



Development and organisation of training for justice professionals regarding investment protection within the EU

FISMA/2022/LVP/0010

Collection of the existing literature and case law on intra-EU investment protection



Funded by the European Union

FISMA/2022/LVP/0010

 european.law

Investment Protection within the EU Desk Research – Summary

Introduction

The purpose of this report is to provide an overview of the key findings from the desk research conducted on Investment Protection within the EU and to present the collected data in a spreadsheet format. You can find the list of data collected in the following pages with links, and you can conduct a deeper search in the *excel file*, where you can also filter the content.

Methodology & Limitations

The desk research was conducted by reviewing relevant academic literature, EU reports, case law, and online resources. The research focused on substantive rules concerning protection of investment in intra-EU settings, under EU legal rules. The collection contains all case-law and documents cited in some of the most relevant reports from recent years concerning protection of cross-border investment in the EU namely the “Protection of intra-EU investment” Communication of 7 July 2018 and the report prepared for the Commission “Impact assessment study on investment protection and facilitation in the EU” of January 2021. In addition, a large number of academic contributions has been assessed to fill in any gaps in case law.

The collection *does not* contain all the case law on *enforcement* of intra-EU awards or injunction proceedings before national courts, as we understand these to fall outside the scope of the research. Similarly, the desk research does not include analysis of the Energy Charter Treaty, its modernisation, or its applicability to intra-EU ISDS.

The data collected was organized into a spreadsheet for easy analysis and reference. However, the spreadsheet could be made more accessible by someone with better expertise in Excel. Please note that when a cell contains a lot of text, as happens in this spreadsheet this text is no longer visible unless clicked on twice.

Finding:

The desk research revealed several key findings related to Investment Protection within the EU. Firstly, most academic literature concerning intra-EU investment protection, written in the wake of the *Achmea* decision concentrates specifically on the constitutional aspects of that case (and subsequent *Komstroy*, *PL Holdings* or *Micula* decisions). In other words, most academic contributions analyse either jurisdiction and admissibility of (ongoing) intra-EU arbitration cases or the enforcement of such awards, rather than substantive rules of EU law applicable to cross-border investments. In addition, another large portion of academic output explores the constitutional fundamentals lying behind EU investment policy (post 2009). Secondly, the case law relied on by the Commission or indeed the few but insightful academic contributions concerned with such EU rules, tends not to explicitly refer to cross-border investments but rather concerns fundamental freedoms most broadly. Thirdly, data collected indicated that while many do mention the role of the ECHR, not many explicitly work through the case law.

Conclusion:

The findings from the desk research highlight gap in research and understanding of protection of cross-border investment in the EU. The spreadsheet contains the detailed data collected during the research process and can be used as a reference tool for future stages of the current project.

Overview

1. Academic Literature:

Julien Berger: [International Investment Protection within Europe. The EU's Assertion of Control](#)

Marc Bungenberg and Stephan Hobe: [The Relationship of International Investment Law and European Union Law](#)

Sonsoles Centeno Huerta and Nicolaj Kuplewatzky: [On Achmea, the Autonomy of Union Law, Mutual Trust and What Lies Ahead](#)

Mel Cousins: [Legitimate Expectation and Social Security Law Under the European Convention of Human Rights](#)

Michael De Boeck: [EU Law and International Investment Arbitration. The compatibility of ISDS in Bilateral Investment Treaties \(BITs\) and the Energy Charter Treaty \(ECT\) with the autonomy of EU law](#)

Anna De Luca: [The Legal Framework for Foreign Investments in the EU: The EU Internal Market Freedoms, the Destiny of Member States' BITs, and Future European Agreements on Protection of Foreign Investments](#)

Angelos Dimopoulos: [EU Foreign Investment Law](#)

Richard Happ and Sebastian Wuschka: [EU Law and Investment Arbitration: Of Cooperation, Conflict, and the EU Legal Order's Autonomy](#)

Konstantina Georgaki: [Conflict resolution between EU law and bilateral investment treaties of the EU Member States in the aftermath of Achmea](#)

Juliane Kokott and Christoph Sobotta: [Investment Arbitration and EU Law](#)

Dominik Moskvan: [Is There an Alternative to Intra-European Bilateral Investment Treaties Framework under European Law?](#)

Dominik Moskvan: [Protection of Foreign Investments in an Intra-EU Context: Not One BIT?](#)

Francesco Montanaro: [The European Union and International Investment Law The Two Dimensions of an Uneasy Relationship](#)

Marta Nunes Vicente: [Property Rights and Legitimate Expectations under United States Constitutional Law and the European Convention on Human Rights: Some Comparative Remarks](#)

