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ESTABLISHMENT OF INVESTMENT COURT SYSTEM UNDER CETA AND EU-VIET NAM FTA AND ITS COMPATIBILITY WITH EU LAW

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Abstract

The Commission's proposal for multilateral investment court system, for its current and future free trade agreements with third countries, aims to institutionalise investment protection at international level to provide consistency and coherence while interpret and applying to provisions in these agreements. However, future of this project depends on success of the investment court system introduced under CETA and EUVFTA. The investment court system has embarked a new regime by assuring transparency, independent members of tribunals who are not appointed by disputant, and importantly an appellate mechanism. In addition to the court system, the mechanism to resolve disputes under CETA and EUVFTA also mandatorily provides for amicable settlement. With an optimistic outlook of the mechanism, criticisms have developed on its drawbacks requiring improvements. It is not only the international criticisms but also from Member states of the EU for its incompatibility with the EU Treaties. As Member states have sought for an opinion from the Court of Justice to assess its compatibility in the light of prevailing jurisprudence to protect autonomy of EU law and legal framework of the EU, a balance has to be struck by the agreements to overcome this. It can be expected that the European Commission will push for similar mechanisms in the future agreements and thus the outcome of this opinion could deeply affect and inspire changes.

Key words: Investment Court system, Multilateral investment court system, Investor-State Dispute Settlement, Autonomy of EU law, CETA, EU Viet Nam FTA, Dispute settlement**.**

* This paper was originally submitted by Shilpa Singh Jaswant in September 2018 as a thesis for the degree "Master of Laws (LL.M.)" at the Europa-Kolleg Hamburg (Supervisor: Prof. Dr. Armin Hatje).

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List of Abbreviations

BIT	Bilateral Trade Agreement
CCP	Common Commercial Policy
CETA	Comprehensive Economic and Trade Agreement
CFSP	Common Foreign and Security Policy
EC	European Commission
ECJ	Court of Justice of the European Union
EU	European Union
EUSFTA	European Union – Singapore Free Trade Agreement
EUVFTA	European Union - Viet Nam Free Trade Agreement
FDI	Foreign Direct Investment
fn	Footnote
FTA	Free Trade Agreement
ICSID	International Centre for Settlement of Investment Disputes
ISDS	Investor-State Dispute Settlement
NAFTA	North American Free Trade Agreement
OLG	Oberlandesgericht
para	paragraph
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of European Union
TTIP	Transatlantic Trade and Investment Partnership
UNCITRAL	United Nations Commission on International Trade Law
VCLT	Vienna Convention on the Law of the Treaties
WTO	World Trade Organisation

CHAPTER 1 – INTRODUCTION

The proposed investment court system under CETA and EUVFTA would provide a rapid and effective means of settling disagreements on whether a party has acted in conformity with its international obligations, application of the agreements, and develops the interpretative understanding of the agreements. The system of dispute settlement at the WTO has worked very well and inspiring from this model the EU has included dispute settlement mechanism based on this[1]. It would build on the EU's groundbreaking approach to depart from investor-State dispute settlement (ISDS) based on *ad hoc* commercial arbitration in the latest agreements.[2] An Investment tribunal, later a multilateral investment court, would bring the key features of domestic and international courts to investment adjudication.[3] With the current negotiations on multilateral system replacing the investment court as in CETA and EUVFTA, would be revolutionary to proceduralise investment protection.

There are problems concerning this idea as some Member states have opposed the present investment court system. The investment court mechanism has sought difficulties as its legality is challenged at the ECJ in Opinion 1/17. With the opinion sought on the investment tribunal under CETA which also puts under threat the future of Viet Nam agreement. As the ECJ guards the autonomy of EU law in its previous judgments, the jurisprudence laid down as - the “very foundation” and “fundamental elements of legal order” and

[1] European Commission, Dispute Settlement in a nutshell from the official website of European Commission, available at http://ec.europa.eu/trade/policy/accessing-markets/dispute-settlement/ (12 September 2018)
[2] *Kaufmann-Kohler/Potestà*, Can the Mauritius Convention serve as a model for the reform of investor-State arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism?, CIDS, Geneva, June 2016, p.10 -13.
[3] Ibid

the juridical system of the EU have been developed by these Treaties whereas it is upon the ECJ to assess whether the creation of any new structure is compatible with those elements. What the notion of autonomy aimed at safeguarding- is the "essential" character of the powers of the Treaties entrusted on the institutions of the EU[4], and in other words, the structural dimension of the EU legal order[5]. Consequently, the ECJ has been given the power within the Treaties to interpret the provisions of the Treaties so as to protect the autonomy of the legal order of the EU.

The research aims to analyse that CETA and EUVFTA are compatible with autonomy of EU law and fundamental rules as laid down in the EU Treaties and the Court's jurisprudence. Since CETA is concluded as mixed agreement and EUVFTA likely to be concluded by the EU alone and most likely face the consequence as in EU-Singapore FTA, the agreements would raise questions on power of Member states to enact laws on subject matter that is under shared competence after Opinion 2/15. The research looks at safeguards provided by the mechanism to resolve investment claims and its drawbacks in order to answer its compatibility with EU law. The research analyses the compatibility with issues of competence between the EU and Member states which would not undermine the exclusive jurisdiction of ECJ.

Structure of the research

The research would be presented in the following chapters based on its aim and objective. The Chapter-2 on criticism of ISDS in essence

[4] Opinion 1/09 in Creation of a Unified Patent Litigation system & European and Community Patents Court, ECLI:EU:C:2011:123, para 89.
[5] *Contartese*, The autonomy of the EU legal order in the ECJ's external relations case law: From the "essential" to the "specific characteristics" of the Union and back again, 54 CMLR 54 (6)2017, pp. 1627–1671 p. 1631

reflects serious concerns about the democratic accountability and legitimacy of this dispute resolution process. The power granted to individual arbitrators in ISDS who are not part of a corps of judges is not well accepted in democracies, and the number of democratic states has increased significantly in the last decades, which may in part explain the surge of criticism. This deficiency in terms of accountability and legitimacy calls for remediation. At the same time, the remedies should avoid sacrificing the gains of investor-State arbitration, which do exist as well.

The Chapter-3 on the significance of autonomy of EU and its possible effects on investment mechanism in CETA and EUVFTA are discussed here. It would deal with challenges posed to establishment of court system which is criticized to take away exclusive jurisdiction of ECJ. The ECJ has embarked firmly to protect the judicial mechanism in *Achmea* judgment and would to do so while discussing the legality of CETA and EUVFTA. However, drafters of the EUVFTAs have taken care of possible problems in order to protect autonomy and supremacy of EU law. The research further analyses the issues of competences under Chapter-4 in the light of Opinion 2/15 sought for EU-Singapore FTA. The research views that it is more than a problem of political pressure from Member states but it could actually compromise legislating power of Member states on subject matter belonging to its competence.

The Chapter-5 would also focus on features of the investment court system as provided in the new investment agreements are discussed here. The new system is likely to introduce a two-tier system, unlike the current ISDS system. There should be a First Instance Panel, decisions of which could be appealed to an Appellate Panel based on factual, as well as legal reasons. It is also

likely to introduce permanent judges – Judges will no longer be selected by parties to a dispute; however, the cases will be allocated randomly to judges who are appointed by parties of CETA and EUVFTA. The judges shall fulfill strong ethical criteria and also new provisions ensuring their impartiality should be implemented. As a result, a double-hat syndrome allowed under the current regime enabling arbitrators in one case to act as counsels in a different one should be limited. Finally, Chapter-6 concludes the research with observations made under various chapters.

CHAPTER 2- CRITICISM OF THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM

2.1. Early investment treaties: bilateral and dispute settlement

Traditionally, enforcement of international law was vested exclusively in the hands of States. In case of violation of international law, the State that was harmed by the breach could resort to counter-measures, such as reprisals, retaliation, and ultimately even the use of force, in order to make the violating State comply with its obligations. ISDS is an exceptional way for the settlement of dispute; a private way to settle disputes.[6] Modern investment treaties include ISDS clause instead of laying enforcement exclusively in the hands of States, they provide for the right of foreign investors to have recourse to ISDS and directly claim for the violation of the respective investment treaty.[7] A fundamental shift in compliance mechanisms under international law which aim to elevate investment treaties towards an objective: law-based order in which the general principles of investment protection can be enforced uniformly. This is independent of the power relations between inter-State compliance structure and subject the enforcement for considerations by bilateralism.[8]

[6] *Diependaele/De Ville/Sterckx*, Assessing the Normative Legitimacy of Investment Arbitration: The EU's Investment Court System, New Political Econ. 2017, p. 4.
[7] *Mills, A.* in: *C. Brown and K.Miles* (eds), Evolution in Investment Treaty Law and Arbitration, p.97-116.
[8] *W. Schill*, The Multilateralisation of International Investment Law, p. 244; European Commission-Discussion paper, Establishment of a multilateral investment dispute settlement system, 13 December 2016 Geneva (Switzerland)

The development of ISDS created an institutionalized and formalized procedure in international investment treaties (including provisions on dispute settlement) to promote confidence while stabilising investment environment[9] and "facilitate wealth-creating cross-border capital flows"[10]. Countries found investment treaties as a tool to enhance investment protection and bringing benefits across borders.[11]

2.2. The empowerment of investment tribunals and their features

Modern investment laws allow investor to avoid extra-legal consideration and bring claims directly to arbitration as they can choose the forum of arbitration organized under ICSID, ICC[12], SCC[13] and/or UNCITRAL Rules[14].[15] The investors determine *locus standi* to initiate against the host-state.[16] While ISDS provisions show variations across the different investment treaties, they normally provide for: (i) the claimant-investor may bring a claim directly against the host State; (ii) the dispute is heard by an arbitral tribunal, where arbitrators possessing knowledge in international public law, economic and investment law, constituted *ad hoc* to hear that particular dispute chaired by a well-known and respected figure;

[9] *Susan Franck,* The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions, Ford LRev 73(4) (2005), p.1521–1625, 1525. See also *H. Schreuer*, in: *Kalicki/Joubin-Bret* (eds.), Reshaping the Investor-State Dispute Settlement System (2015), p. 879–889, 879.
[10] Ibid, p.1524.
[11] *Alvarez/Park*, The New Face of Investment Arbitration: NAFTA Chapter 11, Yale J. Int'l L. 28 (2003), p.365, 366
[12] The International Chamber of Commerce
[13] The Stockholm Chamber of Commerce
[14] The United Nations Commission on International Trade Law. The popular ones are often found in treaties.
[15] *Susan Franck* (fn. 9), p. 1540-1541
[16] *Parra*, Provisions on the Settlement of Investment Disputes in Modern Investment Laws, ICSID Rev.-Foreign Investment L.J (1997), 291-92.

(iii) both disputing parties, including the claimant-investor and the respondent-State, play an important role in the selection of the arbitral tribunal.[17]

With different investment treaties different rights to investors are assured: compensation when an investment is expropriated[18]; States cannot enact currency controls to promote free flow of capital[19]; States cannot discriminate on the basis of nationality or simply, foreign investors cannot be treated worse than domestic investors[20]; States are obliged to treat investments fairly and

[17] *Diependaele/De Ville/Sterckx* (fn.6), p. 4.

[18] Article 4(1) of the *Argentina-Jamaica BIT* provides that "neither country shall take any measure of nationalization or expropriation or any other measure having the same effect against investments in its territory belonging to investors of the other [country], unless the measures are taken in the public interest, on a non-discriminatory basis and under due process of law. The measures shall be accompanied by provisions for the payment of prompt, adequate and effective compensation." See Agreement between the Government of Jamaica and the Government of the Argentine Republic on the Promotion and Reciprocal Protection of Investments of 8 February of 1994. Similarly in article 4(1) of the *Bosnia and Herzegovina-Sweden BIT* provides that investments "shall not be nationalised, expropriated or subjected to requisition or to measures having effect equivalent to nationalisation or expropriation ... except for a public purpose related to the internal needs and under due process of law, on a non-discriminatory basis and against prompt, adequate and effective compensation." Agreement on the Promotion and Protection of Investments between Sweden and Bosnia and Herzegovina of 31 October of 2000.

[19] Article V(1) of the *US-Uzbekistan BIT* provides that "both countries shall permit all transfers relating to a covered investment to be made freely and without delay into and out of its territory. Such transfers include: (a) contribution to capital; (b) profits, dividends, capital gains, and proceeds from the sale of all or any part of the investment or from the partial or complete liquidation of the investment; (c) interest, royalty payments, management fees, and technical assistance and other fees; (d) payments made under a contract, including a loan agreement; and (e) compensation [for expropriation and losses due to armed conflict], and payments arising out of an investment dispute." Treaty between the Government of the United States of America and the Government of the Republic of Uzbekistan Concerning the Encouragement and Reciprocal Protection of Investment of 16 December 1994. This treaty is signed but not in force yet.

[20] Article 3(1-3) of the *Denmark-Lithuania BIT* provides that neither country "shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory" and that neither country shall subject investors or investments "to treatment less favourable than that which it accords to its own [investments or returns and] investors or to investors of any third State." Agreement concerning the Promotion and Reciprocal Protection of Investments of 30 March 1992.

equitable[21]; States have obligation to fully protect and secure an investment[22]; States are obliged under customary international law not to treat investment less favourably than minimum standard as per customary international law[23]; and sometimes, States have to fulfil commitments regarding investments (also known as "umbrella clauses")[24].

2.3. Criticism to "traditional" ISDS

Criticism to ISDS flows mostly from developing countries due to their weak bargaining power and thus, their investors also had to face consequence of this. As a unique feature of ISDS, instead of retaining power over the enforcement of international investment treaties, States have to subordinate to external control by arbitral

[21] Specific treaty provides for specific formulation of this right. Article 1105(1) of NAFTA provides that "[e]ach Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security." North American Free Trade Agreement (NAFTA) of 17 December 1992. Article 2(3)(a) of the U.S.-Estonia BIT provides that investments shall at all times be accorded fair and equitable treatment." Treaty between the Government of the United States of America and the Government of the Republic of Estonia for the Encouragement and Reciprocal Protection of Investment of 16 February 1997.

[22] Article 2(3)(a) of *the US-Estonia BIT* provides that investments "shall enjoy full protection and security", *ibid*. The Australia-Uruguay BIT similarly provides in Article 3(3) that each party "accord within its territory protection and security to investments and shall not impair the management, maintenance, use, enjoyment or disposal of investments." Treaty on the Promotion and Protection of Investments 03 September 2001.

[23] It is not common to have such a commitment; however, there exist certain treaties which do so. It can be found in Article 3(5) of *the Netherlands-Czech Republic BIT* which provides that the countries will treat investments at least as well as required by "obligations under international law existing at present or established hereafter." Agreement on Encouragement of Reciprocal Protection of Investments Between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic of 24 April 1991. Also, article II (2)(a) in *the US-Argentina BIT* provides that the foreign investments "shall in no case be accorded treatment less than that required by international law." Treaty between the United States of America and the Argentine Republic concerning the Reciprocal Encouragement and Protection of Investment of 14 November 1991.

