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Cross-Border Investment Protection under EU Law and International Investment Agreements

Guiding EU-Based Investors Through the Intra-EU and Extra-EU Landscapes

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Abstract

Cross-border investment protection and dispute settlement mechanisms have sustained significant transformations, both within (intra-EU) and outside (extra-EU) of the European Union (EU). This thesis aims to provide a comprehensive examination of the legal frameworks safeguarding EU-based investors and their investments. It delves into the interplay between EU law and international investment agreements (IIAs), focusing on bilateral investment treaties (BITs) and the Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU. At the intra-EU level, the findings reveal the termination of intra-EU BITs following the Achmea ruling, which rendered investor-state dispute settlement (ISDS) incongruent between EU Member States. The shift to relying primarily on EU law has led to a fragmented framework governing investment protection and dispute settlement, raising concerns about adequacy and legal certainty. At the extra-EU level, the increasingly important role of the EU after expanding its competencies in international investments, gradually transitions traditional BITs and ISDS to CETA and an investment court system (ICS) for safeguarding extra-EU investments. The new approach aims at balancing and improving provisions in investment protection with regulatory autonomy. However, it also introduces questions about operational effectiveness and challenges related to ratification, leaving the extra-EU BITs concluded between Member States and Canada in a state of limbo.

Keywords: Investment Protection, Dispute Settlement Mechanisms, EU law, International Investment Agreements, Intra-EU and Extra-EU Bilateral Investment Treaties, Comprehensive Economic and Trade Agreement (CETA), EU-Based Investors

Abbreviations

BIT	Bilateral Investment Treaty
CCP	Common Commercial Policy
CETA	Comprehensive Economic and Trade Agreement
CFR	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
EU	European Union
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
ICS	Investment Court System
IIA	International Investment Agreement
ISDS	Investor-State Dispute Settlement
MS	Member States
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union

1 Introduction

1.1 Background

In the modern globalized economy, investment liberalization stands as a cornerstone of economic progress, paving the way for EU nations and businesses to unlock new routes to growth and development.[1] Embedded within the fabric of developed nations, EU-based investors are now also emanating from emerging economies, integrating markets beyond national borders to both regional and global spheres.[2] These investors are increasingly seeking to secure conducive business environments to safeguard their investments of different forms. Conversely, the EU and other nations are keen on attracting and incentivizing their investments, providing protection through their respective legal frameworks. Recognizing the increasing interconnectedness of global markets, a complex web of international investment agreements (IIAs) specifically aimed at protecting international investors and their investments has been setting its mark, prevalently in the form of bilateral investment treaties (BITs). Such treaties mainly outline the responsibilities of the host states *inter alia* ensuring fair and equitable treatment (FET), protection against expropriation, and commonly enabling investors to commence investor-state dispute settlement (ISDS).[3]

However, in the past decades, the investment protection landscape has not been without its challenges; the surfacing of legal uncertainties for investors involved in both intra-EU and extra-EU investments has gradually unfolded. While within the EU, recent developments hint at a shift in the investment protection paradigm. Ramifications poised to reshape the complete trajectory of BITs between EU Member States (MS), thus, the attention turns to the pillars of EU law, emerging as the primary guardians of investment interests.[4] Venturing beyond the Union, the focal point falls on IIAs of two sorts: extra-EU BITs and broader trade agreements entailing provisions related to investment protection and ISDS. With the EU embarking on a journey to reshape the legal framework governing cross-border agreements with third countries, a series of ground-breaking pacts have already been forged. One of such agreements stands out as a beacon of change setting possible new standards for global trade relations – the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada. Yet amidst this flurry of activities, questions linger about the fate of existing BITs between EU MS and third countries,

[1] Zhongkai Niu, Yi Wang and Tianhao Wu, 'Multinational Enterprise and International Investment Law' (2021) 615 ASSEHR 902.

[2] Karl P Sauvant, 'Multinational Enterprises and the Global Investment Regime: Toward Balancing Rights and Responsibilities' in Julien Chaisse, Leïla Choukroune and Sufian Jusoh (eds), *Handbook of International Investment Law and Policy* (Springer 2021).

[3] Peter Muchlinski, *Multinational Enterprises and the Law: Oxford Scholarly Authorities on International Law* (Third edition, Oxford University Press 2021).

[4] Teis Tonsgaard Andersen and Steffen Hindelang, 'The Day After: Alternatives to Intra-EU BITs' (2016) 17 JWIT 984.

and whether the CETA charts a new course for investment protection of EU-based investors, offering a glimpse of what lies ahead.[5]

1.2 Purpose and Research Questions

The thesis aims to provide an examination of investment protection and dispute resolution mechanisms afforded to EU-based investors within and outside the borders of the EU. To attain this, the content is focused on EU law and IIAs. It addresses contemporary legal issues surrounding investment protection and dispute resolution (used interchangeably with dispute settlement) but also provides an outline of the relevant developments of the systems governing those. The thesis contributes with insights into the legal frameworks that impact certainty and effectiveness in investment environments from an EU viewpoint, offering guidance for EU-based investors facilitating risk management in the evolving landscape of cross-border investment protection.

Having established the purpose, the following research questions have been formulated to thoroughly probe the topic:

Considering the interplay between EU law and IIAs

1. How are EU-based investors ensured cross-border investment protection and access to dispute resolution mechanisms within intra-EU dimensions?

2. How are EU-based investors ensured cross-border investment protection and access to dispute resolution mechanisms under extra-EU IIAs, particularly with Canada?

1.3 Delimitations

In assembling the scope of focus, considerations have primarily been made on showcasing the legal concerns, which would likely arise during cross-border investment transactions. The point-of-departure of the study lies in its EU perspective, and it further specifies investors who are based in the Union without detailing their industry or sector. Nevertheless, investors would mainly refer to enterprises as they commonly conduct substantial investments overseas.[6] Investing capital across borders can vary in reasonings, and oftentimes, these investments are dispersed in different countries both within and outside the EU. Consequently, it is crucial to grasp the rights and protection at the intra- and extra-EU level to fully safeguard investors and investments in host states.[7] With this as a starting point, the intra-EU dimensions are examined through EU law emphasizing EU investment

[5] Norton Rose Fulbright, 'Brexit and Investor-State Dispute Settlement' (Norton Rose Fulbright, June 2017) <https://www.nortonrosefulbright.com/fr-ca/centre-du-savoir/publications/e4e6cf5b/brexit-and-investor-state-dispute-settlement#section4> accessed 4 May 2024.

[6] OECD, 'OECD Guidelines for Multinational Enterprises' (OECD Publishing, 2011) https://www.oecd-ilibrary.org/governance/oecd-guidelines-for-multinational-enterprises_9789264115415-en accessed 4 May 2024.

[7] Certain parts of the intra-EU level structure draw inspiration from an individual paper written in a previous course. This thesis aims to extend that research to a broader perspective.

policy and intra-EU BITs. Since intra-EU BITs do not play a complementary role for the EU subsequent to the well-known CJEU ruling of the Achmea case, the focus is not directed towards specific BITs, but rather as a whole for the perspective. Moreover, as there is an abundance of IIAs at the extra-EU level, the examination is confined to seven extra-EU BITs concluded with Canada by the MS in conjunction with their replacement agreement, CETA, particularly its chapter 8 on investments. This concentration enables the author to conduct an inclusive investigation while remaining within specificity.

1.4 Method and Materials

In the realm of legal research, the doctrinal approach embraces the appropriate methodological focus of the thesis. This method enables a thorough study of principles, rules, and concepts in a specific legal area, probing the way the elements interact. It incorporates an internal view, exploring the law from within the legal system, and underscores present laws as well as their responses to recent developments.[8] In context, the thesis utilizes doctrinal research, as the author examines existing legal frameworks governing cross-border investment protection and dispute settlement within and beyond the EU. This entails legal instruments of EU law focusing on EU Treaties, secondary law, and case laws. It also seeks to elucidate BITs and CETA. In this way, key provisions, principles, and mechanisms relevant to EU-based investors are analyzed. The potential implications of those legal texts are further identified providing an understanding of the current state of law. To strengthen the validity and provide insights into the evolution of legal frameworks, journal articles, monographs, and online sources are equally utilized. Furthermore, a comparative aspect shadows throughout the thesis as it is (I) broadly divided into the intra-EU and extra-EU levels implying similarities and/ or differences. (II) It explores the relations between intra-EU BITs and EU law as well as between extra-EU BITs and the CETA.

With the research approach established, the selection of materials is based on their scope of relevance to EU law and IIAs. Recurring in most chapters, provisions of the Treaty on the European Union (TEU), Treaty on the Functioning of the European Union (TFEU), and the Charter of Fundamental Rights of the European Union (CFR) are non-negotiables to demonstrate the competencies of the Union regarding investments and the protection it secures EU-based investors. As intra-EU BITs have been terminated following the Achmea case,[9] the CJEU ruling is emphasized to showcase the changing investment protection landscape for such agreements between Member States, and the legal mitigation provided to investors following that judgment.

Going beyond the intra-EU levels, Regulation (EU) no. 1219/2012 has been selected as one of the legal texts for understanding the status of current BITs concluded

[8] Jan M Smits, 'What Is Legal Doctrine? On The Aims and Methods of Legal-Dogmatic Research' in Edward L Rubin, Hans-W Micklitz and Rob van Gestel (eds), *Rethinking Legal Scholarship: A Transatlantic Dialogue* (Cambridge University Press 2017).

[9] Nikos Lavranos, 'The World after the Termination of Intra-EU BIT S' (2020) 5 EILA 196.

between EU Member States and third countries. It was the first legislation implemented by the EU after it gained exclusive competence over foreign direct investment (FDI), representing a product of increased scrutiny and approach to unified investment agreements from the EU.[10] Following this, abovementioned extra-EU BITs concluded between the EU Member States and Canada are examined in relation to CETA, which would replace them in accordance with the Regulation.[11] CETA has especially been chosen as it encompasses a pioneering approach to investment protection and dispute settlement, providing insights that could possibly influence future agreements and policies at extra-EU level. Overall, the provisions used for the analysis have been chosen based on comparability and commonality. Lastly, to complement CETA and Regulation 1219/2012, Opinion 1/17 of the CJEU has been included to further shed light on the compatibility of CETA with EU law.

1.5 Structure

The outline of the thesis encompasses four distinct components, each contributing to a complete exploration of the overarching topic. As the text is taken from an EU perspective, the first segment (Chapter 2) introduces the EU legal framework, elucidating the foundational principles and regulatory mechanisms governing investments. It briefly traces the historical development of investment governance, and the EU's competencies in regulating investments. This preliminary section lays the groundwork for subsequent analyses and discussions contextualizing the ensuing chapters.

With an understanding of the basis of the Union, the second segment (Chapter 3) delves into the complexities inherent in safeguarding investors and their investments within the EU territory. The controversies surrounding the investment protection landscape of intra-EU BITs, the landmark case of the Achmea ruling, and the investment provisions provided under EU law as opposed to intra-EU BITs are revealed.

In the third segment (Chapter 4), the focus expands to extra-EU IIAs, highlighting the BITs of which seven EU MS had concluded with Canada as well as their replacing CETA negotiated by the Union itself. It explores the provisions, dispute settlement mechanism as well as the role of CETA. This section allows the author to emphasize on the broader implications and opportunities for global investment protection.

In the last segment (Chapter 5), the thesis draws to a close with a conclusion synthesizing the key findings and insights gleaned from previous cumulative segments. The concluding chapter offers a reflective overview of the thesis' core perspectives on investment protection provided to EU-based investors within and beyond the EU context.

[10] Nikos Lavranos, 'In Defence of Member States' BITs Gold Standard: The Regulation 1219/2012 Establishing a Transitional Regime for Existing Extra-EU BITs - A Member State's Perspective' (2013) 10 TDM 1.
[11] Ibid.

