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**“Provisional Application of EU Free Trade Agreement Investment Chapters and Conflicting Aspects with International Law”**

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## **List of Abbreviations**

BIT	Bilateral Investment Treaty
CETA	European Union- Canada Comprehensive Economic and Trade Agreement
CJEU	Court of Justice of the European Union
EUSFTA	European Union – Singapore Free Trade Agreement
FDI	Foreign Direct Investment
FTA	Free Trade Agreement
ICT	Investment Court System
ILC	International Law Commission
ISDS	Investor-State Dispute Settlement
MIC	Multilateral Investment Court
MIT	Multilateral Investment Treaty
MS	Member State
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
VCLT	Vienna Convention on Law of Treaties

## I. State of the Art

Enforcement of the Treaty of Lisbon on 1<sup>st</sup> of December 2009, has marked the changes in the exclusive competences of the European Union (EU). The outcomes, which followed these developments have been subject of controversial policy discussion for several decades. As suggested by *Basedow* the year of 2009 should have been marked as the winning date for the Commission, which had been fighting since 1970s to “push for an extension of EU’s role and competences” in this field of global economic governance.<sup>1</sup> The very first official “Working Group VII” of the European Union Convention was commenced on 23 April 2003. The draft chapter on “external actions” was one of the most highly debated and controversial one, which received some of 1000 amendments, while additional 100 amendments were made to the Common Commercial Policy Chapters. Several MSs insisted removal of the Foreign Direct Investment (FDI) reference to the amendments.<sup>2</sup> Clearly, developments in relation with new amended version of the “EU Constitution” was subjected to great discussion in the legal scholarship. Where the future legal issues connected with the changes in the competences of the EU were addressed.<sup>3</sup>

When addressing the stages of development in the legal scholarship one should differentiate between the first and second halves of the ongoing decade. Changes in investment policies in the EU has heavily entangled the theory and practice with each other. EU Commission started negotiating new Free Trade Agreements (FTA) (which have been slowly evolving to resemble final EU envisioned structures)<sup>4</sup> around the globe right after the enforcement of the TFEU. However, only some scholars<sup>5</sup> endeavoured to address the implications following these changes, which have found practical applicability nowadays, when overlooking the development in the CJEU Case law.<sup>6</sup> Moreover, the Commission’s commitment<sup>7</sup> to include modified investment-dispute resolution system in every FTA has been made only in 2015,<sup>8</sup>

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<sup>1</sup> Robert Basedow, “A Legal History of the EU’s International Investment Policy,” *The Journal of World Investment & Trade*, September 28, 2016, 744, <https://doi.org/10.1163/22119000-12340011>.

<sup>2</sup> Basedow, 761.

<sup>3</sup> Ahmad Ali Ghouri, ed., *Interaction and Conflict of Treaties in Investment Arbitration*, International Arbitration Law Library 32 (Alphen aan den Rijn: Wolters Kluwer Law & Business, 2015), 151.

<sup>4</sup> “Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Towards a Comprehensive European International Investment Policy,” July 7, 2010. Brussels, Com 343 Final, (7 July 2010) : pp. 9-10.

<sup>5</sup> Basedow, Johann, “The European Union’s International Investment Policy Explaining Intensifying Member State Cooperation in International Investment Regulation.” PhD diss., The London School of Economics and Political Science (LSE), 2014.; Dickson, Moses Oruaze, “Rebalancing international investment agreements in favour of host states: Is it time for a regional investment court?,” *International Journal of Law and Management* 60, no. 2, 2018, pp. 452-469; Jemielniak, Joanna; Pérez, Aida Torres (Editor), “Commercial stakeholders in international economic dispute resolution and the issue of adjudicatory independence”, *Maastricht Journal of European and Comparative Law*, Vol.24 (4), August 2017, pp.582-601.

<sup>6</sup> Opinion 2/15 of the Court (Full Court), No. ECLI:EU:C:2017:376 (CJEU May 16, 2017); Opinion 1/17 of the Court (Full Court), No. ECLI:EU:C:2019:341 (Court of Justice of the European Union April 30, 2019).

<sup>7</sup> Catharine Titi, “International Investment Law and the European Union: Towards a New Generation of International Investment Agreements,” *European Journal of International Law* 26, no. 3 (August 1, 2015): 642, <https://doi.org/10.1093/ejil/chv040>.

