EU international investment policy: Looking ahead

SUMMARY

The Lisbon Treaty entered into force in 2009, providing the European Union (EU) with exclusive competence in the area of 'direct investment', as part of the common commercial policy. This covers the conclusion of international investment agreements (IIAs), which typically aim to protect and/or liberalise foreign direct investment. Since then, the EU has ratified protection IIAs (or provisions in trade agreements) with Canada, Singapore and Vietnam.

Early on, concerns were raised as to the specific EU competence. Opinions requested from the Court of Justice of the EU (CJEU) established that the EU had neither exclusive competence in portfolio international investments (which, unlike direct investments, provide limited control over a firm) nor in the investor-state dispute settlement (ISDS) mechanism – two domains covered by EU protection IIAs. EU Member State approval on these provisions was therefore needed. Moreover, to tackle stakeholders’ general misgivings about the ISDS system – currently based on arbitral tribunals and perceived by some as insufficiently transparent and predictable – the EU is actively contributing to the multilateral talks to reform the current system, the objective being to establish a fully fledged ‘multilateral investment court’ with an appeal tribunal and its own judges.

Furthermore, EU Member States have protection IIAs with other Member States in place (intra-EU IIAs), which envisage arbitral ISDS mechanisms. However, the CJEU ruled in 2018 that arbitral decisions between Member States are incompatible with EU law, and most Member States have agreed to terminate their intra-EU IIAs, raising major stakeholder concerns; the European Commission has launched an initiative to address these with a proposal for a regulation.

Finally, for security reasons, the EU has also implemented EU- and domestic-level mechanisms to screen, coordinate and exchange information about direct investment entering the EU.

The European Parliament is preparing an own-initiative report on EU international investment policy.

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Background

Until 2009, international investment policy was the exclusive competence of EU Member States. The Treaty of Lisbon entered into force on 1 December 2009, and, through Article 3 of the consolidated Treaty on the Functioning of the EU (TFEU), provides the legal basis for the EU’s exclusive competence in the area of common commercial policy and customs union. Article 207 TFEU details the domains covered by the common commercial policy, particularly foreign direct investment (FDI) and (the achievement of uniformity in) measures of liberalisation. Article 207 concludes that the common commercial policy should be conducted in the context of the principles and objectives of the EU’s external action.

On its website, the European Commission sets five objectives for its international investment policy: 1) secure a 'level playing field' whereby market participants compete with the same rules; 2) secure a 'predictable and transparent business environment'; 3) support investment that respects sustainable development; 4) make the EU an attractive place to international investors, but protect the EU’s essential interests; 5) safeguard the right of countries to regulate.

The Commission’s trade policy review, published on 18 February 2021, particularly emphasises that EU’s ‘trade and investment’ agreements should support the green transition and promote responsible and sustainable value chains, so that the sustainability dimension will continue to be reflected in the EU’s trade and investment agreements, and the respect of the Paris Agreement will be considered an essential component. Moreover, the trade and investment agreements concluded with G20 countries should be in line with the Intergovernmental Panel on Climate Change (IPCC) and the ambition to complete climate neutrality. The Commission will also prioritise the implementation of the Convention on Biological Diversity in trade and investment agreements.

For the Commission, trade and investment agreements have also played an important role in promoting respect for core human and labour rights, and will continue to do so, as reflected in the fundamental conventions of the International Labour Organization (ILO).

Moreover, the Commission’s trade policy review envisages that, as part of its strategy of strengthening EU partnerships with neighbouring countries and Africa, the Commission will pursue sustainable investment agreements with Africa and the Southern Neighbourhood. These agreements will be designed together with EU development cooperation tools to support investment and, whenever possible, with a Team Europe approach, which is expected to generate synergies with EU Member States, the private sector and civil society.

A major instrument of the EU’s international investment policy is the ‘international investment agreement’ (IIA), which can be aimed either at protecting international investments (protection IIA) or liberalising them (liberalisation IIA), or both.

