INTERNATIONAL INVESTMENT AGREEMENTS AND EU LAW II

The book is a sequel to the author's previous monograph titled "International Investment Agreements and EU Law" (in Czech: *Mezinárodní dohody o ochraně investic a právo Evropské Unie*) published in 2015 (a slightly updated English version was published in 2016 by Kluwer Law International), which can be henceforth considered 'Volume I'. At that time, the EU international investment policy, based on the Union's new external competence for foreign direct investment conferred on it by the Treaty of Lisbon, was in the middle of its coming to existence, with key questions such as the scope of the EU competence, features of the new EU investment model reflecting the political preferences of the Union, or compatibility of international investment agreements with EU law, yet to be finally resolved. Since then, some crucial developments have taken place: the CJEU issued its Opinion 2/15 on the competence of the EU to conclude the Free Trade Agreement with Singapore, containing also a comprehensive investment chapter. At the same time, the EU has been able – though not without hassle – to establish its new reformed investment treaty model, featuring most notably the so-called "Investment Court System" (ICS), which already forms part of the international investment agreements concluded by the EU, such as the Comprehensive Economic and Trade Agreement between the EU and Canada (CETA) and Investment Protection Agreements with Singapore and Vietnam. Finally, the question of (in)compatibility of international investment agreements with EU law has been clarified by the CJEU with respect to different treaty settings (with different outcomes) in its two landmark decisions: the *Achmea* judgment (concerning a bilateral investment treaty concluded between EU Member States) and Opinon 1/17 (concerning investor-state dispute settlement mechanism in CETA). The present book (now to be considered ‚Volume II'), completes the picture drawn in Volume I by picking up where the first book left off, thoroughly analysing the relevant developments that occurred from 2015 up until mid-2020. Both books are intended to complement each other, together forming – as far as possible – a coherent and comprehensive account of the relationship between international investment agreements and EU law.

The present book is organized in three main Chapters. Chapter 1 deals with the division of competence to conclude international agreements on investment between the EU and its Member States and its reflection in the treaty practice. The core part of the Chapter is devoted to Opinion 2/15, whereby the CJEU clarified that under the post-Lisbon provisions on common commercial policy, the EU has broad external competence for foreign investment, extending to all matters typically covered by international investment agreements, except for two: portfolio investment

and ISDS, for which the EU shares the external competence with Member States. The element of shared competence brings individual Member States into play and exposes the EU international investment policy to their political preferences, as Member States (acting through the Council) may insist on conclusion of EU investment agreements as mixed agreements requiring individual approval by each and every Member State. In follow up to the CJEU's Opinion, and mindful of the infamous CETA ratification episode, the EU institutions adopted a pragmatic solution. The EU has given up the original ambition to negotiate comprehensive economic agreements integrating trade and investment. Instead, the Union's new general approach is to conclude "EU-only" (with no participation of Member States) trade agreements with third countries, entirely falling within the scope of the Union's exclusive external competence, and self-standing investment protection agreements, which will be in most cases concluded as mixed. Chapter 1 furthermore maps the treaty practice of individual Member States after the entry of the Lisbon Treaty into force. Surprisingly enough, while most attention has been so far attracted by various aspects of the new EU international investment policy, Member States have been able to conclude more than 50 post-Lisbon bilateral investment treaties with third countries in the meantime. Such practice is endorsed by Regulation No. 1219/2012, which explicitly allows Member States to conclude new investment treaties with third countries, subject to authorization given by the Commission. The latter has not seemed too hesitant in granting such authorizations so far. This shows that despite the transfer of competence, Member States continue to play active role in this policy area. In many years to come, the international investment policy of the EU and its Member States will be most likely characterized by flexibility. The international legal framework applicable to third-country investors in the EU and to the EU investors abroad will be in any foreseeable future formed by mosaic of treaty instruments adopted by the EU as well as by its Member States individually.