[24] Not all BITs have "umbrella-clauses." Article 11.2(c) of *the U.S.-Jamaica BIT* Investment provides that "each Party shall observe any obligation it may have entered into with regard to investments." Agreement concerning the Reciprocal Encouragement and Protection of 4 February 1994.

tribunals. This change in the enforcement of international investment law prevented the possibility for States to influence investment protection through post-breach bilateral bargaining. Likewise, this substantive standard to protect the interest of investors in ISDS has been criticized while no conciliation to other standards like human rights, environmental protection and public health when the role of State is subordinated.[25] It does not guarantee that in cases of conflict that the latter standards would prevail.[26]

The diverging opinions on the merits and demerits of the protection of foreign investment and investors, and in particular ISDS are seen in the past few years. In support of this system, it is said that the foreign investment protection has generally found to be beneficial with increase of foreign investment flows, the functioning of the global market, the economic growth, and the human development in capital-exporting as well as capital-importing States, and, importantly, positively contributed to the promotion of the rule of law at the international level.[27] On the other hand, the protection to foreign investment and investors is argued to be unfair when compared to domestic investors and their investment.[28] The investment arbitration has undermined the authority of the domestic courts and often impedes appeal at domestic courts due to the ISDS procedure. ISDS allow interpretations which benefit and facilitate

[25] *Atik,* NAFTA Chapter 11: A Catalogue of Legitimacy Critiques, Asper Review of Intl Business and Trade Law 3, (2003), p. 215–34.; *Schneiderman*, Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise, Cambridge, 2008, p.113.
[26] *Sornarajah*, Resistance and Change in the International Law on Foreign Investment, Cambridge, 2005.
[27] *W. Schill*, Enhancing the Legitimacy of International Investment Law: Conceptual and Methodological Foundations of a New Public Law Approach, Vir. J. of Int'l L. 52(1) 2011, p. 61.
[28] *Atik* (fn.25) 2003, *Sornarajah* (fn 25) 2006, *Van Harten/Schneiderman*, Public Statement on the International Investment Regime, Osgood Hall Law School, 31 August 2010, available at https://www.osgoode.yorku.ca/public-statement-international-investment-regime-31-august-2010/.

foreign investors and thus, the development of interpretation of expropriation which is broadened to include indirect expropriation have been highly criticized.[29]

Proliferation of investment treaties with number of investment arbitrations has given rise to inconsistent decisions. This could happen at 3 scenarios[30]: different conclusions done at different tribunals about the same standard in the same treaty; different tribunals organized under different treaties give arise to different conclusions relating to same parties and facts, and similar investment rights[31]; and finally, when different tribunals under different treaties considering similar commercial situation and similar investment rights and give opposite conclusions[32].

Since the last decade, criticisms are drawn towards ISDS. A few States had denounced or intended to denounce ICSID Convention[33] and some of their international investment agreements.[34] A few others had revised their model agreements, while some had completely dispensed with provisions of ISDS.[35] Aspects like relevance, accuracy and possible consequences in predictability are

[29] In *Tecmed v. Mexico*, ICSID Case No. ARB(AF)/00/2 Award (29 May 2003), p. 80, an investor was awarded $ 5.5 million of compensation for the refusal of renewal of operating permit for landfill hazardous waste by Mexican authorities. Available at https://www.italaw.com/sites/default/files/case-documents/ita0854.pdf
[30] *Susan Franck* (fn .9), Ford. L Rev 73 (2005), p.1546.
[31] This is a mechanism adopted by parties to take advantage of investment rights under different treaties.
[32] *Monbiot*, The Real Threat to the National Interest From the Rich and Powerful, The Guardian, 15 October 2013.
[33] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, 575 UNTS 159 / [1991] ATS 23 / 4 ILM 532. The following States have denounced the ICSID Convention: Bolivia (2007); Ecuador (2009) and Venezuela (2012).
[34] The following States have denounced some of their IIAs: Ecuador terminated nine BITs in 2008; Venezuela terminated one BIT in 2008; Indonesia terminated seventeen BITs since 2014; South Africa terminated nine BITs since 2012 (source: http://investmentpolicyhub.unctad.org/ and others).
[35] See for instance U.S.-Australia FTA (2004), Article 11.16

not achieved and ISDS is largely perceived as lacking legitimacy.[36] Given that ISDS are disbanded (i.e. dissolved) after issuing an award, it is perceived that arbitrators are influenced for the concerns of re-appointments. Moreover, because of the *ad-hoc* appointments of arbitrators and they profess other occupations, reliability, independence and impartiality can be debated.[37] Many times arbitrators act as counsel for, both, investors and States in different disputes with same issues also cause a higher perceived risk of conflicts of interest and legitimacy of a tribunal.[38]

2.3.1. Procedural and Structural issues

With lack of consistency or even contradictory awards issued by investment tribunals, there are no appropriate mechanisms to remedy or limit such inconsistencies[39] and to limit multiple proceedings with similar facts and investment rights[40]. Thus, inconsistency could negatively affect effectiveness, reliability, and predictability of the ISDS[41] and its credibility[42].

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[36] As summarized by European Commissioner for Trade Cecilia Malmström, "there is a fundamental and widespread lack of trust by the public in the fairness and impartiality of the old ISDS model. This has significantly affected the public's acceptance of ISDS and of companies bringing such cases". *Cecilia Malmström*, Proposing an Investment Court System, Blog Post, 16 September 2015 available at: https://ec.europa.eu/commission/2014- 2019/malmstrom/blog/proposing-investment-court-system_en

[37] European Commission-Discussion paper, Establishment of a multilateral investment dispute settlement system, 13 December 2016 (fn.8).

[38] Ibid

[39] *Cheng,* Power, Authority and International Investment Law, AUILR 20(3) (2005), p. 516; *Spoorenberg/Viñuales*, Conflicting Decisions in International Arbitration, LPICT 8(1) (2009), p. 91–113, 91. See also UNCTAD (2013), Reform of Investor-State Dispute Settlement: In Search of a Roadmap, International Investment Agreement Issues Note, No. 2 (June 2013), pp. 3–4.

[40] Ibid

[41] *Bucher*, in *Gaillard* (ed.), The Review of International Arbitral Awards, IAI Series 6 (2010), p. 285–296, 287; *Commission*, JIntlArb 24(2) (2007), p. 129–158, 157; *Dolzer,* TDM9 (3) (2012), p. 5; *Kaufmann-Kohler*, Arbitral Precedent: Dream, Necessity or Excuse?, Arbitration International (LCIA) 23(3) (2007), p. 357–378, 374 et seq. and 378; *Kaufmann-Kohler*, in: *Gaillard, E./Banifatemi, Y*. (Eds), Annulment of ICSID Awards, 2004, 189-221, p. 219.

The procedure adopted is long and expensive contribute to its expense for the arbitrators, counsels and running the proceedings itself.[43] The monetary awards may be excessive and as a consequence, governments would be constrained to spend significant amounts of money from public funds defending legitimate public policies.[44] A significant financial burden might be imposed upon low-income countries, which would be unable to properly defend themselves against wealthy transnational corporations.[45]

As noted from above, existing control mechanisms is weak and unsatisfactory.[46] The recourse to *ad hoc* annulment committees (in the ICSID system) has prevented to develop precedence and of a consistent jurisprudence.[47] ISDS lacks appellate mechanism which would thus make it impossible to reverse incorrect decisions[48], or give sanctions to incompetent arbitrators[49]. The lack of transparency in ISDS has not able to provide sufficient possibilities to third parties to participate in ISDS.[50]

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[42] Ibid.
[43] *Garcia*, All the Other Dirty Little Secrets: Investment Treaties, Latin America, and the Necessary Evil of Investor-State Arbitration, FlaJIntlL 16(2) (2004), p. 355.
[44] Ibid.
[45] *Riesenberg*, Fee Shifting In Investor-State Arbitration: Doctrine And Policy Justifying Application Of The English Rule, DukeLJ 60(4) 2011, p.1007. See also UNCTAD (2013), Reform of Investor-State Dispute Settlement: In Search of a Roadmap, International Investment Agreement Issues Note, No. 2 (June 2013), p. 4.
[46] UNCTAD (2013), ibid, pp. 3 f.
[47] Ibid.
[48] *Werner*, in *Dupuy* / *Petersmann/o Francioni* (eds.), Human Rights in International Investment Law and Arbitration (2009), p. 115–117.
[49] Ibid.
[50] *Bastin*, The Amicus Curiae in Investor-State Arbitration, CJICL(1)3 (2012), 208–234, p.224 and 227; *Gus van Harten et al*.,(fn.28); *E.Peterson*, World Trade Agenda (2001), p. 13.

2.3.2. Substantive issues & lack of legitimacy

Lack of determinacy in the awards along with incoherence contributes to lack of legitimacy.[51] Determinacy, while using the rules conveying transparent and clear expectations, when the rights of investors and states are clearly mentioned.[52] Coherence is another factor contributing to legitimacy; as it deals with consistency in application and interpretation of rules to promote fairness and justice.[53] A rule is said to be coherent when its interpretation and application provides for same results for similar facts when the rules are principally fashioned to other rules in the same system.[54] One way is to increase "transparency of rules" and "fairness of application" can reduce conflict or tensions among investors expecting reasonable protection of investment, and states having obligation and expectations towards their own nationals to the extent as bargained in investment treaty.[55] Most importantly, such a transparency will promote legitimacy and promoting just and honest decisions.[56]

With the debates above creating permanent bodies and an appellate mechanism would be a radical replacement of ISDS. It has been argued that the creation of permanent bodies would entail a number of advantages. There innovations would contribute to improving the consistency, predictability and legal correctness of investment awards. Eventually, their presence would enhance the awards' authority and restore the regime's credibility. In other words, they

[51] *Thomas M. Franck*, Fairness in International Law and Institutions (1995), p.30; *Susan Franck* (fn.9), p. 1584.
[52] *Susan Franck* (fn.9), p.1585.
[53] *Thomas Franck*, (fn. 51) at 33, 38-41.
[54] Ibid at 38.
[55] Ibid, at 40-41.
[56] *Caron*, The Legitimacy of the Collective Authority of the Security Council, AmJIntlL 87 (1993), p.561; *G.C.A. Junne*, in: *Coicaud & Heiskannen* (eds.), The Legitimacy of International Organisations (2001), p.191.

would strengthen legitimacy investment arbitration. While complete consistency would require that the newly created bodies give awards possessing precedential value, the creation of an appellate procedure would achieve a measure of harmonization in the awards of tribunals.

CHAPTER 3 - THE CONFLICT BETWEEN AUTONOMY OF EU LAW AND SCOPE OF INVESTMENT TRIBUNAL UNDER CETA AND EUVFTA

The autonomy of EU law as enshrined in *Costa v. ENEL*, as by contrast to the ordinary international agreements, the EU Treaties have created its own legal system upon entry into force has become an integral part of the legal system of Member states and their courts are bound by it.[57] By settled case laws, the founding Treaties have established a "new legal order" and the essential characteristics of the European Union legal order are, in particular, its primacy over the laws of Member states. This ensures that an international agreement does not affect allocation of the power fixed by the EU Treaties or, consequently, the autonomy of EU legal system. The allocation of power within the EU Treaties established a new legal order by possessing its own institutions for the benefit of Member States.[58]

The principles mentioned in the EU Treaties that Member states are obliged to maintain the autonomy of EU law is illustrated in Article 344 TFEU that a Member state must submit concerning the interpretation or application of the Treaties to the ECJ unless otherwise provided by the provision of Treaties. Article 2 TEU recognizes that each Member state shares with the rest of the Member State set of common values on which the EU is founded. The judicial mechanism provided under Article 267 TFEU where Member states and their courts and tribunals to refer for preliminary

[57] Judgment in *Costa v. ENEL*, Case 6-64, ECLI:EU:C:1964:66.
[58] Judgment in *Van Gend & Loos*, Case 26-62, ECLI:EU:C:1963:1, para. 1, 12

ruling which protects the set up for dialogue between the courts and tribunals of Member state and the ECJ. What the notion of autonomy aimed at safeguarding is the "essential" character of the powers of the treaties entrusted on the institutions of the EU[59], and in other words the structural dimension of the EU legal order.[60] Consequently, the ECJ has the power to interpret the provisions of the treaties so as to protect autonomy of the legal order of the EU.

3.1. Supremacy of EU law justifying the autonomy of EU law and vice versa

The principle of supremacy illustrates the relationship of EU law and national law and the ECJ has multiple times upheld that EU law hold always absolute supremacy over national law when there is a conflict.[61] A principle established by the ECJ to accord precedence to a unilateral and subsequent measure over a legal system accepted by the Member states on a basis of reciprocity so as to ensure consistency in the legal system.[62] The existence of mutual trust between the Member states under Article 4(3) TEU and principle of sincere cooperation to ensure fulfilment of the obligations arising out of the EU Treaties or resulting from the acts of the EU institutions are reasons to justify supremacy of EU law. Further the Court stated that Article 267 TFEU provides for a preliminary ruling establishes a relation between the courts and tribunals of Member states and the ECJ, and these judicial bodies have the aim to secure uniform interpretation of EU law to ensure

[59] Opinion 1/09 in Creation of European and Community Patents Court, ECLI:EU:C:2011:123, para 89.
[60] *Contartese*, The autonomy of the EU legal order in the ECJ's external relations case law: From the "essential" to the "specific characteristics" of the Union and back again, (f.5), p. 1631.
[61] Judgment in *Costa v ENEL*, ECLI:EU:C:1964:66.
[62] Ibid

consistency and full effect of the EU law including protecting its autonomy.[63]

Moreover, the ECJ bases supremacy and autonomy on the fundamental premise that Member States share with each other and recognise as a common value on which the EU is founded under Article 2 TEU. Further, agreements entered between Member States are not exempted from the supremacy and the autonomy of EU law and they would be treated just like domestic laws.[64] Moreover, Member states are bound to respect EU law and in no way deviate from the aims of the EU Treaties like common market and thus, any agreement which affects this autonomy would be incompatible. The "essential" characteristics of EU law are that it originates from an independent source of law, i.e., the Treaties, by its primacy over national laws and by the direct effect of provisions of Treaties which are applicable to the nationals of a Member state.[65] These characteristics developed a structured network of principles, rules and mutually interdependent legal relations binding the institutions and Member states, and among Member states.[66]

In other words, any international agreement that give rise to an obligation which may affect the specific characteristics and the autonomy of the EU legal order be found incompatible with the EU law. The reason for an international agreement, including intra-BITs, found incompatible when it allows an investor of a Member state to bring proceedings against another Member state before an arbitral

[63] Opinion 2/13 in Accession of the EU to the ECHR, EU:C:2014:2454, para 176.
[64] Judgment in *Matteucci v. Communauté française of Belgium and Commissariat général aux relations internationales of the Communauté française of Belgium*, C-235/87, ECLI:EU:C:1988:460, para 19-22
[65] Opinion 1/09 in Creating an European & Community Patent Court, EU:C:2011:123, para. 65.
[66] Opinion 2/13 in Accession of the EU to European Convention for the Protection of Human Rights and Fundamental Freedoms, EU:C:2014:2454, para 165-167.

tribunal and the arbitral tribunal gives an interpretation to the EU Treaties which may affect the autonomy of the EU legal order and consistency of interpretation. It is however important to note that not just existence of a judicial structure outside the framework of EU threatens the legal order of EU but the mechanism takes away exclusive jurisdiction of the ECJ or domestic courts and affects the judicial mechanism of EU law which would be explained subsequently in this Chapter and thereafter.[67]

3.2. Article 344 TFEU: Jurisdictional conflict with Article 8 CETA

Article 344 TFEU has a scope to impose obligation on Member states to submit a dispute concerning the interpretation or application of the EU Treaties to any method of settlement as provided in the EU Treaties. The jurisdictional conflict between Article 344 TFEU and Article 8 CETA is absolute, and that the application of international rules, namely rules in CETA, may *allegedly* take away the jurisdiction prescribed as in the EU rules. In *Mox Plant* case, when the dispute related to breach of EU directives between Ireland and the UK were submitted to Arbitration, the ECJ concluded that the obligation imposed on Member states by Article 344 TFEU so as to respect "exclusive" jurisdiction of the Court as in the process set out in Article 259 TFEU and thus the recourse of obtaining the arbitral award is a breach of these obligation.[68] This situation was also confirmed by the Court in its *Opinion on EPC*[69] that any question relating to the interpretation or the application of

[67] Judgment in *the Slovak Republic v. Achmea*, C-284/16, ECLI:EU:C:2018:158
[68] Judgment in *Commission of the European Communities v Ireland,* C-459/03, ECLI:EU:C:2006:345, para, 152.
[69] Opinion 1/09 in Creation of an European and Community Patents Court, ECLI:EU:C:2011:123, para. 88 & 89.

the Treaties would require a Member state to submit it to the ECJ and refrain it from submitting to any other court or tribunal.

