Amsterdam European Law Clinic
Supervisor: Dr. Ivana Isailović
Nieuwe Achtergracht 166
P.O. Box 15544
1001 NA Amsterdam
Telephone: +31(0)20 525 2958
e-mail: amsterdamlawclinics@uva.nl
www.amsterdamlawhub.nl/amsterdamlawclinics

MEMORANDUM

To: SOMO

Authors: Jesse Peters, Florian Huber, Maria Bilwin

Regarding: Comparative Research on Investment Protection Standards and Procedures

Date: 30 January 2021

Overview of contents

List of abbreviations

Abbreviation	Refers to
Awb	Algemene wet bestuursrecht (Dutch administrative code)
BW	Burgerlijk Wetboek (Dutch civil code)
CETA	Comprehensive Economic and Trade Agreement
CJEU	Court of Justice of the European Union
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
EU	European Union
ECT	Energy Charter Treaty
FET	Fair and equitable treatment
HR	Hoge Raad (Dutch Supreme Court)
GC	General Court
ICS	Investment Court System (new mode of ISDS introduced by CETA)
ISDS	Investor State Dispute Settlement
ICSID	International Centre for Settlement of Investment Disputes
Rv	Wetboek van Burgerlijke Rechtsvordering (Dutch civil procedural code)
UNCITRAL	United Nations Commission On International Trade Law

1. Introduction[*]

1.1 Problem

In 2020, the Dutch Minister of Foreign Trade has stated that the section on investment in the Comprehensive Economic and Trade Agreement[1] ('CETA') between Canada, the European Union ('EU') and the EU's Member States provides the same level of protection for investors as Dutch law. The Minister has substantiated this claim by equating Dutch legal norms and safeguards to the legal regime that CETA will bring about.[2] Both the European Commission and Canada have made similar statements in defence of CETA, declaring that the agreement will create a 'level playing field' between domestic and foreign investors.[3]

The Dutch Minister of Foreign Trade made these claims to address criticisms of CETA and convince the Dutch Parliament to ratify the treaty. Similarly, the Minister suggested that the Energy Charter Treaty[4] ('ECT'), which has been in force since 1998, has upheld a similar standard of investment protection as Dutch law.[5] This seems to further suggest that the Minister believes that concerns over investment treaties are misguided.

At the heart of these claims made by the Minister, and earlier by the European Commission and Canadian Government, is the argument that CETA and the ECT do not grant foreign investors covered by these treaties[6] greater rights than foreign or domestic investors enjoy in the domestic legal systems of Canada and the EU Member States, or that they enjoy vis-à-vis EU institutions.

In contrast to these claims, this memo highlights several areas where foreign investors in fact do have greater rights under the ECT and CETA than under domestic Dutch or EU law. These areas will be presented in section 1.3, after we first lay out the scope of this memo.

1.2 Scope

We have assessed the procedural and substantive elements of investment protection under the ECT and CETA, as well as the amounts of damages awarded to investors. These regimes have been compared to Dutch civil and administrative law, as well as the EU's non-contractual liability regime. Although investors

[*] We would like to thank Dr. Jan Kleinheisterkamp, Mr. Wouter Zorg, and Dr. Nicolás Perrone for their helpful comments and answers to our questions. All expressed views and potential errors in this memo remain exclusively ours.

[1] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part [2017] OJ L11/23.

[2] *Kamerstukken I* 2020/21, 35154, F, p. 35.

[3] European Commission, 'Factsheet: Main elements of CETA,' (2016) MEMO/16/445 <https://ec.europa.eu/commission/presscorner/detail/en/MEMO_16_445> accessed 8 December 2020; Government of Canada, 'Learn about CETA benefits for businesses' <www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/ceta_benefits_business-avantages_aecg_entreprises.aspx?lang=eng> accessed 8 December 2020.

[4] The Energy Charter Treaty, Consolidated Version, signed in 2014, entered into force 1998.

[5] *Aanhangsel Handelingen II* 2019-2020 1769, p. 5-6. <www.tweedekamer.nl/kamerstukken/detail?id=2020Z00652&did=2020D05607> accessed 27 November 2020.

[6] Both under CETA and the ECT, only foreign investors can initiate ISDS proceedings, whereas domestic investors cannot. See e.g. Article 25(1) ICSID Convention, and Article 8.2(1)(a) CETA. Where we mention 'investors' in the memo, we refer to 'foreign investors', unless explicitly indicated otherwise.

can take recourse to multiple jurisdictions and (supra)national courts, such as the ECtHR[7], we have investigated these abovementioned avenues because they provide the most important legal regimes for investors to obtain compensation for damages inflicted by bodies of the Dutch state or EU institutions.

The ECT is currently the most litigated international treaty in the world,[8] and has been criticised by civil society actors that consider it an instrument protecting the fossil fuel industry.[9] CETA is a free trade agreement between Canada, the EU and the EU's Member States. It is still in the process of ratification by the EU Member State parliaments. Parts of CETA are provisionally applied since 2017, but CETA's investment chapter, relevant for this memo, has not entered into force yet. Therefore, there is no case law under CETA to analyse, and we were unable to evaluate exactly how arbitral tribunals will interpret CETA's provisions. However, we have analysed the wording of CETA in relation to other investment treaties and their interpretation by arbitral tribunals, which can provide indications as to what could be expected if CETA enters into force.

Investment treaties often have similar wordings, including substantive protections such as the protection against 'indirect expropriation', or the right to 'fair and equitable treatment'. Moreover, the role of arbitrators is somewhat constrained by international law rules, which provide some degree of homogeneity in the interpretation of investment treaties. In international law, provisions of international treaties – including investment treaties – are generally interpreted according to Articles 31 and 32 of the Vienna Convention,[10] that provide general, uniform rules of interpretation.[11] Furthermore, tribunals do occasionally rely on previous decisions by other tribunals.[12] While this does not mean that clear, binding precedents emerge,[13] it cannot be said that arbitral tribunals are legally 'autonomous'. Indications for how a clause in the ECT or CETA will be interpreted, can therefore be derived from other case law. Finally, arbitrators come from a small pool of experts,[14] making it unlikely that their interpretation of CETA will differ fundamentally from the application of similar terms in other treaties.

Outside of the issues we discuss in the memo, there are a number of other areas of comparison that show that investors enjoy greater rights under the ECT and/or CETA than under Dutch or EU law. To start with,

---

[7] The European Convention of Human Rights (ECHR) is an international human rights treaty that is ratified by all EU Member States. The ECHR is not a part of EU law. National judges are required to uphold the provisions of the ECHR, and the European Court of Human Rights (ECtHR) has full jurisdiction to receive complaints of violations of the ECHR by states that are party to the ECHR and that have not been resolved by the national judiciary.

[8] Anna Herranz-Surrallés, "Authority Shifts' in Global Governance: Intersecting Politicizations and the Reform of Investor-State Arbitration' (2020) 8(1) *Politics and Governance* 336, 343.

[9] See e.g., *ECT'sDirtySecrets.org* <https://energy-charter-dirty-secrets.org/> accessed 28 January 2021; Sarah Keay-Bight and Steivan Defilla, 'Energy Charter Treaty Review Should End Protection for Fossil Fuels' (*Energypost.eu*, 20 March 2019) <https://energypost.eu/energy-charter-treaty-review-should-end-protection-for-fossil-fuels/> accessed 28 January 2021. This claim is exemplified by the *Rockhopper v. Italy* case (2017), in which the withdrawal of a permit for drilling by the Italian state gave rise to a damages claim under the ECT by a UK oil and gas company. Other (in)famous examples are the *Vattenfall v. Germany* cases (2009, 2012), where the ECT was used to claim compensation for public measures relating to the environment.

[10] Vienna Convention on the law of treaties, concluded at Vienna on 23 May 1969.

[11] Arbitrators must interpret 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose'.

[12] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (OUP 2012) 33.

[13] Ibid.

[14] Jonathan Bonnitcha, Lauge Skovgaard Poulsen, and Michael Waibel, *The Political Economy of the Investment Treaty Regime* (OUP 2017) 28.

the definition of 'investor' in the ECT and CETA covers shareholders,[15] who can in turn file arbitration cases to obtain compensation, for example for a decrease in the worth of their shares[16]. Under Dutch law, it is virtually impossible for shareholders to obtain damages in court independent of the company at large.[17] Secondly, whereas Dutch and EU law provide appeal mechanisms, and CETA introduces an appeal mechanism as well,[18] most investment treaties, including the ECT, do not and only contain an annulment procedure with narrow possibilities.[19] Furthermore, other issues, such as third party intervention,[20] possibilities to remove an arbitrator or judge because of a perceived lack of impartiality and independence, and relative standards of protection (national treatment and most-favoured-nation treatment) could also contribute to an assessment of whether investors have greater rights under the ECT and CETA than under domestic law. However, these issues fall outside the scope of this research and are therefore not thoroughly investigated in this memo.

1.3 Findings

We have located four main areas in which foreign investors enjoy greater rights under the ECT and CETA, in comparison to the legal avenues for foreign or domestic investors in Dutch civil and administrative law or the EU's non-contractual liability regime. Our most important findings are shortly summarised below.