Chapter 2 focuses on the new EU investment treaty model, as it has evolved over the last decade. The analysis of this part does not aspire to be comprehensive. The earlier drafts of the new EU investment agreements were to some extent reviewed already in Volume I. The overview of the EU model is completed in Volume II mainly by presenting the key features of the ICS, which was for the first time introduced in the EU's unilateral TTIP Investment chapter proposal of 2015, and has since then become the hallmark of the Union's investment treaty model. The reform approach pursued by the Commission is a response to heavy resistance by civil society and widespread criticism of the contemporary investment treaty regime, which has emerged in Europe during the last decade on an unprecedented scale and which was largely fuelled by the decision to include investment protection in TTIP, a megaregional economic agreement to be negotiated between the EU and USA. While the TTIP project later perished, the ICS has since then become the 'flagsip' of the EU international investment policy, now being replicated in all new EU investment agreements and also forming basis for Union's multilateral reform proposals. Yet, it has received a mixed response from commentators, who remain divided on whether

this initiative is a step in the right direction. Second part of the Chapter discusses some more general issues of contemporary international investment law and the EU reform approach. It pictures the legal framework established by international treaty rules on investment protection as heavily path-dependent regime producing some serious anomalies, which is in the author's view unsuitable for application in relations between developed states, and which is at the same time very difficult to reform in a meaningful way given the legal and political constraints. For these reasons, the EU investment model whose design, although certainly introducing partial improvements, largely follows the existing patterns (while for the most part adopting a more pro-state and less investor-friendly stance), can hardly be applauded. While usefulness of its application between the EU and developed states such as USA, Canada or Singapore is open to serious doubts, its replication in relations with developing countries may also be questioned, as it will lower the level of protection of Union investors where such protection might arguably be desirable.

Chapter 3 explores different facets of (in)compatibility of international investment agreements with EU law, a thorny issue that has kept commentators, tribunals and relevant stakeholders busy ever since the incompatibility argument was first used by the Czech Republic in the *Euastern Sugar v. Czech Republic* arbitration. That argument gained relevance especially following Opinion 2/13, in which the CJEU (in)famously turned down the planned EU's accession to the ECHR due to the negative impact it would – in the Court's view – have had on the autonomy of EU law. As far as investor-state dispute settlement is concerned, the Gordian knot has been cut by the CJEU in two important decisions rendered in recent years. In *Achmea*, the Court ruled that investor-state arbitration clauses contained in bilateral investment treaties concluded between EU Member States are incompatible with EU law since they negatively impact on the autonomy of the EU legal order. On the other hand, in eagerly awaited Opinion 1/17 the Court found that the autonomy of EU law does not preclude inclusion of the reformed ISDS in the form of ICS in an agreement concluded between the EU and a third country (*in casu* CETA). This result, which was not necessarily expected, highlights the importance of distinction (intuitively anticipated by the author in Volume I) between purely intra-EU situations, where the relations between Member States are primarily governed by EU law, while in certain contexts the Member States are required to trust each other's organization of justice, and external relations of the EU with third countries, which are governed by international law, with reciprocity as the basic guiding principle. It also shows that certain subtle differences, such as specific wording of the applicable law clause of an investment treaty, which is in practical terms arguably largely indecisive for tribunals' handling of investment disputes, become key when it comes to assessment of the compatibility of a given dispute settlement mechanism with EU law. Whether the Court's differentiated approach to intra-EU BITs and to ICS in EU investment agreements is principled and persuasive, and the extent to which it may have been motivated also by non-legal considerations, can be debated. Opinion 1/17 can be also viewed as 'emergency brake' pulled in the last minute, saving the

infant EU international investment policy from doom and gloom caused by ever-expanding requirements of autonomy, and enabling the EU to make meaningful and credible international commitments. The Chapter also discusses the impact of *Achmea* on ongoing investment arbitration proceedings and the future of intra-EU investment protection. All arbitral tribunals in intra-EU investment disputes (whether under bilateral intra-EU BITs or under ECT) have deliberately chosen not to accord any relevance to the CJEU's decision as far as their own jurisdiction is concerned, and they continue to hear and decide the cases before them on merits even in the post-*Achmea* context, risking that their awards will not be enforceable within the EU. The Member States, for their part, have reacted to *Achmea* by signing the agreement for the termination of intra-EU BITs in May 2020, which provides for a formal phaseout of these treaties (subject to ratification of the termination agreement by individual Member States). On the other hand, the ECT is quite a different story, as its relationship with EU law is even more complicated, both legally and politically. While the EU is advancing reforms of this Treaty at the multilateral level, the reform proposals tabled by the EU so far leave intact the key question – (in)applicability of the ECT in mutual relations between the EU Member States. As in the case of bilateral intra-EU BITs, it will probably take another decision of the CJEU – this time on compatibility of the ECT with EU law – which will indicate whether the *status quo*, as currently set by the consistent practice of arbitral tribunals, is tenable in any longer term, and which may trigger a coordinated action of the Commission and Member Statest to effectively rule out intra-EU application of the ECT.