes in regulation. The CJEU in particular has set a high bar for this, where the standard is a “prudent and well-informed trader”. This expectation of due diligence also impacts how specific and well-based an assurance from the host state must be to give rise to legitimate expectations. Arbitration tribunals have been known to accept more vague statements giving rise to legitimate expectations, which might not have been accepted under EU law.³⁹³

6.3 Right to property

Rights to property are protected both under EU law and the ECT, chiefly by conditions laid down for expropriation. In both regimes, expropriation may only be conducted for a public purpose and against due compensation. Furthermore, under both article 13 ECT and general principles of EU law, expropriation must be non-discriminatory and carried out in accordance with due process of law. While the two frameworks overlap to considerable extent, there are differences between them that allow me to conclude that the regulatory space for states are bigger under EU law. This is mainly because the framework is more predictable, and it is less likely that regulatory measures would be classified as indirect expropriation than under the ECT.

A difference between the regimes can be identified in their view on indirect expropriation. Indirect expropriation under the ECT is understood as a measure or regulation that in

³⁹³ Basener, 2017, p. 459-461.

effect has such an impact on the possibility to manage the property that any economic activity is practically excluded. Under the CFR and its sibling regulation in the ECHR, indirect expropriation is reserved for cases where a transfer of title has taken place in all but name. The bar is clearly higher for indirect expropriation under the CFR than under the ECT. Where indirect expropriation is accepted and frequently recognised by tribunals under international investment law, it is described as an “exceptional” case in important literature on the CFR, and the author is careful to point out that there are no established criteria for what constitutes indirect expropriation under EU law.³⁹⁴

Additionally, expropriation under the ECT aims at the investment as a holistic entity. To determine if a measure amounts to indirect expropriation, an arbitral tribunal will look at the actual effect of the measure. Different tribunals have placed emphasis on different elements, but it is clear that both the economic impact of the measure and the deprivative effect it has on the asset are relevant. In some instances, grave economic impact has been enough to classify a measure as indirect expropriation.³⁹⁵ This is different under the right to property in article 17 CFR. It protects possessions under a wide definition, but economic operations as a whole are not protected. Under EU law, indirect expropriation refers to measures or regulation that have the effect of actually depriving the owner of the property, without constituting a taking. The mere negative economic impact a measure can have will not go far in proving that a measure amounts to *de facto* expropriation.

Measures and regulations that do not reach the bar for *de facto* expropriation under the CFR will instead be considered mere regulations of the use of property. Such regulation is subject to a standard proportionality test, where the general public interest is weighed against the individual’s right, and the measure may not be excessive what is necessary to achieve the aim. It seems that several cases of indirect expropriation under international investment law would be subsumed under “regulation of the use of property” if EU law was the applicable legal order in the cases.

Naturally, states have a wide margin of appreciation to regulate for public purposes under the ECT as well. However, the understanding and scope of this right has varied between tribunals. Some have been inspired by the ECHR and adopted a proportionality test in these instances, but that is far from uniform practice. There is considerable uncertainty regarding the scope of the regulatory space for the host state under the ECT. This lack of clarity is one of the biggest differences in property protection between the ECT and EU law.

Another difference that relates to the meaning of ‘property’ under article 17 CFR is that in cases where a measure affects the market position or unspecified business opportunities or imposes unfair costs or alters the business to its core the investment will be protected under article 16 CFR instead of article 17 CFR. Instances where the business model as such is damaged could fall under the scope of indirect expropriation under the ECT but will typically not be covered by article 17 CFR. This matters, because where both the expropriation clause in the ECT and article 17 prescribe due compensation for

³⁹⁴ Peers et al., 2021, para 17(1).36.

³⁹⁵ See among others Dolzer & Schreuer, 2022, p. 163.

expropriation, article 16 CFR remains silent on how possible infringements should be compensated. It will be left to national courts to determine the appropriate redress in accordance with domestic law in each case.

Both EU law and the ECT use the *Hull*-formula – prompt, adequate and effective – to determine the level of compensation that the state owes for lawful expropriation of property. However, in cases of unlawful expropriation, the calculations of damages may vary between the systems. Under international investment law and the ECT, the violation will be deemed an internationally wrongful act, and the remedy should be “full compensation” that places the investor in an equitable position to that which they had before the breach.³⁹⁶ Under the CFR and EU law however, the appropriate damages will be calculated under the national law of the host state, since EU law does not establish any specific remedies. There is no guarantee that the latter system is as generous as the former.

6.4 Procedural options

As long as no contracting parties withdraw from the ECT, investors may pursue claims against states for violations to the treaty before arbitration tribunals. Some would argue that the access to investor-state arbitration in intra-EU disputes disappeared with the CJEU’s ruling in *Komstroy* in 2019. In *Achmea* the CJEU ruled on the incompatibility of intra-EU BITs with EU law and in *Komstroy*, they specified that this applies to arbitration under the ECT too. However, it is essentially up to each arbitral tribunal to decide whether to comply with the CJEU’s position or not. As organs constituted under an international treaty, the tribunals remain the sole judges over their own jurisdiction.

Regardless, fact remains that if the EU and its member states withdraw from the ECT – assuming they also cancel the sunset clause between themselves – intra-EU investors will no longer have recourse to arbitration to settle disputes over host state measures. EU law offers no similar access to investment-specific dispute settlement. What more is, EU law offers no specific remedies or direct access to the CJEU to bring claims for violations of EU law. If an investor feels that a host state has breached the principles of legality or violated the right to property, they will have no other recourse than to pursue a claim before national courts. It is up to each member state to autonomously decide on their own procedural rules as long as they meet the demands of effectiveness and right to fair trial established under EU law. If the national court chooses, it may direct a request for preliminary ruling to the CJEU on the interpretation of EU law.

Compared to the specifically constituted arbitral tribunals under the ECT, where the arbitrators are experts on investment law and the applicable rules are set out in the ECT, designed specifically to protect the rights of investors, pursuing claims before national courts may be a downgrade for investors. Processes before national courts are typically more transparent and less concerned with the confidentiality of the parties than arbitral proceedings.

³⁹⁶ *Factory at Chorzów*.

7 Conclusion

7.1 Final summary and conclusion

The aim has been to clarify the relevant legal frameworks that are currently overlapping with the ECT. If the EU withdraws from the ECT, which seems likely at the time of writing, these other regulations will remain in force and provide protection for investors. The question is how the legal conditions for investor-state disputes, specifically over environmental protection measures, changes if the EU and its member states withdraw from the ECT.