Thus, a significant question whether investment protection in investment agreement would fall under the scope of Articles 344 and 267 TFEU or this kind of dispute is precluded from their scope. This has been discussed in the recent *Achmea* judgment in and the judgment was not astonishing as the ECJ, in the line of its previous opinion on *accession to ECHR and EFTA court*, has safeguarded the autonomy of legal order by restricting the power to interpret the provision of Treaty to an arbitral tribunal which is not a part of judicial system of the EU.

3.3. The ECJ in *Achmea* judgment and the scope of Article of 344 and 267 TFEU

3.3.1. Analysing the judgment

The facts of the case were as follows: the Slovak Republic, as a successor to Czech and Slovak Republic, succeeded to the rights and obligations of its predecessor under a BIT between the Netherlands and the Slovak Republic to encourage and protect investments. To reform its health system, the Slovak Republic opened its market for private and public operators and Achmea, an undertaking from the Netherlands belonging to an insurance group set up its subsidiary in Slovakia on gaining authorization as a sickness insurance institution. By a legislation of 25 October 2007 which prohibited the distribution of profits generated by private sickness insurance institutions. Subsequently, the Constitutional Court of the Slovak Republic held that the prohibition is contrary to the constitution. Achmea considered the legislation to have caused damage and decided to pursue arbitration under Article 8(2) BIT.

The place of arbitration was chosen as Frankfurt am Main and the German law as the law of the arbitration. At the proceedings the Slovak Republic raised objection to jurisdiction of the tribunal and that Article 8(2) of the BIT is incompatible with the EU law , the EU law should be implemented and the BIT to be terminated by Articles 59 and 30 of VCLT.[70]

At the Arbitral Tribunal[71]

a. The Tribunal found that it does not derive any part of its jurisdiction or authority from EU law instead the jurisdiction is derived from the consent of the parties in accordance of BIT and *lex loci arbitri,* German law since the place of arbitration is Frankfurt am Main.[72] Consequently, EU law is also *lex loci arbitiri* as it is part of German law and law operates between parties.[73]

b. The termination of BIT under Article 59 VCLT[74], firstly, was rejected as there is no explicit termination of BIT due to the

[70] *Eureko BV v. the Czech Republic*, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, PCA Case No. 2008-13, , para 20, available at https://www.italaw.com/sites/default/files/case-documents/ita0309.pdf
[71] Ibid
[72] Ibid, para 225.
[73] Ibid.
[74] The tribunal concluded that Vienna Convention on Law of Treaties requires that termination is implied if the treaties are of same subject matter. Article 59 reads as: "TERMINATION OR SUSPENSION OF THE OPERATION OF A TREATY IMPLIED BY CONCLUSION OF A LATER TREATY

a) A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and: (a) It appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or (b) The provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties." Available at https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155- i-18232-english.pdf

procedure in Article 65 VCLT[75]. Secondly, due to requirement of "same" subject matter between the earlier treaty and later one.[76] The tribunal gave the term "same" in Article 59 VCLT a broader perspective and it meant the treaty in entirety.[77] It further added that the test to apply Article 59 VCLT is when the provisions of the later treaty are "so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time".[78]

The tribunal found that the two in Article 59(1)(a) & (b) VCLT were not met; and as far as the intention in the later treaty should govern the matter, BIT is applicable only between respondent and the Netherlands, and the EU treaties are applicable to all Member states.[79] Also, there is no intention in the EU Treaties that BIT should not govern the relation between respondent and the Netherlands.[80] The tribunal also rejected 'Article 59 VCLT' argument as the protection to investors' right under Article 8 BIT to initiate UNCITRAL arbitration proceedings against a State party is not available in EU law.[81] The protection under Article 5 BIT against expropriation is not similar to freedom of establishment or that in EU Charter on Fundamental Rights.[82] The fact that BIT protects "assets" and "investment" is not similar to "possessions" or "property". Substantially, the EU law does

[75] *Eureko BV v. the Czech Republic* (fn.70), para. 234-238.
[76] Ibid, para. 239.
[77] Ibid.
[78] Ibid, para. 240.
[79] Ibid, para. 244.
[80] Ibid
[81] Ibid, para. 264.
[82] Ibid, para. 261-264.

not protect the rights of investors as extensively done in BIT.[83]

c. The tribunal on the argument of Article 30 VCLT and explained that Article 30(3) VCLT is material for the present case.[84] The incompatibility requirement in Article 30(3) VCLT[85] is applicable even when there is no explicit termination or suspension of earlier treaty as in Article 59 VCLT.[86] The only requirement is that all the parties to earlier treaty are parties to later treaty, thus, the incompatibility is to the extent to relevant provisions and not the entire treaty.[87] Further, there is no explicit prohibition to investor-State arbitration instead that the ECJ have indicated in several occasions, notably in *Eco Swiss* case, and thus cannot be asserted that arbitrations are incompatible with EU law.[88] Further, the tribunal refers the ECJ ruling in the *MOX Plant*[89] case that the ECJ has exclusive jurisdiction to disputes among Member States by virtue of Article 344 TFEU and owing their loyalty to abide EU treaties and not for investor–state arbitration.

d. The inapplicability of BIT under EU law was put forward by respondent and as a matter of EU law, EU law prevail

[83] Ibid, para. 261.

[84] Ibid, para. 268.
[85] Article 30. APPLICATION OF SUCCESSIVE TREATIES RELATING TO THE SAME SUBJECT MATTER (1)…….
(3) When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under Article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.
[86] *Eureko BV v. the Czech Republic* (fn.65), para. 270-271.
[87] As in article 30(3) Vienna Convention on the Law of Treaties
[88] Ibid, para 274
[89] Judgment in *Commission of the European Communities v Ireland*, C-459/03, ECLI:EU:C:2006:345, paras. 172-174.

> national laws and international treaties, and that the ECJ has exclusive jurisdiction to interpret EU law. As part of *lex loci arbitri* and Article 8(6) BIT, EU law is part of German legal order. The tribunal found that it is not deprived of jurisdiction due to EU law[90], and would not be precluded from applying or considering EU law. By calling "interpretative monopoly" of the ECJ, it found itself bound by Article 8 to apply German including EU law.[91] It further noted not all question of interpretation of EU law go to the ECJ but national courts and arbitration interpret and apply EU law.[92]

Following the establishment of jurisdiction, the arbitral tribunal on merits of the case found respondent liable and ordered to pay damages to Achmea[93] to which respondent sought to set aside the award in Oberlandesgericht (OLG) Frankfurt am Main (Higher Regional Court, Frankfurt am Main).[94]

The decision by OLG favoured Achmea and substantiated its reasoning in line with the Arbitral tribunal. It held that arbitration clause is applicable and Article 344 TFEU did not apply to investor-State arbitration, thus, did not invalidate the arbitration clause.[95] OLG also held that the present case is different from the *Opinion for*

[90] *Eureko BV v. the Czech Republic* (fn.65), para. 289. While reading article 8(6) BIT, the tribunal was convinced that it could consider EU law under sub-para (a) & (b). *Note*- para (a) to (d) in Article 8(6) BIT is not in original text and done by the author for reference reasons.
[91] Ibid, para. 282.
[92] Ibid, para. 282-283.
[93] *Achmea BV (formerly known as Eureko BV) v. The Slovak Republic*, Final Award, 7 December 2012, PCA Case No. 2008-13, available at https://www.italaw.com/sites/default/files/case-documents/italaw3206.pdf
[94] Decision of 10 May 2012, OLG Frankfurt am Main in Case 26 SchH 11/10, available at https://www.italaw.com/sites/default/files/case-documents/ita0931.pdf. The discussion here is based on 2nd part of the judgment
[95] OLG Judgment, II.B.2; *Von Papp,* Clash of "Autonomous Legal Order": Can EU Member state Courts bridge the jurisdictional divide between Investment tribunals and the ECJ? A Pleas for Direct referral from Investment tribunals to the ECJ, CMLR 50(2013), 1039-1082, p. 1049

EPC[96] and the tribunal does not have the absolute jurisdiction in these matters and would not completely excluding Member States' courts.[97] Arbitral awards under BIT were controlled by the domestic court and cannot be said that they are completely out of the reach of jurisdictional and institutional framework of the EU.[98]

OLG also found that the ECJ does not have "interpretative monopoly" of EU law as it was also found by the tribunal.[99] Further, EU law do not refrain the courts or tribunal to apply EU law and to ensure full effectiveness and protection of rights under EU law, the national courts are responsible to interpret EU law.[100] OLG referred the ECJ judgment on Swiss-Slovak investment[101] agreement where it was held that it was not task of the ECJ to interpret investment agreement. OLG understood that even the arbitral tribunal could interpret EU law.[102]

OLG also supported the view of the tribunal that a court is in no obligation to refer for preliminary ruling when it is sufficiently informed about the content of EU law[103] under the doctrine of *acte clair.*[104] Subsequently, OLG dismissed the case and on dismissal from there the appeal went to the Bundesgerichtshof. The Court decided to refer the ECJ on the compatibility of the arbitration clause in Article 8 BIT with Articles 18, 267 and 344 TFEU.

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[96] Opinion 1/09 in Creation of an European and Community Patents Court, ECLI:EU:C:2011:123.
[97] *Von Papp* (fn.95), p.1049-1050.
[98] Ibid, p. 1050.
[99] Ibid.
[100] Ibid.
[101] Judgment in *European Commission v. The Slovak Republic*, Case C-264/09, ECLI:EU:C:2011:580, para. 51.
[102] *Von Papp* (fn.95), p. 1051; Judgment in *Eco Swiss China Time Ltd v. Benetton International NV,* case C-126/97, ECLI:EU:C:1999:269, the ECJ held that the arbitral tribunal must narrowly define the circumstances to annul an award and this case the award was incompatible with Article 101 TFEU constituting within public policy.
[103] *Von Papp* (fn.95), p. 1051
[104] Ibid.

3.3.2. Preliminary ruling by the ECJ

The referring Court doubted, firstly, the application of Article 344 TFEU in a dispute between an investor and a Member state and decided to refer the question since there has been no ruling on this matter and it is of great importance as there are BITs existing between Member states and ultimately for the future investment arbitration process.[105] Doubt about Article 344 TFEU was confined due to its purpose in EU legal order. The aims of Article 344 are to safeguard the allocation of power as laid in the Treaties, protect the EU legal autonomy, and manifestation between Member states to cooperate with the ECJ within the meaning of Article 4(3) TEU.[106] The referring Court did not see a nexus between Article 344 TFEU and investor-State investment arbitration, and that the ECJ even has jurisdiction to such disputes.[107]

Secondly, the referring Court questions the ECJ on preclusion of investor-State arbitration clause under Article 267 TFEU[108] as the tribunal cannot ensure a uniform interpretation and application of the EU law. It was held in *Eco Swiss*[109] and subsequently confirmed in *Ascendi Beires Litoral e Alta*[110] since an arbitration tribunal is not a court within the meaning of Article 267 TFEU to refer for preliminary ruling on questions of interpretation of EU law. In order to ascertain a uniform interpretation of EU law, it is upon the national courts to

[105] Judgment in *Achmea*, ECLI:EU:C:2018:158, para. 14.
[106] Ibid, para. 17
[107] Ibid, para. 15
[108] Ibid, para. 18
[109] Judgment in *Eco Swiss v. Benetton*, ECLI:EU:C:1999:269.
[110] Judgment in *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta*, Case C 377/13, EU:C:2014:1745, para. 25 & 26.

determine the validity of arbitral award and if necessary, refer the same to the ECJ.[111]

To the above questions, the ECJ held that Articles 344 and 267 TFEU interpreted as precluding a provision of the international agreement concluded "between Member states under which an investor form one of those Member States, bring proceedings against the latter Member States before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept".[112] The BIT was concluded between Member states which chose to bring proceedings to an arbitration tribunal instead of its own courts.[113] The Court also found that the arbitral tribunal created under intra-BIT is not "court or tribunal" in sense of Article 267 TFEU and cannot refer to the ECJ.[114] Consequently, the dispute which may involve application and interpretation of the EU law and when the same is prevented from being resolved in a manner that ensures full effectiveness of EU law[115] cannot preserve the particular nature of the EU legal order[116].

Reasons for the Court's judgment

The ECJ recalled its previous judgments that it had laid down on international agreements and that "an international agreement cannot affect the allocation of powers fixed by EU Treaties or, consequently, the autonomy of EU legal system, observance is ensured by the Court."[117] This principle is protected in Article 344 TFEU which signifies the obligation of Member states not to submit

[111] Judgment in *Federconsorzi*, Case C-88/91, ECLI:EU:C:1992:276, para 7; Judgment in *Eco Swiss v. Benetton*, ECLI:EU:C:1999:269, para. 40.
[112] Judgment in *Achmea*, ECLI:EU:C:2018:158, para. 60.
[113] Ibid.
[114] Ibid, para. 49
[115] Ibid, para. 56.
[116] Ibid, para. 58.
[117] *Opinion 2/13 in Accession of the EU to the ECHR*, EU:C:2014:2454, para 201.

question of interpretation or application of EU Treaties to any court apart the ECJ. In the same judgment the ECJ also signified the features of EU law calling it as an "essential characteristics of the EU" and autonomy of EU law respecting the law of Member states and international law.[118] The uniqueness that the ECJ described here as EU law stems out an independent source of law, its primacy over Member states' laws and direct effect on the subjects of Member states.[119]

On the other hand, Article 267 TFEU sets the dialogue between courts and tribunals of Member states and the ECJ, ensuring full effectiveness and autonomy of the EU law.[120] By the interpretation of the Court, the arbitral tribunal constituted under an intra-BIT is not a court or tribunal and thus, cannot refer for preliminary ruling. Under Article 8(6) of BIT which allows the arbitral tribunal to rule on possible infringements of BIT and in order to do so, it has to interpret and apply domestic laws of Member states.[121] The Court here considered EU law as forming part of domestic law of Member states and as deriving from an international agreement among Member states.[122] The concerned BIT would need the arbitral tribunal to interpret fundamental freedom, including free movement of capital and freedom of establishment.[123]

In order to answer this, the Court considered its previous judgment held that a common court to a number of Member states, here it was Benelux Court, should be able to submit questions to the ECJ.[124]

[118] Judgment in *Achmea*, ECLI:EU:C:2018:158, para 33.
[119] Ibid, Judgment in *Van Gend en Loos*; Opinion 2/13 for Accession of the EU to the ECHR, EU:C:2014:2454, para. 165 to 167.
[120] Ibid, para. 37.
[121] Ibid, para. 42.
[122] Ibid, para. 41.
[123] Ibid, para. 42.
[124] Judgment in *Parfums Christian Dior SA and Parfums Christian Dior BV v. Evora BV*, Case C-337/95, ECLI:EU:C:1997:517, para. 21; Judgment in *Paul*

The Court, however, found that the arbitral tribunal is not a common court to a number of Member states and it did not have a similar role in the judicial system of Member states.[125] The Court noted the nature of existence of the arbitral tribunal under Article 8 BIT and found it is not part of the judicial system of the Netherlands or the Slovak Republic.[126] Thus it cannot be classified as a tribunal or court of a Member state.[127]

In the present case, Member states agreed to remove from jurisdiction of their own courts and thereby from the system of judicial remedies as required under sub-paragraph of Article 19(1) TEU[128].[129] Article 19 TEU along with Article 2 TEU ensures that it is not only the responsibility of the ECJ but also of Member states and their courts and tribunals.[130] "The very existence of effective judicial review designed to ensure compliance with EU law is of essence of rule of law."[131] The disputes involved may be related to the interpretation of BIT and international law and submitted to a tribunal not part of the EU judicial system is provided by the agreement (i.e., BIT) not concluded by the EU but by Member states, was found to be incompatible with principles of mutual trust and sincere cooperation which disrupts the preservation of 'particular nature' of EU law.[132]

Miles and Others v Écoles européennes, Case C-196/09, ECLI:EU:C:2011:388, para. 40.

