Chapter 1.6

Regional and Multilateral Trade and Investment Agreements

by Hajdu Gábor

A. INTRODUCTION

This chapter is intended to provide an overview of various multilateral international agreements that touch upon the subject of investment law, whether as a principal focus, or as one of the subjects covered by the given treaty. As a consequence, the chapter is divided as follows: first, we will discuss three international agreements that approach investment law from a different perspective than the rest, being conventions that established three important international organizations, the ICSID, the MIGA and the OECD. This will be followed by an overview of more "traditional" multilateral investment agreements or other multilateral agreements with investment elements, including NAFTA, USMCA, the Energy Charter Treaty, CAFTA-DR, TPP and CPTPP. Next, we will discuss the TTIP and the CETA as EU-connected investment agreements that do not fit the traditional multilateral mold as they were negotiated in a bilateral fashion between the United States / Canada and the Commission, but are multilateral in practice because the EU is composed of 27 Member States. Finally, we will discuss ASEAN's two investment agreements as examples of multilateral treaties concluded between member states of an existing intergovernmental organization.

B. CONVENTIONS AND INTERNATIONAL ORGANIZATIONS

I. ICSID

The International Centre for Settlement of Investment Disputes (ICSID) is one of the premier international organizations dealing with international investment. Its origins can be traced back to the 1960s, the period when international investment grew increasingly important and the necessity of providing rules and dispute settlement procedures became apparent. The organization itself came about as part of the World Bank Group. The process began in 1961. A first draft of what would eventually evolve into the ICSID Convention was created in June 1962, when the General Counsel of the Bank submitted to the Executive Directors of the Bank a Working Paper in the Form of a Draft Convention, intended to cover the resolution of disputes between states and nationals of other states, with relation to investment disputes. Subsequently, the Executive Directors and other organs of the World Bank, as well as its Member States, contributed to the development. Their efforts resulted in the first proper preliminary draft of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States in 1963. This was followed by revised drafts and other changes over the next several years. Eventually, the final version of the **ICSID Convention** was signed in March 1965. After a sufficient number of ratifications was accomplished, the Convention entered into force in October 1966. With the Convention, ICSID as an organization came into being.[1]

---

[1] ICSID, *History of the ICSID Convention – Documents Concerning the Origin and the Formulation of the Con-*

Before discussing the activities of ICSID, we should take a look at its organization. Headquartered in Washington D.C., at the principal office of the International Bank for Reconstruction and Development (IBRD, the World Bank),[2] ICSID's two primary organs are the Administrative Council and the Secretariat.[3] The Administrative Council serves as the highest authority within ICSID, regulating its most fundamental questions and issues. This includes the development of the various financial and administrative rules of ICSID, its arbitral procedural rules, the appointment of the ICSID Secretary-General and their deputies, the approval of ICSID's yearly budget, and the approval of utilizing IBRD services and locations. The Administrative Council consists of representatives of the signatory states. Every signatory state of the ICSID Convention is allowed to select one representative and to appoint an alternative representative should the primary representative be indisposed for whatever reason and unable to fulfil their duties. If a signatory state does not appoint a representative or alternative representative, its appointed IBRD governors and alternate governors can fill the role of representing the state on the ICSID Administrative Council. The Administrative Council's Chairman is not appointed or elected, but is always the President of the IBRD. The Chairman moderates the meetings of the Administrative Council but, unlike the state representatives, does not have voting rights.[4]

In actual practice, the Secretariat is the more important body of ICSID, since it administers the disputes between investors and states. Unlike the representative system used by the Administrative Council, the Secretariat is composed of international experts, approximately 70 employees in total. The Secretariat is headed by the Secretary-General of ICSID and two ICSID Deputy Secretary-Generals. Beyond the Secretary-Generals, the Secretariat performs its task through a number of specialized departments. The first of this is the so-called front office, which manages the relations between ICSID and the signatory states, maintains the ICSID list of conciliators and arbitrators, and handles various publications released by ICSID. The second is the general administration and financial management team, which maintains the archives of the organization, handles the ICSID budget, all financial aspects of given operations, human resources, and the IT infrastructure of the organization. Beyond these two general departments, ICSID also maintains five case management teams. These case management teams are assigned to individual ISDS cases. Each consists of experienced legal experts, as well as legal and other assistants. They are mainly organized according to the three official languages of ICSID (English, French, Spanish).[5]

---

vention on the Settlement of Investment Disputes between States and Nationals of Other States – Analysis of Documents (Volume I, International Centre for Settlement of Investment Disputes, 1970), pp. 2-10. The text of the Convention is also available in Emmert (ed.), *World Trade and Investment Law – Documents*, CILP 2018, at pp. 252-264.

2 Article 2 of the ICSID Convention.

3 Article 3 of the ICSID Convention.

4 Articles 4-8 of the ICSID Convention.

5 Articles 9-11 of the ICSID Convention. See also https://icsid.worldbank.org/about/secretariat.

When it comes to its activities, ICSID provides a range of services regarding specific ISDS disputes. Essentially, it can provide three main functions to a given dispute, if so chosen by the parties: venue (the organization maintains suitable locales for holding hearings and such), procedural framework (ICSID possesses two sets of arbitral rules that can be used by disputing parties), and potential arbitrators (as previously mentioned, the organization maintains lists of qualified conciliators and arbitrators, allowing disputing parties to easily and quickly select suitable arbitrators, should they choose to do so). Beyond these core functions, the Secretariat also assists in managing the financial details of given arbitral and conciliatory proceedings, registers cases into its database, assists in organizing hearings, and provides miscellaneous administrative and technical assistance to a given proceeding.[6]

With regard to arbitral services provided by ICSID, we first note that all arbitrations taking place under ICSID rules rely on four specific sources of law: the ICSID Convention itself, and three framework documents: the ICSID Rules of Procedure for Arbitration Proceedings, the Institution Rules, and the ICSID Additional Facility Rules. The ICSID Administrative and Financial Regulation is a contributing document to proceedings. The ICSID Rules are used if both the home state of the investor and the host state of the investment are signatories to the Convention. The Additional Facility Rules arbitral framework is used in cases where only one state, i.e. either the investor's home state or the host state, have ratified the ICSID Convention.