First, the **structure of arbitration proceedings** under the ECT and CETA provides benefits for foreign investors that foreign or domestic investors do not enjoy when seeking compensation in the Dutch or EU legal orders. The first structural feature that is likely to favour foreign investors is the lack of transparency safeguards that exist under the ECT in comparison to Dutch or EU law. The confidential nature of proceedings under the ECT prevents access to essential details of the proceedings. Investment tribunals themselves and scholarly literature have long held that ISDS arbitration cases can affect major public interests. Less public scrutiny in such matters of public interest means that states will be more inclined to settle, while it prevents the general public and civil society from critically evaluating these cases and exposing foreign investor's behaviour. This lack of transparency can thereby protect investors' reputation and image. The politics of the 'closed doors' is in stark contrast with the principles which underpin the organisation of domestic judicial systems. CETA aims to increase the transparency of investment arbitration with the introduction of the Investment Court System (ICS). Because there are no ICS cases yet, we are unable to draw definitive conclusions on the degree of transparency that the new system offers. The second structural feature that is likely to favour investors, is that arbitrators under both the ECT and CETA have

[15] See Article 1(7) jo. 1(6)(b) ECT and Article 8.1 CETA.
[16] David Gaukrodger, 'Investment Treaties and Shareholder Claims for Reflective Loss: Insights from Advanced Systems of Corporate Law' (2014) 2 *OECD Working Papers on International Investment* <http://dx.doi.org/10.1787/5jz0xvgngmr3-en> accessed 3 November 2020.
[17] In Dutch administrative law, claims by shareholders are inadmissible because they only have a derived interest in the matter, see Article 1:2 Awb; ABRVS 12 August 2015, ECLI:NL:RVS:2015:2574, para 4; and CBb 10 May 2015, ECLI:NL:CBB:2016:105, para 5.4. In Dutch civil law, shareholders can only successfully claim if an act specifically hurts them in a way distinguishable from the company at large, which is almost never the case, see e.g. HR 15 June 2011, ECLI:NL:HR:2001:AB2443, para 3.4.2.
[18] Article 8.28 CETA.
[19] Bonnitcha, Skovgaard Poulsen, and Waibel (n 14) 5.
[20] Whereas ISDS typically grants third parties little leeway to intervene, domestic courts might offer third parties more options to do so. We only did cursory research on this topic, but a starting point for a more thorough investigation might be to compare the ECT and CETA to Dutch administrative law, where 'belanghebbenden' ('interested parties') can in principle join a proceeding (Article 8:26 Awb). In Dutch civil courts however, third parties are rarely granted an opportunity to intervene, with the provision laid down in Article 217 Rv being used approximately ten to fifteen times a year nationally.

perverse financial incentives to rule in favour of foreign investors, while such an incentive is lacking in Dutch or EU law. Arbitrators under the ECT are appointed by parties themselves, which means that the arbitrators appointed by the investor have a financial incentive to rule in their favour, in order to be appointed again in the future. Moreover, arbitrators under both the ECT and CETA will receive compensation for each day they work on a case. This creates a financial incentive to be appointed in more cases and not discourage parties able to bring a claim from doing so. Under the current structure of the investment regime, only foreign investors can initiate claims against. Empirical research has shown that these financial incentives contribute to expansive, investor-friendly rulings by arbitrators.

Secondly, both the ECT and CETA foster an '**endure and cash-in**' attitude for foreign investors, whereas Dutch law and EU law do not. 'Endure and cash-in' refers to the fact that investors do not have to challenge a measure that negatively affects their investment in court first, but can directly gain monetary compensation for enduring that measure. Instead of first having to request the measure to be repealed, it is profitable for investors to directly obtain compensation with the measure still in place, because in that case, lost expected profits will be compensated. This means that no actual commercial production or risk-taking is needed to obtain future profits, and that investors can cash-in directly. Under Dutch law, getting compensation is a two-stage process. Investors first have to challenge the legality of measures enacted by a governing body in administrative court. If the measure is found illegal and therefore repealed by an administrative court, investors are put back in the same position as they were before the measure was enacted. In contrast to the investment treaty scenario, any future profits will then have to be earned by actual production and/or risk-taking. If the measure is found legal and not repealed by the administrative court, investors can claim compensation for all damages already suffered *and* lost future profits, which will be assessed through the substantive standards we explained in section 4, and calculated using the principles laid out in section 5. The ECT and CETA thus provide investors with greater rights by offering them the chance to sue directly for damages, without having to challenge the legality of the measure that hurts their investment first. Under EU law, investors can 'endure' a measure and directly claim damages in a non-contractual liability suit, but since chances of obtaining compensation are extremely low, it can hardly be said that investors can 'cash-in'.

Thirdly, the substantive protections for investors under the ECT and CETA put heavy constraints on the **margin of appreciation for administrators and legislators**, while the Dutch and EU legal systems are protective of administrators' and legislators' regulatory space. This is likely to benefit investors in two ways. First, arbitral tribunals have interpreted the most important substantive protections – against 'indirect expropriation' and to 'fair and equitable treatment' – in an expansive way, which means that investors will be compensated in more instances than under the Dutch or EU legal systems. The wording of CETA does not alleviate these concerns. Second, the open-ended wording of these provisions has provided arbitral tribunals with wide discretion to interpret these provisions. Unlike in Dutch and EU law, no clear precedents emerge under the ECT, and it cannot be known whether they will emerge under CETA, which creates legal uncertainty. Legal scholarship has argued that this legal uncertainty poses a risk for states, that could be found liable to their surprise and then have to pay out large fees (see section 5), which can contribute to 'regulatory chill'. Regulation in the public interest could thereby be stifled, which benefits investors who are potentially hurt by stricter regulations in the public interest. Under both Dutch and EU law, the protection of the margin of appreciation for administrators and legislators is an expression of the constitutional value of the separation of powers and is upheld by the judiciary to prevent regulatory chill.

Fourthly, investors can obtain higher **amounts of compensation** under the ECT and presumably under CETA, compared to Dutch or EU law. Under the ECT and CETA, arbitrators use standards to calculate the amounts of compensation providing for full compensation. Under Dutch law, mitigating factors are applied that do not exist under CETA or the ECT, which make sure the eventual sum does not reach extraordinary proportions. Under EU law, non-contractual liability claims are rarely successful, while actual awards granted are rather insignificant compared to the awards in ISDS claims. Certainly, having the possibility to obtain greater compensation is decisive for investors.

2. Structure of arbitral tribunals

Arbitration proceedings under CETA and especially the ECT contain structural features that benefit investors in comparison to the court structures in the Dutch or EU legal orders. We will discuss two of these structural features, namely the lack of transparency under the ECT and the perverse financial incentives for arbitrators under both the ECT and CETA. Proceedings under Dutch or EU law require a high degree of transparency and do not contain these perverse financial incentives.

2.1 Transparency

The ECT and CETA

The confidential nature of proceedings under the ECT prevents access to the essential details of proceedings, including which arguments have been made, what the outcomes of the proceedings have been, and whether or on what terms a possible settlement has been reached. Investment tribunals themselves and scholarly literature have long held that ISDS arbitration cases can affect major public interests.[21] Less public scrutiny in matters of public interest means that states will be more inclined to settle, while it prevents the public and civil society from critically evaluating these cases and exposing foreign investor's actions.[22] The lack of transparency can thereby protect investors' reputation and image. The politics of the 'closed doors' is in stark contrast with the principles which underpin the organisation of domestic judicial systems or the EU's courts.

The degree of transparency in ISDS proceedings initiated under the ECT depends on the arbitration rules that the parties choose.[23] The ICSID rules have been used in most cases.[24] Under these procedural rules, general information on and progress of pending cases is reported, but awards and other decisions by tribunals are not published by default, which has led to many cases not being published at all.[25] Instead, confidentiality remains the norm for all information that arbitrators and tribunal assistants pick up during

[21] *Methanex v USA*, UNCITRAL, 'Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae' (2001), para 49; Joanna Lam and Günes Ünüvar, 'Transparency and Participatory Aspects of Investor-State Dispute Settlement in the EU 'New Wave' Trade Agreements' (2019) 32 *Leiden Journal of International Law* 781, 784.
[22] Lam and Ünüvar (n 21) 782-783.
[23] According to Article 26(2)(b) ECT, the investor and the state can choose any dispute settlement procedure of their choice. If they cannot agree on a procedure, only the options listed by the ECT remain. These are, according to Article 26(4) ECT: the ICSID rules, the UNCITRAL rules, or the Arbitration Institute of the Stockholm Chamber of Commerce.
[24] Bonnitcha, Skovgaard Poulsen, and Waibel (n 14) 69.
[25] Dolzer and Schreuer (n 12) 287. Awards can only be published if both parties consent to that, see Article 48(5) ICSID Convention.

the proceedings.[26] If other rules of procedure than the ICSID rules are used, chances of the awards being published are even lower.[27] Parties are free to decide on which documents will be released, while public hearings are rare in ISDS proceedings under the rules that the ECT prescribes.[28]

Civil society actors have expressed concerns over transparency in the negotiations of CETA.[29] This has resulted in substantial improvements in transparency considerations in CETA, mainly in Article 8.36 CETA. The production of several important documents shall be made available to the public, pursuant to Article 8.36(2) CETA, which refers to the UNCITRAL Transparency Rules[30]. Therefore, the exceptions to transparency laid out in Article 7(1) of the UNCITRAL Transparency Rules apply, the most important of which is 'confidential business information'[31]. Furthermore, hearings 'shall be open to the public', according to Article 8.36(5) CETA, which is a remarkable departure from 'traditional' ISDS. The arbitration tribunal will have the discretion to decide whether 'confidential or protected information' is involved, which could lead to hearings behind closed doors. Since there have been no cases under the ICS, we are unable to evaluate how tribunals will interpret terms like 'confidential business information', but openness is set as the default for ICS hearings.

Dutch law

Dutch law contains more stringent transparency requirements than the ECT does. In Dutch court proceedings, the overwhelming majority of hearings is public, and generally, anyone can visit any court case. Moreover, the rulings and the motivations of those rulings by the judge have to be made public immediately.[32] Exceptions to these standards mostly exist in criminal law, in order to protect minors or public safety.[33] Civil judges can also decide on a request for holding hearings behind closed doors if company secrets would thereby get exposed.[34]

EU law

Under EU law, the rulings of the Court of Justice of the European Union ('CJEU'), consisting of the General Court ('GC') and the European Court of Justice ('ECJ'), including the parties' arguments and the judicial reasoning, are made available to the public shortly after a proceeding is finished. Usually, this information

[26] Lam and Ünüvar (n 21) 790.
[27] Dolzer and Schreuer (n 12) 287.
[28] Ibid. Some arbitral tribunals have decided that they have the power to accept *amicus curia* briefs. Third-party intervention is often considered as a second element of assessing the degree of transparency, e.g. Lam and Ünüvar (n 21) 784. However, as stated in section 1.2, issues regarding third-party intervention fall outside the scope of this memo.
[29] Lam and Ünüvar (n 21) 784.
[30] UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, <https://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf> accessed 13 November 2020.
[31] This term is not specified in the UNCITRAL Transparency Rules or in CETA, see Lam and Ünüvar (n 21) 798. However, it is not unusual to protect confidential business information, see e.g. Eric Wiebes, 'Kamerbrief over Nadeelcompensatie Vervroegde Sluiting Hemwegcentrale' (2019) <www.rijksoverheid.nl/documenten/kamerstukken/2019/12/20/kamerbrief-over-nadeelcompensatie-vervroegde-sluiting-hemwegcentrale> accessed 4 November 2020.
[32] Article 121 Grondwet.
[33] Article 269 Wetboek van Strafvordering.
[34] Article 22a Rv.

is published on the Curia website[35] on the same day that the rulings are delivered. Subsequently, all judgments are also available in the European Court Reports.[36] Further, proceedings before the CJEU include public hearings, unless there are serious reasons to decide otherwise.[37] These arrangements aim to ensure a high level of transparency.

