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The Regime of International Investment in the Light of New EU Economic Agreements

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Abstract

By the term "regime" of international investment, we mean the fundamental principles and rules that constitute the regulatory framework for the investment of nationals or companies of one State in the territory of another. This regime comprises two components, the first of which relates to the establishment of foreign investment / investors in the host State and the second, and most important, covers their subsequent treatment by its public authorities. Such principles and rules are laid down in the new EU economic agreements, some of which constitute comprehensive Free Trade Agreements containing a chapter on foreign investment establishment liberalization (EU-Japan, EU-South Korea, EU-Australia, EU-New Zealand), others which also have comprehensive scope, contain a chapter on both investment liberalization and investment protection (EU-Canada CETA, EU-Mexico) while others are stand-alone investment agreements as they exclusively rule the protection of the investments of one party's nationals or companies in the territory of the other (EU-Singapore IPA, EU-Vietnam IPA, EU-Japan IPA). These EU agreements contain reformed investment protection rules that are not present in the existing Bilateral Investment Treaties (BITs). A key common feature of the above agreements, especially in the field of protection/treatment of foreign investment/investors, is the establishment of rules seeking to clarify some critical concepts in order to reduce the margins of discretion of both parties and their investors in the interpretation and application of rules adopted. In this context, the texts clarify, first of all, the notion of investment and investor to make clear who are entitled to invoke the provisions of the agreements to claim protection against the practices of the authorities of the host Party. It is clear that the so-called 'shell' or 'mailbox' companies are not protected. The agreements also define more clearly

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and precisely on the one hand the concept of fundamental standards of treatment (non-discrimination, fair and equitable treatment, physical security, protection against expropriation, possibility to transfer and repatriate funds relating to an investment) and on the other hand the cases in which the authorities of the Contracting Parties are in breach of these standards. The aim is to avoid unfounded complaints against measures which do not, however, constitute a breach by the authorities of the obligations arising from the provisions of the agreements. The pursuit of creating a secure legal environment for foreign investors and their investments ultimately involves the creation of a permanent, objective, independent and impartial dispute resolution system.

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1. Introduction

Since the mid-2000s, the EU has implemented a strategy for negotiating global economic agreements with its most important partners in the context of the international trade system. These agreements also covered the liberalization of the establishment in each party's territory of the investments/investors of the other party but not the treatment post establishment. Following the Lisbon Treaty, the EU implemented a comprehensive policy on international investment that would include their protection too. In this context, it has concluded two categories of agreements. The first includes comprehensive agreements containing provisions on foreign investment establishment or on both establishment and protection. The second includes the so called stand-alone investment agreements as they exclusively rule the protection of the investments of one party's nationals or companies in the territory of the other. The object of the study is to examine the fundamental provisions of the above agreements and in particular the rules establishing the standard of treatment-protection of foreign investments and investors.

2. The distinction of new generation EU agreements in function of their scope

Since the mid-2000s, the European Commission has set as EU main goal in the field of international economic relations, the creation and maintenance of open markets worldwide both in the field of trade in goods and services and in the area of investment (Commission, 2006). Achieving this goal is particularly important for the EU, given that it is not only the world's largest exporter and importer of goods and services taken together, but also the largest foreign direct investor and the most important destination for foreign direct investment (FDI) (Commission, 2007).
The realization of this objective was based on the implementation of a strategy oriented mainly to the conclusion of new generation global bilateral free trade

agreements with third countries (Rigod, B. 2012). It is important to stress that this strategy should have developed as a complement to the efforts for trade liberalization in the WTO multilateral framework. In other words, to boost the EU's capacity to benefit from trade and investment, the Commission has developed an ambitious bilateral agenda complementing EU's engagement at the principles and rules of WTO agreements (Commission, 2010). The aforementioned global agreements contain a chapter on investment. However, the strategic objective of opening up international markets is not pursued only through the conclusion of such agreements. Besides these, the EU concluded with third countries agreements covering exclusively investment protection issues.