It is important to note that the ICSID Convention and the various framework documents are chiefly sources of procedural rules. Substantive rules regarding the investment dispute typically flow from other sources, such as BITs and other investment agreements relevant to the dispute. Similarly, it is important to highlight that ICSID is not an arbitration forum *per se.* It provides venue, procedural framework and even arbitrator lists at the disputing parties' discretion, but it does not function like a proper or permanent arbitral court. Nevertheless, the awards reached by arbitration tribunals utilizing the ICSID rule set are binding and final, with five different potential means of remedy: supplementary decision or rectification, interpretation, revision, or annulment.

As a consequence of its utility and the efficacy of ICSID overall, the ICSID rule set has proven to be highly popular, with a large percentage of ISDS cases using ICSID Rules of Procedure or ICSID Additional Facility Rules for arbitration proceedings, and using ICSID for venue and technical administration of cases. Not all ISDS cases rely on the organization, but it undoubtedly serves an unmatched role in international investment law today.

II. MIGA

The Multilateral Investment Guarantee Agency (MIGA) is an international organization that is also part of the World Bank Group. The origins of this organization can be traced back to the 1980s. The so-called **MIGA Convention** was submitted to the World Bank's Board of Governors in 1985. After

---

6 Ibid.

endorsement by the Board and ratification by a sufficient number of states, it entered into force in 1988.[7]

MIGA was created as a legally separate and financially independent organization. Its goal was primarily to enhance cross-border investment by providing a new source of investment insurance, supplementing other public or private investment protection options, for non-commercial risks facing foreign investors in developing countries.[8] Originally starting with 29 member states, its ranks expanded to include 182 countries in total as of 2022.[9]

MIGA's organizational structure was established by its Convention. It is comprised of a Council of Governors, a Board of Directors, a President, and associated staff. The Council of Governors is the highest governing body of MIGA, and can delegate several of its functions to the Board of Directors. However, it also holds some exclusive powers, such as the admission of new and suspension of existing members, decisions on the increase or decrease of the capital, amendments to the Convention, and so on. Each member of the MIGA Convention can appoint a single Governor (and an alternate) to the Council. One of these Governors is then selected by the Council to act as its Chairman. In general, the Council meets annually, though it can also hold meetings at its discretion or when called to do so by the Board of Directors.[10] The Board of Directors is responsible for the general operations of MIGA. It consists of twelve Directors, with the President of the IBRD serving as chairman by default. The chairman has no voting rights, except to break ties. The Board may meet at the call of its chairman, or when requested by at least three of its Directors.[11] As for the President and his associated staff, the President is responsible for conducting the ordinary business of MIGA under the control of the Board of Directors, assisted in these duties by the staff of the agency. The President is nominated by the chairman of the Board, and appointed by the Board.[12]

In general, MIGA's chief activities consist of two categories: political risk insurance and credit enhancement. For the former, MIGA provides a number of purchasable coverages for investors. These are coverage for breaches of contract (protection in case a government breaches or repudiates a contract with an investor), coverage for currency inconvertibility and transfer restriction (if a situation arises where the investor is legally unable to convert local currency into hard currency), coverage for expropriation (if the host state government reduces the investor's ownership of the insured investment through its measures and actions), and coverage for war and civil disturbance

---

7 For an in-depth look at the history of MIGA, see: Shihata, *MIGA and Foreign Investment – Origins, Operations, Policies and Basic Documents of the Multilateral Investment Guarantee Agency* (1988), pp. 29-99. The text of the Convention is available in Emmert (ed.), *World Trade and Investment Law – Documents*, CILP 2018, at pp. 134-154.

8 Article 2 of the MIGA Convention.

9 See MIGA's website: https://www.miga.org/history.

10 Articles 30-31 of the MIGA Convention.

11 Article 32 of the MIGA Convention.

12 Article 33 of the MIGA Convention.

(if political acts of war or civil disturbance result in the loss, damaging or disappearance of tangible investor assets).[13] It is important to emphasize once again that MIGA does not provide insurance against common commercial or business risk, only against non-commercial risks that are beyond the scope of the investor's normal business decisions. Furthermore, as previously noted, MIGA also provides credit enhancement services for cases where a government (whether the state itself, some sub-sovereign entity of it, or a state-owned enterprise) does not honor its financial obligations towards the investor. This "product" of MIGA can protect against losses arising from such failures.[14]

In order to benefit from these coverages, investors have to submit applications to MIGA. The first step, the preliminary application, is free-of-charge, and is followed by MIGA assigning an underwriter to review the project the investor is requesting coverage for, as well as to discuss the various details of the insurance, such as preliminary pricing estimates. The preliminary application will be then followed by the so-called definitive application. After the submission of a definitive application, MIGA conducts a more thorough review of the proposed project before deciding whether to issue coverage. The agency has to ensure that the would-be-covered investment meets its eligibility criteria.[15] The latter is particularly important because MIGA maintains an exclusion list of certain types of investments it cannot guarantee. These include such projects as production or trade in weapons and munitions, production or trade in tobacco, or gambling enterprises.[16]