2.2 Financial incentives for arbitrators[38]

The ECT and CETA

Proceedings under the ECT benefit foreign investors, because unlike in the Dutch or EU legal systems, investors exercise influence over who will decide their case. Under the ECT, arbitral tribunals are set up on an *ad hoc*, case-by-case basis.[39] Most arbitrations under the ECT, and in ISDS in general, use the ICSID Convention.[40] Under these rules, parties can decide amongst themselves on the number of arbitrators, always uneven, with the default set at three arbitrators, where both parties can appoint one arbitrator and have to agree on the third.[41] If an agreement is not reached, the Chairman of the Administrative Council of the ICSID will fill in the vacant position(s), according to Article 38 of the ICSID Convention. Investors do not have similar influence on who will decide their case in Dutch or EU law, where independent judges will do so. This is beneficial for investors, because arbitrators will be aware of the fact that a favourable ruling for the investor will increase the likelihood of being appointed in more disputes by the investor party, while a negative ruling weakens their chances of being appointed again.[42] Because sitting on an arbitral tribunal can be quite lucrative,[43] arbitrators therefore have a considerable financial incentive to rule in favour of the investor.[44]

---

[35] The Court of Justice of the European Union <https://curia.europa.eu/jcms/jcms/j_6/en/> accessed 19 December 2020.
[36] Curia, 'Public hearings' <https://curia.europa.eu/jcms/jcms/Jo2_22322/en/> accessed 12 December 2020 and Curia, 'Court of Justice Presentations' <https://curia.europa.eu/jcms/jcms/Jo2_7024/en/> accessed 16 December 2020.
[37] Article 31 Statute of the Court of Justice of the European Union.
[38] The financial incentives discussed in this section are structural features of ISDS and do not hinge on individual arbitrators' behaviour. Rules regarding the removability of individual arbitrators exist, although it is debatable whether those are effective to ensure the impartiality of arbitrators. Other research has for example pointed out that some arbitrators are hired as counsellors in other disputes, creating ethical problems, see Pia Eberhardt and Cecilia Olivet, 'Profiting from Injustice: How Law Firms, Arbitrators, and Financiers are Fuelling an Investment Arbitration Boom' *Corporate Europe Observatory* and the *Transnational Institute*. While it could be argued that these arbitrator practices also benefit investors, we limit ourselves in this section to the financial incentives that arise directly from the structure of arbitral proceedings under the ECT and CETA.
[39] According to Article 26(2)(b) ECT, the investor and the state can choose any dispute settlement procedure of their choice. If they cannot agree on a procedure, only the options listed by the ECT remain. These are, according to Article 26(4) ECT: the ICSID rules, the UNCITRAL rules, or the Arbitration Institute of the Stockholm Chamber of Commerce.
[40] Bonnitcha, Skovgaard Poulsen, and Waibel (n 14) 69. These rules can only be used if both the state of the investor and the host state are parties to ICSID. Currently, 163 countries are party to ICSID, including the Netherlands.
[41] Article 37(2) ICSID Convention.
[42] Gus van Harten, 'Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration,' (2012) Osgoode Hall Law School Research Paper No. 41/2012, 10-11.
[43] With sums of compensation sometimes reaching close to US$1 million per arbitrator, see Eberhardt and Olivet (n 38) 35.
[44] Ibid 27, 48.

With the introduction of the ICS in CETA, investors do not have any influence over who sits on the arbitral tribunals in proceedings under CETA, because the ICS will be staffed by fifteen permanent members – five from Canada, five from the EU, and five from third countries – that will be nominated by representatives of the EU and Canada.[45] This removes the incentive for arbitrators to rule in favour of investors in order to be appointed again by the investor party. The new system in Articles 8.27 and 8.28 was introduced to strengthen the legitimacy of ISDS and address arbitrator's potential conflicts of interest and unethical behaviour. The fifteen arbitrators that will be appointed should have the qualifications to serve as judges in their home country and should be 'jurists of recognised competence'. Moreover, CETA contains an ethics clause for arbitrators in Article 8.30, to further prevent conflicts of interest. Given that there have been no ICS cases yet, we are unable to review whether these measures will be successful in achieving a more balanced and fairer type of ISDS.

Still, both the ECT and CETA are conducive to creating another financial incentive for arbitrators to rule in favour of investors. Members of the ICS under CETA, and arbitrators sitting on a tribunal under the ECT, will receive compensation for each day that they work on a case, instead of collecting a flat, fixed salary.[46] In Article 8.27(14) CETA, the default system for compensation of arbitrators is taken from Article 14(1) of the Administrative and Financial Regulations of the ICSID Convention. In Article 14(1) of said Regulations, it is specified that arbitrators will receive (i) compensation for each day that they participate in meetings of the body of which they are a member; (ii) compensation for all other work performed in connection with the proceedings; (iii) an allowance to cover expenses made while away from their normal place of residence; and (iv) compensation for travel expenses. The amounts of these fees are determined by the Secretary-General of the ICSID Convention, which are currently set at US$3,000 per day of work, not covering the aforementioned travel and other expenses.[47] This means that arbitrators have a considerable financial incentive to make sure that more disputes arise,[48] and that proceedings take more time than needed. Under both the ECT's regime and the ICS, only investors are able to launch investment claims. As stated in the report 'Profiting from Injustice' by *Corporate Europe Observatory* and the *Transnational Institute*: "[A]n arbitrator's main source of income and career opportunities depends on the decision of companies to sue."[49] Therefore, arbitrators have a financial incentive to rule in favour of investors to not discourage them to launch claims in the future.[50] Empirical research has shown that these systemic incentives have resulted in expansive, investor-friendly interpretations of vague formulations in investment treaties.[51]

[45] Comprising the CETA Joint Committee, see Article 26.1(1) CETA.
[46] In addition, ICS arbitrators will be paid a monthly retainer fee (Article 8.27(12) CETA). It should be noted that the CETA Joint Committee has the ability to change this system into a regular salary (Article 8.27(15) CETA), but we do not know if the Committee will adopt such a decision.
[47] ICSID, 'Cost of Proceedings' <https://icsid.worldbank.org/services/content/cost-of-proceedings> accessed 19 December 2020.
[48] Laurens Ankersmit, 'Nog Altijd te Conservatief en Eenzijdig; Het 'Investment Court System' in CETA' (*Tweede Kamer der Staten-Generaal*, Position Paper, 31 October 2019) <www.tweedekamer.nl/kamerstukken/detail?id=2019Z20865&did=2019D43565> accessed 14 November 2020.
[49] Eberhardt and Oliver (n 38) 36.
[50] Van Harten, 'Arbitrator Behaviour in Asymmetrical Adjudication' (n 42) 10.
[51] Ibid 50; Gus van Harten, 'Arbitrator Behaviour in Asymmetrical Adjudication (Part Two): An Examination of Hypotheses of Bias in Investment Treaty Arbitration' (2016) 53(2) *Osgoode Hall Law Journal* 540, 575.

Dutch law

Under Dutch law, investors have no influence on which judge will rule in their case, and judges have no financial incentive to rule in favour of investors. Judges in a particular case are selected by the board of the court at which the case is filed. This board is bound to make selections on objective grounds, keeping in mind that the independence and impartiality of the court must be preserved.[52] In most cases, the selection process happens at random, but in special cases, a judge can be picked due to their specific expertise.[53] Furthermore, Dutch judges are employed on a full-time basis and receive a flat annual salary, that is not dependent upon the amounts of cases that they handle. Judges are appointed for life and can only be dismissed by the Supreme Court in extremely rare circumstances. The annual salary is dependent on the level at which the judge is active, but ranges from €74,000, to €111,000, before taxes.[54] These conditions make sure that judges have no need to look for other sources of income besides their job, while also guaranteeing that they have no incentive to rule in favour of the party that is able to bring a case. These rules aim at creating a fair judicial system that benefits neither investors, nor governing bodies.

EU law

Under EU law, investors also have no influence on the composition of the judiciary. Furthermore, judges in the EU courts have no financial incentive to rule in favour of investors, or any particular party to a dispute. EU cases concerning non-contractual liability are heard by the GC at first instance, and by the ECJ if the ruling by the GC is appealed. The GC is composed of two judges for every EU Member State, whereas only one judge per Member State sits on the ECJ. These judges do not 'represent' their country, but ought to be entirely independent. Every three years, a replacement of one half of the number of judges is due.[55] Judges need to possess the qualifications required to serve on the highest judicial offices of their home state or be 'jurisconsults of recognised competence'.[56] The independence of judges must be 'beyond doubt'.[57] Therefore, in order to prevent any conflict of interests, CJEU judges are also precluded from holding any political or administrative office.[58] Similar to Dutch law, and in contrast to the proceedings under the ECT and CETA, judges at the GC or ECJ receive a fixed annual salary.[59] Their remuneration is therefore independent of the number of cases brought to the GC or ECJ. Therefore, judges have no financial incentive to rule in favour of parties that are able to bring disputes.

---

[52] Articles 1, 3 Code zaakstoedeling. <https://www.rechtspraak.nl/SiteCollectionDocuments/Code%20zaaktoedeling%20-%20met%20preambule.pdf> accessed 16 December 2020.
[53] Article 4 Code.
[54] De Rechtspraak, 'Veelgestelde Vragen Rechters' <www.rechtspraak.nl/Organisatie-en-contact/Rechtspraak-in-Nederland/Rechters/Paginas/Veelgestelde-vragen.aspx#7df2883d-2528-498e-aea8-cc8297d96e93107b4ee7-7e1a-45af-98d4-c1d2f0e133b49> accessed 4 November 2020.
[55] Article 253, second indent, TFEU; Article 9 Statute of the Court of Justice of the European Union.
[56] Article 253, first indent, TFEU.
[57] Ibid.
[58] Article 4 Statute of the Court of Justice of the European Union.
[59] Fiona Gartland, 'EU judges total pay package now more than €300,000' (*The Irish Times*, 11 January 2015) <www.irishtimes.com/news/crime-and-law/eu-judges-total-pay-package-now-more-than-300-000-1.2491639#:~:text=Judges%20at%20the%20Court%20of,than%20€300%2C000%20a%20year> accessed 16 December 2020.

3. ‘Endure and cash-in’

The ECT and CETA

Both the ECT and CETA foster an ‘endure and cash-in’ attitude for investors, while Dutch law and EU law do not.

