What can explain the termination of intra-EU bilateral investment treaties? A qualitative case study on which actors' preferences determined the termination of bilateral investment treaties between the EU member states.

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A qualitative case study on which actors' preferences determined the termination of bilateral investment treaties between the EU member states.

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This thesis marks the end of my academic journey. I want to take this opportunity to thank all the people who joined me on this journey and express my thoughts by reflecting on the past year in a few brief sentences.

After finishing law school, I was eager to go abroad and study in a different field to broaden my knowledge further. However, after thinking about it for over a year, overshadowed by the uncertainties of the COVID-19 crisis, I am glad that I applied for this engaging program and moved to The Hague.

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I am now looking forward to entering professional life and using my accumulated knowledge as a consultant for public and legal affairs in a Viennese consulting agency.

Abstract

This single case study researches the preferences of the actors identified by the two leading theories of EU (legal) integration: liberal intergovernmentalism and neo-functionalism. The preferences guided us to derive a conclusion on which theory can best explain the termination of intra-EU bilateral investment treaties (BITs). This provided new building blocks to the ongoing discussion of the theories contrasting approaches to EU integration. The methods used in this study are document analysis and within-case causal process tracing to uncover the different steps of the actors to measure their preferences. Liberal intergovernmentalism states that the EU member states' preferences are the steering factor of legal integration as they are the masters of the EU treaties and the only actors that can alter them. The EU organs act as the agents of the states and are reactive to them. Neo-functionalists explain that individual actors and their self-interests determine integration. They form interest groups on the national and supranational levels and create spillover effects. Furthermore, as the EU agenda setter, the European Commission (EC) is a central actor in explaining EU legal integration. This study found convincing evidence that especially the EC was a significant steering factor in explaining the termination. Overall, the interest groups' preferences from the supranational level picked up the economic needs of the national level and supported the termination of intra-EU BITs for a change to an EU-wide system to reduce transaction costs and boost the EU economy. This study argued that the member states reacted to these actors. Therefore, this study concluded that neo-functionalism is perceived as the better theoretical approach to explain the termination of intra-EU BITs.

Table of Content

List of Abbreviations

AG	Advocate General
Art.	Article
BGH	Bundesgerichtshof (Federal Court of Justice)
BIT	bilateral investment treaty
CJEU	Court of Justice of the European Union
DG	Directorate-General
DG FISMA	Directorate-General for Financial Stability, Financial Services and Capital Markets Union
DG JUST	Directorate-General for Justice and Consumers
ECOFIN	Council of Ministers of Economic Affairs and Finance
EC	European Commission
ECC	European Economic Community
ECT	European Energy Charter
e.g.	exempli gratia (“for example”)
EGC	European General Court
EP	European Parliament
EU	European Union
i.a.	inter alia (“among other things”)
ISDS	Investor-state dispute settlement
MS	Member state
OLG	Oberlandesgericht
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
vs	versus

1. Introduction

On May 5th, 2020, 23 member states of the European Union signed an agreement on the termination of the intra-EU bilateral investment treaties (BITs). A bilateral investment treaty is an agreement between two countries (the signatories) that provides a standardized legal basis for investors being active across borders. These bilateral agreements regulate investor-state relations and are based on international law. They aim to provide guidelines and codes of conduct for transnational investor-state investments. In other words, direct investments of private actors across national borders shall be protected under international law, with dispute settlement bodies (investor-state dispute settlement (ISDS)) providing impartial judgments. BITs are used worldwide, fostering transnational investments while reducing the possibility of politically biased treatment of investors. BITs originated in 1959, and today approximately 3000 BITs are in effect worldwide (Sprenger & Boersma, 2014). Until the termination agreement of May 2020, 196 BITs between EU member states were active (CJEU, 2018). This study examines the potential actors that influenced this process and aims to unveil what can explain the termination of these BITs.

The core idea of BITs was to protect private investors from one country investing in another to increase international trade and spur the global economy. However, as with any business investment, an issue or dispute can arise. Therefore, to reduce the risk of being exposed to political and diplomatic tensions in the host state, BITs were targeted to set standardized rules and, especially, detach any legal dispute detached from the jurisdiction of neither the investors' state nor the host state (Reinisch, 2009; Sprenger & Boersma, 2014). Therefore, the impartial investor-state dispute settlement bodies (ISDS) are the core mechanisms BITs provide. Those bodies would provide neutral grounds for the dispute to be heard and ruled out in front of international dispute settlement bodies (arbitration tribunals). In other words, the investor, being a private person or organization, would not need to turn to the national courts and its jurisdiction to issue a claim of contract breach or financial damages against the host state (Sprenger & Boersma, 2014). However, it is not only about protecting private investors and the depoliticization and denationalization of disputes. International arbitration is also favorably used due to the shorter average duration of trials and reduced costs, the professional competence of the judges, and the possibility of de-escalation through mediation (Reinisch, 2009). This does not mean that national judges, in general, are not proficient enough to rule on financial disputes. However, the core assumption is that those cross-border financial activities can be highly complex and beyond local judges' scope.

The countries of the European Union were involved in BITs with each other to protect investments just on the same level as with countries outside of the EU. These European BITs are called intra-EU BITs. Some of these BITs were negotiated and ratified long before the EU came into existence as we know it today (Treaty of Maastricht 1992, Treaty of Lisbon 2007). However, in 2018 a legal dispute between

the Dutch insurance provider (investor) Achmea BV and the Slovak Republic was ruled on by the Court of Justice of the EU (CJEU), declaring that intra-EU BITs are not (longer) compatible with EU law (Slowakische Republik v Achmea BV, 2018). This ruling has stirred up the international arbitration world as it introduced great legal uncertainty. Moreover, it would create a paradoxical situation that better protects investments from outside the EU than investments within.

The Achmea case was an investment based on the BIT signed between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic (since 1993, Slovak Republic) (Netherlands - Slovakia BIT, 1991). In its decision, the CJEU ruled that the arbitration courts are not courts according to EU law. However, their arbitration awards (the ruling of arbitration courts) touch upon interpreting EU law and are considered final decisions. In other words, the CJEU cannot be appealed to by preliminary ruling procedures. This would deprive the CJEU of its function of being the decisive interpreter of the treaties (CJEU, 2018). As a result, in May 2020, 23 of the 27 member states effectively heralded the end of an era by signing an intra-EU BIT termination agreement (MS of the EU, 2020) (see 2.3.).

With this termination, the ongoing intra-EU investments based on BITs are in trouble because, if a problem should arise, they can no longer base their claims on the BIT agreement their investment was brought up on in the first place. This is already visible with follow-up decisions of the CJEU, which are based on the argumentation of the Achmea Case (C-284/16) (see Komstroy C-741/19, PL Holding C-109/20) (Bevan et al., 2021). Therefore, transnational trade could be affected without agreeing on a cohesive new framework for intra-EU investment protection that provides similar protection as BITs. As this can result in a withdrawal of investments within the EU and weaken its economy, this significantly impacts society, which is why this topic is of high salience to study.

Therefore, the question that arises with that situation is, why did we see the termination of intra-EU BITs? The CJEU played a central role by ruling the Achmea case (C-284/16) the way it did since it made this situation visible to the broader public for the first time. As the court is the sole interpreter of the EU treaties and makes binding decisions, this ruling can significantly affect the member states and its economy. However, such an ‘activist’ ruling, thus an expansionist interpretation of the treaties, needs support upfront as well as a response.

As mentioned, the CJEU and its decision are highly visible in this relationship with the termination agreement (MS of the EU, 2020), but the court is just one player. The decision itself is insufficient to achieve the outcome (termination) as it needs to feel support for ruling more extensively in its interpretation of the treaties (Alter, 2009). The termination of the intra-EU BIT agreement eventually led to an extension of the jurisdiction of the national courts and the CJEU itself, promoting the supremacy of EU law. Therefore, the termination of intra-EU BITs is a case of EU legal integration (supranationalization). Hence, only the response of politics with new policies will provide a decision with the impact that can eventually influence European legal integration (Alter, 2009).

This study will discuss in detail (see 3.) the scholarly strands of the two main theoretical approaches on which this study will be based. In sum, the two schools of thought, liberal intergovernmentalism and neo-functionalism, identify three main groups of actors. Those are the EU member states on the one hand and national and supranational interest groups with an economic focus, as well as the European Commission on the other. Subsequently, this study formulates three expectations derived from the respective theories.

Briefly outlined, liberal intergovernmentalism argues that the member states and their preferences steer the pace of EU legal integration (Garrett et al., 1998; Garrett & Weingast, 1993; Moravcsik, 1995; Verdun, 2020). In contrast, neo-functionalism argues that the preferences of interest groups of national and supranational actors, with a strong focus on the European Commission to promote the spillover effect, are the cause of why we see EU legal integration (Burley & Mattli, 1993; Haas, 1958; Hooghe, 2002; Höreth, 2013; Niemann, 2017; Stone Sweet, 2004; Sweet & Brunell, 1998; Sweet & Sandholtz, 1997). Since neither of these theoretical approaches managed to be a general grand theory of what explains EU legal integration, this study does not aim to discard one of the theories (see Hooghe & Marks, 2019). This study instead aims to add to the existing literature with the analysis of a most recent case ruled upon by the CJEU that shows the outcome of supranationalization and legal integration by testing which of the theoretical approaches explains it best. The three expectations see different actors responsible for the termination of intra-EU BITs (outcome), which is why this study will work out whose preference was present to produce this outcome.

In sum, this study will assess the preferences present and assign them to either group to uncover the cause of the termination of intra-EU BITs. Both theories are well established within their scholarly strands but provide very different explanations about whose preferences produce the termination of the intra-EU BITs (outcome). This study will assess the case of the termination of intra-EU BITs as within-case analysis. By uncovering evidence through causal process tracing, this study will reveal which group saw a more favorable position, hence which preferences were present, and, therefore, what explains the outcome of the termination of intra-EU BITs best. This study will contribute to the literature's ongoing discussion of which theory helps explain EU legal integration best and will provide new building blocks for further research with this recent case.

Therefore, the research question this study aims to answer is:

What can explain the termination of intra-EU bilateral investment treaties?

This study is structured along the following lines. First, we will provide a brief overview of the legal background in which this study is working. Then, we address the legal framework of the CJEU and its function regarding the interpretation of EU primary law (EU treaties). Furthermore, this study will introduce BITs and why they are deemed important before briefly outlining the discussions surrounding the Achmea ruling. This chapter will aid us in drawing better interpretations from the findings.

Subsequently, the theoretical framework will explore in depth the theoretical approaches scholars have been discussing for decades on how to explain legal integration. Thereinafter, we operationalize these concepts and the derived expectations by assigning indicators to the expectations to measure them. Following, we will introduce the methods this study uses and why they are well-fitted before reflecting on their reliability, validity, and the study's limitations.

The central part will be dedicated to thoroughly discussing the results extracted from the documents this study consulted, selected, and analyzed. Then, after discussing the documents from the pre- and post-Achmea decision-making in temporal order, structured according to the main actors of the study to work out their preferences, we will link the findings to the indicators. Furthermore, we will speculate on possible alternative causal explanations.

Wrapping up this study, we will draw conclusions from the theoretical implications of the findings and formulate an answer to the research question. Finally, we will discuss what this study can add to the existing literature and provide starting points for further research.

2. Background information – The CJEU, Achmea, and BITs

Since this study is researching the field of European legal integration, this chapter will provide background information about the legal framework this study is working in. To understand the outcome of the termination of the intra-EU BITs, this chapter will first introduce the functioning and the working modalities of the Court of Justice of the European Union (CJEU) and the EU treaties (primary law). Secondly, this study will address the origins of the bilateral investment treaties (BITs) and why they became such a broadly accepted institution of international law. Finally, this chapter will briefly discuss the Achmea decision (C-284/16), as this study is heavily grounded in the come about, the implications, and the responses to this decision that provided momentum for the agreement of the termination of the intra-EU BITs to be signed by the EU member states. This chapter will aid in drawing inferences during the document and within-case analysis (see 5.) due to providing rich knowledge about the circumstances the different actors were working in.

2.1. The European Court of Justice and the EU law Treaty framework

First, we briefly need to shift the gaze to the CJEU and the EU Treaties to understand the signing of the agreement for the termination of intra-EU BITs. The treaties in question are the EU's primary law and originate in the agreement of and ratification through the member states. Those treaties are the *Treaty on European Union* (TEU) and the *Treaty on the functioning of the European Union* (TFEU). As the treaties state, the institutions should only "act within the limits of the powers conferred upon" (Corrias, 2011, p. 2) them by the treaties. In other words, the institutions shall not exceed the powers the treaties gave them. Furthermore, since the Union is only working within and based on the treaties, it does not hold a general competence (also known as *competence competence*) of extending its own competencies

(Corrias, 2011). Therefore, as the power of the EU originates from the individual member states delegating competencies to the EU and its organs, the member states are also the only competent actors to alter these treaties and make amendments in a unanimous decision-making process (de Freitas, 2015). The CJEU is the guardian of the EU treaties and the primary law's sole interpreter. On top of that, it also reviews secondary law, national laws, and their applicability and conformity with supranational EU law (Garrett et al., 1998).

The CJEU decisions are based on the various cases brought in front of it through member states, the Commission, or individuals. In other words, the court cannot decide on its own which articles of the treaties it would like to review and interpret. The CJEU issues over a thousand cases yearly (e.g., 1.739 in 2019 (Riehle, 2020)), and while most of them are one-off decisions without significant impact outside of the very case, every now and then, a so-called landmark decision leaves the Luxemburg court. These decisions can have a significant impact on other cases or even on the whole community. For example, major landmark decisions regarding the internal market, which scholars are still citing on a regular basis, are the cases of Cassis de Dijon (C-120/78), Dassonville (8/74), and the Keck cases (C-267/91; C-268/91) (see Jäger, 2020). The decisions issued by the CJEU are known as European case law, meaning that later cases are (usually) built up on the earlier decision. That goes both ways, as national courts must stick to the case law of the CJEU when deciding on issues touching upon EU law. However, the CJEU will also refer to its earlier decisions when formulating an argument on a particular case (Boin & Schmidt, 2020).

Looking at the legal framework, we see that the primary law of the EU has a rather general approach and barely regulates it in depth (de Freitas, 2015; Höreth, 2013). Furthermore, the current form of the treaties just fell short of becoming what ought to be a constitution for Europe (de Freitas, 2015). It was discussed but eventually failed to be ratified following the negotiations in Lisbon in 2007. Therefore, this vague primary law gives discretion to the CJEU function as the highest court in the EU to "address and redress the problem of incomplete contracting" (Höreth, 2013, p. 32). This discretion allows for more teleological interpretation – so extension by not just narrowly focusing on the words themselves but basing the interpretation on the purpose and aim of the regulation – and, therefore, more expansionist rulings. Höreth (2013, p. 32) argues further that this "gap-filling activity" of the CJEU eventually leads to an increase in the "judicialization of politics." Finally, it is argued that this indeterminacy actually "called for an active role of the ECJ" (de Freitas, 2015, p. 178).

Moreover, this harbors another main principle that goes in line with competencies and treaty interpretation, the doctrine of implied powers. Even though this practice did not originate from the CJEU but comes from overseas American legal scholars, the CJEU is the leading EU actor fostering this doctrine today in its task of interpreting EU primary law (Corrias, 2011). This doctrine closes the gap between the principle of the limit of delegated competencies, in that the EU organs are only allowed

to work within that specific scope and the general functioning of the Union. The doctrine is a rule of interpretation that inherits the idea that without a broader interpretation, the "law would have no meaning or could not be reasonably and usefully applied" (Corrias, 2011, p. 8). In other words, without it being delegated in the treaties, the EU organs should interpret the law as far as necessary not to let their delegated competencies be wasted unused. Thus, this results in competence stretching, or as Corrias (2011, p. 7) puts it accordingly, we experience "creeping competencies." As the court is supposed to be that impartial player, that should not work for either side (in a multi-level dimension, in favor of more state sovereignty or more EU integration into the supranational level), it is noteworthy that regarding the implied powers doctrine, the CJEU is also perceived as a somewhat active player of this competency creeping in favor of the EU and thereby actively encouraging further EU legal integration (Corrias, 2011).

Finally, within the framework of international organizations and their organs, we experience the absence of a clear separation of power and control mechanisms. As this differs throughout the international organizational field regarding the function of the different international courts, the CJEU is considered one of the strongest and boldest international courts (Alter, 1998; de Freitas, 2015). That being said, due to the treaty's indeterminacy and the court's discretion, the CJEU has leeway to decide how to work in the field of interpretation of the treaties (de Freitas, 2015). Therefore, if the CJEU sees support for an expansionist decision, it will likely use its given leeway and discretion to make use of it. This will result in a so-called activist decision (de Freitas, 2015).

On the contrary, according to Alter (2009), even though the court is powerful, history has shown that without certain support from the public or politics, the CJEU would not act too boldly on its own, as it had already left many opportunities to push towards the supremacy of EU law unused when there was no support present (see also Alter & Steinberg, 2007). Even if a decision could be understood as being an activist ruling, to have a broad impact on the EU as a whole, it needs to see some sort of "political follow-through" (Alter & Vargas, 2000, p. 462). In short, a CJEU decision needs a "post-ruling political mobilization" to create a far-reaching impact (Alter, 2009, p. 18).

Having established that the CJEU is a powerful player that can make use of its power to interpret the treaties in various ways, we know that the CJEU can use its influence of interpretation to help steer favorable outcomes. In the theoretical framework (see 3.), we need to extract from the literature what and whose preferences support the court to rule extensively in this matter.

2.2. Bilateral Investment Treaties (BITs)

To understand what can explain the termination of intra-EU BITs, we first need to understand what BITs are in general, how they emerged, and why countries signed them with each other. As we have now laid out the functioning of the CJEU and the EU treaty framework, elaborating on BITs will aid us in understanding the different takes on the future of intra-EU BITs by the actors relevant to this study.

In short, BITs are bilateral agreements regarding investments between two countries. They regulate how to proceed with arising disputes if an investor from one of these countries invests in the market of the other country. One key element of BITs is the so-called Investor-State Dispute Settlement (ISDS) mechanism that regulates that any dispute arising between the parties (Investor and State) shall not be handled within their own countries' jurisdiction. In contrast, the tribunals will be installed in a third country to take away any advantage for the parties. Therefore, international arbitrational tribunals would be installed to provide for the highest level of impartiality.

International trade and investments across borders emerged as an institution throughout the industrial revolution. However, investing and bringing up companies in different countries also bore huge risks (de Nanteuil, 2020). The legal system in some countries was not yet developed as well as in others, creating uncertainty for investors. However, as will be worked out, equally developed legal systems are not even the norm within the EU (de Nanteuil, 2020; European Union, 2020). The main problem was that private investors feared financial damages caused by the host country. As a national, one would file a complaint at the competent national court. However, things are more difficult if we introduce cross-border investments to the equation.