Beyond these primary services, MIGA also provides a number of other services to further its objectives as an international organization. These include capital optimization (insuring mandatory reserves held by a bank's subsidiaries in emerging markets); the Small Investment Program (SIP), a special program with a streamlined approval process, designed to facilitate small and medium-size enterprises accessing MIGA coverages and thus further their investment goals; private equity fund insurance (extending MIGA's guarantee coverage to private equity funds that meet the agency's eligibility criteria and commit to its social, anti-corruption and environmental policies); and dispute resolution services (intended to help prevent the escalation of disputes between MIGA's investor-clients and their host states into full-fledged investment arbitration claims).[17]

III. OECD

Headquartered in Paris, France, the Organisation for Economic Co-operation and Development (OECD) is the successor organization of the Organisation for European Economic Co-operation (OEEC). The latter was an international organization set up in 1948, in order to assist the implementation of the Marshall Plan in the wake of the Second World War, by helping the European

---

13 Article 11 of the MIGA Convention.

14 See MIGA's website for more details: https://www.miga.org/product/non-honoring-financial-obligations.

15 See MIGA's website for more details: https://www.miga.org/our-process.

16 Ibid. For more detailed information on MIGA's investment insurance system, see Chapter 3.7.

17 See MIGA's website for further details on these topics: https://www.miga.org/capital-optimization; https://www.miga.org/small-investment-program; https://www.miga.org/private-equity-fund-insurance; as well as https://www.miga.org/dispute-resolution.

beneficiary countries cooperate in economic and trade matters. As such, the OEEC's membership consisted of a number of European countries, originally 18 of them. After the Marshall Plan ended in the 1950s, the OEEC faced an identity crisis, especially in the wake of NATO's rising importance. Regardless, the organization continued its work in encouraging economic productivity among its participating states. In the end, the OEEC was replaced by a more global organization, which would become the OECD. Notably, the United States and Canada joined the negotiations, and alongside the OEEC's member states, became founding members of the OECD. The founding convention was negotiated in 1960 and becoming effective in 1961.[18]

The OECD as an international organization is principally a consultative body, aimed at fostering economic growth, employment, and balancing the rise in standards of living with maintaining financial stability in its member states.[19] Due to its consultative nature, the OECD has no coercive tools at its disposal to enforce its agenda. Thus, it relies on various publications and conferences, and on persuading the relevant economic and political actors in its member states and around the world that its recommended actions are to the benefit of their countries.

The OECD's organisation can be principally divided into three parts: the OECD Council, the Committees, and the OECD Secretariat.[20] The OECD Council is the highest decision-making body within the international organization. Its membership is comprised of representatives sent by the OECD member states, as well as the European Commission. Its chairman normally is the Secretary-General who, as the name implies, also heads the Secretariat. The Council holds regular meetings in order to review and discuss various crucial topics relating to the work of the OECD. It also has a special meeting type, called the Ministerial Council Meeting, which takes place annually, and includes the heads of government, as well as various economy, trade and foreign ministers from the OECD member states. The Secretary-General is not the chairman of these meetings.[21] Council meetings decide on the most impactful topics related to the OECD's activities, such as the budget of the organization.[22] As for the Committees, they are expert and working groups designed to facilitate discussion and review of various proposals, suggest solutions to emerging economic problems, and assess data collected by the Secretariat.[23] The OECD operates more than 300 such committees, with participants coming from a wide range of backgrounds, including representatives of various member state bodies, but also members of academic communities, business represen-

---

18 See the OECD website for more details: https://www.oecd.org/general/organisationforeuropeaneconomicco-operation.htm. See also: Barbezat, *The Marshall Plan and the Origin of the OEEC*, in Richard T. Griffiths (ed.), 'Explorations in OEEC History' (1997), pp. 33-41.; Boel, *The European Productivity Agency, 1953-1961,* in Richard T. Griffiths (ed.), *Explorations in OEEC History* (1997), pp. 113-122.

19 Article 1 of the OECD Convention.

20 Articles 7, 9, 11 of the OECD Convention.

21 Articles 7-10 of the OECD Convention.

22 For the work of the Ministerial Council Meeting, see https://www.oecd.org/mcm/.

23 For more details on the work of the Committees, see https://www.oecd.org/about/structure/.

tatives, and civil society organizations.[24] The Secretariat is headed by the Secretary-General and runs the day-to-day operations of the OECD. The Secretariat's various directorates and divisions directly work with member state regulators and other policy makers, and collect and analyze data for the Committees. They also provide recommendations to them regarding the subjects of committee discussions.[25]

The OECD's activities are highly varied, covering a large number of economic and related topics, such as industry, innovation, education, and so on. For present purposes, its work related to international investment is most relevant. As with other areas of interest for the OECD, the organization principally relies on conferences, discussions, proposals and publications to advance its agenda regarding investment. One of the principal tools are the international investment-related legal instruments created by the OECD, which altogether form a set of OECD standards that would-be member states must adhere to before acceding to membership in the organization. The two most important instruments in this regard are the OECD Codes of Liberalisation, and the **Declaration on International Investment and Multinational Enterprises**. The former are composed of the **Code of Liberalisation of Capital Movements**[26] and the **Code of Liberalisation of Current Invisible Operations**.[27] Originally created in 1961, they have been revised several times, most recently in 2019. Both codes are legally binding on countries that have chosen to adhere to them, and they aim to ensure non-discriminatory liberalization with regards to capital movements, as well as liberalization of so-called invisible operations or transactions, removing barriers to trade in services in the process. The other notable legal instrument, the **1976 Declaration on International Investment and Multinational Enterprises**.[28] The Declaration includes Annex 1 with various recommendations for multinational enterprises on conducting business responsibly in a global context. Annex 2 of the Declaration contains guidelines for reconciling conflicting requirements that may be imposed on a multinational enterprise. The Declaration also emphasizes the principle of national treatment. It was adopted by all OECD countries, and there are currently 12 Non-OECD countries who have also chosen to adhere to it.[29]

These instruments are not the only investment-related outputs of the OECD. It is also important to mention the so-called **Policy Framework for Investment (PFI)**. Compared to the aforementioned instruments, the PFI is a more recent creation, dating back to 2006, and last updated in 2015. The PFI takes the form of a book, which outlines policy recommendations on 12 different areas that could be connected to investment. These include categories such as investment policy, investment promotion and facilitation, competition, infrastructure, corporate governance, and so on. The

---

24 Ibid.

25 Ibid.

26 https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0002.