Under both the ECT and CETA, arbitration tribunals do not have jurisdiction to rule on the legality of a measure under domestic or EU law, but can only award monetary compensation to investors. Arbitrators cannot order governing bodies or state legislators to change national laws, regulations, or policies.[60] In CETA, it is determined in Article 39(1) that the final award of the tribunal can only consist in monetary damages and applicable interest, even as a means of restitution of property after an unlawful expropriation. Investors can therefore only request monetary compensation in an ICS claim. Contrary to the majority of investment treaties, Article 8.39(3) CETA contains an incentive for states to grant restitution of property or repeal a measure that hurts the investor, because if the state does so, that reduces the amount of compensation the investor will obtain. However, this does not mean that arbitral tribunals can order states to repeal a measure.[61]

Moreover, investors can initiate ICS claims without having to exhaust local remedies first, which means that no prior litigation is needed before a claim under the ECT or CETA is admissible.[62] Investors are thus able to directly sue states for monetary compensation, without having to challenge the measure that causes the damage to their investment first. This fosters an ‘endure and cash-in’ attitude for investors,[63] meaning that they will ‘endure’ the measure which hurts their investment, without having to make an effort to repeal the measure first, and are able to ‘cash-in’ through obtaining compensation from the governing body for damages and lost expected profits. To be clear, this benefits investors, since no actual production or risk-taking is needed to obtain expected profits.[64] The compensation that the state will have to pay covers those lost expected profits.

---

[60] Although in some exceptional cases, tribunals have found themselves competent to order measures concerning performance or injunctions (e.g., *Enron v Argentina*, ICSID Case No. ARB/01/3), monetary compensation remains the only possible remedy in practically all ISDS cases. See Bonnitcha, Skovgaard Poulsen, and Waibel (n 14) 121.

[61] By giving an incentive to the state to repeal of a measure that might be in the public interest, this provision could contribute to ‘regulatory chill’, meaning that states will fail to act in the public interest over concerns about possible costly ISDS claims. See Gus van Harten, ‘The European Union’s Emerging Approach to ISDS: A Review of the Canada-Europe CETA, Europe-Singapore FTA, and European-Vietnam FTA’ (2016) 1 *University of Bologna Law Review* 138, 163; Kyla Tienhaara, ‘Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement’ (2018) 7 *Transnational Environmental Law* 229 (describing different forms of regulatory chill).

[62] This distinguishes ICS from other supranational court systems such as the system under the ECHR. See Alessandra Arcuri and others, ‘Expropriating Democracy: On the Right and Legitimacy of not Ratifying CETA’ (*EJIL:Talk!*, 20 October 2020) <www.ejiltalk.org/expropriating-democracy-on-the-right-and-legitimacy-of-not-ratifying-ceta/> accessed 10 November 2020.

[63] This phrase is taken from Jan Kleinheisterkamp, ‘Financial Responsibility in European International Investment Policy‘(2014) 63(2) *International and Comparative Law Quarterly* 449, 460.

[64] Jan Kleinheisterkamp, ‘’New Thinking Video: No Greater Rights’ <https://www.geg.ox.ac.uk/publication/new-thinking-video-no-greater-rights> accessed 16 December 2020.

Dutch law

The predicament for investors in Dutch law is remarkably different. Investors under Dutch law cannot 'endure and cash-in', without first trying to annul the measure that causes damage to their investments.

Suing governing bodies directly for damages is precluded by the division of competences between Dutch courts. Investors that have a legal conflict with (a body of) the state have the possibility of entering either an administrative court, or a civil court. Administrative courts deal with the state acting in its unique executive function. Administrative law sets the limits for the exercise of executive power by governing bodies and determines whether actions taken by those governing bodies are legal, or not. If an administrative judge rules that a measure is illegal, the measure will most likely be repealed with retroactive effect.[65] Civil courts, on the other hand, treat governing bodies in the same way as private parties. Civil law, especially the 'open norm' of Article 6:162 BW, could be used by investors to get monetary compensation from governing bodies if a measure hurts them disproportionately.[66] This compensation can also include lost expected profits,[67] but, as will be explained in section 5, does not reach the same amounts as the awards granted by arbitral tribunals.

Crucially, investors that are hurt by a measure from a governing body are obliged to *first* enter an administrative court and challenge the legality of the measure, if possible. Civil courts have to render a damage claim inadmissible, if a proceeding at the administrative court is available to the investor.[68] Only if an appeal at the administrative court is not possible due to procedural hurdles, or if the administrative court does not find the measure unlawful, can the investor bring a damages claim in civil court.

This puts investors in a worse position than the ECT and CETA. As explained above, foreign investors prefer to directly claim monetary compensation and endure the measure that hurts their investment. In Dutch law, domestic and foreign investors have to enter an administrative court first, in which the measure could be found illegal. If the court finds the measure illegal, investors will ideally be put in the same position as before the measure was enacted. Any possible damages that might have arisen in the (usually short) phase from the measure being enacted to the administrative judge's ruling, could then be up for compensation.[69] Compensation in such a case does not encompass any expected future profits, given that the measure is repealed and cannot cause damages after its annulment. Investors would therefore have to take the same, regular economic risks that they would have had to take before the measure was enacted, in order to obtain any profits. Only if the administrative court confirms the measure's legality, can an investor bring another legal action in civil court to obtain compensation, which can include both the damages already suffered before the administrative judge's ruling *and* lost expected profits. The civil judge who will rule on this damages claim will do so in accordance with the substantive provisions that we will explain in section 4 and calculate the damages using the rules explained in section 5.

[65] Article 8:72 Awb.
[66] E.g. HR 18 January 1991, (*Leffers/Staat*), ECLI:NL:HR:1991:AC4031.
[67] Article 6:96(1) BW.
[68] HR 28 February 1992, (*Changoe/Staat*), ECLI:NL:HR:1992:ZC0527, para 3.2.
[69] Article 8:88 Awb.

EU law

Contrary to the ECT and CETA, EU law does not foster an 'endure and cash-in' attitude.

The ground for non-contractual liability cases against EU institutions, Article 340, second indent, TFEU, is an independent legal action, which means that it is not connected to the EU's annulment procedure of Article 263 TFEU.[70] Investors do not have to start an annulment action first, before being able to bring an admissible non-contractual liability claim. Investors are therefore allowed to 'endure' the measure and ask directly for monetary compensation. However, it can hardly be said that investors can subsequently 'cash-in'. It is extremely difficult to obtain compensation from an EU institution in a non-contractual liability case.

The ECJ has a wide discretion to interpret the conditions for non-contractual liability claims, since Article 340, second indent, TFEU only refers to the 'general principles common to the legal systems of the Member States'.[71] From the start, the ECJ has chosen to take a 'strict approach'[72] towards the liability of EU institutions, and it has held this approach consistently. For instance, in *CNTA v Commission* (1975), the ECJ set the bar for liability high, stating that only a 'sufficiently flagrant violation of a superior rule of law for the protection of the individual' could incur liability.[73] In *Mulder et al v Council and Commission* (1992), the ECJ repeated its strict approach, this time holding that liability in a field characterised by a wide margin of appreciation for EU institutions could only occur when 'the institution has manifestly and gravely disregarded the limits on the exercise of its powers'.[74] In *FIAMM* (2008), the ECJ again confirmed its strict approach towards the liability of EU institutions and even formulated it as such.[75] In section 4, we will expand on the substantive tests the ECJ has developed to apply this 'strict approach' in non-contractual liability cases. For now, it suffices to mention the accompanying low success rate of non-contractual liability claims, which reflects the strict approach taken by the ECJ. According to numbers published in 2020, only 23 out of 530 filed damages claims succeeded,[76] which means that in no less than 95.7% of all non-contractual liability claims, no damages at all were awarded.[77]

4. Margin of appreciation for administrators and legislators

[70] Case 4/69, *Lütticke III* [1971] ECLI:EU:C:1971:40, para 6.
[71] Tunicja Petrašević and Mato Krmek, 'The Non-contractual Liability of the EU - Case Study of *Sumelj* case' (2017) 1 *EU and Comparative Law Issues and Challenges Series* 260.
[72] Joined Cases C-120/06 P and C-121/06 *FIAMM and Giorgio Fedon & Figli v Council and Commission* [2008] ECLI:EU:C:2008:476, para 174.
[73] Case 74/74 *CNTA v Commission* [1975], ECLI:EU:C:1975:59, para 16.
[74] Joined Cases C-104/89 and C-37/90 *Mulder et al v Council and Commission* [1992], ECLI:EU:C:1992:217, para 12.
[75] *FIAMM* (n 72) para 174.
[76] Laurens Ankersmit, 'Regulatory autonomy and regulatory chill in Opinion 1/17' (2020) 7 *Europe and the World: A law review* 1-21, 10.
[77] To put this into context: ISDS claims concerning indirect expropriation (20%) and FET (36%) have considerably higher success rates for investors than the EU non-contractual liability regime (4%).

The ECT and CETA

Both the ECT and CETA constrain the regulatory space of legislators and administrators in a way that Dutch and EU law do not. The substantive protections for investors under the ECT and CETA make it difficult for states or the EU to legislate in the public interest, while Dutch law and EU law are protective of the discretionary power of legislators and administrators. The vaguely formulated and broadly applied substantive protections under the ECT and CETA - such as the protection against 'indirect expropriation' and the obligation of parties to provide 'fair and equitable treatment' - may lead to 'regulatory chill', while Dutch law and EU law contain sufficient safeguards to protect the regulatory space of states[78] or the EU. The ECT and CETA thereby benefit for investors, because regulations in the public interest can generally hurt business and decrease the worth of investments.[79] Moreover, under the ECT and CETA investors are able to obtain compensation in instances that do not give rise to compensation under Dutch or EU law. Investors will thus profit from actual awards under the ECT and CETA in cases where national or EU law do not grant compensation, *and* the chilling effect of potential claims, that might prevent regulations in the public interest from coming about in the first place[80]. We will discuss the two most important[81] substantive protections of the ECT and CETA, namely the protection against 'indirect expropriation' and the obligation of states to provide 'fair and equitable treatment', and show how these protections constrain the regulatory space of states and the EU.

First, both under Article 13 ECT and 8.12(1) CETA, parties to the agreement[82] are allowed to expropriate only under strict conditions[83]. Under both treaties, a distinction is being made between 'direct expropriation', which concerns an actual transfer of a title of ownership, and 'indirect expropriation'.

The ECT leaves a wide space for arbitrators to determine what 'indirect expropriation' means, which creates legal uncertainty that increases the likely chilling effects on regulators[84], and could lead to damages awards for investors in instances that do not give rise to compensation under Dutch or EU law. The ECT does not specify what 'indirect expropriation' means and leaves its interpretation to arbitrators which have adopted wide and somewhat contradictory interpretations of this notion. Legal scholarship distinguishes between two approaches taken by arbitral tribunals to interpret 'indirect expropriation'.[85] Under the 'purpose and characteristics'-approach, the state's regulatory purpose is taken into account. Under the 'effects'-approach, the state's regulatory purpose is deemed irrelevant, and only the actual effects on the investor are assessed.[86]

---

[78] We consider 'states' to be made up of the executive, legislative and judiciary branches of government. When the term 'state' is mentioned in this section, we only refer to the executive and legislative branches.

