

Nico Basener

Investment Protection in the European Union

Considering EU law in investment arbitrations arising from
intra-EU and extra-EU bilateral investment agreements



Nomos

facultas



DIKE

Studien zum Internationalen Investitionsrecht

herausgegeben von

Prof. Dr. Marc Bungenberg, LL.M., Universität des Saarlandes

Prof. Dr. Stephan Hobe, LL.M., Universität zu Köln

Prof. Dr. August Reinisch, LL.M., Universität Wien

Prof. Dr. Andreas R. Ziegler, LL.M., Universität Lausanne

In Kooperation mit dem

International Investment Law Centre Cologne (IILCC)

Prof. Dr. Stephan Hobe, LL.M.

Prof. Dr. Bernhard Kempen

Prof. Dr. Heinz-Peter Mansel

Prof. Dr. Burkhard Schöbener

Band 26

zugleich Band 14 der Schriftenreihe des

International Investment Law Centre Cologne (IILCC)

Nico Basener

Investment Protection in the European Union

Considering EU law in investment arbitrations arising from
intra-EU and extra-EU bilateral investment agreements



Nomos

facultas



DIKE

Die Deutsche Nationalbibliothek verzeichnet diese Publikation in der Deutschen Nationalbibliografie; detaillierte bibliografische Daten sind im Internet über <http://dnb.d-nb.de> abrufbar.

Zugl.: Köln, Univ., Diss., 2017

ISBN 978-3-8487-4347-6 (Nomos Verlag, Baden-Baden, Print)

ISBN 978-3-8452-8571-9 (Nomos Verlag, Baden-Baden, ePDF)

ISBN 978-3-7089-1001-7 (facultas Verlag, Wien)

ISBN 978-3-03751-965-3 (Dike Verlag, Zürich/St.Gallen)

1. Auflage 2017

© Nomos Verlagsgesellschaft, Baden-Baden 2017. Gedruckt in Deutschland. Alle Rechte, auch die des Nachdrucks von Auszügen, der fotomechanischen Wiedergabe und der Übersetzung, vorbehalten. Gedruckt auf alterungsbeständigem Papier.

Für Meike, meine Geschwister und meine Eltern

Vorwort

Die vorliegende Arbeit wurde zum Sommersemester 2017 von der Universität zu Köln als Dissertation angenommen. Bis zur Drucklegung konnte daher Literatur und Rechtsprechung bis Juni 2017 berücksichtigt werden.

Für die vielseitige Unterstützung, die mir bei der Erstellung dieser Arbeit zuteil wurde, möchte ich mich an dieser Stelle ganz herzlich bedanken.

An erster und vorderster Stelle gilt mein herzlicher Dank Herrn Professor Dr. Stephan Hobe für seine stete Unterstützung mit Tat, Rat, Kritik und Anregungen, die er mir als Betreuer und Erstkorrektor dieser Arbeit zuteil wurden ließ. Diese Arbeit hätte ohne seine Förderung und seinen Beitrag in der hier vorliegenden Form niemals erscheinen können.

Ebenfalls gilt mein Dank Herrn Prof. Dr. Bernhard Kempen, der die Arbeit als Zweitkorrektur begutachte, für die äußerst hilfreichen Anmerkungen und Anregungen.

Die Idee zu dieser Arbeit geht zurück auf meinen Studienaufenthalt an der Université de Paris 1 / Panthéon-Sorbonne während des deutsch-französischen Magisterstudiengangs. Während des Verfassens eines Beitrags zu einer dort einzureichenden schriftlichen Seminararbeit, stieß ich erstmals auf die – damals noch sehr junge Fragestellung – der Interaktion von Europarecht und Investitionsschutzrecht. Nachdem die Frage zwei Jahre später immer noch nicht umfassend gelöst schien, wuchs die Idee zu dieser Arbeit.

Mein Dank gilt daher auch Frau Prof. Dr. Dauner-Lieb, die mich während eben dieser Studienzeit als Programmleiterin, aber auch danach, mit Rat und Tat begleitete und förderte. Sie trägt einen erheblichen Anteil daran, dass diese Arbeit heute in dieser Form erscheinen kann.

Bedanken möchte ich mich auch bei meinen Freunden, die mich auf unterschiedlichste Art und Weise bei der Erstellung unterstützten.

Abschließend gilt mein Dank selbstverständlich meinen Eltern, meinen Geschwistern und meiner Lebensgefährtin. Meinen Eltern und meinen Geschwistern, da sie mich auf meinem bisherigen Lebensweg und im Rahmen meiner Ausbildung stets unterstützten und mir diese ermöglichten. Meiner Lebensgefährtin, weil sie es war, die mich stets neu

aufbaute, stets Verständnis hatte und durch ihren Rückhalt in wesentlichem Maße dazu beigetragen hat, dass diese Arbeit erfolgreich abgeschlossen wurde.