The first step away from being at the mercy of the national courts of the host state, trying to incentivize cross-border investment protection, was the so-called "state contract." With state contracts being the ancestor of today's BITs, the main criticism of these contracts was that the private parties working across borders still depended on the state they were operating in to establish remedies and arbitration courts in cases of conflict (de Nanteuil, 2020). In other words, though the investment disputes were no longer fought out in front of national courts, investors still depended on the host countries to establish a dispute settlement body in case of conflict. The modern solution, which really gained traction in Europe at the beginning of the 1990s, together with the emergence of the single market (1993), should resolve this problem. BITs detach the issues from the host state by installing ad hoc arbitration courts in a third country while also assigning the law of this third state to the investment at stake. As both parties need to agree on the applicability of the BIT upon contracting, they assign the statute of the arbitration court as well as the law to be applied to the case. Therefore, there should not be a tough of war in the case of an arising dispute between the parties (de Nanteuil, 2020; Reinisch, 2009). This system of independent dispute settlement bodies aims to minimize the risk of being at the mercy of a state where the investment takes place.

In the following paragraph, we will briefly address the main advantages regularly brought up in connection with BITs, as outlined by Reinisch (2009). First, the *de-nationalization* of disputes helps to base the issue resolution on impartial grounds regarding the parties' origins and their respective national laws. Furthermore, by resolving issues from the state territory of all parties, they also account for *de-politicization* and prevent any diplomatic conflict between the host country and the investor's country

of origin to influence the private actor's investments (Reinisch, 2009). Secondly, dispute resolution is, on average, *faster* than national procedures and *less expensive* (European Union, 2020; International Arbitration, 2022). Moreover, as these matters often concern sensitive company data, *confidentiality* is safeguarded better by tribunals since national court procedures are mostly public (Reinisch, 2009). Furthermore, the arbitrators (judges) are *highly skilled* and *knowledgeable* in the various fields of dispute. Each party gets to *choose* one arbitrator, and those two assign a neutral third arbitrator, who also has the chair (Reinisch, 2009). Finally, the *enforcement* of the awards is guaranteed under public international law (Reinisch, 2009). To ensure enforcement, BITs are based on established standard rules of arbitration. For the Netherlands - Slovakia BIT (1991), the broadly accepted UNCITRAL Arbitration Rules 1976 under UN supervision are applicable.

Regarding intra-EU BITs, the de-politicization and the effectiveness of national remedies (especially in Central and Eastern Europe) is a very salient topic. Only when a country is considered a liberal democracy can one anticipate that state actions will be controlled by a functioning rule of law with an independent judiciary and checks and balances in place granting individuals certain rights, such as access to effective domestic remedies (Herre, 2021). However, as we would arguably like to see more countries in this world being liberal democracies, the most recent V-Dem report of 2021, analyzed by Boese et al. (2022), shows a very different picture. In 2021, 70% of the world's population lived under autocratic regimes, with only 34 countries (13 % of the world's population) being officially considered liberal democracies (Boese et al., 2022). Of course, the European Union countries, on average, are still topping the board. However, an average estimation always leaves room for outliers. For example, whereas Poland, Romania, and Slovakia are considered electoral democracies, Hungary was even determined an electoral autocracy (Boese et al., 2022). These issues are also recognized in the EU Justice Scoreboard (European Union, 2020) and Eurobarometer (DG JUST, 2019) regarding the rule of law and the effectiveness and impartiality of the judicial systems of the EU member states (see also Vinocur & Hirsch, 2022). In conclusion, private actors investing across borders barely have guarantees that in the case of an upcoming problem involving the host state, they would have access to national courts that are effective, independent, and not politically motivated in any way (Madner & Mayr, 2019; Reinisch, 2009). Therefore, the institute of BITs was introduced with an Investor-State Dispute Settlement (ISDS) mechanism that would resolve arising issues in front of impartial tribunals based on public international law.

The previous two sections gave a brief overview of the functioning of the CJEU and the EU legal framework on the one hand and the functioning of Bilateral Investment Treaties (BITs) and Investor-State Dispute Settlement (ISDS) mechanisms based on public international law on the other. The following section will introduce the Achmea decision (C-284/16) and elaborate on the dispute surrounding it. As stated in the beginning, this decision raised a lot of talks regarding the relationship

of EU law with public international law and how the future of investments within member states of the EU should be regulated and safeguarded.

2.3. Slowakische Republik (Slovak Republic) vs Achmea BV, C-284/16

In March 2018, the CJEU issued a decision on the case of the Slowakische Republik (Slovak Republic) vs. Achmea BV. The core of this case dealt with the establishment of a branch office (investment) of the Dutch Achmea BV, a company specialized in insurance providing, in the Slovak Republic (from now on, Slovakia). Achmea BV aimed to participate in the Slovakian national insurance market opened to private investors due to new national policies in 2004. In 2006 however, the Slovak government reversed this liberation process of opening the health insurance market to private investors. Furthermore, the authority prohibited the transfer of any profits made during that time to the legal holder of international companies which caused financial damages to investors, such as Achmea BV, that, in good faith of the opening policies in 2004, invested in this sector (CJEU, 2018). Consequently, in 2008 the company filed a complaint claiming financial damages caused by Slovakia based on a breach of the bilateral investment treaty (BIT) upon which this investment was based. The treaty in question is the bilateral *Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic* negotiated and signed in 1991 and in effect since October 1st, 1992 (Netherlands - Slovakia BIT, 1991). Following the dissolution of Czechoslovakia on January 1st, 1993, the Slovak Republic is the legal successor to the Czech and Slovak Federal Republic and enters into all rights and obligations under the BIT Agreement mentioned (C-284/16).

The agreement stipulates that all parties should respect each other and may not conduct any behavior that could jeopardize the investments, including withholding and prohibiting the transfer of money and profits (Netherlands - Slovakia BIT, 1991, Article 3 & 4). Furthermore, in the case of an arising dispute, the parties shall determine upon contracting the geographical jurisdiction of an arbitration court and thereby the law to be applied (Netherlands - Slovakia BIT, 1991). According to the BIT applicable to these parties, the ad hoc court should be based in Frankfurt am Main, and therefore German law would be applicable (CJEU, 2018). With the decision from December 7th, 2012, the arbitration court in Frankfurt am Main imposed on Slovakia a payment obligation to Achmea BV of 22,1 million euros due to financial damages caused by a breach of the BIT. Slovakia appealed in the last instance in front of the Bundesgerichtshof (BGH) of Germany, arguing that the BIT is incompatible with EU law and the ad hoc court is not competent to rule on this issue (CJEU, 2018). The argumentation was based on the fact that Slovakia joined the European Union in May 2004 and hence accepted the acquis communautaire (= the body of EU primary and secondary law developed over the years). Therefore, since the BIT agreement is now a bilateral agreement based on international law between two member states of the EU, this is incompatible with EU law (CJEU, 2018). Since the question of the compatibility of BITs with EU law arose for the first time, the CJEU had not been consulted yet, and the issue was of

high salience because of the 196 intra-EU BITs in effect, a preliminary ruling procedure (regarding Articles 18, 267 and 344 TFEU) was necessary. To repeat, since the CJEU is the sole interpreter of how to understand the treaties, the BGH, as a final national instance, was obliged to bring this question before the CJEU (Art. 267 para. 3 TFEU).

The CJEUs argumentation precisely matches why BITs were introduced in the first place. It argues that the remedies the EU law provides cannot be assured by disentangling the case from the national courts. In other words, following the line of reasoning of the CJEU, the parties should use the modalities of the judicial review of national laws by the CJEU or request an infringement procedure in front of the European Commission against the host state. Put differently, the BITs are redundant since there is enough protection based on EU law. However, since the arbitration court is considered a final instance (Art. 8/7 Netherlands - Slovakia BIT) and touches upon the interpretation of EU law but is not a court according to Art. 267 TFEU, it is not eligible to issue preliminary questions to the CJEU for the interpretation of the law of the treaties (CJEU, 2018). Therefore, the CJEU concluded that BITs are not in line with EU primary law and, hence no longer applicable between investors based in an EU member state investing in another EU country.

Following the release of the Achmea decision, the European Commission issued a communication paper on the future of intra-EU investments, arguing for the termination of intra-EU BITs by the EU member states (European Commission, 2018). As a result, in May 2020, 23 of the EU member states signed the termination of all intra-EU BITs.

This chapter describes why BITs were introduced worldwide as globalization gained traction. However, so did the EU simultaneously with the advent of the single market. As this study will work out, investments within the EU single market are crucial for its success. With the signing of the termination agreement in 2020, the intra-EU BITs lost their legal basis. As will be shown in detail in the results chapter (see 5.), the termination agreement did not account for any separate investor protection but thought the existing EU law provided sufficient remedies. However, the EC initiated workshops and a public consultation phase on the necessity for a new EU-wide investment protection framework. As for the time when this study was conducted (end of 2022), the legislative process is still ongoing, and we cannot yet determine the future of intra-EU investment protection. We are currently in a phase of legal uncertainty for investors within the EU, and this study will research what can explain the termination of intra-EU BITs.

3. Theoretical Framework

In this chapter, the study will introduce the main theoretical expectations that can explain the outcome of the termination of intra-EU bilateral investment treaties. As indicated, the ruling of the CJEU (C-284/16) pushed this topic to a broader agenda, including the public agenda of scholars and academics

as well as the political agenda of policymakers. Therefore, in this section, the different players that have an influence on the direction and the pace of EU legal integration need to be analyzed in depth. We will first briefly outline the main approaches this study will work with. The subsequent sections will then discuss the two main theoretical frameworks used in depth. Following, this study will formulate the expectations for each approach derived from the theories that can explain the termination of intra-EU BITs.

The two main theoretical frameworks utilized are liberal intergovernmentalism and neo-functionalism. These leading theories are in an ongoing debate over which approach can determine what causes legal integration (Hooghe & Marks, 2019). The representatives (scholars) of the two schools are constantly working towards consolidating their theory as new cases, and situations come up that provide new research potential. In short, the players identified by the theories are the EU member states and their preferences on the one side (liberal intergovernmentalism) and interest groups' preferences shaped by the community of individual economic and supranational actors, as well as the preferences of the European Commission on the other (neo-functionalism). Those groups can provide the CJEU with support for its interpretation of the EU treaties when a case is brought before it but also spur the response for a policy switch.

The first theoretical approach of liberal intergovernmentalism explains that national preferences are shaped by the governments of the different EU member states as they are rational actors with fixed preferences. As the signees of the EU treaties, they are in charge of the integration process. The CJEU, the European Commission, and other supranational and individual economic actors are reactive to the member state's preferences.

The second theoretical approach of neo-functionalism identifies individual actors with self-interests that work together in interest groups. Furthermore, as the EU agenda setter, the European Commission is a central actor in promoting EU legal integration. The neo-functionalist theory is an economy-based approach where individual economic actors form interest groups on the national level that significantly influence the member states' preferences. Moreover, the theory also explains that supranational actors work towards removing transaction costs for the economy to flourish. Together they form interest groups that work towards a well-functioning EU economy and are thereby steering factors of EU legal integration. Furthermore, the European Commission is perceived to be pro-integrationist and is an active player who promotes a shift of competencies to the EU level for perceived economic benefits. Their actions will create a spillover effect on other branches to act as well and will shift political positions. In this view, member states are more reactive to the interest groups' preferences and the supranational actors. As neo-functionalism is a more nuanced approach, this study will explore the interest groups' preferences on the one side and the active involvement of the European Commission on the other.

In sum, the theoretical debate is split between the views that either member states' or interest groups' preferences and the European Commission determine legal integration. This study will use this main distinction as a basis to draw causal inferences on what can explain the termination of intra-EU BITs.

3.1. Member states' preferences

As indicated, the preferences of the EU member states are one approach to explaining EU legal integration. The origins can be assumed to be based on the broader international relations theory of realism. Hence, we will look at the realist theory first. However, liberal intergovernmentalism took this approach to the next level as it evolved from the same ideas and based them in the European setting (Verdun, 2020).

3.1.1. Neo-realism

The first explanation originates in the school of (neo) realism, which argues that the member states are the master of the treaties and, therefore, legal integration follows the preferences of the most powerful states. Realists explain that the relationship and actions between actors are based on a balance of power and that states have fixed interests that they are rationally pursuing (Wohlforth, 2009). Next to groupism and egoism, anarchy is a guiding principle of realism and explains that the national state is the highest authority, hence nothing can be above it (Wohlforth, 2009). Conquering collective action problems shapes communication between individual states to make them collaborate to overcome the anarchy belief that one can never trust another state (Garrett & Weingast, 1993; Wohlforth, 2009). It is the interest of the nation-state that shapes case law and not the caselaw that shapes the interest of the nation-state (Garrett & Weingast, 1993; Volcansek, 1986). Furthermore, as Garrett (1992) argues, most decisions align with the interests of the most powerful states. Finally, legal integration and CJEU decisions are guided by the member states' preferences as they are the principals, and the CJEU and EU institutions are their agents (Garrett & Weingast, 1993).

In sum, the broader approach of neo-realism lays out the initial idea that member states are the highest authority. Therefore, their preferences guide the way for integration collaboration processes on the European level.

3.1.2. Liberal Intergovernmentalism

Liberal intergovernmentalism theory goes in the same direction as the realist ideas but argues more nuanced that the governments represent the national interest and negotiate with other governments to determine the degree of integration processes (Moravcsik, 1995; Verdun, 2020). Still, governments are perceived to have fixed interests and strive for the least necessary degree of integration, which would indicate a loss of sovereignty, autonomy, and, ultimately, power (Moravcsik, 1995). However, due to globalization, governments do adjust their national preferences if they see (e.g., economic) benefits from integration and cooperation, such as the realization of the internal market (Garrett, 1995). It was the idea of a direct answer to the neo-functionalist approach to European integration (Verdun, 2020).

However, liberal intergovernmentalism did not manage to disprove the neo-functionalism approach but still stands as a major theory for explaining European integration (Verdun, 2020).

Brought up initially by Stanley Hoffmann, intergovernmentalism stressed the influence the member states of the EU have on the integration pace. However, they also have the power to completely derail the possibility of EU integration (Verdun, 2020). In the 1990s, liberal intergovernmentalism was brought along and helped this theory gain new momentum explaining the negotiations around the Treaty of Maastricht 1992 and the integration of the single market (Verdun, 2020). The institutions of the EU facilitate cooperation between the member states. However, this was just about the same moment as neo-functionalism had its comeback as well (see 3.2.).

The EU member states negotiate with each other in the different European Union organs (Sweet & Brunell, 1998). According to the liberal intergovernmentalist approach, the "national executives are in control of every crucial step in the European polity" (Sweet & Brunell, 1998, p. 73). These officials working together in the different EU organs set the "content, scope, and pace of integration" (Sweet & Brunell, 1998, p. 73). This point of view does not emphasize that the most powerful states get what they want, but rather that it is about finding the common denominator on how far and fast legal integration should or should not go (Sweet & Brunell, 1998). According to Moravcsik (1995), member states generally strive for autonomy in domestic politics. Still, as they need to achieve their (e.g., economic) policy goals, they cooperate with the other governments and integrate further, if needed, for their preferred outcome (see also Sweet & Brunell, 1998). Garret (1995) explains in his answer to neo-functionalist criticism (by Burley & Mattli, 1993) of his and Barry Weingast's (1993) earlier work that governments see the "mutual gains from trade liberalization" (Garrett, 1995, p. 172) and therefore also the gains for their national interest which leads to an update of the prior interests. Therefore, the governments would not jeopardize a CJEU decision, even though they could, by not accepting it, to realize the gains for their economy (Garrett, 1995). Therefore, governments have a conscious choice and are not just reactive.

Finally, when it comes to the EU organs, including the CJEU, the member states' preferences shape their actions based on the principle-agent theory's assumption. Thus, the member states are the principles, and the EU organs are the agents fulfilling their duties to the liking of the principals (Guston, 2003). As mentioned above, this was already argued from the neo-realist point of view (Garrett & Weingast, 1993). However, Garrett (1995) states in his later and slightly softer argument that the CJEU is also a strategic rational actor. Therefore, the Court would issue decisions that can enhance its powers (supremacy) only where it perceives support from the member states in their response to maintain its reputation and not have its decisions reversed (Garrett, 1995).

Since the liberal intergovernmental approach has brought on the main assumptions of realism and is now one of the leading theories for explaining EU integration, this study bases its first expectation of

what explains the outcome of the termination of intra-EU BITs on the preferences of the EU member states as they are working together in shaping their common preferences for the need of further EU legal integration.

However, the preferences of the member states are not always the same, as the positions can depend on factors such as the countries' overall political influence, the number of citizens, economic power (GDP), and financial interdependency (net contributors vs. net beneficiaries) which reflects politicization and interdependency in integration attempts (see also Schimmelfennig et al., 2015). However, this study focuses solely on legal integration, and there was no opt-out possibility of the CJEU's authority (Alter, 2009). Therefore, due to feasibility and for the scope of this study, we will indicate the common preferences according to the mutual gains of the member states (economy, autonomy, sovereignty, legal harmonization) from the termination of intra-EU BITs (outcome). To rule out alternative causal explanations and simply a reactive behavior of the member states, the analysis has to be able to back up the findings of potential gains by focusing on member-state statements and perceptions regarding bilateral investment treaties in the pre-Achmea phase (see 5.) and their termination within the EU. Only if the mutual gains are perceived as high, and the member state statements and perceptions are aligned towards favoring termination, the member states' preferences to favor the termination of intra-EU BITs are homogenous.

Therefore, for this theoretical approach to hold, the termination of intra-EU BITs would occur if the majority of the member states saw a favorable position for them. The member states' preferences and positions would need to shine through with sound evidence during the process tracing and show that member states wanted further legal integration in this field as they saw mutual benefits from it. In other words, the preferences need to be homogenous in favoring the termination. However, since the member states are the actors eventually signing the termination agreement, the evidence needs to show that they formulated their preferences *actively* and not *reactively* to outside influence from other actors.

Expectation 1: *When more EU member states are in favor of the termination of intra-EU BITs, the likelihood that the termination of intra-EU BITs was caused by the EU member states' preferences is high.*

3.2. Interest groups' preferences and the European Commission

3.2.1. Neo-functionalism

The main rival of the liberal intergovernmental approach is the neo-functionalist school of thought. Since the late 50s, originating around Ernst Haas in an approach of presenting neo-functionalism as a grand theory of European integration, it was an ongoing debate about which theory is the right one (Haas, 1958; Niemann, 2017). This early approach was more refined and challenged the endogenous effects of the national interest of the member states as the primary explanation (Niemann, 2017). Hooghe and Marks (2019, p. 1114) explain that "the state (is) an arena in which societal actors operate

to realize their interests." The central assumption was that individual rational actors (private organizations) make decisions independently but are shaped by the recognition of mutual learning and connection due to cooperative decision-making processes. Put simply, the individual actors are working within a community, influencing each other's preferences and aligning them (Niemann, 2017). As a counterweight to the purely endogenous factors of national interest argued by liberal intergovernmentalist, they find that the community membership of the individual actors shapes the way of forming the preferences of interest groups and consequently that of the governments. In other words, the government's interest is shaped by the individual actors and the interest groups. Those actors are not restricted by a domestic political approach, and the community is perceived as the (nongovernmental) elites shaping integration (Niemann, 2017). Finally, the community profits from the predominantly positive outcomes of supranationalization if they perceive it as favorable. Even though this theory was heavily criticized and is no longer seen as a grand theory, it regained momentum in the 80s. It was restored as one of the primary explanations for European legal integration. With the emergence of cross-border trade, we saw a general rise in interest in EU community law from the economy as it was more favorable to have one cohesive community law over several national legal structures (Niemann, 2017).