<sup>8</sup> *Supra Note* 11.

and once again upheld in 2017. Integrating investment protection chapters in the FTAs from legal policy aspect marks the novelty and subjects these new generation FTAs to fall under the special agreement category, which are one of the first of their kind with significant impacts on the relationship between the European Union and Public International Law, especially in the field of International Investment Law.

The decision of the CJEU in Opinion 2/15<sup>9</sup> substantially changed the dynamics, due to the fact that it raised the concerns which have been unfamiliar for the practice of public international law up until now. While numerous scholarly works<sup>10</sup> have been dedicated to the implications following the new structure of CETA, only some scholars such as Ghouri<sup>11</sup>, Koutrakos<sup>12</sup> and some few others<sup>13</sup> have noted in their publications, that it was only a “matter of time” before it became clear that changes with the EU competences within the field of investment policies would incur implications between the EU and International law obligations of the MSs. Some other scholars such as Kokott and Sobota,<sup>14</sup> although noting that from public international law the EU law is regarded as the regional law, did not endeavor to further explore compatibility of the changes in the EU law with the International commitments of the MSs. They stated that due to the fact that the earlier investment treaties are substituted with the new ones embodied in the FTAs, there is no conflict of international obligations of MSs with the EU law.<sup>15</sup> However, finding in the Opinion 2/15 of the CJEU resulted the chapters on investment in CETA to have “partial legitimacy” and for this international agreement became subject to provisional application, which in itself was the result of the political trade-off<sup>16</sup> for the vote of region of Wallonia in Belgium in exchange for the reference<sup>17</sup> to the CJEU for the opinion regarding the substantive compatibility of the investment dispute settlement mechanisms embodied in the CETA with the EU law. Which has been

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<sup>9</sup> *Opinion 2/15*.

<sup>10</sup> Mestral, de. Armand, "Negotiating CETA with the European Union and Some Thoughts on the Impact of Mega-Regional Trade Agreements on Agreements Inter Partes and Agreements with Third Parties", In *European Yearbook of International Economic Law 2017*, pp. 437-455. Springer, Cham, 2017; Dolle, Tobias, and Bruno G. Simões. "Mixed Feelings about “Mixed Agreements” and CETA's Provisional Application", *European Journal of Risk Regulation* 7, no. 3, 2016, pp. 617-622.; Dickson-Smith, Kyle Dylan, "Does the European Union Have New Clothes?: Understanding the EU's New Investment Treaty Model", *The Journal of World Investment & Trade* 17, no. 5, 2016, pp. 773-822.

<sup>11</sup> Ghouri, *Interaction and Conflict of Treaties in Investment Arbitration*, 174–75.

<sup>12</sup> Panos Koutrakos, “The Autonomy of Eu Law and International Investment Arbitration,” *Nordic Journal of International Law* 88, no. 1 (March 11, 2019): 42, <https://doi.org/10.1163/15718107-088010003>.

<sup>13</sup> Basedow, Johann, "The European Union's International Investment Policy Explaining Intensifying Member State Cooperation in International Investment Regulation." PhD diss., The London School of Economics and Political Science (LSE), 2014.; Dickson, Moses Oruaze, "Rebalancing international investment agreements in favour of host states: Is it time for a regional investment court?," *International Journal of Law and Management* 60, no. 2, 2018, pp. 452-469; Jemielniak, Joanna; Pérez, Aida Torres (Editor), “Commercial stakeholders in international economic dispute resolution and the issue of adjudicatory independence”, *Maastricht Journal of European and Comparative Law*, Vol.24 (4), August 2017, pp.582-601.

<sup>14</sup> Juliane Kokott and Christoph Sobotta, “Investment Arbitration and EU Law,” *Cambridge Yearbook of European Legal Studies* 18 (December 2016): 3–19, <https://doi.org/10.1017/ce1.2016.5>.

<sup>15</sup> Kokott and Sobotta, 6–7.

<sup>16</sup> Panos Koutrakos, “The Autonomy of Eu Law and International Investment Arbitration,” *Nordic Journal of International Law* 88, no. 1 (March 11, 2019): 59, <https://doi.org/10.1163/15718107-088010003>.

<sup>17</sup> “CETA BELGIAN REQUEST FOR AN OPINION FROM THE EUROPEAN COURT OF JUSTICE,” n.d., [https://diplomatie.belgium.be/sites/default/files/downloads/ceta\\_summary.pdf](https://diplomatie.belgium.be/sites/default/files/downloads/ceta_summary.pdf).

just recently decided by the court to be in compliance with the EU law.<sup>18</sup> However, the decision has been evaluated to have adversarial nature, due to the fact that deciding this otherwise would jeopardize the political consequences<sup>19</sup> of the whole agreement. Scholar such as *Fecak*<sup>20</sup> in his book addresses the implications surrounding these issues and has well observed findings on some of the major topics, which will have big relevance for the thesis to build upon, however the issue of provisional application of the treaty within the aspect which current developments in the EU law raised has not been endeavored by the author to be covered.