München, Juli 2017

Nico Basener

Literaturverzeichnis

Abbreviations	21
Introduction	23
Part I: Investment protection in the European Union: the rise of potentially conflicting legal frameworks in the European Union	33
Chapter 1: The necessity of investment protection	33
Chapter 2: The ascent of investment protection through IIA / BITs	37
A. The historical development of investment protection mechanisms	37
I. From the Middle Ages until the Colonial Era: the use of force and other individual measures	37
II. The Post-Colonial Era: the gradual rise of public international law as protection mechanism	39
1. Customary international law: minimum standard of treatment	40
2. Conventional obligations: Treaties of Friendship, Commerce and Navigation	42
III. Remaining inefficiencies of the protection mechanisms leading to more specific instruments	44
1. Procedural enforcement: dependence on either the home state or the host state	44
2. Unspecific provisions and a general trend to the conclusion of more specific treaties	46
B. International Investment Agreements: investment protection through bilateral or multilateral international treaties	47
I. Conventional protection of investments through IIAs	49
II. Higher degree of clarity as to the protection standards	50
III. Direct enforcement by investors	51
IV. Enlargement of the scope of rights through the terms investment and investor	54
C. State-contracts	57
Chapter 3: The reception of modern investment protection through IIAs / BITs in the EU: doubling the protection?	58
A. Rise of the EU and the internal market: Investment protection through EU law	58

B. Rise of IIAs concluded by EU member states: EU-Investment protection through IIAs	63
I. Extra-EU IIAs	66
II. Intra-EU IIAs	67
III. Mixed agreements including the EU as contracting party	68
Chapter 4: The separate legal frameworks of investment protection in the EU	70
A. The IIA framework: investment-protection through IIAs	70
I. Guiding principles of investment protection through IIAs	70
II. Substantive protection: overview and scope of protection standards in IIAs	71
1. Fair and equitable treatment	72
2. Protection against Expropriation	77
3. Full protection and security	80
4. Non-discrimination clauses	83
(1) National treatment	83
(2) Most favoured nation treatment	86
(3) Other non-discrimination clauses	87
5. Umbrella clauses	89
6. Free transfer of funds	90
7. Admission clauses and right to establish	92
III. Legal remedies: the dispute settlement mechanism in IIAs	93
1. Investor-state arbitration governed by the ICSID-Convention	95
(1) Jurisdiction of the Centre	95
(2) Procedural rules and applicable law	97
(3) Recourse and enforcement	99
2. Investor-state arbitration in private forums: ICC / SCC, etc.	101
(1) Jurisdiction of the arbitral tribunal	101
(2) Applicable law and procedural rules	102
(3) Recourse and enforcement of arbitral awards issued in private forums	104
3. Other remedies such as inter-state and local remedies	107
B. The EU-Law framework: „investment“-protection in EU law	108
I. Guiding principles of EU law	109
II. Substantive protection and its limits under EU law	110
1. Investment protection through the fundamental freedoms	110
(1) Freedom of establishment	111
(2) Free movement of capital	118
(3) Free transfer of funds	122

(4) Free movement of goods and freedom to provide services	122
2. Charter of Fundamental Rights of the EU	123
(1) Scope of application of the Charter (Art. 51 of the Charter)	124
(2) Freedom to conduct business (Art. 16 of the Charter)	127
(3) Right to property (Art. 17 of the Charter)	129
3. Other principles, including the general principles of EU law and principles of access to justice and due process / relief	136
III. Dual provisions offering protection but also enabling interventionist measures	139
1. Competition law: Art. 101, 102 TFEU	140
2. State aid provisions: Art. 107 ff TFEU	140
3. Secondary legislation	141
IV. Legal remedies: judicial review as conceived under EU law	142
1. Proceedings before national courts and preliminary ruling procedure (Art. 267 TFEU)	142
2. Immediate proceedings before the CJEU: legal actions enumerated in the European Treaties	145
(1) Action for annulment (Art. 263, 264 TFEU)	145
(2) Infringement proceedings as inter-state remedies for violation of EU law (Art. 258 ff TFEU)	147
3. Action for damages	148
(1) Extra-contractual action for damages against the EU	149
(2) Extra-contractual action for damages against the member states	150
Chapter 5: Potential conflicts of EU law and international investment law	151
A. Preliminary remarks as to the notion of conflict regarding different legal frameworks	153
B. Potential conflicts between EU law and IIAs	156
I. Conflicting provisions between EU law and IIAs regarding substantive guarantees	156
1. State aid rules (Art. 107 ff TFEU)	158
2. European public procurement and competition law	161
3. Fundamental freedoms and their limitations in general	165
4. Non-discrimination (Art. 18 TFEU or the fundamental freedoms)	168
5. Free movement of capital	169