2.1 The comprehensive agreements containing a chapter on investment

The EU has concluded or is negotiating free trade agreements with most important economic partners across all continents such as Canada, Japan, South Korea, the Mercosur, Central American countries, Singapore, Vietnam, Australia, New Zealand, Peru, Colombia, and Mexico. In terms of content, the new agreements should be comprehensive and ambitious in their coverage, aiming at the highest possible degree of liberalization.

They are not limited to import duties, the importance of which has been reduced, but also address issues such as regulatory and technical barriers to goods, services and investment, intellectual property rights, public procurement, competition, innovation protection, sustainable development (labor standards, environmental protection) and other important issues. About fifteen years ago, trade liberalization agreements covered a quarter of the EU's foreign trade. Today, more than a third of economic transactions with third countries are governed by such agreements. Upon completion of all negotiations with the trading partners, two-thirds of the aforementioned transactions will be conducted in accordance with the rules of the new liberalization agreements. This is by far the most ambitious commercial agenda in the world (Commission, 2015).

Given the large increase in capital movements and FDI, since about half of global trade now takes place between subsidiaries of multinational corporations, it was crucial to establish rules that will ensure access to investment markets. These agreements covered the liberalization of access to the market of one part for investments and investors of the other part but not the post-establishment treatment. Regarding investment protection, the Bilateral Investment Treaties (BITs) signed by each EU member with third countries were implemented. Following the entry into force of Lisbon Treaty, on 1-12-2009, the EU implemented a comprehensive policy on international investment including their protection too and sought to include in the current trade negotiations the issue of investment protection along with their liberalization (Gallo, D. and Nicola, F. 2016).

Some of new EU comprehensive Agreements such as the EU-Japan EPA[3], EU-Vietnam FTA[4], EU-Singapore FTA[5], EU-South Korea FTA[6], EU-Australia FTA[7], EU-New Zealand FTA[8] and EU-Mercosur trade agreement[9] contain a chapter on foreign investment establishment liberalization. Others which also have comprehensive scope, contain a chapter on both investment liberalization and investment protection. This is the case for EU-Canada CETA[10] (it provisionally entered into force on 21 September 2017, so most of the CETA now applies) (Levesque, C. 2013) and new EU-Mexico agreement[11].

2.2 The Investment Protection Agreements (IPA)

The Lisbon Treaty has, since its entry into force on 1-12-2009, expanded the scope of the EU's common commercial policy (Larik, J. 2015). Thenceforth, this policy covers the foreign direct investment sector. The Article 207 TFUE confers exclusive competence to the EU to negotiate and conclude agreements regulating comprehensively the area of foreign direct investment (Herve, A. 2015). The object of the new agreements was the establishment of rules that will ensure not only the liberalization of access to the market, the initial entry and establishment, but also the strengthening of the protection of investments and investors post-establishment. However, the Opinion 2/15 of the ECJ on the free trade agreement with Singapore caused a fundamental change in the context of concluding new agreements (Kleimman, D. 2018). According to this Opinion, the EU has exclusive competence for the conclusion of global economic agreements in all areas except the investment area where it has shared competences with its Member States (Kleimman, D. and Gesa, K. 2018). Following this evolution, it was decided from now on that two separate agreements would be concluded. One agreement will cover mainly trade in goods and services and all trade-related issues for which exclusive power is recognized in the EU. The other agreement will only cover issues related to the post-

[3] The EU-Japan Economic Partnership Agreement entered into force on 1-2-2019. Council Decision (EU) 2018/1907 of 20 December 2018 on the conclusion of the Agreement between the European Union and Japan for an Economic Partnership, OJ L 330, 27.12.2018. For the text of the EPA, see https://trade.ec.europa.eu/doclib/press/index.cfm?id=1684.

[4] Commission, Proposal for a Council Decision on the conclusion of the Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam, COM/2018/691 final, https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1551257348905&uri=CELEX:52018PC0691.