Furthermore, supranational actors, such as the European Commission as the EU agenda setter, promote community law harmonization to account for economic benefits for the EU. They would "care about the provision of a variety of collective goods that would not otherwise be provided" (Hooghe, 2002, p. 26). Therefore, the EC is working towards more integration to strengthen the EU by supporting the EU law supremacy and "shift(ing) authority to the European level" (Hooghe, 2002, p. 26). This, of course, also strengthens the EC itself. Therefore, neo-functionalism argues that the EC is generally perceived to be pro-integrationist (Hooghe, 2002).

The causal mechanisms in neo-functional theory are the spillover effect in the different stages. According to Haas (1958), the main idea was that spillover happens automatically. First, the functional spillover explains the interdependency across sectors of economies. The different sectors cannot be left insulated from each other and will cause policy updates in the other areas as well. Second, the political spillover describes the learning effect of the domestic elites that shifts their political expectations towards more supranationalization when interdependency is present. The presence of interdependency is heavily guided by the interest groups determining the functional spillover of different areas, causing a spillover of political loyalties and upgrading the common interest toward European integration. Finally, the cultivated spillover demonstrates that the supranational institutions themselves gain more power due to integration processes (Niemann, 2017).

Regarding European legal integration concerning the CJEU, self-interested actors would bring cases in front of the CJEU (direct effect or preliminary procedures) when they see a favorable outcome for them.

These cases eventually create a spillover effect in other fields (functional) and cause a change in political preferences (political) (Burley & Mattli, 1993; Stone Sweet, 2004; Sweet & Brunell, 1998). It was not only individuals, but in general, one could say that interest groups were pursuing their self-interest (Höreth, 2013). Since this also went against member states' interests, it shows that their preferences do not influence the CJEU according to the neo-functionalist view (Höreth, 2013).

The bespoken actors are individuals or private organizations in the first place. However, as explained above, they find themselves in a community where they learn from each other and collaborate, which will influence their preferences. A strong approach of early neo-functionalism was the determinacy of the economic situation and the respective interest groups that would shape these interests. Liberal intergovernmentalists discarded this as being too economy-focused (Niemann, 2017). However, with the emergence of cross-national trade and the internal market in the 80s, neo-functionalism resurrected, and the narrative of the interest groups working together on the national and supranational levels shaping the preferences and pace of supranationalization gained traction again. Also, with the Treaty of Maastricht 1992, the European Commission gained even more influence on the integration process as the European Community (and later the EU) became a supranational organization.

a) Interest groups

Following that new momentum, Niemann (2006) introduced a new reworked framework of neo-functionalism that emphasizes the strength of national or transnational (economic) interest groups in restraining the member states and therefore shaping the interest of the member states effectively and not the other way around. Niemann (2006) explains that the preference and determination of whether supranationalization is needed and favored are restrained by two factors. First, the 'sovereignty consciousness' explains that the community of actors is shaped by "national traditions, identities and ideologies" (Niemann, 2017, p. 10). Therefore, supranationalization can be opposed if not necessary or favored in a particular field. Secondly, the national governments are restrained in their autonomy because of the individual actors working together in economic interest groups lobbying the government. Finally, there are also structural limitations, such as legal tradition (Niemann, 2017).

As this leads us to the core argument that individual actors are working together as a community influencing the interest groups and shaping their preferences to steer the legal integration pace, Niemann (2017) as well as Ernst Haas, in his final attempt at working on neo-functionalist theories, emphasize, that the modern neo-functional approach has somewhat of a constructivist notion. In other words, they have shared values and beliefs they are working towards (Alter, 2009). Therefore, the neo-functionalist framework emphasizes that the *economic interest groups* lobbying the national interests on the national level have a substantial impact on steering the European legal integration pace.

Furthermore, Sweet and Sandholtz (1997), as well as Sweet and Brunell (1998), develop that argument further by paying more attention to the supranational level. According to them, supranational

organizations (e.g., the Commission, the CJEU) are working together with and for the benefit of transnationally active actors (economic actors working across borders). The so-called 'supranationalists' (Sweet & Brunell, 1998, p. 63) are working towards their preferences of removing national barriers, reducing transaction costs, and constructing a more supranational world. Especially supranational institutions themselves push for that development if they (i.) feel support from transnational actors (e.g., scholars and academics) but mainly if they (ii.) see a benefit for it for individual actors with cross-national trade activity (Sweet & Sandholtz, 1997). Put simply, the supranational actors work closely related to the national economic interest groups.

However, the supranational organizations are also gaining overall influence and power by that, but as discussed, the supranational actors would not push supranationalization without any outside support (see 2.1.). This was already acknowledged by Hass (1958) in his cultivated spillover that supranational organizations (e.g., Commission, the CJEU) gain more power by further supranationalization (see also 2.1.). In this view, member states are more reactive to integration processes (see 3.1.2). In sum, they work towards "gradually but comprehensively replac(ing) the nation state in all its functions" (Sweet & Sandholtz, 1997, p. 299). The position of the EC will be addressed in detail in the following subsection.

In sum, Sweet and Sandholtz (1997) and Sweet and Brunell (1998) introduce a second notion to the argumentation of interest groups pursuing their preferences. They adjust the notion from only economic interest groups lobbying the national interests (see 3.2.1.) to the supranational actors picking up the economic needs and aligning them with their supranationalist goals.

Therefore, the preferences the analysis for this expectation (interest groups) will be based on are twofold. As discussed, the neo-functionalist theory explains the interaction of the national (and transnational) individual actors and the supranational actors working together in interest groups to steer and determine the pace of legal integration. First, the preferences of the national economic interest groups will be determined and analyzed based on the potential economic benefits for private actors (and private organizations). Furthermore, we will focus on the perception of the economic interest groups regarding the unification of community law and whether there are voices in favor of the contingency of a functioning legal framework (tradition) (Niemann, 2017). Secondly, the preferences of the supranational actors are the construction of a supranational Europe targeted at aiding individual economic actors involved in transactions across borders that benefit from harmonized European law. Moreover, they prefer removing national barriers and reducing transaction costs while also benefiting from becoming more powerful. This approach shows an interconnectedness of the supranational level with the individual economic actors and provides the neo-functionalist approach with a nuanced economy-based causal explanation for legal integration.

Therefore, the analysis needs to provide sound evidence that there are perceived economic benefits for the individual economic actors and that the statements and positions in favor of unification rather than contingency are aligned. That would indicate that more national economic interest groups are in favor of termination and that the preferences of the individual economic actors are homogenous. Furthermore, the analysis needs to provide evidence that the preferences of supranational actors pushing for supranationalization are aligned with the individual economic actors' preferences. In sum, the documents need to show that the supranational actors worked towards legal harmonization to aid the individual economic actors. That will indicate that these actors working together in interest groups shape the pace of EU legal integration. If that is the case and they favor the termination, the likelihood that they caused the termination of intra-EU BITs is high.

Explanation 2: *When more (economic and supranationalist) interest groups are in favor of the termination of intra-EU BITs, the likelihood that the termination of intra-EU BITs was caused by the (economic and supranationalist) interest groups' preferences is high.*

b) European Commission

In the discussion above, we extracted from the neo-functionalist approach that individual actors and their self-interests are the focus of EU legal integration. They form interest groups on the various levels of governance and work together to fulfilling their goals. Member states are reactive to these groups. However, it is not only interest groups. Some individual actors also deserve greater attention. Since this study focuses on EU legal integration and the European Commission has the sole authority to initiate new legal proposals, we need to take a closer look at this EU institution.

With the signing of the Treaty of Maastricht (1992), the European Economic Community (ECC) became a supranational institution that set the course for what we know today as the European Union (Britannica, 2022). In this regard, the European Commission (EC) set out to become one of the leading actors of the EU framework. Accordingly, the EC was granted additional powers in the areas of justice and home affairs, foreign and security policy, and economic and monetary union. The EC's powers are designed to help carry out its primary function, which is to represent the interests of the EU and to ensure the efficient functioning of the EU's internal market. Therefore, its powers are intended to help the EU achieve its goals of promoting economic and social cohesion, protecting the environment, and strengthening its role in the global economy.

As one of the central EU institutions, the EC is responsible for proposing and implementing EU legislation and enforcing EU law. This gives the EC significant influence over the policies and decisions of the member states, as they are required to comply with EU law and the directives of the EC. Moreover, according to neo-functionalist theory, the EC is central in promoting the spillover effect from one policy field to another. As the member states are influenced by the EC's guidance and work together in one policy field, they are likely to cooperate in other related policy fields. Thus, the EC, as the agenda

setter of the EU, has an influential position in promoting and determining EU legal integration (Hooghe, 2002; Sweet & Sandholtz, 1997).

Furthermore, as mentioned above, in the view of neo-functionalism, it is argued that the supranational actors, especially the EC, aim to provide collective goods that cannot be provided otherwise. Therefore, they strive to promote transferring more competencies and authority to the EU (Hooghe, 2002; Sweet & Sandholtz, 1997). This process will gradually take away competencies from the member states to strengthen the EU. Therefore, we experience a strong notion of the member states being reactive to the European Commission as a supranational actor.

As Hooghe (2002) explains further, the officials (individuals) working for the European Commission have incorporated this function of the EC (e.g., completing the single market) within the EU and therefore work towards this goal. In other words, the officials within the EC pursue the preferences the EC is set out to fulfill. Thus, the preferences of the individuals are aligned with the general perception of the priorities the EC should promote (Hooghe, 2002). As discussed, neo-functionalists argue that the rational self-interest of individuals is the focus of this theoretical approach. Therefore, since the individual actors working for the EC are also pro-integrationists, they "are primarily motivated to defend the Commission's institutional interest in deeper integration, and they do so out of rational self-interest" (Hooghe, 2002, p. 26). In this respect, the bureaucrats of the Commission, as they also strive for self-fulfillment in their careers, want to maximize their discretion in working towards their set goals (Hooghe, 2002).

In sum, this theory emphasizes that the individual actors and the institutions they work in can shape the policies, preferences, and decisions of the individual member states. Especially regarding the European Commission, we experience a strong supranational organization that sets and determines the pace of the European Union, its legislative proposals, and policies. Therefore, the European Commission has a strong steering effect on the pace of European legal integration.

To determine the preferences of the EC, this study will focus on notions of the EC to terminate intra-EU BITs. Furthermore, we will focus on the tendency to shift authority to the EU level. Additionally, we look for expressions of maximizing the bureaucratic discretion of the EC in its working modalities. Moreover, as this approach is very economy focused, we will sharpen the lens on the economic benefit of the EU single market and the EU economy while discussing the documents.

Therefore, the third expectation that this study will focus on is how active the EC is regarding the termination of intra-EU BITs. According to neo-functionalism, a strong involvement of the EC indicates its preferences and will have a high likelihood that the EC is a determining steering factor in this situation. Therefore, the stronger the EC is involved in favoring the termination, the higher the likelihood that the European Commission caused the termination of intra-EU BITs.

Expectation 3: *The more active the European Commission acts in favor of the termination of the intra-EU BITs, the higher the likelihood that the termination of intra-EU BITs was caused by the preferences of the European Commission.*

4. Research Design

This study will answer the research question "What can explain the termination of intra-EU BITs?" with a qualitative deductive approach. This study has a descriptive part where we analyze the come about of the outcome (termination of the intra-EU BITs) and an explanatory part that will unveil the causal mechanism that led to this outcome. To this end, this study will be conducted as a single case study that allows us to dive deep into the various notions of the players involved and uncover whether the outcome met their preferences. For that to achieve, the study will use the qualitative research methods of document analysis and within-case causal process tracing (Blatter & Haverland, 2012; Bowen, 2009; Toshkov, 2016; Yin, 2017).

This chapter will be structured as follows: First, we will spell out and operationalize the theoretical concepts used and introduce how we will measure the independent variables in the analysis. The operationalization is summed up in the overview of Table 1. Subsequently, this section will introduce the methodology of the research methods used by this study. Concluding this chapter, we will address the validity and reliability of this research design as well as the different limitations of a case study approach.

As the theoretical framework (see 3.) showed, the two main groups of scholars stand firmly behind their respective theoretical approaches even though they have historically long debated contrasting understandings of European legal integration. The scholars of each group tried to convert their primary theoretical approach further over time by approaching it from different angles and providing evidence for their findings through the various cases that came up over time. The case of this study opens the possibility for further testing of which of the two theoretical approaches – and the three respective expectations – holds the best explanation for our dependent variable (the termination of intra-EU BITs). For this theory testing deductive approach, this study will apply the document analysis method since it provides us with a stable view of the historical development surrounding our outcome. As this study works through judicial decisions, notions of member states, statements of the European Commission and other supranational actors, individual actors, and interest groups, we are provided with a dense collection of documents for our data selection (see Table 2). Officially produced documents and issued statements are (mostly) easily and openly accessible for everyone, and they are stable, which enhances reliability. However, even though court documents might also be stable sources, the accessibility is not always as easily done (see 5.). This situation can be circumvented with substitute primary sources (Court ruling, opinion of the Advocate General) and backed up with secondary sources (scholars) that collected

those documents for prior studies. Furthermore, these documents provide in-depth and thorough summarization of the spelled-out positions of the different actors (Bowen, 2009).

Next to document analysis, the within-case analysis will use causal process tracing to track down the evidence and preferences in a temporal order by analyzing the various documents, notions, statements, and decisions that arose. This will provide the study with a comprehensive causal chain that links the causes to the outcome and ensures that we rule out reversed causation. As causal process tracing is based on the central assumption of configurational thinking, a multitude of causal factors can work together and cause the outcome. Furthermore, the assumption of equifinality opens room for different, divergent pathways that can cause the same outcome. Finally, the causal heterogeneity lays out that the causal effects that explain this study's outcome do not determine that in a different setting, they can have a different effect (Blatter & Haverland, 2012). This is very well-fitted for this study as the aim, or even the audacity, is not to disprove one of the theories. It instead provides the discussion with new building blocks of how legal integration comes about and is explained best by analyzing what preferences and interests shine through in this most recent case.

4.1. Operationalization

The theoretical framework of this study lays out the two main theoretical approaches and formulated three expectations that can explain legal integration. On the one hand, according to the intergovernmentalist view, the member states' preferences are rational and predetermined to steer the pace of legal integration. They affect the decision-making of the CJEU and provide a response for the decision that translates into European legal integration. On the contrary, neo-functionalists argue that the economic interests of individuals shape interest groups that influence the government's national interests and the Court's decision-making. Furthermore, the preferences of supranational institutions shine through as they work towards further legal integration to promote the supremacy of EU law if they perceive that this also favors the economic situation of the private actors. Moreover, as it is for legal integration, the European Commission is a central actor in promoting the spillover effect as it sets the EU agenda and proposes new legislation and policies.

In sum, according to liberal intergovernmentalism, member states are proactive actors, and the individual national and supranational actors are reactive to them. On the other hand, neo-functionalism argues the contrary, in that member states are more reactive. At the end of this section, Table 1 provides an overview of the theories, expectations, variables, and indicators used to measure the preferences.

a) Dependent variable

The termination of intra-EU BITs can be understood as a case of European legal integration in the sense of supranationalization, as it empowers the community law applicability and uniforms the EU law by promoting EU law supremacy. Therefore, the outcome variable, and thus the expectations, will be analyzed along the theoretical lines of argumentation of legal integration. As it is for the dependent

variable (outcome), for each of the expectations, we need to account for explicit statements of the various actors towards termination or continuation of this variable (intra-EU BITs). The study will measure if the actors favor termination or continuation by extracting their position from the documents this study analyzes. For example, the communication submitted by the EC in 2019 just after handing down the Achmea judgment holds an explicit statement of the EC to favor the termination of the EU BITs by asking the member states to do so.

b) Member state preferences (independent variable 1)

To unpack the concept of member state preferences, we need to assign indicators to this concept to measure if the outcome meets the preferences. Based on the discussion in section 3.1.2., we focus on the explanation and measurement of legal integration. In this light, we assume that member states are rational decision-makers with fixed interests, which is why they will weigh their benefits for each outcome and, in general, hesitate to give up more competencies to the supranational level (Moravcsik, 1995). Therefore, they strive to ensure autonomy and sovereignty in the first place. However, as they see the interdependency and the benefits from the internal market (for instance), they collaborate with the other member states to better the internal market as they have perceived economic benefits (Garrett, 1995).

To measure this expectation's dependent variable, this study sought to identify explicit claims of representatives of the MS (governments, diplomats) of the termination or continuation of intra-EU BITs. Furthermore, to measure if more member states favored termination or continuation, we need to adjust for the degree of heterogeneity of their preferences. Therefore, the independent variable (1) of the first expectation is the degree of heterogeneity of the member states' preferences with regard to the termination or continuation of intra-EU BITs. The respective indicators to measure these preferences are an explicit claim of a representative of a member state regarding the urge for autonomy or sovereignty. On the other hand, we look for an explicit claim if there are perceived benefits from cooperation and legal harmonization for the member states (see Table 1).

For example, these claims can be found in the thorough opinion of Advocate General Wathelet (2017) issued to the Court regarding the Achmea case, the "non-paper" of the Council of the EU (2016), and the joint declarations of the member states following the Achmea ruling.

c) Interest group preferences (independent variable 2)

The representatives of the neo-functionalist approach argue that the individual actors are forming interest groups consisting of national and supranational actors working together to lobby the member states' preferences and support the Court. Thereby, they steer the legal integration process. As the interest groups are a twofold approach, we need to outline the two assumptions regarding the national and supranational actors of the interest groups to measure the preferences.

Firstly, this study assumes that the economic interest groups of individual actors favor a well-functioning internal market and coherent community law rather than differentiated national laws. However, a well-functioning established legal system and tradition can prevent national economic interest groups from actively lobbying the governments and the Court for further legal integration (Niemann, 2017).

Secondly, the supranational actors gain from further integration as this expands their powers (without necessarily expanding their competencies) as the community law gets further acceptance and broader applicability. The supranational actors will work towards more legal integration if they perceive overall economic benefits for the Union. Furthermore, their preferences are in favor of termination if there is an economic benefit for private actors by removing barriers and reducing transaction costs.