Protection IIAs

Usually called ‘investment protection agreements’, protection IIAs aim to protect the assets ‘located’ in a party’s territory and owned by an ‘investor’ of the other party’s country. The EU has signed three protection IIAs to which the European Parliament gave its consent: namely, with Canada (Chapter Eight, Parliament consent in 2017), Singapore (2019) and Vietnam (2020). They are still subject to ratification by EU Member States (see Box 2 on p. 4). An agreement in principle was signed with Mexico (agreement in principle, 26 April 2018, last update May 2020, Chapters Investment (Section B – Investment protection), Capital movements and Resolution of investment disputes; chapters in a free trade agreement are being negotiated with Chile (most recent EU proposal dated 6 February 2018, Chapter Investment and Trade in Services (Section B – Investment protection).

Protection IIAs signed by the EU typically include provisions guaranteeing fair and equal treatment. For instance, Canada-EU Comprehensive Economic and Trade Agreement (CETA) Article 8.10
protects investment against ‘denial of justice in criminal, civil or administrative proceedings’, ‘fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings’, ‘manifest arbitrariness’, and ‘targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief’. In addition, protection IIAs provisions require that a party should not expropriate or nationalise investments, except where ‘it serves public purposes’, is a ‘due process of law’, is ‘conducted in a non-discriminatory manner’, and/or is ‘accompanied by prompt, adequate and effective compensation’.8

Investment court system in EU protection IIAs

Investment dispute resolution provisions in protection IIAs set out the procedural framework for settling disputes between foreign private investors and a host state – the investor-state dispute settlement (ISDS) mechanism.9 According to this mechanism, a private investor may claim compensation from a state outside domestic courts by means of arbitral tribunals. The applicable ISDS system is typically either the World Bank International Centre for Settlement of International Disputes (ICSID, Convention Arbitration Rules), the United Nations Commission On International Trade Law (UNCITRAL, Arbitration Rules), or the International Chamber of Commerce (ICC).10 A protection IIA may also define its own ISDS rules, and each of the EU IIAs establishes its own ‘investment court system’ (ICS) (Table 1).

An ICS in EU protection IIAs typically works as follows. Shortly after an IIA enters into force, the parties establish two lists of judges, for the first-instance tribunal and the appellate tribunal, respectively. Each list is made up of two sub-lists of judges selected by each party (typically, nationals of the party), and one sub-list of judges selected by both parties (typically, nationals of neither of the two parties). However, the terms of office of half of the individuals appointed immediately after the agreement’s entry into force are usually extended, to avoid the entire tribunal being renewed at the end of the first term.

Table 1 – EU IIA investment court system

<table>
<thead>
<tr>
<th>Country</th>
<th>Composition</th>
<th>Term duration</th>
</tr>
</thead>
<tbody>
<tr>
<td>Canada</td>
<td>Tribunal: 15 members</td>
<td>5 years, renewable once</td>
</tr>
<tr>
<td></td>
<td>Appellate Tribunal</td>
<td>Terms to be defined by the CETA Joint Committee</td>
</tr>
<tr>
<td>Vietnam</td>
<td>Tribunal: 9 members</td>
<td>4 years, renewable once</td>
</tr>
<tr>
<td></td>
<td>Appeal Tribunal: 6 members</td>
<td>4 year, renewable once</td>
</tr>
<tr>
<td>Singapore</td>
<td>Tribunal: 6 members</td>
<td>8 years, renewable</td>
</tr>
<tr>
<td></td>
<td>Appeal Tribunal: 6 members</td>
<td>8 years, renewable</td>
</tr>
</tbody>
</table>

Source: EPRS; author’s compilation.