27 https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0001.

28 https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0144.

29 For more information on the Declaration, see its text and attached information on the OECD website: https://www.oecd.org/daf/inv/mne/oecddeclarationanddecisions.htm.

objective of this framework is to assist countries in creating healthy environments for investors, and to create competitive and robust milieus for investment, that nevertheless respect the economic and institutional specifics of the given country.[30]

Another important tool in the OECD's investment-specific arsenal is the **Foreign Direct Investment Regulatory Restrictiveness Index (FDI Index)**. This database monitors statutory restrictions on FDI for 22 different economic sectors in 69 countries, including all OECD member countries. The FDI Index it provides valuable information to foreign investors, while also providing the monitored countries with easy feedback for assessing the overall status of their policies regarding FDI.[31] Beyond these tools, the OECD has several more investment-related activities, including publication of reviews of different countries' investment policies, and facilitation of various regional programs for improving investment environments.[32]

C. MULTILATERAL TRADE AND INVESTMENT AGREEMENTS

I. NAFTA and USMCA

The origins of the North American Free Trade Agreement (NAFTA) can be traced back all the way to the 1980s, when the United States of America and Canada sought closer trade relations with each other. At this juncture, American foreign policy was oriented towards facilitating the negotiation of free trade agreements, as shown by the Trade and Tariff Act of 1984. Canada was likewise interested in pursuing freer trade with its neighbor. As a consequence, the two countries started officially negotiating with each other in 1986. Their mutual effort resulted in a free trade agreement in 1988. Soon after, Mexico expressed an interest in achieving closer trade relations with its northern neighbors. Canada, the USA and Mexico ultimately decided to create a multilateral free trade agreement. This decision culminated in the **NAFTA Agreement** being signed between the three countries in 1992 and entering into force on 1 January 1994.[33]

NAFTA was a comprehensive, multilateral free trade agreement, aiming not only at the elimination of barriers to trade but also the achievement of goals such as protection of intellectual property rights and, most important for us, the increase of investment opportunities.[34] The text of the Treaty was divided into eight parts, twenty-two chapters, and 2206 articles, as well as eight annexes. The chapters themselves covered a wide variety of subjects, such as agriculture, sanitary and phyto-sanitary measures, emergency actions, and technical barriers to trade, among many others.

Chapter 11 of the NAFTA Treaty (found in Part Five) contained the investment rules. The Chapter was divided into three sections, with Section A dealing with substantive rules for investment,

---

30 OECD, *Policy Framework for Investment* (2015), available at https://www.oecd.org/investment/pfi.htm.

31 The database can be accessed on the OECD's website: https://www.oecd.org/investment/fdiindex.htm.

32 See the OECD's in-depth description of their activities on their website: https://www.oecd.org/investment/.

33 James R. Holbein, *NAFTA: Final Text, Summary, Legislative History & Implementation Directory* (Volume 1, James R. Holbein, Donald J. Musch (eds.), 1994), pp. 1-12.

34 Article 102 of NAFTA.

Section B covering procedural matters, specifically the settlement of disputes between a contracting party and investors of another contracting party, and Section C providing the definitions used by the Chapter. The substantive rules established the expected clauses typical of other international agreements with investment focus: treatment standards such as national treatment, most-favored-nation treatment, and minimum standards of treatment, as well as clauses covering the rules for expropriation and compensation. In general, the standards covered under this Section were highly detailed, especially in contrast to other investment agreements created around the same time.[35]

Section B created a fairly standard Investor-State Dispute Settlement framework for dispute settlement between foreign investors and host states.[36] However, unlike several other investment treaties, NAFTA contained somewhat more detailed rules on ISDS, even though it also referred to the three principal options for arbitration namely, depending on the choice of the claimant investor and specific circumstances, the ICSID Convention, the Additional Facility Rules of ICSID, or alternatively, the UNCITRAL Arbitration Rules.[37] It is also important to note that the claimant had to waive their right to initiate or continue any proceedings under administrative tribunals or courts of any NAFTA signatory state, with relation to the disputed measures. The only exception here applied if the proceedings involved injunctive, declaratory or other extraordinary relief not aiming at payment of damages.[38] Beyond rules on the initiation of ISDS proceedings, Section B also included rules on the establishment of the arbitration tribunal, especially with regards to its consolidation. By contrast, NAFTA's articles regarding ongoing arbitral proceedings were relatively sparsely worded, with the exception of rules covering the final award of the arbitration tribunal and its finality and enforcement,[39] which showed similar detail as the early articles of the Section.