[125] Judgment, in *Achmea*, ECLI:EU:C:2018:158, para. 48.

[126] Ibid, para 45.

[127] Ibid.

[128] Sub-para of Article 19 (1) reads as : '1. ……..Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.'

[129] Judgment in Achmea, ECLI:EU:C:2018:158, para. 55.

[130] Judgment in *Associação Sindical*,EU:C:2018:117, para. 32; Opinion 1/09 in Agreement creating an European Patent Court, EU:C:2011:123, para. 66 .

[131] Judgment in *Rosneft Oil Company v Her Majesty's Treasury and Others*, C-72/15, EU:C:2017:236, para. 73.

[132] Judgment in *Achmea*, ECLI:EU:C:2018:158, para. 58.

3.4. Effect of *Achmea* judgment on legality of investment court

The ECJ has again placed the autonomy of EU legal order as supreme and an arbitration clause in intra-BIT between Member states is incompatible with Articles 344 and 267 TFEU. The ECJ firmly protects the system of judicial cooperation between itself and courts of Member states, giving power to the ECJ under Article 267 TFEU and thereby an obligation placed on courts of Member states.[133] It found that EU treaties have developed a "structured network of principles, rules and mutually interdependent legal relations" and protected under Article 267 TFEU.[134] This will be under a great consideration for the ECJ in its opinion on CETA. To test compatibility of CETA with EU law, it cannot be made in isolation of discussing the limited scope of jurisdiction of the Tribunal in CETA. Although it may seem that the Tribunal structure is similar to arbitration under intra-BIT as in *Achmea* judgment, however there are autonomy safeguards under Article 8.31 CETA to protect sanctity of EU law. The Tribunal has no jurisdiction to address compatibility of a measure of a Member state with investment agreement and not to discuss the legality of the measure[135] and it does not affect the jurisdiction of the ECJ or competence of Member states to legislate are discussed in Chapter 4 & 5.

In *Opinion of the EPC,* the ECJ already broadened the scope of Article 344 TFEU as it "merely prohibits Member states from submitting a dispute concerning the interpretation and application of the Treaties to any method of settlement other than provided for in

[133] *Von Papp* (fn.95), CMLR 50 (4), p. 1055.
[134] Request for an opinion submitted by the Kingdom of Belgium pursuant to Article 218(11) TFEU (Opinion 1/17)
[135] Article 8.31.2 CETA

the Treaties".[136] Any dispute between Member states and to find if anyone of them has breached its EU obligation would trigger the obligation under Article 344 TFEU. The Court emphasized the importance of Article 267 TFEU, which is essential for the preservation of the Community character of the law established by the Treaties, aims to ensure that, in all circumstances, that law has the same effect in all Member States. The preliminary ruling mechanism established to avoid divergence in the interpretation of EU law which the national courts have to apply and tends to ensure this application by making available to national judges a means of eliminating difficulties which may be occasioned by the requirement of giving EU law its full effect within the framework of the judicial systems of the Member States.[137] Thus, it can be concluded that disputes between Member states and an individual and a Member state involving interpretation or application of EU law, the domestic courts cannot be deprived of the jurisdiction by Member states and thereby, the ECJ to a preliminary ruling under Article 267 TFEU. The judgment seems not to affect extra-BIT but only intra-BITs or may affect the intra application of multilateral agreements.[138] Also Member states cannot bring a dispute between them under CETA and thereby to investment tribunal. Given that the result of this decision will not affect the interest of non-EU members. CETA and EUVFTA are protecting the judicial framework of the EU legal order by not ousting the possibility for an investor to challenge a dispute in

[136] *Opinion 1/09 in Agreement creating an European Patent Court,* EU:C:2011:123, para 63.
[137] Judgment in *Rheinmühlen-Düsseldorf,* Case 166/73, ECR ECLI:EU:C:1974:3, para. 2 and 3; Judgment in *Skatteverket v Gourmet Classic Ltd*, Case C-458/06, ECLI:EU:C:2008:338, para. 20; Opinion 1/09 in Agreement creating an European Patent Court, EU:C:2011:123, para. 83.
[138] *Nikitin,* The CJEU's Achmea Judgment: Getting Through the Five Stages of Grief, 10 April 2018, available at http://arbitrationblog.kluwerarbitration.com/2018/04/10/cjeus-achmea-judgment-getting-five-stages-grief/ (12 September 2018)

domestic courts or tribunals of a Member state, and if the Tribunal is empowered under the agreements to limit its jurisdiction only to provisions of the agreement. But it has to ensure to not to give a new interpretation to EU law and hold the already existing interpretation as a matter of fact and the same is discussed in chapter 4.

While regarding an international agreement creating a court responsible for the interpretation of its provisions, the ECJ held that such an agreement is not, in principle, incompatible with EU law.[139] The ECJ said that "after the conclusion of an international agreement binding upon the EU, to the effect that such an agreement is, by reason either of its content, or of the procedure adopted for its conclusion, incompatible with the provisions of the Treaties could not fail to provoke, not only in the internal EU context, but also in that of international relations, serious difficulties and might give rise to adverse consequences for all interested parties, including third countries". Here the ECJ has already laid down possible incompatibility of an international agreement between the EU and third countries and interpretation of CETA and EUVFTA would fall under its jurisdiction. Further, the judicial mechanism provided under Article 267 TFEU where Member States and their courts and tribunals to refer for preliminary ruling which protects the set up for dialogue between the courts and tribunals of Member State and the ECJ.

[139] Judgment in *Achmea ,* ECLI:EU:C:2018:158, para 57 ; *Opinion 1/91 on EFTA* , ECLI:EU:C:1991:490, para. 40 and 70; *Opinion 1/09 in Agreement creating a Unified Patent Litigation System*, EU:C:2011:123, para 71 "The competence of the European Union in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit itself to the decisions of a court which is created or designated by such agreements as regards the interpretation and application of their provisions".

CHAPTER 4- CONFLICT OF COMPETENCE BETWEEN MEMBER STATES AND THE EU

With the previous judgment of the ECJ, it is important to explicitly provide for jurisdictional issues decided by the EU and Member states, and to be not left with arbitral tribunal, and this is also true for an investment tribunal[140] and that is why Article 8.22(1) (f) and (g)[141] are of great interest which is discussed in this chapter. The autonomy of EU law, to the extent that arbitral tribunal may decide on limiting competence between the EU and its Member states, is also addressed in CETA under Article 8.21. The ECJ has emphasized the importance of fixing competence of determined by the EU instead of the arbitral tribunal is listed below in the light of *Opinion 2/15*.

4.1. Parallel administration of justice

4.1.1. Access to investment tribunal with aim to delimit parallel proceedings

The process to submit a claim under CETA and EUVFTA provide for legal certainty and importantly, protect the autonomy of EU law. The objective to proceduralise the submission of claims with respect to the investment agreement would not affect 'exclusive jurisdiction' of the ECJ or that it does not produce interpretation of binding nature.

[140] *Dimopoulos*, The involvement of the EU in investor-state dispute settlement: A question of responsibilities, CMLR 51 (6) 2014, p. 1699

[141] The provision only allows an investor to bring a claim either to the Tribunal or to domestic courts, and such provision that does not allow for parallel proceedings is logical and not uncommon in international law.

Article 8.22(1)(f) & (g) CETA[142] allows an investor to submit a claim if the investor, in addition to other requirements, withdraws or discontinues any existing procedure before tribunal or court, and that it waives it right to initiate any claim or proceeding before a tribunal or court under domestic or international law with respect to a measure alleged to constitute a breach. That CETA and EUVFTA prohibit an investor to seek remedies under domestic or international tribunals and courts. This kind of provision is known as "fork in the road"[143] as the investor has to choose either to submit a claim under the treaty or start proceeding at domestic court or tribunal. The necessity of such a provision under these agreements ensures not to undermine confidence in dispute settlement under agreements.[144] Under parallel proceeding, respondent-state has to defend the measure several times or multiple recovery of same damage lead to procedural unfairness with inconsistent and contradictory decision.[145] The prohibition is applicable to an investor and the locally established enterprise that the investor own or controls, directly or indirectly[146], unless the investor is deprived to control the locally established enterprise, or preventing the locally established

[142] Also Article 8(1) EUVFTA In Chapter 8: Trade in Services, Investment and E-Commerce in EUVFTA, Section 3: Resolution of Investment Disputes (hereinafter referred as "EUVFTA"). Agreed text as of January 2016.

[143] *Taton/Croisant,* Intra-EU investment arbitration post-Achmea- a look at the additional remedies offered by the ECHR and EU law, Business law blog 25 May 2018, available at https://www.law.ox.ac.uk/business-law-blog/blog/2018/05/intra-eu-investment-arbitration-post-achmea-look-additional-remedies (last accessed 13 September 2018)

[144] UNCITRAL'S Work On Concurrent Proceedings In Investment Arbitration: Overcoming The 'Treaty/Contract Claims' Gap, in *Ramaswamy/João* Ribeiro (eds.) Harmonising Trade Law to Enable Private Sector Regional Development, UNCITRAL Regional Centre for Asia and the Pacific, New Zealand Association for Comparative Law, 2017), pp. 59-80, 61.

[145] Ibid, p. 62

[146] Article 8.22(2) CETA and Article 8(2) & (3) EUVFTA.

enterprise form fulfilling the requirements by the investor's host state.[147]

Under ICSID Convention, a presumptive rule provides that when a party consent to arbitration under ICSID, unless otherwise stated, deemed to exclude another remedy[148]. CETA and EUVFTA are found to be consistent with ICSID Convention.[149] NAFTA contains a similar provision but allow investors to seek injunctive relief before local court simultaneously to claim under arbitral proceedings as long as investors do not claim damages. If interpreting "any existing proceeding" or "any claim or proceeding", CETA and EUVFTA may preclude injunctive relief, compensation to damages, or other remedies but it is unclear if this also includes interim or provisional relief under domestic or international court or any tribunal.

A criticism floats with this is that CETA and EUVFTA infringed right to remedy as guaranteed under ECHR. However, CETA and EUVFTA provide that the claim can be submitted after 2 years of an investor ceases to pursue claim at domestic courts or tribunals of a parties to the agreement, or in case an investor has initiated and the proceedings have ended and, in that event, no later 10 years after the investor received information of alleged breach due to which it had incurred damage.[150] This ensures that investors are not harmed while bringing a claim to courts or tribunals of parties and then have enough time to bring a claim under CETA and EUVFTA. The conditions precedents as found in Article 8.22(1) CETA are to be fulfilled by the investor or the Tribunal may decline its jurisdiction. Some of the conditions are found in other investment treaties which require a cooling-period of 6 months before submitting a claim to

[147] Article 8.22(3) CETA and Article 8(2) & (3) EUVFTA.
[148] ICSID, Article 26
[149] Under ICSID Convention
[150] Article 8.19(6)(b) CETA and Article 4(2)(b) EUVFTA.

arbitral tribunal. In most cases, the arbitral tribunals have been reluctant to deny jurisdiction when preconditions are not fulfilled.[151]

The conditions precedents as found in Article 8.22(1) CETA and Articles 8 & 9 EUVFTA are to be fulfilled by the investor or the Tribunal may decline its jurisdiction. In most cases, the arbitral tribunals have been reluctant to deny jurisdiction when preconditions are not fulfilled.[152] The precondition of waiting period of 6 months before submitting a claim in NAFTA[153] and objected by respondent was found to be contrary to the objective of NAFTA when jurisdiction was deprived.[154] On the contrary, the Singapore Court of Appeal held that strict compliance of conditions precedent to arbitration is binding, and non-compliance of it can deprive the tribunal of its jurisdiction.[155] This may give rise to different interpretation to conditions precedent in EUSFTA than in CETA and EUVFTA, which may result in inconsistent interpretation of similar conditions.

4.1.2. Overlapping of proceedings under international agreement or domestic courts

The FTAs provide, in case of an international agreement, when there is a potential overlapping compensation, or the other claim could have a significant impact on the resolution of the claim brought pursuant to Article 8.24 CETA, then the Tribunal shall stay its proceedings or would ensure to take into account the proceedings

[151] *Vlavianos/Pappas*, in: The Guide to Energy Arbitrations (2nd ed), GAR (2017); *Salini Costruttori v. Morocco,* Decision on Jurisdiction ICSID Case No. ARB/00/4 (23 July 2001)*; Ethyl Corporation v. Canada,* in NAFTA Award on Jurisdiction (24 June 1998), 38 Int'l Legal Mat 708*.*
[152] *Vlavianos & Pappas*, ibid.
[153] Article 1120, NAFTA
[154] *Ethyl Corporation v. Canada,* in NAFTA Award on Jurisdiction (24 June 1998), 38 Int'l Legal Mat 708, para. 83.
[155] *International Research Corp PLC v. Lufthansa Systems Asia Pacific Pte Ltd and another,* [2013] SGCA 55, para. 63.

brought under different international tribunal. This would reduce the possibility of situations like in the well-known *Lauder v. Czech Republic*[156] and *CME v. Czech Republic*[157] cases with same factual cases but brought by different claimants belonging to a group of company under different BITs.[158]

This provision is different from Article 8.22 CETA which prohibits submitting claim with respect to a measure alleged to constitute a breach but in Article 8.24 CETA there is no requirement that it has to be claims from a measure or that they are similar claims, instead it must cause an impact of potential overlapping of compensation or an international claim that could have a significant impact on decision of the Tribunal.[159] The purpose of this provision could be of significance what may not be found in other investment agreements. It may mean that any claim before a forum under an international agreement, the proceeding under CETA has to be stayed or take into account the decision pursuant of that international agreement. This promotes consistence and uniformity in mechanism by CETA and EUVFTA in international and EU law.

This is in line with the autonomy of EU law if TFEU and TEU were to be considered as international agreement and the forum is the ECJ, or any other claim brought in a different forum under different international agreement.[160] Drafters of CETA and EUVFTA have

[156] *Lauder v. Czech Republic* (Final Award) (September 3, 2002) available at www.mfcr.cz/scripts/hpe/default.asp
[157] *CME Czech Republic B.V. v. Czech Republic*, Partial Award (September 13, 2001), available at http://mfcr.cz/Arbitraz/en/PartialAward.doc.
[158] Improving the System of Investor-State Dispute Settlement: An Overview in: Making the Most of International Investment Agreements: A Common Agenda, Symposium Co-Organised By ICSID, OECD AND UNCTAD. 12 December 2005, Paris Room 1, OECD Headquarters, Paris, p. 11, available at https://www.oecd.org/investment/internationalinvestmentagreements/35808448.pdf
[159] Article 8.24(a) & (b) CETA and Article 8(8) EUVFTA
[160] This is the interpretation of the author from her own understanding of the provision.

been cautious while adding this provision in case there is an exclusive jurisdiction of the ECJ on certain issue which would affect the proceeding of the Tribunal, the Tribunal cannot undermine or ignore jurisdiction of the ECJ or its decision.