Mavluda Sattorova: [Investor Rights under EU Law and International Investment Law](#)

Emily Sipiorski: [The Need for Intra-EU Investment Protections](#)

Catharine Titi: [International Investment Law and the European Union: Towards a New Generation of International Investment Agreements](#)

2. Communication of the European Commission

[Communication of the Commission on Certain Legal Aspects Concerning Intra-EU Investment](#) [97/C 220/06]

[Action Plan on Building a Capital Markets Union](#) [COM(2015) 468 final]

[EU law: Better results through better application](#) [2017/C 18/02]

[Commission Interpretative Communication on the Acquisition of Farmland and European Union Law](#) [2017/C 350/05]

[The Goods Package: Reinforcing trust in the single market](#) [COM(2017) 787 final]

[Action plan on the Reinforcement of SOLVIT: Bringing the benefits of the Single Market to citizens and businesses](#) [COM(2017) 255 final]

[Mid-Term Review of the Capital Markets Union Action Plan](#) [COM(2017) 292 final]

[Welcoming Foreign Direct Investment while Protecting Essential Interests Communication](#) [COM(2017) 494 final]

[Protection of intra-EU investment](#) [COM(2018) 547 final]

3. Legislation

3.1. Directive

[88/361/EEC](#) Directive for the Implementation of Art. 67 of the Treaty

3.1. Regulation

[Regulation 1215/2012](#) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

[Regulation \(EU\) 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

4. Decision of the European Commission

[Micula Decision](#) (EU) 2015/1470

5. Case law

5.1. Court of Justice of the European Union

[C-44/79 Hauer](#), ECLI:EU:C:1979:290

[Joined Cases C-15/76 and C-16/76 France v Commission](#), ECLI:EU:C:1979:29

[C-102/81 Nordsee](#), ECLI:EU:C:1982:107

[C-182/83, Fearon v Irish Land Commission](#), ECLI:EU:C:1984:335

[C-157/85 Brugnoni](#), ECLI:EU:C:1986:258

[C-314/85 Foto-Frost](#), ECLI:EU:C:1987:452

[C-103/88 Costanzo](#), ECLI:EU:C:1989:256

[C-5/88, Wachauf](#), ECLI:EU:C:1989:321

[C-106/89 Marleasing](#) ECLI:EU:C:1990:395

[C-113/89 Rush Portuguesa](#), ECLI:EU:C:1990:142

[C-5/89 Commission v Germany](#), ECLI:EU:C:1990:320

[Joined Cases C-6/90 and C-9/90 Francovich](#), ECLI:EU:C:1991:428

[C-269/90 Technische Universität München](#), EU:C:1991:438

[Joined Cases C-143/88 and C-92/89 Zuckerfabrik, Süderdithmarschen](#) ECLI:EU:C:1991:65

[C-76/90 Säger](#), ECLI:EU:C:1991:331

[C-204/90 Bachmann](#), ECLI:EU:C:1992:35

[C-148/91 Veronica](#), ECLI:EU:C:1993:45

[C-19/92 Dieter Kraus](#), ECLI:EU:C:1993:125

[C-91/92 Faccini Dori](#), ECLI:EU:C:1994:292

[C-55/94 Gebhard](#), ECLI:EU:C:1995:411

[C-384/93 Alpine Investments](#), ECLI:EU:C:1995:126, paras. 29 to 31

[Joined Cases C-46/93 and C-48/93 Brasserie du Pêcheur and Factortame, ECLI:EU:C:1996:79 paras. 40 to 42](#)

[C-5/94 Hedley Lomas, ECLI:EU:C:1996:205](#)

[C-169/95 Spain v Commission ECLI:EU:C:1997:10](#)

[C-122/96 Saldanha, ECLI:EU:C:1997:458](#)

[C-309/96 Daniele Annibaldi v. Sindaco del Comune di Guidonia and Presidente Regione Lazio ECLI:EU:C:1997:631](#)

[C-265/95, Commission v France, “Spanish Strawberries” ECLI:EU:C:1997:595](#)

[C-24/95 Land Rheinland-Pfalz v Alcan Deutschland, ECLI:EU: 1997:163](#)

[C-54/96 Dorsch Consult, ECLI:EU:C:1997:413](#)

[C-10/97 and C-22/97 IN.CO.GE.'90, ECLI:EU:C:1998:498](#)

[C-200/96 Metronome Musik GmbH v Music Point Hokamp GmbH, ECLI:EU:C:1998:172](#)

[C-212/97 Centros, ECLI:EU:C:1999:126](#)

[C-224/97 Ciola, ECLI:EU:C:1999:212](#)

[C-255/97 Pfeiffer, ECLI:EU:C:1999:240](#)