In the extra-EU context, the protection under extra-EU BITs is almost identical to that offered by the ECT. The problem for investors in the extra-EU setting is whether there is an extra-EU BIT to rely on at all, as the framework is full of holes. There are not extra-EU BITs to provide full geographical coverage. The BITs do however generally offer the same substantive and procedural protection as the ECT. For the members of the EU that have announced their intention to withdraw from the ECT, this means that if they are serious in their pursuit of eliminating protection for fossil fuel investments and threat of investor-state arbitration, they need to terminate or renegotiate their BITs, including the sunset clauses.

In the intra-EU context, there is no doubt that the protective framework offered under EU law overlaps with the protection standards in the ECT to considerable extent, and that both regulations place limitations on the state's regulatory space. The study and comparison presented in this thesis show that the regulatory space for host states is likely to be wider under EU law than under the ECT, although the differences are small. The loss of investor-state arbitration will probably feel like a blow for investors if the EU leaves the ECT. Investors will still have recourse to national courts and local remedies, and the substantial protection offered under EU law is very similar to that offered by the ECT. However, loss of the clear-cut protective aim of the ECT, and the mono-focus and expertise of arbitrators in investment tribunals are not suffered easily.

The wider regulatory space is primarily due to the fact that EU law is a complete legal system that must have room to satisfy a plethora competing concerns. EU law is consequently written with a balance of interests in mind. It is evident from the onset that states have a wide margin of appreciation to regulate, and the principle of proportionality means that economic- or individual considerations must always be balanced with other public interests.

On a more detailed, substantive level, there are minor differences in how the frameworks view legitimate expectations, particularly regarding what assurances from states that can give rise to such expectations, and how drastic changes in regulation are handled in the two frameworks. Overall, this protection is very similar in the two systems, although the CJEU is more prone to highlight the state's right to regulate freely. There are bigger differences between the protection of property rights in the two frameworks. For indirect

expropriation, EU law focuses more on the deprivation of property, whereas arbitration tribunals are more likely to take economic losses into account. However, the main difference lies in that the conditions for property regulation that does not amount to indirect expropriation are clearly regulated in EU law, whereas tribunal practice under the ECT is inconsistent.

In conclusion, it is expected that the conditions for EU-internal direct investors to bring claims against states will change if the EU and its member states withdraw from the ECT. The chief difference is in the procedural options available under the different frameworks, but there are also material differences. Member states are likely to have more space to regulate for environmental protection and climate action without facing claims for compensation from intra-EU investors. If the states wish to achieve the same result regarding their extra-EU investors, they would be wise to terminate or renegotiate their extra-EU BITs in tandem with withdrawing from the ECT.

7.2 Further questions and research

Having presented the result and conclusion of the study in the previous section, this last part will be dedicated to a reflection outside the scope of the thesis, and two suggestions for further research.

First a wider reflection on the EU's possible withdrawal from the ECT. An important question not touched upon in this thesis is how it will affect investments in renewable energy. The ECT affords the same protection for these investors as for fossil fuels investors. Fact is that the majority of arbitration cases that have been raised under the ECT have been in relation to removed fiscal incentives for solar panels in Spain and Italy. Along with less fossil fuel combustion, the planet is in dire need of investments into renewable energy. In this situation, it may not be the wisest to remove the additional substantive protection that the ECT affords investors compared to EU law, including those in the renewable energy sector.

The modernised proposal for the ECT contains clauses where contracting parties can choose to exclude fossil fuels from the protective scope of the treaty. The carve out does not come into effect until 10 years after the ratification of the new treaty.³⁹⁷ Critics have said that it is too little, too late and advocated for immediate withdrawal and cancellation of the sunset clause. The modernised proposal also explicitly recognises that investor-state dispute resolution under the ECT is not possible in the intra-EU setting.³⁹⁸ For intra-EU renewable energy investors, this means that the consequences of the EU accepting the modernisation or leaving the ECT are essentially the same. In both instances, the option of investor-state arbitration disappears, and the substantive protection remains essentially the same. It remains to be seen if the EU chooses to fix, leave, or kill the Energy Charter Treaty.³⁹⁹

³⁹⁷ Public Communication on Decision of the Energy Charter Conference, 24 June 2022.

³⁹⁸ Public Communication on Decision of the Energy Charter Conference, 24 June 2022.

³⁹⁹ Brauch, 2021.

Regarding future research, two suggestions will be made here. Firstly, it is surprising that so little is written about substantive investment protection under EU law. As demonstrated in this thesis, direct investment protection cuts through a variety of different regulations and it is quite tricky to piece it together in a cohesive whole. There is a gap on the market for a comprehensive guide to investment protection under EU law. If the ECT is ultimately terminated within the EU, the academic and commercial interest in investment protection within the Union should increase.

In general, there seems to be a hole in legal writings where comparisons of EU law with public international law should be. It would be interesting to see more studies where EU law is compared with regimes of public international law. The federal characteristics of the EU and the international legal origin of its primary sources mean that EU law has more in common with public international law than is always recognised. Thematic, functional comparisons would serve both to place EU outside of its normal context and introduce it to a wider audience. It would also be interesting to see if the development and interpretation of EU law could somehow be implemented in the development of a more cohesive international legal system. International law in general has a shortage of cohesive case law, where the EU has an abundance.

Annex 1, list of selected bilateral investment treaties

BLEU* – Albania BIT (1999)
BLEU* – Armenia BIT (2001)
BLEU* – Azerbaijan BIT (2004)
BLEU* – Bosnia and Herzegovina BIT (2004)
BLEU* – Georgia BIT (1993)
BLEU* – Kazakhstan BIT (1998)
BLEU* – Kyrgyzstan BIT (1989)
BLEU* – Moldova BIT (1996)
BLEU* – Mongolia BIT (1992)
BLEU* – North Macedonia BIT (1999)
BLEU* – Tajikistan BIT (1989)
BLEU* – Türkiye BIT (1986)
BLEU* – Turkmenistan BIT (1989)
BLEU* – Ukraine BIT (1996)
BLEU* – Uzbekistan BIT (1998)
BLEU* – Yemen BIT (2000)
France – Albania BIT (1995)
France – Armenia BIT (1995)
France – Azerbaijan BIT (1998)
France – Bosnia and Herzegovina BIT (2003)
France – Georgia BIT (1997)
France – Kazakhstan BIT (1998)
France – Kyrgyzstan BIT (1994)
France – Jordan BIT (1978)
France – Moldova BIT (1997)
France – Mongolia BIT (1991)
France – Montenegro BIT (1974)
France – North Macedonia BIT (1998)
France – Tajikistan BIT (2002)
France – Türkiye BIT (2006)