2 The EU Legal Framework Governing Investments

2.1 Treaties, Secondary Law, and the Primacy Principle

Before proceeding with an in-depth examination of EU investment protection, it is crucial to comprehend the legal framework that governs it as a whole: EU law. At the base, the European Union (EU) contains 27 European nations as its Member States, who have respectively given up parts of their sovereignty to the Union meaning that the power of decision-making in particular value-added areas is transferred to the EU institutions. This includes e.g., the European Parliament, European Council, as well as the European Commission, which plays an especially crucial role in investment protection and dispute settlement.[12] The Union is grounded in the rule of law divided in what is known as the hierarchy of norms. Within this system, the foundation of every decision made by the Union is established in its Treaties, also known as, primary law. The Treaties are binding, and they define the goals of the Union, set the structure for the governing bodies involved, outline how decisions are reached, and establish the relationship between the EU and its MS. Over time, these Treaties have been revised to improve the EU institutions, extend its jurisdiction, and facilitate the accession of new MS. They are the product of negotiations and consensus among all EU MS, and subsequently, ratified by their respective legislatures. The concerns regarding investments have, thus, been developed throughout the evolution of these Treaties [13]

Currently, the EU Treaties in force entail the TEU, TFEU, CFR, and the Treaty establishing the European Atomic Energy Community. Among these, the TEU, TFEU, and CFR are to be further examined in the following chapters.[14] With the Treaties as the basis, there follows secondary law with its effects laid out in Article 288 TFEU. It usually covers Regulations, Directives, Decisions, Recommendations, and Opinions.[15] In this case, the pertinence falls on Regulations and Opinions. Regulations are defined as the binding legislative acts that apply directly to all EU MS without requiring national implementation, which ensures uniformity across the EU on various issues. Opinions, on the other hand, are a tool used by EU institutions to express their stance on a specific matter. However, they are non-binding in opposed to Regulations.[16]

Given the integrated nature of the Union, where decisions made at the EU level influence the MS and vice versa, a hierarchy of legal norms ensures consistency and

[12] Damian Chalmers, Gareth Davies, and Giorgio Monti, 'The EU Institutions' in *European Union Law: Text and Materials* (Cambridge University Press 2019).
[13] Damian Chalmers, Gareth Davies, and Giorgio Monti, 'European Integration and the Treaties on European Union' in *European Union Law: Text and Materials* (Cambridge University Press 2019).
[14] Michael Peil, 'A New EU: The Treaty of Lisbon Enters into Force' (2009) 18 ILSA Quarterly 12.
[15] Consolidated version of the Treaty on the Functioning of the European Union [2016] OJ C202/47, Art 288.
[16] Damian Chalmers, Gareth Davies, and Giorgio Monti, 'Lawmaking' in *European Union Law: Text and Materials* (Cambridge University Press 2019).

coherence in the application of laws across the EU. Therefore, a fundamental principle i.e., the primacy of EU law has been acknowledged. This principle is called for in scenarios where there has occurred a conflict between EU law and national law. The Union has legal personality meaning that it is an independent entity embracing its rights. As certain aspects of EU law can be directly applicable to the national laws of the MS, incompatibilities between the two have been largely resolved within the framework of the EU legal order. While neither the EU Treaties nor secondary legislations entail explicit provisions on this order, the primacy principle has mainly been practiced through case laws, particularly, judgments from the Court of Justice of the European Union (CJEU) which it has upheld consistently over the decades.[17]

2.2 Tracing Back in Time: The Founding Agreements on Investments

Through the years since the establishment of the European Economic Community (predecessor of the EU), the Union's competencies have also enlarged. The EU has developed into becoming actively involved in areas from trade and environment to investments and fundamental rights protection. It reflects the progressive occupation of a broader spectrum of national regulatory domains. There have been taken considerations into creating clear instructions on the limitations *ultra vires* actions from the Union for the reassurance of its Member States. Yet the EU competencies have also been greatly influenced by the contributions of each MS. Consequently, the delineation of the competencies mirrors the prevailing power dynamics among the MS under each revision of the Treaties. The evolution of the EU competencies is the outcome of the MS' pursuit of collective benefits.[18]

The development of the EU approach to investment competence can be reverted to the 1950s, before the establishment of the Treaty of Rome. While the Treaty per se did not accommodate the Union with the legal competencies within the area of cross-border investment streams such as FDI, the discussions were, nevertheless, ongoing on the Union's role in regulating matters surrounding them. The Spaak Report dating to 1956, is a document that laid the groundwork for the vision of creating a supranational authority. It emphasizes cooperation and integration among European nations. It is instrumental in shaping the foundations and preparational work of the Treaty of Rome, which proceeded to establish the EEC. The report referred to creating the internal market highlighting the importance of freedom of capital transactions. Naturally, a shared external capital regime was suggested to be needed in handling financial movements from outside of the EU territory. The external regime mentioned in the Spaak Report was seemingly a mere recommendation for the six founding members of the Union; France, Germany, Luxemburg, Italy, and the Netherlands, as they proceeded to formulate the Treaty of Rome with great caution. The liberalization of capital transactions ought to, instead, only happen to the extent necessary for the functioning of the internal market for goods and services.

[17] Directorate-General for Communication (European Commission) and Klaus-Dieter Borchardt, *The ABC of EU Law* (Publications Office of the European Union 2017).

[18] Theodore Konstadinides, 'The Competences of the Union' in Robert Schütze and Takis Tridimas (eds), *Oxford Principles Of European Union Law: The European Union Legal Order: Volume I* (Oxford University Press 2018).

As a result, there was no immediate requirement for a unified external capital regime in this Treaty.[19]

Nevertheless, the Treaty of Rome established the Common Commercial Policy (CCP); the area of competence which later became a significant component of the Union's authority to negotiate in external relations. Although, the CCP was in a transitional period at the time of the Treaty and was rather set to come fully into force in 1970. Up until that date, it was for the Member States themselves to manage their trade dealings outside of the Union. It did not, however, preclude the Union from concluding its own bilateral agreements, as the Treaty of Rome allowed it to settle agreements with third nations in the realm of customs tariffs.[20]

Moving towards the intergovernmental conference (IGC) on the Maastricht Treaty in 1991, the European Commission suggested a significant reform of the CCP. It aimed to not necessarily expand, but rather elucidate its competence in the trade-related aspects of *inter alia* export policy, investments, and movements of capital. The MS responded to this proposal with much resistance. The concluding version of the Treaty, ultimately, retained the existing CCP framework without substantial amendments. However, the Treaty did introduce a unified external capital system to manage capital flows between the MS and third nations. This new regime inadvertently granted the Union shared competence over governing investment market access, which simultaneously marked its relevance in shaping international investment policies.[21]

For the European Commission, the urge to modernize and extend the legal authority in international investment policy continued through the Treaty of Amsterdam in the late 1990s. Particularly, the coverage in the realms of intellectual property, services trade, and FDI was emphasized. Since FDI grew in importance for the global economy, demonstrating both complementary and substitutive impacts on trade. And bilateral investment treaties (BITs) were perpetually signed between MS and third nations, it was believed that these have eroded the EU's capacity to oversee capital flows. In conjunction with the fact that many third nations connected market access for goods and services with specific investment obligations, the EU was additionally concerned with expanding the CCP scope. However, as the majority of MS cited reasons such as the safeguarding of their national competencies, the requests for a CCP reform were largely rejected. [22]

Furthermore, the subsequent Treaty of Nice negotiated in the early 2000s, which was focused on making ready the expansion of new members, had nevertheless, broadened the CCP to include the regulation of trade in services. It embraced the Union to take part in negotiations on services trade, though initially denied by the MS. It indirectly acknowledged the Union to regulate service-related investment liberalization.[23]

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[19] Robert Basedow, 'A Legal History of the EU's International Investment Policy' (2016) 17 JWIT 743.

[20] Cae-One Kim, 'Developments in the Commercial Policy of the European Economic Community' (1971) 8 CML Rev 148.

[21] Robert Basedow, 'A Legal History of the EU's International Investment Policy' (2016) 17 JWIT 743.

[22] Basedow (n 21).

[23] Ibid.

While the Treaty of Amsterdam and Nice were not concluded in complete fulfillment, the long-awaited success eventually came into force with the Treaty of Lisbon in 2009. The Treaty granted the EU the exclusive competence to govern direct investments specifically FDI under the scope of the CCP. This meant that from then on, the EU would be able to embrace the authority to enact an international investment policy as well as negotiate IIAs on behalf of its MS, which commonly aim at safeguarding and/or liberalizing these direct investments.[24]

2.2.1 Status Quo: Investment Competencies

The EU competence divisions as elucidated in the Treaty of Lisbon are now laid out in Articles 2-6 of the TFEU.[25] They are based on the principle of conferral stated in Article 5(1) and (2) TEU with which the Union can solely act within the boundaries delegated to it by the Treaties, and those exceeding the competencies are retained by the MS.[26] The three classifications are defined in Article 2 TFEU and contains (I) the exclusive competencies of Article 3 TFEU, in the domain of the customs union, the CCP, and international agreements insofar as they are mandated by EU legislation or could impact common rules. The exclusive competencies grant the Union the mere power to make laws and enact legally binding measures in the specified areas, and MS may only act if authorized by the Union. While Article 4 TFEU covers (II) the shared competencies e.g., the internal market, areas of consumer protection, environment, and energy. In this confinement, both the Union and the MS can make laws and enact legally binding acts. The MS can only and ought to exercise their authority where the Union has not done thus far, or as the Union decides to stop exercising its authority in that capacity, the MS takes action. The last division found in Article 6 TFEU embodies (III) the supporting competencies in *inter alia* civil protection, protection and bettering of human health, and industry. With this legal basis, the Union is authorized to engage in measures that assist, coordinate, and supplement the efforts of the MS. For the pertinence of investment protection of EU-based investors, the exclusive and shared competencies are emphasized; both relevant for intra- and extra-EU level investments.[27]

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[24] Robert Basedow, 'The EU's International Investment Policy Ten Years on: The Policy-Making Implications of Unintended Competence Transfers: Journal of Common Market Studies' (2021) 59 JCMS 643.

[25] Consolidated version of the Treaty on the Functioning of the European Union [2016] OJ C202/47.

[26] Consolidated version of the Treaty on European Union [2012] OJ C326/13.

[27] Consolidated version of the Treaty on the Functioning of the European Union [2016] OJ C202/47.

3 Intra-EU Investment Protection and Dispute Settlement

3.1 The Emergence of BITs within the EU

In the world of IIAs, BITs stand out as one of the prevailing forms. Fundamentally, BITs are treaties that are negotiated between two nations aimed at safeguarding cross-border investments made by their respective citizens/investors within each other's borders. They also establish mechanisms for resolving conflicts related to these investments via investor-state arbitration, commonly before an independent international arbitral tribunal instead of national courts. The proliferation of BITs concluded by European nations can be traced back to the 1960s, and they were predominantly signed with nations pertaining to the southern part of the world, which held economic significance for European States' domestic enterprises. However, BITs conducted between the "old" EU nations i.e., the first 15 members, were almost non-existent. Agreements between the "old" MS and other European nations that were yet a part of the Union also remained rare till the end of 1980s and the beginning of 1990s. It was not until the fall of the Communist regimes in Central and Eastern Europe which gave rise to multiple newly sovereign nations that led to the acceleration of BITs within Europe.[28]

In the following years of demand, the patterns of such bilateral treaties were primarily negotiated between "old" EU nations which were largely located in Western Europe, and less tech-forward emerging economies typically from the Eastern European regions.[29] For the Central and Eastern European nations, it created a pathway towards becoming market-oriented economies, thus, the International Monetary Fund and the World Bank encouraged the establishment of BITs to promote foreign investments and to create economic development. While it was also beneficial for the "old" EU nations to enter these BITs to protect their investors in the newly emerging European region, the effective economic revitalization of these emerging economies was partially attributed to the foreign investments fueled by Western European nations. It eventually also led to the largest enlargement of the EU in 2004 in addition to the subsequent expansions in 2007 and 2013, which all had Central and Eastern European nations progressively joining. Following these waves, the question was naturally whether the investment treaties concluded pre-EU accession would become incompatible with EU law post-accession. During the different enlargement waves, the European Commission made the statement that the terms of the BITs per se should not stipulate an impact on the Treaties because of the accession. As a result, the notion of intra-EU BITs came to light, retaining the

[28] Veronika Korom, 'Intra-EU BITs in Light of the Achmea Decision' (2022) 3 CEJCL 97.