6. Changing legal framework	170
II. Conflicting provisions between EU law and IIAs regarding jurisdiction	170
1. Conflict between arbitration clauses and Art. 344 TFEU	171
2. Conflict between arbitration clauses and the dispatch of competencies in the EU	172
3. Conflict between arbitration clauses and the principle of non-discrimination (Art. 18 TFEU)	173
C. Potential implications of the conflict	175
I. Arbitration proceedings	176
II. ‘Setting-aside’ or ‘vacatur’ proceedings and annulment proceedings	176
1. Setting-aside an award rendered in private forums (ICC, SCC, etc.)	177
(1) Invalidity of the arbitration clause (Art. 34 (2) lit. a UNCITRAL Model Law (Lack of jurisdiction))	177
(2) Award contrary to public policy	179
2. ICSID-Annulment proceedings	181
III. Enforcement proceedings	183
1. Enforcement in private forums (ICC, SCC, etc.)	183
2. Enforcement of ICSID-Awards	184
IV. The impact of further potential EU proceedings on the enforcement of an award	186
V. Conclusion on potential conflicts in the arbitration proceedings	187
D. Handling EU law in international investment arbitration proceedings: different scenarios but similar interests	187
I. Distinguishing different types of situations raising the conflict: intra-EU vs. extra-EU IIAs	187
II. Enjeux en question – Guiding principles which should be respected by any solution to this conflict of laws	189
Part II: Conflicts between EU Law and IIAs in the intra-EU setting	191
Chapter 6: Intra-EU IIAs in arbitration proceedings: how to address the interaction of EU law and intra-EU IIAs	193
A. Structure of the analysis	198
B. The perspective of an arbitral tribunal in an intra-EU investment dispute	200

Chapter 7: EU law as international law applicable to the dispute	204
A. The relevance of any other rule of law than the IIA in the proceedings	204
B. The qualification of EU law as international law	206
I. EU law is sourced in international law	213
1. Transferal of competencies and rights to legislate	214
2. Irrelevance of principles set forth in the European Treaties for its qualification	218
II. EU law primarily creates rights and obligations towards member states and as an auxiliary individual rights	222
III. EU law regulates rights between subjects of international law	223
Chapter 8: The relevant rule of conflict of laws regarding EU law and IIAs	225
A. Preliminary remarks how to resolve conflicts between several rules of laws	226
I. Absence of explicit provisions dealing with the conflict in IIAs and the European Treaties	228
II. Absence of conflict rule leading to the termination of an entire treaty	230
B. Art. 59 of the Vienna Convention on the Law of Treaties	231
I. Same subject matter in terms of Art. 59 VCLT	232
1. The notion of sameness in Art. 59 VLCT as interpreted by the arbitral tribunals dealing with intra-EU disputes	233
2. The misuse of the notion of “same subject matter” to eliminate conflicts ab initio	235
II. Tacit intention to terminate the IIA subsequent to a member state’s accession to the European Union (Art. 59 (1) lit. a VCLT)	240
III. Incompatibility of EU law and IIAs (Art. 59 (1) lit. b VCLT)	243
IV. Conclusions on the effect of Art. 59 VCLT on intra-EU IIAs	245
C. Conflict rules of the TFEU (Art. 350, 351 TFEU and the principle of primacy)	245
I. Ordinary meaning and scope of Art. 351 TFEU	246
II. Ordinary meaning and scope of Art. 350 TFEU	247
III. Art. 350, 351 TFEU as opposition to the (inherent) general principle of primacy	247
D. Applicable conflict rule under the principles of the Vienna Convention on the Law of Treaties	252
E. Conclusion and summary concerning the rule of conflict in the intra-EU hypothesis	254

I. First sub-hypothesis: IIA concluded before accession	254
II. Second sub-hypothesis: IIA concluded after accession	255
III. Necessity of a conflict and the legal consequences	255
Chapter 9: Jurisdiction of the arbitral tribunal: Incompatibility of the intra-EU IIA's arbitration clause	256
A. Incompatibility of arbitration clauses with the specific characteristics and the autonomy of EU law (the exclusive jurisdiction of the CJEU)	257
I. Why the arbitral tribunal should consider the interpretation of the CJEU in its arbitration proceedings	257
II. The erroneous view on the criteria to be observed by a dispute settlement mechanism within the European Union	259
1. The irrelevance of the EU's competencies to regulate arbitration for the question of compatibility	263
2. The scope of application of Art. 344 TFEU	264
3. The existence of a duty to respect the fundamental elements of the European Union's legal order and judicial system	268
4. The criteria to determine the incompatibility with the general principles of the European Union's legal and judicial order	272
III. Violation of the principles deduced by the CJEU by arbitral tribunals in investment proceedings	280
1. Quantity of cases and quality of provisions concerned (criteria n° 1 and n° 2)	280
2. Interpretative monopoly – (<i>de facto</i>) binding interpretation (criteria n° 3)	283
3. Circumvention of preliminary ruling procedure – disrupting the interaction of the courts (criterion n° 4)	286
4. Further safeguards to ensure the uniform application of EU law (criterion n° 5)	290
5. Contravention of the principle of mutual trust (criteria n° 6)	292
6. Overall assessment of the criteria n° 1 to n° 6	295
IV. Interim conclusions on the arbitration clause's incompatibility with the autonomy of the EU's legal order and its specific characteristics	295
V. Excursus for mixed agreements	296
B. Incompatibility of the arbitration clause with EU law due to the violation of competencies exclusively attributed to the EU?	297