[C-54/99 Association Église de Scientologie de Paris, ECLI:EU:C:2000:124](#)

[C-361/98 Italy v Commission, ECLI:EU:C:2001:29](#)

[C-208/00 Überseering, ECLI:EU:C:2002:632](#)

[C-367/98 Commission v Portugal, “Limosa” ECLI:EU:C:2002:326](#)

[C-483/99 Commission v France “Elf Aquitaine”, ECLI:EU:C:2002:327](#)

[C-388/01 Commission v Italy, ECLI:EU:C:2003:30](#)

[C-243/01 Gambelli, ECLI:EU:C:2003:597](#)

[C-327/00 Santex, ECLI:EU:C:2003:109](#)

[C-452/01 Ospelt, ECLI:EU:C:2003:493](#)

[C-167/01 Inspire Art, ECLI:EU:C:2003:512](#)

[C-198/01 CIF, ECLI:EU:C:2003:430](#)

[Case C-442/02 CaixaBank ECLI:EU:C:2004:586](#)

[C-17/01 Sudholz, ECLI:EU:C:2004:242](#)

[C-319/02 Manninen, ECLI:EU:C:2004:484](#)

[C-458/03 Parking Brixen, ECLI:EU:C:2005:605](#)

[C-213/04 Ewald Burtscher v Josef Stauderer, ECLI:EU:C:2005:731](#)

[C-266/03 Commission v Luxembourg, ECLI:EU:C:2005:341](#)

[C-174/04 Commission v Italy, ECLI:EU:C:2005:350](#)

[C-17/03 VEMW, ECLI:EU:C:2005:362](#)

[C-452/04 Fidium-Finanz, ECLI:EU:C:2006:631](#)

[C-506/04 Wilson, ECLI:EU:C:2006:587](#)

[C-310/04 Spain v Council, ECLI:EU:C:2006:521](#)

[C-370/05 Festersen, ECLI:EU:C:2007:59](#)

[C-281/06 Jundtv Finanzamt Offenburg, ECLI:EU:C:2007:816](#)

[C-341/05 Laval, ECLI:EU:C:2007:809](#)

[Joined Cases C-231/06 to C-233/06 Jonkman, ECLI:EU:C:2007:373](#)

[C-503/04 Commission v Germany, ECLI:EU:C:2007:432](#)

[C-380/05, Centro Europa 7, ECLI:EU:C:2008:59](#)
[C-210/06 Cartesio, ECLI:EU:C:2008:723](#)
[C-349/07 Sopropé, ECLI:EU:C:2008:746](#)
[C-276/07 Delay, ECLI:EU:C:2008:282](#)
[C-49/07 MOTOE, ECLI:EU:C:2008:376](#)
[C-347/06 ASM Brescia, ECLI:EU:C:2008:416](#)
[C-67/08 Block ECLI:EU:C:2009:92](#)
[C-169/07 Hartlauer, ECLI:EU:C:2009:141](#)
[C-201/08 Plantanol, ECLI:EU:C:2009:539](#)
[C-341/08 Petersen, ECLI:EU:C:2010:4](#)
[C-72/09 Établissements Rimbaud, ECLI:EU:C:2010:645](#)
[C-279/09 DEB, ECLI:EU:C:2010:811](#)
[Joined Cases C-188/10 and 189/10 Melki and Abdeli, ECLI:EU:C:2010:363](#)
[C-271/09 Commission v Poland, ECLI:EU:C:2011:855](#)
[Joined Cases C-372/09 and C-373/09, Josep Peñarroja Fa ECLI:EU:C:2011:156](#)
[C-400/08 Commission v Spain, ECLI:EU:C:2011:172](#)
[C-476/10 Pepic, ECLI:EU:C:2011:422](#)
[C-577/10 Commission v Belgium \("Limosa"\), ECLI:EU:C:2012:814](#)
[C-318/10 SIAT, ECLI:EU:C:2012:415](#)
[C-283/11, Sky Österreich GmbH v Österreichischer Rundfunk, ECLI:EU:C:2013:28](#)
[C-362/12 Test Claimants in the Franked Investment Income Group Litigation, ECLI:EU:C:2013:834](#)
[C-426/11 Alemo-Herron a.O. ECLI:EU:C:2013:521](#)
[C-315/13 De Clercq, ECLI:EU:C:2014:2408](#)
[C-553/12 P Commission v Greece \("DEI"\), ECLI:EU:T:2016:733](#)
[C-169/14 Sánchez Morcillo, ECLI:EU:C:2014:2099](#)
[C-69/14 Dragoş, ECLI:EU:C:2015:662](#)
[C-342/14 X-Steuerberatungsgesellschaft, ECLI:EU:C:2015:827](#)
[C-333/14 Scotch Whisky, ECLI:EU:C:2015:845](#)
[C-593/13 Rina Services, ECLI:EU:C:2015:399](#)
[C-83/14 CHEZ Bulgaria, ECLI:EU:C:2015:480](#)
[C-201/15 AGET Iraklis, ECLI:EU:C:2016:972](#)
[Commission v Hungary, ECLI:EU:C:2016:108](#)
[C-689/13 Puligienica, ECLI:EU:C:2016:199](#)
[C-78/16 and C-79/16 Pesce a.O., ECLI:EU:C:2016:428](#)
[Joined Cases C-458/14 and C-67/15 Promoimpresa, ECLI:EU:C:2016:558](#)
[C-57/15 United Video Properties Inc. v. Telenet NV ECLI:EU:C:2016:611](#)
[C-492/14 Essent Belgium, ECLI:EU:C:2016:732](#)
[C-106/16 Polbud, ECLI:EU:C:2017:804](#)
[C-685/15 Online Games Handels, ECLI:EU:C:2017:452](#)
[C-6/16 Eqiom, ECLI:EU:C:2017:641](#)