[29] Christer Söderlund, 'Intra-EU BIT Investment Protection and the EC Treaty' (2007) 24 JIA 455.

full effectiveness of the then nearly 200 BITs signed between the “old” MS and Central and Eastern European nations.[30]

3.2 Sunsetting Intra-EU BITs: The End of an Era

3.2.1 The Controversies Shadowing Intra-EU BITs

Despite the successful emergence of intra-EU BITs, it was also followed with copious discussions, both politically and legally, resulting in years of divisions among the EU MS as well as between the European Commission and the MS. Disputes through investment arbitration from these intra-EU BITs were especially prevalent from the EU enlargement in 2004 until 2018. Many of them being against Central and Eastern European nations which had become Members of the EU. Notwithstanding the inceptive statement by the Commission, it soon discovered several legal issues stemming from the presence of the intra-EU BITs. Firstly, the Commission contemplated that (I) the treaties could result in discriminatory behaviors among EU-based investors as well as among the MS themselves; (II) It could contravene the principle of mutual trust in EU law; (III) it could lead to the practice of strategically selecting the court based on the expectation of receiving the most advantageous ruling, also known as, forum shopping; (IV) they may also infringe on the exclusive jurisdiction of the CJEU to illuminate EU law, as they establish an alternate legal framework through arbitration processes.[31] Thus, the European Commission argues that both the enforcement of intra-EU BITs and its dispute settlement through arbitration would be deemed incompatible with EU law.[32]

While a small number of MS including e.g., the Czech Republic, Denmark, Italy, and Ireland, agreed with the Commission’s call, the” old” MS had opposing views. Their investors had significant investments in the Central and Eastern European nations, which were protected by the bilateral treaties. Opting out of such BITs would, from their standpoint, be inadequate for safeguarding the protection of investments and investors, as it is not otherwise provided under EU law. Due to the view of the unequal level of investment protection, MS such as the Netherlands and Germany opposed the invitation to terminate the intra-EU BITs.[33] These conflicting perspectives were prolonged, as the Commission and the opposing MS were not able to come to agreeing terms. On the one hand, the” old” EU Members were merely consenting to the termination of intra-EU BITs if they were to be promised a new and improved dispute settlement mechanism. However, on the other hand, the Commission was not committing itself to the replacement regime proposal. Instead, in 2015, the Commission initiated infringement proceedings against MS, whose intra-EU BIT arbitration had sparked considerable controversy including the Slovak Republic, Romania, Sweden, Austria, and the Netherlands.[34]

[30] Korom (n 28).
[31] Ibid.
[32] Lavranos (n 9).
[33] Korom (n 28).
[34] Ibid.

With the Commission acknowledging the difficulty in persuading most MS to terminate their intra-EU BITs, it turned to the arbitral tribunals anticipating them to dismiss claims made by EU-based investors under these BITs. However, the arbitral tribunals' ruling of such treaties had seemingly upheld the statements made by the Commission, [35] referring to the BITs as being supplementary rather than incongruent with the EU Treaties. Consequently, the Commission showed its advocacy towards Member States who argued for the jurisdictional deficiency of the tribunals during investment arbitration cases, as well as the annulment proceedings following the arbitration awards instead.[36]

3.2.2 The Achmea Ruling: A Legal Milestone?

A notable case stemming from the numerous legal and political debates surrounding intra-EU BITs, with potentially lasting effects on the landscape of intra-EU investment protection, is the Slovak Republic v. Achmea B.V. ruling, also known as the Achmea case. The Achmea judgment gained significant attention as it later involved the preliminary ruling of the CJEU, emphasizing the issue of compatibility of intra-EU BITs with EU law. Although the ruling has marked its landmark position, it is still uncertain whether it has been able to provide definite clarity for future intra-EU BITs and the intra-EU implementation of other IIAs.[37]

The CJEU judgment on Achmea took place in 2018, however, the root of the case dates to as early as 1991 from a bilateral treaty concluded between the Netherlands, one of the founding members of the EU, and the erstwhile Czechoslovakia, which was yet a member of the Union at the time. The BIT was later enforced in 1992 aiming to promote and safeguard the investments conducted by investors between the respective nations. The BIT entailed protection provisions such as Article 3(1) on FET, and Article 4 on unrestricted transfer of payments More importantly, it consisted of Article 8 on the dispute settlement through arbitration, which became the primary focal point of the case. In the subsequent year of 1993, the Slovak Republic took on the role as the legal successor to the Czech and Slovak Federal Republic, thereby also inheriting all its rights and obligations, including those outlined in the treaty with the Netherlands. While initially, the BIT was considered one between an EU MS and a third country, it eventually evolved into an intra-EU agreement upon the Slovak Republic joining the Union. In the same period, the Slovak Republic underwent a restructuring of its healthcare system, allowing both domestic and international entities to offer private sickness insurance in the market.[38]

The dispute of the case occurred when the Dutch enterprise, Achmea B.V. entered the Slovak market to participate as one of the international entities with approval and authorization to provide sickness insurance services in the nation. Achmea established a subsidiary investing capital into it to operate on the market. However, two years later, the Slovak Republic enacted restrictions on the prior liberalization of the private sickness insurance market affecting Achmea's ability to generate

[35] Lavranos (n 9).

[36] Korom (n 28).

[37] Bartosz Soloch, 'CJEU Judgement in Case C-284/16 Achmea: Single Decision and Its Multi-Faceted Fallout: The Law & Practice of International Courts and Tribunals' (2019) 18 LPICT 3.

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

profits. This led the enterprise to seek investment arbitration on the grounds of Article 8 of the BIT against the Slovak Republic. Achmea argued that the legislative restrictions of the nation had breached provisions of the BITs, prompting financial damages on the enterprise. As the selected UNCITRAL arbitral tribunal was seated in Germany, the proceedings were governed by German law. The Slovak Republic contested the jurisdiction of the arbitral tribunal, stating that following its accession to the EU, resorting to investor-state arbitration under an intra-EU BIT would conflict with EU law. In 2012, the arbitral award had, nonetheless, ruled the Slovak Republic in breach of FET and unrestricted transfer of payments laid out in Article 3-4 of the BIT. The award demanded the nation a total of EUR 22.1 million for compensating the damages of Achmea.[39]

As the Slovak Republic was resistant to the final arbitration award, it went before the German courts, both at first instance and on appeal citing Article 267 TFEU on preliminary ruling procedures; Article 344 TFEU on the exclusive jurisdiction of the CJEU; Article 18 TFEU on non-discrimination. Albeit both German courts initially disagreed with the Slovak Republic's concerns, the German Federal Court of Justice (Bundesgerichtshof) ultimately decided in 2016 to refer the case for preliminary ruling before the CJEU.[40] The decision was influenced by several factors, including the EU Commission's support for the Slovak Republic, the absence of prior CJEU rulings on the issue, as well as the potential implications for the primacy of EU law in conflicts involving BITs between EU MS.[41]

At the preliminary judgment of the CJEU in 2018, the Court addressed the questions regarding Articles 267 and 344 TFEU while Article 18 TFEU remained unspoken of. The Court commenced the ruling by underlining the autonomy of the EU legal system as stipulated in Article 344 TFEU. This emphasis was, particularly, notable in the context of national and international laws, highlighting the general supremacy of EU law over the legislation of its MS, as well as the direct impact of its provisions on the MS and their citizens. The CJEU then conducted a 3-step examination to determine the compatibility of investor-state dispute settlement mechanisms within intra-EU BITs. The first step revolved around whether arbitral tribunals formed under the BIT would have to employ and construe EU law. To assess this concern, the Court emphasized Article 8(6), which determined the laws for the tribunal to apply when settling a dispute between an investor and the state. The provision covered domestic laws of the MS, which would potentially involve EU law. Since the fundamental freedoms are a part of domestic laws, the tribunal would likely need to incorporate EU law into its interpretation, which would influence the autonomy of the EU legal order.[42] As a result, the Court resorted to the second step of the analysis, considering if such tribunals would be eligible to seek preliminary ruling before the CJEU. However, the Court rendered that such tribunals under the BIT would not constitute a court or tribunal of an MS, as it has been intended to work

[39] Ibid.

[40]Bartosz Soloch, 'CJEU Judgement in Case C-284/16 Achmea: Single Decision and Its Multi-Faceted Fallout: The Law & Practice of International Courts and Tribunals' (2019) 18 LPICT 3.

[41] Jens Hillebrand Pohl, 'Intra-EU Investment Arbitration after the Achmea Case: Legal Autonomy Bounded by Mutual Trust?' (2018) 14 ECL Rev 767.

[42] Quentin Declève, 'Achmea: Consequences on Applicable Law and ISDS Clauses in Extra-EU BITs and Future EU Trade and Investment Agreements' (2019) 4 A Journal on Law and Integration 99.

outside of the judicial systems of the nations involved. Therefore, for it to request a preliminary ruling under 267 TFEU would not be feasible. Nevertheless, in the last step of the analysis, the CJEU noted a different aspect. The EU autonomy could be maintained if the arbitral awards are subject to the review of national courts, which would then be able to refer questions concerning EU law to the Court. However, it found that the decisions of the arbitral tribunal are conclusive. The tribunal chooses its procedures, the law which governs its decisions, and its seat of arbitration. In this case, the arbitration took place in Germany, which under its national laws only permits limited review of arbitral decisions. This could eventually prevent EU law from being properly applied and interpreted.[43]

The Court further underscores the distinction between dispute settlement mechanisms in intra-EU BITs and international agreements concluded between the EU and third nations. The latter can still be compatible with EU law, even if they create courts with binding decisions on EU institutions. However, it is under the condition that they respect the EU autonomy, and do not resolve disputes related to EU law outside of the EU's judicial system.[44] Based on the collective statements, the Court found that Article 8 of the intra-EU BIT had adverse impacts on the autonomy of the EU legal order. Concluding the case, it adjudicated the ISDS clause to be incompatible with EU law.[45]

3.2.3 The Termination Agreement

The immediate responses to the Achmea judgment were dispersed, especially, between the Commission and arbitral tribunals. Many tribunals resisted the final ruling asserting their jurisdiction over such disputes, and contending that they do not operate within the EU legal system.[46] On the other end, the European Commission was offered a much-anticipated opportunity to enhance its discussions with all MS to terminate the intra-EU BITs, as it perceived such treaties as increasingly redundant.[47] The Commission eventually published a Communication in mid-2018 addressing this viewpoint.[48] With the extensive dialogue taking place within the EU, in 2019, a Declaration supported by most MS was collectively issued. The Declaration addressed the legal implications of the CJEU ruling of the Achmea case, as well as the overall investment protection within the Union, pledging to end intra-EU BITs as a whole. In light of the scope of investment protection facing the termination of such treaties, MS which endorsed the Declaration observed the rights and freedoms under EU law as adequate.[49] Consequently, in 2020, 23 EU Member States excluding Austria, Finland, Ireland, and Sweden, had agreed on a plurilateral treaty for terminating almost 130 intra-EU BITs. It was named the "Agreement for

[43] Dorieke Overduin, 'Turning Tides: The Landmark Decision in the Achmea Case – The Ecosystem of EU Law Means the End of Intra-EU BITS' (2018) 3 EILA Rev 242.

[44] Case C-284/16 *Slowakische Republik v Achmea BV.* [2018] ECLI:EU:C: 2018:158., para. 57-58.