In general, provisional application, although quite often used as the mechanism by EU, has not been fully undertaken by legal scholarship,<sup>21</sup> although it has implications which impacts the legal practice in international economic relations to the great extent. Only in 2012 the UN international Law Commission (ILC) has included provisional application as the working plan for the upcoming years<sup>22</sup> and currently has work in progress for adopting the guidelines, which still does not endeavor to address the sole issues surrounding the provisional application of investment treaties within the perspective of the particular example suggested by this proposal.

## II. Detailed Description

### 2.1. Introduction

Extending EU's exclusive external competences to the FDI has caused more complex issues, rather than invoking single-signature system for the investment agreements.<sup>23</sup> This has been proven by rendering of the Opinion 2/15 of the CJEU regarding the clarification of the EU's external competences. To summarize the ruling of the Court, it was concluded that substantive parts of the EU-Singapore FTA (EUSFTA) investment chapters fall under the exclusive competences of the EU, while the procedural ones, covering the investor-state dispute resolution mechanisms under the shared competences with the MSs. Subjecting the FTAs to fall under the "mixed" category, thus, requiring under the shared competences for all MSs to ratify FTAs, leaving the enforcement and effectiveness of the agreement to very risky and lengthy path under political implications.<sup>24</sup> It shall be noted that, majority of the new generation EU FTAs have clauses regulating the provisional application of the Treaty until the full

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<sup>18</sup> *Opinion 1/17 of the Court (Full Court), No. ECLI:EU:C:2019:341 (CJEU April 30, 2019).*

<sup>19</sup> Koutrakos, "The Autonomy of Eu Law and International Investment Arbitration," March 11, 2019, 59.

<sup>20</sup> See Tomáš Fecák, *International Investment Agreements and EU Law* (Alphen aan den Rijn: Wolters Kluwer, 2016).

<sup>21</sup> Matthew Belz, "Provisional Application of the Energy Charter Treaty: Kardassopoulos v. Georgia and Improving Provisional Application in Multilateral Treaties," *Emory International Law Review* 22 (2008): 727; Peter C. Laidlaw, "Provisional Application of the Energy Charter as Seen in the Yukos Dispute Comment," *Santa Clara Law Review* 52 (2012): 655–84; Alex M. Niebruegge, "Provisional Application of the Energy Charter Treaty: The Yukos Arbitration and the Future Place of Provisional Application in International Law Comment," *Chicago Journal of International Law* 8 (2008 2007): 355–76.

<sup>22</sup> "Report of the International Law Commission," Official Records, Sixty-Fourth Session (New York: United Nations, General Assembly, 2012), <http://legal.un.org/docs/?symbol=A/67/10>.

<sup>23</sup> Frank Hoffmeister, "Bilateral Developments in EU Trade Policy Seven Years After Lisbon: A Look into the Spaghetti-Bowl à La Bruxelloise (2010–2016)," in *European Yearbook of International Economic Law 2017*, ed. Marc Bungenberg et al., vol. 8 (Cham: Springer International Publishing, 2017), 412, [https://doi.org/10.1007/978-3-319-58832-2\\_13](https://doi.org/10.1007/978-3-319-58832-2_13).

<sup>24</sup> August Reinisch, "The EU and Investor-State Dispute Settlement: WTO Litigators Going 'Investor-State Arbitration' and Back to a Permanent 'Investment Court,'" in *European Yearbook of International Economic Law 2017*, ed. Marc Bungenberg et al., vol. 8 (Cham: Springer International Publishing, 2017), 253, [https://doi.org/10.1007/978-3-319-58832-2\\_9](https://doi.org/10.1007/978-3-319-58832-2_9).

ratification by all MSs parliaments, thus invoking immediate effectiveness of the treaty within the matter where EU enjoys the exclusive competences.<sup>25</sup> However, this fact rather than finding the solution to the issues, complicates them even more, especially within the matters of:

- a) Provisional application of the investment treaties;
- b) Compliance of such application with international commitments of the MSs and
- c) Impact of the duty of the sincere cooperation of the MSs under EU law as the solution;

These issues will be discussed in more details in the upcoming sections.