4.2. International responsibility of the EU along with Member state: important to determine respondent under Article 8.21 CETA and Article 6(2) EUVFTA

The conclusion of CETA and EUVFTA with Member states has not made the role of the EU any easier. The drafters have done their job and now the responsibility lies with application and interpretation on the EU that it does not significantly affect legal certainty. Dimopoulos finds that it is important to determine respondent status in investor-state dispute concluded as mixed agreements.[161] Perhaps this may affect the access of investors to the dispute mechanism as guaranteed in CETA but not sure about EUVFTA as it is to be signed between EU and Viet Nam. However, international law requires that both the EU and Member states assume full responsibilities and rights over the provisions of the mixed agreement concluded by them jointly.[162] As a result of Articles 27 and 46 VCLT between states and International organisation of 1986 provides that demarcation of competence is a matter of internal questions and does not affect the validity of the provisions of the mixed agreements.[163] In addition, it may not be correct to say that when the EU has exclusive competence in matters related to FDI

[161] *Dimopoulos* (fn.140), p. 1688.
[162] *Dimopoulos*, ibid; also see *Bleckmann*, in: O'Keeffe and Schermers (eds.), Mixed agreements (1989), p. 159.
[163] Even this convention never came into force but recognized as codifying principles of customary international law. *Steinberger*, EJIL 17 (2006), pp.837-862, p. 843.

and to bear the responsibility for violations related to measures by Member states, especially when they are not related to EU law.[164]

An example about responsibility between the EU and Member states under the WTO would illustrate lack of rules on international responsibility on Member states on violating provisions falling under the competence of the EU. The WTO Panel in *Airbus* case[165], concerning the compatibility of measures of the EU and Member states, found that Member states responsible for the measures of their organs even when the EU was ready to accept responsibility for the acts of its Member state. The EU has competence in the field of trade in goods and was actually the respondent in the case, however, the measure taken by Member state[166] being member of the WTO and adopted the same outside the framework of the EU.[167] The Panel was convinced that Member state should be held responsible but did not contest the acting of the EU as respondent. It can be concluded that a measure adopted by a Member state even when the EU holds competence in it, Member state should hold international responsibility.[168]

By this logic, a possibility to demarcate responsibilities between the EU and Member states based on competences could be a solution as viewed by certain commentators[169] but may not be effective as there are agreements which are solely entered by the EU when they share the competence with Member states. Also, the agreements on

[164] *Dimopoulos,* (fn. 140), p.1688.
[165] *EC-Airbus*, WTO Panel Report 30 June 2010, WT/DS316/R
[166] A measure by a Member State in the field of exclusive competence of the EU when it is empowered by the Union or to implement acts adopted by the Union. In Ronald van Ooik , The European Court of Justice and the division of competences in the European union in : Interface between EU law and National law, p. 15.
[167] *Dimopoulos* (fn. 140), p. 1690.
[168] Ibid.
[169] *Cremona*, Case Note: Shaping EU Trade Policy in Post-Lisbon: Opinion 2/15 of 16 May 2017, ECLR 14(2018), pp. 231–259, p. 237.

CFSP are concluded as mixed agreement and the EU has exclusive competence over it.[170] That is why it is important to let the EU to determine the respondent for investor-state dispute and opening a possibility that even a Member state can be responsible for acts of an organ of the EU.[171] Neither of the parties to the agreement including the investor should be allowed to challenge the legality of the proceedings at the Tribunal on the grounds of inappropriate determination of the respondent[172] and not left at the hands of the Tribunal to determine respondent. This would ensure that claims addressed by investors of third countries are addressed to correct respondent, may it be the EU or Member states and the compulsory jurisdiction of the Court is not affected which protects the autonomy of EU law[173], and put away the doubts on competence between Member states and the EU.

Perhaps the necessity to conclude an agreement like CETA (and also EUVFTA) as a mixed agreement instead of removing the areas of shared competence and then sign it as mixed agreement as done in EUSFTA was as a result of political necessity, and most likely be fate of EUVFTA. As the Court acknowledged that "there was no possibility of the required majority being obtained within the Council for the Union to be able to exercise alone the external competence that it shares with the Member States in this area."[174] Independent of legal problems that these treaties would face, there are problems of political in nature.[175] It was important for the Commission to have all

[170] Ibid, p.250.
[171] *Kuijper/ Paasivirta*, in: *Evans/ Koutrakos* (eds.), The international responsibility of the European Union (2013) p. 35-71, at 60-63; *Dimopoulos* (fn.140), p. 1690. This kind of provision exists in Energy Charter Treaty.
[172] *Dimopoulos* (fn.140), p. 1702.
[173] *Dimopoulos*, ibid, p.1700-1701
[174] Judgment in *Germany v Council,* Case C-600/14, ECLI:EU:C:2017:935, para 68.
[175] *Hubner/ Deman/ Balik,* EU and Trade Policy-making: the Contentious case of CETA, JEurInteg 39(7) (2017), p 843-857 (13 Sepetmber 2018).

Member states on board with the negotiations for CETA that the Commission had to face with views from some of the Member states that CETA should be concluded as a mixed agreement at the very end of its negotiating stage as areas negotiated by the EU were seen as outside its competency.[176] In September 2014, Germany published its legal opinion on CETA and found that it should be concluded as a mixed agreement and that it has to be adopted at the parliaments of all 28 Member states.[177] On the contrary, President Juncker took an opposite view but soon after the intervention from Germany, France and Austria joined in.[178] Campaigns were launched by European civil society against TTIP and CETA.[179] As a result, consultation began for ISDS in TTIP which crashed the online server and the result was that 97% of submissions rejected ISDS, and stalled the negotiations for TTIP. In December 2015, DG Trade Commissioner Malmström indicated that with the new Canadian Government an improved version of ISDS in the reopening of negotiations to meet the expectation of fairer and transparent procedure to ISDS.[180] This gave the EU an opportunity to develop the Tribunal of first instance and Appellate Tribunal[181] to regain its democratic accountability. They were finally able to meet the expectation of Member states and European Parliament.[182]

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[176] Ibid.
[177] Ibid.
[178] Ibid.
[179] *Perez-Rocha*, Challenging the Corporate Trade and Investment Agenda in Europe, *Institute for Policy Studies*, September 7, 2014, available at http://www.ips-dc.org/challenging-corporate-trade-investment-agenda-europe/ (12 September 2018)
[180] European Initiative Against TTIP and CETA. 2016. "Short Introduction." https://stop-ttip.org/what-is-the-problem-ttip-ceta/ (12 September 2018)
[181] European Commission, Commission Proposes New Investment Court System for TTIP and Other EU Trade and Investment Negotiations. *European Commission: Press Releases*, 16 September 2015, available at http://europa.eu/rapid/press-release_IP-15-5651_en.htm (12 September 2018)
[182] European Commission-DG Trade CETA: EU and Canada Agree on New Approach on Investment in Trade Agreement." *European Commission: Trade*, 29

4.3. Issues of Competence in Interpretation of CETA and EUVFTA in the light of Opinion 2/15

The recent FTAs like CETA and EUVFTA include the new mechanism to settle investment dispute between an investor and state. In order for the European Union to conclude such agreements it is important to answer whether the EU holds the external competence to do so or it shares the competence with Member states? This was although not answered directly by the ECJ in its Opinion 2/15 about the EU-Singapore FTA but concluded as a matter of shared competence involving aspects of FDI and portfolio investment.[183] The ECJ opined that the Singapore Agreement was not exclusively under the competence of the EU especially the non-direct foreign investment, including portfolio investment and provision of ISDS fall outside the Common Commercial Policy; instead it is a matter of shared competence. The conclusion of the Court about provisions on investment protection that it may fall within the scope of common commercial policy when about FDI but the provision also relates to non-direct investment and thus, has to be concluded by the EU and Member states.

As a matter of fact, CETA unlike EUSFTA (and most probably EUVFTA) was concluded as a mixed agreement and hence the agreement may not be questioned due to lack of competence. However, the aim of CETA and EUVFTA to introduce greater control of the government over arbitrators and the research may be skeptic as the role of the Joint Committee is of prominent nature than

February2015, available at http://trade.ec.europa.eu/doclib/press/index.cfm?id=1468 (12 September 2018)

[183] *Opinion 2/15 on the EU-Singapore FTA*, ECLI:EU:C:2017:376, para 224, 225.

Member states.[184] As much as the advantages of investment court system can be discussed (as done in chapter 2 & 5 along with its features), the research cannot overlook as this may shadow the interests of Member states. It can be argued that *de facto* power still lies with the EU and Member states would be mere signing parties of these agreements without representation.[185]

4.3.1. Role of Joint Committee in CETA

The Joint Committee is comprised of representatives from the EU and Canada[186] and is responsible for questions concerning trade and investment and the implementation and application of the agreement.[187] The Committee is co-chaired by the Minister for International trade of Canada and the Members of the European Commission responsible for Trade or their respective designees.[188] As a central body, it is responsible for the appointment of members of the Tribunal and Appellate Tribunal[189] and to subsequently appoint successors, additions and replacements. The Committee is empowered to adopt interpretation of the agreement when it is of serious concern and of binding nature.[190] The Committee also has the power to delegate responsibilities to the specialised committees established in the agreement[191] and consider or agree on an amendment of the agreement. Further, the Committee has the

[184] European Commission, MEMO/14/542, EC Memo- EU-Canada agree deal to boost trade and investment, Brussels, 26 September 2014, available at http://europa.eu/rapid/press-release_MEMO-14-542_en.htm (12 September 2018)
[185] *Heppner*, A Critical Appraisal of the Investment Court System Proposed by the European Commission, DRJ 70 (2017), p. 97.
[186] Article 26.1 CETA
[187] Article 26.3 CETA
[188] Article 26.1 CETA
[189] Article 8.27 CETA
[190] Article 8.31(3)(2) CETA
[191] Article 26.2 CETA

power to make decisions in respect of all matters as provided in the agreement.[192]

The Joint Committee and the creation of several specialised sub-committees are modelled from NAFTA Free Trade Commission. The Joint Committee may decide a specified date from when an interpretation is binding[193] and this is something not expressly mentioned in NAFTA.[194] However, what is important to note is that this decision is binding on parties of CETA subject to the completion of any necessary internal requirements and procedures, and that the parties shall implement them. It would guarantee uniformity in interpretation and application of the agreement as one of the advantages of investment court in Chapter 2 & would encompass the expectation of the ECJ to abide by the autonomy of EU law. In fact it gives the Joint Committee more than an advisory body but a supervisory body as in Article 26(1)(4)(a) CETA adds that "the Joint Committee shall supervise and facilitate the implementation and application of the agreement."[195] Indeed, the Joint Committee has reserved a great deal of powers to the parties, including Member states, which implements the decisions acts as mechanism of 'checks and balances' of powers since "with great powers come great responsibility". One could assume that while not undermining the importance of the Joint Committee could help to achieve the objective of uniformity and consistency[196] by having interpretation ensured by one Committee.

However, what may not be acceptable is that if the decisions would impact the matters within the realm of Member states especially to

[192] Article 26.3 CETA
[193] Article 8.31(3) CETA and this is not mentioned expressly in NAFTA
[194] *Sardinha*, Towards a new horizon in Investor-State Dispute Settlement?, CanYIntlLp 54 (2016), p. 320.
[195] As in Article 26.1.4.a CETA
[196] *Susan Franck* (fn.95).

matters which the EU has no competence to conclude provisions on investment protection in FTAs with third countries like EUSFTA, CETA and EUVFTA. Hence, the interpretation by Joint Committee (or Trade Committee in EUVFTA) might be deciding on matters within the competence of Member states.[197] Thus, it should distinctively clear that what might and might not fall under the competence of the EU and Member states regarding investment protection. The ECJ has answered the question in its Opinion 2/15 which is an important part of interpretation on the competence of the EU regarding CCP in Lisbon Treaty.

4.3.2. Opinion 2/15 of the Court of Justice

The European Union under Article 207(1) TFEU provides that EU acts concerning 'foreign direct investment' fall within the common commercial policy.[198] The framers of the Lisbon Treaty intended to exclude any other foreign investment (non-direct investment) in the CCP and "accordingly, the commitment *vis-á-vis* a third state relating to other foreign investment do not fall within the exclusive competence of the EU pursuant to Article 3(1)(e) TFEU."[199] The ECJ elaborated the scope of the CCP as far as FDI is concerned as

> "any EU act promoting, facilitating or governing participation — by a natural or legal person of a third State in the European Union and vice versa — in the management or control of a company carrying out an economic activity is such as to have direct and immediate effects on trade between that third State and the European Union, whereas

[197] *Heppner*, (fn. 185) p. 101
[198] Opinion 2/15 on the EU-Singapore FTA, ECLI:EU:C:2017:376, para. 80-81. Also see, Article 207(1) TFEU provides that EU acts concerning 'foreign direct investment' fall within the common commercial policy.
[199] Ibid, para 83.

> there is no specific link of that kind with trade in the case of investments which do not result in such participation."[200]

By this position of the ECJ one can argue that any policy regarding "facilitating and governing" FDI would fall under the scope of CCP including investment protection.[201] The ECJ discussed other provisions related to investment protection, inter alia market access, national treatment and most-favoured nation treatment, fair and equitable treatment, full protection and security, and arbitrary expropriation or expropriation without compensation.[202] The Council and Member states argued to counter the position of the Commission by submitting that the above mentioned obligations and derogation provided as to maintain public order, to protect public security or to protect one of the other public interests cannot be committed by the EU with a third country.[203] The ECJ added that the set of commitments of "no less favourable treatment" and to prohibit arbitrary treatment — "which relate in particular to natural and legal persons of each Party exploiting, increasing and selling their holdings in companies that are carrying out economic activities and are located in the territory of the other Party — contributes to the legal certainty of investors."[204] The ECJ found that the envisaged agreement on direct investment including the treatment of the participation of investors of parties to the agreement "display a specific link with that trade".[205]

The ECJ concluded that "less favourable" commitment in the envisaged agreement would not encroach upon the competences of Member states regarding public order, pubic security and other

[200] Ibid, para. 84.
[201] *Cremona* (fn.169), p. 240.
[202] Opinion 2/15 on the EU-Singapore FTA, ECLI:EU:C:2017:376, para 86-93.
[203] Ibid, para. 98-100.
[204] Ibid, para. 94.
[205] Ibid, para. 95-96.

public interests, instead puts obligation on Member states to exercise their competence which, in any manner, does not render "the trade commitments" entered by the EU redundant.[206] Further, the competence of Member states to use armed force or declaration of state emergency is not affected and merely the commitment requires that a Member state to compensate an investor if suffered losses.[207]

It can be conclusively said that the investment protection as discussed above and their interpretation would not affect the competence of Member states. It is important to note that these protections are commonly found in investment agreement and would bring uniformity in fulfilling the commitments by the EU and Member states. But what may be of grave importance is the competence to regulate expropriation of investments in Article 8.12 CETA and interpretation of the provision.[208] Since the Article 345 TFEU grants the power to Member states to govern the system of property ownership and Member states have the power to regulate, including the exception, for expropriation.[209]

4.3.3. Expropriation

The Opinion expresses the sensitivity of Member states regarding other commitments, *like* to protect investment from expropriation[210], affecting their competence in the field of property law, criminal law, tax law and social security[211]. The ECJ noted that Member states have competence under Article 345 TFEU to govern system of

[206] Ibid, para. 102-103.
[207] Ibid, para. 104.
[208] *Heppner* (fn.185), p. 102-103.
[209] Article 8.12(1) CETA
[210] Includes arbitrary expropriation, without compensation or regarding equitable and non-discriminatory treatment relating to criminal or penal offences, social security or compulsory savings and taxation.
[211] *Opinion 2/15 on the EU-Singapore FTA*, ECLI:EU:C:2017:376, para 105.

property ownership, including investments in property as a result of FDI, but subjected to "fundamental rules of the EU".[212] Further the ECJ also confirmed that the expropriation of private property under national law must be compatible with Union law,[213] in particular principles of non-discrimination.[214] As far as the commitments relating to criminal law, tax law or social security are not found by the Court in the envisaged agreement but any such relevant future legislation should be applied in an equitable and non-discriminatory manner.[215]

4.3.4. Expropriation in CETA and EUVFTA

While applying the reasoning as provided by the Court of Justice in Opinion 2/15 to Article 8.12(1) CETA and Article 16 EUVFTA[216], it is upon the Tribunal and Appellate Tribunal to interpret and apply the provisions within the agreement including expropriation under Article 8.31 CETA[217]. While interpreting and applying, the domestic laws of the disputing party are taken as matter of fact and they shall follow prevailing interpretation given to the domestic law.[218] Further, any meaning given to the domestic law by the Tribunal is not binding to the courts or the authorities of the disputing party.[219] The Tribunal is not authorised to determine the legality of the measure like, that of expropriation under a national law and does not take the role of constitutional court. It is also not appropriate for the Tribunal to

[212] Judgment in *Essent and Others*, C-105/12 to C-107/12, EU:C:2013:677, para 29 and 36.
[213] Judgment in *Konle*, Case 302/97, ECR ECLI:EU:C:1999:271, para 38; Judgment in *British American Tabacco,* Case-491/01, ECLI:EU:C:2002:741, para. 147.
[214] *Opinion 2/15 on the EU-Singapore* FTA, ECLI:EU:C:2017:376, para 107.
[215] Ibid, para. 108.
[216] Chapter 8 (II) Investments: Article 16 EUVFTA.
[217] Chapter 8 (II) Investments, Section 3 Resolution of Investment Disputes Article 16 EUVFTA
[218] Article 8.31.2 CETA
[219] Article 8.31.2 (last line) CETA

assess the fairness of a measure where the legislators try to balance interest of investors against public interest.[220] Instead the Tribunal could determine the consistency of a measure with the agreement.