As mentioned earlier, Section C covered the definitions used by the Chapter, with a specific focus on defining investment, both as to what constitutes investment (positive description) and what does not (negative description). The positive description is relatively varied, with eight different main categories of what constitutes an investment (such as enterprise, debt security of an enterprise, and so on). In the negative description, NAFTA explicitly excluded claims to money that arose solely from commercial contracts for the sale of goods or services by a national or enterprise of a contracting party to an enterprise of another contracting party, as well as claims based on the extension of credit in connection with a commercial transaction, such as trade financing (except for specific types of loans covered earlier in the definition). It also excluded any other claims to money. In all three cases, this exception presupposed that the claims to money did not involve the kinds of

35 Articles 1101-1114 of NAFTA.

36 See Part 5 on Investor-State Dispute Settlement (ISDS).

37 Article 1120 of NAFTA.

38 Article 1121 of NAFTA.

39 Articles 1135, 1136 of NAFTA.

interests that were described in the positive description of what constitutes investment.[40] Finally, NAFTA had some contracting party-specific rules, for example for the publication of awards.[41]

Overall, at the time of its ratification, NAFTA was considered an innovative and in-depth agreement from an investment law perspective, that could theoretically serve as a model for other investment agreements, both bilateral and multilateral.[42] However, it did not escape criticism over the decades following its establishment, some of which related to its investment chapter, while others connected to its trade-related chapters. This criticism became a substantial part of American political discourse, since NAFTA supposedly gave too many advantages to Mexico, which ultimately resulted in the renegotiation of the Treaty during the Trump administration.[43] This renegotiation, and the replacement of NAFTA with the United States–Mexico–Canada Agreement (USMCA), partially affected the investment rules of NAFTA. Most notably, Canada chose to be excluded from its dispute settlement rules, i.e. the ISDS framework. For more information on the USMCA, and its emergence from NAFTA, see Chapter 4.6.

II. The Energy Charter Treaty

The Energy Charter Treaty (ECT) is a special agreement, as it concerns itself with a specific topic and its various trade and investment aspects, unlike most other agreements being discussed in this Chapter which cover investment (and sometimes trade) in general. The topic, as the Treaty's name implies, is the energy sector. The ECT came into being in 1994, and has been signed by 53 and ratified by 50 member states as of 2022. The WTO and ASEAN, among others, are present as observers as well.[44] The treaty's principal purpose originally was to ensure stability and security in the energy supply of Western Europe, but its scope has expanded beyond that since then.[45]

The structure of the ECT is rather unique, from the perspective of investment law. Definitions are found in Part I of the Treaty, with investment law and trade law-related definitions intermixed with each other.[46] Part III of the ECT covers substantive rules for investments. Finally, Article 26 in Part V covers the ECT's dispute settlement rules for investment-related disputes.

The substantive rules in Part III are fairly broad and detailed, and include obligations towards ensuring fair and equitable treatment towards investors, creating stable, equitable, favorable and

---

40 Article 1139 of NAFTA.

41 Annex Article 1137.4 of NAFTA.

42 See more in detail: Alschner, *Interpreting Investment Treaties as Incomplete Contracts: Lessons from Contract Theory* (2013).

43 For more information on the shift in American trade policy, see: Dan Ciuriak, *From NAFTA to USMCA and the Evolution of US Trade Policy* (2019).

44 See the ECT's website for the full list of member states and observers: https://www.energycharter.org/who-we-are/members-observers/.

45 Article 2 of the ECT.

46 Article 1 of the ECT.

transparent conditions for investments, providing most constant security and protection, among others. The ECT also covers rules on compensation, expropriation and other classic investment law subjects we can find in most investment treaties.[47]

The dispute settlement mechanism covered in Article 26 of the ECT follows the traditional ISDS model, with arbitration (following consultation) being the primary means of resolving disputes, alongside turning to the host state's regular or administrative courts, and other options. In general, the procedural rules found in Article 26 are relatively sparse, especially compared to NAFTA, for example. For arbitration, the ECT gives investors a choice between four arbitral frameworks: The ICSID Convention and ICSID Rules of Procedure for Arbitration Proceedings, the ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules, and finally a claim can be submitted to the Arbitration Institute of the Stockholm Chamber of Commerce. The conduct of the arbitration receives relatively little attention in this article, with the principal focus being on the initiation of arbitration, and a short paragraph on awards.

Since it has been frequently invoked in ISDS cases, the ECT is facing a number of controversies. For discussion of these controversies, as well as reform proposals relating to the Treaty, see Part 6.

III. CAFTA-DR

The Central America Free Trade Agreement (CAFTA) was originally planned as a multilateral free trade agreement between the USA, El Salvador, Costa Rica, Honduras, Guatemala and Nicaragua. However, negotiations eventually included the Dominican Republic as well, leading to the amendment of the treaty's name to **Dominican Republic – Central America Free Trade Agreement** (abbreviated as CAFTA-DR or DR-CAFTA). The negotiations eventually resulted in an agreement that gradually entered into force for the participating countries between 2005 and 2009. Interestingly, it is not considered a proper international agreement according to the U.S. Constitution, since it was not submitted to and not approved by a two-thirds majority of the Senate. From the U.S. perspective, it is considered a congressional-executive agreement, a type of (international) agreement that is signed by the President, and approved by both houses of Congress with a simple majority.[48]

As a comprehensive free trade agreement, CAFTA-DR contains its own chapter on investment, the tenth chapter. This chapter is divided into three sections from A to C. A covers substantive rules regarding investments, B covers dispute settlement, and C covers definitions. The treaty also contains a number of annexes. Thus, the general structure is reminiscent of the one used by NAFTA, as described earlier. Section A of the treaty covers the expected topics of investment agreements: standards of treatment (national treatment, most-favored-nation treatment, minimum standard of

---

47 Articles 10-17 of the ECT.

48 For a more detailed history of the treaty, see: Patrick R. Coad, *DR-CAFTA: An Impact Analysis Thus Far* (2012). See also the Georgetown Law Library guide for this treaty: https://guides.ll.georgetown.edu/c.php?g=363556&p=3662931.