[79] Take the damages claims that have arisen in response to regulations that protect the environment: Tienhaara (n 61) 1, 3-4.

[80] Ibid 4, 7-9.

[81] These protections have the highest ISDS success rates for investors of all substantive investment protections: indirect expropriation claims succeed in 20% of cases, FET claims in 36% of cases. See Bonnitcha, Skovgaard Poulsen, and Waibel (n 14) 93.

[82] For the ECT: states, for CETA: states and the EU.

[83] For both treaties, expropriation can only occur for a public purpose, under due process of law, in a non-discriminatory way, and on payment of prompt compensation.

[84] Tienhaara (n 61) 7.

[85] Bonnitcha, Skovgaard Poulsen, and Waibel (n 14) 106.

[86] E.g., *Metaclad v Mexico*, ICSID Case No. ARB(AF)/91/1. Examples include a host state cancelling an investor's operating license citing the failure of the investor to meet mandatory environmental standards (*Tecmed v. Mexico*, ICSID Case No. ARB(AF)/00/2), and a state banning the sale of an investor's product citing public health risks (*Chemtura Corporation v. Canada*, UNCITRAL).

This 'effects'-approach favours investors compared to Dutch or EU law, that always assess the regulatory purpose of the legislator or administrator and protect the regulatory space to adopt policies in the public interest.

Although CETA aims to limit the space of arbitrators to interpret the scope of 'indirect expropriation', it still contains more uncertainty than Dutch or EU law, and thereby does not protect states' and the EU's regulatory space as well as Dutch or EU law. CETA defines 'indirect expropriation' in Annex 8-A(1) as 'a measure or series of measures of a Party [that] has an effect equivalent to direct expropriation, in that it *substantially deprives the investor of the fundamental attributes of property* in its investment, including the right to use, enjoy and dispose of its investment, without formal transfer of title or outright seizure' (italics added). Annex 8-A further specifies that indirect expropriation has to be assessed on a case-by-case basis, but that non-discriminatory measures 'designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation', except in 'rare circumstances' when the measure is manifestly excessive. Even though we cannot assess its application in case law, this definition seems to limit the scope of 'indirect expropriation' to some extent and signal to arbitrators that a more restrictive interpretation of the clause is desirable. However, CETA still provides arbitrators with a wide discretion to interpret vague terms like 'substantial', 'fundamental attributes of property,' 'legitimate public welfare objectives', and even 'non-discriminatory'[87]. It also allows arbitrators to assess whether state measures are 'designed and applied' to protect legitimate public interests. Therefore, the annex to CETA does not solve the legal uncertainty regarding the meaning of 'indirect expropriation'. This is likely to restrict the regulatory space of legislators and administrators.

Secondly, both Article 10(1) ECT and 8.10(1) CETA guarantees investors the right to 'fair and equitable treatment' ('FET'). Arbitral tribunals again have a wide discretion to interpret this open-ended clause, while the application of FET has been used more frequently.[88]

Legal scholarship has defined subcategories of FET as it is regularly applied by arbitral tribunals.[89] Given that the ECT contains no definition or further explanation regarding FET, this general analysis applies to the ECT. The most striking differences with domestic law are found in two of those subcategories: the prohibition of arbitrary and unreasonable conduct and the protection of legitimate expectations. Arbitrary or unreasonable conduct is found when a measure cannot be justified by a rational policy justification.[90] This means that arbitral tribunals assess the reasons that a state provides to justify a measure and conclude themselves whether this is 'arbitrary' or not.[91] To what degree arbitral tribunals scrutinise regulatory measures has differed greatly.[92] The second subset of FET discussed here, namely the protection of 'legitimate expectations', is generally seen by arbitrators as a standalone ground for compensation, and has also been interpreted broadly.[93] Although it is an outlying view, some arbitral tribunals have even extended

[87] We have not found a uniform definition of 'non-discriminatory treatment' in CETA. It could refer to the relative standards of protection laid out in Section C of Chapter 8 CETA, but given that discriminatory treatment is already prohibited by that section, it would then be puzzling why this caveat is added in this clause.
[88] Bonnitcha, Skovgaard Poulsen, and Waibel (n 14) 108.
[89] Ibid 109.
[90] Ibid 110.
[91] E.g. *Noble v Romania*, ICSID Case No. ARB/01/11, paras 176-179.
[92] Bonnitcha, Skovgaard Poulsen, and Waibel (n 14) 110. For an example of a tribunal taking an active role in evaluating policy justifications of state conduct, see *Occidental v Ecuador II*, ICSID Case No. ARB/06/11.
[93] Bonnitcha, Skovgaard Poulsen, and Waibel (n 14) 111.

investors' legitimate expectations to the stability of a state's regulatory environment, which means that a major shift in policy could be found to violate an FET clause.[94] Numerous FET claims have already been filed under the ECT against regulatory changes to protect the environment.[95] The expansive interpretation by arbitral tribunals of these two subsets of FET - 'arbitrary or unreasonable conduct' and 'legitimate expectations' - are beneficial to investors, because they are broader than investment protection under Dutch and EU law, and lead to legal uncertainty, that could in turn spur 'regulatory chill'.

In response to concerns over the scope of FET,[96] Article 8.10(2) CETA contains a list of elements[97] that could give rise to a breach of fair and equitable treatment. The wording of this list does not specify whether it is meant to be an exhaustive list or not. While the list does not include 'legitimate expectations' as a separate ground that constitutes 'fair and equitable treatment', arbitrators are instructed by Article 8.10(4) CETA to take into account 'legitimate expectations' of investors that have arisen from 'a specific representation' when assessing the obligation of states to provide 'fair and equitable treatment'. At this stage, we are unable to evaluate how Article 8.10 CETA will be applied in practice. However, on the basis of its wording, no substantial divergence from the 'traditional' FET clauses as discussed under the ECT can be noted, apart from some qualifying terms, such as 'manifest' in relation to arbitrariness. It is unclear whether this qualification will have any impact on the rulings of arbitral tribunals. According to some scholars, the wording of CETA codifies previous arbitral practice rather than challenge it.[98] Article 8.10 CETA creates the same legal uncertainty for states as the ECT does, and constraints the regulatory space of states and the EU, in a manner that the Dutch and EU legal orders do not.

Finally, it should be noted that the parties to CETA have 'reaffirmed their right to regulate' in Article 8.9(1) CETA. This means that 'the mere fact' that a state or the EU introduces a regulation that hurts investors is not prohibited under CETA. We cannot assess what this clause will mean in practice. However, what is meant by 'the mere fact' is unclear. Which additional elements have to be in place before a regulation *can* constitute a breach of a substantive protection in CETA? Article 8.9 therefore seems to be a mere declaration of parties, and not a clause to be used as a proper legal defence in actual ICS cases.

Dutch law

Unlike the ECT and CETA, Dutch law is more protective of the regulatory space of administrators and legislators and Dutch legal standards of investment protection are interpreted uniformly, which provides for greater legal certainty than the ECT and CETA.[99] We will discuss shortly how Dutch law protects

[94] E.g. *Occidental v Ecuador*, LCIA Case No. ARB/02/1; Bonnitcha, Skovgaard Poulsen, and Waibel (n 14) 113
[95] Diego Zannoni, 'The legitimate expectation of regulatory stability under the Energy Charter Treaty' (2020) 33 *Leiden Journal of International Law* 452.
[96] Bonnitcha, Skovgaard Poulsen, and Waibel (n 14) 112.
[97] These include: denial of justice, a fundamental breach of due process, manifest arbitrariness, targeted discrimination on manifestly wrongful grounds, abusive treatment of investors, and a breach of any further elements that could be added by the Joint Committee upon request of a Party.
[98] See Tienhaara (n 61) 16-17 on the wording of TTIP, which on this point is similar to CETA.
[99] In Dutch law, clear precedents emerge over time because of the hierarchy of courts: interpretative standards are set by the highest court that rules on a certain policy area, in most instances the Dutch Supreme Court ('Hoge Raad'). Under the ECT, *ad hoc* tribunals can come to radically different conclusions. CETA introduces an appellate system (Article 8.28), which could mean that precedents emerge, but this cannot be assessed yet.

investors against 'indirect expropriation', 'arbitrary and unreasonable conduct', and 'breaches of legitimate expectations'.

First, the notion of 'indirect expropriation' under Dutch law is interpreted restrictively, by applying Article 1 Protocol 1 ECHR, which protects the right to property. In a case where an entire industry was regulated out of existence, the Supreme Court dismissed investors' claim that this constituted indirect expropriation of their investment, because ownership of the assets remained.[100] The Dutch Supreme Court thereby dismissed the investors' claims that general practice in international investment law legitimises a broader interpretation of the right to property than given by the ECtHR.[101]

Dutch law provides for additional investment protection in case a measure of a governing body significantly reduces the worth of an investor's property, which also corresponds to cases of 'indirect expropriation' under the ECT and CETA. A distinction has to be made between lawful measures that reduce the value of an investment, and unlawful measures. If a measure is unlawful under national law, investors should first try to annul or modify the measure before an administrative court, as was explained in section 3. Measures that are deemed unlawful can give rise to compensation, but Dutch courts apply a strict causality test to determine whether compensation is due. For instance, damage caused by an unlawful administrative measure will not be compensated, when it is likely that if the governing body had taken a legal measure instead of the actual (now annulled) measure, this would have resulted in the same damage for the investor.[102] Moreover, the only damages that are up for compensation are those suffered by the investor in the (usually rather short) period between the enactment of the measure, and the administrative judge's ruling. If a measure is deemed lawful under national law, investors can rely on the 'principle of equality' ('égalitébeginsel'), enshrined in Article 3:4(2) Awb, which holds that the consequences of actions of governing bodies cannot disproportionately fall on a small, distinguishable group of private parties. The government should in such a case compensate disproportionate losses ('nadeelcompensatie').[103] The threshold for obtaining this kind of compensation is higher than under the ECT or CETA. First, the damage must fall outside the 'normal company risk', which is usually set at 15% of the company's annual turnover, before any damages will be awarded.[104] The second crucial factor for determining whether the measure gives rise to compensation, is the measure's 'foreseeability'.[105] If the government has provided for a reasonable transition period, and investors have time to diversify their assets, investors cannot claim the reduction of value as damages.[106] Moreover, even damages resulting from sudden government actions can