As the exceptions to expropriation[221], the Tribunal has to consider in the light of Article 8.31 CETA and other provision of the agreement. Nevertheless, these standards are common to other investment agreements like NAFTA[222] and many BITs.[223] As a result of the interpretation, it could be said that interests of investors are not disadvantaged as the EU and Member states are responsible under EUFTAs.[224]

The Tribunal has to interpret the provision in the light of international law that 'a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and which affects, *inter alia*, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments have been given by the regulating government to the then putative foreign investors contemplating investment that the government would refrain from such regulation'.[225] Also, in the light of Article 31(1) VCLT which provides that a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context in light of its object and purpose." There is

[220] *Been/Beauvais*, The Global Fifth Amendment? NAFTA's Investment Protections and the misguided quest for an International "Regulatory Takings" Doctrine, NYUniL.Rev 78(1) 2003, p. 38.
[221] Article 8.12 CETA and Article 16 EUVFTA – the exception includes for a public purpose; under due process of law; in a non-discriminatory manner; and on a payment of prompt, adequate and effective compensation to be read with Article 8.31.2 CETA.
[222] Article 1110 of NAFTA
[223] *Been/Beauvais*(fn. 221), p. 50-55.
[224] *Dimopolous* (fn.140), p. 1678.
[225] By Methanax Tribunal in *Methanax v. USA* (Final Award on Jurisdiction and Merit, 3 August 2005), para 7.

a developed jurisprudence on the understanding of “expropriation”, “indirect expropriation” or “measure having an effect equivalent to nationalisation or expropriation” and to protect investment from any disguised measures.[226] Any violation to autonomy of EU law produced due to ISDS produces effect to EU law and not to international law.[227] It may too early to say that interpretation of the agreements would interfere with competence of Member states.

[226] *Been/Beauvais,* p. 51-58; *Beauvais,* NYUEnvtlLJ 10 (2) (2002), p.268-69.
[227] *Dimopulos* (fn.140), p. 1697.

CHAPTER 5- FEATURES OF THE INVESTMENT COURT

5.1. Amicable settlement of disputes

Resolution of disputes in CETA and EUFTA as far as possible to be settled amicably[228] and the mechanisms ensure to avoid long and expensive burden of investor-state arbitration. The mechanisms, compared to adversarial legal procedures, are more flexible with regard to rules of evidence and less formalized.[229] The comprehensive treaties provide for mediation[230], a process of amicable settlement with the assistance of a neutral third person who may be appointed upon agreement by the parties or request the ICSID Secretary to do so.[231] The mediator may evaluate the legal merits of the dispute[232] and assist the parties to define the issue of dispute. On the other hand, conciliation[233] uses a third neutral party and provide non-binding recommendations and solutions to the dispute.[234]

5.1.1. Conciliation

CETA and EUVFTA provide for amicable resolution at any time, including after the arbitration has commenced.[235] A waiting period,

[228] Article 8.19(1) first sentence CETA.
[229] *Hindelang/ HageMeyer* , Study-In Pursuit of an International Investment Court, Policy Department, DG for External Policies(2017),p.32; *Constain*, Mediation in Investor-State Dispute Settlement-Government Policy and the Changing Landscape, ICSID Review, Vol 29 (2014), pp. 25, 30.
[230] Article 8.20 CETA.
[231] Article 8.20(3) CETA.
[232] *Susan Franck*, ICSIDRev 29 (2014), p. 66.
[233] Article 8.19 CETA.
[234] *C Reif*, Conciliation As A Mechanism For The Resolution Of International Economic And Business Disputes, FordLRev.14(3),1993, p. 579.
[235] Article 8.19 (1) CETA and Chapter 8 (II), Section 3, Article 4 EUVFTA.

before submitting a claim for arbitration, during which consultation should be held is 6 months and conciliation should start within 2 months of submission of the request for consultation.[236] The submission for arbitration is only admissible when the waiting period has expired. A desirable approach of this that the time limit for consultation establishes legal certainty in settling disputes and avoiding delays to the process.[237] In the agreements, consultation have to be initiated 3 years after becoming aware of the breach or 2 years after the investor ceases to pursue dispute under local remedies.[238]

It also requires the specific information to be included in the request for consultations, *inter alia*, the claimant along with evidence for the qualification as investor.[239]

5.1.2. Mediation

Mediation can be accessed by the disputing parties under Article 8.20 CETA and Article 6 along with Annex I in EUVFTA. Unlike conciliation, mediation is proceduralised and the rules of mediation are adopted by the Committee on Services and Investment[240] and Annex I in EUVFTA. The rules in EUVFTA are mostly detailed rules,

[236] In CETA, Article 8.22 (1) (b) provides for at least elapse of 180 days from the submission of consultation to initiate a claim to the Tribunal, and in EUVFTA, under Article 6(1) allows that if the dispute is not settled within 3 months from the submission of request for consultation, a notice of intent to arbitrate be delivered and under Article 9(1) EUVFTA, after the period of 3 months may the claim for arbitration be made. In CETA, Article 8.19(1) provides that consultation to be held within 2 months from the date of submission, and the corresponding provision in EUVFTA, Article 4(4) which also provides for 2 months.

[237] *Hindelang/ HageMeyer* (fn.230), p. 37; Article 8.19(8) CETA

[238] Article 8.19(6)(a) CETA and Article 4(2) EUVFTA

[239] Such a qualification is not mentioned in FTA between EU and Singapore. Other information needed under Article 8.19(7) CETA and Article 4 (1) EUVFTA: the substantive provision of the investment treaty that has been alleged to be breached, the legal and factual basis of the claim, and the estimated amount of damages claimed.

[240] Under Article 8.20(1) CETA and the rules to be adopted by the Committee pursuant to Article 8.44.3(c) CETA.

unlike CETA, with the selection[241] and role of mediator[242], implementation of the mutually agreed solution[243], time limit[244] and method to terminate the mediation and the following procedure after mediation.[245] The parties are free to choose a mediator or when the parties cannot bring consensus then request the ICSID Secretary in case of CETA[246] or the President of the Tribunal in case of EUVFTA.[247]

5.2. Dispute settlement under CETA and EUVFTA

The new agreements allow for investor-state court system to settle the dispute which is different from mechanisms as mentioned above. The mechanism of court system is similar to traditional arbitration but has brought a few changes and emancipated from the traditional model.[248] CETA and EUVFTA provide a fair and independent system compared to traditional system. In this chapter, the features of the tribunal system, along with inspiration to build such a system, are mentioned compared to traditional system.

5.2.1. Determine respondent

In order to submit a claim for dispute under the agreements, it is necessary to determine respondent. This intermediate step is to determine respondent when the respondent is the EU or a Member state when the dispute cannot be settled by consultation. Under

[241] Article 3, Annex 1 EUVFTA
[242] Article 4, Annex 1, EUVFTA
[243] Article 5, Annex 1, EUVFTA which allows the parties to modify and also under Article 4(5), the disputing parties shall endeavour to reach a mutually agreed solution within 60 days from the appointment of the mediator.
[244] Article 7, Annex 1, EUVFTA.
[245] Article 6, Annex 1, EUVFTA.
[246] Article 8.20(3) CETA.
[247] Article 3(2) & (3) EUVFTA.
[248] *Hindelang/HageMeyer* (fn. 230), Policy Department, DG for External Policies(2017), p. 53.

CETA[249], a notice is sent within 90 days of the submission of the request for consultation to the EU concerning the alleged breach by the EU or a Member state. In EUVFTA, the procedure is slightly different; the claimant may send a notice of intent to arbitrate within 90 days of the submission of the request for consultations, which trigger automatically the determination of the respondent by the EU within 60 days of the notice of intent[250]. In case the EU has failed to determine, the identified measure belonging to the EU or a Member state would determine the respondent.[251]

5.2.2. Submitting a claim

In CETA Article 8.18(1) and in EUVFTA Article 1 chapter 8 allow an investor to make a claim for breach of the obligations in the agreements. An investor can submit claim only with regard to breach of obligations under provisions of national treatment[252]; most-favoured nation treatment[253]; to appoint senior management of an enterprise of the party[254]; right to regulate investment and regulatory measures with legitimate objectives of protection of public health, safety, environment or public morals, social or consumer protection or promotion of cultural diversity[255]; protection of investment under fair and equitable treatment and full protection and security[256]; compensation for covered losses[257]; not to unlawfully expropriate covered investment; transfer relating to covered instrument[258];

[249] Article 8.22(1) CETA.
[250] Article 6(1) and (2) EUVFTA.
[251] Article 8.21.4 CETA.
[252] Article 8.6 CETA and Article 3 EUVFTA
[253] Article 8.7 CETA and Article 4 EUVFTA
[254] Article 8.8 CETA and no corresponding provision in EUVFTA
[255] Article 8.9 CETA and Article 13*bis* EUVFTA
[256] Article 8.10 CETA and Article 14 EUVFTA
[257] Article 8.11 CETA and Article 15 EUVFTA
[258] Article 8.12 CETA and Article 16 EUVFTA

transfer relating to covered instrument[259]; and protect rights under subrogation[260]. Moreover, there is a substantive protection of "market access" but this is excluded from the jurisdiction of the Tribunal and thus a claim cannot be submitted against this.[261]

These new agreements have said to institutionalise investor-state arbitration.[262] In these agreements the institution is determined, i.e., the Tribunal established under the agreements, unlike done in a commercial arbitration which is chosen by the parties. However, the parties have choice to submit claims under the rules prescribed in the agreement; the rules of ICSID Convention and Rules of Procedure for Arbitration Proceedings, ICSID Additional Facility Rules if the former do not apply, UNCITRAL Arbitration Rules, or any other rules agreed the parties.[263]

5.2.3. Constitution of the Tribunal

The European Commission calls it an *investment court system* as done in for the first time in CETA and TTIP before establishing a *multilateral investment court*.[264] As a matter of fact the tribunals constituted are done on *ad hoc* basis specifically established for the purpose of a dispute and subsequently dissolved. The court system that the Commission envisaged comprises of a Tribunal and an Appellate Tribunal. Under CETA, the court system is not explicitly mentioned as a permanent tribunal[265] but there are diverse opinions that the intention is to create a permanent tribunal empowered with

[259] Article 8.13 CETA and Article 17 EUVFTA
[260] Article 8.14 CETA and Article 18 EUVFTA
[261] Article 8.18 (1) and (2) CETA and Article 1 EUVFTA excludes market access.
[262] *Hindelang/HageMeyer* (fn. 230), p. 89.
[263] Article 8.23 (2) CETA and Article 7 (2) EUVFTA
[264] Article 8.29 CETA
[265] *J VanDuzer et al*., Integrating Sustainable Development into International Investment Agreements- A Guide for Developing Countries, Commonwealth Secretariat, August 2012; *Heppner* (fn.185), p. 96; *Hindelang/HageMeyer* (fn. 230), p. 89.

exclusive competence to hear claims[266]. For now, the Tribunal in CETA consists of 15 members[267] appointed by each, i.e., 5 members from Canada and other 5 from the EU with remaining 5 neutral members appointed by the Joint Committee. They are appointed for two 5-year terms and 4-year term[268]. The adjudicators are *ex ante* selected by the state parties to the investment agreements.

The Tribunal shall hear the case in divisions, appointed by the President of the Tribunal[269], in a division of 3 members where one of the members shall be national of a Member state of the EU, one from Canada/Vietnam and one from a third country, who will chair the division[270]. The assignment of cases are "random and unpredictable"[271] and with a possibility of being heard by a sole arbitrator who shall be from the third country[272]. The members of the Tribunal are paid a monthly retainer fee and both parties to the agreement have to contribute towards it.[273] Under the CETA, the ICSID Secretariat will act as Secretariat for the Tribunal and provide it with appropriate support.[274]

The Tribunal as envisaged by the Commission has not reached to permanent institutionalization but semi permanent[275] where roster of judges is chosen from members of Tribunal who are not appointed

[266] *Sardinha* (fn.194), p. 321.
[267] As compared in EUVFTA, 9 members and 3 members from Viet Nam and other 3 from the EU with remaining 3 neutral members.
[268] Article 8.27 (5) CETA and Article 12 (5) EUVFTA
[269] Article 8.27 (7) CETA and Article 12 (7) EUVFTA
[270] Article 8.27 (6) CETA and Article 12(6) EUVFTA
[271] CETA, Article 8.27.7; EU-Vietnam FTA, Article 12(7)
[272] Article 8.27(9) CETA and Article 12 (9) EUVFTA
[273] CETA, Article 8.27.14; EU-Vietnam FTA, Article 12(16)
[274] CETA, Article 8.27.16. The issue is still open in the EU-Vietnam FTA. See Article 12(18)
[275] *Heppner* (fn.185), p.46.

on a full-time basis.[276] The issue of conflict of interest when arbitrators continue to work as party representatives and as arbitrators in different case is not solved here. Although there is an attempt done to limit the conflict by stipulating "limited incompatibilities" in the role of the arbitrators but it does not prohibit them to pursue any other case.[277] The agreements have attempted to solve the problem by providing that 'upon appointment, [arbitrators] ….refrain from acting as counsel or as party-appointed expert or witness in any pending or new investment dispute under this or any other international agreement'.[278]

5.2.4. Appellate Body

An appellate tribunal is established to review awards by the Tribunal based on the grounds.[279] The Commission envisages the appellate mechanism that might "increase legitimacy both in substance and through institutional design by strengthening independence, impartiality and predictability".[280] This is a permanent body under EUVFTA but no such permanency is found explicitly in CETA. However, the lack of word "permanent" in CETA does not also infer that it is not permanent since the Commission envisioned of creating a "permanent multilateral appeals" in future. Thus, for now it can be assumed that CETA and EUVFTA have different intention with regard to permanency of Appellate Tribunal. Appellate Tribunal in CETA is differently institutionalized than in EUVFTA where the

[276] Under Article 8.27(11) CETA, the members have to ensure that they are available and able to perform the functions as in the rules. Also, a similar provision in Article 12(13) EUVFTA which reflects the intention of the agreements that the members are not on full-time basis.
[277] *Hindelang/HageMeyer* (fn. 230), p.90.
[278] Article 8.30(1) CETA, and Article 14(1) EUVFTA which additionally bars the arbitrators from the domestic realm.
[279] Provided under Article 8.28 CETA
[280] European Commission, Investment in TTIP and beyond – the path for reform, Concept Paper, p.9 available at http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF

tribunal in the latter agreement is allowed to draw up its own working procedure.