[45] Case C-284/16 *Slowakische Republik v Achmea BV.* [2018] ECLI:EU:C: 2018:158., para. 59.

[46] Tereza Profeldová, 'The Aftermath of the Achmea Case', in *Universal, Regional, National – Ways of the Development of Private International Law in 21st Century* (Masaryk University Press, 2019).

[47] Gordon Nardell QC and Laura Rees-Evans, 'The Agreement Terminating Intra-EU BITs: Are Its Provisions on "New" and "Pending" Arbitration Proceedings Compatible with Investors' Fundamental Rights?' (2021) 37 AI 197.

[48] Katariina Särkänne, 'Agreement for the Termination of the Intra-EU Bit s: Breaking the Stalemate, But Not Quite There Yet?' (2022) 91 NJIL 253.

[49] Lenard Sandor, 'The Constitutional Dilemmas of Terminating Intra-EU BITs' (2022) 3 CEJCL) 177.

the Termination of Intra-EU Bilateral Investment Treaties (Termination Agreement)”.[50] The termination had been entered into force in accordance with Article 16(1) of the agreement in August 2020.[51] An important aspect of the Termination Agreement, which has also been up for discussion since it was implemented is found in Article 2 and Article 3. They touch on the issues of the so-called sunset clauses, also known as survival clauses. These clauses prolong the BITs’ protective effect for a specified period even after the termination of the treaties. It restricts nations from immediately abandoning their treaty obligations. Article 2 of the agreement aims at ending all such clauses in the intra-EU BITs in force, while Article 3 seeks to remove the sunset clauses in those treaties that have already been terminated, to ensure that the agreement is thorough and comprehensive.[52] On the whole, the agreement is intended to end the BITs between the signatory Member States, and make clear as a result of the CJEU interpretation of EU law in the Achmea case that the arbitration clauses in such treaties are inapplicable. Instead, Member States and their investors ought to revert to the domestic courts which shall and can apply EU law fully. While the Termination Agreement appears to bring intra-EU BITs towards a resolution, new questions prevail, and the aftermath for the level and effectiveness of investment protection and dispute settlement for investors within the EU remain seemingly open-ended.[53]

3.3 Brief Exploration of the Common Intra-EU BIT Provisions

As a consequence of the Termination Agreement, EU-based investors are likely to face new challenges, and the concentration is instead put on the level of investment protection and dispute resolutions given to them in the recent change of landscape. While safeguarding investments of EU investors was originally operated through two distinct legal frameworks: the one governed by intra-EU BITs and the other which they are reliant on now, EU law and the national laws of the EU MS. To explore the nuances of the issues, this section analyzes the provisions on investment under EU law, discussing whether the investment protection would likely be adequate for investors investing within EU borders.[54] Although intra-EU BIT provisions are important for perspective, they are only briefly explored due to their current ineffectiveness in the EU.

In many intra-EU BITs, it is noticeable that there are three recurring components; the definition of the scope of the treaty often by clarifying what qualifies “investment” and “investor”. This makes it clear that the treaty is targeted within confined frames toward investments; the obligations of the host economies toward the investors; dispute settlement provisions through ISDS particularly with the use

[50] Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union [2020] OJ L 169/1.

[51] Information concerning the entry into force of the Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union [2020] OJ L 281/1.

[52] Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union [2020] OJ L 169/1.

[53] Särkänne (n 48).

[54] Andersen and Hindelang (n 4).

of arbitration.[55] To break into more detail, the prominent obligations of host states would entail (I) the assurance of non-discrimination prohibiting unjustified differential treatment based on nationality,[56] and under the umbrella of non-discriminatory behaviors, there are common provisions of national treatment ensuring that foreign investors are not treated less favorably than domestic investors; most-favored-nation requiring the host nation to treat the foreign investors identical as with investors from other nations. (II) The right to FET is considered to extend across a broad spectrum of legal principles such as transparency in governmental activities, prevention of arbitrary actions, assurance of legal certainty, safeguarding the investor's legitimate expectations, and adherence to proportionality. (III) They can also cover expropriation, and while it is not prevented per se as such, it would be protected against when it occurs without adequate compensation to investors, or when it violates certain principles e.g., due diligence or non-discrimination. The BITs often protect both against direct expropriation which refers to the outright seizure of assets or property by a government in the absence of compensation. Indirect expropriation involves government actions or regulations that significantly diminish the value or use of an investment leading to a substantial economic impact, even without outright seizure. (IV) Since investors would often place great importance on the ability to repatriate profits, the intra-EU BITs would typically also include the free transfer of different funds for investments. (V) Last but not least, as utilized under the Netherlands-Slovak Republic BIT mentioned in the Achmea case, intra-EU BITs refer to arbitration mechanisms for resolving disputes for the investors/investors and the host nations. This setup allows investors to individually turn to a neutral venue sidestepping potentially biased or ineffective national courts in the host nations.[57]

3.4 Current Investment Provisions under EU Law

Within the EU legal framework, investment protection can be comparably complex and characterized by its multi-level structure. Since EU-based investors are no longer covered by the intra-EU BITs, they are subject to a diverse array of legal regimes including the national laws of the EU MS, primary and secondary EU law. While this is seemingly scattered, it is the present coverage of investment protection across the various levels of governance within the EU.[58]

3.4.1 Protection Against Discriminatory Treatment

The TFEU encompasses several provisions which could be broadly comparable, but not as definite as those from the intra-EU BITs. First and foremost, and although not merely applicable to investments but to all areas covered by the Treaty, Article 18 TFEU outlines one of the fundamental elements of EU law. That is, any discriminatory acts against individuals or entities including investors based on

[55] Roos van Os and Roeline Knottnerus, 'Dutch Bilateral Investment Treaties: A Gateway to "Treaty Shopping" for Investment Protection by Multinational Companies' (2011) SOMO 1.

[56] Mavluda Sattorova, 'Investor Rights under EU Law and International Investment Law' (2016) 17 JWIT 895.

[57] Andersen and Hindelang (n 4).

[58] Ibid.

nationality shall not be allowed.[59] The assurance of equal treatment without discrimination also carries the keystone to the four fundamental freedoms of goods, services, persons, and capital in the internal market. While all four freedoms are important, it is relevant to highlight Article 63(1) TFEU, which governs the unrestricted transfer of capital. Article 63(2) provides the freedom of payments between EU MS and between the MS and third nations. This ensures that there shall not be imposed barriers on the flow of capital across borders nor shall there be restrictions on the transfer of money in transactions.[60] Additionally, a principle closely related to the four freedoms is Article 49 TFEU guaranteeing the freedom of establishment. It grants entities and individuals the right to create and manage businesses. It applies to the establishment of e.g., subsidiaries, branches, and agencies under the same conditions as nationals of the host country, which many EU-based investors would utilize for their investments.[61]

Although these anti-discrimination provisions belong to the EU's fundamental principles, EU law also explicitly recognizes that the different freedoms may be restricted to accommodate conflicting public interests, with the burden of proof put on the MS.[62] For instance, where such discriminatory treatment would be considered justified are only for reasons of e.g., public policy, security, and health as outlined in Article 52(1) TFEU, and shall be applied proportionately.[63] From the standpoint of EU-based investors, the non-discriminatory provisions contain obvious exemptions which would possibly influence their investments through the benefits of the freedoms in comparison to those of intra-EU BITs. The BITs, especially the older ones, usually lack exceptions for e.g., public health, environmental protection, or national security, which could lead to the investors having a higher likelihood of challenging government measures that impact their investments in the host state and eventually prevail in arbitration proceedings. While they may be facing fewer regulatory hurdles in the EU market through the BITs that are often without derogations. Concerns would predictably be raised about the balance between investor rights and public policy objectives, and as a result, undermine EU law.[64]

3.4.2 Protection Against Expropriation

As touched on previously, intra-EU BITs have long been incorporating the safeguarding against expropriation. Under EU law, the rules protecting this aspect can be found widely in the TFEU and CFR. Commencing with Article 345 TFEU, which touches on the Union's competence in regulating property ownership rules, it is worded that EU Treaties shall not undermine the property ownership system in the individual MS.[65] While this may seem as if MS contains the exclusive competence to govern property rights overall, the practice of it may differ slightly. Since the Article is quite vaguely phrased, there have been divided viewpoints on the

[59] Consolidated version of the Treaty on the Functioning of the European Union [2016] OJ C202/47, Art 18.
[60] Consolidated version of the Treaty on the Functioning of the European Union [2016] OJ C202/47, Art 63.
[61] Consolidated version of the Treaty on the Functioning of the European Union [2016] OJ C202/47, Art 49.
[62] Sattorova (n 56).
[63] Consolidated version of the Treaty on the Functioning of the European Union [2016] OJ C202/47, Art 52.
[64] Sattorova (n 56).
[65] Consolidated version of the Treaty on the Functioning of the European Union [2016] OJ C202/47, Art 345.

interpretation of it by legal scholars.[66] European institutions such as the CJEU have taken a narrow approach toward the provision's elucidation. From previous Court cases such as *Fearon v. Ireland*, the CJEU has stated that Article 345 TFEU does not necessarily prohibit EU rules on property protection from being applied. This means that the measures taken by MS, which would impact property rights, shall remain subject to the principle of non-discrimination as outlined in EU law.[67] In this respect, the provision mainly covers the right of MS to nationalize or privatize property, thus, the Union ought not to be impeded from governing protection of foreign investments against expropriation. With the Court's narrowed interpretation, the provision does not reject the EU from interfering in the complete property regime, whether direct or indirect expropriation.[68]

Moving on with more specificity to the protection against expropriation, Article 16 of the CFR guarantees the freedom to conduct a business.[69] This complements Article 17 of the CFR citing the "Right to Property". The provision draws influence from Article 1 of Protocol No. 1 of the European Convention on Human Rights.[70] It affirms the rights to property ownership and asserts that all individuals have the fundamental right to own, use, manage, and pass on their possessions legally obtained. However, it also outlines the conditions under which property may be legally taken or regulated by authorities, e.g., in the public interest. In such cases, fair compensation must be provided promptly for what has been lost.[71] The essence of the provision has similarly been stressed in EU case laws: *Metronome Musik GmbH v Music Point Hokamp GmbH*[72] and *Germany v Council*. The Court points out that property protection rules under EU law are not absolute.[73] They are subject to non-discrimination and the principle of proportionality as stated in Article 5(4) TEU.[74] The protection rules ought to be balanced with their social function and the objectives of general interest pursued by the EU.[75]

3.4.3 Dispute Settlement

With the Termination Agreement as a turning point for investor-state dispute settlement, not only is the EU undergoing a reform period in this respect, but EU-based investors are exposed to a different avenue than arbitration in cases of disputes. Without the guarantee of investor-state arbitration, disputes would be reverted to the EU legal system itself.[76] As stipulated in Article 47 of the CFR, anyone subject to EU law, and whose rights and freedoms are infringed, would have access to an effective remedy before an impartial tribunal.[77] In principle, the legal remedies for

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[66] Angelos Dimopoulos, 'EU Competence over Foreign Investment' in Angelos Dimopoulos (ed), *EU Foreign Investment Law* (Oxford University Press 2011).

[67] Case C-182/83 *Fearon v Irish Land Commission* [1984] ECLI:EU:C: 1984:335.

[68] Dimopoulos (n 66).

[69] Charter of Fundamental Rights of the European Union [2012] OJ C-326/319, Art 16.

[70] Andersen and Hindelang (n 4).

[71] Charter of Fundamental Rights of the European Union [2012] OJ C-326/319, Art 17.

[72] Case C-200/96 *Metronome Musik GmbH v Music Point Hokamp GmbH* [1998] ECLI:EU:C:1998:172, para. 21.

[73] Case C-280/93 *Germany v Council* [1994] ECLI:EU:C: 1994:367, para. 78.

[74] Consolidated version of the Treaty on European Union [2012] OJ C326/13, Art 5(4)

[75] Sattorova (n 56).