Box 1 – Decisions of the Court of Justice of the EU

The Court of Justice of the European Union (CJEU) has issued two opinion on EU IIAs. In the first, of 30 April 2019, it ruled that Canada-EU provisions establishing the ICS are compatible with the Treaties (Opinion 1/17), thus allowing ICS in all subsequent EU IIAs. However, in the second opinion, on the EU-Singapore IIA, issued on 16 May 2017, the CJEU ruled that while ‘direct investment’ falls within EU competence, portfolio investment, investor protection and ISDS frameworks do not (Opinion 2/15). In practice, this means that EU IIAs that cover portfolio investment and envisage an ISDS mechanism should be ratified by Member States. The distinction between (foreign) direct investment and portfolio investment is thus essential, and the difference is related to the control of the assets or company: establishing a manufacturing plant or acquiring a firm abroad are two examples of direct investment; purchasing shares bringing little control over the firm’s decisions is an example of portfolio investment.
The president of the tribunal, who is appointed by the parties on a rotating two-year basis, selects a division of three members to hear the case. It is worth noting that the arbitral tribunal’s decision only concerns the IIA provisions’ interpretation, i.e. the tribunal determines whether the measures taken by a party are in breach of the provisions, and it also decides on the compensation (award).

Multilateral dispute settlement

The EU is engaged in inter-governmental talks at UNCITRAL to reform the UNCITRAL ISDS mechanism in a way that would lead to the establishment of a multilateral investment court (MIC). The reform will address concerns raised by states, international organisations and civil society with regard to the transparency and consistency of decisions, the independence of arbitrators, and the cost and duration of arbitral procedures. The overarching goal of the Council of the EU’s mandate is to establish a fully fledged permanent multilateral investment court with an appellate mechanism and tenured judges. The talks started in 2017 and are now at the reform proposal stage. The proposals range from perfecting the current ISDS to setting up formal investment courts comprised of first-instance and appellate tribunals. In its comments on the proposals, the EU has reiterated that an established MIC, i.e. a single-standing institution with permanent professional staff and an appeal instance, is far more likely to rule ‘more consistently and independently from the interests of disputing parties’. The adoption of an MIC is envisaged in the EU IIAs (see for instance, Canada-EU CETA Article 8.29).

Right to regulate

Criticism of protection IIAs, including the EU’s, has mainly focused on the IIAs’ potential impact on the right of states to regulate, calling for a balance between investors’ protection and nations’ ‘right to regulate’. The Investment Policy Hub published by the United Nations Conference on Trade and Development (UNCTAD) lists the ISDS cases together with arbitral decisions and compensations, whenever publicly available. At the time of writing, of the 486 settled cases for which the outcome is known and in favour of a party, 212 decisions were in favour of the state (44 %) and 274 in favour of investors (56 %).

Figure 2 below shows the amount of damages awarded in the 185 ISDS cases launched since 2000 for which the decision was in favour of investors. The total amount awarded is $86 billion (in current value); 62 % of all cases concern less than $50 million in settlement amounts.
Remarkably, a very few cases represent the bulk of the awarded amounts: four cases make up 70% of the total, namely *Tethyan Copper v Pakistan* (initiated in 2012, $4.1 billion), *Veteran Petroleum v Russia* (2005, $8.2 billion), *ConocoPhilips v Venezuela* (2007, $8.3 billion), and *Hulley Enterprise v Russia* (2005, $40 billion).

Figure 2 – ISDS decisions initiated since 2000 with decisions in favour of investors; total awards (in current billion US dollars, left scale) and number of cases (right scale)

Data source: UNCTAD *Investment Dispute Settlement Navigator*; author’s compilation.

Considering pending cases, according to the UNCTAD Investor Policy Hub, the four largest amounts claimed are those in the cases *Cosigo Resources and others v Columbia* (2016, $16.5 billion), *International Holding Project Group and others v Egypt* (2018, $15 billion), *Yukos Capital v Russia* (2013, $13 billion), and *Vattenfall v Germany (II)* (2012, €4.7 billion). Spain alone has to respond to 30 pending cases, 28 of which under the Energy Charter Treaty. Only 17 of these 30 cases made the amount claimed public, totalling nearly €3 billion.