To measure this expectation's dependent variable, this study sought to identify explicit claims of representatives of individual actors and supranational actors of the termination or continuation of intra-EU BITs. Furthermore, to measure if more actors forming interest groups favored termination or continuation, we need to adjust for the degree of heterogeneity of their preferences. Therefore, the independent variable (2) of the second expectation is the degree of heterogeneity of interest groups' preferences with regard to the termination or continuation of intra-EU BITs. On the one side, the respective indicators to measure this variable are explicit claims of individual economic actors that legal consistency and tradition would be favored in contrast to perceived benefits from unified community law. On the other side, we look for explicit claims of supranational actors to reduce transaction costs and spur the economy and an explicit claim that promotes EU law supremacy.

These claims can be found, for instance, in the documents produced in the two consultation phases (pre- and post-Achmea) by the individual economic actors, the stakeholder workshop report issued by DG FISMA (2019), and the briefing document of the European Parliament (2017) on the intra-EU investment situation regarding the single market.

d) European Commission preferences

Neo-functionalism explains that the European Commission is the central driver of the spillover effect. As the EC is the agenda setter of the EU and is generally believed to be pro-integrationist, it will promote legislation that fosters the building and preservation of a strong EU and, thereby, a strong EU economy. In this attempt, the EC will gradually work towards a shift of authority to the EU level to achieve economic benefits for the EU economy. Furthermore, this study assumes that the individual actors working within the EC have aligned preferences with the overall goals of the EC (Hooghe, 2002). Therefore, as they are rational actors, they favor more bureaucratic discretion in their decision-making procedures.

To measure this expectation's dependent variable, this study sought to identify explicit claims of representatives of the European Commission (e.g., DGs) of the termination or continuation of intra-EU

BITs. Furthermore, to measure how actively the EC is involved regarding the termination or continuation, we need to adjust for the degree of activeness of the European Commission. Therefore, the independent variable (3) of the third expectation is the degree of activeness of the European Commission with regard to the termination or continuation of intra-EU BITs. The indicators to measure the third independent variable are an explicit claim of the EC in favor of the termination of the intra-EU BITs. Moreover, the documents must provide an explicit claim of the EC to shift authority towards the EU level. In this regard, we adjust for an explicit claim of the perceived benefits for the EU economy. Finally, a further indicator is an explicit claim of the maximization of bureaucratic discretion.

The documents that are used to identify these indicators are (i.a.) the amicus curiae briefs issued by the EC to various prior tribunals to the Achmea case collected by Kent (2016) and Rösch (2017) and the communication of the EC (2018) to the EP and EU Council as a response to the Achmea ruling. Additionally, the impact assessment of DG FISMA (2020) regarding the public consultation phase in the summer of 2020 will provide good insight.

The document analysis and the within-case causal process tracing will select and sort the documents according to their chronological origin and subsequently discuss them according to the variables and indicators. This will determine how homogenous the respective preferences of the actors are to derive interpretations and formulate an answer to the research question.

Theory	Expectation	Variable	Indicator	Source
Liberal intergovernmentalism: National governments working together will adjust the degree of necessary legal integration by weighing the perceived benefits of cooperation whilst not giving up autonomy and sovereignty. <u>Member states are proactive players.</u>	**Expectation 1:** When **more** EU member states are in favor of the termination of intra-EU BITs, the likelihood that the termination of intra-EU BITs was caused by the EU member states' preferences is **high**.	**Dependent variable:** Termination/continuation of intra-EU BITs	- Explicit claim of representatives of the MS (governments, diplomats) of termination/continuation of intra-EU BITs	Court documents, tribunal awards, press releases, declaration of the member states following the court decision, commission documents, EU organ documents, consultation documents
		Independent variable 1: Degree of heterogeneity of member states' preferences with regard to termination or continuation of intra-EU BITs	- Explicit claim (autonomy, sovereignty, benefits of cooperation/harmonization) of interest of an actor representing a member state - Explicit evidence of autonomy and/or sovereignty benefits for the different member states retrieved from secondary sources (academia)	Press releases, declaration of member states following the court decision, secondary sources (Blog posts and academic articles/books)
Neo-functionalism: Individual actors who form interest groups of economic and supranationalist desires determine the pace of EU legal integration. They create spillover effects on other branches and will alter political views. Economy-focused approach backed up by the supranational organs urging the creation of common rules to reduce transaction costs. The European Commission, as the agenda setter, plays a central role in promoting a shift of authority to the EU level.	**Expectation 2:** When **more** economic and supranationalist actors forming interest groups are in favor of the termination of intra-EU BITs, the likelihood that the termination of intra-EU BITs was caused by the (economic and supranationalist) interest groups' preferences is **high**.	**Dependent variable:** Termination/continuation of intra-EU BITs	- Explicit claim of individual actors (economic/private) and/or supranational actors of termination/continuation of intra-EU BITs	Court documents, tribunal awards, consultation documents, EU organ documents, secondary sources (blog posts and academic articles/books)
		Independent variable 2: Degree of heterogeneity of interest groups' preferences with regard to termination or continuation of intra-EU BITs	- Explicit claim of individual actors that legal consistency and legal tradition would be favored - Explicit claim of supranational actors to reduce transaction costs and spur the economy - Explicit claim of supranational actors to favor EU law supremacy	Court documents, tribunal awards, consultation documents, secondary sources (blog posts and academic articles/books)

Member states are reactive players.	**Expectation 3:** The **more** active the European Commission acts in favor of the termination of the intra-EU BITs, the **higher** the likelihood that the termination of intra-EU BITs was caused by the preferences of the European Commission.	**Dependent variable:** Termination/continuation of intra-EU BITs	- Explicit claim of representatives of the EC (DG) of termination/continuation of intra-EU BITs	Commission documents (communications, amicus curiae briefs), consultation documents, reports, secondary sources (blog posts and academic articles/books)
		Independent variable 3: Degree of activeness of the European Commissions with regard to termination or continuation of intra-EU BITs	- Explicit claim of the EC to favor the termination of intra-EU BITs - Explicit claim of EC about authority shifts to the EU level - Explicit claims of the EC of maximizing bureaucratic discretion - Explicit claim of the EC about perceived economic benefits	Commission documents (communications, amicus curiae briefs), reports, consultation documents, secondary sources (blog posts and academic articles/books)

Table 1: Overview of the operationalization

4.2. Methodology

A case study is best used if we want to explain or describe in depth the outcome of a contemporary event, so an event happened in the recent past with implications in the present where the behavior of the actors cannot be altered and manipulated anymore (Yin, 2017). The termination agreement is signed, and the actors can no longer be manipulated in their decision. Hence this qualifies well for using a case study approach. The termination of the intra-EU BITs, so the agreement and signing by the EU member states, is a very recent development, based on prior nudging through different actors (as discussed) and made publicly visible through a CJEU decision (and follow-up decisions). It marks the current final step in this legal integration process. Hence it provides the scope for our analysis of what caused this termination agreement to happen. Further research in the future will be challenged by the aftermath of this termination and its future implications. Therefore, a case study is best suited for tracing down the different steps of the preferences and interests that led to this contemporary outcome. Historical research would not be as appropriate since we are analyzing a current development.

Furthermore, case studies are the best fit to understand a real-world case in a real-world context where "the boundaries between phenomenon and context may not be clearly evident" (Yin, 2017, p. 15). In contrast to other research methods, case study research provides the possibility of developing an understanding through the theoretical propositions that will aid the study through the design, data collection, and selection. Moreover, it can rely on a multitude of different evidence and analyze the situation in depth in a triangular fashion (Yin, 2017). Finally, case study research is best fitted as it can explain the complex causal links of real-world phenomena that are too hard to disentangle for a survey or experimental research. Also, it can describe the intervention and add an evaluation of the topic as it unfolds the process (Yin, 2017). As mentioned at the beginning of this chapter, the limitations of case study approaches will be addressed at the end (see 4.3.).

4.2.1. Document analysis

For the document analysis, this study will assign the different documents to the time phase of the pre-Achmea and post-Achmea decision of the CJEU. Consequently, we will collect documents from primary and secondary sources within these two phases.

Document analysis is a crucial part of almost any case study, as it allows one to make inferences about the bigger picture. However, this study will pay detailed attention to whether and to what degree to generalize from the different documents. Furthermore, a specific focus will be on the systematic collection and selection of the documents of the different phases (pre- and post-Achmea) and the context in which the very document was produced, and what was the targeted audience. The documents shall not be understood as the plain truth but rather identify the objective the document was produced for and treat it accordingly to avoid introducing bias (Yin, 2017). Finally, this study will also pay significant attention to sorting the material from the different groups and assign primary attention to the most

important documents that can provide the study with evidence of high certainty and uniqueness. Therefore, following this section, Table 2 will provide an overview of the selected documents for this study which are discussed in the subsequent chapter. The interpretations are drawn from the analysis of all the documents listed, but only if directly referred to them will they be cited accordingly.

Pre-Achmea Phase

In the pre-Achmea phase, the primary documents gathered for this study are produced by the European Commission (statements, commentaries, and amicus curiae letters), the CJEU (decisions, opinions advocate general), international tribunals (awards, argumentation), national courts (decision, preliminary procedures), EU member states (statements to the Court), and interest groups (position papers and public consultation phase). In sum, we will analyze and discuss the decisions of the different judicial instances involved, the awards from the Achmea tribunal and prior tribunals, and the opinion of the Advocate General, which thoroughly outlines the member states' positions upon issuing the Achmea decision. Moreover, we discuss statements from individual actors and private organizations produced and published during the first public consultation phase in 2017 that provide us with the economic implication and the individual actors' preferences and stakes in this discussion.

In addition, we collect secondary commentary from the academic literature on the pre-Achmea phase regarding the evolution and perception of the actors regarding investment treaties on a broader spectrum. Furthermore, this study gathers documents from legal scholars and academics to provide insight into the legal basis of the supranational notion.

As this study aims to gather primary sources, due to the availability and the non-disclosure of certain documents, that is not always possible. In general, as mentioned, for all secondary sources collected from the pre-Achmea and the post-Achmea phase, this study will focus on identifying the objective in which the document was produced to minimize the introduction of bias.

Post-Achmea Phase

Subsequently, this study will assess the documents produced after the handing down of the Achmea ruling as responses that consequently led to the termination of intra-EU BITs. These documents will include primary sources such as official statements and communication from the European Commission, EU member states' position papers, and individual actors' and interest groups' statements regarding the legal and economic sides. In addition, secondary commentary from scholars on the official responses, as well as the further implication on the internal market situation, will aid a deeper analysis and interpretation of the different positions of the actors. Finally, the scholars' implications on the legal framework and the economic results of a possible termination will help understand the bigger picture of who would gain from that outcome and therefore unveil the preferences.

Primary sources		Nr.	Secondary sources	Nr.
Judicial documents	Court decisions / Tribunal awards	9	Academic articles/books	6
	Related documents (e.g., press statement, AG opinion)	4	Academic blog posts	12
Declaration member states		4	Additional secondary documents	2
Consultation documents		21		
EU organ documents	EC, EP	6		
Treaties, agreements	BIT, TFEU, termination/draft	4		
Press release		5		

Table 2: Overview of the selected documents

4.2.2. Causal Process Tracing

Causal process tracing (CPT) is a Y-focused approach that asks how we ended up in this situation and how the outcome was possible. It is not so much focused on the effects that caused the outcome, but the aim is to uncover the causal steps that led over time to the outcome. Therefore, central to this approach is the timeline and sequential temporal order to uncover causal inference (Blatter & Haverland, 2012).

CPT is based on configurational thinking, meaning that the outcome is a "result of a combination of causal factors," that "there are divergent pathways to similar social outcomes (equifinality), and (that) the effects of the same causal factor can be different in different contexts and combinations (causal heterogeneity)" (Blatter & Haverland, 2012, p. 80). In contrast to qualitative comparative analysis (QCA) and co-variational analysis, CPT is the most useful approach for this study as it can uncover the multiple causal factors of a within-case analysis that, by working together, can produce an outcome (Blatter & Haverland, 2012). Since the focus is on the process and timeline, our case can be thoroughly researched due to the different notions and statements from the different actors that can explain the come about of the termination of intra-EU BITs (outcome) over time. By building up a comprehensive storyline, this study will be guided by sound evidence that can show with certainty and density that a particular pathway explains the causality of the outcome (smoking guns) (Blatter & Haverland, 2012). Furthermore, with the unpacked information and evidence, CPT will allow this study to link the causes to the effect and uncover "confessions" about the outcome (Blatter & Haverland, 2012, p. 83). Since this within-case analysis is not based on scores and values assigned to different variables and the corresponding effects but is focused on the outcome variable and the come about, the essential factors that CPT provides this study with are the focus on the temporal order and the analytical depth this study can achieve. That will show that the effects actually caused the outcome. Therefore, it is not only about what conditions are necessary or what preferences shine through eventually, but how and when they occur and pile up on top of each other to show that the sum of the evidence can create the outcome (Blatter & Haverland, 2012).

4.3. Validity, Reliability, and Limitations

As this within-case analysis is focused on our very case, the internal validity is strong, but the generalizability to other cases cannot be drawn too broadly. According to Toshkov (2016), as a single case study's main aim is to focus on substantive importance, generalizations should not be made carelessly, which means the external validity is low. However, since the goal is to provide new insights into the ongoing debate between the leading theoretical approaches, generalizability is not the primary objective but producing new building blocks to further develop the theoretical frameworks and create argumentations for the research yet to come. Since both groups of scholars could not achieve a universal grand theoretical status, this study does not have the audacity to establish the only possible pathway (Niemann, 2017; Verdun, 2020). This aligns with the assumption of possible equifinality and heterogeneity of cases as the outcome can also be caused through a different pathway and does not determine that the discovered cause is a necessary condition (Blatter & Haverland, 2012). This study will focus on what is called the 'possibilistic generalization' that makes this particular outcome possible (Blatter & Haverland, 2012, p. 82).

Another limitation that arises with an explanatory single case study is that it is based on existing theoretical frameworks. If the prior "building blocks are missing and if prior knowledge fails to suggest strong causal links between them, it is very hard to connect various pieces of within-case material into compelling explanations" (Toshkov, 2016, p. 305). Therefore, chapter two is crucial as it provides thorough background knowledge to draw better inferences even with weak connections present. Furthermore, regarding reliability, this study emphasizes the spelling out of the variables for which the documents will be screened and selected. Moreover, the interpretation of the documents (especially regarding secondary sources) will be adjusted carefully to the light of their origin. However, even though the study tries to guide through the process and the interpretation as thoroughly as possible, the interpretation process is always subjective and will affect reliability.

Finally, it is important to point out that this study is focused on explaining legal integration with a strong focus on the CJEU and its decisions. The theoretical frameworks utilized for this study, even though used and applied under the same general terms of the well-established theories of neo-functionalism and liberal intergovernmentalism, leave open many other ways of explaining European integration which are not directly connected to the CJEU. For instance, a contemporary approach to European integration is discussed by Schimmelfennig (2018) in his attempt to explain the differences in European integration during periods of crisis. In sum, this study narrowly focuses on the outcome of legal decision-making and the further supranationalization of community law. More concisely, the termination of intra-EU BITs will be illuminated by the different leading theoretical assumptions and unpack which preferences steer legal integration.

5. Results

In this chapter, this study will present and analyze the collected documents to explain what preferences steered the termination of the intra-EU BITs. The selected documents will be sorted into the two time periods indicated (pre- and post-Achmea phase). Unpacking the evidence and building up a causal process will guide us to derive an explanation for the present outcome (termination of intra-EU BITs). After discussing the documents of the two phases, this study will link what could be derived from the documents with the indicators and the variables of the three formulated expectations of this study. In the final chapter (Conclusion), we will then discuss these empirical findings in light of the academic literature and provide an answer to our research question.

The following chapter will be first and foremost structured in the two time periods of the pre-Achmea decision-making phase and the post-Achmea decision-making phase. Within each phase, next to the time of their creation, the documents will be sorted and presented according to the actors we are interested in to extract their preferences. Dividing the documents into subsections and sorting them among the different actors is vital to building a comprehensive overview of the different preferences and indicating their homogeneity.

The pre-Achmea phase will provide insights into the status quo of investor-state dispute settlements (ISDS) and the run-up to the CJEU Achmea decision on the preliminary questions posed by the German BGH (*Bundesgerichtshof*). Therefore, this study will first present and discuss the different judicial documents (court decisions, tribunal awards) produced on the national and supranational level, as well as the different observations submitted to the court by the member states and the Advocate General (AG). This will provide us with evidence of the preferences of the member states. Secondly, we will address the documents that will provide evidence of the activeness and preferences of the EC. Finally, to discuss the preferences of the economic actors, we present documents that will briefly lay out the relationship of the EU single market with intra-EU investments. This is needed to get an understanding of the perceptions of the economic interest groups regarding the discussion about intra-EU BITs. Thereinafter, we will discuss documents submitted to an EC consultation phase that will provide evidence of the preferences of the economic actors regarding the intra-EU BITs and their future.

In the post-Achmea period, this study will focus on the responses (follow through) by the member states, the European Commission, and the individual actors. We will first address the immediate answer of the EC to the Achmea decision. Following, we will present the member states' declarations on how to proceed toward the termination of BITs in the aftermath of the Achmea decision. Finally, we will discuss the economic actor's response to the decision extracted from workshops and submitted documents to the EC. Finally, we will also present and discuss documents submitted to the EC (DG FISMA) during the public consultation following the termination treaty signing. The consultation phase provides essential documents that will help us link back thoughts to the pre- and post-Achmea phases

to derive conclusions. Structured along these lines, we can thoroughly discuss the relevant documents and connect them to our studies' expectations, the variables, and the indicators.

In addition to discussing primary documents, both phases are heavily discussed throughout the academic world. It is essential since not all primary documents that would aid this research are publicly available. For example, this is due to the restricted access of third parties (as I am) to documents submitted in relation to CJEU procedures. However, those articles, books, and blog posts will be used as secondary sources to help forge an argumentation on how to interpret the different notions and try to uncover the underlying intentions of the actors. Therefore, they will be used as a backup to this study's findings and interpretations to guide us toward identifying the indicators of the preferences and deriving conclusions about the respective explanations developed in the theoretical framework (section 3.).

Following the document discussion in the two phases, we will link these documents to the expectations of this study. Furthermore, this study will reflect on the potential actors present that this study did not account for. According to the causal process tracing method, there are multiple ways to achieve similar outcomes (Blatter & Haverland, 2012). Hence, we will address alternative explanations that could also have potentially influenced the termination of the intra-EU BITs. Thereinafter, we will address the presence or absence of indicators for the dependent and independent variables for the first expectation (regarding liberal intergovernmentalist theory). Subsequently, this study will address the presence or absence of indicators for the dependent and independent variables for the second and third expectations (regarding neo-functionalist theory).

After wrapping up the findings and linking them to the expectations, in the last chapter, we will conclude this study with a final discussion of the theoretical approaches and the findings and provide an answer to our research question.