[5] Council Decision (EU) 2019/1875 of 8 November 2019 on the conclusion of the Free Trade Agreement between the European Union and the Republic of Singapore, OJ L 294, 14.11.2019, https://data.consilium.europa.eu/doc/document/ST-7972-2018-INIT/en/pdf

[6] 2011/265/EU: Council Decision of 16 September 2010 on the signing, on behalf of the European Union, and provisional application of the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, OJ L 127, 14.5.2011, p. 1–1426.

[7] The initial text proposals tabled by the EU side are available at: https://trade.ec.europa.eu/doclib/press/index.cfm?id=1865.

[8] The initial text proposals tabled by the EU side are available at: https://trade.ec.europa.eu/doclib/press/index.cfm?id=1867.

[9] The text of the Title *Trade in Services and Establishment* is available at: https://trade.ec.europa.eu/doclib/docs/2019/july/tradoc_158159.%20Services%20and%20Establishment.pdf

[10] Regarding CETA text, see https://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/.

[11] https://trade.ec.europa.eu/doclib/docs/2018/april/tradoc_156812.pdf

establishment treatment regime for investors and their investments, to their protection on the territory of the Host Party. This second category therefore includes Investment Protection Agreements (IPA). So far this is the case for EU-Singapore IPA[12], EU-Japan IPA (still under negotiation) and EU-Vietnam IPA[13]. Those IPAs once in force will replace the bilateral investment treaties (BITs) concluded in the past between each of these third countries and each of EU Member States.
This separation has serious implications affecting the adoption process (Council of the EU, 2018). The agreements of the first category falling entirely within the EU's exclusive competence, are approved at EU level by the Council and the European Parliament and do not require ratification by Member States in order to enter into force. Investment Protection agreements, which cover areas of shared competence, will continue to require approval at the EU level, as well as ratification at national level. In other words, an IPA must also go through the relevant national ratification procedures in all Member States in order to enter into force. The time frame for implementing this agreement is therefore much longer.

3. The legal framework of investment establishment

Several EU global agreements contain provisions ensuring the freedom of establishment allowing investors of a Party to have access to the market of the other Party in order to pursue an economic activity (EU-Canada CETA, EU-Japan EPA, EU-Singapore FTA, EU-Vietnam FTA, EU-South Korea FTA, EU-Australian FTA and EU New-Zealand FTA).

3.1 The notion of establishment

The establishment consists in the creation or acquisition of a legal person, in particular through participation in the capital or creation of a branch or a representative office in one or in the other contracting party, respectively, for the purpose of establishing or maintaining lasting economic links. The beneficiary of the right of establishment is any entrepreneur of a part, namely any natural or legal person of a part who wishes to create/acquire or is creating/is acquiring or has created/acquired a business in the territory of the other part seeking the above purpose.

3.2 The regime of establishment liberalization

The scope of the provisions concerning the liberalization of investment, covers any measure fulfilling certain conditions.
Firstly, this measure must be taken by a contracting party. In particular, the above

[12] It was signed on 19 October 2018. 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, https://eur-lex.europa.eu/resource.html?uri=cellar:55d54e18-42e0-11e8-b5fe-01aa75ed71a1.0002.02/DOC_2&format=PDF#page=2

[13] The text of the IPA is available at:
https://eur-lex.europa.eu/legal content/EN/TXT/?uri=CELEX:52018PC0693

provisions shall apply to measures adopted not only by the central administration authorities but also by regional or local governments or authorities as well as non-governmental organizations in the exercise of the powers assigned to them by central, regional or local authorities.

Secondly, the measure taken in accordance with the above, must regulate the establishment or operation of economic activities by:

a) The entrepreneurs of the other party.
b) The covered companies, namely those created or acquired, directly or indirectly, by an entrepreneur of a contracting party on the territory of the other party, which exist on the date of entry into force of the agreements or are established later in accordance with applicable law.

The concept of economic activity includes any service or activity of an industrial, commercial or professional nature as well as the activities of craftsmen, with the exception of the services provided or the activities performed in the exercise of governmental authority.

In order to facilitate the access of each other's companies to the market of the other, the parties undertake commitments similar to those deriving from the General Agreement on Trade in Services (GATS). Specifically, agreements prohibit the authorities of a Party to maintain or adopt, in respect to market access through establishment or operation by an operator or company of the other, measures which impose restrictions or set specific conditions.