France – Turkmenistan BIT (1994)
France – Ukraine BIT (1994)
France – Uzbekistan BIT (1993)
France – Yemen BIT (1984)
Germany – Afghanistan BIT (2005)
Germany – Albania BIT (1991)
Germany – Armenia BIT (1995)
Germany – Azerbaijan BIT (1995)
Germany – Bosnia and Herzegovina BIT (2001)
Germany – Georgia BIT (1993)
Germany – Kazakhstan BIT (1992)
Germany – Kyrgyzstan BIT (1997)
Germany – Jordan BIT (2007)
Germany – Moldova BIT (1994)
Germany – Mongolia BIT (1991)
Germany – Montenegro BIT (1989)
Germany – North Macedonia BIT (1996)
Germany – Tajikistan BIT (2003)
Germany – Türkiye BIT (1962)
Germany – Turkmenistan BIT (1997)
Germany – Ukraine BIT (1993)
Germany – Uzbekistan BIT (1993)
Germany – Yemen BIT (2005)
Netherlands – Albania BIT (1994)
Netherlands – Armenia BIT (2005)
Netherlands – Bosnia and Herzegovina BIT (1998)
Netherlands – Georgia BIT (1998)
Netherlands – Kazakhstan BIT (2002)
Netherlands – Jordan BIT (1997)
Netherlands – Moldova BIT (1995)
Netherlands – Mongolia BIT (1995)
Netherlands – Montenegro BIT (2002)

Netherlands – North Macedonia BIT (1998)
Netherlands – Tajikistan BIT (2002)
Netherlands – Türkiye BIT (1986)
Netherlands – Ukraine BIT (1994)
Netherlands – Uzbekistan BIT (1996)
Netherlands – Yemen BIT (1985)
Poland – Albania BIT (1993)
Poland – Jordan BIT (1997)
Poland – Mongolia BIT (1995)
Poland – Montenegro BIT (1996)
Poland – North Macedonia BIT (1996)
Poland – Switzerland BIT (1989)
Poland – Türkiye BIT (1991)
Slovenia – Albania BIT (1997)
Slovenia – Bosnia and Herzegovina BIT (2001)
Slovenia – Moldova BIT (2003)
Slovenia – Switzerland BIT (1995)
Slovenia – Türkiye BIT (2004)
Slovenia – Ukraine BIT (1999)
Slovenia – United Kingdom BIT (1996)
Slovenia – Uzbekistan BIT (2003)
Spain – Albania BIT (2003)
Spain – Armenia BIT (1990)
Spain – Azerbaijan BIT (1990)
Spain – Bosnia and Herzegovina BIT (2002)
Spain – Georgia BIT (1990)
Spain – Kazakhstan BIT (1994)
Spain – Kyrgyzstan BIT (1990)

* Belgium-Luxembourg Economic Union.

Bibliography

References

Books

Alvarez, G. ‘Article 25 Economic Integration Agreements’ in Leal-Arcas, R. (ed). *Commentary on the Energy Charter Treaty*. Edward Elgar, 2018.

Basener, N. *Investment Protection in the European Union: Considering EU law in investment arbitrations arising from intra-EU and extra-EU bilateral investment agreements*. PhD thesis: University of Cologne, 2017.

Brown, C. & Cucinotta, D. ‘Treatment standards in environmental-related investor-state disputes’ in Miles, K. (ed). *Research Handbook on Environment and Investment Law*. Research Handbooks in Environmental Law. Edward Elgar Publishing, 2023.

Bobek, Michal, ‘The effects of EU law in the national legal systems’ in Bernard, C. & Peers, S. (eds). *European Union Law*. 3rd edition. Oxford University Press, 2020.

Burgstaller, M., ‘The Future of Bilateral Investment Treaties of EU Member States’ in Bungenberg, M., Griebel, J., & Hindelang, S. (eds) *International Investment Law and EU Law*. Springer Berlin Heidelberg, 2011.

Collins, D. *An introduction to International Investment Law*. 2nd edition. Cambridge University Press, 2023.

Craig, P. ‘Development of the EU’ in Bernard, C. & Peers, S. (eds). *European Union Law*. 3rd edition. Oxford University Press, 2020.

Cuyvers, A. ‘General principles of EU law’ in Ugirashebuja, E., Ruhangisa, J. E., Ottervanger, T., & Cuyvers, A. (eds.). *East African Community Law*. Brill/Nijhoff, 2017.

De Witte, B. ‘EU law; is it international law?’ in Bernard, C. & Peers, S. (eds). *European Union Law*. 3rd edition. Oxford University Press, 2020.

Dias Simões, F. ‘Article 26 Settlement of disputes between an investor and a contracting party’ in Leal-Arcas, R. (ed). *Commentary on the Energy Charter Treaty*. Edward Elgar, 2018.

Dimopoulos, A. *EU Foreign Investment Law*. Oxford University Press, 2011.

Dolzer, R., Schreuer, C. & Kriebaum, U. *Principles of International Investment Law*. 3rd edition. Oxford University Press, 2022. [electronic version].

Eleftheraidi, P. ‘The EU’s relationship to international law: lessons from Brexit’, in Davies, G., & Avbelj, M. (eds.). *Research Handbook on Legal Pluralism and EU Law*. Edward Elgar Publishing, 2018.

Erlbacher, F. & Maxian Rusche, T., ‘Articles 206-207: Common commercial policy’ in Kellerbauer, M., Klamert, M. & Tomkin, J. (eds). *The EU Treaties and the Charter of Fundamental Rights: A Commentary*. Oxford University Press, 2019.

Flynn, L. ‘Free movement of Capital’ in Bernard, C. & Peers, S. (eds). *European Union Law*. 3rd edition. Oxford University Press, 2020.

Gonin, E. & O’Reilly, R. ‘Intra-EU Investment Protection and the Rule of Law’ in Baltag, C. & Stanič, A. (eds). *The Future of Investment Treaty Arbitration in the EU: Intra-EU BITs, the Energy Charter Treaty, and the Multilateral Investment Court*. Kluwer Law International, 2020.