I. The type of provisions to be affected to trigger the application of the ERTA-jurisprudence	301
II. Scope of comparison under the ERTA-Doctrine / Pringle-Case	303
III. Interim conclusion on the arbitration clause's incompatibility due to violation of the EU's exclusive competences	305
C. Incompatibility of the arbitration clause with the principle of non-discrimination	305
I. Violation of the principle of non-discrimination by the arbitration clause	307
1. Inbound perspective (host state discriminating non-IIA protected investors)	307
(1) Difference in treatment between investors from different nationalities	308
(2) Comparable circumstances between such investors	309
(3) Justification for the differential treatment in comparable circumstances	316
2. Outbound perspective (home state favoring its national investors towards non-national investors)	316
II. Legal consequences of the violation of the principle of non-discrimination	319
D. Interim conclusions on conflicts between EU law and arbitration clauses contained in IIAs	321
Chapter 10: Primacy of EU law on the merits	322
A. Inconsistency with substantive guarantees provided in the IIA	322
B. How to implement EU law's primacy on the merits	323
Chapter 11: Challenges to the results due to the particular interests and rights in question	326
A. Impact of sunset clauses on the results	326
B. Conformity of the solution with the interests in question	332
Part III: Conflicts between IIAs and EU Law in the extra-EU setting	335
Chapter 12: The current status of extra-EU IIAs under public international law and EU law	338
A. External perspective: continuous validity of extra-EU IIAs under public international law	338
I. Principle of pacta sunt servanda	339
II. No fundamental change of circumstances upon accession to the EU (Art. 62 VCLT)	340
III. Consequences for obligations arising from IIAs under public international law	342

B. Unionist perspective: primacy of EU law despite contradicting obligations under public international law	343
I. The effects of Art. 351 TFEU: grandfathering of conflicting obligations	344
II. Limits to Art. 351 (1) TFEU and its consequences for the unionist perspective on extra-EU IIAs	346
1. Limits to Art. 351 (1) TFEU regarding <i>prior treaties</i>	347
2. Non-application of Art. 351 (1) TFEU to substantial conflicts in posterior treaties	352
(1) Arguments against the application of Art. 351 (1) TFEU by analogy	353
(2) Limitations to the grandfathering effect of Art. 351 (1) TFEU if applied by analogy	354
III. Summary regarding the unionist perspective and the status of extra-EU IIAs	356
C. Excursus for mixed agreements and future comprehensive trade agreements	357
Chapter 13: Current perception of EU law in extra-EU arbitration proceedings	358
A. The dual nature of EU law in extra-EU arbitration proceedings: international law but also domestic law of the member state	359
B. Potential interferences of EU law with extra-EU investment proceedings	361
I. Interferences of EU law with extra-EU investment proceedings through the IIA itself	362
1. The legality requirement: investments made in accordance with the law of the host state	363
(1) The prerequisite of the investment's legality under the law of the host state	363
(2) Consequences for interferences of investments with EU law	369
2. Interpretation of the Fair and Equitable Treatment standard	372
II. Interferences of EU law with extra-EU investment proceedings through domestic law being applicable law to the arbitration proceedings	376
1. EU law being the applicable law to the jurisdictional stage as <i>lex loci arbitri</i> .	376
2. EU law at the merits stage	379
C. The role of EU law in the subsequent proceedings	382
I. Setting-aside or enforcement proceedings	383
II. Potential decisions by the European Commission	384

D. Interim conclusion on the disruptive potential of ignoring EU law in extra-EU investment proceedings	387
Chapter 14: Cooperative approach: transposing Solange and Bosphorus to extra-EU investment proceedings	388
A. The reception of “similar conflicts” by other courts: Solange and Bosphorus	389
I. German Constitutional Court: Solange II	389
II. ECtHR: Bosphorus vs. Ireland	390
B. Transposing Solange and Bosphorus to extra-EU IIA investment arbitration	395
I. EU law as a mean of interpretation for obligations under an IIA	396
1. EU law as domestic law being applicable law to the investment dispute	397
2. Considering EU law by virtue of Art. 31 (3) lit. c VCLT	397
(1) Mixed agreements (e.g. Energy Charter Treaty)	398
(2) Transposing the underlying idea of the Bosphorus-Approach to extra-EU-IIAs	405
II. Interim results on the possibility to transpose the Bosphorus Approach to IIAs	406
Chapter 15: Conditions to reduce the margin of control according to the Bosphorus-Approach	407
A. Equivalence of substantive protection under EU law	408
I. Protection against (direct and indirect) expropriations	408
1. Equivalence of measures being qualified as expropriations	412
2. Equivalence of conditions for a lawful expropriation	417
(1) Public purpose / public interest	418
(2) Due process of law	418
(3) Prohibition of discrimination	419
(4) Due compensation	420
3. Equivalence of protected assets and holders of these rights	422
(1) Protected assets and difficulties arising thereof	422
(2) Implications of the chain of control: indirectly owned investments	427
II. National treatment and non-discrimination clauses	428
1. Equivalence of prohibition of national treatment under the free movement of capital	429
(1) Protected assets: “investment” and “free movement of capital”	430
(2) Exceptions and justifications to guarantees under the IIA and under EU law	432