In particular, it is not possible to impose restrictions on the number of the other party companies that may exercise the right of establishment. This prohibition applies to restrictions that take one of the restrictively mentioned forms, such as exclusive rights, monopolies, numerical quotas or the requirement for an economic needs test. Thus, e.g., Japan or Canada cannot limit the number of EU companies that will be allowed to establish in their territory in order to exercise an economic activity, by providing for a monopoly regime in certain sectors. They also cannot depend the number of EU companies that will be given access to their market by the existence of economic needs to be met.

Concerning market access through establishment of an investor of another Party, no host party may adopt or maintain measures imposing limitations on the total value of transactions or assets in the form of numerical quotas or the requirement of an economic needs test.

Measures imposing limitations on the participation of foreign capital in enterprises operating on the territory of the host country are prohibited. In the context of this prohibition, a party may not determine α maximum percentage of shares that may be held by foreigners, nor impose a restriction on the total value of foreign investment that may be made.

Moreover, a contracting party is not allowed to impose limitations, in form of numerical quotas or of requirement for an economic needs test, on the total number of natural persons that may be employed in a particular sector or that a company can employ and who are necessary for carrying out an economic activity and deal directly with this.

Finally, the prohibition applies to measures which provide for specific types of legal entities or joint ventures through which an operator of the other party can exercise an economic activity.

4. The clarification of rules related to investment protection post-establishment

A critical issue related to the implementation of investment protection rules is the determination of their scope. During the negotiations, the EU and its partners sought to clearly define which forms of economic activity are investments and are protected by the agreement's provisions. The parties also sought to clarify which persons are investors and beneficiaries of the standards of treatment established by the agreements and therefore are entitled to access the investor-state dispute solution system.

4.1 The delimitation of protection rules scope: the notion of foreign investment

As for the notion of investment, it includes any type of asset that an investor owns or controls, directly or indirectly (asset-based definition). It is important to note that the agreements specify certain characteristics that this asset must satisfy in order to fall within the scope of their provisions and benefit from the protection regime they establish. More specifically, it should have the characteristics of an investment, mainly a certain duration, commitment of funds or other resources, benefit or profit expectation or assumption of risk.

The EU Agreements list certain forms that investments can take. Specifically, an investment can take the following forms:

a) An enterprise.
b) Shares, stocks and other forms of equity participation in an enterprise, including rights derived therefrom.
c) Bonds, debentures, and loans and other debt instruments, including rights derived therefrom.
d) Other financial assets, including derivatives, futures and options.
e) Tangible or intangible, movable or immovable property as well as any other property rights, such as leases, mortgages, liens, and pledges.
f) Turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts.
g) Intellectual property rights.
h) Claims to money or to other assets, or to any contractual performance having an economic value.

The returns that are invested should be treated as investments too. The term "returns" means all amounts derived from the investment or reinvestment, including gains, rights and interest or other fees and payments in kind.

Taking into account the above elements, we could note that the definition of

investment is based on economic interests and values. This approach leads to a wide scope, since it not only covers enterprises and equity participation in an enterprise, but also securities interests arising from concessions contracts, intellectual property rights and claims for money or claims for fulfillment under a contract. Therefore, the definition of the investment does not only cover long-term FDI but also includes short-term portfolio investments, even if they are purely speculative.

As an investment covered by the provisions of the agreements (covered investment) is considered, as far as a contracting party is concerned, the investment in the territory of that party, which was carried out in accordance with the legislation in force in this party at the time of its implementation, is owned or controlled directly or indirectly by an investor of the other Contracting Party and exists on the date of entry into force of the agreements as well as the investment made or acquired subsequently. Investments that were not made in accordance with the law in force in the host party at the time of their implementation are excluded from the scope of application of protection rules (clean hands doctrine).

4.2 The definition of persons entitled to claim protection against host party measures: the notion of foreign investor

It is also necessary to define the concept of the investor because the EU agreements provide protection only for the persons who have the status of an investor as defined by special provisions.