[76] Pierre Collet, 'The Current European Union Investor State Dispute Settlement Reform: A Desirable Outcome for Investment Arbitration? Commentary' (2020) 53 NYU JIPL 689.

[77] Charter of Fundamental Rights of the European Union [2012] OJ C-326/319, Art 47.

investors would be sought through domestic courts of the host nation or place of investment.[78] Under Article 4(3) TEU on the principle of sincere cooperation, it is expected that the EU and the MS are cooperative in fulfilling their respective obligations under the EU Treaties. As such, there shall be mutual trust between the parties to provide the equivalent legal protection.[79] However, the actualities are not always corresponding. This is also where issues can arise in effect, as the investors need to adhere to the procedural requirements and formalities of the legal system in the country where they invest, but also to the quality and possible shortcomings of certain courts within that EU MS. For investors, the reliance on domestic courts may give rise to concerns of partiality favoring the host nations; various legislative bodies within the EU MS may differ in the way they enact investor protection; it can be a rather time-consuming process, hence, inefficient; as well as the domestic court having insufficient knowledge in the pertinent legal domain or industry of the investment.[80]

However, domestic courts are not necessarily the final pathway for legal remedy in investment disputes; above them lies the CJEU. While it is true that the CJEU is responsible for securing the accurate interpretation and application of EU law, investors are also restricted from pursuing further action which allows them to gain direct access to the CJEU. Individuals and businesses can, in theory, seek access through the action of annulment as outlined in Article 263 TFEU, which constitutes them as “non-privileged applicants”. This makes them subject to more limited conditions, and likely a lengthier process.[81] The provision requires applicants to demonstrate that they are directly and individually affected by an EU act, and not by an investor-state dispute. Therefore, for investors to reach CJEU, it would rather be by referral of the domestic court itself through the preliminary ruling stated in Article 267 TFEU.[82] In certain circumstances, the European Commission may also on the grounds of Article 258 TFEU commence infringement proceedings toward an MS for not complying with an obligation under the Treaties. If the MS does not carry out measures to comply with the EU or provide sufficient justifications, the case can be brought before the CJEU.[83] However, such a scenario is much dependent on the political considerations of the European Commission, thus, investors are highly confined to bring an investor-state dispute beyond domestic courts.[84]

3.4.4 Concerns on Adequacy for EU-Based Investors

Having provided an outline of the investment protection provisions under the Treaties of the Union, the investment protection mechanisms under EU law appear to contain a wider reach of scope with less specificity towards EU-based investors and their investments. Arguably, there can be several reasonings for this viewing: (I) Albeit the EU has increasingly emphasized private rights since the Treaty of Lisbon, inherently, EU law is focused on European integration, liberalizing markets (the

[78] Collet (n 76).

[79] Consolidated version of the Treaty on European Union [2012] OJ C326/13, Art 4(3).

[80] Collet (n 76).

[81] Consolidated version of the Treaty on the Functioning of the European Union [2016] OJ C202/47,Art 263 para 4.

[82] Andersen and Hindelang (n 4).

[83] Consolidated version of the Treaty on the Functioning of the European Union [2016] OJ C202/47, Art 258.

[84] Andersen and Hindelang (n 4).

internal market), and protecting economic freedoms. Its predominant aim is, therefore, not to regulate the relations between investors and states. In this aspect, the investor-state regulation still primarily falls under IIAs. (II) Since the Union is multi-faceted, investment protection under it is complex and divided between EU and national laws. With confining interpretations and various exceptions in the interest of national law, it further builds on the intricacy. This is opposed to older-generation intra-EU BITs, where exceptions to public objectives or other restrictions were rarely included. (III) With domestic courts being the primary source of dispute settlement mechanisms under EU law, the effective submission of an investor's claim as well as the interpretation of investment protection provisions may vary across MS. The courts are likely less knowledgeable in specific areas of investments, and as remedies are determined by individual MS, cases brought before domestic courts can reduce consistency.[85]

Nevertheless, multiple fundamental principles found under intra-EU BITs are rooted in EU law e.g., the safeguarding of investor's legitimate expectations. The provisions contained under BITs rather afford more comprehensive investor protection in comparison to EU law, which interprets such protection in consideration of their social impact. While it is true that investment protection provisions under EU law are not as targeted as intra-EU BITs, EU-based investors would receive a high level of protection if it were necessary to ensure the functioning of the internal market. However, vice versa, it may also be curtailed if the enforcements were to hamper the freedoms. In the interest of EU-based investors, the current investment legal framework of the Union may not be the ideal model for protecting investments and providing access to effective dispute settlement. Perhaps, there is a need for a more balanced investment framework entailing social concerns with adequate coverage of investment protection, especially, in the evolving investment environment within the EU.[86]

At present, the landscape of intra-EU investment protection for EU-based investors has undergone significant changes after the Achmea ruling and Termination Agreement. However, the trajectory of investment protection does not end at the EU level. Moving outside of the Union, investments of EU-based investors are governed by a network of IIAs instead of the sole reference to EU law. This sets the stage for understanding the broader context of investment protection and dispute settlement mechanisms afforded to investors, which is to be unraveled in the following chapter.

[85] Ivana Damjanovic (ed), 'The Internal Investment System of the EU', in *The European Union and International Investment Law Reform: Between Aspirations and Reality* (Cambridge University Press 2023).
[86] Sattorova (n 56).

4 Extra-EU Investment Protection and Dispute Settlement

4.1 Regulation 1219/2012 on Transitional Arrangements of Extra-EU BITs

Cross-border investment protection can be complicated, and while EU law aims at protecting those within its multi-level system, such transactions typically also disperse across numerous other countries outside of the Union as well. They can be referred to as extra-EU investments involving a non-EU nation and an EU MS. As mentioned in Chapter 2, the EU gained exclusive competence over FDI under the CCP after the Treaty of Lisbon. The direct outcome of such a transition is that the EU would be authorized with the negotiation and conclusion of IIAs with countries outside the Union. Yet before that, the EU MS had already concluded approximately 1200 BITs with third nations.[87] In view of the European Commission, the conferral of competence raised issues with the existing extra-EU BITs concluded by the MS. Therefore, on account of Article 2(1) TFEU, the EU MS ought to be authorized to continue maintaining and enforcing their BITs.[88] As a result of the discussions between the EU institutions and MS, Regulation 1219/2012 was implemented and enforced in 2013. The Regulation, also known as a grandfathering instrument, revolves around the transitional arrangements and legal effect of extra-EU BITs following the Treaty of Lisbon.[89] It sets the rules governing the continuation, alteration, and establishment of extra-EU BITs.[90] Following Article 1 of the Regulation, it deals with any MS' extra-EU BITs with provisions on investment protection, providing the procedural framework of how they can adjust and form these agreements, without going against the EU's areas of competencies.[91] Consequently, the Regulation has three clear measures i.e., the maintenance of the existing BITs signed prior to the MS accession to EU or the Lisbon Treaty; the BITs that would be concluded after the Regulation; and lastly, those signed in between the Lisbon Treaty and the Regulation. The first measure (pre-Lisbon Treaty enforcement BITs) is outlined in Articles 2-6 of the Regulation. The MS of those BITs associating with that ought to notify the Commission and specify whether they want to maintain the agreements in effect or allow them to come into effect under the rules of the Regulation (Article 2).[92] All of which would be assessed on whether they would

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[87] Luca Pantaleo, 'Member States Prior Agreements and Newly EU Attributed Competence: What Lesson from Foreign Investment' (2014) 19 EFA Rev 307.

[88] Lavranos (n 10).

[89] Pantaleo (n 87).

[90] Annalisa Daniela Puppo, 'Legal Issues Within the Eu and Member States Concerning Bilateral Investments Treaties' (2021) 14 SSL 71.

[91] Regulation (EU) No 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 [2012] OJ L 351/40, Art 1.

[92] Puppo (n 90).

create significant barriers to the finalization of BITs negotiated by the Union with the same third nation (Article 5). Therefore, they are at least effective up until such new BITs are enforced (Article 3).[93] These measures can be considered as *ex post* control, because the assessment of existing extra-EU BITs occurs after the Commission has been notified, and corrective measures may be taken from then onwards.[94]

The second measure (future MS BITs) laid out in Articles 7-11 of the Regulation, addresses the conditions that allow the authorization of MS to either alter an existing BIT or conclude a new one in the future. Under Article 8, before any negotiation, the Commission shall be notified by the MS about the intentions of the potential BIT. The criteria are then listed for which would withhold the authorization such as it is conflicting with EU law; contradicting EU principles and objectives for external action; or hindering negotiations by the EU with third nations (Article 9(1)). The commission is also allowed to demand the inclusion or removal of certain clauses from the BIT to sustain consistency with EU investment policy and law (Article 9(2)). The involvement of the Commission during negotiations and the authorization process for signing and concluding the BITs are also detailed further in Articles 10-11. If authorized by the Commission, provisions from the pre-Lisbon Treaty measure in the Regulation are applied, as though they had been informed under Article 2. If not, the Commission provides the reasons for the decisions to the MS.[95] In opposition to the previous provisions, these measures would consist of *ex ante* control. They ensure that the negotiation and conclusions of BITs align with EU law, policies, and objectives from the outset. They enable proactive oversight and intervention from the Commission.[96] With the inclusion of future BITs into the Regulation, it is recognized that the MS would remain able to sign new and amended BITs insofar as there have been approved compatibility by the Commission.[97]

Furthermore, the third measure ("in-between BITs") concerns the agreements signed by MS between the enforcement date of the Lisbon Treaty and the Regulation (Article 12).[98] There are similar notification requirements, and the Commission assesses whether the agreements comply with the conditions listed in Article 9. Having established compliance, the BITs are authorized maintenance or entry into force under EU law. Otherwise, the MS would be reasoned for the refusal. Altogether, any BIT falling within the scope of the Regulation has obligations to inform the Commission about the meetings scheduled under the BITs, and the agenda to be discussed at the meetings. In cases where the initiation of dispute resolution arises, MS ought to pursue the agreement of the Commission before the formal procedures. Shall the Commission request it, the MS can activate the relevant dispute resolution mechanisms outlined in the BIT. Consequently, both the MS and

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[93] Regulation (EU) No 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 [2012] OJ L 351/40, Art 5 & 3.

[94] Puppo (n 90).

[95] Regulation (EU) No 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 [2012] OJ L 351/40, Art 7-11.

[96] Puppo (n 90).

[97] Lavranos (n 10).

[98] Puppo (n 90).

the Commission are expected to cooperate throughout the dispute settlement process.[99] For EU-based investors, the Regulation affirms the status quo of extra-EU BITs, and even though it contains specific procedural conditions, the level of investment protection afforded to investors would most likely remain similar as before. The main concern would rather be that some extra-EU BITs would be gradually ceased due to being substituted by Union BITs. In the interest of the EU, it is currently not believed that all extra-EU BITs would be replaced.[100]

4.2 Extra-EU BITs Concluded between Member States and Canada

Since the accession of MS from multiple Central and Eastern European nations into the EU during its enlargements from 2004-2013, the BITs concluded by them with third nations pre-accession has also been much highlighted. Just before the enforcement of the Regulation, nations including the Czech Republic, Slovak Republic, Poland, Hungary, Romania, Croatia, and Latvia were seemingly in discussions with Canada to alter certain provisions for better compliance within the Union, and assurance of more specified investment protection provided to their investors in the host state. The European Commission eventually approved of the renegotiations that these MS had with Canada. Among them, 4 were amended post-EU accession between 2009-2010, and the rest had reputedly undertaken re-negotiations but were not signed.[101]

While these extra-EU BITs are, nonetheless, valid under public international law, as they are concluded with non-EU nations. Under EU law, with the clarification on the legal effect of extra-EU BITs in Regulation 1219/2012, MS are allowed to maintain or have their extra-EU bilateral agreements enter into force if they are to be found compatible with EU law. However, they are also subject to the replacement principle.[102] In the same period as the amendments of the Central and Eastern European MS BITs with Canada during 2009-2010, the EU was simultaneously negotiating a broader bilateral agreement, the CETA. Once that agreement comes fully into force, the seven extra-EU BITs concluded by MS would naturally be replaced and ceased.[103] Nevertheless, the stated extra-EU BITs are still partly in force, as the whole of CETA has to be ratified by all MS. However, with the presence of CETA, their relevance is increasingly diminished.[104]

Since Chapter 3 has touched on some of the important provisions of intra-EU BITs, which in principle contain structural resemblance with extra-EU BITs, they are not repeated here. However, the current landscape for these MS-Canada BITs is

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[99] Regulation (EU) No 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 [2012] OJ L 351/40, Art 12-13.