- Grabenwarter, C. *European Convention on Human Rights: Commentary*. Bloomsbury Academic, 2013.
- Hindelang, S. *The Free Movement of Capital and Foreign Direct Investment: The Scope of Protection in EU Law*. Oxford University Press, 2009.
- Hobér, K. *The Energy Charter Treaty: A Commentary*. Oxford University Press, 2020.
- Hofmann, H. C. H., 'General principles of EU law and EU administrative law' in Bernard, C. & Peers, S. (eds). *European Union Law*. 3rd edition. Oxford University Press, 2020.
- Lock, T. 'Article 16 CFR: Freedom to conduct a business' in Kellerbauer, M., Klamert, M. & Tomkin, J. (eds). *The EU Treaties and the Charter of Fundamental Rights: A Commentary*. Oxford University Press, 2019.
- Lock, T. 'Article 17 CFR: Right to property' in Kellerbauer, M., Klamert, M. & Tomkin, J. (eds). *The EU Treaties and the Charter of Fundamental Rights: A Commentary*. Oxford University Press, 2019.
- Lock, T. 'Article 51 CFR: Field of Application' in Kellerbauer, M., Klamert, M. & Tomkin, J. (eds). *The EU Treaties and the Charter of Fundamental Rights: A Commentary*. Oxford University Press, 2019.
- Lock, T. 'Article 52 CFR: Scope and interpretation of rights and principles' in Kellerbauer, M., Klamert, M. & Tomkin, J. (eds). *The EU Treaties and the Charter of Fundamental Rights: A Commentary*. Oxford University Press, 2019.
- Lock, T. & Martin, D. 'Article 47: Right to an effective remedy and to a fair trial' in Kellerbauer, M., Klamert, M. & Tomkin, J. (eds). *The EU Treaties and the Charter of Fundamental Rights: A Commentary*. Oxford University Press, 2019.
- Mejía-Lemos, D. 'Article 10 Promotion, protection and treatment of investments' in Leal-Arcas, R. (ed). *Commentary on the Energy Charter Treaty*. Edward Elgar, 2018.
- Mejía-Lemos, D. 'Article 13 Expropriation' in Leal-Arcas, R. (ed). *Commentary on the Energy Charter Treaty*. Edward Elgar, 2018.
- Peers, S., Hervey, T., Kenner, J., & Ward, A. (eds). 'Article 16' in *The EU Charter of Fundamental Rights: A Commentary*. Hart Publishing, 2021. [electronic version].
- Peers, S., Hervey, T., Kenner, J., & Ward, A. (eds). 'Article 17(1)' in *The EU Charter of Fundamental Rights: A Commentary*. Hart Publishing, 2021. [electronic version].
- Radi, Y. *Rules and Practices of International Investment Law and Arbitration*. The Law in Context Series. Cambridge university press, 2020.
- Reichel, J. 'EU rättslig metod', in Korling, F. & Zamboni, M. (eds). *Juridisk Metodlära*. Studentlitteratur, 2014.
- Reinisch, A. & Tropper, J. 'Investment Arbitration, The Termination Agreement of intra-EU BITs and its effect on investment arbitration in the EU', in Klausegger, C. Klein, P., Kremslehner, F., Petsche, A., Pitkowitz, N., Welser, I. & Zeiler, G. (eds). *Austrian Yearbook on International Arbitration 2022*. Kluwer Law International, 2022.
- Schabas, W. A. *The European Convention on Human Rights: A Commentary*. Oxford University Press, 2015. [electronic version].
- Schütze, R. *European Union Law*. 2nd edition. Cambridge University Press, 2018.

Smits, J. M. 'What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research' in Geste, R., Micklitz, H. & Rubin, E. (eds). *Rethinking Legal Scholarship: A Transatlantic Dialogue*. Cambridge University Press, 2017.

Sornarajah, M. *The International Law on Foreign Investment*. 5th edition. Cambridge University Press, 2021. [electronic version].

Spaventa, E. 'Fundamental Rights in the European Union' in Bernard, C. & Peers, S. (eds). *European Union Law*. 3rd edition. Oxford University Press, 2020.

Stanič, A. 'Enforcement of Awards and Other Implications of Achmea' in Baltag, C. & Stanič, A. (eds). *The Future of Investment Treaty Arbitration in the EU: Intra-EU BITs, the Energy Charter Treaty, and the Multilateral Investment Court*. Kluwer Law International, 2020.

Talus, K. & Särkännä, K. 'Achmea, the ECT and the Impact on Energy Investments in the EU' in Baltag, C. & Stanič, A. (eds). *The Future of Investment Treaty Arbitration in the EU: Intra-EU BITs, the Energy Charter Treaty, and the Multilateral Investment Court*. Kluwer Law International, 2020.

Tomkin, J. 'Article 49 TFEU' in Kellerbauer, M., Klamert, M. & Tomkin, J. (eds). *The EU Treaties and the Charter of Fundamental Rights: A Commentary*. Oxford University Press, 2019.

Tomkin, J. 'Article 52 TFEU' in Kellerbauer, M., Klamert, M. & Tomkin, J. (eds). *The EU Treaties and the Charter of Fundamental Rights: A Commentary*. Oxford University Press, 2019.

Tomkin, J. & Steiblytė, A. 'Article 63 TFEU' in Kellerbauer, M., Klamert, M. & Tomkin, J. (eds). *The EU Treaties and the Charter of Fundamental Rights: A Commentary*. Oxford University Press, 2019.

Triantafylou, E. & Pusztai, D. 'Achmea, Investment Treaty Arbitration, Public International Law and EU Law: The Way Forward' in Baltag, C. & Stanič, A. (eds). *The Future of Investment Treaty Arbitration in the EU: Intra-EU BITs, the Energy Charter Treaty, and the Multilateral Investment Court*. Kluwer Law International, 2020.

Tridimas, T. *The General Principles of EC Law*. Oxford University Press, 1999.

Usher, J. A. *General Principles of EC Law*. European Law Series, Longman, 1998.

Valguarnera, F. 'Den komparativa metoden' in Korling, F. & Zamboni, M. (eds). *Juridisk Metodlära*. Studentlitteratur, 2014.

Viñuales, J. E. 'Foreign investment and the environment in international law: current trends' in Miles, K. (ed). *Research Handbook on Environment and Investment Law*. Research Handbooks in Environmental Law. Edward Elgar Publishing, 2023.

Academic journals

Basedow, J. R. 'The Achmea Judgment and the Applicability of the Energy Charter Treaty in Intra-EU Investment Arbitration'. *Journal of International Economic Law* 23(1), 2020: 271–92.

Brauch, M. D. 'Should the European Union Fix, Leave or Kill the Energy Charter Treaty?'. *Columbia Centre on Sustainable Development*, 2021.

Bungenberg, M., & Bohme, B. 'Under the Radar - The Return of Member States in EU Investment Policy.' *Journal of International Economic Law*, 25(4), 2022: 627–642.

Eckes, C. & Ankersmit, L. 'The compatibility of the Energy Charter Treaty with EU law'. *ClimateEarth & University of Amsterdam*. 2022.