This status is mainly recognized to a natural person or an enterprise of a Party (other than a branch or representative office), who has made an investment in the territory of the other Party. The use of the term "has made" is based on the fact that the protection rules cover the operation of the investment after the investor's initial establishment. By natural person we mean, in the case of the EU, a natural person who has the nationality of one of the EU members states in accordance with their respective laws.

An enterprise of a Party is:

a) An enterprise engaged in substantive business activities in the territory of the Party where it has legally established or
b) A company established or organized under the laws of that Party and directly or indirectly owned or controlled by a natural person of that Party or by an enterprise referred to above.

In other words, to become a beneficiary of the protection regime as an EU investor, an enterprise (moral person) must not only have been established under the law of a member state and have its own registered office as well its central administration in its territory but also must undertake substantial business activities in this territory (Dimopoulos, A. 2012). The term "substantial business activities" is equivalent to the term laid down in Article 54 TFUE "principal place of business".

From the above it can be concluded that the protection provided by the agreements to investors does not extend to so-called "shell" or "mailbox" companies. A necessary condition for an enterprise to be attributed the status of an investor is that it carries out substantial business activities in the territory of one of the contracting

parties.
However, it has not been sufficiently clear what we mean by *substantial business activities* so it is up to the tribunal of investment dispute resolution system to determine whether the activities of a company in one of the parties may be considered without doubt essential (important), in order to qualify this company as an investor of that party.

4.3 The new precise standards on investment protection

The new EU agreements contain reformed investment protection rules that are not present in the existing BITs with third countries. They provide guarantees that the best available treatment is accorded to EU investors when investing in the territory of its partners. In addition, the agreement will ensure a high level of investment protection while preserving each party's right to regulate on their territory to pursue legitimate public policy objectives such as the protection of health, safety of the environment, social protection or consumer protection or promotion and protection of cultural diversity. The term "protection standards" includes some basic principles of treatment that public authorities are committed to respect and which a foreign investor may rely on when deciding to invest in a particular country.

4.3.1 The principle of non-discriminatory treatment

The EU had emphasized the need for non-discriminatory treatment to continue to be a key element in EU investment negotiations. It should be stressed that the fundamental clauses on non-discriminatory treatment and in particular the national treatment clause and the most-favored nation (MFN) clause would cover both the establishment of the foreign investment and the operation of the investment post-establishment.
Each of the parties shall provide to the investors of the other party and to the covered investments treatment no less favorable than the treatment accorded in similar circumstances to its own investors and investments they make (national treatment) as well as to investors and their investments in any third country (MFN treatment), concerning the operation, management, maintenance, exploitation and sale or other disposal of their investments in the territory of the first party. The new agreements establish provisions introducing exceptions to the principle of non-discriminatory treatment, which are in accordance with the TFUE Articles 51 and 52.

4.3.2 The Clarification of the standard of Fair and Equitable Treatment

This standard must be clearly defined so as to limit the margin of tribunals to interpret in a way that assigns either too many or too few rights to investors. Its broad interpretation by the decisions of arbitration courts in the past have turned this standard into an effective "weapon" against the laws and other regulatory measures applied by the host countries. In particular, this standard must specify exactly the actions that the host party is not allowed to take in the context of the treatment accorded to foreign investor and his investment.

The agreements impose on each party the obligation to provide Fair and Equitable Treatment for the covered investments and for the investors who made them. A party does not comply with this fundamental obligation in case it adopts measures which constitute:

a) Denial of justice in a civil, criminal or administrative procedure.
b) Substantial infringement of the appropriate law enforcement, including substantial infringement of the principle of transparency in a criminal or administrative procedure.
c) Conduct obviously arbitrary.
d) Abusive treatment of investors including practices such as coercion, pressure, and harassment.
e) Form of targeted clearly unjustified discrimination based on criteria such as gender, race or religion.
f) Breach of the legitimate expectations of the investor which had grown by specific and clear (unambiguous) promises by the host party and on which he had relied in order to be persuaded, to be motivated to proceed with his investment.