## **2.2. Effects of Provisional Application on Investment Chapters in the EU FTAs**

Provisional application of the treaty under the customary international law is instrument which exists for the states or international organizations to enable them to trigger immediate effectiveness of the whole or parts<sup>26</sup> of the negotiated terms of the treaty,<sup>27</sup> where such action is the matter of urgency, strengthening the ties and preserving cooperative relationship between the parties to the negotiation.<sup>28</sup> However, this process is subject to lengthier and more complicated route when the treaty is multilateral and thus, requires approval for enforcement by number of states.<sup>29</sup> EU's competence in applying the agreement provisionally was not clarified up until the treaty of Amsterdam in 1997, when the EC was delegated with such power by the MSs. Nowadays, under Article 218 (5) of the TFEU, EU commission within the scope of exclusive competences of the Union by the approval of the Council has the competence to "adopt decision authorizing of the agreement and its provisional application before entry into force".<sup>30</sup> Which indicates the notion of "executive prerogative of nation state governments" in accordance with Art. 25 of Vienna Convention on the Law of Treaties (VCLT).<sup>31</sup> Overlooking the practice of European Union, when certain existing factors hinder the possibility of the effective enforcement of the agreement,<sup>32</sup> in such cases often provisional application of the treaty<sup>33</sup> is addressed. However, provisional application has not found much of the active acceptance in the field of

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<sup>25</sup> C-28/12 Commission v Council (Court of Justice of the European Union April 28, 2015).

<sup>26</sup> "Report of the International Law Commission," Official Records, Seventieth Session (New York: United Nations, General Assembly, August 30, 2018), 205, <http://undocs.org/en/A/73/10>.

<sup>27</sup> "Report of the International Law Commission," 205.

<sup>28</sup> Tomoko Ishikawa, "Provisional Application of Treaties at the Crossroads between International and Domestic Law," *ICSID Review - Foreign Investment Law Journal* 31, no. 2 (May 1, 2016): 271, <https://doi.org/10.1093/icsidreview/siw002>.

<sup>29</sup> Ishikawa, 270; Graham Coop, *Energy Dispute Resolution: Investment Protection, Transit and the Energy Charter Treaty* (Huntington, NY: JurisNet, 2011), 250–51.

<sup>30</sup> "Treaty on the Functioning of the European Union" (n.d.) Art. 218 (5).

<sup>31</sup> David Kleimann and Gesa Kübek, "The Signing, Provisional Application, and Conclusion of Trade and Investment Agreements in the EU. The Case of CETA and Opinion 2/15," RSCAS Working Paper (European University Institute, November 2016), 16, [https://econpapers.repec.org/paper/rscscuui/2016\\_2f58.htm](https://econpapers.repec.org/paper/rscscuui/2016_2f58.htm).

<sup>32</sup> Author's note: Reference is made to the following agreements which incurred provisional application: European Community and South Africa "Trade, Development and Co-Operation Agreement" (TDCA) of 1999; EU-Ukraine "Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part; EU-Canada "Comprehensive Economic and Trade Agreement", (CETA).

<sup>33</sup> Author's note: Such application derives itself from Article 25 of the Vienna Convention and Article 218 (5) of the TFEU. Article 25 sets the conditions when the provisional application can be invoked. Conditioning the application if: a) "The treaty itself so provides; or (b) The negotiating States have in some other manner so agreed". The same treatment has been guaranteed by Article 218 (5) of the TFEU, stating: "The Council, on a proposal by the negotiator, shall adopt a decision authorising the signing of the agreement and, if necessary, its provisional application before entry into force".

international investment law.<sup>34</sup> Provisionally applied Bilateral Investment Treaties (BITs) of Multilateral Investment Treaties (MIT) have rarely found their way in international law, one of the examples being Energy Charter Treaty. However, recently in new generation EU FTAs they have been actively included by the EU, one of the most recent demonstrations been the provisional application of CETA, enabling “companies and citizens to start reaping the benefits of this agreement right away”,<sup>35</sup> as mentioned by Commissioner for Trade Cecilia Malmström.<sup>36</sup> Although this concept of customary international law serves the purpose of filling the time-gap between the signing and enforcement of the treaty, it is followed by number of legal implications especially when it comes to curved out application of the procedural parts of the international investment treaty provisions which represent essential parts of the whole treaty. Despite the fact that EU has recorded history of adopting provisional application of the treaties, the practice still exposes little guidance<sup>37</sup> when it comes to applying this mechanism to investment treaties.