[100] HR 16 december 2016, (*Pelsdierenhouders*), ECLI:NL:HR:2016:2888, para 3.4.2.
[101] Without expanding on the jurisprudence of the ECtHR, which is outside the scope of the memo, it is noteworthy to add that the ECtHR uses a 'fair balance' test, which leaves quite a wide margin of appreciation for states, see e.g. ECtHR 29 March 2006, ECLI:NL:XX:2006:AW8901. Therefore, the ECtHR does not undermine or limit the margin of appreciation that Dutch courts provide for administrators and legislators.
[102] ABRvS 28 December 2016, (*Biolicious*), ECLI:NL:RVS:2016:3462, r.o. 8.1.
[103] Investors can ask for 'nadeelcompensatie' in both administrative and civil proceedings. In civil law, the failure to compensate excessive losses in itself can constitute an 'unlawful act' (Article 6:162 BW), see HR 18 January 1991, (*Leffers/Staat*), ECLI:NL:HR:1991:AC4031.
[104] Michiel Tjepkema and Lynn van der Velden (eds),'Handleiding nadeelcompensatie bij infrastructurele maatregelen,' *Ministerie van Binnenlandse Zaken en Koninkrijksrelaties*, 2018, 43. This fixed rate is also deducted in calculating the amount of damages that needs to be compensated, see section 5.
[105] Cbb 10 December 2008, JB 2009/86; HR 20 June 2003, (*Staat/Harrida*), ECLI:NL:HR:2003:AF7902; Conclusion AG, HR 11 September 2009 (*Cagemax/Staat*), ECLI:NL:PHR:2009:BI7145, r.o. 5.4.1.
[106] HR 16 December 2016, (*Pelsdierenhouders*), ECLI:NL:HR:2016:2888, para 3.5.2.

in some instances be seen as 'foreseeable' and therefore not compensated, or subjected to severe mitigation of the amount of damages (see section 5). For example, a company that had a large stockpile of animal protein (worth €1.4 million), while this product was subjected to prohibitions throughout the EU, did not get any compensation after a Dutch prohibition that effectively depraved all value from the stockpile, because it was deemed 'foreseeable' that such measures were on their way, even though the Dutch prohibition was enacted within two weeks after the first notice.[107] Finally, the Dutch judiciary is quite strict in requiring a clear causal link between the measure and the damage, before compensation is awarded.[108]

Secondly, Dutch law protects against 'arbitrary and unreasonable conduct' of governing bodies, but leaves a wide margin of appreciation for administrators, unlike the ECT, whereas it is unclear how CETA will apply this protection. The 'prohibition of arbitrariness' in the Dutch legal order is one of the principles of good governance ('algemene beginselen van behoorlijk bestuur') as a subset of the principle of equality in Article 3:4(2) Awb. However, administrative judges only review compliance with this principle in a marginal way, to restrain from violating the discretionary powers of the administrative branch.[109] Leaving a margin of appreciation for administrators is crucial to ensure that the judiciary does not interfere with political decision-making or reviews the balancing of interests strictly. This consideration expresses the constitutional value of the separation of powers between the branches of the state. Besides the marginal review of administrative actions, another consequence of this consideration is that acts of the legislature themselves cannot be challenged at all.[110] The Netherlands has no Constitutional Court, which means that only the executive acts giving effect to legislation can be challenged in court, but not the legislation itself. The ECT and CETA do not make such a distinction, so investors can challenge acts of the legislature as well under those treaties. A violation of the prohibition of arbitrariness by administrators is only found in Dutch cases if the application of a discretionary competence is so clearly wrong in weighing interests or qualifying facts, that it is unreasonable to argue that the decision is lawful.[111] Only serious inconsistencies or carelessness can give rise to a breach of this principle. We cannot assess if CETA's prohibition of 'manifest arbitrariness' as a subset of FET will provide for a similarly restrictive approach by arbitrator, but the crucial constitutional prerogative for the Dutch marginal review of this principle is lacking in CETA.

Finally, Dutch law contains protection against a breach of 'legitimate expectations' that is applied extremely restrictive in comparison to the FET standards in the ECT and CETA. The 'principle of trust' ('vertrouwensbeginsel') is an unwritten rule of Dutch administrative law and one of the principles of good governance. It entails that a private party should be able to rely on a specific commitment by a government

[107] See HR 11 September 2009 (*Cagemax/Staat*), ECLI:NL:HR:2009:BI7145, the accompanying Conclusion by the AG, and the case note by Van Ravels.
[108] E.g. ABRvS 27 August 2008, (*Kokkelvisserij*), ECLI:NL:RVS:2008:BE9265. A permit was granted in July 2004 but did not enter into effect because it was challenged in court. After the administrative court annulled the permit, the Minister had to make a new decision (July 2005), this time retroactively retracting the permit. The investors in question were in 2004 not able to exercise their business activities and asked for more than €62 million in 'nadeelcompensatie'. However, the administrative judge found that no compensation had to be paid, because there was no causal link between the retraction of the permit (in 2005) and the lost profits of 2004.
[109] Rolf Ortlep and Wouter Zorg, 'Van Marginale Toetsing naar Toetsing op Maat: Einde van een Geconditioneerde Respons?' (2018) 1 *Ars Aequi* 20, 21.
[110] Article 1:1(2)(a) Awb
[111] Ibid 23.

official and be compensated if the governing official breaches this commitment.[112] Courts rarely find a breach of this principle.[113] The most striking difference with the FET protection of legitimate expectations is that unlike arbitral tribunals reviewing FET, Dutch law takes into account the actual competence of the official whose statements have given rise to expectations of the investor. If a statement was made by someone who was not competent to have made the eventual decision, no breach of the principle of trust can be found.[114] This is part of a strict test that Dutch courts have to apply when assessing a possible breach of this principle.[115] The 'principle of trust' can also not be used to gain compensation for actions of the legislature, for example in the case of sudden policy changes. If investors are hurt by sudden policy changes, they can ask the administrative branch for 'nadeelcompensatie', as explained above.

EU law

EU non-contractual liability grants investors far less substantive protections than the ECT and CETA do. The ECJ has set strict conditions for non-contractual liability, which have led to an extremely low success rate for non-contractual liability claims, as already mentioned in section 3. EU law thereby provides administrators and legislators with a much wider margin of appreciation for its institutions than the ECT or CETA, which in turn prevents 'regulatory chill'.

Substantive protections under the EU's non-contractual liability regime are more restricted than the protections offered by the ECT and CETA because all legal measures are categorically excluded as a ground for compensation, the standard of a 'sufficiently serious' breach is higher than under the ECT or CETA, and additional factors resemble the Dutch 'nadeelcompensatie', whereas those are absent from the standards of protection under the ECT or CETA.

First, the ECJ has listed four cumulative criteria before non-contractual liability can be found: the rule that has been violated must confer rights on individuals,[116] the conduct of the EU institution must be unlawful, there must be factual damage, and there must exist a causal link between the conduct of the EU institution and the sustained damage.[117] The conditions are cumulative, meaning they all have to be met before damages will be awarded.[118] The ECJ in *FIAMM* explicitly denied the possibility of EU institutions being liable in case of a lawful act or omission, especially when it concerns legislative activity.[119] As a result, no compensation can be granted if the measure that hurts an investor is legal under EU law.[120] Even in a case

[112] Karianne Albers, 'Een frisse blik op het vertrouwensbeginsel: Meer aandacht voor het burgerperspectief?' (2019) 153 *De Gemeentestem* 772, 772.
[113] Ibid.
[114] Ibid.
[115] The test includes three cumulative conditions: (i) was a specific commitment or promise made, by explicit statements or actions, that raised the impression of a conscious positioning of the administrator? This requirement is similar to the FET standards in the ECT and CETA. (ii) Can the commitment or promise be attributed to the competent governing body, even if the other party could have reasonably believed that the statement was made by the competent governing body? This requirement is notably absent from the FET standards, as international investment law is not concerned with the national division of competences. (iii) Does the raised trust outweigh other interests? This requirement is also absent from FET standards. See for these three conditions ABRvS 29 May 2019, ECLI:NL:RVS:2019:1694.
[116] Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur* [1996] ECLI:EU:C:1996:79, para 51.
[117] *FIAMM* (n 72) para 106.
[118] Ibid, para 165
[119] Ibid, para 175.
[120] Ibid, para 179.

where a company was put out of business by a disputed finding of the Commission, the ECJ dismissed the compensation claim, respecting the 'wide margin of appreciation' for the Commission in 'delicate and controversial cases'.[121]

Secondly, investors challenging legislative activity of the EU will not only have to show that a measure was unlawful, but also that 'a sufficiently serious breach of a superior rule of law for the protection of the individual has occurred'.[122] A 'sufficiently serious breach' has only occurred when the EU institution 'manifestly and gravely disregarded the limits on its discretion'.[123] This means that the discretion of the institution[124], and the reasons for its conduct[125] are central factors in determining whether an institution is liable, while these factors are absent from the text of the ECT and it remains unclear how arbitral tribunals will interpret CETA on this front. This requirement, on top of mere illegality, forms an additional burden of proof for investors before they can obtain compensation. An example of this difficulty can be seen in the protection of 'legitimate expectations.' While the ECJ has accepted 'legitimate expectations' as a 'general and superior principle of [EU] law for the protection of the individual',[126] a breach of investors' legitimate expectations can only give rise to compensation if the principle is breached in a 'sufficiently serious' manner,[127] which adds another hurdle that does not exist under the ECT or in the text of CETA.

Thirdly, the ECJ's case law on non-contractual liability resembles the Dutch standards of 'nadeelcompensatie', in that damage of investors can only be compensated if it goes 'beyond the normal economic risks inherent in the activities of the sector concerned', while foreseeability is also a factor of relevance in determining whether the investor can claim compensation.[128] Therefore, the substantive protections that exist under the EU's non contractual liability regime are more restricted than those under the ECT or CETA. The low success rate of non-contractual liability claims reflects the high thresholds set by the ECJ, as explained in section 3.