treatment), as well as clauses on expropriation, compensation and transfers. This section of CAFTA-DR also covers miscellaneous topics such as performance requirements, denial of benefits, and non-conforming measures.[49] With regards to expropriation, one of the annexes provides additional detail.[50]

Section B covers the ISDS system used by the agreement. Following the lead of NAFTA, it is relatively detailed. The agreement contains specific rules for the submission of the claim and the initiation of disputes in general, with the possible rule sets being the ICSID Convention (and ICSID Rules of Procedure for Arbitration Proceedings), the ICSID Additional Facility Rules, or the UNCITRAL Arbitration Rules.[51] As expected, this section principally focuses on this initial aspect of the ISDS proceedings, with further rules on the conditions for and limitations on the consent of each disputing party, and the selection of arbitrators. However, it does possess somewhat lengthy articles on the conduct of the arbitration, the transparency of proceedings, and consolidation, among other topics. In the final part of the section, we can also find a detailed article on awards.[52]

Finally, Section C covers the definitions used by the chapter. The definition list is not particularly detailed, with the exception of investment and investment agreement, which are both elaborated in some detail by the agreement.[53]

IV. TPP – CPTPP

The origins of the **Trans-Pacific Partnership Agreement (TPP)** can be traced back to 2002, to an Asia-Pacific Economic Cooperation (APEC) summit, during which three countries – New Zealand, Chile and Singapore, collectively known as P3 or the Pacific Three – agreed to further economic and trade negotiations among each other. These negotiations were joined by Brunei in 2005, turning the P3 into P4. As a result of the negotiations between the four countries, the so-called Trans-Pacific Strategic Economic Partnership became effective in 2006, but the deliberations on the agreement's financial and investment chapters were delayed by two years. This allowed the USA, under President George Bush, to join the negotiations in 2008, to be followed by several other states in the years until 2013. The additional states were Australia, Vietnam, and Peru (the first batch), then Malaysia, Canada, and Mexico (the second batch), and finally Japan. As a conse-

---

49 Articles 10.1-10.14 of CAFTA-DR.

50 Annex 10-C of CAFTA-DR.

51 Article 10.16 of CAFTA-DR.

52 Articles 10.20-10.26 of CAFTA-DR.

53 Article 10.28 of CAFTA-DR. For further analysis see, inter alia, J.F. Hornbeck, *The Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR): Developments in Trade and Investment*, Congressional Research Service 2012, available at https://nationalaglawcenter.org/wp-content/uploads/assets/crs/R42468.pdf; as well as Julia Johnson, *Towards a New Generation in Central American Trade: Proposals for Modernizing CAFTA-DR*, 32 Pace Int'l L. Rev. 2019-2020, Vol. 32, No. 1, pp. 103-136.

quence, negotiations on the TPP evolved into the desire to create a new and comprehensive Pacific Ocean-based trading block.[54]

The negotiations were successfully concluded in October 2015, with the governments announcing a final iteration of the planned TPP agreement. The draft was signed in February 2016.[55] However, the 2016 American presidential elections proved to be a watershed moment for the Treaty. After taking office, Donald Trump, who was known for his anti-TPP stance, withdrew the United States of America from the TPP in January 2017.[56]

As the United States of America had been one of the primary promoters of the TPP, this resulted in a crisis of sorts, with TPP's future looking uncertain. However, in May 2017, several signatories of the TPP expressed an interest in reviving the agreement (potentially with Chinese inclusion, though this has not yet come to be), which in turn led to the creation of the **Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)**,[57] the successor agreement of the stillborn TPP. The CPTPP was signed by 11 TPP signatories in March 2018, and came into effect in December 2018.[58]

Both the TPP and the CPTPP are comprehensive free trade agreements, meaning that they covered a wide variety of topics that moved beyond more traditional free trade subjects like national treatment, sanitary and phytosanitary measures, or technical barriers to trade. As such, they also included chapters on topics such as environment, labor, and regulatory transparency. It should be noted that the CPTPP is much shorter than TPP and mainly refers to the text of the TPP, effectively serving as an amendment to it. One of the topics covered by the TPP is investment, in Chapter 9. The CPTPP adapted Chapter 9 from the TPP, but excluded certain provisions from it, or to be more precise, suspended their application indefinitely.

Chapter 9 of the TPP / CPTPP can be considered a fairly typical example of a detailed investment agreement. It is somewhat similar in structure to NAFTA. It consists of two sections. Section A covers definitions, standards and similar substantive rules, while Section B covers dispute resolution and procedural rules. The definitions found in the TPP follow a standard pattern, with specific entries for enterprise, investment, investor (of a Party vs. a non-Party), investment agreement and

---

54 Schott, *Chapter 34,* in Looney (ed.), 'Handbook of International Trade Agreements: Country, Regional and Global Approaches' (2018), pp. 401-402.

55 Ibid., p. 402.

56 Ibid. pp. 408-409. For further analysis see, inter alia, Colin Grabow, *5 Years Later the United States Is Still Paying for Its TPP Blunder*, Cato Institute, 10 February 2022, available at https://www.cato.org/blog/5-years-later-united-states-still-paying-tpp-blunder.

57 The text is available at https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/text-texte/cptpp-ptpgp.aspx?lang=eng.