One of the most recent examples of EU using mechanism of provisional application is with CETA. Pursuant to Article 30.7 of CETA, EU and Canada used their right to voluntarily provisionally apply parts of CETA<sup>38</sup> which fell under the exclusive external competences of the EU. In the perspective of the CETA investment chapters, Opinion 2/15 resulted excluding procedural chapters to be effective under provisional application. This approach of the CJEU has been challenged EU Commission, which has been arguing in favor of the dispute settlement mechanisms, stressing that they are inseparable parts to accord full protection to the substantive parts of the FDI clauses in the Free Trade Agreements.<sup>39</sup> Provisional applicability of such conceptually important agreement in such manner, alters the operability of the whole investment chapter,<sup>40</sup> as investment arbitration is the key, which enables the disputing party i.e. investor to enforce substantive parts of the investment treaty sufficiently.<sup>41</sup> In fact, as mentioned above such complications during the provisional application is unknown<sup>42</sup> to the international practice therefore this thesis will address this issue, involving the implications following such action, which in further will be elaborated in the research question section of the proposal.

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<sup>34</sup> William Joseph Simonsick, “Is Provisional Application on the Rise in International Investment Agreements? The European Union’s Recent Treaty Practice and the Curious Case of Von Pezold,” *Nordic Journal of International Law* 88, no. 2 (April 24, 2019): 187, <https://doi.org/10.1163/15718107-08802002>.

<sup>35</sup> “European Commission, ‘EU-Canada Trade Agreement Enters into Force’, Press Release, Brussels, 20 (September 2017), Available at: <[http://Europa.Eu/Rapid/Press-Release\\_IP-17-3121\\_en.Htm](http://Europa.Eu/Rapid/Press-Release_IP-17-3121_en.Htm)> [Retrieved on 28 November 2018].,” n.d.

<sup>36</sup> “European Commission, ‘EU-Canada Trade Agreement Enters into Force’, Press Release, Brussels, 20 (September 2017), Available at: <[http://Europa.Eu/Rapid/Press-Release\\_IP-17-3121\\_en.Htm](http://Europa.Eu/Rapid/Press-Release_IP-17-3121_en.Htm)> [Retrieved on 28 November 2018].”

<sup>37</sup> Kleimann and Kübek, “The Signing, Provisional Application, and Conclusion of Trade and Investment Agreements in the EU. The Case of CETA and Opinion 2/15,” 16; Ishikawa, “Provisional Application of Treaties at the Crossroads between International and Domestic Law,” 271.

<sup>38</sup> “EU-Canada Comprehensive Trade Agreement,” n.d. Art. 30.7.

<sup>39</sup> *Opinion 2/15*§303.

<sup>40</sup> Kleimann and Kübek, “The Signing, Provisional Application, and Conclusion of Trade and Investment Agreements in the EU. The Case of CETA and Opinion 2/15,” 18.

<sup>41</sup> Tomáš Fecák, *International Investment Agreements and EU Law* (Alphen aan den Rijn, the Netherlands: Kluwer Law International B.V, 2016), 2.

<sup>42</sup> Lisa Diependaele, Ferdi De Ville, and Sigrid Sterckx, “Assessing the Normative Legitimacy of Investment Arbitration: The EU’s Investment Court System,” *New Political Economy* 24, no. 1 (January 2, 2019): 41, <https://doi.org/10.1080/13563467.2017.1417362>.



## 2.3. Dual System of the Investment Treaties

In the following sections the proposal will focus on the effects of the provisional application of the investment treaty and conflicting aspects with international law commitments of the MSs. It will elaborate on the issue of applicable investment regime regulating FDI during the provisional application of the treaty, while taking into consideration the aspects of international law commitments of the MSs from the perspective of previously concluded Bilateral Investment Treaties.

### 2.3.1. Applicable Investment Treaty Regime at the Time of Provisional Application

Exclusive competences of the EU have been designed to enable EU to operate independently. The convenience of the system is established in terms of commission representing the Union, while conducting all the negotiations and international agreements, which are not further assisted by requirement of the MSs ratification.<sup>43</sup> In this respect, Common Commercial Policy (CCP) has always been regarded as one of the most “supranational” and developed of the EU’s external policies.<sup>44</sup> However, due to the turn of the events, external exclusive competences in Article 207 of the TFEU,<sup>45</sup> resulted in making the issue more complex than was intended to<sup>46</sup> as elaborated above. Subjecting “mixed” agreements to the provisional application of the Treaty. Due to the fact that process of provisional application can be stretched in time<sup>47</sup> shedding the light on the issue of the applicable investment regime, offering guarantees to the foreign investor becomes essential. Especially, in the perspective of recent developments where the operability of provisionally applied investment regime is challenged due to the hierarchy of applicable orders of international law.