[100] Philip Strik, 'The Interplay between EU Law and Member State Bilateral Investment Agreements with Third Countries', in *Shaping the Single European Market in the Field of Foreign Direct Investment* (Hart Publishing 2014).

[101] Ibid.

[102] Ivana Damjanovic (ed), 'The External Investment System of the EU', in *The European Union and International Investment Law Reform: Between Aspirations and Reality* (Cambridge University Press 2023).

[103] Damien Nyer, 'The Investment Chapter of the EU-Canada Comprehensive Economic and Trade Agreement' (2015) 32 JIA 697.

[104] Nicolas Angelet, 'CETA and the Debate on the Reform of the Investment Regime' in Makane Moïse Mbengue and Stefanie Schacherer (eds), *Foreign Investment Under the Comprehensive Economic and Trade Agreement (CETA)* (Springer International Publishing 2019).

seemingly moving in a different direction, where their validity would be challenged by CETA. Comprehending the sunset and/or survival clauses within the BITs, therefore, becomes prevalent. In theory, such clauses should guarantee that the investments of EU-based investors made before the termination of a BIT carry on being safeguarded for a specified period. They provide more stability and certainty, preventing the sudden removal of investment protection from investors. The clauses commonly cover both substantive provisions and dispute settlement clauses in the BIT.[105] They are also present in all the MS-Canada BITs. Beginning with the older agreements, Article 14 on duration and termination in the Poland-Canada BIT (1990) deals with this. It states that for the investments made prior to the effective date of the termination notice, investment protection provisions of Article 1-13, would remain in effect for 20 years.[106] Similarly, the Hungary-Canada BIT (1991) sunset clause is found in Article 14(3) on final provisions securing investors 20 years of protection under its provisions.[107] In the following Croatia-Canada BIT (1997)[108] as well as the 4 amended treaties: Romania-Canada BIT (2009)[109], Latvia-Canada (2009)[110], Czech Republic-Canada BIT (2009)[111], and Slovak Republic-Canada BIT (2010)[112] the timeframe is shorter. The sunset clauses of the 5 BITs also lie in their final provisions, of which the investment protection provided under them would remain in force for 15 years. The duration of sunset clauses generally varies in different agreements, and among these 7 BITs, the older ones provide a longer period of protection. The amended and newer ones allow a comparably shorter period, but overall, all their lengths of application are, nonetheless, within the typical range.[113] Instead, the question is directed toward whether the years guaranteed in these 7 BITs would be affected by CETA.

While the sunset clauses of the 7 BITs are within 15-20 years, pursuant to Article 30.8(2) of CETA on termination, suspension, or incorporation of other existing agreements, the duration of such clauses has been effectively reduced. It refers directly to Annex 30-A, which lists all 7 agreements concluded by MS with Canada. The provision states that claims can still be submitted under those agreements, however, with the condition that (I) the treatment in question was provided while the BIT was still in force, and (II) the claim shall be within 3 years from the date the BIT

[105] James Harrison, 'The Life and Death of BITs: Legal Issues Concerning Survival Clauses and the Termination of Investment Treaties' (2012) 13 JWIT 928.

[106] Agreement between the Government of Canada and the Government of the Republic of Poland for the Promotion and Reciprocal Protection of Investments (signed 6 April, entered into force 22 November 1990) CTS 1990 43.

[107] Agreement between the Republic of Canada and the Republic of Hungary for the Promotion and Reciprocal Protection of Investments (signed 3 October 1991, entered into force 21 november 1993) CTS 1993 14.

[108] Agreement Between the Government of Canada and the Government of the Republic of Croatia for the Promotion and Protection of Investments (signed 3 February 1997, entered into force 30 January 2001) CTS 2001 4, Art 15.

[109] Agreement Between the Government of Canada and the Government of Romania for the Promotion and Reciprocal Protection of Investments (signed 8 May 2009, entered into force 23 November 2011) Art 18.

[110] Agreement Between the Government of Canada and the Government of the Republic of Latvia for the Promotion and Protection of Investments (signed 5 May 2009, entered into force 24 November 2011) Art 18.

[111] Agreement Between the Government of Canada and the Government of Czech Republic for the Promotion and Protection of Investments (signed 6 May 2009, entered into force 22 January 2012) Art 15.

[112] Agreement Between the Government of Canada and the Slovak Republic for the Promotion and Protection of Investments (signed 20 July 2010, entered into force 14 March 2012) Art 15.

[113] Harrison (n 105).

was ceased.[114] The implications of such amendment ought to be discussed later in the chapter.

4.3 Comprehensive Economic and Trade Agreement (CETA)

On October 30, 2016, the free trade agreement known as CETA between the EU and Canada was signed. It represents the first comprehensive agreement to have been concluded by the EU with a non-EU developed economy since the extension of competence under the CCP following the Lisbon Treaty in 2009. The initiation of negotiations between EU and Canada commenced in 2009. This prolonged until September 26, 2014, when the negotiations were eventually concluded.[115] As bilateral investment disputes through arbitration had been increasing against EU MS, the European Commission was concerned about such BIT models to be posing risks. Hence, CETA has arguably been an aim to create a new model or standard in international trade agreements with investment provisions.[116] The agreement entails 30 chapters, and it targets a broad-ranging scope that goes beyond the traditional trade concerns on goods and services. It extends to including chapters on e.g., investment, regulatory cooperation, environmental protection, and public procurement. The present reach in scope of CETA is the element that distinguishes it from any other existing BITs and trade agreements.[117]

Although CETA had been signed in 2016, until now, it has not been enforced fully. The reasoning behind this is that CETA has been presented as a mixed agreement. Granted, the EU contains exclusive competence over the conclusion of trade agreements in areas of e.g., commercial aspects of FDI or trade in goods and services with third nations under Article 207 TFEU. However, the trade-related concerns in CETA arguably also touch on areas that fall under the competencies of MS. While the European Commission initially proposed to categorize CETA as an EU-only agreement, there have been diverse opinions coming from the Council and MS. For instance, it has been suggested by Germany that Article 207 TFEU solely states the inclusion of FDI and no other forms of investments such as foreign portfolio investments, thus, the EU exclusive competences do not contain all aspects of the agreement.[118]

Since the agreement is proposed as a mixed agreement, it requires ratification i.e., receiving the formal consent by all relevant national (and some regional) parliaments. Usually, the areas considered as EU competence can be provisionally applied as laid out in Article 218(5) TFEU. This indicates that specific or most parts of the agreement can come into effect allowing for temporary implementation, while

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[114] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part (signed 30 October 2016, provisionally applied 21 September 2017) Chapter 30.

[115] Nyer (n 103).

[116] Nathalie Bernasconi-Osterwalder and Howard Mann, 'CETA and Investment: What Is It About and What Lies Beyond?' in Makane Moïse Mbengue and Stefanie Schacherer (eds), in *Foreign Investment Under the Comprehensive Economic and Trade Agreement (CETA)* (Springer International Publishing 2019).

[117] Kurt Hübner, Anne-Sophie Deman and Tugce Balik, 'EU and Trade Policy-Making: The Contentious Case of CETA' (2017) 39 JIE 843.

[118] Tobias Dolle and Bruno G Simões, 'Mixed Feelings about "Mixed Agreements" and CETA's Provisional Application' (2016) 7 EJRR 617.

the lengthy ratification process remains ongoing. Currently, the EU has provisionally applied for the whole of CETA, and only with some exceptions. As a result of the compromises reached from the differing views within the Union, certain provisions on investment protection and investment dispute resolution have been avoided in the provisional application.[119] In an EU notice concerning the provisional application, it is specified that Articles 8.1-8.8, Article 8.13, Article 8.15 (excluding paragraph 3), and Article 8.16 of CETA on investments are applied for.[120] Nevertheless, in the relevance of EU-based investors, the chapter on investments found in CETA persists to be of most importance. The following sub-sections would, therefore, further examine the provisions regarding investment protection and dispute resolution in the agreement, identifying the patterns that are comparable to those in extra-BITs concluded between the MS and Canada. When all related parties have ratified the agreement, which is a matter of time, and all aspects of the investment protection provisions are enforced, EU-based investors investing in Canada can anticipate extensive protection under this agreement.

4.4 Investment Provisions under Chapter 8 of CETA

At the forefront, chapter 8 of CETA entitled "Investment", provides the provisions on definition and scope, establishment of investments, non-discriminatory treatment, investment protection, and resolution of investment disputes between investors and host state. The chapter is organized into six sections (A-F), and the provisions of most relevance to the thesis and protection of EU-based investors are to be examined. The substantive rules establishing the rights and obligations are detailed in the following 4 segments, while the last segment unravels the procedural rules governing the process and conduct of the dispute resolution mechanism.

4.4.1 Definitions and Scope

At first sight, section A elucidates the prevalent definitions of CETA (Article 8.1). Observing previous BITs and the recent need for greater certainty in such agreements, the definitions covered in CETA are seemingly written more extensively.[121] For EU-based investors to benefit from provisions in this agreement and chapter, they first need to fit the definition of an investor and investment. In Article 8.1, investors can be a government body (referred to as "Party"), a natural person based on citizenship and residency, or an enterprise (excluding branches or representative offices) of a government body. The definition of enterprises further pinpoints their engagement in considerable business activities within that territory, but they can also be owned or controlled (direct or indirect) by a natural person or enterprise of the Party. The mentioned entities shall be involved in making, seeking

[119] Bart Driessen, 'Provisional Application of International Agreements by the EU' (2020) 57 CML Rev 741.

[120] Notice concerning the provisional application of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part [2017] OJ L 238/9.

[121] Jan Asmus Bischoff and Matthias Wühler, 'The Notion of Investment' in Makane Moïse Mbengue and Stefanie Schacherer (eds), *Foreign Investment Under the Comprehensive Economic and Trade Agreement (CETA)* (Springer International Publishing 2019).

to make, or having made an investment in the territory of the other Party.[122] In comparison to traditional BITs, the definition of investors under CETA shuns legal entities, the so-called shell companies. These companies lack substantial business activities and would not be able to take advantage of the investment provisions under this agreement.[123]

Similar to other investment treaties, CETA also follows an asset-based approach to its definition of investments in which it articulates with "every type of asset", succeeding with a non-exhaustive list of the forms the investment may take. Besides this, the agreements also define "covered investments", which put additional criteria that the investment shall meet for investors to qualify for full protection under it.[124] That includes (I) the investment is located within the territory of the host state. (II) It complies with the relevant laws and regulations at the time it is made. (III) The investment shall be of direct or indirect ownership or control of an investor from the other Party. (IV) The investment must either already exist as the CETA comes into force or be made after that point.[125] In conjunction with definitions, the scope of CETA in Article 8.2(2) and (3), add sector-specific carve-outs. This indicates that certain sectors are excluded from receiving protection under CETA e.g., those related to air services or audio-visual services.[126]

4.4.2 National Treatment and Most-Favored-Nation

Moving forward, section C provides the rules on non-discriminatory treatment with two distinctions: national treatment (Article 8.6) and most-favored-nation treatment (Article 8.7). National treatment has long been a recurring clause in IIAs, and the one in CETA can be largely comparable to those as well. In CETA, national treatment contains 3 paragraphs; firstly, it overall ensures that foreign investors are treated no less favorably than the treatment afforded to domestic investors and their investments in similar circumstances; secondly, it clarifies that the national treatment principle applies not only to federal level but also to sub-national governments in Canada. Therefore, governments at the provincial or municipal level shall also provide foreign investors with treatment no less favorable than the treatment afforded to domestic investors. This enables consistency across all levels of government; thirdly, along the lines of paragraph 2, the national treatment also applies within the EU. Each government within the EU shall treat investors from the other Party and their investments the same as they treat their domestic investors.[127]

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[122] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part (signed 30 October 2016, provisionally applied 21 September 2017) Chapter 8.