Hirsch, M. 'Between Fair and Equitable Treatment and Stabilization Clause: Stable Legal Environment and Regulatory Change in International Investment Law'. *Journal of World Investment & Trade*, 12(6), 2011: 783–806.

McGlade, C. & Ekins, P. 'The geographical distribution of fossil fuels unused when limiting global warming to 2 °C'. *Nature*. 517, 2015: 187–190.

Maljean-Dubois, S., Ruiz Fabri, H. & Schill, S. W. 'International Investment Law and Climate Change: Introduction to the Special Issue'. *The Journal of World Investment & Trade*. 23(5-6), 2022.

Miljenić, O. 'Energy Charter Treaty-Standards of Investment Protection'. *Croatian International Relations Review*. 24(83), 2018: 52-83.

Nowrot, K. 'How to Include Environmental Protection, Human Rights and Sustainability in International Investment Law'. *Journal of World Investment & Trade*. 15, 2014: 612-644.

Schokkaert, J. 'European conventional practice of protection of investments abroad'. *Journal of World Investment*, 3(4), 2002: 615-656.

Taton, X. & Croisant, G. 'Judicial Protection of Investors in the European Union: The Remedies Offered by Investment Arbitration, the European Convention on Human Rights and EU Law'. *Indian Journal of Arbitration Law*. 7(2), 2019: 61-145.

Tienhaara K. 'Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement'. *Transnational Environmental Law*. 7(2), 2018: 229-250.

Tienhaara K, Downie C. 'Risky Business: The Energy Charter Treaty, Renewable Energy, and Investor-State Disputes'. *Global Governance*. 24(3), 2018: 451-472.

Tropper, J. & Wagner, K. 'The European Union Proposal for the Modernisation of the Energy Charter Treaty – A Model for Climate-Friendly Investment Treaties?' *The Journal of World Investment & Trade*. 23(5-6), 2022.

Özgür, E. 'A note on Charanne and construction v Spain; a return to cautious interpretation of legitimate expectations?' *International Arbitration Law Review*, 19(2), 2016.

Reports

Gaukrodger, D. The future of investment treaties - possible directions. OECD Working Papers on International Investment, No. 2021/03, OECD Publishing, Paris, 2021. [working paper]

International Energy Agency. *Net Zero by 2050 - A Roadmap for the Global Energy Sector*. Paris, 2021.

IPCC, 2018. *Summary for Policymakers. In: Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty*. Masson-Delmotte, V., P. Zhai, H.-O. Pörtner, D. Roberts, J. Skea, P.R. Shukla, A. Pirani, W. Moufouma-Okia, C. Péan, R. Pidcock, S. Connors, J.B.R. Matthews, Y. Chen, X. Zhou, M.I. Gomis, E. Lonnoy, T. Maycock, M. Tignor, and T. Waterfield (eds.). Cambridge University Press, pp. 3-24.

IPCC. *IPCC Sixth Assessment Report - Mitigation of Climate Change*. 2022.

IRENA. Stranded assets and renewables: how the energy transition affects the value of energy reserves, buildings and capital stock. International Renewable Energy Agency (IRENA), Abu Dhabi, 2017. [working paper]

Salvatore, L. D. *Investor–State Disputes in the Fossil Fuel Industry*. International Institute for Sustainable Development. 2021.

UNCTAD. *Fair and Equitable Treatment: UNCTAD Series on Issues in International Investment Agreements II*, 2012. UNCTAD/DIAE/IA/2011/5.

UNCTAD. *International Investment Agreements Reform Accelerator*, 2020. UNCTAD/DIAE/PCB/INF/2020/8.

UNCTAD. *Taking of Property: UNCTAD Series on Issues in International Investment Agreements*, 2000. UNCTAD/ITE/IIT/15.

UNCTAD. *The International Investment Treaty Regime and Climate Action*. UNCTAD IIAs Issues Note. Issue 3, September 2022.

UNCTAD, *World Investment Report 2007: Transnational Corporations, Extractive Industries and Development*. New York & Geneva, 2007.

News, blogs and other webpages

Baldon, Clémentine & Dupré, Mathilde. ‘After France’s withdrawal from the ECT, what are the next steps?’, *Veblen Institute for Economic Reforms*, 11 Jan 2023. <https://www.veblen-institute.org/After-France-s-withdrawal-from-the-ECT-what-are-the-next-steps.html> (accessed 30 March 2023).

Braun, Stuart. ‘Multi-billion euro lawsuits derail climate action’, *Deutsche Welle*, 19 April 2021. <https://www.dw.com/en/energy-charter-treaty-ect-coal-fossil-fuels-climate-environment-uniper-rwe/a-57221166> (accessed 28 March 2023).

Climate Case Chart, ‘The Netherlands v. RWE and Uniper (Anti-Arbitration Injunctions)’, *Sabin Center for Climate Change Law*. <http://climatecasechart.com/non-us-case/netherlands-v-rwe-and-uniper-anti-arbitration-injunctions-before-the-higher-regional-court-of-cologne/> (accessed 29 April 2023).

Corporate Europe Observatory, ‘Busting myths around the Energy Charter Treaty’, 2020, <https://corporateeurope.org/en/2020/12/busting-myths-around-energy-charter-treaty> (accessed 20 April 2023).

Eckes, C., Main-Klingst, L. & Schaugg, L. ‘Why a coordinated withdrawal from the Energy Charter Treaty is inevitable’, *Euractiv*, 2023. <https://www.euractiv.com/section/energy/opinion/why-a-coordinated-withdrawal-from-the-energy-charter-treaty-is-inevitable/> (accessed 23 May 2023)

The Economist, ‘How some international treaties threaten the environment: Investor-state dispute-settlement provisions are blamed for impeding government action’, *The Economist*, 5 Oct. 2020. https://www.economist.com/finance-and-economics/2020/10/05/how-some-international-treaties-threaten-the-environment?giftId=9dafa32a-4f30-4282-8524-d3b8da146195&fbclid=IwAR18NrkiYtJNXD7t0zsac-wKA7yD8dAUxi0NPIsz-SttIKrQz5_yljBhRqCs (accessed 5 April 2023).

Embassy of the Republic of Kazakhstan in the Kingdom of Netherlands, ‘Trade and economic cooperation between the Republic of Kazakhstan and the Netherlands’, Government of Kazakhstan, <https://www.gov.kz/memleket/entities/mfa-hague/activities/1876?lang=en> (accessed 9 May 2023).

Euractiv. 'LEAK: Exit from Energy Charter Treaty 'unavoidable', EU Commission says', *Euractiv*. 8 Feb 2023. <https://www.euractiv.com/section/energy/news/exit-from-energy-charter-treaty-unavoidable-eu-commission-says/> (accessed 20 March 2023).