(3) Scope of application of the free movement of capital: <i>erga omnes</i> protection?	440
2. Compensation of protection through application of Art. 20 of the Charter	443
III. Fair and equitable treatment	445
1. Administrative and judicial due process (element no°1)	447
(1) Due process in judicial proceedings	447
(2) Due process in administrative proceedings	450
2. Prohibition of arbitrary and discriminatory measures and measures causing intentional harm (element no°2)	452
3. Obligation to provide legality, stability and transparency in exercising legislative or regulatory powers (element no°3)	453
4. Honouring of legitimate expectations and stability of legislation (element no°4)	457
5. Principle of proportionality (element no°5)	462
6. Overall comparative assessment regarding the FET standard	462
IV. Further principles: Prohibition of arbitrary measures and umbrella clauses	463
1. Protection against arbitrary measures	463
2. Umbrella clauses	463
V. Additional protection for investors established within the EU and operating in other EU member states	465
VI. Overall assessment of substantive protection under EU law and IIAs	465
B. Equivalence of procedural guarantees under EU law	467
I. How to address the equivalence of procedural protection	468
II. The implementation of procedural investment protection by mixed arbitration	469
III. Equivalence of procedural investment protection under EU law compared to IIAs	470
1. Procedural protection through a non-national court system	471
(1) Direct actions before the CJEU	471
(2) Supplementary function of national courts under EU law	478
(3) The assisting function of secondary relief: compensation for violation of EU law	482
2. Specific performance instead of deterrence: how to ensure observance of substantive guarantees	484

3. Complementary means offered by EU law to enforce compliance with substantive guarantees	485
IV. Overall assessment of the equivalence of procedural protection under IIAs and EU law	487
Chapter 16: Implementing the Bosphorus-Approach in extra-EU investment arbitration proceedings	488
A. The presumption of lawfulness: how to determine if an act is ‘mandatory’ under EU law	488
I. Mandatory actions by the host states under EU law	489
II. The burden of proof relating to an act being “mandatory”	490
B. Rebutting the presumption: when to consider the protection to be manifestly deficient	491
I. Consequence of prior proceedings	491
II. Downgrade in the level of protection	492
III. Considerable lack of protection in the particular case depriving the investor of any protection	492
IV. Denial of justice: forcing the EU member states to grant sufficient procedural protection	493
C. The required dialogue of the judges	495
D. Conformity of the solution with the interests in question	496
Part IV: Outlook regarding the EU’s future investment policy	499
Conclusion	503
Literature	513

Abbreviations:

BIT	Bilateral Investment Treaty
CCP	Common Commercial Policy
cf.	please refer to
Charter	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union which shall comprise the reference to the Court of Justice of the European Coal and Steel Communities, the Court of Justice of the European Communities, the Court of First Instance, the General Court and the Court of Justice
ECHR	European Convention on the protection of Human Rights
ECT	Energy Charter Treaty
ECtHR	European Court of Human Rights
et al.	and others
EU	European Union
EU Law	All sources of law deriving from primary or secondary law of the European Union, including the TEU, TFEU, general principles of the law applicable in the European Union as derived by the CJEU, secondary law and those general principles and conventional obligations of international law which are binding within the European Union and its member states
European Treaties	All treaties concluded between the EU member states since the Treaty of Rome, including all amendments (until the Lisbon Treaty) and accession treaties
FCN treaties	Treaties of Friendship Navigation and Commerce
FET	Fair and Equitable Treatment
f / ff	following page / following pages
FPS	Full Protection and Security
ICC	International Chamber of Commerce
IIA	International Investment Agreement (including BITs and multilateral investment treaties as well as trade agreements, which include provisions on investment protection)

Abbreviations

ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ILC	International Law Commission
IMF	International Monetary Fund
LCIA	London Court of International Arbitration
MFN	Most-Favoured Nation
para	paragraph (<i>Randnummer</i>)
p.	page / pages
SCC	Stockholm Chamber of Commerce
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UNCITRAL	United Nations Commission on International Trade Law
VCLT	Vienna Convention on the Law of Treaties

Introduction

Presumably only few aspects of the European Union's common commercial policy currently attract more attention in the public and political sphere than the negotiation of the two trade agreements CETA¹ and TTIP² by the European Union (EU) with Canada and the United States of America. Besides fears about the “*blurring*” of consumer protection and environmental standards, the most controversial aspect of these agreements is the inclusion of an investment protection mechanism in both agreements.³ The most militant oppositions express conclusions such as:

“The most invidious aspect about TTIP is the investment agreement [...]. It's about stopping parliament[s] from passing regulations that would protect our economy, our people, our health.”⁴

The general concept of such investment protection mechanism is as follows: two or more states agree upon a certain number of substantive protection standards for investors abroad in an international agreement. Those standards could e.g. include a prohibition of discriminatory measures towards the investor or a prohibition of expropriation. Whenever a state undertakes a specific measure, *inter alia* as Germany did by adopting the law on the termination of nuclear plants after the accident in Fukushima, foreign investors may not only challenge this measure (the law ordering the termination) under the domestic legal framework but also under the protection standards conferred in the international investment agreement (IIA). Hence, even though the measure may comply with the requirements of national (constitutional) law, it might however breach the protection standards agreed upon on the international level. Additionally, those treaties usually refer the disputes arising from IIAs to international arbitral tri-

-
- 1 Comprehensive Economic and Trade Agreement, under negotiation since 2009.
 - 2 Transatlantic Trade and Investment Partnership, under negotiation since 2011.
 - 3 Cf. also: *Lang*, Der EuGH und die Investor-Staat-Streitbeilegung in TTIP und CETA (Beit. zum Transnat. Wirt.-R, Vol. 138, 2015), p. 6.
 - 4 Joseph Stiglitz, Nobel Price winner 2001 (economics) and former head of the IMF and IEA, interview on 10/10/2015 relating to the TTIP regulations with GEDProject, available at <https://www.youtube.com/watch?v=slfO5HRRjQg> [last checked on: 28/02/2017].