[123] Dorieke Overduin, 'INVESTMENT CHAPTER IN CETA: GROUNDBREAKING OR MUCH ADO ABOUT NOTHING?', in *International Arbitration and EU Law* (Edward Elgar Publishing 2021).

[124] Bischoff and Wühler (n 121).

[125] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part (signed 30 October 2016, provisionally applied 21 September 2017) Chapter 8.

[126] Overduin (n 123).

[127] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part (signed 30 October 2016, provisionally applied 21 September 2017) Chapter 8.

The second non-discriminatory distinction is the most-favored-nation clause, which contains 4 paragraphs. This clause has been incorporated in most BITs, perhaps, more than national treatment provisions have been.[128] It similarly addresses the equal treatment of foreign investors, however, different from national treatment it indicates that each Party to the agreement shall treat investors from the other Party and their investments no less favorably than investors from a third nation and their investments in similar situations. It then proceeds to apply the most-favored-nation to the different levels of governments within Canada and the EU, as in the national treatment provision, but instead ensures that foreign investors are not disadvantaged compared to investors from third nations. The last two paragraphs involve the exception for recognition and dispute resolutions as well as clarification on the definition of "treatment".[129] The formulation of this clause is seemingly more confining for averting certain leeway from the definition of most-favored-nation treatment in earlier BITs. Thus, as stated in paragraph 4 clarifying "treatment", the import of more favorable ISDS provisions from other investment treaties or trade agreements cannot be applied under this clause.[130]

Both national treatment and most-favored-nation belong to the notion of non-discrimination, and arguably one of the commonalities between them is that they both are "relative" obligations. In the sense that the protection they offer to EU-based investors and their investments mainly relies on the level of protection granted to the domestic investors of the host state or other investors from third nations under similar circumstances.[131]

4.4.3 FET and Expropriation

While the previous section encompasses provisions that are important for the protection of EU-based investors and their investments, section D specifies with the title "investment protection". From the outset, Article 8.9 provides an innovative clause allowing for the right to regulate. It underscores the right of the Parties involved to enact regulatory measures within their respective territories to protect areas of e.g., public health, safety, environment, and cultural diversity. Interrelated with the provision after it (Article 8.10) on FET, Article 8.9(2) emphasizes that these regulatory actions, which may lead to negative effects on investments or investor expectations do not, per se, constitute a violation of the obligations outlined in Chapter 8. It additionally clarifies that if a Party decides to not grant or continue to grant subsidy, it does not necessarily result in a breach of the agreement if there were no prior legal or contractual obligations to provide or maintain the subsidy, or if it aligns with certain terms or conditions related to the subsidy. The provision concludes with ensuring that nothing in section D of the agreement shall cease a

[128] Claire Crépet Daigremont, 'Most Favoured Nation Treatment' in Makane Moïse Mbengue and Stefanie Schacherer (eds), in *Foreign Investment Under the Comprehensive Economic and Trade Agreement (CETA)* (Springer International Publishing 2019).

[129] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part (signed 30 October 2016, provisionally applied 21 September 2017) Chapter 8.

[130] Overduin (n 123).

[131] Andrea K Bjorklund and Lukas Vanhonnaeker, 'National Treatment' in Makane Moïse Mbengue and Stefanie Schacherer (eds), in *Foreign Investment Under the Comprehensive Economic and Trade Agreement (CETA)* (Springer International Publishing 2019).

Party from stopping a subsidy or asking for its repayment under specific conditions.[132]

Regarding FET for investments, the relevant clause can be found in Article 8.10 of CETA titled "treatment of investors and covered investments". FET clauses are commonly worded in broader manner in BITs, as they have originally been designed to address potential gaps in other substantive investment protection provisions. They are intended to accommodate evolving circumstances, but this has also led to varied interpretations and approaches across arbitration cases.[133] Therefore, the one formulated in CETA appears quite different from the usual FET clauses found in BITs. Perhaps, the first to be presenting a defined list with 7 paragraphs illustrating the various scenarios which constitute a violation of the obligation.[134] The provision commences with the statement that each Party shall provide FET as well as full protection and security to investments made by investors from the other Party.[135] The concern on full protection and security has commonly been on whether such provision constitutes both physical and legal security, and to clarify that, Article 8.10(5) of CETA merely covers physical security.[136] In paragraph 2, it proceeds to detail the list of situations that can constitute a breach of the clause. In deciding whether the FET clause has been breached, considerations are made on whether the Party has established specific promises to the investor to encourage their investments (legitimate expectations). If the Party later frustrates these expectations, it may be deemed a breach of FET. The clause further clarifies that a breach of other provisions in CETA or separate international agreements does not automatically mean that there is a breach of Article 8.10. Lastly, a measure that breaches domestic law does not, per se, violate this clause either. The Tribunal shall determine whether the measure has been inconsistent with the obligations set out in the first paragraph of this clause.[137]

In safeguarding EU-based investors against expropriation, Article 8.12 applies. It contains conventional treaty language concerning the requirements for expropriation. However, the innovative aspect of the clause is found in Annex 8-A aimed at complementing paragraph 1 of Article 8.12. The Annex explains the distinction between direct and indirect expropriation highlighting that it lies in the formal transfer of title or the outright seizure of property. While disputes arising on the ground of direct expropriation are increasingly unusual, the notion of indirect expropriation has marked its prevalence in ISDS cases. This has, thus, resulted in

[132] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part (signed 30 October 2016, provisionally applied 21 September 2017) Chapter 8.

[133] Overduin (n 123).

[134] Patrick Dumberry, 'Fair and Equitable Treatment' in Makane Moïse Mbengue and Stefanie Schacherer (eds), *Foreign Investment Under the Comprehensive Economic and Trade Agreement (CETA)* (Springer International Publishing 2019).

[135] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part (signed 30 October 2016, provisionally applied 21 September 2017) Chapter 8.

[136] Catharine Titi, 'The Right to Regulate' in Makane Moïse Mbengue and Stefanie Schacherer (eds), *Foreign Investment Under the Comprehensive Economic and Trade Agreement (CETA)* (Springer International Publishing 2019).

[137] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part (signed 30 October 2016, provisionally applied 21 September 2017) Chapter 8.

discussions on the interpretation of it.[138] Reflecting on this, Annex 8-A paragraph 2 outlines, among other things, 4 factors that are considered to determine whether a government action constitutes indirect expropriation. They encompass the economic impact on the investment, the duration of the government action, interference with expectations that the investor had when investing, and finally, the character of the measure. Moreover, paragraph 3 of the Annex further ensures that governments may regulate and impact policies to safeguard public welfare without such actions categorized as indirect expropriation. This is unless the measure is so severe that it appears excessive relative to the purpose of it. With the inclusion of the Annex, arbitral tribunals would be better guided in instances of potential indirect expropriation, which are more complicated to identify, affecting EU-based investors.[139] Overall, it is observed that CETA seeks to leave less ambiguity for interpretation by clearly safeguarding the regulatory rights of governments through both the FET and expropriation clause.[140]

4.4.4 Free Transfer of Funds and Exceptions

Proceeding further, EU-based investors should also be able to freely transfer funds in relation to their investments without unnecessary limitations or delays. This aspect is, indeed, also covered by chapter 8 of CETA and detailed in Article 8.13. Paragraph 1 expresses that the transfers should be in a freely convertible currency and at the current market exchange rate. It is followed by a list of transfers which it entails such as capital contributions, profits, dividends, interest, etc.[141] It is common that the free transfer clauses include exceptions enabling a Party to deviate from this obligation in certain circumstances,[142] which in this case, is targeted in Article 8.13(3). However, it is under the condition that the exception is applied fairly and without discrimination as well as absent of hidden restrictions on transfers.[143]

While not going in-depth with the specific exceptions of chapter 8, Article 8.15 on reservations and exceptions and Article 8.16 on denial of benefits demonstrate these. They provide the exemptions of Article 8.4 through Article 8.8 for protecting certain sectors and measures, ensuring consistency with other international agreements, and allowing the preservation of regulatory autonomy.[144]

4.4.5 Investment Dispute Resolution

Granted, the previously stated clauses all embrace new elements, which can reflect the improvements attributed to the numerous arbitral awards and discussions on this

[138] Overduin (n 123).

[139] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part (signed 30 October 2016, provisionally applied 21 September 2017) Chapter 8.

[140] Overduin (n 123).

[141] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part (signed 30 October 2016, provisionally applied 21 September 2017) Chapter 8.

[142] Titi (n 136).

[143] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part (signed 30 October 2016, provisionally applied 21 September 2017) Chapter 8.

[144] Bjorklund and Vanhonnaeker (n 131).

aspect of investment protection. However, the true cutting-edge component of CETA lies in section F of chapter 8 on the resolution of investment disputes between investors and states, the ISDS mechanism. As the section spans from Article 8.18 to Article 8.45, only the most essential aspects of the mechanism are touched on.[145] Essentially, ISDS is a type of international arbitration. It resolves disputes between foreign investors and host states via a neutral and legally binding process through arbitral tribunals (panels) with one or multiple arbitrators. The seat of arbitration as well as arbitrators are chosen by the parties themselves, usually not of the same nationality as the parties. It is often perceived as a hybrid mechanism that allows, in this case, EU-based investors, to resolve disputes with a host state utilizing international private law tools but addressing international public law issues. Whether such a mechanism is to be activated for investments, is agreed on in IIAs between nations.[146]

However, the CETA ISDS mechanism distinguishes itself from the traditional with a dual-level judicial structure, an ICS. Firstly, it consists of a permanent arbitration tribunal of the first instance (the Tribunal) to hear claims regarding breaches of investment protection provisions (Article 8.27). It initially contains 15 members appointed by the CETA Joint Committee to work as the pre-determined list of arbitrators.[147] Opposed to traditional ISDS, Canada and the EU (the contracting parties) each have five people seated in the investment court, while the rest would be nationals of third nations. If deemed important, the Committee may enlarge or reduce the number of members but still sustain the same balance of nationalities. Cases would be assigned in divisions of three members, one of each nationality, and chaired by a third country national. The allocation of cases would occur unpredictably and randomly pursuant to Article 8.27(6) and (7).[148] According to Article 8.23, for EU-based investors initiating this route of dispute settlement, the claim may be put forward under the rules of ICSID Convention and Rules of Procedure for Arbitration Proceedings; the ICSID Additional Facility Rules if the previous does not apply; the UNCITRAL Arbitration Rules; or a different set of rules suggested by the investor solely with the prerequisite of consent from the respondent (host state). If that is otherwise not agreed on, the investor shall revert to one of the pre-defined rules.[149]

In the second tier of this ICS, Article 8.28 presents an Appellate Tribunal that would be responsible for upholding, amending, or reversing decisions (awards) based on factors listed in paragraph 2. Appeals should take place within 90 days of the first instance Tribunal award issuance. However, it is noted that the Appellate Tribunal does not issue the final amended award directly, but rather, once it has reviewed the case and provided its report, the Tribunal of first instance is responsible for issuing

[145] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part (signed 30 October 2016, provisionally applied 21 September 2017) Chapter 8.

[146] Overduin (n 123).

[147] Ibid.

[148] Stefanie Schacherer, 'TPP, CETA and TTIP Between Innovation and Consolidation—Resolving Investor–State Disputes under Mega-Regionals' (2016) 7 JIDS 628.