To ensure that EU Member States are not subject to legal actions outside domestic courts that potentially threaten the implementation of regulations in the country’s interest, EU IIAs include provisions that safeguard the ‘right to regulate’. For example, the Canada–EU CETA Article 8.9 provides that the parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the ‘protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity’. More specifically, investment protection is not breached if a party regulates, including through a modification to its laws, ‘in a manner which negatively affects an investment or interferes with an investor’s expectations, including its expectations of profits’. The same principle applies to the interruption of subsidy payments. The EU-Vietnam IIA Article 2.2 has similar provisions. The clause on the right to regulate marks a difference compared with pre-2009 bilateral IIAs signed by EU Member States.

Box 4 – Energy Charter Treaty

The Energy Charter Treaty (ECT) is an example of a treaty that provides for ISDS mechanisms between contracting parties, including between EU Member States. The ECT was signed in December 1994 and entered into force in April 1998. There are 53 signatories and contracting (state) parties to the treaty, which was conceived as a multilateral framework to facilitate commercial energy relations across the Eurasian continent; indeed, the ECT chiefly protects cross-border investments in energy-related equipment. Some critics consider its provisions for arbitral-based ISDS mechanisms as posing a threat to the energy transition, since fossil fuel investors are likely to increase claims as states take action to fight climate change. Since 2018, discussions are being held on modernising the ECT, and the Commission has tabled its negotiation proposal. The most recent round of negotiations took place in January 2022, with some progress in the areas of investment protection, sustainable development and dispute settlement. On 2 September 2021, the CJEU ruled that the ECT could not be used in intra-EU disputes (Judgment 741/19, ‘Komstroy case’). France has suggested a potential withdrawal from the ECT if no agreement on modernisation could be found, while Italy already withdrew from the ECT in 2016.
Investment liberalisation and facilitation

IIAs may aim to grant or ‘liberalise’ access to markets of the other party. Liberalisation IIAs typically include provisions requiring that the principles of non-discrimination and most-favourable nation (MFN) are respected for the establishment of firms in the other party. They are most often part of EU FTAs, such as those signed with Japan, South Korea and the United Kingdom. The EU-Canada CETA Section B (Establishment of investments) also includes market access provisions. Article 8.4 (Market access) requires that a party should neither (a) impose limitations on e.g. enterprises establishment, value or number of transactions, nor (b) restrict or require specific types of legal entity. The MFN principle in establishment is also present in EU-Canada CETA Article 8.7(1); the ‘National treatment’ Article 8.6 covers the establishment, as well. The provisions envisage non-limitation of the number of enterprises, the value of transactions, the number of operations, the participation of foreign capital, the type of legal entity, and the number of natural persons.

Meanwhile, IIAs aimed at facilitating investment (facilitation IIA) have gained in popularity. Along the lines of liberalisation agreements, facilitation IIAs are a broad concept based on the intention of making it easier for foreign investors to establish, operate and expand their investments. The main instruments include the facilitation of documentation and treatment of applications, and the setting up of enquiry-point and one-stop shop type mechanisms for foreign investors. The European Commission emphasises that the facilitation of foreign investments is beneficial for developing countries as well, and in its trade policy review, it considers facilitation IIAs as an instrument for pursuing sustainable investment agreements with Africa and the Southern Neighbourhood. This initiative started with the launch of negotiations with Angola, and with the EPA deepening negotiations with five countries of eastern and southern Africa. Within the World Trade Organization (WTO), the EU is also contributing (with a publicly available proposal) to the discussions on investment facilitation for development, which aim at a conclusion by the end of 2022.

Table 2 – EU international investment agreements

<table>
<thead>
<tr>
<th>Country</th>
<th>IIA/FTA chapters</th>
<th>Protection/liberalisation</th>
<th>Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>Canada (Chapter Eight)</td>
<td>FTA chapters</td>
<td>Both</td>
<td>Member State ratification</td>
</tr>
<tr>
<td>Vietnam</td>
<td>IIA and FTA chapters (liberalisation)</td>
<td>Both</td>
<td>Member State ratification</td>
</tr>
<tr>
<td>Singapore</td>
<td>IIA and FTA chapters (liberalisation)</td>
<td>Both</td>
<td>Member State ratification</td>
</tr>
<tr>
<td>Mexico (modernisation)</td>
<td>FTA chapters</td>
<td>Both</td>
<td>Agreement in principle</td>
</tr>
<tr>
<td>Chile</td>
<td>FTA chapters</td>
<td>Both</td>
<td>Text proposal</td>
</tr>
<tr>
<td>Angola</td>
<td>IIA only</td>
<td>Liberalisation (facilitation)</td>
<td>Negotiations started (June 2021)</td>
</tr>
</tbody>
</table>