Therefore, they EU agreements set out a closed list of practices of the host party that explicitly constitute a breach of FET, making it clear when this party's authorities violate or not the obligation to provide this treatment.

4.3.3 The clarification of the content of the standard of Full Protection and Security

The EU agreements impose on each Contracting Party the obligation to accord to the covered investments made by the investors of the other party, Full Protection and Security. This term refers to the obligations of the host party only in respect of the physical security of investors and covered investments. Therefore, non-violent demonstrations, peaceful occupations of factories or strikes may in no case be considered as a violation of the standard of full protection and security, even if they have an impact on the daily activities of a productive unit (e.g., a factory).

4.3.4 The clarification of the legal framework ruling expropriation of foreign investment

Another crucial issue on which the EU has sought to establish clearly formulated rules, is indirect expropriation. This is one of the most controversial concepts in the investment protection system. Indirect expropriation exists in case that a measure does not directly expropriate the property but has this effect. An act of indirect expropriation may be the revocation of the license required for a factory to operate. The new investment agreements should provide for a detailed set of rules that will guide tribunals on how to judge whether a measure taken by the host party constitutes indirect expropriation. This goal was achieved in the EU agreements.

The parties reserve the right to nationalize or expropriate a covered investment either directly or indirectly, by taking a measure having equivalent effect to a

nationalization or expropriation if the following conditions are met:

a) They act for the satisfaction of the public interest.
b) In accordance with the principles of proper implementation of the law.
c) In a manner that does not introduce discrimination.
d) By paying with rapid and effective procedures adequate compensation.

For the first time, the EU agreements text contains a detailed wording aimed at clarifying the notion of the term "indirect expropriation", in order to prevent investors' claims against measures taken by the host party to pursue public policy objectives. A foreign investor will no longer be able to found his claim for compensation in the reduction of his profits caused by a regulation established by the host party for the protection of its public interest. In other words, investors cannot challenge host party's legitimate public policy measures.

Firstly, the agreements provisions clarify the cases of direct expropriation and those of indirect expropriation. Direct expropriation occurs when an investment is nationalized or otherwise directly expropriated through the official transfer of titles (ownership) or definitive seizure. Indirect expropriation results from a measure or set of measures taken by the host party, which have an effect equivalent to that of direct expropriation, only when there is an investor substantial deprivation of fundamental property rights associated to his investment, including the right to use, to exploit, to dispose its investment without an official transfer of property titles or a definitive seizure.

Secondly, it becomes mandatory to conduct a step-by-step investigation to determine whether a measure adopted by the host party constitutes indirect expropriation. The object of the investigation is mainly the economic impact of the measure taken, its duration and its nature. However, it is clear that the mere fact that the measure adopted by the host party increases the cost for an investor, does not imply the existence of indirect expropriation. It is clarified that the measures taken by a host party to achieve the legitimate aim of protecting the public interest, e.g., for the protection of health, safety of the environment and which do not introduce discrimination, do not constitute indirect expropriation unless there are rare cases such as when a measure is clearly excessive in relation to the objective pursued.

4.3.5 The possibility to transfer and repatriate funds relating to an investment

The EU agreements contain a special transfer clause according to which each contracting party allows to the other party's investors the unimpeded transfer without unjustified delay, in a freely convertible currency, of various types of funds related to their investment.

These transfers include:

a) Capital contributions, such as principal and additional resources for the purpose of maintaining, developing or increasing the investment.
b) Profits, dividends, interest, capital gains, payments, as well as other types of returns or amounts resulting from the covered investment.

c) Revenues from the sale or liquidation of all or part of the covered investment.
d) Payments made under a contract concluded by the investor, including payments made under a loan agreement.

Essentially it is a provision designed to ensure the free movement of any kind of capital related to investments.