When submitting the request for Opinion 2/15, Commission stated question to the CJEU, whether the EU had exclusive competence to terminate the existing BITs with Singapore and instead replace them with the investment chapters under EUSFTA.<sup>48</sup> Which directly addresses the issue of regulating applicable investment regime. This question derived from Article 9.10.1 of Chapter 9, section A, which states that “bilateral investment agreements between the MSs and Singapore ... will cease to exist,... replaced and superseded by the EUSFTA”.<sup>49</sup> In relation with this, the opinions of the Advocate General *Sharpston* and the CJEU have been split, and from this standing one could argue that the decision of the court has been political, rather than judicial.<sup>50</sup> The CJEU held that those competences which fall under

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<sup>43</sup> Marise Cremona, “Shaping EU Trade Policy Post-Lisbon: Opinion 2/15 of 16 May 2017,” *European Constitutional Law Review* 14, no. 01 (March 2018): 4, <https://doi.org/10.1017/S1574019617000402>.

<sup>44</sup> Cremona, 4.

<sup>45</sup> Treaty on the Functioning of the European Union Art. 207.

<sup>46</sup> Tobias Dolle and Bruno G. Simões, “Mixed Feelings about ‘Mixed Agreements’ and CETA’s Provisional Application,” *European Journal of Risk Regulation* 7, no. 3 (September 2016): 617, <https://doi.org/10.1017/S1867299X00006139>.

<sup>47</sup> Ishikawa, “Provisional Application of Treaties at the Crossroads between International and Domestic Law,” 272.

<sup>48</sup> “Opinion of Advocate General Sharpston Delivered on 21 December 2016, 2/15, ECLI:EU:C:2016:992,” n.d. §§371-398.

<sup>49</sup> “AG Opinion 2/15” §371.

<sup>50</sup> Dylan Geraets, “Changes in EU Trade Policy After Opinion 2/15,” *Global Trade and Customs Journal*, 2018, 16.

the exclusive one of the EU can be the subject of the direct succession by the EU, without the need of the MSs to express their consent on the act of termination the BITs with third states.<sup>51</sup> Basing its ruling on the fact that Singapore has given prior consent to the termination and change of the commitments of the MSs under previously existing BITs. Such reasoning is problematic in two aspects. First, this blind-sided disregards the commitments of the MSs under International law. Second, it results un-clarity regarding the applicable procedural regime, in case only the substantive parts can replace the investment regimes, since they are subject to EU's exclusive competences.

Advocate General *Sharpton*'s opinion went on the path of different reasoning and concluded that under international law she could not find bases which would have given the EU the right to directly terminate existing BITs on behalf of the MSs and replace them with the new commitments under EUSFTA, which conflicts with the "fundamental concept of the international law" based primarily on the consent.<sup>52</sup> Additionally, it shall be noted that recent practice Investment Tribunals still disregard the "solution" created by the CJEU and resolve the disputes taking into consideration international obligations of the MSs as the separate notion.<sup>53</sup> Therefore, this situation might result the issues regarding the enforcement of the awards and raise the questions regarding equal treatment of foreign investors in particular MSs. Thus, as this notion is very novel the theoretical considerations need to be applied from the perspectives of both international and EU law.

#### **2.4. Principle of Sincere Cooperation under EU Law**

As mentioned above, the CJEU has ruled in Opinion 2/15 that BITs between Singapore and MSs will be directly terminated and substituted by EUSFTA, due to the fact that Singapore consented to such change. However, under international law the EU is not a successor of the BITs of the MSs, therefore it cannot act as their authorized organization to terminate these BITs. In this respect, examination of Art. 351 of the TFEU in conjunction with Art. 4 of the TEU is essential, to determine whether above stated conflict with the EU and International Law can be resolved.