58 Schott, supra note 54, at pp. 409-411. See also the Australian Department of Foreign Affairs and Trade's website: https://www.dfat.gov.au/trade/agreements/in-force/cptpp/comprehensive-and-progressive-agreement-for-trans-pacific-partnership.

investment authorization, among others.[59] A notable divergence between the two agreements is that CPTPP specifically excluded “investment agreement” and “investment authorization” from among its definitions, suspending the application of their respective entries in the TPP until such a time that the signatory parties of the CPTPP can agree on them.[60]

When it comes to the standards of treatment, the TPP follows the lead of earlier investment agreements, with specific articles on national treatment, most-favored-nation treatment, and minimum standards of treatment.[61] It also deals with the question of expropriation and compensation, transfers relating to investments covered by the treaty, and performance requirements imposed on investors regarding the establishment, acquisition, expansion, management, conduct, operation or sale of their investments. Beyond these crucial articles, Section A’s substantive rules cover questions of senior managerial interference by host states, subrogation, non-conforming measures, special formalities and information requirements, as well as denial of benefits.[62] Overall, the substantive rules found in the TPP are highly detailed and extensively covered by the agreement. The CPTPP did not directly alter these articles, with the exception of the above-mentioned definitions.

Section B on dispute settlement follows a rather standard ISDS formula. After mandatory consultation and negotiation, the investor can submit an application based on three different bases: the host state violating one of its obligations found in the substantive rules part of the chapter, or the host violating an investment agreement with the investor, or a withdrawal or breach of an investment authorization given to the investor.[63] Since the parties could not agree on unambiguous definitions of “investment agreement” and “investment authorization”, the CPTPP indefinitely suspended the latter two bases.[64]

The ISDS process under the TPP/CPTPP can utilize the ICSID Convention or the ICSID Additional Facility Rules, the UNCITRAL arbitration rules, or any other arbitral framework the parties to the dispute can agree on.[65] Despite its rather classic framing of ISDS, the TPP/CPTPP can be considered notable for attempting to include stronger safeguards to close possible loopholes in ISDS, for example by referring explicitly to the right of the host state to regulate in the public interest, emphasizing that the burden of proof of a violation of investor rights is on the investor-claimant, by excluding frustrated investor expectations as a breach of treaty obligations in themselves, and by attempting to ensure that frivolous claims are more easily dismissed.[66]

---

59 Article 9.1. of TPP.

60 Article 2, Annex paragraph 2(a) of CPTPP.

61 Articles 9.4–9.6 of TPP.

62 Articles 9.8–9.15 of TPP.

63 Article 9.19 of TPP.

64 Article 2, Annex paragraph 2(b) of CPTPP.

65 Article 9.19(4) of TPP.

66 United States Trade Representative, *TPP Chapter 9 Summary,* p. 6.

V. TTIP – CETA

Both the **Transatlantic Trade and Investment Partnership (TTIP)** and the Comprehensive Economic and Trade Agreement (CETA) cannot be considered classic multilateral agreements, as there were only two parties to the negotiations, namely the EU on one side and a single country – the USA and Canada respectively – on the other side. However, due to the unique nature of the EU as representative of 27 Member States, it seems reasonable to discuss these two agreements in the context of this chapter on multilateral agreements.

The first one to be examined is the Transatlantic Trade and Investment Partnership. This was a comprehensive free trade agreement proposed for the United States of America and the European Union. It would have covered a wide range of subjects, including investment. The original, formal negotiations between the European Commission and the United States Trade Representative (USTR) began in July 2013, after the EU-US High-Level Working Group presented a final report on the subject of a comprehensive free trade agreement, which was positively evaluated by the European Commission, leading the EU Council of Ministers to granting the Commission a mandate to proceed with the negotiations.[67] However, from the beginning, the talks suffered from a variety of disagreements, including the difficulty of reconciling EU and US positions on a number of trade issues. More importantly, after a draft of the treaty was leaked to the press, widespread public protest erupted across the EU. Essentially, the draft was perceived as a conservative free trade agreement prioritizing, once again, free trade and freedom of investment over other values, and quite possibly requiring a reduction of environmental and other standards in the EU.[68] However, the final death blow to the TTIP came in the form of the 2016 elections in the USA. After the victory of Donald Trump, it quickly became evident that the TTIP was "dead in the water." The negotiations stalled, and the matter was quietly dropped.[69]

The TTIP's significantly more successful cousin was the **Comprehensive Economic and Trade Agreement (CETA)** between Canada and the European Union. CETA's negotiations started in 2009, when the Council of the European Union authorized the Commission to begin formal negotiations on an economy-focused international agreement with Canada. In 2011, this mandate was expanded to include Commission authority to negotiate substantive and procedural provisions for investment protection, and related to dispute settlement matters. Soon after, a CETA chapter on investment protection was drafted. This chapter would have utilized typical ISDS mechanisms as its dispute resolution of choice. Eventually, similar public pressure as with the TTIP forced the negotiating partners' hands and resulted in a reworking of the dispute settlement provisions, moving away from the traditional ISDS system in favor of a proposal involving a regional or global

---

67 European Parliamentary Research Service, *Towards an EU-US trade and investment deal* (2014).

68 Michael Nienaber, *Tens of Thousands Protest in Europe Against Atlantic Free Trade Deals*, Reuters, 17 September 2016.

69 Philip Blenkinsop, *U.S. Trade Talks in Deep Freeze after Trump Win, Says EU*, Reuters, 11 November 2016.

investment court.[70] Even with these concessions, negotiations were proceeding very slowly. In 2013, the parties reached a consensus on the most important parts of the agreement, which was followed by the ironing out of the remaining details of the treaty.[71] Eventually, in July 2016, the Commission submitted a formal proposal to the Council to sign the finalized CETA. Consent of all 27 Member States governments on the one side, and the government of Canada on the other, was achieved CETA was signed on 30 October 2016.[72] With 28 ratification requirements, it has not entered into force as of August 2022. Substantive details are covered in Chapter 4.1.