European Commission, 'Investment', *European Commission Trade Policy*. https://policy.trade.ec.europa.eu/help-exporters-and-importers/accessing-markets/investment_en (accessed 4 April 2023).

European Commission, 'Dispute settlement', *European Commission Trade Policy*. https://policy.trade.ec.europa.eu/help-exporters-and-importers/accessing-markets/investment_en (accessed 4 April 2023).

European Environmental Bureau, 'Civil Society Organisations' Statement against the Energy Charter Treaty', 6 July 2021, <https://eeb.org/library/civil-society-organisations-statement-against-the-energy-charter-treaty/> (accessed 16 May 2023).

Eurostat, 'Coal production and consumption statistics', *European Union*. 17 April 2023. https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Coal_production_and_consumption_statistics (accessed 9 May 2023).

Eurostat, 'Glossary: Fossil fuel', *European Union*. 19 Sep 2019. https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Glossary:Fossil_fuel (accessed 9 May 2023).

Fernando, Jason, 'Discounted Cash Flow (DCF) Explained With Formula and Examples', *Investopedia*, 30 March 2023, <https://www.investopedia.com/terms/d/dcf.asp> (accessed 12 May 2023).

IISD, 'Energy Charter Treaty Withdrawal Announcements Reflect Reform Outcome is Insufficient for Climate Ambition', *International Institute for Sustainable Development*. 7 Nov 2022. <https://www.iisd.org/articles/statement/energy-charter-treaty-withdrawal-announcements> (accessed 30 March 2023).

International Energy Agency, 'Baseline European Union gas demand and supply in 2023'. <https://www.iea.org/reports/how-to-avoid-gas-shortages-in-the-european-union-in-2023/baseline-european-union-gas-demand-and-supply-in-2023> (accessed 9 May 2023).

International Energy Charter, 'Contracting Parties and Signatories of the Energy Charter Treaty'. *International Energy Charter*. <https://www.energychartertreaty.org/treaty/contracting-parties-and-signatories/> (accessed 20 April 2023).

International Energy Charter, 'Italy'. International Energy Charter. Updated 31 July 2015. <https://www.energycharter.org/who-we-are/members-observers/countries/italy/> (accessed 16 May 2023).

International Energy Charter, '72 Countries plus the EU, Euratom and ECOWAS Adopt the International Energy Charter'. *International Energy Charter*. Updated June 2015. https://web.archive.org/web/20151001233843/http://www.energycharter.org/news/article/72-countries-plus-the-eu-euratom-and-ecowas-adopt-the-international-energy-charter/?tx_news_pi1%25Bcontroller%25D=News&tx_news_pi1%25Baction%25D=detail&cHash=6c41bf6940672cf5b390ced07fc5b0e5, (accessed 4 April 2023)

International Energy Charter, 'Statistics on ECT Cases'. *International Energy Charter*. Updated 10 Jan 2023. <https://www.energychartertreaty.org/cases/statistics/> (accessed 30 March 2023).

International Energy Charter, 'The 33rd Meeting of the Energy Charter Conference held under the Chairmanship of Mongolia'. *International Energy Charter*. Updated 22 Nov 2022.

<https://www.energychartertreaty.org/treaty/contracting-parties-and-signatories/> (accessed 4 April 2023).

Mathiesen, Karl & Hanke Vela, Jakob. 'The obscure energy pact that threatens the EU's Green Deal', *Politico*. 18 Dec 2020. <https://www.politico.eu/article/energy-charter-treaty-threatens-eu-green-deal/> (accessed 31 March 2023).

Mazzotti, Paolo. 'Rockhopper v. Italy and the Tension between ISDS and Climate Policy'. *Völkerrechtsblog*. 21 Dec 2022. <https://voelkerrechtsblog.org/de/rockhopper-v-italy-and-the-tension-between-isds-and-climate-policy/>, (accessed 30 March 2023).

Moldenhauer, Oliver & Schmidt, Nico. 'ECT data analysis: Results and Methods', *Investigate Europe*. 23 Feb 2021. <https://www.investigate-europe.eu/en/2021/ect-data/> (accessed 30 March 2023).

Montoya, Lukas. 'Transparency'. *Jus mundi*. 14 Nov 2022. <https://jusmundi.com/en/document/publication/en-transparency> (accessed 23 May 2023).

OECD Library, 'Foreign Direct Investment (FDI)', *OECD*. 24 March 2023. https://www.oecd-ilibrary.org/finance-and-investment/foreign-direct-investment-fdi/indicator-group/english_9a523b18-en (accessed 5 May 2023).

Pintzler, Petra. 'Verrückt, verrückter, Moorburg', *Die Zeit*, 2 April 2015. <https://www.zeit.de/wirtschaft/2015-04/private-schiedsgerichte-verfahren-ttip-deutschland-europa-aerger>, (accessed 31 March 2023).

Statista, 'GDP of European countries in 2021', April 2022. <https://www.statista.com/statistics/685925/gdp-of-european-countries/> (accessed 9 May 2023).

UNCTAD, 'International Investment Agreements Navigator.' *UNCTAD Investment Policy Hub*. 2023. <https://investmentpolicy.unctad.org/international-investment-agreements> (accessed 10 May 2023).

UNCTAD, 'Investment Dispute Settlement Navigator.' *UNCTAD Investment Policy Hub*. Updated 31 Dec 2022. <https://investmentpolicy.unctad.org/investment-dispute-settlement> (accessed 29 Apr 2023).

The World Bank Data Bank, 'Metadata Glossary: foreign direct investment', *The World Bank Group*. 2023. <https://databank.worldbank.org/metadataglossary/world-development-indicators/series/BX.KLT.DINV.CD.WD?fbclid=IwAR2jHGK7Afu0yRtvFPiGqNKqLk-njJdNE6Bi5UdTM9J3sGvTsaLAVYCau3Y> (accessed 5 May 2023).

World Energy & Climate Statistics: Yearbook 2022, 'Refined oil products production', *Enerdata*. 2022, <https://yearbook.enerdata.net/oil-products/world-refined-production-statistics.html> (accessed 9 May 2023).

World Energy & Climate Statistics: Yearbook 2022, 'Coal and lignite production', *Enerdata*. 2022. <https://yearbook.enerdata.net/coal-lignite/coal-production-data.html> (accessed 9 May 2023).

Primary sources

International treaties

Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union, 29 May 2020, SN/4656/2019/INIT (entered into force 29 Aug 2020).

Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001, Yearbook of the International Law Commission, 2001, vol. II, Part Two. [ARSIWA]

Energy Charter Treaty, 17 Dec 1994, UNTS vol. 2080, p. 95. [ECT]

Vienna Convention on the Law of Treaties, 23 May 1969, UNTS vol. 1155, p. 331. (entered into force on 27 January 1980). [VCLT].

Secondary legislation of the European Union

Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty.

Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market.

Regulation 1219/2012 of the European Parliament and of the Council of 12 December 2012, establishing transitional arrangements for bilateral investment agreements between Member States and third countries.

Regulation 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union.

Official communications and other documents

Communication from the Commission to the European Parliament and the Council, ‘Protection of intra-EU investment’, Brussels 19 July 2018, COM(2018) 547 final. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018DC0547&rid=8> (accessed 6 May 2023).

European Parliament, draft agenda INTA(2023)0426_1 for meeting of the Committee on International Trade on the 26th-27th April 2023. Last updated 31 March 2023. Available at: https://www.europarl.europa.eu/doceo/document/INTA-OJ-2023-04-26-1_EN.html (accessed 10 May 2023).

European Parliament, reply (14 April 2023) to Parliamentary question P-003556/2022(ASW). Available at: https://www.europarl.europa.eu/doceo/document/P-9-2022-003556-ASW_EN.html (accessed 10 May 2023).

European Parliament resolution of 23 June 2022 on the future of EU international investment policy, 2022, P9_TA(2022)0268. Available at: https://www.europarl.europa.eu/doceo/document/TA-9-2022-0268_EN.html (accessed 9 March 2023).

European Parliament resolution of 24 November 2022 on the outcome of the modernisation of the Energy Charter Treaty, 2022, P9_TA(2022)042. Available at: https://www.europarl.europa.eu/doceo/document/TA-9-2022-0421_EN.html (accessed 5 April 2023).

Non-paper from the European Commission, ‘Next steps as regards the EU, Euratom and Member States’ membership in the Energy Charter Treaty’, Feb 2023. Available at: <https://www.euractiv.com/section/energy/news/exit-from-energy-charter-treaty-unavoidable-eu-commission-says/> (accessed 20 March 2023).

Public Communication on Decision of the Energy Charter Conference, Energy Charter Secretariat, Brussels, 24 June 2022. CCDEC 2022, 10 GEN. Available at: <https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2022/CCDEC202210.pdf>

Table of cases

Court of Justice of the European Union

Joined Cases 7/56 and 3-7/57, *Dineke Algera, Giacomo Cicconardi, Simone Couturaud, Ignazio Genuardi, Félicie Steichen v Common Assembly*. ECLI:EU:C:1957:7.

Joined Cases 42/59 and 49/59, *SNUPAT v High Authority*. ECLI:EU:C:1961:5.

Case 111/63, *Lemmerz-Werke GmbH v High Authority of the ECSC*. ECLI:EU:C:1965:76.

Case 11/70, *Internationale Handelsgesellschaft v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*. ECLI:EU:C:1970:114.

Case 4-73, *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities*. ECLI:EU:C:1974:51.

Case 2/74, *Jean Reyners v Belgian State*. ECLI:EU:C:1974:68.

Case 43-75, *Defrenne v SABENA*. ECLI:EU:C:1976:56.

Case 85/76, *Hoffmann-La Roche v Commission*. ECLI:EU:C:1979:36.

Case 120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*.

ECLI:EU:C:1979:42. [*Cassis de Dijon*]

Joined cases 154, 205, 206, 226 to 228, 263 and 264/78, 39, 31, 83 and 85/79, *SpA Ferriera Valsabbia and others v Commission*. ECLI:EU:C:1980:81.

Case 44/79, *Hauer v Land Rheinland-Pfalz*. ECLI:EU:C:1979:290.

Joined cases 205 to 215/82, *Deutsche Milchkontor and others v Germany*.

ECLI:EU:C:1983:233.

Case 294/83, *Les Verts v Parliament*. ECLI:EU:C:1986:166.

Case 222/84, *Johnston v Chief Constable of the Royal Ulster Constabulary*.

ECLI:EU:C:1986:206.

Case 120/86, *J. Mulder v Minister van Landbouw en Visserij*. ECLI:EU:C:1988:213.

Case 302/86, *Commission v Denmark*. ECLI:EU:C:1988:421.

Case C-152/88, *Sofrimport SARL v Commission*. ECLI:EU:C:1990:259.

Case C-221/89, *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others*. ECLI:EU:C:1991:320.

Case C-368/89, *Antonio Crispoltoni v Fattoria autonoma tabacchi di Città di Castello*.

ECLI:EU:C:1991:307.

Joined cases C-6/90 and C-9/90, *Andrea Francovich and Danila Bonifaci and others v Italian Republic*. ECLI:EU:C:1991:428.

Case C-55/91, *Italy vs Commission*. ECLI:EU:C:1993:832.

Case C-143/93, *Gebroeders van Es Douane Agenten BV v Inspecteur der Invoerrechten en Accijnzen*. ECLI:EU:C:1996:45.

Case C-280/93, *Germany vs Council*. ECLI:EU:C:1994:367.

Case C-55/94, *Reinhard Gebhard mot Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*. ECLI:EU:C:1995:411.

Case T-115/94, *Opel Austria v Council*. ECLI:EU:T:1997:3.

Joined cases C-163/94, C-165/94 and C-250/94, *Criminal proceedings against Lucas Emilio Sanz de Lera, Raimundo Díaz Jiménez and Figen Kapanoglu*. ECLI:EU:C:1995:451.

Case C-24/95, *Land Rheinland-Pfalz v Alcan Deutschland*. ECLI:EU:C:1997:163.

Case C-84/95, *Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communications and others*. ECLI:EU:C:1996:312.

Case C-302/97, *Klaus Konle v Österreich*. ECLI:EU:C:1999:271.

Case C-324/98, *Telaustria Verlags GmbH och Telefonadress GmbH mot Telekom Austria AG*. ECLI:EU:C:2000:669.

Case T-13/99, *Pfizer Animal Health SA v Council*. ECLI:EU:T:2002:209.

Joined cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99. *Hans Reisch and Others (joined cases C-515/99 and C-527/99 to C-540/99) v Bürgermeister der Landeshauptstadt Salzburg and Grundverkehrsbeauftragter des Landes Salzburg and Anton Lassacher and Others (joined cases C-519/99 to C-524/99 and C-526/99) v Grundverkehrsbeauftragter des Landes Salzburg and Grundverkehrslandeskommission des Landes Salzburg*. ECLI:EU:C:2002:135.