From the general principles of the EU law, when EU sets certain policies in this very particular case, the MSs shall do their best to bring all other international agreements in conformity with EU objectives, principle, which is envisaged under Article 351(2) TFEU. However, it does not necessarily call for the termination of the agreement.<sup>54</sup> Therefore from the general obligation the Member States do not have the obligation to terminate their existing BITs. On the contrary, as argued by some scholars the BITs which were concluded prior to Lisbon Treaty entering into force should not be thought as being unharmonious with the EU law. Due to the fact that they have not been negotiated in violation of previously existing competences of the MSs. Therefore, in this case, continues validity of the BITs could not be questioned under new competences of the Union.<sup>55</sup> Although the validity of these BITs stay untouched the obligation of the MSs to bring them in conformity with external investment objectives of the EU remains. In order to determine what are the duties under Article 4 of the TEU of the MSs, as due to not reach practical applicability of this principle it should be narrowly analyzed in respect with the

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<sup>51</sup> Cremona, "Shaping EU Trade Policy Post-Lisbon," 253.

<sup>52</sup> "AG Opinion 2/15" §396.

<sup>53</sup> See: *United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Republic of Estonia*, ICSID Case No. ARB/14/24 (n.d.).

<sup>54</sup> Treaty on the Functioning of the European Union Art. 351 (2).

<sup>55</sup> Tomáš Fecák, *International Investment Agreements and EU Law*, 2016, 325, <http://www.kluwerarbitration.com/CommonUI/book-toc.aspx?book=TOC-Fecak-2016>; Philip F. J. S Strik, *Shaping the Single European Market in the Field of Foreign Direct Investment*, 2016, 173.

issues stated here.

In this respect, there can exist two approaches which shall be clarified when examining what duty of sincere cooperation entails: a) The MSs have option to bring their currently existing BITs in compliance with the EU law, or b) they should explicitly consent to terminate these BITs. Although the second way as one of the options of the obligation, as upheld by the CJEU in the *Commission v. Portugal*<sup>56</sup> can be seen as the option, in case of the BITs this option might not be as convenient. Unilateral termination will not have immediate effect and will incur the rise of numerous disputes in relation with the treatment of the investors guaranteed under subsequent BITs. As a matter of fact by the self-survival or otherwise regarded as the “sunset” clauses of the arbitration the ISDS is always applicable even on the part regarding the termination of the whole BIT. Thus, giving the possibility to the upcoming lengthy arbitral disputes under subsequent BITs.

### **III. Aim of Research and Research Questions:**

In respect with all the above mentioned the research intends to observe findings on the issues presented below. Research aims to find theoretical explanations to the practical issues which arose recently in practice in connection with the relationship of European Union and International Law. The field of observation of the research will be effects of provisional application on investment chapters of the EU Free Trade Agreements, with the primary focus on CETA and EUSFTA, which research will entertain as the landmark case studies, based of which it will elaborate theoretical findings. The findings of the research are envisioned to build upon already existing legal scholarship and extend to the aspects which yet remain unexplored. The conclusions will be directed and become useful for legal scholars, students and practitioners who specialize in the given scope of research. With these considerations the research plans to answer the following questions:

Taking into consideration the fact that in recent developments in the field of EU law the investment chapters have been found to be subject of provisional application within the framework unknown to the International Investment Law practice, the research aims to answer:

- What are the effects of the provisional application of the investment chapters of the EU FTAs on the already existing public international law commitments of the MSs?

This question can be divided into several sub-guiding questions:

- From international law considerations which are the substantive applicable regime which governs the treatments of the foreign investors from the third states in the EU?
- During the time of provisional application of investment chapters which fall under the exclusive competences of the EU what is the applicable dispute-resolution mechanism?
- How can duty of Sincere Cooperation under Article 4 of the contribute to finding solution to the existing implications?

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<sup>56</sup> C-62/98 - *Commission v Portugal*, Judgment of the Court of 4 July 2000. (n.d.)§ 46-47; C-84/98 - *Commission v Portugal*, Judgment of the Court of 4 July 2000. (n.d.)§§ 55-56.

#### **IV. Methodology**

Based on the necessities of the given chapters research will employ mixed, doctrinal legal and socio-legal research methods taking into consideration the specificities of the approaches, which are best fit to the raised issues. Adopting conclusions based on the findings during the research, contributory to legal scholarship, academic, practitioner lawyers and policy makers.

Main focus of the study will be directed to the Free Trade Agreements of the EU adopted after 2009. Precisely, focusing firstly on the time-frame of provisional application of CETA and EUSFTA (time between the conclusion and complete ratification of the Ms of the EU) and secondly, on the post-ratification period. Using them as the case studies for examining compatibility of the consequences of CJEU Opinion 2/15 in EU law with International law commitments of the MSs. It will develop having tentative hypothesis which later will be applicable to the future occasions in practice. Therefore, theoretical explanations during the research will be based on the specific examples of the case studies and they will be elaborated on the developing stages of the research. The explanations drawn from the case studies will be bases for the general explanations of the specific cases and will lead to adopting final conclusions on the raised issues.