5.1. Pre-Achmea period

In section 2.3., we already discussed the Achmea decision (C-284/16), what the dispute was about, and roughly outlined the come about from issuing the claim in front of the tribunal in 2008 until the final decision of the CJEU in March 2018. In a very brief overview, we will lay out the timeline of the different (legal) steps and documents produced in this very context before the final decision was handed down by the CJEU and what implications we can derive from those documents to answer our research question. This section of the court documents will also provide us with the main implications that will help to identify the member states' preferences. Subsequently, we will provide an overview of the documents that can unveil the activeness and influence of the European Commission (EC) regarding the termination of intra-EU BITs. In the final section, we will address the preferences of the economic actors. For that to achieve, we will briefly discuss the relationship of intra-EU investment with the EU single market and turn to the evidence collected from the first public consultation phase in this regard.

5.1.1. Documents submitted to Court surrounding the Achmea case

a) National level

The first official document issued in this matter was the partial award (Partial Award, PCA Case No. 2008-13, 26.10.2010) from the installed tribunal in Frankfurt am Main, Germany, in October 2010. The Slovak Republic ("Slovakia") raised the claim from the very beginning that the BIT (Netherlands - Slovakia BIT, 1991) is not compatible with EU law since both countries are members of the EU. Slovakia argues that "the accession of the Slovak Republic to the EU in May 2004 terminated the BIT or rendered its arbitration clause inapplicable, and accordingly this Tribunal lacks jurisdiction to hear the dispute" (Partial Award, PCA Case No. 2008-13, para. 9). This was also called more prominently the "Intra-EU Jurisdiction Objection" (Partial Award, PCA Case No. 2008-13, para. 9) which is the central claim of this dispute for the scope of this study. The tribunal decided positively about its jurisdiction over this case. Subsequently, Slovakia appealed against that partial award and especially against the tribunals' jurisdiction in front of the OLG (*Oberlandesgericht*) Frankfurt am Main. However, the OLG Frankfurt am Main confirms the decision of the tribunal to speak the jurisdiction in its favor (OLG, 26 SchH 11/10, 10.05.2012). Subsequently, the tribunal issued its final award (Final Award, PCA Case No. 2008-13, 07.12.2012) on 07. December 2012, by blocking any further attempt of Slovakia to object against the tribunals' jurisdictions and ordered Slovakia to pay the lump sum of €22.1 million to Achmea BV due to the caused financial damages.

In a final attempt, Slovakia appealed against the tribunal's final award in front of the OLG Frankfurt am Main. Slovakia holds on to its central argument that the BIT is no longer applicable due to its accession of Slovakia to the EU. It further argues that the prior court decisions need to be revised in the assumption that the CJEU has definitively clarified this particular issue. Therefore, Slovakia argues that the BIT is especially incompatible with Articles 18, 267 & 344 TFEU and requests the court to initiate a preliminary ruling before the CJEU for its final interpretation.

However, the OLG makes clear in its decision (OLG, 26 Sch 3/13, 18.12.2014) from the 18. December 2014 that the BIT is compatible with the protection guaranteed in Art. 267 and 344 TFEU. The OLG further argues that the CJEU has recognized arbitration as a form of judicial dispute resolution equivalent to national courts. In its view, the member states assured that arbitration and its tribunals seamlessly fit into the EU legal order. Furthermore, national courts may declare arbitrational awards null and void if a fundamental provision of the EU is violated. According to the OLG decision 26 Sch 3/13, the CJEU explained in its case law (regarding Art. 268 TFEU) that "any remaining area free of control is to be accepted in the interest of the efficiency of the arbitration proceedings" (OLG, 26 Sch 3/13, para. 39; remark: translated from German). Regarding Art. 344 TFEU, the OLG further argues that this article only addresses disputes between two member states, not a private actor and a member state. Finally, regarding Art. 18 TFEU, there is no discriminatory factor in the fact that some private actors (here referred to as "investors from other member states") can make use of the protection of the

BIT, and other private actors cannot. A discriminatory factor could only be judged in this case by comparison with a Slovakian investor investing in Slovakia, according to the OLG (26 Sch 3/13). However, the OLG argues that it would be a common practice to incentivize foreign investors when contracting to spur cross-border trade. Hence, it would not be discriminatory. However, this is not even the case in the Achmea issue. Therefore, since the OLG is not obliged to initiate a preliminary procedure (see section 2.3.), it rejected the request to issue questions to the CJEU due to the lack of necessity.

Therein after, Slovakia appealed in front of the highest court of Germany, the BGH, to once again request a preliminary procedure in front of the CJEU (BGH, I ZB 2/15, 03.03.2016). The BGH discusses the preceding decision of the OLG (26 Sch 3/13) and adds notions of the European Commission's legal position to the equation (the Commission's amicus curiae briefs will be discussed below). It points out that the Commission has had a contrasting view for the longest time and intervenes in investor-state arbitration by putting forward its stance on the incompatibility of intra-EU BITs with EU law. However, the BGH confirms the point of view of the OLG and emphasizes in paragraph 22 of its decision (I ZB 2/15) that "the Senate (the BGH) is inclined to decide the question in the opposite sense" (contrasting the EC view) (remark, translated from German). However, since the BGH addresses that there cannot be found a definite interpretation of this particular situation within the existing CJEU case law, in other words, there is no interpretation of the CJEU on this matter yet, the BGH is obliged to initiate a preliminary ruling procedure (see section 2.3.).

To sum up this discussion, the national courts of Germany see no legal reason why BITs and ISDS mechanisms should not be compatible with EU law. It can therefore be implied that the judges, as part of the academic sphere (legal scholars), did not see a necessity for change in the legal system as it is.

b) Supranational level

Following the written and oral stage (regarding the two main parties) of the procedure in front of the Grand Chamber of the CJEU, Advocate General Melchior Wathelet (19. September 2017), as well as the member states, issued final observations/opinions regarding the issue at hand before the CJEU released its final decision (C-284/16) on 6. March 2018.

Advocate General (AG) Melchior Wathelet first discusses the importance of this preliminary procedure as it allows the CJEU to rule on the applicability of BITs, especially the investor-State dispute settlements (ISDS) mechanisms, for the first time. As noted above, the European Commission has offered its opinion in various prior arbitrational tribunal procedures (amicus curiae briefs). However, the straightforward question of the inapplicability of ISDS mechanisms with EU law never made it in front of the court until this case. Moreover, Wathelet (2017) argues that resolving this issue is of utmost importance since, at the time being, 196 intra-EU BITs have been in effect building the legal basis of cross-border (intra-EU) investments.

In brief, the AG followed the argumentation of all the prior German courts on the three main articles in question (Art. 18, 267 & 344 TFEU). The AG argues that there is no incompatibility of intra-EU BITs with EU law, and there is also no perceived danger to the EU resulting from it. It is therefore important to notice that until now, all reviewed documents issued within the judicial process (e.g., AG opinion) reject the argument of the problematic situation the BITs apparently create by exposing EU law to the possibility of fragmentation. In other words, this also indicates that there was no necessity to act.

However, the AG acknowledged the importance of this situation and went into unprecedented, thorough depth with his argumentation by exposing the (in his view) flawed argumentation of the EC, Slovakia, and the countries supporting the view of inapplicability and danger to the EU system. He presents his line of reasoning in a "preliminary observations" section before working through the preliminary questions. For this study, this section in the AGs' document is of significant importance, which is why we will explore these arguments in depth in this overview to link them to the expectations in the following sections. Additionally, at this point, it is necessary to mention that study was denied access to the individually submitted member state observations by The Registry of the Court of Justice (5. December 2022). Therefore, to conduct this study, we need to rely even more on the AG's in-depth analysis of the submitted documents and academic responses.

As the AG points out, we experience the formation of two groups. The first group argues that the intra-EU BITs are compatible with EU law and can exist next to it. The second group argues that the intra-EU BITs are incompatible with EU law and have to be terminated. The first group consists of – next to all the prior mentioned national German Courts – the member states: the Federal Republic of Germany, the French Republic, the Kingdom of the Netherlands, the Republic of Austria, and the Republic of Finland. The second group consists of the European Commission and especially the member states: the Czech Republic, the Republic of Estonia, the Hellenic Republic, the Kingdom of Spain, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, Hungary, the Republic of Poland, Romania, and the Slovak Republic.

The first important thing the AG notices is that the member states of the first group have seldom been respondents to arbitrational proceedings (in the last 30 years, a total of 5 cases (UNCTAD, n.d.)). In fact, those are mostly the countries of origin of the investors. In contrast, the member states of the second group are the main respondents to arbitration procedures (in the last 30 years, a total of 114 cases (UNCTAD, n.d.)). Due to the obvious distinction, it is easy to understand that those countries (second group) would favor the inapplicability not to be exposed to international tribunals anymore but resolve situations in front of their respective national courts (see 2.2. why this is problematic). However, there are also investors from the second group of countries investing within the same – the second – group. Since they are now arguing the incompatibility but did not terminate their BITs with each other on prior occasions, it shows that they wanted their own investors to benefit from the arbitration

mechanism and therefore acknowledged the merit of arbitration for private investors in the opposite to national court procedures (Wathelet, 2017). Therefore, supporting the termination would favor these member states' preferences as they are no longer prone to the possibility of international arbitration awards against them. However, this would eventually also harm their citizens when acting as investors. Furthermore, it indicates that they did not consider the general incompatibility before this occasion. However, this case now provides them with a clean way out of international arbitration to resolve the claims against them in front of their national courts. Furthermore, it also does not harm their citizens as intra-EU BITs would be terminated for all member states eradicating the possibility of discrimination, which was the main argument when asked by the AG about why they did not terminate them earlier if perceived as inapplicable. Even though that would generally favor the argument of legal harmonization, it is a notion of regaining autonomy and sovereignty since it would mean exchanging international tribunals with their national courts. Therefore, regarding the member states' preferences (expectation 1), we see the indicators of autonomy and sovereignty shining through. Furthermore, since the countries of the second group would collectively gain from it, we see the indicators for the benefits of cooperation also present.

On a second note, the AG reviews the position of the European Commission. In the EC's view, intra-EU BITs pose a "systemic risk" to the "uniformity and effectiveness of EU law" (Wathelet, 2017, para. 44). First of all, from a historical point of view, the Commission had the standpoint that "BITs were instruments necessary to prepare for the accession to the Union of the countries of Central and Eastern Europe" (Wathelet, 2017, para. 40). However, in the present case, the EC argues that this was only intended to last just until the accession itself. After that, the BITs would be automatically terminated. However, as pointed out by the AG, if this were to be the case, why was there no termination clause in the BITs stating its termination with joining the EU from the beginning? This inconsistency is an indicator that unveils the current notion of the Commission as a supranational actor to try to promote EU law supremacy. However, the systemic risk of fragmentation is not present or at least "greatly exaggerated" according to the research of the AG (Wathelet, 2017, para. 45). UNCTAD (n.d.) statistics show that in only 10 out of 62 intra-EU arbitrations based on BITs, the investors succeeded with their claim. However, according to Wathelet (2017, para. 45), in none of these cases, "the tribunal (was) required to review the validity of acts of the Union or … the member states" regarding EU law. In fact, in the submitted observations from the EC and the member states, only one case was brought up that is perceived to be incompatible with EU law. One case can hardly be considered a "systemic risk."

Considering this study, it unveils a strong steering effect by (especially) the member states of the second group to prepare to terminate the intra-EU BITs on this occasion. However, it is also clearly visible that the EC strongly argues for the termination of intra-EU BITs. Hence, we see the indicators present for expectation three. Furthermore, as we see a push from a supranational actor towards EU law supremacy, this could also help expectation two. In this regard, until now, this study has not yet addressed the

evidence regarding economic actors and interest groups in the pre-phase. However, as actively detected by the member states, BITs provided private actors with an economically efficient and transparent system. This is arguably implicit from the member states not terminating them on earlier occasions due to the perceived discrimination. Therefore, in contrast to the EC, it could be argued that there was no need for change from these stable mechanisms visible regarding individual economic actors and national interest groups. This contradicts expectation two.

However, as the AG refers to the "non-paper" from 7 April 2016, issued by the first group of member states, there is nothing prohibiting the replacement of the intra-EU BITs with a multilateral EU-wide treaty applicable to all investors from the EU member states (Council of the EU, 2016). Since it is consistent with this group of actors being the states of origin of most investors, we can anticipate stronger influence from the economic interest groups. Therefore, even though these member states do not see incompatibility with EU law, they would agree with replacing intra-EU BITs, which partly aligns with – at least the participating – member states' preferences towards the termination of the intra-EU BITs prior to the CJEU issuing its decision. Generally, this is strong evidence of support from more member states with homogenous preferences in favor of termination in the pre-Achmea phase.

Furthermore, this links to what most scholars mentioned when analyzing the AGs' opinion. The way the AG structured its argumentation is, at face value, perceived as being "against" the EC position. However, as argued by multiple authors (Carta & Ankersmit, 2018; Dimitrov, 2017; Grothaus & Bellinghausen, 2017; Lavranos, 2017), the AG is actually not far from the ECs' position but builds up its argument of 'Europeanisation' differently (Lavranos, 2017). Where the EC works towards incompatibility and termination, the AG subordinates the tribunals underneath the CJEU jurisdiction. As a result, the awards could be challenged by the member states in front of national courts, which in turn would finally have to ask the CJEU for its interpretation. Put simply, the AG also prepares its argumentation in favor of a 'Europeanisation' of intra-EU BITs (Lavranos, 2017). Therefore, we do not directly see support for the termination of intra-EU BITs, but we do experience a "pro-Europe" notion even in counter argumentations.

However, there is an interesting and important distinction between the 'non-paper' compromise and the argument from the EC, the second group, and the AG. The incompatibility with simply a termination would open the main problems discussed in section 2.2. However, changing the BITs to multilateral treaties with standardized rules could adjust for many of the problems discussed in section 2.2. Moreover, economic interest groups were likely to be present in the 'non-paper' approach negotiations.

To sum up, the argumentation of the member states regarding the incompatibility reveals that they had a more active than reactive position in taking the economic benefits of the individual actors into account. Their active position shows through since they would not terminate on earlier occasions. For the second group of member states, we see high homogeneity in favor of the termination of the intra-EU BITs. The

“non-paper” rounds up a relatively cohesive member state compromise to terminate intra-EU BITs. However, they teased in their ‘non-paper’ a compromise in the form of a multilateral treaty instead. Therefore, we can conclude for the first group of member states (Germany, France, the Netherlands, Austria, and Finland) that even though they did not deem it necessary, they saw the common benefit of a compromise (common denominator) in favor of the termination. Therefore, the first group's preferences were homogenous in favor of termination and aligned with the second group. However, for the first group of member states, it is less about autonomy or sovereignty and more about the compromise of benefiting from cooperation. Therefore, we see the indicators of the first expectation present. There are claims for autonomy and especially the common benefit of cooperation present.

Furthermore, we do see solid supranational support towards the termination through the Commission, which shows their supranationalist tendencies. Finally, even the contrasting view of the AG to termination would eventually cut out the impartial international features of intra-EU BITs as he argues that they are similar to domestic courts and would thereby fall under the jurisdiction of the CJEU, not public international law. Therefore, we can conclude at this stage that the documents reveal that the supranational actor’s preferences were homogenous in favor of EU law supremacy. They were furthermore homogenous in favor of the termination of intra-EU BITs. Those are indicators for the second expectation. Furthermore, strengthening the EU law can also be understood as a shift of authority to the EU level as the EU organs gain more power and influence. This is an indicator of the third expectation that shows the activeness of the EC regarding this issue.

Finally, on 6 March 2018, the Grand Chamber of the CJEU published its decision (C-284/16). As already discussed, the CJEU did not follow the prior court’s interpretations or the AGs opinion. Instead, it decided that arbitrational tribunals are not courts within the member states’ legal framework (Art. 267 TFEU). Therefore, the arbitrational tribunal is not eligible to issue preliminary procedures. (Side note: Here, we see an inconsistency in the sense that in the past, the CJEU sometimes did accept preliminary questions from arbitrational tribunals and sometimes did not (Wathelet, 2017). On the other side, academic literature (Lang, 2018) argues that the main problem is that arbitrational tribunals are generally allowed to issue preliminary rulings but cannot be forced to do it. In contrast to that, the CJEU now ruled that they are not courts within the EU treaties at all, meaning they are not eligible to issue preliminary procedures (anymore?)). However, especially these procedures have "the object of securing uniform interpretation of EU law, thereby serving to ensure its consistency, its full effect, and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties” (C-284/16, para. 37). The Court derives that this also stands against Art. 344 TFEU and its prohibition of alternative settlement mechanisms as those provided by the EU treaties. However, the judgment does not go into depth on the opinions raised by the AG. In fact, the court’s argumentation is somewhat considered relatively shallow by not addressing any notions regarding the necessity of harmonization due to the fear of fragmentation. The court thereby follows the argumentation (and supremacist tendencies) of the

Commission as well as the second group of member states. As a result, it concludes that intra-EU arbitration mechanisms (ISDS), as provided in BITs, are not compatible with EU law. In other words, as it can be derived from that: intra-EU BITs are incompatible with EU law.

In light of this study, we can derive that this brief, non-extravagant judgment plowed the way the EC pursued for the longest time. We see an additional supranationalist statement toward further legal integration of EU law by pushing for the supremacy of EU law. Linking it back to the prior paragraph, the CJEU saw support from the member states of group two. However, due to the "non-paper," we see evidence that there was eventually also support from the member states of group one (Germany, France, the Netherlands, Austria, and Finland) regarding the termination. Furthermore, there was evident support from the EC towards termination. It could even be argued that there was support from the AG, not for a judgment that would usher the termination, but support for the primacy of EU law.

5.1.2. Documents regarding the European Commission

As already indicated, the European Commission issued statements and offered its opinion in various arbitrational tribunal proceedings. Therefore, what can be noted here at the beginning is that the EC is undoubtedly a strong player regarding the overarching question of what can explain the termination of the intra-EU BITs. However, as mentioned, due to accessibility restrictions, this study will have to base its drawing of causal inferences regarding the EC as an actor mainly on secondary sources. Therefore, to grasp the main intentions of the EC in prior arbitration cases to the Achmea decision, this study will predominantly rely on the work of Kent (2016) and Rösch (2017) as they have compiled the most important arbitrational procedures and extracted the ECs' opinions. However, the originals of the EC statement to the Achmea case and selected other primary documents are also available for this section of the discussion.

Not any later than in 2006 (ECOFIN, 2006), the EC working with ECOFIN mentioned noticeably, for the first time in an annual report to the Council of the EU, that intra-EU BITs can be seen as inapplicable with EU law. The report invited the member states "to review the need for such BITs agreements" since "part of their content has been superseded by Community law upon accession" (ECOFIN, 2006, para. 16). With the Treaty of Lisbon (in force since 2009), the EC gained the competence to negotiate and sign extra-EU BITs on behalf of the EU. Consequently, the EC issued a directive to fade out all existing extra-EU BITs and started substituting them with multilateral treaties (remark: not all extra-EU BITs were terminated) (Directive Nr. 1219/2012). However, this did not regard – nor did the EC gain competencies in this field – intra-EU BITs. However, the EC did not shy away from issuing its opinion on the not applicability of intra-EU BITs and especially intra-EU arbitration (ISDS). This was even topped up with initiated infringement procedures against member states to prevent them from paying the awards granted to the investors (Rösch, 2017).