The ECJ's strict interpretation is based explicitly on the protection of the margin of appreciation of the European institutions and the importance of not hindering the legislative process. In *FIAMM*, the ECJ explained this in a paragraph that is worth quoting in full:

> [T]he *strict approach* taken towards the liability of the [EU] in the exercise of its legislative activities is attributable to two considerations. First, even where the legality of measures is subject to judicial review, exercise of the legislative function *must not be hindered by the prospect of actions for damages* whenever the general interest of the [EU] requires legislative measures to be adopted which may adversely affect individual interests. Second, in a legislative context characterised by the exercise of *a wide discretion, which is essential for implementing a [EU]*

[121] Case C-352/98 *Bergaderm* [2000] ECLI:EU:C:2000:361, paras 10, 66.
[122] Ibid, para 172.
[123] Joined Cases C-104/89 and C-37/90 *Mulder et al v Council and Commission* [1992] ECLI:EU:C:1992:217, para 12.
[124] E.g. *Bergaderm* (n 121) para 44.
[125] E.g. *CNTA v Commission* (n 73) para 43: the ECJ held that if an overriding matter of public interest exists, no liability is incurred.
[126] *Mulder et al v Council and Commission* (n 123) para 15. See also *CNTA v Commission* (n 73) paras 28, 33.
[127] *Mulder et al v Council and Commission* (n 123) para 19.
[128] Ibid, paras 13, 17.

policy, the Community cannot incur liability unless the institution concerned has *manifestly and gravely* disregarded the limits on the exercise of its powers.[129]

The ECJ clearly outlines that it takes a strict approach, in order to prevent hindrance of the legislative function of the EU (i.e., prevent 'regulatory chill'), because a wide margin of appreciation is essential for the functioning of the EU. Only manifest and grave breaches can outweigh these considerations. This strict approach, and consequently the low success rate of non-contractual liability claims against EU institutions, makes it considerably less attractive for investors to pursue this legal avenue, especially if investors have the chance to claim under the ECT or CETA.

5. Amounts of compensation

Investors can obtain extraordinarily high amounts of compensation under the ECT, and presumably under CETA, compared to Dutch or EU law. The standards arbitrators use to calculate the amounts of compensation under the ECT and CETA provide for full compensation, while Dutch law contains several mitigating factors that result in lower amounts of compensation. Non-contractual liability claims under EU law are almost never successful, while actual awards granted are rather insignificant.

The ECT and CETA

The ECT and CETA have not laid down principles governing the quantification of damages for breaches of substantive standards of protection other than expropriation. According to customary international law, which is applied, 'full reparation' for any injury caused by the breach has to be made by the state.[130] The position that the investor would be in 'but for' the breach must be determined, and damages so as to restore the investor to that position must be calculated.[131]

Regarding expropriation, both Article 13(1)(d) ECT and Article 8.12(1)(d) CETA require 'prompt, adequate, and effective compensation', meaning compensation equal to the investment's fair market value according to the *Hull standard* or *Hull formula*.[132] Fair market value is the price a willing buyer would pay a willing seller for the investment in an arm's length transaction.[133] Arbitrators may use different valuation techniques, namely income-based approaches, market-based approaches or asset-based approaches, individually or in combination.[134] According to Article 8.12(2) CETA, 'valuation criteria shall include going concern value, asset value including the declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value'. Since around 2010, 'discounted cash flow' is the most widely used income-based valuation technique, while often misused by tribunals;[135] it values an investment as the sum of its predicted future profits discounted to the present at an appropriate rate. The amount an investor

[129] *FIAMM* (n 72) para 174 (italics added). This paragraph repeats the identical paragraph 45 of the earlier *Brasserie du Pêcheur* (n 116).
[130] International Law Commission (ILC) Articles on State Responsibility, Article 31(1)).
[131] Bonnitcha, Skovgaard Poulsen, and Waibel (n 14) 113.
[132] Ibid 122.
[133] Ibid 121.
[134] Bonnitcha, Skovgaard Poulsen, and Waibel (n 14) 123.
[135] Toni Marzal, 'Against DCF valuation in ISDS: on the inflation of awards and the need to rethink the calculation of compensation for the loss of future profits' (*EJIL: Talk!*, 26 January 2021) <https://www.ejiltalk.org/against-dcf-valuation-in-isds-on-the-inflation-of-awards-and-the-need-to-rethink-the-calculation-of-compensation-for-the-loss-of-future-profits/> accessed 26 January 2021.

has invested plays no role. This may lead to an investment being valued significantly higher than the amount of money that an investor has spent. It looks at the complete lifespan of an investment and thus involves a degree of speculation.[136] ISDS practitioner George Kahale[137] has stated that many investors claim unrealistically exaggerated amounts of compensation to produce 'mega claims' as a strategy to make arbitrators think of lower amounts, that are still overvalued, as realistic.[138]

This is not merely a hypothetical threat for states. Known amounts of compensation in investment treaty arbitrations can get into the billions of dollars, and a great number of awards being in the millions of US$. Notably, arbitral tribunals seem to grant higher amounts of compensation more regularly, with all of the awards over US$100 million being granted after 2000, 11 of them between 2000 and 2010, and 39 between 2010 and 2021.[139] The following table comprises data about known ISDS cases and is included to provide an indication of the success rate and amounts actually awarded to investors.

Amount	**Claimed**	**Awarded by tribunal**	**Agreed in settlement**
US$1-9.9 million	38	34	2
US$10-99.9 million	150	47	15
US$100-499.9 million	158	19	9
US$500-999.9 million	53	3	5
US$1 billion or over	78	6	2

Source: UNCTAD, as of September 2016[140]

Specifically, under the ECT, large damages claims have also been awarded, with the case of *Yukos v Russia* as a famous example. In that case, the arbitral tribunal awarded the majority shareholders that were hurt by the Russian government for starting a tax evasion criminal proceeding no less than $50 billion in damages.[141] Such an amount is inconceivable under Dutch or EU law proceedings.[142] Other notable amounts of compensation that have been awarded on the basis of a violation of the ECT are the US$45 million awarded to Ioannis Kardassopoulos for the unlawful expropriation of an oil pipeline,[143] and the US$89 million awarded to Khan Resources for a violation of the ECT's umbrella clause.[144] It must be noted that

[136] Bonnitcha, Skovgaard Poulsen, and Waibel (n 14) 123-127.
[137] George Kahale III is chairman and partner of New York based law firm Curtis, Mallet-Prevost, Colt & Mosle LLP and head of the firm's renowned international arbitration practice, see: <https://www.curtis.com/our-people/george-kahale-iii/experience> accessed 17 December 2020.
[138] Example: store first doubles price and later gives a 25% reduction. George Kahale, 'Damages in ISDS: Just Compensation or Highway Robbery?'(*CCSI*, 2 November 2020) <http://ccsi.columbia.edu/2020/11/02/damages-in-isds-just-compensation-or-highway-robbery/> accessed 17 December 2020.
[139] Marzal (n 135).
[140] Excerpt of Table 1.3 from: Bonnitcha, Skovgaard Poulsen, and Waibel (n 14) 27; the data only includes known investment treaty arbitrations where UNCTAD had information about the amount of compensation claimed, awarded, or agreed to in settlement.
[141] *Yukos v Russia*, UNCITRAL, Award of 18 July 2014, p. 594.
[142] Another supranational court, the ECtHR, has also ruled on the dispute between Yukos and Russia and awarded a record sum of €1.9 billion, which is still significantly less than the damages award under the ECT.
[143] *Ioannis Kardassopoulos v Georgia*, ICSID Case No. ARB/05/18.
[144] *Khan Resources v* Mongolia, UNCITRAL, Award of 2 March 2015, p. 117.

since ECT awards are only published on the basis of the consent of both parties, we cannot assess all of the exact amounts of compensation paid out for violations of the ECT.

Dutch law

The amounts of damages Dutch courts grant generally do not come close to the amounts granted under ISDS proceedings.

Both administrative and civil courts apply the general measures of the civil code regarding the types of damages that can be compensated.[145] There is a closed system of categories for costs eligible for compensation.[146] The most important category is that of financial loss ('vermogensschade'), which consists of actual losses and lost expected profits.[147] Interest can be a part of the compensation, if requested. The day of the request will be the day that starts the count.[148] Calculation of exact amounts often depends on classified documents within the company.[149] The civil judge calculates in the most appropriate way and estimates the costs if no precise assessment can be made.[150] This is also the case in the difficult exercise of calculating lost expected profits: these should not cover a speculative account of what the investor *could* have made, but what would be the *likely* amount of profits that the investor would have made if the action resulting in the damage had not occurred, based on *objective* data, such as earlier business results.[151] Only damages that can be reasonably attributed to the debtor are to be compensated.[152] Any profits made due to the act causing the damage are deducted from the total amount.[153]

Investors can get compensation for both lawful and unlawful government actions negatively affecting their investment. If a measure is found unlawful by an administrative court, in principle the damage to the investor is compensated fully.[154] However, as explained in section 3, this will only cover damages that have materialised in the (usually short) period between the enactment of the measure and the ruling by the administrative judge. Any lost expected profits are not considered because the repeal of the measure puts the investor back in the same position as it was before the measure was enacted. Administrative courts are competent to grant up to €25,000,[155] otherwise the matter is referred to civil court, which can in principle grant any amount of compensation it sees fit.

If a measure is found lawful and an investor is able to get 'nadeelcompensatie', because the measure disproportionately affects them, Dutch law grants considerably less compensation than the ECT or CETA do. To give an example, the closing of an entire coal plant in Amsterdam gave rise to 'nadeelcompensatie'

[145] Bezwaar en Beroep Juridische Diensten, 'Beroep en schadevergoeding' <http://www.bezwaar-en-beroep.nl/beroep/beroep-en-schadevergoeding/> accessed 4 November 2020.
[146] Article 6:95(1) BW.
[147] Article 6:96(1) BW.
[148] Article 11 Policy Rule Nadeelcompensatie, Ministerie van Infrastructuur en Waterstaat 2019.
[149] Wiebes (n 31).
[150] Article 6:97 BW.
[151] Jan Joling, 'De Vaststelling van Vermogensschade wegens Gederfde Winst of Geleden Verlies,' (2007) 66 *NTBR* 461-467.
[152] Article 6:98 BW.
[153] Article 6:100 BW.
[154] Article 6:98 BW.
[155] Article 8:89(2) Awb. This gives an indication of the amounts that could be at play in these proceedings, differing remarkably from the amounts under the ECT or CETA.

of €52.5 million.[156] Only losses exceeding the 'normal company risk' are assessed,[157] whereas full compensation is the norm under the ECT and CETA. The 'normal company risk' is often assessed as a fixed share of the annual turnover of a company, which is then deducted from the damages that an investor receives.[158] For example, the upcoming prohibition on mink farms will lead to compensation for investors, which obviously will meet the threshold, because their entire business will be closed, but the compensation that mink farmers receive is subjected to a deduction of 15% of their total losses, that remain within the 'normal company risk'.[159] Another threshold in assessing whether 'nadeelcompensatie' should be paid by the governing body, and if so, how high this should be, is whether the measure was foreseeable for the investor.[160] If an investor should have seen the measure coming, it is deemed to have passively accepted the risk of it coming about.[161] If an investor omitted to take action to reduce the damage, while reasonably being able to have done so, compensation is excluded.[162] The standard is interpreted strictly towards the investor, as explained in section 4, and can lead to a considerable reduction in the amounts of compensation,[163] or no compensation at all.[164] This consideration is absent from the calculations envisaged by the ECT and CETA.

