

EU Investment Protection Law

Keller

2023

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EU Investment Protection Law

Chapter Eight of CETA,
the Vietnam and Singapore Free Trade
Agreements and EU Regulations 1219/2012,
912/2014 and 2019/452

Article-by-Article Commentary

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Foreword

This book owes its existence to the original idea germinated by Professor Dr Christoph Herrmann of the University of Passau to expand a previous German language publication on the EU legal framework on investment protection¹ into a comprehensive work, for which I owe him great thanks. The resulting text represents the culmination of a truly international in-depth research project on the significance and impact of the new approach to investment protection of the European Union ('EU'), as implemented in the Comprehensive Economic and Trade Agreement ('CETA') as well as the EU's agreements with Singapore and Vietnam and certain surrounding legislation. With contributors from across our Clifford Chance continental European network, spanning arbitration practices in Amsterdam, Düsseldorf, Frankfurt, Madrid, Paris and Warsaw (and including cooperation with previous esteemed colleagues now undertaking new endeavours), our colleagues have applied their knowledge and expertise in this specialised area, providing unique insights into the issues raised by these new legal frameworks. It should be noted that the authors of this book have contributed such insights in a personal capacity.

This book is intended to constitute a comprehensive reference work, providing the reader with a complete picture of the current status of EU investment protection law through detailed commentaries by experienced international dispute resolution and EU law practitioners. Accordingly, in the following chapters, after a detailed introduction, the reader will find comprehensive analysis of Chapter Eight of CETA,² provision by provision, drawing on the jurisprudence of ISDS tribunals under other multilateral trade agreements, such as the North American Free Trade Agreement ('NAFTA'), as well as various bilateral investment treaties ('BITs'). Also provided is a comparative overview of the provisions of Chapter Eight of CETA against the investment protection provisions in two other trade agreements that the EU has recently concluded, namely the EU-Vietnam agreement (consisting of the EU-Vietnam Free Trade Agreement³ (the 'EU-Vietnam FTA') and the EU-Vietnam Investment Protection Agreement⁴ (the 'EU-Vietnam IPA')) and the EU-Singapore agreement (consisting of the EU-Singapore Free

¹ Keller and Schmitt, 'Verordnung (EU) Nr. 1219/2012 des Europäischen Parlaments und des Rates zur Einführung einer Übergangsregelung für bilaterale Investitionsschutzabkommen zwischen den Mitgliedstaaten und Drittländern' in Krenzler, Hermann, Niestedt, *EU-Außenwirtschafts- und Zollrecht*, vol 2 (18th supp, 2021); Keller and Schmitt, 'Verordnung (EU) Nr. 912/2014 des Europäischen Parlaments und des Rates zur Schaffung der Rahmenbedingungen für die Regelung der finanziellen Verantwortung bei Investor-Staat-Streitigkeiten vor Schiedsgerichten, welche durch internationale Übereinkünfte eingesetzt wurden, bei denen die Europäische Union Vertragspartei ist' in Krenzler, Hermann, Niestedt, *EU-Außenwirtschafts- und Zollrecht*, vol 2 (18th supp, 2021).

² Comprehensive Economic and Trade Agreement (CETA) between Canada, of the One Part, and the European Union and its Member States, of the Other Part [2017] OJ L11/23. This book reproduces the text of the Articles of Chapter Eight CETA, and the footnotes thereto, in accordance with the Official Journal version and follows the original footnote numbering. The reader should note that other versions of the text, for example the versions published by Canada, contain different footnote numbering.

³ Free Trade Agreement Between the European Union and the Socialist Republic of Viet Nam [2020] OJ L186.

⁴ Proposal for a Council Decision on the Conclusion of the Investment Protection Agreement Between the European Union and its Member States, of the One Part, and the Socialist Republic of Viet Nam, of the Other Part COM/2018/693 final.

Foreword

Trade Agreement⁵ (the ‘EU-Singapore FTA’) and the EU-Singapore Investment Protection Agreement⁶ (the ‘EU-Singapore IPA’)). In each chapter, the reader will also find a specialised bibliography for further reference. A comparative annex is also included which shows in tabular form the parallel provisions of CETA, the EU-Singapore FTA and IPA, and the EU-Vietnam FTA and IPA.

Commentary is also provided on three central EU Regulations which interface with CETA, namely (i) Regulation (EU) No 1219/2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries⁷ (‘Regulation 1219/2012’), (ii) Regulation (EU) No 912/2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party⁸ (‘Regulation 912/2014’), and (iii) Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investments into the EU⁹ (‘Regulation 2019/452’). In this way, the reader can gain a contextualised understanding of how this area of law operates as a whole, including the role that the supporting EU legislation plays within the framework.

Where the CETA text refers extensively to, or incorporates, other documents, such as decisions of the CETA Joint Committee, or the CETA Committee on Services and Investment, these have been included as annexes to the relevant chapters for the reader’s convenience. Accordingly, as well as the relevant decisions of the CETA committees, this book also contains the full texts of (i) the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (‘UNCITRAL Transparency Rules’), (ii) the International Bar Association Guidelines on Conflicts of Interest in International Arbitration (‘IBA Guidelines on Conflicts of Interest’), and (iii) the text of Chapter Eight of CETA. In this way, the reader has easy access not only to quality practitioner insights, but also to the full surrounding legal context.

Finally, as editor of this work, it is my task to also draw the reader’s attention to those contributors who, although not named in the authorships, made substantial contributions to this book. Many hours have been dedicated by Leticia Diehl Tomkowski, Alexander Dünkelsbühler, Marie Orf, Jessica Sblendorio, Hanna Shalbanava and Katerina Strataridaki. I am so grateful for your excellent support – without you, this book would not have been possible.

Dr Moritz Keller
Frankfurt, September 2022

⁵ Free Trade Agreement Between the European Union and the Republic of Singapore [2019] OJ L294.

⁶ Proposal for a Council Decision on the Conclusion of the Investment Protection Agreement Between the European Union and its Member States, of the One Part, and the Republic of Singapore of the Other Part COM/2018/194 final – 2018/0095 (NLE).

⁷ Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 Establishing Transitional Arrangements for Bilateral Investment Agreements Between Member States and Third Countries [2012] OJ L 351/40.

⁸ Regulation (EU) No 912/2014 of the European Parliament and of the Council of 23 July 2014 Establishing a Framework for Managing Financial Responsibility Linked to Investor-to-State Dispute Settlement Tribunals Established by International Agreements to which the European Union is Party [2014] OJ L 257/121.

⁹ Regulation 2019/452 of the European Parliament and of the Council of 19 March 2019 Establishing a Framework for the Screening of Foreign Direct Investments into the Union [2019] OJ L1 79/1.

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