On the other hand, a division of appellate tribunal much like the first-instance tribunal is created on *ad hoc* basis but the nationality restriction is only found in EUVFTA.[281] This needs an explanation that why nationality requirement was deemed essential at first instance and not in appellate stage in CETA and why it is done so in EUVFTA. Perhaps the Joint Committee of CETA is left to supplement the regulations as there are extensive regulations laid down in EUVFTA which are not found in CETA.

In EUVFTA, there are 6 members appointed by the Trade Committee of EUVFTA upon recommendation of parties of the agreement. Members of Appeal Tribunal are appointed for a 4-year term and renewed once. There is also a requirement to have a President and Vice President to Appeal Tribunal as done for first instance which is not found in CETA except for first-instance tribunal. Members of Appellate Tribunal, in both FTAs, are paid a retainer fee and not barred to pursue other occupations[282] and however are not allowed to act as counsel or party-appointed expert in pending or new investment protection dispute in this or any other

[281] Article 13 (8) EUVFTA allows for the appeal to be heard in division of three of whom one shall be from the EU, one from Vietnam and one national of a third country and it shall be chaired by the national of a third country. However, in Article 8.28 CETA no such restriction on nationality is found but left to the Joint Committee to adopt a decision on administrative and organizational matters.

[282] In EUVFTA under Article 13 (17), upon the consideration by the Trade Committee, the retainer fees can be converted to monthly salary then the members of Arbitral Tribunal cannot pursue other occupation unless exempted by the President of the Appellate Tribunal.

agreement[283] which may ensure independence "beyond doubt" and avoids direct or indirect "conflict of interest".[284]

5.2.5. Award

In EUVFTA and CETA, every award is preliminary and becomes final when 90 days are elapsed and neither party has initiated appeal.[285] The appellate body may modify, reverse or uphold a award by the Tribunal on the grounds: (a) errors in the application and interpretation of applicable law; (b) the Tribunal has manifestly erred in the appreciation of the facts, including the appreciation of relevant domestic law; (c) on the grounds provided in Article 52(1) ICSID[286], in so far as not covered in above two grounds.[287] The appeal mechanism allows the parties to appeal for errors and defects of the award without resubmitting to a new arbitral tribunal. As permitted, Appellate Tribunal shall apply its own legal findings and conclusions to the facts and render a final decision.[288]

Jurisdictional issue

There is not explicit mention on the question of jurisdiction and the appeal in case of errors of jurisdiction. Nevertheless, Article 52(1)(b)

[283] Article 27(1) EUVFTA along with compliance of Annex I (Code of Conduct). In CETA Article 8.27(4) and Article 8.30 enlists educational and ethical qualifications similar to EUVFTA.
[284] Article 27(1) EUVFTA and in Article 8.30(1) CETA
[285] Article 27(7) EUVFTA and Article 8.28 (9) (c) (i) CETA along with other conditions: the initiate appeal has been rejected or withdrawn or 90 days have elapsed from an award by the Appellate Tribunal and the Appellate Tribunal has not referred the matter back to the Tribunal.
[286] Article 52 of ICSID - (1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds: (a) that the Tribunal was not properly constituted; (b) that the Tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the Tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based.
[287] Article 8.28 (2) CETA and article 28 (1) EUVFTA.
[288] Article 28(4) EUVFTA.

ICSID includes jurisdictional error that means it could be ground to challenge an award. This raises a question whether Appellate Tribunal only has jurisdictional scope on final award and not on a positive award on jurisdiction? Under ICSID rules there may be one award but in UNCITRAL Arbitration Rules[289] there are many awards which may be challenged in judicial review before the final award. The rules in CETA and EUVFTA do not directly deal with a question on jurisdiction and thus it may be assumed that the parties have to wait until the final award is issued to appeal a positive or mixed jurisdiction award, leading to additional costs that the parties have to bear.[290]

The "manifest excess of power" ground in Article 52(1) (b) ICSID includes jurisdictional error.[291] Thus, it can be said that such a ground would be available under CETA and EUVFTA to appeal

[289] Article 23 of UNCITRAL Arbitration Rules (2010 Revised Rules)- The disputants can raise the plea that the arbitral tribunal does not have jurisdiction shall be raised no later than in the statement of defence or, with respect to a counterclaim or a claim for the purpose of a set-off, in the reply to the counterclaim or to the claim for the purpose of a set-off and it not precluded that in fact it has appointed the arbitrator. Such pleas are heard by the arbitral tribunal itself since it has power to rule on its own jurisdiction, available at http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/pre-arb-rules-revised.pdf; 2016 UNCITRAL Notes on Organizing Arbitral Proceedings, Under the sub-heading: *11. Points at issue and relief or remedy sought*- §70. "Depending on the points at issue, the arbitral tribunal may consider the appropriateness of deciding on certain claims or issues (such as jurisdiction, liability or other discrete issues whose determination will likely advance the resolution of the case)". *Reports of the United Nations Commission on International Trade Law* on the work of its forty-eighth session (Official Records of the General Assembly, Seventieth Session, Supplement No. 17 (A/70/17), paras. 14-133), and forty-ninth session (Official Records of the General Assembly, Seventy-first Session, Supplement No. 17 (A/71/17), paras. 132-158), available at http://www.uncitral.org/pdf/english/texts/arbitration/arb-notes/arb-notes-2016-e-pre-release.pdf

[290] *Sardinha* (fn 194), p. 327; *Sacerdoti*, Investment Arbitration Under ICSID and UNCITRAL Rules: Prerequisites, Applicable Law , ICSID Rev—ForInvestLJ, p. 34; *Parra*, Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment, I*CS*IDReview - ForInvestLJ12(2) 1997, p. 302.

[291] *Sacerdoti* (fn. 292), p. 43; *Hirsch*, The Arbitration Mechanism of the International Centre for the Settlement of Investment Disputes1993, p. 25, 31.

under jurisdictional error as it is not expressly mentioned in the treaties. However, the treaties are silent on the standards of review by the Appellate Tribunal and it can be assumed that the standard to review awards would be correction on error of law.[292]

A limited review of the award is available in most of the rules and correctness has been rarely applied.[293] The inclusion of word "manifest" would draw relevancy of the interpretation as laid down in Article 52 ICSID. Under ICSID, the interpretation of "manifest" is applied to errors in law and jurisdictional issues.[294] On application of interpretation of ICSID, it should not be just a mere error in appreciation of facts to justify intervention but "obvious, clear or self-evident"[295] or "egregious nature"[296] which can be done without much analysis of the award.[297] Similarly, a "manifest excess of power" in jurisdictional matters should be a distinctive ground for annulment of award and the standard has to be similarly applied that it should be a "jump off the page" error.[298] Thus, in case there is a manifest error in jurisdiction, an interpretation of the law would not be required.

[292] Article 8.28(2) CETA and Article 28(3) EUVFTA- allow for modify or reverse of the erred award and in addition, the EUVFTA also allows applying its own legal findings and conclusions to the facts and rendering a final decision.
[293] *Sardinha* (fn 194), p. 328.
[294] On "manifest" jurisdictional errors: *Pinsolle*, Jurisdictional Review of ICSID Awards, JWIT 5(4) (2004), p. 620; Background Paper on Annulment For the Administrative Council of ICSID, ICSID, 10 August 2012, available at https://icsid.worldbank.org/en/Documents/resources/Background%20Report%20on%20Annulment_English.pdf.
[295] Approach by ICSID Annulment Committee in *Total SA v. Argentine Republic*, ICSID case no. ARB/02/7
[296] *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Application for Annulment of the Award, para. 29-30.
[297] *Avila*, in: *van den Berg* (ed), Arbitration Advocacy in Changing Times, ICCA Congress Series 15 (2011), p. 292
[298] "The excess of power should at once be textually obvious and substantively serious"- *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the ad hoc Committee on the Application for Annulment of Mr. Soufraki, para. 38 – 40.

Thus, such a claim would be allowed and if required, refer back to the Tribunal[299] for correction of the award.

5.2.6. Enforcement

In investment arbitration, a vast majority of the awards are recognised and enforced voluntarily.[300] In case, it is not enforced, the party in whose favour the award issued can enforce at domestic courts.[301] Under ICSID, the awards are enforced automatically which is not found in other rules. However, CETA and EUVFTA require that the awards are enforced based on these rules as stipulated.

Final awards under these agreements are binding on the parties irrespective of the arbitration rules chosen.[302] The parties are under obligation to recognise and comply with an award without delay. All awards are provisional, and the awards become final when none of the disputing parties have appealed and 90 days have elapsed.[303] There may be common grounds to reach finality of the award between the FTAs but there are substantive differences when it comes to *recognition* and *enforcement*. In EUVFTA, once an award is final it would not be subject to appeal, review, set aside, annulment or any other remedy.[304] Also, the disputing parties have to *recognise* the award as binding and *enforce* the pecuniary obligation as if it is a final judgment of a court in that Party state.[305] The situation is different for the first 5 years after entry into force or any period fixed by the Trade Committee and the respondent state is Viet Nam; the recognition and enforcement shall be conducted

[299] Article 8.28(9) CETA and Article 8.28(4) EUVFTA
[300] *Blackaby/ Partasides/ Redfern/ Hunter*,in: Redfern and Hunter on International Arbitration (6th ed.) 2009, § 11.07
[301] Ibid, §11.12
[302] Article 8.41(1) CETA and Article 31(1)(a) EUVFTA
[303] Article 8.28(9)CETA and Article 27 (7) and Article 29(1) EUVFTA
[304] Article 31 EUVFTA
[305] As reproduced from Articles 53 & 54 of the ICSID.

pursuant to the New York Convention. For this purpose, the award is deemed to be arbitral awards and claims 'arising out of a commercial relationship or transaction', also found in CETA. The reason to have such an assumption as Viet Nam made a reservation in the New York Convention to limit enforcement of arbitral awards which are not out of a commercial relationship,[306] such a reservation is contravened here.[307] But when a claim is submitted under ICSID, a final award issued shall qualify as an award under ICSID and thus, the procedure under ICSID for enforcement and recognition are applicable to EUVFTA[308] which is also found in CETA.

In CETA, it is allowed to enforce an award. The provision makes a difference between the awards under ICSID and not under ICSID. Under ICSID claims, the enforcement can be sought when 120 days have elapsed and 90 days under non-ICSID rules.[309] By reading the provision[310], it can be determined that enforcement is not immediate as in EUVFTA and also not automatic, instead it depends on the rules applied. CETA has left it to the Joint Committee to decide on the procedure.[311]

[306] It is a commercial reservation. Del *Luca/Welsh*, Enforcement of Foreign Arbitration Agreements and Awards Application of the New York Convention in the US, AMJCompL62 (2014), p. 72; *Saunders/Salomon*, Enforcement of Arbitral Awards Against States and State Entities, Arbitration International, LCIA 23(3), p. 465.

[307] The status of the parties to the New York Convention. Found in Notes Declarations or other notifications pursuant to article I(3) and article X(1), available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html

[308] As done in Article 31(8) EUVFTA and Article 8.41.6 CETA. The obligation under ICSID is explicitly mentioned in Article 31(5) EUVFTA and Article 8.41.4 CETA that "[e]xecution of the award shall be governed by the laws concerning the execution of judgments or awards in force where such execution is sought."

[309] Article 8.41.3 CETA

[310] Article 8.41 CETA

[311] Article 8.28(9)(e) along with Article 8.28(7) CETA, which is upon the decision of the Joint Committee to continue with Article 8.41.3 CETA

Inter-se modification to ICSID

This seeks for a discussion that CETA and EUVFTA render modification to ICSID to this extent that phrase like "pursuant to this Convention"[312] has lost its meaning.[313] However, it is argued that alleged modification is done between the parties of CETA and EUVFTA that is, *inter se* modification,[314] and not obligated to the third parties (parties to the ICSID Convention).[315] The *inter se* modification stays between the parties and would not affect the other third parties when they intended to remain such modification among themselves. Both agreements include "for greater certainty" in Article 31(8) EUVFTA and Article 8.41.6 CETA so as to make clear that the final awards are deemed as awards under ICSID Convention and its applicability in spite of the modification.[316]

5.2.7. Transparency of proceedings

Confidentiality is an inherent feature in commercial arbitration which is why arbitration is preferred.[317] Although it can be found that it is not exactly confidentiality but privacy is assured which excludes participation of third parties. Thus, it can be said that arbitration may

[312] Article 54(1) ICSID

[313] *Hindelang/HageMeyer* (fn. 230), p. 166; *Calamita,* The (In)compatibility of Appellate Mechanisms with Existing Instruments of the Investment Treaty Regime, JWIT 18(4) (2017), p 604; *Dickson-Smith*, Does the European Union have New Clothes?, JWIT 17(5) (2016) , p. 803; *Reinisch,* Will the EU's Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards?—The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration, JIEL 19(4) (2017), p. 780-782.

[314] Article 41 VCLT provides that any *inter se* modification to a Convention is not a modification of the Convention or leads to any amendment.

[315] *Reinisch*,(fn.314)p. 781.

[316] *Hindelang/ HageMeyer* (fn.230), p. 166; *Reinisch*, Ibid, p. 781.; *Calamita* (fn.314), p. 19.

[317] *Poorooye / Feehily*, Confidentiality and Transparency in International Commercial Arbitration: Finding the Right Balance, HNLR 22 Spring (2017), p.281. The difference explained in *Esso Australia Resources Ltd v. Plowman* (1995) 128 ALR 391 (Austl.); *Urban Box Office Network v. Interfase Managers*, No 01 Civ. 8854, 2004 WL 2375819 (SDNY Oct 21, 2004)

involve two concepts: privacy and confidentiality. Privacy in arbitration excludes participation of unauthorised third parties or even observing, thus limiting transparency.[318] Confidentiality, however, is pertaining to the access of information like written submissions and contents of it, evidence adduced and documents produced, record of the hearing and award of the tribunal.[319] Another reason for parties to choose arbitration so as to restrict or exclude public involvement in commercial arbitration is to protect trade secrets[320] from competitors[321] and enables efficient enforcement of the arbitration awards.

There are advantages to include confidentiality - it reduces possible damage to continue business relations[322] and parties are free to make any argument that cannot be done in a public forum[323]. With increasing number of arbitration awards are challenged in the courts,[324] it had become a reason for conflict with public interest.[325]

UNCITRAL Transparency Rules[326] (also known as Mauritius Convention)

[318] Ibid, p. 281.
[319] *Henkel*, The work product Doctrine as a means toward a Judicially Enforceable Duty of Confidentiality in International Commercial Arbitration, NC. JIntlARB 73 (4) 2009, p.1065.
[320] Trade secrets are intangible assets in the broadest sense. Since many investment treaties include intangible assets as part of investment treaties as it done in CETA and EUVFTA that the definition of investment in Article 8.1 CETA and Chapter 1-General Provisions in Chapter 8 of EUVFTA-Definition clause includes tangible and intangible assets.
[321] *Kim*, Protecting Trade Secrets under International Investment Law: What Secrets Investors Should Not Tell States, JMARSHALL REVINTELL. PROPL15(2)2016, p. 999.
[322] *Henkel* (fn. 321), p.610.
[323] *Feiciano*, The Ordre Public Dimensions of Confidentiality and Transparency in International Arbitration: Examining Confidentiality in the Light of Governance Requirements in International Investment and Trade Arbitration, PHILLJ 87 (1) (2012), p.27.
[324] *Henkel* (fn.321), p. 1062.
[325] *Poorooye / Feehily* (fn 319), p. 278
[326] Upon ratification, the Transparency Rules were applicable to arbitration initiated under UNCITRAL Arbitration Rules pursuant to treaties concluded on or

In 2013, UNCITRAL adopted the Rules on Transparency in Treaty-based Investor-State Arbitration ("the Transparency Rules") along with a new Article 1(4) of the UNCITRAL Arbitration Rules as the first attempt to proceduralise transparency in arbitration. The Transparency Rules introduced a large degree of publicity in the arbitral proceedings by introducing provisions, *inter alia*, for public disclosure of commencement of the arbitration proceeding[327] and also the notice and response of arbitration with written submissions from the parties and non-disputing third parties, transcripts of hearings, awards and decision[328]. However, expert reports, witness statements and exhibits are made available upon request to the arbitral tribunal.[329] The Rules allow open hearings[330] and submissions by non disputing parties[331].[332] The Convention achieved to overcome the non-uniformity with regard to the application of clauses, like most favoured nation to procedural matter.