EU law

The amounts of compensation paid after a successful non-contractual liability claim are considerably lower than the amounts paid out under the ECT and CETA.

So far, EU institutions have only been found liable for small amounts of compensation.[165] A recent example is the *Safa Nicu Sepahan v Council* case, in which a company was wrongfully placed on a sanctions list, and received a mere €50,000 in compensation, where it had claimed €2 million.[166] The Court is able to award both material and immaterial damages in the same case, as the GC did in *Kendrion*,[167] where €590,000 in material damages and €6,000 in immaterial damages were awarded. This ruling was overturned

[156] See e.g., Wiebes (n 31).
[157] HR 18 January 1991, (*Leffers/Staat*), ECLI:NL:PHR:1991:AC4031, para 3.11; Tjepkema and Van der Velden (n 105) 94-95.
[158] This bar can vary according to local policies, but the most common hurdle is set at 15%, see: Tjepkema and Van der Velden (n 105) 43. This always includes the first €1,000 of the damage, and 2% of the turnover of the undertaking, see: Article 3 Policy Rule Nadeelcompensatie, Ministerie van Infrastructuur en Waterstaat 2019.
[159] Rijksdienst voor Ondernemend Nederland, 'Nadeelcompensatie vervroegd verbod pelsdierhouderij' <https://www.rvo.nl/subsidie-en-financieringswijzer/nadeelcompensatie-vervroegd-verbod-pelsdierhouderij> accessed 20 December 2020.
[160] Article 5 Policy Rule Nadeelcompensatie, Ministerie van Infrastructuur en Waterstaat 2019.
[161] Tjepkema and Van der Velden (n 105) 94.
[162] Article 8 Policy Rule Neelcompensatie, Ministerie van Infrastructuur en Waterstaat 2019.
[163] Tjepkema and Van der Velden (n 105) 16, 44-45, 94-95.
[164] Ibid; Article 7 Policy Rule Nadeelcompensatie, Ministerie van Infrastructuur en Waterstaat 2019.
[165] Rafał Mańko, 'Briefing: Action for damages against the EU' (2018) <https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/630333/EPRS_BRI(2018)630333_EN.pdf> accessed 17 December 2020.
[166] Case T-384/11 *Safa Nicu Sepahan v Council* [2014] ECLI:EU:T:2014:986, paras 78, 92. Upheld by the ECJ in Case C-45/15 P [2017] ECLI:EU:C:2017:402.
[167] Case T-479/14, *Kendrion NV v European Union* [2017] ECLI:EU:T:2017:48.

by the ECJ,[168] but gives another recent indication of the amounts of damages that EU non-contractual liability claims can award.

There is no specific standard used in these cases to calculate the amount of compensation. Neither the amounts of compensation nor principles governing the quantification of damages are directly regulated under EU law.[169] Full compensation of damages that have occurred due to the action or omission of the EU institution is the rule, consisting in 'the difference between what the applicants would normally have earned and what they actually have obtained.'[170] Moreover, the damage must be actual, certain, quantifiable, and cannot be purely hypothetical.[171]

The CJEU generally leaves the calculation of damages to the parties themselves, if it cannot determine the exact amount of damage at the time of the ruling.[172] When such an agreement as to the amount of compensation between the parties is not reached, the matter is referred back to the General Court or the ECJ.[173]

Conclusion

On 18 September 2020, the Dutch Minister of Foreign Trade defended CETA in front of the Dutch Senate, claiming that 'CETA does not invite multinational corporations to bring claims. The investment protection under CETA does not differ in that regard from investment protection under Dutch law.'[174] The purpose of this memo is to highlight several areas that make it more attractive for investors to file damages claim under investment treaties such as the ECT or CETA, rather than pursue the legal venues offered by Dutch civil and administrative law, or the EU's non-contractual liability regime. We showed how the structural features of investment treaty arbitration, the fact that measures do not need to be challenged in an administrative court first before a damages claim is possible, the broader scope of substantive investment protection under the ECT and CETA, and the higher amounts of compensation awarded under the ECT and likely under CETA, all contribute to this predicament.

This memo is only an analysis of some of the features that show that foreign investors enjoy more rights under investment treaties than under domestic or EU law. Other issues, such as the possibilities of shareholder claims, the possibilities for appeal, the removal of biased arbitrators, large legal fees for states, third-party intervention and relative standards of protection could also provide interesting arguments to bolster the conclusion that foreign investors protected by international investment treaties, are structurally favoured by the investment treaty regime. This conclusion questions the legitimacy of investment protection in trade agreements and poses the question of whether investment treaties can be improved in order to create a genuine 'level playing field' between foreign and domestic investors. We hope that this memo provides a meaningful contribution to these important debates.

[168] Case C-150/17, *Kendrion NV v European Commission* [2018] ECLI:EU:C:2018:1014.
[169] Mańko (n 165).
[170] *Mulder et al v Council and Commission* (n 123), paras 26, 34.
[171] Joined Cases T-3/00 and T-337/04 *Pitsiorlas v Council and ECB* [2007] ECLI:EU:T:2007:357, para 293.
[172] E.g. *CNTA v Commission* (n 73) para 47.
[173] Mańko (n 165).
[174] *Kamerstukken I* 2020/21, 35154 F, MvA, p. 31.

Bibliography

Albers K, 'Een frisse blik op het vertrouwensbeginsel: Meer aandacht voor het burgerperspectief?' (2019) 153 *De Gemeentestem* 772-779.

Ankersmit L, 'Nog Altijd te Conservatief en Eenzijdig; Het 'Investment Court System' in CETA' (*Tweede Kamer der Staten-Generaal*, Positon Paper, 31 October 2019) <www.tweedekamer.nl/kamerstukken/detail?id=2019Z20865&did=2019D43565> accessed 14 November 2020.

Ankersmit L, 'Regulatory autonomy and regulatory chill in Opinion 1/17' (2020) 7 *Europe and the World: A law review* 1-21.

Arcuri A, and others, 'Expropriating Democracy: On the Right and Legitimacy of not Ratifying CETA' (*EJIL:Talk!*, 20 October 2020) <www.ejiltalk.org/expropriating-democracy-on-the-right-and-legitimacy-of-not-ratifying-ceta/> accessed 10 November 2020.

Bonnitcha J, Skovgaard Poulsen L, and Waibel M, *The Political Economy of the Investment Treaty Regime* (OUP 2017).

Dolzer R, and Schreuer C, *Principles of International Investment Law* (OUP 2012).

Eberhardt P, and Olivet C, 'Profiting from Injustice: How Law Firms, Arbitrators, and Financiers are Fuelling an Investment Arbitration Boom' *Corporate Europe Observatory* and the *Transnational Institute*.

Gartland F, 'EU judges total pay package now more than €300,000' *The Irish Times* (11 January 2015) < https://www.irishtimes.com/news/crime-and-law/eu-judges-total-pay-package-now-more-than-300-000-1.2491639#:~:text=Judges%20at%20the%20Court%20of,than%20€300%2C000%20a%20year> accessed on 16th December 2020.

Gaukrodger D, 'Investment Treaties and Shareholder Claims for Reflective Loss: Insights from Advanced Systems of Corporate Law' (2014) 2 *OECD Working Papers on International Investment* <http://dx.doi.org/10.1787/5jz0xvgngmr3-en> accessed 3 November 2020.

Herranz-Surrallés A, ''Authority Shifts' in Global Governance: Intersecting Politicizations and the Reform of Investor-State Arbitration' (2020) 8(1) *Politics and Governance* 336-347.

Joling J, 'De Vaststelling van Vermogensschade wegens Gederfde Winst of Geleden Verlies,' (2007) 66 *NTBR*.

Kahale G, 'Damages in ISDS: Just Compensation or Highway Robbery?'(*CCSI*, 2 November 2020) <http://ccsi.columbia.edu/2020/11/02/damages-in-isds-just-compensation-or-highway-robbery/> accessed 4 November 2020.

Kleinheisterkamp J, 'Financial Responsibility in European International Investment Policy' (2014) 63(2) *The International and Comparative Law Quarterly* 449-476.

Kleinheisterkamp J, 'New Thinking Video: No Greater Rights' <https://www.geg.ox.ac.uk/publication/new-thinking-video-no-greater-rights> accessed 16 December 2020.

Lam J and Ünüvar G, 'Transparency and Participatory Aspects of Investor-State Dispute Settlement in the EU 'New Wave' Trade Agreements' (2019) 32 *Leiden Journal of International Law* 781-800.

Mańko R, 'Briefing: Action for damages against the EU' (December 2018) <https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/630333/EPRS_BRI(2018)630333_EN.pdf> accessed 17 December 2020.

Marzal, T, 'Against DCF valuation in ISDS: on the inflation of awards and the need to rethink the calculation of compensation for the loss of future profits' (*EJIL: Talk!*, 26 January 2021) <https://www.ejiltalk.org/against-dcf-valuation-in-isds-on-the-inflation-of-awards-and-the-need-to-rethink-the-calculation-of-compensation-for-the-loss-of-future-profits/> accessed 26 January 2021.

Ortlep R, and Zorg W, 'Van Marginale Toetsing naar Toetsing op Maat: Einde van een Geconditioneerde Respons?' (2018) 1 *Ars Aequi* 20-25.

Petrašević T and Krmek M, 'The Non-contractual Liability of the EU - Case Study of *Sumelj* case' (2017) 1 *EU and Comparative Law Issues and Challenges Series* 260.

Tienhaara K, 'Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement' (2018) 7 *Transnational Environmental Law*.

Tjepkema MKG, and Van der Velden L, (eds),'Handleiding nadeelcompensatie bij infrastructurele maatregelen,' *Ministerie van Binnenlandse Zaken en Koninkrijksrelaties*, 2018.

Van Harten G, 'Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration,' (2012) Osgoode Hall Law School Research Paper No. 41/2012.

Van Harten G, 'Arbitrator Behaviour in Asymmetrical Adjudication (Part Two): An Examination of Hypotheses of Bias in Investment Treaty Arbitration' (2016) 53(2) *Osgoode Hall Law Journal*.

Van Harten G, 'The European Union's Emerging Approach to ISDS: A Review of the Canada-Europe CETA, Europe-Singapore FTA, and European-Vietnam FTA' (2016) 1 *University of Bologna Law Review* 138-165.

Waibel M, 'International Investment Law and Treaty Interpretation' in Rainer Hofmann and Christian Tams, *International Investment Law and General International Law: From Clinical Isolation to Systemic Integration?* (Nomos, 2011).

Zannoni D, 'The legitimate expectation of regulatory stability under the Energy Charter Treaty' (2020) 33 *Leiden Journal of International Law* 451-466.