Source: EPRS; author’s compilation.
Responsible business conduct

There is general concern that multinational enterprises may sometimes cause negative impacts on the sustainable development of the countries in which they operate. The Organisation for Economic Co-operation and Development (OECD) Centre for Responsible Business Conduct (RBC) aims to minimise these adverse impacts by making recommendations to its members. It published the Guidelines for Multinational Enterprises, an international legal instrument adopted by all OECD members and open for adherence to non-OECD members. The most recent (2011) update of the guidelines addressed issues such as human rights, employment, environment, and bribery. It was complemented by the Due Diligence Guidance for RBC, adopted in 2018.

The EU calls for the use of the OECD guidelines in its IIA with Canada (Article 22.3). The European Commission has been working on the preparation of a legislative proposal on sustainable corporate governance, including mandatory due diligence. To this purpose, it published a study and conducted public consultations. The proposal for a directive was adopted by the Commission on 23 February 2022; it aims to cover human rights and environmental due diligence.

Inward direct investment screening framework

The EU has established a new inward investment screening framework. The European Parliament as co-legislator adopted a regulation establishing a legal framework for the screening of FDI inflows into the EU in February 2019 by a large majority, and the framework entered into force in April 2019 (Regulation 2019/452). The regulation establishes a system for cooperation and exchange of information on investments from non-EU countries that may affect security or public order, and it ensures that the EU is better equipped to protect its own interests.

Since its implementation (as of 30 November 2021), the mechanism has resulted in more than 400 cases being screened by the Commission; in the most recent available period (11 October 2020 – 30 June 2021), 265 cases were notified to the Commission. The most represented sectors are manufacturing, information and communications technology (ICT), wholesale and retail, and finance. The ultimate investors of these cases are predominantly located in the United States, the United Kingdom, China, Canada and the United Arab Emirates. 20% of these cases were deemed to be a possible cause for concern, and in 8 cases (3% of the total), the Commission adopted formal opinions with information or recommendations to Member States.

Intra-EU cross-border investment protection

The CJEU judgment in the case Slovak Republic v Achmea BV of 6 March 2018 (hereafter Achmea case) establishes that the ISDS provisions contained in the protection IIA between the Netherlands and Slovakia, which envisage arbitral decisions, are incompatible with EU law. The judgment is considered to set the rule with respect to the incompatibility of similar ISDS provisions contained in protection IIAs between EU Member States, or ‘intra-EU’ IIAs.

As a follow-up to the CJEU decision, the Commission issued a communication underlining that EU law already offers a ‘complete system of judicial remedies’. Therefore, cross-border investors in the EU may invoke directly applicable EU rights, which have supremacy over national law. National judges have a special role and responsibility in protecting investment, together with the CJEU. The Commission emphasises that EU law protects all EU cross-border investments throughout their lifecycle: access to the market, access to public procurement, freedom of operation, freedom of incorporation of companies, and exit from the market. The communication states (p. 16):

In principle, EU investors should only occasionally need to invoke the protection of legitimate expectations because they can usually rely on the application of the fundamental freedoms enshrined in the Treaty (including proportionality and non-discrimination) and on EU secondary law.