bunals and hence carve out these investment disputes from the national judicial framework. Most of the current criticism is closely related to this regulation.⁵

Besides all criticism, the EU member states were among the leading countries when concluding and implementing investment protection mechanisms through IIAs. Predominantly the EU member states tried to foster investment protection through the conclusion of bilateral agreements – also referred to as bilateral investment agreements (BITs) – with other states all over the world. The result is an extensive network of IIAs concluded by EU member states either among themselves (intra-EU IIAs) or with non-member states (extra-EU IIAs).

The problem to be addressed in this thesis: Potential conflicts between EU law and intra-EU and extra-EU IIAs

The current debate on TTIP and CETA should not obscure the discussions on a different subject which is closely interlinked but dates back before the first negotiations of those agreements were started in 2009 and 2011. Given that the competence to negotiate such agreements was transferred to the EU in 2009 only, previous IIAs were negotiated by the member states. Approximately in 2006/2007 the question arose how EU law and international investment law interact and how potential conflicts of both systems could be resolved. The questions are of multiple nature. Lets imagine two EU member states that have concluded an IIA including several substantive protection standards. One of these states has granted particular advantages to investors to build up their business in disfavoured regions of the member state, in order to enhance economic development. The European Commission might consider such advantages to constitute state aids in terms of Art. 107 TFEU and thus prohibited under EU law, which leads to their mandatory revocation towards the investor.⁶ The investor, besides potentially challenging the revocation of aids before national courts or the

5 Cf. comment by the German Judges Association, available at: <http://www.zeit.de/politik/ausland/2016-02/ttip-deutscher-richterbund-schieds-gerichte> [last checked on: 28/02/2017].

6 The example is provided by reference to the facts in the reknown *Micula Case*, cf.: *Ioan Micula, Viorel Micula & others vs. Romania*, 11.12.2013 – ICSID Case No. ARB/05/20 - Final Award and Decision on Jurisdiction and Admissibility dated 23.09.2008.

CJEU, might also seek judicial protection by an arbitral tribunal, basing its claim on the IIA. Indeed, it can be argued that revoking an advantage previously granted to an investor might violate such investor's legitimate expectations and thus be contrary to the so-called fair and equitable treatment standard guaranteed under an IIA. What should the member state do? Risking infringement proceedings in the European context to avoid being ordered to pay damages by an arbitral tribunal based on the investment treaty? Can arbitral tribunals even be competent to rule upon the legality of a measure which is mandatory under EU law without impeding on the competences of the European Courts? What would be the effect of contradicting decisions by the arbitral tribunal, basing its considerations on the IIA and European Courts, judging the case by reference to national and EU law? The questions become even far more complicated when taking into consideration that both frameworks *ab initio* claim absolute supremacy within their respective framework. Whereas EU law is essentially based on the principle of supremacy as one of the fundamental rules to guarantee its so-called autonomy and its uniform application, international investment law usually refers to the general principle in international law that changes in a state's domestic law cannot excuse violations of international obligations (cf. Art. 27 Vienna Convention on the Law of Treaties (VCLT)).

These questions are more than theoretical. In the last decade, a considerable number of disputes was closely related to the question of the interaction of EU law with international investment law. In 2015, 130 pending investment arbitration cases were based on intra-EU IIAs (19% of all cases).⁷ Additionally disputes based on extra-EU IIAs, involving the responsibility of an EU member state, are increasing, a fact which was nearly unconceivable for long times. This increase in procedures raised particular interest for these questions. In several of the arbitral proceedings EU member states tried to demonstrate that IIAs could not set aside the obligations undertaken under EU law. Although taken into consideration by several arbitral tribunals, these objections were mostly dismissed very clearly. The European Commission is actively seeking to face the (alleged) threat to the uniform application of EU law within the member states through such investment proceedings. The last attempt of these interventions were infringement proceedings initiated in 2015 against several member states which accuse them of being in violation of EU law by

7 UNCTAD, World Investment Report, 2016, p. 105.

keeping IIAs in force, despite the threat to the autonomy of the EU's legal order. Several national courts were also sought with the question in the context of enforcement or setting aside proceedings regarding arbitral awards being rendered based on IIAs involving EU-member states. One of the most prominent proceedings in *Achmea (former Eureko) vs. Slovak Republic* finally led to a preliminary ruling reference of the German Federal Supreme Court on 10.05.2016 to the CJEU regarding the validity of dispute settlement provisions in intra-EU IIAs and their effect on the arbitral tribunal's jurisdiction.⁸

Literature review

Despite the tremendous importance of the subject and the increasing number of arbitral awards rendered in the meantime⁹, the current perception of the conflict in literature remains rather fragmented. *Ahner* analysed the possibilities for the EU to conclude future IIAs but expressly carves out the problems arising in the context of intra-EU or extra-EU conflicts.¹⁰ *Schmitt* explored the consequences of the shift of competences for foreign direct investments to the EU through the Lisbon Treaty, without treating the difficulties which derive from the potential conflicts of IIAs and EU law in arbitration proceedings.¹¹ *Bräuninger* exclusively focuses on the (potential) discrimination of investors in extra-EU IIAs, which will only

8 *Engel*, SchiedsVZ, 2015, 218, 218, cf. also: *Peterson*, IA Reporter Vol. 9, No. 11 (2016), 2, 2 f.