Interestingly, with the rise of its competence regarding extra-EU BITs due to the Lisbon treaty, the EC started its journey of working against intra-EU BITs as well. However, in 2006, the EU knew about 150 intra-EU BITs (ECOFIN, 2006). At the time of the Achmea decision, the EU knew 196 intra-EU BITs (CJEU, 2018; Lang, 2018; Wathelet, 2017). Therefore, for this study, we need to acknowledge that due to this significant rise in intra-EU BITs, the EC as a supranational actor, even though very visible, cannot be the sole factor that caused the termination of intra-EU BITs in 2020. This is where causal process tracing shows its strengths, as we can follow the evolution of this issue closely with the focus on the process as the outcome is already present. However, since the discussion has shown that the EC has been working for the longest time for the termination of intra-EU BITs, we see the indicators for expectation three present. The EC is very active regarding this policy.

For conducting this study, we looked at the EC positions in six different arbitrational proceedings. Due to the scope, we will not do an in-depth discussion of the individual cases and also not address every case separately, as they can be combined for our use. We instead focus on the EC position concerning intra-EU BITs to derive inferences for our expectations. The six cases looked at, in short, are the *EURAM vs Slovakia*, *U.S. Steel vs Slovakia*, *Micula vs Romania*, *Eureko vs Slovakia*, *Electrabel vs Hungary*, and the *Check Cases* (Kent, 2016; Rösch, 2017).

Overall, the discussion initiated by the EC concerns the danger of fragmentation of international law and how the EC perceives EU law as superior to other international laws. In the beginning phase after the Treaty of Lisbon, the EC stressed the supremacy of EU law. So, next to the CJEU, which is often put in focus due to its interpretation hegemony, the EC is very present when it comes to urging EU law supremacy (Kent, 2016). The EC is described as the "agent of fragmentation" (Kent, 2016, p. 233). However, it is important to note, as indicated in section 2.1., that the CJEU can only act on the cases brought in front of it. The EC, however, can issue opinions proactively within its discretion. As it is for landmark cases such as *Van Gend en Loos* (26/62), the CJEU also ruled in favor of the supremacy of EU law (direct effect of EU law). This, however, only concerned an EU law versus national member state law conflict. The EC took it one step further and "demanded that non-EU tribunal(s) also accept this Euro-supremacist approach" (Kent, 2016, p. 233). Therefore, the EC challenged public international law to be inferior to EU law when touching upon EU-related issues.

In the *EURAM* and *U.S. Steel* cases, the EC issued opinions to each tribunal stating that it should reject its jurisdiction as intra-EU BITs are incompatible with EU law. In both cases, the EC expressed a strong view that, since the cases took place within the EUs' jurisdiction, EU law is applicable and supreme to any treaty based on public international law. Where the ECs opinion followed an invitation by the EURAM tribunal, even though it finally rejected it, regarding the U.S Steel case, the EC acted without such an invitation (Kent, 2016). On top of that, in the U.S. Steel case, the EC went beyond simply asking the tribunal to reject its jurisdiction. The EC issued a threat stating that any awards issued under

this tribunal would be considered “State aid” and would need the approval of the Commission, which it would not give, of course. We see this pattern of framing awards resulting from international arbitration being rendered as invalid payments from the state to the investor in later cases as well. The case was discontinued, however (Kent, 2016).

The Micula vs Romania case was more prominent even though the beginning was the same as in the prior cases. The EC issued an opinion that the tribunal should declare that it has no jurisdiction and that EU law is supreme. However, the issued threat of providing illegal state aid without EC approval – as in the prior cases – became a reality. The tribunal eventually rejected the EC opinion and awarded the investor 170 million euros in its final award. Since Romania had already started payment to the investor, the EC issued a suspension of the payment, ordering Romania to stop until this matter was clarified (Kent, 2016). Thereinafter, the Swedish investors filed a lawsuit against the EC in front of the European General Court (EGC). However, even though the investors “won” the arbitration, they eventually withdrew their complaint against the EC, and the case was closed before it even started. Hence, this issue made it not in front of the CJEU (Rösch, 2017). However, it is important to note that the EC was very well prepared to fight this through. Rösch (2017) and Kent (2016) argue in this regard that the EC wanted to bring it (finally) in front of the CJEU.

In an interim result, the cases discussed so far show that the threat of the EC is not “empty” and that the EC actively pushed EU law supremacy over public international law. However, since it did not make it in front of the CJEU to determine this issue, the ECs’ hands are bound in moving further. It would be interesting to understand why the Swedish investors suddenly withdrew their complaint after being awarded 170 million euros and then waived all payments. At this point, one can only speculate about the intrinsic motivation of the investors. However, considering what is being discussed in this study, one could argue that the investors did not want to risk a CJEU judgment on the incompatibility of intra-EU BITs and ISDS mechanisms. Such a judgment could eventually lead to an end of intra-EU BITs in total. This could lead to the assumption that, as discussed in section 2.2., BITs and especially ISDS mechanisms are perceived favorably by private investors in contrast to national courts. Therefore, private economic actors would not favor its termination. This argument is backed up by Rösch (2016), who explains that the ISDS mechanism would not have been at the center of the Micula case for the CJEU to decide upon. However, “it could not have been completely ruled out that the CJEU would nevertheless have positioned itself on the applicability of intra-EU BITs (and its ISDS) provisions, e.g., in an *obiter dictum*” (Rösch, 2017, p. 112) (remark: translated from German) (side note: *obiter dictum* is a statement or opinion of a judge that does not regard the primary question of the case at hand and is not legally binding. However, coming from the CJEU judges, it has a certain impact).

Summing up, the EC positions itself as a powerful actor pursuing EU law harmonization and supranationalization. We see explicit statements from the EC regarding the termination. We also see

explicit claims for shifting authority to the EU level to promote harmonization (expectation three). Therefore, the EC can be perceived as active in this phase. The CJEU, on the other hand, is also already perceived as it could tend toward the ECs' positions. We see a tendency of private actors not to risk the termination of intra-EU BITs by bringing such a case in front of the CJEU. This is consistent with the Achmea case since, in this case, it was Slovakia – so a member state – that eventually brought the case in front of the CJEU, not a private investor. Looking at the indicators, this unveils support from the supranational actors concerning the second expectation. However, as it is for the national economic interest groups, we instead see the indicators for legal consistency and tradition present.

The Micula case was the first case that redirected broader attention to the intra-EU BITs dispute. In the Czech cases, Kent (2016) explains that the EC position stayed widely the same even though the EC lost its strong EU supranationalist notion in its argumentation. However, Kent (2016) does not believe that the EC changed its overall view, as it still mentioned the already known threats. It should be more understood as the EC trying to find a more diplomatic language in contrast to what the EC used to do in earlier cases (Kent, 2016).

On a final note, it is interesting to notice that, running parallel to the arbitration proceedings just discussed, the EC urged the member states to terminate their individual BITs on various occasions. The most recent 'invitation to termination' was on 18.06.2015 (Rösch, 2017). However, from all the states addressed, only one (Romania) replied and eventually followed the invitation of the EC and terminated all its intra-EU BITs. Again, the EC did issue infringement procedure threats against all addressed states, but even though there was no reaction, the EC did not prolong it.

Considering this study, this indicates that in the pre-Achmea phase, even though the member states did not see the same threat as private actors as discussed above, they did also not see a rush in terminating the BITs. We can link that back to what has been discussed regarding the AGs' opinion (Wathelet, 2017). As he noticed, the member states of group two (in favor of incompatibility) did not terminate earlier as they did not want to deprive their investors of benefiting from the protection of the BITs and ISDS mechanism. Overall, we experience a more active than reactive position of the member states, presenting us with indicators for the first expectation.

In conclusion, the position of the EC can be considered to be strongly determined as favoring the termination of intra-EU BITs. However, the EC did not take too many drastic legal steps until now. That explains why we saw a slow reaction from the member states. Furthermore, it indicates that the EC also depends on a certain momentum generated by the member states without putting too much pressure on them. Moreover, we can detect connections with the change from a very harsh formulation after the Micula case, as this topic became more salient in the broader public – or at least broader academia. Furthermore, Rösch (2017) also argues that we see this slow reaction from the member states

due to the rising importance of cross-border investments, which also increased the importance of intra-EU BITs.

5.1.3. Documents regarding the economic and supranational interest groups

In this final section of the pre-Achmea phase overview, we will address the importance of BITs to the single market by analyzing documents from the European Parliament and economic interest groups. They will deepen our understanding of the second expectations as they unveil the positions of individual economic and supranational actors in the pre-Achmea phase.

In section 2.2, this study introduced BITs and why they became the status quo for cross-border investor-state relations. In the run-up to the Achmea decision, the scholars underpinned the necessity of adequate protection in place for investors from one country to invest in another. However, even though multiple academic voices (e.g., Schöne, 2016) supported the current situation the investors found themselves in, this only indicates that investors were, first and foremost, seeking protection for their investments. It does not rule out the possibility that economic actors would also have seen better protection in a change of system (e.g., multilateral treaties – 'non-paper') and would therefore have actively lobbied for it.

As worked out above, the EC was already promoting the intra-EU BIT termination for a long time but proposed the introduction of a multilateral investment court to the European Council in 2017 only for extra-EU BITs. Therefore, to answer this study's research question, we need to uncover whether there were notions from economic interest groups present that were promoting a legal switch towards a multilateral approach, as also indicated in the "non-paper." This provides insight if the interest groups lobbied the member states' positions towards terminating the intra-EU BITs to exchange it with a multilateral treaty. In other words, we need to address whether the interest groups were the active actors and the member states only reacted to the situation or vice versa.

First, this study will give a quick overview of the situation regarding the single market and intra-EU investments. The creation of the EU single market, as argued by a briefing paper issued by the European Parliament, was and still is one of the main factors that increased the wealth and GDP of the individual member states (GPD increase by 2.2 %) while also enhancing the overall employment rate (+ 2.8 million jobs) (European Parliament, 2017). The single market spurred intra-investments in the EU economy but also benefited highly from the increased cash flow. Further integration of the single market or its completion could boost the EU economy even more (+ 651 million euros/year) (European Parliament, 2017). The main pillars of the single market are the "four freedoms" (goods, people, services, and capital). Intra-EU cross-border investments fall under the free movement of capital and services. Therefore, a significant rise and success of the single market can be assigned to the investments of private investors in other EU countries.

However, investments across borders that spur the economy seek reassurance. When it comes to the opinion of the EC, what the current EU law provides is adequate. Moreover, based on the argumentation

of mutual trust between member states, having BITs guarding investments between intra-EU investors and EU member states would not be necessary. Therefore, for the EC, sufficient protection was present for investors within the scope of EU law. In short, the remedies the EC thought were sufficient and were endorsed are the possibility of member state liability (Francovich) and the possibility of judicial review of national laws. Finally, investors could initiate infringement proceedings before the EC as a last resort.

In November 2017, the German Chambers of Commerce and Industry, the national umbrella organization representing 79 regional German Chambers in total, issued a statement regarding the "Public consultation on the (...) disputes between investors and public authorities within the single market" (European Commission, 2017, para. 1). This public consultation, launched in July 2017, provides a thorough insight into the preferences of the national economic interest groups prior to the Achmea decision regarding intra-EU BITs and ISDS mechanisms. The German Chamber acknowledges the position of the EC and that the EU law provides certain protection. Furthermore, the Chamber states that the EU legal framework is essential for the overall economy. "However, this is not sufficient" (DIHK, 2017, p. 1). The different statements submitted to the consultation emphasize that the current system works well. However, if it came to a change in the system with the member states deciding to terminate intra-EU BITs, the EU law would not provide sufficient protection for investors, which would eventually harm the intra-EU investment climate. As the German Chamber sums it up, "effective investor protection requires a binding dispute settlement mechanism with enforceable decisions as last resort" (DIHK, 2017, p. 1). The statements argue for the need for investor protection and enforcement mechanisms as this would spur the internal market. However, the German Chamber statement provides this study with evidence of high certainty. It states that the EC has "received requests from businesses to *uphold the existing intra-EU BITs* or at least to establish a binding and enforceable EU-wide dispute settlement mechanism [emphasis added]" (DIHK, 2017, p. 2). The different statements support this claim. Therefore, there is evidence that the interest groups prior to Achmea had high homogeneity in keeping the current system (indicators for legal tradition and consistency). Furthermore, they would only want to see an EU-wide system as the necessary alternative if the member states were to decide to terminate the intra-EU BITs.

We can link that back to the negotiations surrounding the non-paper since these statements mainly come from the interest groups based in member states of the first group. Therefore, we can assume with higher certainty that the interest groups did influence these countries.

In conclusion, for the pre-Achmea phase, we still see a strong steering power of the supranational actors (EC as agenda setter especially). If we link that back to the question asked at the beginning of this subsection, we do not see active interest from the economic interest groups in changing the current system. Quite the contrary, the documents provided explicit claims from economic interest groups that the current system is favored and change is neither wanted nor needed (legal tradition, consistency).

Only if intra-EU BITs were to be terminated would they (national interest groups) favor an EU-wide mechanism (e.g., a multilateral treaty). In the economic interest groups' opinion, it would harm the single market as investors feel less protected and would therefore shy away from further investing. Finally, as mentioned earlier in the Micula case, one could interpret the investors' withdrawal of the complaint against the Commission as an attempt to prevent the termination of intra-EU BITs by inadvertently triggering an ECJ ruling unfavorable to them. Therefore, in the pre-phase, we see a rather reactive role of the economic interest groups regarding the signing of the termination agreement. The economic interest groups were homogenous in their preferences not to favor the termination of intra-EU BITs.

However, on a closing note, one could make the argument in this case that even though, at face value, the supranational interest groups (EC, EP, and arguably the AG) are in favor of further supranationalization, thus they favor the termination of intra-EU BITs, and the economic interest groups are not, their approaches are not wholly contrary to each other. The economic interest groups support the needs of the individual actors. Therefore, their argumentation contrasts the mere abolishment of the termination, which would have immediate adverse effects on the individual economic situation. That would result in great legal uncertainty and a decline in direct foreign investments. However, from the supranational actors' point of view, there is evidence (European Parliament, 2017) that the completion of the single market, where the intra-EU BITs are just a small piece, would be overall favorable for Europe's economy. That would result in the economic interest groups having short-term impacts in mind and the European actors pursuing long-term goals.

5.2. Post Achmea period

In the second phase of the result discussion, we take a closer look at the response (political follow-through) that the decision triggered. This section will present and discuss the selected documents produced in the post-Achmea phase that will help to get a deeper understanding of what can explain the signing of termination of the intra-EU BITs agreement in 2020. This section will first look at the documents produced by the European Commission to understand its point of view on the further steps toward the termination agreement. Following, we will look at the different member-state declarations that followed the decision to analyze their response and their preferred proceedings toward the signing of the termination agreement. Lastly, prior to the signing, to address the position and preferences of the economic interest groups, this study presents documents of individual actors as well as the outcome of a workshop initiated in late 2019 that will provide further evidence to derive conclusions.

Subsequently, following this document discussion, we will also address the multitude of documents provided by various actors in a public consultation phase initiated by the EC concerning the future of intra-EU BITs that took place from May until September 2020. Even though this consultation phase started after signing the termination agreement, the documents will give us a comprehensive insight

into the response phase. Thereby the study will receive the necessary input from economic actors and organizations to draw conclusions on their preferences. Regarding causal process tracing, emphasizing the timeline of the occurrence of these documents is especially important as it uncovers the tendencies of the overall steering function of the European Commission and the supranational actors as a whole. Furthermore, this section is important to unveil the strong neo-functionalist tendency this study will likely conclude as the strongest theoretical approach for our research question.

Therefore, the following section will be structured along the three groups of actors this study analyzes. First, we will work through the documents the EC, the member states, and the economic actors produced in the response phase. Then, in the final step, we will address the documents produced in the EU public consultation phase just after the signing of the agreement by the member states, which will help to sum up the current status quo of this process. This determines the scope of this study since the legal future of intra-EU investments has yet to be determined, and the legislative process is ongoing (Hallak, 2022).

On a side note, it is first necessary to point out the status quo of the legal situation the Achmea decision created. The legal argumentation of the CJEU is structured around the Achmea case, which is why the argumentation, first and foremost, affects the legal situation of the Netherlands and Slovakia BIT. However, the CJEU ruled that "the arbitration clause in the BIT has an adverse effect on the autonomy of EU law and is therefore incompatible with EU law" (CJEU, 2018, para. 14). Therefore, the extension to all other BITs is easy to draw. Additionally, the CJEU underpinned this ruling in subsequent cases that show a similar structure (Moldova vs Komstroy C-741/19, Poland vs PL Holdings C-109/20) (Bevan et al., 2021). With these follow-up decisions, the CJEU eventually expands the inapplicability of intra-EU BITs and the IDSD mechanism, as ruled in the Achmea case, to all cases with a similar underlying intention of an international tribunal dispute settlement mechanism. In other words, not only BITs but every treaty that knows similar ISDS mechanisms is incompatible with EU law. Therefore, the CJEU made its position very explicit and did not soften its approach or even reverse it.

5.2.1. Documents regarding the European Commission

Just about four months after the CJEU handed down the Achmea ruling, the European Commission submitted a communication paper to the European Parliament and the Council (European Commission, 2018). In this communication, the EC laid out in detail that it is committed to promoting a stable and predictable future for investors within the internal market. However, this stable future is still solely based on the existing EU rules. As the EC puts it, the communication is aimed to be a guideline "on the existing EU rules for the treatment of cross-border EU investments." (European Commission, 2018, p. 1). It emphasizes the "high level of protection (of EU rules), even though it may not solve all problems investors may face" (European Commission, 2018, p. 1). Furthermore, the EC emphasizes regarding the protection of investors, that if they "exercise on of the fundamental freedoms" (p. 2), they benefit from those granted rights as well as being protected by the Charter of the EU and "the general principles of Union law" (European Commission, 2018, p. 2).

In sum, the EC works its way comprehensively through the existing protection to argue against the necessity of a new common framework. In short, the EC presents for individuals (investors), especially the remedies for the possibility of member state liability (Francovich), judicial review, and EC infringement proceedings. Whereas state liability can also account for financial damages, judicial review is a measurement that can be used if a national law is perceived to be contrasting EU regulations. Finally, the individuals can call the EC and request the initiation of infringement procedures by arguing that the respective member states harmed the investors' rights guaranteed by the EU treaties.