On 5 May 2020, 23 EU Member States signed the multilateral termination agreement for the termination of intra-EU IIAs, which entered into force on 29 August 2020. Although Section 2
Articles 2 and 3 of the termination agreement explicitly terminate ‘sunset clauses’, discussions among experts as to the effective disapplication of the latter are still ongoing.¹⁹

In 2020, the Commission launched the initiative ‘Cross-border investment within the EU – clarifying and supplementing EU rules’ and conducted consultations, which ended in September 2020. On this occasion, some stakeholders declared that uneven judicial systems across EU Member States could be an issue for the capital markets union. In addition, some shared their perception that domestic courts do not offer investors the same level of protection as international law offers to non-EU investors.²⁰ They therefore welcomed the development of a codified intra-EU investment law, together with an efficient and effective new alternative ISDS system compatible with EU law.

The inception impact assessment for the consultation states that the initiative aims to address the ‘uneven level of investment protection’ in different EU Member States, which affects investors’ confidence. The inception assessment specifies that EU rules on investor protection are set out in different sources and are of diverse nature. Some of them, which safeguard rights and freedoms and thus protect investments, are spread out across different pieces of EU secondary law. Some are sector-based (e.g. financial services, transport), while others are more horizontal (the Services Directive for instance). As EU secondary law does not regulate all matters, some aspects of investments are covered only by the EU Treaties, the Charter of Fundamental Rights (such as the right to property or the free movement of capital), and general principles of EU law (such as legal certainty and legitimate expectations). Nevertheless, the EU formulation of general rules allows EU Member States to specify their details in various ways in national rules. This can lead to inconsistencies in applying EU legislation, despite the guidance provided by the CJEU’s case law. Beyond the national application of EU law, investors are also concerned about the variations in the levels of compensation.

Positions

European Parliament

The European Parliament has launched an own-initiative procedure (2021/2176 INI) addressing the future EU international investment policy. The lead committee is the Committee on International Trade (INTA); with the rapporteur Anna Cavazzini (Greens/EFA, Germany). The Committee on Development (DEVE) has been consulted for opinion, with Benoît Biteau (Greens/EFA, France) as rapporteur. The INTA draft report was published on 7 February 2022.

Moreover, in a resolution of 12 February 2020 on the conclusion of the EU-Vietnam protection IIA, the Parliament welcomes the new approach to investment protection and the ICS as a modern and innovative ISDS mechanism. Parliament also notes that the agreement safeguards the right to regulate in areas such as public health, public services, and environmental protection. However, it calls on the Commission to take further account of the fight against climate change and respect for the Paris Agreement in safeguarding the parties’ right to regulate, as in the Canada-EU CETA. Moreover, the Parliament reiterates that the high level of EU investor protection should be accompanied by responsibilities for investors to exercise due diligence with regard to sustainable business practices in compliance with human rights and international labour conventions as well as environmental standards. To help achieve the UN sustainable development goals (SGDs), in particular SDG 1 (no poverty), SDG 8 (decent work and economic growth) and SDG 10 (reduced inequalities), investment must contribute to the creation of quality jobs, support the local economy, and fully respect domestic regulations, including tax requirements. The Parliament also emphasises that stakeholders such as labour and environmental organisations can contribute to ICS proceedings by assisting the court in providing information.

The European Parliament already took a position on EU international investment policy in previous legislative terms. A resolution on the future of European international investment policy, adopted on 6 April 2011 – soon after the Lisbon Treaty entered into force – noted that investment protection
should remain the first priority of EU IIAs, and that strong and effective investor protection in the form of IIAs is key to protecting EU investments in developing countries as it enhances stability. IIAs should, however, also be based on investors’ obligations in terms of compliance with human rights and anti-corruption standards, and EU IIAs should respect public interventions and the right to regulate. The Parliament was already concerned by the ‘level of discretion of international arbitrators’ and about the ISDS mechanisms in general, calling for changes.

European Economic and Social Committee

In its 2019 own-initiative opinion on the role of the EU’s trade and investment policies in enhancing the EU’s economic performance, the European Economic and Social Committee (EESC) recalls that EU trade and investment policy has become subject to unprecedented scrutiny and political examination, and that the EU must therefore gain sufficient internal consensus. To this end, it needs to promote a progressive trade agenda that builds on the protection of fundamental environmental, social and consumer standards and rights.