[149] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part (signed 30 October 2016, provisionally applied 21 September 2017) Chapter 8.

a revised award.[150] Similar to the first tier of ICS, members of the Appellate Tribunal are decided and appointed by the Joint Committee, and hearings of the appeal would also come about in divisions of three members. Currently, as laid out in Article 8.28(7), the administrative and organizational details concerning the operational aspects of the Appellate are yet specified in CETA but would be determined by the Joint Committee.[151]

The final award issued from these proceedings under CETA would contain a binding effect on the disputing parties, and it is enforceable with regard to the specific case being adjudicated (Article 8.41(1)). Interestingly, Article 8.31(2) clarifies that in the awarding process of the Tribunal, if deemed appropriate, it would also consider domestic law as a factual matter. When doing so, the Tribunal would adhere to the interpretation provided by domestic courts or authorities of the relevant Party. However, this interpretation shall not be binding on the courts or authorities of that Party.[152]

Nevertheless, EU-based investors covered by CETA are not merely confined to only one way of resolution in cases of disputes. Several options could be available for resolution. Firstly, it is typically encouraged to (I) engage in consultations, as an attempt to reach an amicable settlement. This can take place at any stage of the process, even after a claim has been formally submitted to the Tribunal by an investor (Article 8.19). The disputing parties would also be able to at any time (II) request for mediation for settlement, which unlike arbitration, is non-binding. It is, however, still facilitated by a third party i.e., a mediator. Opting for this recourse should also not affect the legal rights of the parties involved under Chapter 8 of CETA (Article 8.20). (III) Other than these provisions, investors would not be restricted to initiating proceedings in domestic courts where appropriate. If an investor instead prefers to seek legal remedies through filing a claim to the Tribunal, which is specifically designed for CETA, the investor is not necessarily required to appear before domestic courts prior.[153] However, Article 8.22(1) stipulates that an investor can only submit such a claim if the ongoing legal proceedings in any other tribunals or courts (domestic or international) in relation to the alleged breach are ceased or withdrawn. The investors should also renounce their right to begin any legal action before domestic or international courts and tribunals concerning a measure that is claimed to have violated the agreement.[154] This avoids parallel proceedings on the same issue and ensures that the dispute resolution process is concentrated within the ICS framework of CETA.[155]

[150] Overduin (n 123).

[151] Schacherer (n 148).

[152] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part (signed 30 October 2016, provisionally applied 21 September 2017) Chapter 8.

[153] Laura Puccio and Roderick Harte, ‘From Arbitration to the Investment Court System (ICS): The Evolution of CETA Rules’ (European Parliamentary Research Service, June 2017) <https://www.europarl.europa.eu/thinktank/en/document/EPRS_IDA(2017)607251> accessed 19 May 2024.

[154] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part (signed 30 October 2016, provisionally applied 21 September 2017) Chapter 8.

[155] André von Walter and Maria Luisa Andrisani, ‘Resolution of Investment Disputes’ in Makane Moïse Mbengue and Stefanie Schacherer (eds), in *Foreign Investment Under the Comprehensive Economic and Trade Agreement (CETA)* (Springer International Publishing 2019).

4.5 Opinion 1/17 and Ratification Implications of CETA

At this point, there has been formed an understanding of extra-EU BITs along with the scope and coverage, investment protection as well as dispute settlement of CETA. To complete the overview of extra-EU investment protection afforded to EU-based investors within this focus, the question of compatibility and implication of ratification are equally important to mitigate risks and enhance investor confidence.

While at the intra-EU level, the Achmea ruling has been a heated topic, at the extra-EU level, Opinion 1/17 has sparked significant debates regarding the compatibility of section F in chapter 8 of CETA with EU law. It is a legal opinion issued by the CJEU in 2019, pursuant to Article 218 (11) TFEU, which allows EU institutions or MS to seek preliminary opinions from the CJEU. The opinion is, especially, relevant as it was published a year after the Achmea case which ruled the ISDS mechanism of intra-EU BITs incompatible with EU law. The request for this opinion was initially brought about by internal negotiations and discourse in Belgium, where the regional (Wallonia) parliament voted against CETA.[156]

To give an overview, the Court rendered 3 main points to its position: the autonomy of EU law, the principle of equal treatment as well as the right to effective judicial protection before a tribunal. Starting with the principle of autonomy, the Court assessed Article 8.31(1) and (2) of CETA concluding that the authority of the Tribunal to interpret and apply law is limited to the provisions of CETA itself. It also adheres to international law principles applicable between the EU and Canada. The Court considered Article 8.21 of CETA, highlighting that the exclusive jurisdiction of the CJEU to rule on the divisions of power between the EU and its MS remains intact. Thus, it concluded that the ICS would not obstruct the EU's ability to function within its constitutional framework, emphasizing that there have been taken into account adequate provisions to maintain a Party's right to regulate to safeguard public interests.[157]Following the autonomy aspect, the CJEU proceeded to navigate the principle of equality. As expressed by Belgium, CETA allows Canadian enterprises to bring disputes against EU MS to the CETA Tribunal, however, EU enterprises cannot bring similar disputes within the EU. This was clarified by the Court stating that these are not comparable scenarios; Canadian investors in the EU are the same as EU investors in Canada, and the situation argued by Belgium concerns comparison to domestic investors in the Union subject to EU law. Consequently, the Court dismissed the argument.[158] Lastly, regarding the question of accessibility to an independent tribunal per Article 47 CFR, CJEU notes that through Articles 8.1-8.8, it is safeguarded that the Tribunal is accessible to any enterprise or natural persons (covered by the agreement) from the contracting parties. On the Tribunal's impartiality, the Court refers to Article 8.30 on ethics. It also mentions Article 8.39(6) containing supplemental rules diminishing the financial

[156] Damjanovic (n 102).

[157] Maria Fanou, 'The CETA ICS and the Autonomy of the EU Legal Order in Opinion 1/17 – A Compass for the Future' (2020) 22 CY EL 106.

[158] Cécile Rapoport, 'Balancing on a Tightrope: Opinion 1/17 and the ECJ's Narrow and Tortuous Path for Compatibility of the EU's Investment Court System (ICS)' (2020) 57 CML Rev 1725.

burden of claimants, who are natural persons or small and medium-sized enterprises.[159]

The issuance of this opinion may arguably ease some concerns for MS and EU-based investors on the compatibility of the ICS with EU law. It could also potentially assist in setting the precedent for future ISDS mechanisms in EU trade agreements with third nations.[160] Considering that EU-based investors investing within the EU borders are fully protected by the EU legal framework, while EU-based investors investing in third nations are mainly reliant on IIAs. The goal of creating CETA and the ICS has, therefore, been to provide such investors with a fair level of investment protection and legal remedies outside of the EU.[161] This is also demonstrated in the Opinion, where the CJEU places a high priority on protecting EU-based investors abroad. It emphasizes the access to ICS in CETA to be directly connected to the objective of free and fair trade under Article 3(5) TEU.[162] Despite the presence of Opinion 1/17, the debates surrounding CETA continues, and the agreement remain subject to new and ongoing challenges.[163]

As stipulated in paragraph 45 of the Opinion, the ICS would only take effect after all MS have ratified CETA. The European Commission would continue to review the ICS and ensure that MS are given enough time to contemplate the mechanism during the ratification process.[164] Presently, 17 out of 27 MS have approved of the agreement. Among the signatories include most of the MS which had concluded BITs with Canada i.e., Slovak Republic, Czech Republic, Croatia, Latvia, and Romania. Despite the ratification of these MS, they are not bound by the provisions that have not been provisionally applied for.[165] As mentioned previously, the extra-EU BITs are, therefore, kept conditionally in force. However, Regulation 1219/2012 requires that for the BITs (pre- and post-Lisbon Treaty) covered by it, the MS shall promptly notify the Commission of any dispute requests. In this way, the Commission may intervene to clarify how EU law applies. Observing the current investment regulatory framework of the EU, it is seemingly fragmented between IIAs that are concluded by the EU and the MS. Until the CETA has reached full ratification, the traditional ISDS provisions apply in the extra-EU BITs corresponding to Article 351 TFEU on conflict of laws.[166]

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[159] Jonathan Lim, 'Opinion 1/17 (C.J.E.U)' (2020) 59 ILM 89.

[160] Jonathan Lim, 'Introductory Note to Opinion 1/17 (c.j.e.u)' (2020) 59 ILM 89.

[161] Damjanovic (n 102).

[162] Opinion 1/17 of the Court (Full Court) [2019] ECLI:EU:C: 2019:341, para 200.

[163] Lim (n 160).

[164] Opinion 1/17 of the Court (Full Court) [2019] ECLI:EU:C: 2019:341, para 45.

[165] Council of the European Union, 'Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part.'(Council of the European Union, May 2024) https://www.consilium.europa.eu/en/documents-publications/treaties-agreements/agreement/?id=2016017 Accessed 23 May 2024.

[166] Damjanovic (n 102).

5 Conclusion

In answering the research questions of the thesis, the conclusion is divided into two parts: (1) intra-EU level investment protection and dispute settlement as well as (2) extra-EU level investment protection and dispute settlement afforded to EU-based investors.

The EU legal framework governing investments is grounded in an intricate and hierarchical system of norms, with the foundational Treaties forming primary law, and secondary legislation ensuring uniformity across MS. The evolution of EU competencies, from the Treaty of Rome to the Treaty of Lisbon, has expanded the Union's role in regulating investments and negotiating international agreements on behalf of its MS. However, as demonstrated in Chapter 3, investment protection was traditionally managed through BITs. With the termination of intra-EU BITs following the CJEU's Achmea ruling, the landscape of investment protection and dispute settlement within the EU has undergone significant changes. EU-based investors with their intra-EU investments are now navigating a framework reliant on national laws and EU law. The protection under EU law is complex and scattered. While there are broader provisions concerning investment protection provided to investors under EU law, it is acknowledged that they may not fully replicate the comprehensive protection offered by intra-EU BITs. Dispute settlement being primarily through domestic courts also further complicates the process, with varying effectiveness and interpretations across MS. This marks a shift away from investor-state arbitration influencing legal certainty and investor confidence in intra-EU investments.

Amid the developments within intra-EU contexts, extra-EU investments emerge as a compelling option for EU-based investors, as they are governed by the framework of IIAs. These agreements, often in the form of extra-EU BITs, provide concise protections and dispute settlement mechanisms as in those of intra-EU BITs. However, as showcased in Chapter 4, following the EU's exclusive competence in the areas of FDI, the landscape for such BITs has similarly been subject to changes. In this respect, the EU clarifies the legal effect of such agreements in Regulation 1219/2012, ensuring that existing extra-EU BITs can continue to apply under specific conditions, while new BITs must comply with EU law from the outset. The Regulation enables the European Commission to oversee negotiations and secure consistency with EU external action objectives. Against this backdrop, the Regulation involves a replacement principle allowing for EU-concluded IIAs to substitute existing BITs concluded by MS with the same country. CETA, stands as a prime example of the EU's approach to integrating investment protection into its broader trade framework, with arguably improved provisions protecting investments and dispute settlement while maintaining the regulatory autonomy of EU nations in

safeguarding public interests. Notably, the agreement features a pivotal ICS, which aims to address previous legal concerns on ISDS. With a CJEU-issued Opinion 1/17, the ICS is rendered compatible with EU law. Nevertheless, the extra-EU investment protection framework continues to be in transition. Until CETA is ratified by all MS, its framework is subject to scrutiny, and extra-EU BITs remain tentatively in force for investors, contingent on the oversight of the EU.

Concluding on these grounds, the EU's evolving legal framework has reshaped both intra-EU and extra-EU investment protection and dispute settlement mechanisms, reflecting a shift from traditional BITs to a more consolidated approach under EU law and IIAs. Consequently, it is vital for EU-based investors to stay informed of the developments in the regulatory landscape within and beyond the EU to safeguard their investments effectively.

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