In conclusion, the communication is evidence that the EC was favoring and actively worked toward the signing of the agreement of the termination of the intra-EU BITs without the necessity of introducing a new EU-wide system. Overall, this is consistent with the observation of Fouchard and Krestin (2018), as they state that the Achmea decision is not such a big surprise for the international arbitration world. They explain that this is just the "next step in the evolution of a trend marked by years of opposition by the EC" (p. 3) and "its relentless efforts to push several EU member states to terminate existing intra-EU BITs" (p. 3-4). In sum, the active position of the EC in favor of the termination of intra-EU BITs prior to the termination agreement signing is very well visible.

5.2.2. Documents regarding the EU member states

On the 15th and 16th of January 2019, the EU member states issued joint declarations about the aftermath of the Achmea ruling and the future of intra-EU BITs. Where all 28 member states (including Great Britain) eventually signed one of these declarations, they differ slightly regarding the scope of the Achmea ruling. The main point of argumentation was how to proceed with the Energy Charta Treaty (ECT). The ECT is a multilateral investment treaty built up similarly to intra-EU BITs, as it provides international arbitration as a dispute settlement mechanism. However, the CJEU did not speak on the future of the ECT yet. Therefore, this can be considered a side fact for the scope of this thesis (see Moldova vs Komstroy C-741/19, issued 02.09.2021).

In their declarations from January 2019, the member states laid out the main pillars of their further steps. Firstly, regarding the intra-EU BITs, the member states clarified that any tribunal procedure should be stopped and no new ISDS tribunal should be installed. Secondly, the member states declared that the intra-EU tribunals no longer have jurisdiction over intra-EU issues. However, it is interesting to note in this respect that, from the legal perspective, the tribunals' jurisdiction cannot be revoked by the member states. This is because international public law holds that only tribunals themselves can determine their jurisdiction; member states cannot deprive them of that (Debevoise, 2019). The member states further agreed on the termination of the intra-EU BITs within the following year.

However, it is interesting to see that there is no distinction between the group of member states into one and two anymore, especially regarding the need to install a new EU-wide system in exchange. Apparently, this issue did not make it in these declarations. On top of that, the declarations do not

provide a deep insight into the legal future of investment protection. However, what was mentioned is that "grandfathering" or "sunset" clauses that would protect investments made prior to termination "do not produce effects" (Representatives of EU MS, 2019, p. 1). In other words, with termination, all intra-EU BITs will lose their applicability and deprive ongoing investments of their legal basis to call international tribunals. Therefore, not only are future investments affected, but these declarations make clear that all ongoing investments can also no longer file a complaint based on a BIT. This opens great legal uncertainty, as grandfathering or sunset clauses should condition precisely for the fact that a termination of the BIT in the future shall not affect the investment signed when it was still in effect. Along these lines was the termination agreement structured in the end.

In conclusion, the declarations provide clear evidence that the member states strive for termination without substituting the current system. The member states' preferences seem even more homogenous than they have been in the pre-Achmea phase. They are in line with the ECs' view of sufficient legal protection granted by the existing EU regulations. Due to the new legal situation created by the CJEU's ruling, this is understandable. If the member states were to continue with the intra-EU BITs, they would risk infringement procedures. Therefore, in the aftermath of this decision, we can experience a clear softening in the difference between the member states' approaches. They followed the supranational guidelines and paths. Furthermore, since the voices of the first group (Germany, France, the Netherlands, Austria, and Finland) for a compromise are no longer present, we experience decreasing influence on the member states through economic interest groups.

In sum, we see that the member states consciously decided to terminate the intra-EU BITs. Furthermore, it cannot be ruled out that the pursuit of autonomy is not present anymore (indicators for expectation one). However, we do conclude that they are more *reactive* after the CJEU ruling, and the supranational actors play a determining role in the process of termination of the intra-EU BITs by the member states.

5.2.3. Documents regarding the economic and supranational interest groups

Regarding the responses to the Achmea decision and especially the communication from the European Commission, this study will first focus on a thorough response paper issued on behalf of economic actors prior to signing the agreement. The document is a direct answer to the EC communication and its provision that the EU regulations are sufficient for investors. In the subsequent section, this study will look at the documents submitted by economic actors and other individual actors during the EU consultation phase following the signing of the agreement.

To recap, the EC pinpoints the effectiveness of EU remedies by exploring the field of possible actions for individuals to take. The member states align with the EC position as they also deem these options sufficient for investors. Those are the possibility of member state liability (Francovich), judicial review, and EC infringement proceedings.

Firstly, claiming damages caused by a member state (Francovich) is the provision that comes closest to what is provided for in BITs (CGSH, 2019). However, the conditions laid out in Francovich for an individual to claim damages caused by member states in front of the CJEU are very hard to achieve to come even remotely close to the level of protection BITs would guarantee. Individuals can only claim the violation of rights protected by EU law, not national laws. Furthermore, there are three conditions (such as "sufficiently serious breach") that must be present simultaneously (CGSH, 2019). Therefore, the hurdles are already way higher than they are with BITs. Moreover, when it comes to national courts, the situation investors find themselves in is never assured to be entirely impartial as it would be in front of an international tribunal. Especially in eastern European countries, the impartiality of judges is highly questioned (see section 2.2.). Finally, as it is for the overarching jurisdiction of the CJEU, an individual can only request a preliminary ruling in front of a court, but national courts can reject it. The highest national courts would only be obliged to issue preliminary procedures in front of the CJEU if there is a question regarding EU law unanswered by the CJEU. However, there is no possibility of requesting a justification for why a preliminary procedure request was refused (CGSH, 2019).

In contrast, under BITs, there are only two main criteria for state liability claims. Those are the "attribution of conduct to the State under international law, and a breach of an international obligation of the State" (CGSH, 2019, p. 10). In other words, issuing claims against a member state under a BIT is constructed as effortlessly as possible to give reassurance to the investor.

Furthermore, individuals could initiate a judicial review of national laws that conflict with EU law. However, this would result in the annulment of the very national law but would leave the investor without financial damage compensations. Finally, requesting infringement procedures in front of the EC could be a last resort for the investor. However, in 2018, the registered infringement procedure requests at the EC added up to 3.850 cases, with only 185 being pursued by the EC (CGSH, 2019). On top of that, only 30 of those eventually ended up in front of the CJEU (CGSH, 2019). This shows that there is no doubt that investors would be better protected by intra-EU BITs and international tribunals. Furthermore, in the rare case of succeeding, this would also not lead to financial compensation (CGSH, 2019).

To sum up, next to the multitude of requirements that investors would need to prove, there is a general lack of financial compensation for most of these procedures. Efficiency, effectiveness, legal certainty, and financial damage compensation are (i.a.) the main pillars of BITs and essential reasons why many investments take place in the first place (CGSH, 2019) (see also 2.2.). In fact, the mechanism that would eventually provide financial compensation awarded by national courts is far from what tribunals could award investors. In 2018, the average financial compensation awarded by intra-EU BITs tribunals was 91 million euros (remark: that is about 45% of the average amount claimed by the investors). The

awards would go as high as 4.3 billion dollars (e.g., Eureko vs Poland 2003). In contrast, financial compensations from national courts are seldom likely even to reach 100.000 euros (CGSH, 2019).

On a final note, in late 2019, the EC (DG FISMA) held a workshop with economic interest groups representatives on the future of intra-EU investment protection in response to the 2019 member-state declarations. In the report of DG FISMA (2019), summing up the workshop discussion, it is apparent that the economic actors feared significant disruption to the internal market if the termination (including sunset clauses) were signed without an alternative system in place. The report addresses the major legal uncertainties and the above-mentioned differences in financial compensation. They furthermore address the length of national judicial procedure (up to 10 years) that can make the investment collapse overall. Of around 14 actors present, only one, the Erasmus University, NL, supported the view that the EU law is sufficient to protect investors. However, the University cannot be considered a member of economic interest groups. In sum, this deepens the assumption that the national economic actors and their interest groups did not want a change in the system. The homogeneity of the preferences of economic interest groups not in favor of change is high.

In conclusion, in the economic interest groups' opinion, the termination, as the member states and the EC declare it, would harm the single market as investors feel less protected and would therefore shy away from further investing. It furthermore creates a paradoxical situation in which extra-EU BITs would protect investors from outside the EU better than investors acting within the single market. This response to the Commission shows that, especially regarding the short-term period, the economic actors face legal uncertainty without a new EU-wide system. The homogeneity of the economic actors was high in that they did not want a termination, and only if there would be a termination would they favor it to include a change to an EU-wide system. Since the termination agreement was eventually signed without provisions on a change to an EU-wide system, this document further deepens the assumption that economic interest groups were rather *reactive* to the termination.

According to the timeline, the just discussed documents sum up the documents that were produced in the post-Achmea phase but prior to the signing of the termination agreement. On 5 May 2020, the termination agreement, formulated along the lines of the MS declarations from January 2019, was signed by all EU member states except Austria, Finland, Ireland, and Sweden. As mentioned above, Austria and Finland were part of the first group of member states arguing against incompatibility, and that termination should only happen with a change to an EU-wide system. On the other hand, Ireland and Sweden did not forward a separate opinion to the CJEU regarding the Achmea case. The final agreement also included the termination of sunset and grandfathering clauses and did not mention the introduction of an EU-wide multilateral investment protection framework.

5.2.4. Documents regarding the EU consultation phase

As mentioned above, regarding the causal process tracing method with its focus on the timeline to build up causal explanations, this section will provide deep insights into the possible underlying intentions of especially the EC to shape EU legal integration. This emphasizes the neo-functionalist expectations to explain legal integration and, eventually, the termination of intra-EU BITs best.

Just one month after the signing of the termination agreement of the intra-EU BITs, the European Commission initiated a public consultation phase asking the broader public if they deem it necessary to initiate an EU-wide system of intra-EU investment protection. This phase adds a very intriguing twist to the findings of this study.

First, it is important to mention that the agreement was signed on 5 May 2020 but will come into effect for each member state only after ratifying the treaty. Hungary and Denmark were the first signatories that ratified the treaty. Therefore, for those two countries, the agreement will come into effect for the first time on the 29. August 2020 (Ingwersen, 2020). As this study has unveiled in the previous sections, it is important to note that the European Commission stressed that EU law provides sufficient protection for intra-EU investments. Moreover, the termination agreement was indeed signed without the provision of exchanging it with a new system. However, just a month after signing the termination treaty (May 2020), the EC initiated a new consultation phase that let one speculate that the EC made a complete turn on its approach from the previous years. The consultation questionnaire "indicates that there are *insufficient safeguards* to ensure the predictability and stability of the regulatory framework for investors" and that "the existing legal provisions … that can be used by investors against Member States, are supposedly *not clear enough* and need to be *further specified*. [emphasis added]" (ClientEarth, 2020, p. 2). On the other hand, recalling the 2018 communication of the EC, it assured that EU law provides a "high level of protection" for investors and that an EU-wide system is not needed (European Commission, 2018, p. 1). However, as the 2019 workshop has shown, the EC was listening to the concerns of the economic interest groups. Furthermore, the Inception Impact Assessment by the EC (DG FISMA, 2020) lays out why the EC is initiating this consultation. This impact assessment, issued on 26 May 2020, argues that this consultation phase needs to address the "uneven level of investment protection on different member states that affect investor confidence" as well as the "concerns about enforcement of rights and effective remedies" (DG FISMA, 2020, p. 2).

Overall, this strengthens the impression that the European Commission, in fact, did have the short-term effects for private investors also in mind but first coordinated a cohesive termination to subsequently draft up a new proposal to keep the investment climate stable. This also links back to the workshop by DG FISMA, which revealed the strong position of the necessity of an EU-wide system by the economic interest groups. However, it is interesting to notice that the EC apparently did not reveal this position prior to signing the termination agreement. This suggests an even stronger connection between the

supranational actors, or more concisely, the EC and the economic interest groups than anticipated in the previous sections.

Regarding the submitted statements to the consultation phase, on the one hand, we see support for a new proposal initiated by the EC from economic interest groups. The economic interest groups that submitted statements in the consultation phase mainly represent banks, companies, and insurance groups (national and transnational). They highly welcome the acknowledgment of the EC that more than the existing EU framework might be required to account for all possible issues arising in cross-border investment relations. This proposal is of importance, especially for the EU investment climate, regarding the paradoxical situation of extra-EU investments being better protected than intra-EU investments. This new framework is needed to spur future investments in the single market. This aligns with what was analyzed in the previous sections regarding economic actors, that such an EU-wide protection mechanism is needed and necessary if intra-EU BITs were to be terminated. Furthermore, it is also noticeable that the statements in favor come from representatives of the investor side. Additionally, it is interesting that 5 out of 7 supporting statements originate from interest groups from the first group of member states (see Wathelet, 2017: France, Germany, and Austria). However, as for the other two statements, one is from a European representation of insurance companies, and the other was submitted anonymously. Therefore, at this point, there is undoubtedly a significant influence from the economic interest group of the member states of the first group of member states. Alternatively, one can at least argue that they are very active.

On the contrary, the consultation phase reveals that actors who do not represent the investor side have a different view. For example, representatives of NGOs and labor associations see no necessity for a new EU-wide investor protection system. In fact, they argue that with the termination, there was eventually a level playing field regarding different branches of economic actors within the EU that do not have an equivalent mechanism to BITs and ISDS. Furthermore, there can be public interests contrasting investors' protection needs, such as "health and social protection as well as environmental and climate protection," that would be undermined with a new explicit strengthening of investors (BAK, 2020, p. 2). However, even though all the non-supportive statements made the argument that new legislation is not needed, they had another engaging argument in common. All three statements mentioned that "the outcome of the consultation seems already decided and (is) likely to lead to the proposition of new investment protection tools" (Baldon, 2020, p. 1). In other words, these actors see the consultation more as information about what the EC will do next rather than an actual question to the public sphere and a weighing of the outcome as to whether a new investment framework is necessary. This links back to what was discussed at the beginning of this section, as the EC seems to have "changed" its view on the need for a new EU-wide system after the termination of the intra-EU BITs. Or, if we put it the other way around, did the EC ever not account for a new framework and orchestrate this situation to terminate intra-EU BITs to eventually promote EU law supremacy and spur

the completion of the single market? One thing that can be said with high certainty is that the EC would mostly not like to see an actual decline in cross-border investments, as this would harm the EU economy. In sum, linking it to this study, we can derive the active role of the EC.

On a final note, the consultation phase was closed on 8 September 2020. However, already on 16 September 2020, EC President Ursula von der Leyen announced in the letter of intent regarding the Speech on the State of the Union 2020 that the EC would initiate a new proposal for an EU-wide intra-EU investment protection framework to "boost cross-border investment" (Hallak, 2022, p. 1). This also found its way into the "New Action Plan on a Capital Market Union for people and business, put forward by the Commission on 24 September 2020" (Hallak, 2022, p. 1). Therefore, we can confidently conclude that initiating an EU-wide intra-EU investment protection framework was likely already planned before the consultation phase was concluded. In the end, this also reflects the result of the workshop with the economic interest groups. Furthermore, one could make the argument that regarding the wording of the termination of the BITs, which was up to the member states, the EC did not want to raise the issue of a lack of protection through EU law to get the BITs out of the way. This would spare the EC tough negotiations with the member states upon signing the treaty. Subsequently, the EC could launch a new framework with a clean slate, as the termination agreement would abolish all existing protection external to EU law (maximizing bureaucratic discretion). In fact, a new framework proposal, as mentioned in the beginning, was announced just about two weeks after the termination agreement came into force for the first two countries. Moreover, since the consultation phase gave away the intention of the EC, the investors also saw reassurance of the raised concerns during the workshop, even way before the termination came into effect.

In conclusion, the consultation phase provided sound evidence that the EC not only had the long-term effects of a possible strengthening of EU law supremacy accounted for but probably also planned the initiation of an EU-wide mechanism way ahead. The workshop and the raised concerns by the individual economic actors were likely to have influenced the EC. This shows the close connection of supranational actors to account for the economic needs and benefits of economic interest groups and the EU as a whole. Furthermore, this shows the overarching strength of an active EC as an agenda-setter to steer EU legal integration. Even though this still shows that economic interest groups are less of a steering factor, the EC does take their needs into account and has overall a very economic focus next to the sole legal supremacy to public international law. With the working together of both levels, the steering effect is visible. Regarding the second expectation, the supranational interest groups would provide guidance on the EU level and pick up the individual needs of the national interest groups and take them into account. Overall, this provides a solid picture of the indicators for the second explanation. Even though the individual actors favored legal consistency, if the EU level accounts for their needs, they will align with them in favor of harmonized regulations. As the consultation documents have shown, this would even present the economic interest groups with a stronger position than other

branches perceive their own situations (see BAK, 2020; Baldon, 2020). Also, this EU-wide system would reduce transaction costs for individuals and spur the overall economy of the EU while promoting EU law supremacy. Therefore, the indicators for the second explanation are present.

Furthermore, this section also invites one to speculate that the Commission apparently wanted to avoid the member state treaty on the termination of the intra-EU BITs to include any arrangements on the future of intra-EU investments. Thereby the EC could initiate a framework proposal detached from the direct influence of the member states. This would indicate more bureaucratic discretion for the EC in drafting the new proposal. With the shift of more authority to the EU level since the EC can propose new legislation, we see the indicators for the third expectation present. In this respect, member states are more *reactive* actors. They reacted to the firm guidance of the EC, and with the initiation of a new EU-wide system for all EU countries, the autonomy claims assigned earlier to the first group of member states are contradicted. As indicated, this section provides strong evidence for the neo-functionalist explanation of how to explain EU legal integration. Furthermore, it helps to rule out earlier possible interpretations. It strengthens the assumption that the member states are more reactive to the national and supranational interest groups and actors, especially to the EC.

5.3. Linking the findings to the expectations

The above discussion of the selected documents has laid out in detail the different steps the actors involved took over time. We derived interpretations from them and already pointed out some indicators visible to match them in this section with our formulated expectations on what can explain the termination of intra-EU BITs. Focusing on the timeline of the documents' creation, causal process tracing showed its strength in building interpretations for possible causal pathways. The following sections will match the above discussion to the indicators of our formulated expectations. Therefore, we will first briefly recap the expectations and the respective theoretical approaches (see Table 1). Subsequently, before we head into discussing our three expectations, we will shortly speculate on possible alternative explanations about which actors and factors could have also influenced the outcome this study could not account for.

On the one side, liberal intergovernmentalism explains that member states have fixed preferences and adjust the pace of legal integration if they deem it necessary and see benefits from cooperation. They generally strive not to give up more autonomy or sovereignty (competencies) to the EU level. Furthermore, member states are the principals of the treaties, and the other actors (national and supranational) merely react to their actions. Therefore, the first expectation of this study sought to identify the member states' preferences to understand if the preferences were homogenous and if more member states favored the termination of intra-EU BITs. Furthermore, we considered whether these preferences were actively or reactively formulated.