Based on the theoretical nature of the research questions integrated in the sections of the research proposal, doctrinal research methodology will be employed to find theoretical explanations of the issues raised above within the broader aspect of the hierarchy between the public international law and EU law. Research will start from analysing primary and secondary sources of International and EU law in relation with the provisional application of the treaty and conflicts related to hierarchy of international law norms. Information search system such as University library and online sources of Lexis Nexis, HeinOnline, Kluwer Law International, WestLaw and etc. will be employed for the purposes of finding necessary data in terms of secondary sources. Moreover, carrying out various research fellowships at the research centres such as UN International Law Commission, in relation with the working group on provisional application of the treaty is planned as part for gathering empirical data for the research.

Empirical data consisting of the case and international investment-state arbitration practice will be gathered. Limiting its scope on the conflict of hierarchy in relation with international and regional law. Within the area of EU law focusing on the CJEU case law and Investor-State Arbitration awards in the field of international law. Both quantitative descriptive-explanatory and qualitative analyses will be applied on the empirical data gathered through the case law. The aim of the quantitative analyses will be to determine what the indicative number is when international law commitments were favoured over the regional ones. Qualitative analyses will be necessary to determine the theoretical incentives of these rulings. With the purpose of gathering the most recent data, research will select several foreign investment companies which carried out investment during the time-line of provisional application of CETA and EUSFTA. The goal would be to gather data of raised investment disputes and the applicable regime for resolving them. Questioners covering the information related to the type of the dispute and choice of applicable law along with the explanatory note will be distributed to these investors in both jurisdictions of EU, Canada and Singapore cross-examining the choice of regimes of the investors of both origins. The findings of the questionnaire will be integrated with the analyses of the case law adding to the findings of the research for adopting final conclusions.

Finally, research will gather comparative data on the duration of the existing “sunset clauses” in the BITs of the MSs-Canada and Singapore, with the goal to find the average time-frame of the applicability

of these clauses. To elaborate on the challenges under the duty of sincere cooperation of the MSs to bring their international commitments in accordance with the EU law.

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## **VI. Work Plan Outline:**

Over the course of 30 Months along with completing the mandatory courses necessary under the Doctoral Program in Law at the University of Vienna, the research working framework will be divided in the time-frame adopted below. The above indicated chapters will have the working time-line of approximately three months and the cycle in connection with each section will be the following:

- Finalize gather all the primary and secondary materials and identifying the most relevant to the purposes of the research;
- Research case law;
- Group them in the systematic manner providing for and against of the research proposal;
- Draft the first outline of first section of the proposal;
- Identify the areas which needs more research and the type of the resources needed to identify;

In relation with the specific data gathering through questioners and comparative analyses of the BITs the following approach will be employed:

- Adopt the necessary questioners and identify the investments to be sent the questioners;
- Adopt criteria for the transferring of the data outcome of the questioners;
- Elaborate on the findings transferring them in the dissertation;

- Determine the BITs between Canada and Singapore;
- Gather data;
- Elaborate in the dissertation;

Group them in the systematic manner providing for and against of the research proposal;

Year of 2020-2021:

1 January – 30 March 2020:	Chapter I.
30 March – 30 June	Chapter II.
30 June – 30 September	Chapter III.
30 September – 30 December	Chapter IV.

2021

1 January – 30 March	Chapter V.
30 March – 30 June	Research Fellowship abroad/Chapter VI
30 June – 30 September	Chapter VII.
30 September – 30 December	Final redrafting/correction of the sources

2022 (Spring Semester)

1 January – 30 March	Submission for the review to the committee
30 March-30 April	Public Defense of the Dissertation
30 April-30 June	Publication of the Dissertation

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### **International Agreements**

- Association Agreement between the European Union and its Member States, of the one part, and Ukraine
- Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part
- EU- Canada Comprehensive Economic and Trade Agreement
- EU-Georgia Deep and Comprehensive Free Trade Area (DCFTA)
- EU-Singapore Free Trade Agreement
- EU-South Korea Free Trade Agreement
- EU-Vietnam Free Trade Agreement

### **Web Sources:**

- Access to European Union Law
  - <http://eur-lex.europa.eu/>
- Web-page of the European Commission
  - <http://ec.europa.eu/>
- Web-page of the European Union
  - <http://europa.eu/>
- CJEU Web-site
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