[C-64/16 Associação Sindical dos Juizes Portugueses, ECLI:EU:C:2018:117](#)
[C-284/16 Achmea, ECLI:EU:C:2018:158](#)
[Joined Cases C-52/16 and C-113/16 SEGRO and Horváth, ECLI:EU:C:2018:157](#)
[C-414/16 Vera Egenberger, ECLI:EU:C:2018:257](#)
[C-34/17 Donnellan, ECLI:EU:C:2018:282](#)
[C-612/15 Kolev, ECLI:EU:C:2018:392](#)
[C-230/18, PI v. Landespolizeidirektion Tirol, ECLI:EU:C:2019:383](#)
[C-109/20, Poland v. PL Holdings ECLI:EU:C:2021:875](#)
[C-741/19 Moldova v Komstroy](#)
[No. C-638/19 Commission v. European Food and Others \(Micula\) \(appeal pending\)](#)
[Joined Cases C-798/18 and C-799/18, Anie and Athesia ECLI:EU:C:2021:280](#)
[C-177/20 Grossmania ECLI:EU:C:2022:175](#)
[C-282/14 Stylinart Order, ECLI:EU:C:2014:2486](#)
[C-322/16 Global Starnet ECLI:EU:C:2017:985](#)
[C-526/14 Tadej Kotnik and Others v Državni zbor Republike Slovenije, ECLI:EU:C:2016:570](#)
[C-234/20, Satini-S ECLI:EU:C:2022:56](#)
[C-235/17 Commission v Hungary, “Usufruct over agricultural land” ECLI:EU:C:2019:432](#)
[C-155/21 Italy v. Athena Investment](#)

5.2. *Opinions of Advocates General*

[Singapore Opinion 2/15](#)
[Achmea Opinion of AG Wathelet](#)
[Opinion 1/17 \('CETA Opinion'\)](#)
[Opinion pursuant to Article 218\(11\) TFEU Draft modernised Energy Charter Treaty](#)

5.3. *General Court of the European Union*

[T-624/15, T-694/15 and T-704/15, European Food SA and Others v European Commission \(Micula\) ECLI:EU:T:2019:423](#)

5.4. *European Court of Human Rights*

[Werra Naturstein GmbH & Co KG v Germany \(Application no. 32377/12\)](#)

5.5. *National Courts*

[Bundesgerichtshof \(BGH\) Federal Court of Justice – Achmea case](#)
[District Court of the Hague – RWE/UNIPER v. Netherlands](#)
[Higher Regional Court of Berlin / Federal Court of Justice – Germany v. Mainstream Renewables and others](#)
[Higher Regional Court of Cologne / Federal Court of Justice – The Netherlands v. Uniper SE](#)
[Higher Regional Court of Cologne / Federal Court of Justice – The Netherlands v. RWE AG](#)

6. **Other sources**

6.1. *Reports*

[UNCTAD Fact Sheet on Intra-European Union Investor-State Arbitration Cases](#)

[European Commission Impact assessment study on investment protection and facilitation in the EU](#)

[European Parliament Report EU international investment policy: Looking ahead](#)

[European Commission: EU Justice Scoreboard 2022](#)

[Council of Europe Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights – Protection of property](#)

6.2. Agreement

Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union [[OJ 2020 L 169](#)]

6.3. Declaration of Member States

[Member States' declaration of the Representatives of the Governments of the Member States of 15 January 2019 on the Legal Consequences of the Achmea Judgment and Investment Protection](#)