However, each party has the possibility to temporarily adopt the absolutely necessary safeguards measures affecting the transfer of capital related to the investment when, in exceptional cases, capital movements cause or threaten to cause serious difficulties in the implementation of its monetary policy or foreign exchange policy. The validity of these measures may not exceed six months. In particular, the EU's decision to implement such measures may be based on the need to protect the functioning of the Economic and Monetary Union. In addition, any party may, in accordance with the conditions laid down, adopt or maintain restrictive measures regarding, inter alia, the transfers related to covered investments if it faces or is threatened with serious difficulties in the balance of payments as well as serious external financial difficulties. In any case, these restrictive measures must be absolutely necessary to achieve the intended purpose and not be a means of arbitrary or unjustified discrimination.

4.3.6 The party's commitment to compensate for losses in certain exceptional circumstances

The provisions on investment protection provide for the compensation for the losses suffered by covered investments made by investors of a Party, due to armed conflict, social unrest, civil war, emergency, or natural disaster in the territory of the host party. Each Party shall accord to investors of the other Party whose covered investments suffer losses owing to one of the exceptional circumstances mentioned above, treatment no less favorable than that accorded to its own investors.

5. The establishment of a new investment court system: in search of balance between protecting investors and safeguarding the right of a state to regulate

A necessary element of a legal framework ensuring a stable, predictable and favorable investment environment is the existence of a dispute settlement system between foreign investors and host states. In particular this system is necessary for the effective enforcement of the protection accorded to investors. It is therefore indisputable that the provisions on dispute settlement are closely related to the protection of foreign investors.

The agreements seek to establish a clear framework and strict conditions for investors to make complaints under the dispute settlement system. The aim is to ensure the enforcement of investment protection standards and prevent abuse by investors.

The new agreements mark a radical reform of the framework ruling investment disputes resolution. They abandon the old and traditional Investor to State Dispute Settlement (ISDS) approach established by the existing BITs. Instead, they establish a fairer, more transparent and institutionalized system for the investment disputes settlement. They set up an Investment Court System (ICS) (Karydis, G. 2019).

In particular, the first fundamental element of this new system is the establishment of independent, impartial and permanent investment Tribunals, inspired by the general principles governing the functioning of public judicial systems in each contracting party (EU, its Member States and third countries), as well as and international courts (International Court of Justice, European Court of Human Rights) (Munari, F. and Cellerino, C. 2015).

Secondly, according to clarification introduced by the new agreements, only disputes arising out of the breach of specific provisions of the agreements fall within the scope of the investment dispute settlement system. In particular, the recourse to this system is possible only for breach of investment protection provisions but it does not extend to issues related to the market access (establishment). An investor of a party may submit to the tribunal established under the dispute resolution system a claim for breach by the other party of the obligation:

a) To provide fair and equitable treatment as well as full protection and security.
b) To comply with provisions on expropriation or free transfer.

In addition, the members of these investment Tribunals will be appointed by the contracting parties (the EU Union and each of its partners) in advance for a fixed term and must meet strict standards of independence and integrity. The agreements provide for strict ethical rules for these persons in order to ensure their independence, impartiality, and the absence of conflict of interest. Compliance with a binding code of conduct is a basic obligation of the members of the Courts.

It is also particularly important that these agreements:

(a) Include an appeal mechanism that makes it possible to correct errors and will contribute to the coherence of the decisions of the courts of first instance,

(b) Contain provisions against abusive claims. These provisions safeguard each party against potential abuses of the system, mainly through the prohibition of multiple and parallel claims.

(c) Introduce the loser-pays principle concerning the allocation of procedural costs.

The ultimate goal of the parties is to set up a Multilateral Investment Court that will replace the bilateral dispute resolution systems established by the bilateral agreements under consideration.

6. CONCLUSIONS

From the previous analysis, it is clear that both the new EU comprehensive agreements and the Investment Protection Agreements provide for reformed protection rules creating a more predictable and secure legal environment for investors of the contracting parties. Especially provisions on the new Investment Court System (ICS) represent a significant step forward from the traditional

approach existing in most of the Bilateral Investment Treaties worldwide. They ensure a high level of protection for investors, while fully preserving the right of governments to regulate and pursue public policy objectives such as the protection of health, safety of the environment.

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