VI. ASEAN Investment Agreements

The Association of Southeast Asian Nation (ASEAN) is responsible for two multilateral investment agreements that could be considered unique from the perspective of this chapter. ASEAN itself was founded in 2008 as an intergovernmental organization with legal personality bringing together Brunei, Indonesia, the Philippines, Cambodia, Laos, Malaysia, Myanmar, Singapore, Thailand and Vietnam.[73] The ASEAN Agreement for the Promotion and Protection of Investment, dates back to 1987. The **2009 ASEAN Comprehensive Investment Agreement**[74] replaces it wholesale. In general, ASEAN is a trading and economic block seeking to emulate the success of the European Union, and its member states have been using a variety of multilateral agreements to harmonize, among other topics, international investment law among themselves.

The original agreement was comparatively succinct, both with regards to its substantive and procedural provisions. It was not divided into sections, and contained only fourteen articles, none of them particularly expansive. Its content resembled a traditional BIT. It established definitions and briefly elucidated on requirements for the treatment of investors, specifically highlighting full protection, fair and equitable treatment, most-favored-nation treatment, and national treatment, without going into significant detail on any of them.[75] It also established brief rules on expropriation and compensation, repatriation of capital and earnings, and subrogation.[76] Overall, while it was a pretty typical 1980s investment agreement, it definitely could not be considered a multilateral investment agreement on par with the other agreements described in this chapter.

---

70 For details, see Part 4 Chapter 4.1, and Part 6.

71 Fontanelli and Bianco, *Converging Towards NAFTA: An Analysis of FTA Investment Chapters in the European Union and the United States*, Stanford Journal of Int'l Law 2014, Vol. 50, No. 2, pp. 232-???, at p. 242.

72 BBC, *CETA: EU and Canada Sign Long-Delayed Free Trade Deal*, 30 October 2016. The text of the agreement is available at https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3546/canada---eu-ceta-2016-.

73 See the 2008 ASEAN Charter, available at https://asean.org/wp-content/uploads/images/archive/publications/ASEAN-Charter.pdf.

74 Available at https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3273/asean-comprehensive-investment-agreement-2009-.

75 Articles I-IV of the ASEAN Agreement for the Promotion and Protection of Investment.

76 Articles VI-VII of the ASEAN Agreement for the Promotion and Protection of Investment.

By contrast, the newer 2009 agreement is significantly more detailed in all respects. It contains 46 articles separated into several sections and is by all means a modern investment agreement. The substantive rules in Section A are vastly more detailed compared to the 1987 treaty. Although the 2009 agreement utilizes much of the same staple content as the older agreement – various rules and standards for investor treatment and compensation for expropriation – it also delves into subjects such as general and security exceptions, transparency, investment facilitation and the like.[77]

A similar picture emerges from the procedural rules of the two agreements. In the older 1987 treaty, there is only a single article (Article X) on arbitration, it is light on details, and uses somewhat ambiguous language. For example, the treaty's English version refers to "[disputes being brought] before ICSID, UNCITRAL and Regional Centre for Arbitration at Kuala Lumpur or any other regional centres found within ASEAN."[78] The source of uncertainty here is obviously that the procedural rules and the venue of an ISDS dispute need not necessarily match in all cases, so the question arises whether this article of the investment agreement mandates both venue and procedural framework, or only the former. This inexact language is especially notable with regard to UNCITRAL which, unlike the other listed options, does not function in the role of a venue for arbitration. Otherwise, the older treaty contains some guidelines on the selection and constitution of the arbitration tribunal, as well as some general rules on its proceedings.

The 2009 treaty, by contrast, provides much more detail again. Section B is devoted to ISDS and the agreement (in the vein of NAFTA perhaps) contains extensive rules on arbitration procedures. The dispute settlement options are clearly formulated, with little-to-no-room for interpretation regarding where and under which arbitral framework the claimant can submit their claim.[79] The agreement overall focuses more on the initiation of the dispute proceedings (submission of claim, constitution of the arbitral tribunal, etc.), and the award, with somewhat less detail about the actual proceedings. This makes sense because those details would be provided by the chosen arbitral rule framework.[80]

D. CONCLUSIONS

The case of ASEAN's two investment agreements shows how much multilateral agreements between largely the same countries can and have evolved over time, especially with regards to investment law. From the relatively humble 1987 treaty with sparse details and only basic rules, ASEAN arrived at a truly comprehensive agreement in 2009, with highly specific and in-depth guidelines on investment protection and dispute resolution. Similar developments can be seen in other parts of the world. The reason is simple. Contemporary drafters are not working in a bubble or vacuum. They are obviously aware of evolutionary improvements made to bilateral and multi-

---

77 Articles 4-24 of the ASEAN Comprehensive Investment Agreement.

78 Article X of the ASEAN Agreement for the Promotion and Protection of Investment.

79 Article 33 of the ASEAN Comprehensive Investment Agreement.

80 Articles 34-41 of the ASEAN Comprehensive Investment Agreement.

lateral treaties between other states seeking to provide adequate rules for similar problems.[81] Furthermore, as will be explored in greater detail in Part 5, and in contrast to the confidentiality commonly encountered in commercial arbitration, a large majority of ISDN arbitration awards are also published. This case law shows which rules in bilateral and multilateral investment treaties are helping with equitable settlement of disputes and which rules are too ambiguous or otherwise poorly drafted to provide predictable and fair results.

What this means, however, is that home states and host states should review their treaties every now and then and jointly make suitable amendments, preferably before investors shun a country because protections are outdated, or before host states exit the system altogether because they are no longer able to regulate their affairs and modernize their laws without constantly risking investor claims.

---

81 The reader is reminded here of the comprehensive collection of BITs and multilateral treaties with investment provisions (TIPs) published by UNCTAD (https://investmentpolicy.unctad.org/international-investment-agreements); and the similar database made available by ICSID (https://icsid.worldbank.org/resources/databases/bilateral-investment-treaties).