Case C-358/00, *Buchhändler-Vereinigung GmbH v Saur Verlag GmbH & Co. KG and Die Deutsche Bibliothek*. ECLI:EU:C:2002:317.

Case T-283/02, *EnBW Kernkraft GmbH v Commission*. ECLI:EU:T:2005:101.

Case C-309/02, *Radlberger Getränkegesellschaft mbH & Co. and S. Spitz KG v Land Baden-Württemberg*. ECLI:EU:C:2004:799.

Case C-231/03, *Conorzio Aziende Metano (Coname) mot Comune di Cingia de' Botti*. ECLI:EU:C:2005:487.

Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*. ECLI:EU:C:2007:772.

Case C-546/07, *Commission v Germany*. ECLI:EU:C:2010:25.

Case C-384/08, *Attanasio Group Srl v Comune di Carbognano*. ECLI:EU:C:2010:133.

Case T-52/09, *Nycomed Danmark v EMA*. ECLI:EU:T:2011:738.

Case C-544/10, *Deutsches Weintor eG v Land Rheinland-Pfalz*. ECLI:EU:C:2012:526.

Case C-283/11, *Sky Österreich GmbH v Österreichischer Rundfunk*. ECLI:EU:C:2013:28.

Case C-181/12, *Yvon Welte v Finanzamt Velbert*. EU:C:2013:662.

Case C-314/12, *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH*. ECLI:EU:C:2014:192.

Case C-442/14, *Bayer CropScience SA-NV and Stichting De Bijenstichting v College voor de toelating van gewasbeschermingsmiddelen en biociden*. ECLI:EU:C:2016:890.

Case C-477/14, *Pillbox 38 (UK) Limited, agissant sous le nom commercial Totally Wicked v Secretary of State for Health*. ECLI:EU:C:2016:324.

Case C-134/15, *Lidl GmbH & Co. KG v Freistaat Sachsen*. ECLI:EU:C:2016:498.

Case C-284/16, *Slowakische Republik v Achmea BV*. ECLI:EU:C:2018:158.

Case C-741/19, *République de Moldavie v Komstroy. LLC*, ECLI:EU:C:2021:655.

Opinion 1/17 Accord ECG UE-Canada. ECLI:EU:C:2019:341.

Opinion 2/13, On Accession to the ECHR. ECLI:EU:C:2014:2454.

International arbitration tribunals

AES Summit Generation Limited and AES-Tisza Erömi Kft v. The Republic of Hungary, ICSID Case No. ARB/07/22. (Award, 23 Sep 2010).

Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12. (Award, 14 July 2006).

BG Group Plc. v. The Republic of Argentina, UNCITRAL, (Award, 24 Dec 2007).

Bilcon of Delaware et al v. Government of Canada, PCA Case No. 2009-04. (Award on Jurisdiction and Liability, 17 March 2015).

Charanne and Construction Investments v. Spain, SCC Case No. V 062/2012, (Award, 21 Jan 2016).

CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8. (Award, 12 May 2005).

Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica, ICSID Case No. ARB/96/1. (Award, 17 Feb 2000).

Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/36. (Final Award, 4 May 2017).

El Paso Energy International Company v. The Argentine Republic, ICSID Case No. ARB/03/15. (Award, 31 Oct 2011).

Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19. (Award, 25 Nov 2015).

Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19. (Decision on Jurisdiction, Applicable Law and Liability, 30 Nov 2012).

Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania [I], ICSID Case No. ARB/05/20. (Final Award, 11 Dec 2013).

Isolux infrastructure Netherlands, BV v. Kingdom of Spain, SCC Case No. V2013/153. (Award, 12 July 2016).

LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic, ICSID Case No. ARB/02/1. (Decision on Liability, 3 Oct 2006).

Limited Liability Company Amto v. Ukraine, SCC Case No. 080/2005. (Final Award, 26 March 2008).

Marfin Investment Group v. The Republic of Cyprus, ICSID Case No. ARB/13/27. (Award, 26 July 2018).

Marvin Roy Feldman Karpa v. United Mexican States, ICSID Case No. ARB(AF)/99/1. (Award, 16 Dec 2002).

Methanex Corporation v. United States of America, UNCITRAL. (Final Award of the Tribunal on Jurisdiction and Merits, 3 Ag 2005).

PL Holdings S.à.r.l. v. Republic of Poland, SCC Case No. V 2014/163 (Final Award, 28 Aug 2017).

Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24. (Award, 27 Aug 2008).

Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v. Italian Republic, ICSID Case No. ARB/17/14. (Final Award, 23 Aug 2022).

RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/30. (Decision on Jurisdiction, 6 June 2016).

Saluka Investments B.V. v. The Czech Republic, UNCITRAL. (Partial Award, 17 March 2006).

S.D. Myers, Inc. v. Government of Canada, UNCITRAL. (Partial Award, 13 Nov 2000).

Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2. (Award, 29 May 2003).

Unión Fenosa Gas, S.A. v. Arab Republic of Egypt, ICSID Case No. ARB/14/4. (Award of the Tribunal, 31 Aug 2018).

European Court of Human Rights

Allan Jacobsson v. Sweden (no. 1), No. 10842/84, 25 October 1989, Series A no. 163.

Centro Europa 7 S.r.l. and Di Stefano v. Italy [GC], No. 38433/09, 7 June 2012, ECHR 2012.Gianni and

Köktepe v. Turkey, No. 35785/03, 22 July 2008.

Olczak v. Poland (dec.), No. 30417/96, 7 Nov 2002, ECHR 2002-X (extracts).

Gianni and Others v. Italy, No. 35941/03, 30 March 2006.

Papamichalopoulos and Others v. Greece, No. 14556/89 [1993] ECHR 28, 16 EHRR 440.

Pine Valley Developments Ltd and Others v. Ireland, No. 12742/87, 29 November 1991, Series A no. 222.

Sporrong and Lönnroth v. Sweden, No. 7151/75 and 7152/75, 23 September 1982, Series A, No. 52.

Van Marle and Others v. the Netherlands, No. 8543/79, 8674/79, 8675/79 and 8685/79, 26 June 1986, Series A no. 101

International Court of Justice

Elettronica Sicula SpA (ELSI) (United States vs Italy), Judgement, [1989] ICJ Reports 15.

Factory at Chorzów (Germany vs Poland), Judgement, (26 July 1927), PCIJ Series A. No 17.

Others

Sedco, Inc., Sedco International, S.A. & Sediran Drilling Company v. National Iranian Oil Company & The Islamic Republic of Iran. Interlocutory Award No 55 (28 October 1985), Iran - US State Claims Tribunal Reporter, Award No. ITL 55-129-3.