9 Cf. *inter alia* the awards: *Binder vs. Czech Republic*, 06.06.2007 – UNCITRAL - Award on Jurisdiction; *Eastern Sugar vs. Czech Republic*, 27.03.2007 – SCC No. 088/2004 - Partial award; *Euram vs. Slovak Republic*, 22.10.2012 – PCA Case no. 2010-17: First Award on Jurisdiction; *Achmea vs. Slovak Republic*, 26.10.2012 – PCA Case No. 2008-13 - Award on Jurisdiction, Arbitrability and Suspension; *Electrabel vs. Hungary*, 30.11.2012 – IC-SID Case No. ARB/07/19: Decision on Jurisdiction, Applicable Law and Liability; *EDF vs. Hungary*, 04.12.2014 – UNCITRAL - Award; cf. also the judgements / orders rendered by national courts, *inter alia*: *Higher Regional Court Frankfurt*, SchiedsVZ (2013), 119, 10.05.2012 – 26 SchH 11/10; *German Federal Supreme Court*, 03.03.2016 – I ZB 2/15; *Swiss Federal Supreme Court*, *1^{er} Cour de droit Civil*, 06.10.2015 – 4A 34/2015.

10 *Ahner*, Investor-Staat-Schiedsverfahren nach Europäischem Unionsrecht, 2015.

11 *Schmidt*, Die Kompetenzen der Europäischen Union für ausländische Investitionen in und aus Drittstaaten, 2013.

be of minor importance for this thesis.¹² General literature and handbooks contain very little on the specific subject matter.¹³ Several articles and discussion are centred around the recent decisions of the arbitral tribunals, without however questioning the overall approach of those tribunals.¹⁴ Others try to limit the discussion either on the international law perspective or the EU law perspective, which might lead to, at least partially, ignoring the far-reaching implications of the question in practice for both, investors and states.¹⁵ Additionally, with the upcoming negotiations of the free trade agreements, the focus shifts on particular issues of policy making and potential possibilities how to reconcile investment protection and EU law in future agreements.¹⁶

Focus of the thesis

However, a comprehensive approach of how the arbitral tribunals should address the question of conflicting provisions in EU law and international investment law, both regarding intra-EU IIAs as well as extra-EU IIAs, is missing so far. From a current perspective, this conflict will subsist for quite a while, given that the negotiations on agreements which should replace pre-existing IIAs are pending and it becomes more and more doubt-

12 *Bräuninger*, Investitionsschiedsgerichtsbarkeit und Diskriminierungsverbote, 2015.

13 The most extensive debates can be found in the different chapters in *Bungenberg/Griebel/Hobe u. a.* (Eds.), *International Investment Law*, (2015), cf. inter alia: Chapter 4: II. European Bilateral Approaches or Chapter 7: II EU Rules and Obligations related to investment; furthermore the different contributions in *Bungenberg/Griebel/Hindelang* (Eds.), *Internationaler Investitionsschutz und Europarecht*, (2010) also address the interferences but, however, largely focus on the future competences of the EU in the context of the Lisbon Treaty.

14 Cf. inter alia: *Reinisch*, *LIEI* Vol. 39, No. 2 (2012), 157; *Wehland*, *ICLQ* Vol. 58, Iss. 2 (2009), 297; *Söderlund*, *JOIA* Vol. 24, Iss. 5 (2007), 455.

15 Among the largest contributions in journals feature: *Burgstaller*, *JOIA* Vol. 26, No. 2 (2009), 181; *Dimopoulos*, *CMLR* Vol. 48, No. 1 (2011), 63; *Eilmansberger*, *CMLR* Vol. 46 (2009), 383; *Hindelang*, *LIEI* Vol. 39, Iss. 2 (2012), 179; the recent contribution by *Tietje/Wackernagel*, *JWIT* Vol. 16, Iss. 2 (2015), 205 has a different focus but treats overlapping questions with regard to this thesis.

16 *Hindelang*, *AVR* Vol. 53 (2015), 68; *Lang*, *Der EuGH und die Investor-Staat-Streitbeilegung in TTIP und CETA* (Beit. zum *Transnat. Wirt.-R.*, Vol. 138, 2015); *Lenk*, *EJLS* Vol. 8, No. 2 (2015), 6.

ful, if those agreements will ever (and to which extent) include any particular provisions on investment protection. Hence, a comprehensive analysis of the existing particularities and conflicts in this – existing – situation of overlapping legal frameworks is of predominant importance. As a senior associate of a renowned law firm involved in several of the current disputes puts it:

„The problem about this subject is that ‘Internationalists’ do not listen to ‘Europeanists’ and vice-versa.”¹⁷

This thesis will thus try to overcome these difficulties by furnishing a comprehensive analysis of how arbitral tribunals should consider EU law in arbitration proceedings arising in the context of an international investment protection dispute. The focus will be on disputes based on IIAs concluded by EU member states with other member states as well as non-member states, which engage the responsibility of an EU member state under the respective IIA. Within this analysis, the questions of the interference of EU law with all stages of the arbitration proceedings should be questioned, including the question of whether (or whether not) EU law is part of the applicable law in those disputes, which effects it might have on the arbitral tribunal’s jurisdiction or the substantive protection provided under international investment law.