5.2.8. Transparency under CETA and EUVFTA

Treaties provide for transparency to limit confidentiality and privacy, and making documents as listed in the treaties publicly available irrespective of arbitration rules parties choose. CETA restricts both confidentiality and privacy involved in investment arbitration compared to partly assure in EUVFTA. A great majority of the

after 1 April 2014 and it would be applicable to treaties concluded before 1 April 2014 when parties agree.

[327] Article 2 UNCITRAL Transparency Rules

[328] Article 3(1) UNCITRAL Transparency Rules. The documents are available in Transparency Registry of the UNCITRAL for public scrutiny at http://www.uncitral.org/transparency-registry/registry/index.jspx

[329] Article 3(2)& (3) Transparency Rules

[330] Article 6 UNCITRAL Transparency Rules

[331] Article 4 & 5 UNCITRAL Transparency Rules

[332] *Johnson/ Bernasconi-Osterwalder*, New UNCITRAL Arbitration Rules on Transparency: Application, Content and Next Steps, CIEL, IISD & Vale Columbia Centre on Sustainable International, (2013) Investment Policy Paper, p. 3.

treaties do not include the provision for transparency, but early attempt was done by NAFTA parties to include transparency.[333] As a result of this effort, UNCITRAL Transparency Rules are applicable to CETA and EUVFTA.[334] Along with the list of documents as mentioned under Article 3(1) UNCITRAL Transparency Rules, CETA and EUVFTA include request for consultation, notice for determination of respondent, notice of challenge to a Member of the Tribunal and the decision of such a challenge, and request for consolidation.[335] The public disclosure of the award would improve predictability and consistency in the jurisprudence of the Tribunal creating precedents for future decisions.[336] However, the availability of documents in public is subject to redaction of confidential or protected information, like business secrets and classified government information of respondent-state.[337]

Under CETA, hearings are public which is not found in EUVFTA and are still private. Much burden lies on the Tribunal to determine on confidentiality of information and in cases when legible confidential information is disclosed could damage the interest of the disputing parties[338], and may be a cause to appeal the award.[339] On the other

[333] As noted in *Methanex* case[334], the tribunal, with the consent of the parties, allowed *amicus curiae* submissions and held open hearing. *Methanex v. United States*, Decision of the Tribunal on Petitions from Third Persons to Intervene as *Amici curiae* (2001).

[334] Article 8.36(1) CETA and Article 20(1) EUVFTA.

[335] Article 8.36(2) CETA and Article 20(2) EUVFTA. Corresponding to unique requirement of the treaties, CETA also includes disclosure of the agreement to mediate and exhibits. It is, however, the responsibility of the respondent-state to disclose the documents subject to its laws under Article 8.36(4) CETA and Article 20(4) EUVFTA.

[336] *Poorooye / Feehily* (fn 319), p. 313.

[337] Article 8.36 (4) CETA and Article 20 (4) EUVFTA.

[338] *Gary Born* International Commercial Arbitration, p. 2780; *Poorooye / Feehily* (fn 319), p 300.

[339] Under Article 8.28(2) CETA, the disputing parties could appeal under the claims that the Tribunal has wrongly interpreted the applicable law, or manifest errors in interpretation of the facts, or exercised its power in excess or any other grounds available under Article 52(1) ICSID. As the confidentiality standards are

hand, it is necessary in investment disputes involving a private party against State giving better protection to public interests and policies.[340]

Additionally, a new articulated obligation on the disputing parties is introduced to protect redacted information from public disclosure if they share with another person (including government officials) in connection with proceedings.[341] Respondent states are under the obligation to deliver to the non-disputing parties on request for consultation, a notice to determine respondent, the disputed claim submitted to the Tribunal, and request for consolidation of the non-disputing parties.[342] The Tribunal can also accept or invite non-disputing party to submit, orally on in written submissions, interpretation of particular provision of the treaties.[343] The provision demonstrates the importance of interpretation of the agreements by third parties, a significant opportunity for academic and practitioners to scrutinise and contribute to interpretation of FTAs.[344]

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different in different state and this could lead to extra effort on the Tribunal to decide on this issues.

[340] *Poorooye / Feehily* (fn 319), p. 310.

[341] Obligation under Article 8.37 (1) CETA and Article 20 (8) EUVFTA. In CETA under Article 8.37(2), respondent are not prevented from sharing information to government officials subject to that the officials would protect confidential or protected information.

[342] Article 8.38 (1) (a) CETA and Article 24(1)(a) EUVFTA. Upon request, pleadings, memorials, briefs, requests and other submissions made to the Tribunal by a disputing party, written submissions, minutes or transcripts of hearings of the Tribunal, and orders, awards and decisions of the Tribunal at the cost of the non-disputing party would be made available to him under Article 8.33 (1) (b) CETA & Article 8.38 (1) (c) CETA and Article 24(1) (b) EUVFTA.

[343] Article 8.38(2) CETA and Article 24(2) EUVFTA. Additionally, under Article 26 of the EUVFTA, the Tribunal can also invite expert reports in writing on any factual issue concerning environmental, health, safety, or other matters raised by a disputing party.

[344] *Poorooye / Feehily* (fn 319), p. 303; *Sardinha* (fn. 194) p. 358; This is a reflection of Article 1128 of the NAFTA which invite submissions of non-disputing parties and importance of the parties' influence and control.

CHAPTER 6- CONCLUSION

The proceduralisation of investment court system proposed by the Commission aims to limit criticism revolved around ISDS due to its lack of legitimacy, transparency and appellate mechanism. The new and improved investment regime under CETA and EUVFTA could be a solution to the problem with consistency and confidentiality in international law. However, any violation to the autonomy of EU law produced due to investment protection produces effect to EU law and not to international law[345] would not give optimistic results to this new mechanism and that is why, it is important to address its compatibility with EU law. The objections by Member states over such a tribunal system have led to seek an opinion from the ECJ on this issue. Although the system is promising and would laid down stepping stones for investment protection but this may not be sufficient for the ECJ to find it compatible.

Achmea ruling confirms that intra-EU BITs are incompatible and the effects of the judgment would reverberate to agreements with third-countries. It may put CETA and EUVFTA under scrutiny unless they comply with the EU Treaties and the jurisprudence as laid down by the ECJ. The ECJ found arbitral tribunals under investment agreements entered between Member states are outside the judicial system of the EU and incompatible with autonomy of EU law since arbitral tribunals are empowered under the principle of *lex loci arbitri* to also include EU law within their jurisdiction and interpret it.[346] In the case of CETA, as a mixed agreement and EUVFTA, still under consideration, entered with a third state and this part of ruling may not be applicable. A logical conclusion that can be drawn is that the

[345] *Dimpopulos* (fn. 139), p. 1697.
[346] Judgment in *Achmea*, ECLI:EU:C:2018:158, para 58.

Tribunal under CETA and EUVFTA would not fall within judicial framework of the EU since the jurisdiction of the Tribunal is limited to claim related to breaches of investment agreements and to determine if a measure of Member state and of the EU is in violation of the standards set in Sections C or D of Chapter 8 CETA. It can only resolve a dispute under the applicable law *i.e.,* the provision of investment agreements and take domestic law as a matter of fact. However, the ECJ places responsibility on the arbitral tribunal to protect the autonomy of the EU law by not giving new interpretation to EU laws and affecting its consistency. Thus, the jurisprudence on establishing and protecting the autonomy of the EU law could be a game changer to determine legality of the tribunal system under these agreements.

The ECJ has protected the autonomy of the EU in many cases and call it as the "essential" characteristics[347], as it originate from an independent source of law, i.e., the EU Treaties, by its primacy over national laws[348]. These characteristics developed a structured network of principles, rules and mutually interdependent legal relations binding the institutions and Member States, and among Member States.[349] The standard of review of the ECJ to protect the autonomy of the EU law is a matter of these tribunals and Member states too. Since the ECJ has never been eager to open doors of interpretation of the EU Treaties for a tribunal, which is out the EU judicial framework, and thus the burden like an intra-BIT lies on CETA and EUVFTA too. Moreover, Member states are obligated to

[347] Opinion 2/13 in Accession of the EU to European Convention for the Protection of Human Rights and Fundamental Freedoms, EU:C:2014:2454.
[348] Opinion 1/09 in Agreement creating a Unified Patent Litigation System, EU:C:2011:123, para. 65.
[349] Opinion 2/13 in Accession of the EU to European Convention for the Protection of Human Rights and Fundamental Freedoms, EU:C:2014:2454, para 165-167.

bring issues related to EU law to the ECJ and not to the Tribunal which may disrupt the consistency of interpretation of EU law.

On the contrary, if the ECJ finds that the Tribunal under CETA and EUVFTA is part of judicial framework of the EU and that the Tribunal could send for a preliminary ruling to the ECJ departing from its previous judgments, even then it has responsibility to protect the autonomy of the EU law along with maintaining uniformity and consistency in interpretation while applying the EU law. In both the situations, an interpretation of EU law done by the Tribunal under CETA and EUVFTA may affect the consistency.[350] But as the research discusses the features of the Tribunal under CETA and EUVFT it would be visible that the drafters of FTAs have assured that autonomy of the EU law is protected, at least in theory.

Ensure jurisdiction of domestic courts and ECJ

Even when CETA and EUVFTA precludes parallel proceedings[351] under a domestic or international court or tribunal so as to not to undermine the authority of the Tribunal, and this could mean taking away the exclusive jurisdiction of the ECJ. If in case parallel proceedings are allowed, the respondent-state has to defend the measure several times or in some cases, multiple recovery of same damage lead to procedural unfairness with inconsistent and contradictory decisions.[352] Thereby, precluding parallel proceedings would also avoid 'forum shopping' by the investors. Moreover, the agreements do not allow parallel proceedings for disputes related to an alleged measure which is submitted as inconsistent with agreements. Additionally, the Tribunal is under obligation to stay its

[350] Judgment in *Costa v. ENEL*, ECLI:EU:C:1964:66.
[351] Article 8.22(1)(f) & (g) CETA.
[352] Ibid, p. 62.

proceedings or take into account proceedings under international agreement which may affect the findings of the Tribunal or the compensation awarded, as the provision uses "shall" instead of "may"[353]. The investment agreements assure that in case the Tribunal fail to do so, appellate body has authority to modify or reverse award on "manifest errors in the appreciation of facts, including….. *relevant domestic law*" which may include EU law[354] (emphasis supplied). There is no definite assurance that the decisions of the ECJ would be respected even if it is considered as decisions of international court or tribunal. Thus, it is important to assure that the tribunals under CETA and EUVFTA take into consideration decisions of the ECJ and the domestic courts effectively and importantly, ensure supremacy of the EU law and full respect to decisions of the ECJ.

But the problem does not end here, as the ECJ in the *Achmea* judgment has been reluctant about the arbitral tribunals to interpret EU law and the same fate would be for the Tribunals in CETA and EUVFTA. Perhaps the limited scope of disputes of the Tribunal done by the drafters of the agreements, especially interpretation and application of EU law is a solution. The Tribunal is not allowed to interpret and apply the provision of the EU Treaties including prevailing domestic laws and "shall follow the prevailing interpretation given to the domestic law".[355] While determining consistency of measures, it has to consider the domestic law as 'matter of fact' and it is clear that domestic law of Member state includes EU law.

[353] Article 8.24 CETA
[354] Article 8.28 CETA
[355] Article 8.31.2 CETA

Issue of competence and international responsibility

After the *opinion on EU-Singapore FTA*, it is important to look at nature of agreement concluded. CETA is mixed agreement and EUVFTA may be one in future, both are binding on Member states as it is to the EU. However, it is not clear that the question of competence between the EU and Member states is related with conclusion of international agreement as mixed agreement. It is nonetheless clear that the question of competence would not affect the interpretation of the investment agreements done by the tribunal under these agreements. The question of determining obligation arising from the agreements, that whether it would be responsibility of the EU or Member states, requires interpretation of the agreement and due to the drafting of CETA and EUVFTA it would within the jurisdiction of the ECJ.[356] In fact the agreements has placed obligation of international responsibility on the EU to determine respondent.

In other words, the right to access tribunal as per the rules to determine respondent by the EU in both agreements would allow foreign investors to initiate proceedings without affecting the autonomy of EU law, supremacy of EU law and would promote legal certainty.[357] This conclusion would also put away any future doubts on competences, *inter alia* on law making and concluding the agreement between Member states and the EU which would be mutually exclusive of the determination of respondent done to fix international responsibility. The issue of competence would however justify the reason to conclude the agreements as mixed agreements

[356] *Mohay,* The Status of International Agreements Concluded By The European Union In The EU Legal Order, Pravni Vjesnik, 33(3-4), p. 154.
[357] *Dimopolous* (fn.140), p. 1702.

since some areas are shared between the EU and its Member states[358] as suggested by the Advocate General in the *Opinion 2/15*.

Unique features of the Investment court system

CETA has given power to a Joint Committee to appoint judges for the tribunal. The institutionalization would ensure legitimacy and consistency to decisions after introducing an appellate body. While allowing participation of non-disputing third parties and interpretations of provisions to the agreements from scholars and person of interest, having compulsory resolution through amicable mechanism like conciliation and mediation and transparency are a front runner of this system. But public hearing is not ensured in EUVFA as discussed in Chapter 5. Much debate flows to the form of the institutionalization as permanency, but instead has created a hybrid alternative to resolve investment disputes. Although the Joint Committee is entrusted with the responsibility to appoint member of tribunals but the cases are allotted on random basis to a roster of judges much like done in WTO panel. However, the tribunal would be dissolved and the issue of sending back to the same tribunal once decided by the appellate body is still a problem. The question rises that whether the same tribunal would hear the dispute or a new tribunal would be created? Moreover, it does not contribute to 'permanent structure' as proposed by the Commission. As judges of the Tribunal are paid a retainer fees and not a salary, and are allowed to take up other occupation, does not support the idea of permanency. It can still be said that the system is not balanced out, fair and independent as the judges are allowed to take up other

[358] Ibid.

professions. Instead the current system seems to be semi-permanent or a hybrid structure.[359]

On the other hand, the tribunals organized under CETA and EUVFTA, respectively, may give rise to different conclusions relating to similar commercial situation and similar investment rights since the provisions are similar in both agreements. A possibility of incoherence and determinacy would lead to issues of legitimacy of the tribunals. Any of the agreements do not deal with correlation of the tribunals under different agreements. As a result, with proliferation of investment agreements and tribunals, procedural fairness is not ensured as the tribunals could determine the rights of an investor form Canada differently than Viet Nam. Also another procedural flaw that the research discussed that both the agreements do not directly deal with a question on jurisdiction and thus it may be assumed that the parties have to wait until the final award is issued to appeal a positive or mixed jurisdiction award, leading to additional costs that the parties have to bear.

The problem of coherence and determinacy will be solved by creating a new regime of investment protection with a multilateral investment court[360] which would be permanent in nature with full tenured and impartial judges. The consistency would be ensured with a permanent appellate mechanism and all the treaties would be considered at par with one another. As concluding remarks, the present system in the agreements are a way forward to institutionalise investment protection but this optimism should not be taken blindly and hinder improvement and develop of multilateral system.

[359] *Sardinha* (fn.194), p. 365.

[360] Council of EU, Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes, 12981/17 ADD 1 DCL 1, 20 March 2018, available at http://data.consilium.europa.eu/doc/document/ST-12981-2017-ADD-1-DCL-1/en/pdf

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