Conversely, neo-functionalism argues that interest groups of national and supranational actors and their self-interests steer the legal integration process. This approach is economy focused and argues that the actors will work towards bettering their economic situation. Whereas the individual actors are more focused on their individual benefits, the supranational actors focus on the long-term economic effect for the EU. If the interest groups' preferences align, they lobby the member states and influence their preference formulation. Therefore, if more interest groups favored the termination of intra-EU BITs, they would have lobbied and influenced the member states in their decision-making. The member states are reactive to these groups. This would create spillover effects for other branches to act as well and spur more integration. Therefore, the second expectation holds that if more interest groups favored the termination, the likelihood that they caused it is high.

In this regard, the EC, as the agenda setter of the EU, is proposing new legislation and is generally perceived to be pro-integrationist. The neo-functionalist theory emphasizes that the EC is crucial in spurring the spillover effect and promotes authority shifts to the EU level while also maximizing its discretion (self-interest of bureaucrats). Therefore, the third expectation derived from the neo-functionalist approach argues that the more active the EC is in a policy field, the higher the likelihood that the EC is a causal factor in further integrating this field.

In sum, the theories have contrasting approaches on which actors are more active and which are more reactive to legal integration.

5.3.1. Alternative explanations

As indicated in earlier sections, EU integration can be influenced by a multitude of things. Next to the actors we discussed, integration processes can also be highly influenced by crises and general geopolitical situations. For example, the signing of the termination agreement was just around the same time the COVID-19 pandemic hit Europe. Some scholars argued that, especially in times of financial and economic instability, investors should not be scared off by the creation of legal uncertainty, as they would withdraw their investments from the EU market. However, it is also argued that, specifically, the COVID-19 crisis will trigger a lot of investor-state disputes (Bray & Kapoor, 2020). On the one hand, it could suggest that individual actors favored the termination even less. On the other hand, one could argue that it would boost the member states' preferences in favor of termination as they would fear many financial awards from tribunals against them.

On a second note, other theoretical scholars, although not perceived as providing a leading theoretical explanation, argue that neither member states nor individual actors (interest groups) and their self-interest are causal factors for legal integration. For example, Alter (2009) developed a strong constructivist approach. Roughly summed up, she argues that individual actors from all levels (national and supranational: e.g., scholars, individual private actors, public officials, politicians, bureaucrats, judges, lawyers) all work together in so-called Euro law movements (remark: a community of actors

that share the same pro-European belief and ideology). They communicate with each other, agree on the pace of legal integration, and send handpicked cases to the CJEU. This is a very nuanced approach that this study could not account for. Moreover, since this study aimed to address the lengthy discussion of the two leading theories, this would have been beyond the scope of this research. Additionally, such collaborative tendencies could not be spotted while reviewing the documents. However, this could be a starting point for further research using interviews as a more fine-grained method to uncover deeper intrinsic motivation to prove or disprove such a complex mix of actors.

In sum, regarding alternative explanations and the methods used for this study, we conclude that the documents selected and revised gave a good insight that the two leading theoretical approaches accounted for the main actors present. However, we are aware that decision-making is very complex. In sum, the overall tendencies and preferences of the actors did shine through strongly enough for this multilevel analysis study (and its scope) to derive conclusions and provide new building blocks for research yet to come.

5.3.2. Liberal Intergovernmentalism

The first expectation, as just outlined, emphasizes the member states' preferences and their steering effect as the master of the treaties. The indicators of this approach are explicit claims of autonomy and sovereignty in contrast to perceived benefits from collaboration.

As worked out in the beginning, the opinions of the member states that were forwarded to the CJEU (analyzed by AG Wathelet, 2017) saw the member states divided into two groups. The significantly larger group of those member states argued the incompatibility of intra-EU BITs with EU law. As the discussion has shown, these countries were the main respondents to intra-EU ISDS procedures and contained those countries the BITs aim to protect the investors from. The incompatibility does not necessarily result in automatic termination. However, since the core of the BIT is the international tribunal as a dispute settlement body, the remaining BIT would be an empty shell. The documents have also shown why the individual member states did not terminate their BITs earlier with the other countries as they did not want their own economy and investors to suffer from potential discrimination. The Achmea case provided a coordinated exit from international arbitration towards their national courts. Therefore, there was a clear statement about the termination of intra-EU BITs from the second group of member states based on economic implications.

Furthermore, the second group of member states had a clear position of autonomy from international arbitration. As explained above, this is an interesting phenomenon as the termination would provide further legal integration within the EU but also give back some degree of autonomy and sovereignty to the individual member states. In sum, we see the indicators of this liberal intergovernmentalist expectation visible in the second group of member states. Moreover, among this group, the homogeneity in favor of termination increased as the discussion moved toward the Achmea decision.

Secondly, the documents have shown that the member states from the first group did not see incompatibility with EU law. However, with the "non-paper," we see clear evidence in the pre-Achmea phase of those countries compromising towards the termination of intra-EU BITs for a multilateral treaty agreement. Therefore, for the first group of member states, the documents revealed that the benefit of cooperation was present in contrast to the autonomy or sovereignty tendencies. Therefore, for group one, we also see the indicators of termination present. However, we do experience the weighed merit of harmonization and cooperation through compromise.

If we look at the post-phase, the joint declarations showed that the two groups of member states merged their approach and argued that they would follow the CJEU decision and terminate the intra-EU BITs. The declarations showed no need for compromise with an EU-wide system anymore. However, in the end, not all countries signed the termination agreement. Furthermore, it is interesting to notice that from the first group (i.a.) France and Germany, as major players in the EU, moved to the other side and signed the agreement without compromise.

Overall, we did see hesitation and a stronger position of the member states in the pre-phase as they would not terminate earlier. However, we saw them following the new legal reality the CJEU has created with its ruling. They would have risked infringement procedures if they did not terminate the BITs. This is also evident in the declarations since they are dedicated to the legal aftermath of the Achmea ruling. The indicators for autonomy and sovereignty were more present in the pre-phase. In the post-phase, they faded out, especially regarding the benefit of compromise. However, even though the post-phase and the public consultation revealed a strong steering effect of the EC, which leads us to the assumption that the member states overall were rather reactive to the interest groups and the EC, we cannot prove or disprove how involved the member states were with the actual switch of the EC towards an EU-wide framework just after the signing. However, in light of our discussion and according to our expectations, as this deprives the member states of their autonomy tendencies and unveils their reactive behavior, we infer that the *first expectation* does not provide a strong explanation for what caused the termination of intra-EU BITs.

5.3.3. Neo-functionalism

As outlined above, the second theoretical approach focuses on the individual actors and their self-interest rather than the member states themselves. The various actors working in national and supranational interest groups aiming to better the economic situation are at the center of this approach. They would spur the integration process by creating spillover effects to other policy fields, altering political views, and influencing the member states' decision-making processes. In this regard, the EC is a central driver of this spillover effect as it sets the legal agenda of the EU. According to neo-functionalism, economy-focused interest groups and supranational actors (EC) steer and determine the legal integration process to bolster the economy and reduce transaction costs. Member states are reactive to their behavior.

First, the discussion of the documents could provide solid evidence that all the actors would consider general economic factors. The supranational actors would want to see the completion of the EU single market. The economic interest group stressed the perceived adverse effects of only eradicating the current system. However, as it turned out, the EC did account for the short-term concerns of the individual actors and economic interest groups and also had the long-term economic interest of the EU single market in mind. The overall benefits of the completion of the EU single market were also acknowledged by other supranational actors (e.g., EP).

First, we will look at the European Commission and its activeness. It is interesting to point out that, especially in the pre-phase, there was a substantial involvement of the EC present. The analysis provides strong evidence that the EC was a significant steering factor determining the termination of the intra-EU BITs. Regarding the dependent variable, the EC stated that it favored termination. However, as also shown, the EC could not do it on its own. The EC was dependent on the member states to pick up the momentum provided. We saw a general pattern of the EC working actively for a shift of autonomy towards the EU level as the EC and its work groups (DGs) promote a notion of deeper integration to provide a more effective overall outcome for the EU economy and, therefore, for the EU as a whole. The workshops and the consultation phases are evidence that the EC was working towards harmonization and favored the completion of the single market, which would benefit the EU economy. Furthermore, the second consultation phase and the orchestrating tendencies of the EC provide argumentation that the EC wanted the member states' termination agreement not to include any arrangements on the future of intra-EU investments. This links to the indicator of the EC maximizing its bureaucratic discretion in drafting a new directive or regulation.

In this respect, we experience the member states as being more reactive to the supranational actors. They would act especially according to the pace provided by the EC. Regarding the *third expectation*, we can infer that the EC had a very active role and therefore has a high likelihood of being a causal factor that can explain the termination of the intra-EU BITs.

Turning the focus to the interest groups, we will first examine the national economic interest groups. This will be done to do justice to the perceived differences in preferences that have emerged between the national and supranational levels of interest groups. The voices of the economic interest groups were foremost working against the termination by arguing that there are currently no mechanisms for investors on the EU level present, which harms the investors' position. Furthermore, we have clear evidence from the 2017 consultation that individual economic actors favored the intra-EU BITs over a new EU system. This provides clear evidence for the indicators of legal tradition and consistency in contrast to the change to a different system. Also, the Micula case opened speculations about whether the private investors might have withdrawn their complaint against the EC interventions not to unintentionally create the opportunity for the CJEU to rule unfavorable regarding the ISDS mechanism

and intra-EU BITs. Therefore, we have sound evidence that the national economic interest groups were homogenous in not favoring the termination of intra-EU BITs. Furthermore, regarding the non-paper and the first group of member states, we can derive that the economic interest groups substantially impacted these countries. However, they could not determine the future of the termination agreement. Therefore, regarding the *second expectation* with the focus on the national economic interest groups, in this case, they cannot be seen as having a strong causal factor, at least not on their own.

However, as it is for the workshop and the 2020 consultation phase, we can infer that the economic interest groups ongoingly lobbied towards a new EU-wide system since it was clear that the old intra-EU BITs were to be terminated. This clearly shows that the economic interest groups did have an influence regarding the connection to the supranational sphere as they considered their concerns. Overall, we see strong evidence that the supranational actors favored the termination to (i.a.) promote the completion of the EU single market (e.g., European Parliament, 2017). Moreover, as the second consultation phase has shown, the supranational actors have accounted for the economic situation and simultaneously prepared for a new EU-wide investor protection framework. This is sound evidence that the supranational level did take the individual economic interest into account, wanted to reduce transaction costs in the long term, and spur the overall economic situation. Moreover, the supranational actors such as the CJEU, the AG, and the EC played a leading role as they promoted legal integration and a shift of competencies to the EU level. In sum, the preferences of the supranational interest groups (and especially of the EC as an actor) were homogenous in favoring the termination of intra-EU BITs. They considered the short-term, so the individual economic effects and needs of the national economic interest groups, as well as the long-term economic effects for the EU, and weighted the benefits from it.

Overall, we see strong arguments for the neo-functionalist expectations as the member states are following the direction the EC, and the CJEU, with its legal implications, have set. The member states did sign the agreement in the end, but they seem to be working according to the ECs' guidance. Therefore, as for the second expectation regarding the supranational interest groups, the preferences were homogenous in favor, and the indicators towards termination were present. Furthermore, we see the indicators for promoting EU law supremacy, the overall economic effects, and the reduction of transaction costs present.

In conclusion, even though the national economic interest groups were not in favor of termination, their need for protection was accounted for by the supranational level. With the supranational level steering the member states towards a cohesive termination, they subsequently accounted for the individual investors' preferences to protect the overall investment climate and boosted the single market completion. Therefore, looking at the second expectation, the economic focus was clearly visible regarding the interest groups as a whole. Furthermore, the supranational actors' urge to reduce

transaction costs and spur the economy was stronger than the individual claims for consistency. As said above, we concluded that the national actors foremost wanted protection for their investments. Overall, the indicators for the second expectation are visible, especially for the supranational actors to determine legal integration. This hardens the assumption that the member states reacted to their actions. Therefore, the likelihood is high that the (economic and supranational) interest groups' preferences are a causal factor in the termination of intra-EU BITs.

6. Conclusion

This study provided a thorough insight into the different actors' preferences the theoretical approaches used for this study outlined. Recalling the ambition of this study, we did not aim nor have the audacity to disprove any of the well-established theoretical approaches. In fact, that would not be possible as we did see evidence for all expectations to be plausible. Since this study, with its multilevel analysis approach, explores the understanding of the termination of intra-EU BITs at a more macro and meso level, drawing definite conclusions should be done carefully. However, generalization from a single case study is generally difficult, but providing an answer to this case will add to the existing literature to use it as a building block for further research and further sharpening the theories in light of contemporary developments. In general, all actors accounted for in the expectations played a significant part in uncovering and formulating an answer to the research question about what can explain the termination of intra-EU BITs.

The member states of the EU are the central actors as the signees of the EU treaties. All competencies the EU as a supranational actor holds stem eventually from the individual member states. Therefore, the liberal intergovernmentalist approach is comprehensible in stating that only the member states decide when and if more competencies will be dedicated to the EU and its institutions. Member states are generally believed to strive to protect their autonomy but also see the benefit of cooperation, especially in economic situations. That is why the EU was brought up in the first place, to cooperate for the greater good of all countries involved. However, as this study has shown, it cannot be said with high certainty that, in this case, the member states were the steering factors that determined the pace of legal integration.

Bilateral investment treaties are a well-known institution worldwide. Switching away from such a system is a complex process with high stakes. As this study stressed, protecting the investment climate is crucial for the EU economy to stay competitive. However, as it is for the high financial awards by ISDS tribunals against member states, they had the motivation to gain back autonomy by basing disputes in front of their national courts. Furthermore, this would give all parties access to remedies under EU law. The documents have shown that especially the countries of group two (Czech Republic, Estonia, Greece, Spain, Italy, Cyprus, Latvia, Hungary, Poland, Romania, Slovakia), therefore the EU member states that are respondents to most of the investment disputes, supported the cohesive

termination of the intra-EU BITs. However, as it turned out, it cannot be said that the member states were the steering actors since the EC promoted the termination for the longest time and even issued infringement procedure threats. Furthermore, as the member states terminated without an EU-wide system, which would cater to their autonomy, the second consultation phase (2020) has revealed, rather clearly, that EC had the initiation of an EU framework well accounted for.

According to liberal intergovernmentalism, the member states are the principals, and the EU actors are their agents. According to this doctrine, the agents would ultimately act according to the principals' preferences. This underpins the assumption that the principals are the determining, active actors. However, the way the EC communicated and stressed the sufficiency of the EU law for the investors and urged the member states since the signing of the Treaty of Lisbon (2007) to terminate the intra-EU BITs, the tendencies of the EC to promote integration in this field is very strong. Furthermore, the apparent turnaround of the need for an EU-wide system by the EC just after the signing of the termination agreement to provide the EC with the discretion to draft a new proposal with a clean slate cannot be understood as the agent serving the preferences of the principals ultimately. In this respect, as the member states had a perceived benefit from not being obliged to pay the high awards to the private investors, this can be understood as a positive side effect for the member states. However, as a new EU-wide framework is being drafted, if there would be no financial compensation for the investors (or as low as explained under the provisions of current EU law remedies), this would be a disincentive for investors to perceive this new system as sufficient. Therefore, it is likely that the new framework will see a provision of financial compensation due to a contract breach, as this was one of the main arguments from the economic interest groups that would harm the investment climate and, thereby, the EU economy.

Looking at the neo-functionalist side, the scholars of this theory stress the importance of the interest groups composed of multiple individual actors serving their respective self-interests. This creates a spillover effect that spurs integration. The spillover effect explains that policy fields cannot be seen as isolated since a decision on integration in one area will also affect other branches. Furthermore, political beliefs will change as they have a learning effect from increased interdependency to promote supranationalization. Interest groups and their economic preferences guide this interdependency. However, next to the interest groups, the European Commission is a central figure in spurring the spillover effect as it is the agenda setter of the EU and proposes legislation and new policies.

Therefore, according to neo-functionalism, economy-focused interest groups on the national and supranational levels and the EC are the determining actors that promote further legal integration. The interest groups and actors lobby and influence the preferences of the national governments in their decision-making processes. That is why neo-functionalists argue that the member states are reactive to these actors in their decision-making.

As the documents have revealed, the economic perception is very well visible during the discussion of the results. The economic interest groups on the national level arguably lobbied the member states from the first group (Germany, France, the Netherlands, Austria, and Finland). As discussed, those countries are mainly the investor's country of origin which made a joint statement favoring an EU-wide system (non-paper). Even though the public consultation phases revealed the position of national economic interest groups of no termination, we experienced the high salience of this issue for the representatives of private actors. However, the effect of their lobbying did not reach enough countries, as the majority of countries argued in favor of termination without introducing a new framework. Additionally, the supranational actors pointed out the perceived gains from closer collaboration for the EU economy. The collaborative approach of the countries favoring the termination can be summarized under the assumption of the changing political views on termination due to the interdependency created by the perceived discrimination of investors if only some BITs would be terminated and not all of them together.

On the contrary, it is interesting to notice the individual voices not sharing the perceived harm to the economy. Representatives of NGOs and labor associations state that there was no need for a new framework as with the termination, they saw a level playing field with other branches. However, those actors exposed the predetermined consultation phase that, no matter the outcome, the EC would initiate a proposal for a new investment framework. This is what happened. However, most of the submitted consultation documents supported a new framework. Moreover, all these documents in favor can be attributed to being issued on behalf of the investors' side.

In sum, this shows the strong presence of the economic interest groups. Even though the national economic groups were not in favor of termination, we did experience a "picking up" of the economic needs at the supranational level. The supranational actors, especially the EC, would account for the long-term and short-term effects of the termination of intra-EU BITs. They aim to reduce transaction costs and spur the overall economy.

Moreover, what was most apparent to derive from these findings, was the overarching, orchestrating function of the European Commission. This study concludes that the EC had a central, leading, and determining function. The EC was backed up by the supranational actors working towards supranationalization and promoting the supremacy of EU law. This was especially visible for the CJEU, which also gained more influence with this ruling. Furthermore, the EP supported the benefits of completion of the single market. Finally, the economic interest groups participated in public consultations and workshops, providing ideas and recommendations for how to draft the new proposal.

In conclusion, this study argues that the neo-functionalist approach holds the better explanation for what caused the termination of intra-EU BITs. The EC was very active and the central actor facilitating the termination and spurring spillover effects resulting in the termination agreement and further integration

of the EU legal framework. The majority of interest groups highly supported a new framework if it would come to a termination of the BITs. This is what was initiated just after the signing of the termination agreement. To summarize, in this case, the member states were more reactive to the actions of the actors identified by neo-functionalism.

Since this study was looking at the situation of the EU as a whole for a specific case, we intended to provide an answer to which of the two leading theories of EU integration explains this process best. As pointed out, the results of a single case study should not be generalized carelessly to other cases. However, this can be a starting point for further research that could focus on individual member states and try to unveil the process more fine-grained. Furthermore, conducting interviews with representatives of economic interest groups or government officials can also provide a deeper insight into the underlying intentions of the different actors. Finally, the future of intra-EU investments has yet to be settled, as the legislative process is ongoing. Therefore, further research can build on top of this study's findings by adding the documents yet to come.

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