Several questions should however be excluded from this analysis. First, the question of state-contracts will not be further analysed. These contracts, which are usually concluded between investors and states regarding a particular investment, represent several particularities, which could also interact with EU law, but which are subject to a completely different setting than IIAs as international treaties. Second, mixed agreements concluded by the EU and the member states, will not be treated in deeper detail as well. The reason for this omission is basically that the only existing treaty, the Energy-Charter-Treaty, represents particularities linked to its negotiation, which could bias the overall analysis and set a completely different focus. Furthermore, given the recent uncertainties regarding the inclusion of investment protection in further agreements, the situation remains highly uncertain. However, within the analysis, whenever possible, some of the particularities or consequences for mixed agreements will be highlighted. Third, given the considerable amount of contributions regarding the EU’s future competences, this subject will only be treated when

17 Quote from an off-the-record conversation with a senior associate having been involved in several proceedings based on either intra-EU or extra-EU BITs.

necessary to derive consequences for the existing IIAs. The focus should be exclusively on the conflict between IIAs and EU law.

Structure of the analysis

Addressing this conflict requires a three-step approach.

First, following this introduction, the different mechanisms of investment protection within the EU should be explained (*Part I*). This requires an analysis of the roots of modern investment protection through IIAs as well as its basic features. These features will be contrasted to the most important provisions of EU law which might be advanced by investors in the EU in order to protect their investment against measures from EU member states or the EU. It will be demonstrated that *de facto* both frameworks, EU law as well as investment protection through IIAs, build two overlapping frameworks, which have not been construed in a coordinated approach. The analysis of the different protection standards under both frameworks serves as a basis for the entire understanding in the further thesis and developments. Having compared those two frameworks and having taken into consideration the particular features of each of them, Part I will finish by outlining various potential conflicts of both frameworks regarding investments in the EU.

Second, based on these potential conflicts, the following parts of the thesis will develop solutions how to resolve these conflicts in arbitration proceedings. To be able to develop those solutions, one needs to fundamentally distinguish between intra-EU and extra-EU disputes. Given the different actors in question, the approach to resolve the conflict as well as the considerations to take into account, cannot be identical in the extra-EU and intra-EU context. Hence, the analysis will be separated. The conflict regarding EU law and intra-EU IIAs should be addressed first (*Part II*). It will be demonstrated that the conflict between the provisions of EU law and intra-EU IIAs lead to the arbitration clause and the substantive protection standards contained in IIAs to be set aside by conflicting provisions of EU law. To demonstrate this, it will be first shown that EU law can be considered as international law. Second, it will be developed that under the relevant rules of conflict of law applicable in this context, the provisions of EU law prevail over conflicting provision under any international obligation by the member states and conflicting provisions of international law need to remain unapplied. It will then be outlined that arbitration clauses contained in IIAs actually conflict with EU law and hence need to

be set aside and that a substantial guarantee provided in an IIA cannot alter the member states' obligations under EU law.

After having advanced the solution to be applied in the intra-EU context, the question how to consider EU law in the extra-EU context will be deployed (*Part III*). After having a look on the current perception of the conflict, the potential influences and implications of EU law on the arbitration proceedings will be outlined. The major part of this extra-EU analysis will however focus on the development of a new approach how to address questions of EU law in international arbitration proceedings based on extra-EU IIAs which is influenced by similar solutions developed by the ECtHR regarding multi-level legal frameworks in the well-known *Bosphorus-Decision*. These developments should in particular demonstrate that despite of various arbitral tribunals having concluded the contrary, the protection offered by EU law and IIAs can at least be considered equivalent, enabling new procedural approaches to address the conflict between both frameworks. Finally, given the results, a brief outlook should outline several prospects of the solution for the current discussions on trade agreements and the future investment policy of the EU (*Part IV*). The previously found theses will then be summarised in the Conclusion.

Terminological comments

For matters of clarification, several terminological issues should be addressed at this stage as well. For the purpose of this thesis, European Treaties will refer to the integrity of treaties concluded by EU member states since the creation of the European Coal and Steel Community in 1951 and the Treaty of Rome establishing the European Economic Community and European Atomic Energy Community in 1958. Hence, as long as not expressly denominated, this includes all amendments to the Treaty of Rome, such as the Brussels Treaty, Single European Act, etc. until the Lisbon Treaty, as well as the Accession Treaties by new member states.

Similarly, EU law will refer to the integrity of law in relation with the EU, which means: primary law as contained in the European Treaties (TEU, TFEU, Charter), secondary law issued by institutions of the EU (directives, regulations, decisions) as well as all general principles of EU law developed in the jurisprudence.

For further simplification, all decisions by the Court of Justice of the European Coal and Steel Communities, the Court of Justice of the European Communities, the Court of First Instance, the General Court and the