In an earlier opinion from 2011, the EESC welcomed the new EU competence in FDI and the opportunities this first step brings for stronger, more consistent investment protection between Member States and third countries. The EESC urged the Commission to use protection IIAs as key opportunities to encourage the kind of long-term investment in developing countries that brings economic benefits such as high quality decent work, infrastructure improvements and knowledge transfer.

In a 2017 opinion on the screening of FDI, the EESC emphasised that, although it supports an open investment environment and welcomes FDI, a framework for screening of FDI is needed, since FDI may also carry risks and jeopardise national security and public order.

Public and expert opinions

Shortly after direct investment became an EU competence in 2009, criticism flared up, with protests breaking out as the EU and the United States launched negotiations on a transatlantic trade and investment partnership (TTIP) in 2013. Massive opposition against the ISDS system surfaced and continued with the Canada-EU CETA. Trade unions, human rights and farming groups, in particular, were concerned that by giving ‘so much power to multinational corporations’, the investor protection provisions in the agreements would be a ‘threat for the environment, health and labour regulations’. Some major associations still argue that the proposed MIC would be insufficient to tackle the issue.

With regard to the over-riding of the CJEU, in a 2020 study, academic Maria Fanou argues that CJEU Opinion 1/17 should not be perceived as an automatic green light for any future investment court, such as the MIC – although the CJEU deems it a step towards the MIC. According to academic Arnaud de Nanteuil, some doubts may remain as to the compatibility of the ICS with EU law. As he explains, the use of Article 344 TFEU sets out the exclusive competence of the CJEU on disputes involving the application or interpretation of EU law – thus the recourse to any other dispute settlement mechanism is prohibited when it comes to applying and interpreting EU law. However, exception was made for international agreements in the Achmea ruling (paragraph 57), ‘provided that the autonomy of the EU and its legal order is respected’. This is consistent with CJEU Opinion 1/17, which explains that the reason for which the ISDS envisaged by the Canada-EU agreement is compatible with the autonomy of the EU legal order is twofold. Firstly, the tribunals have no power to interpret or apply EU law; secondly, the powers of the envisaged tribunals do not prevent the EU institutions ‘from operating in accordance with the EU constitutional framework’ (paragraph 119).

In a November 2020 article, academic Robert Basedow argues that the competence struggles between EU institutions and Member States play an important role in shaping EU international investment policy, and that for policy-making, it matters how the EU received an underlying
competence. Before 2009, the EU Member States were competent in direct investment, and some of them were highly active in this policy domain. The article highlights that some Member States had concluded more than a hundred IIAs, while others showed little interest in them. As the article notes, the EU's first steps in this domain have attracted considerable public attention; according to critical voices, the IIAs, and particularly their ISDS provisions, conveyed the impression that the EU was protecting foreign investors but insufficiently protecting EU stakeholders vis-à-vis multinational companies. This general belief seems to have translated into both the failure to ratify EU IIAs and the European Commission's decision to revisit its approach to IIAs. In a September 2020 study, Basedow finds that the EU's IIA approach has become 'more development-friendly' in comparison with the IIA approaches of EU Member States, and that the 'politicisation and aggregation' of various Member State preferences fuelled this shift in policy outcomes.

In a background note to the March 2021 Annual Conference on Investment Treaties, the OECD highlights that sustainable development requires a 'stronger regulatory framework'. Although domestic laws are essential to address this issue, there is an incentive to weaken regulatory standards in a competitive market. IIAs could help by including commitments to 'accede to key international treaties and basic standards on the environment, health, human rights or labour, and to their implementation'. Moreover, liberalisation IIAs are likely to play a greater role in the future. Increased market access would benefit in terms of competition and the transfer of expertise, which is essential for the SDGs.

Box 5 – Impact of IIAs on FDI

Analysis of the impact of investment agreements on FDI has produced mixed results, probably because of variety in types of IIAs. The question is twofold: do IIAs result in higher FDI, or does new FDI benefit hosting countries? Other benefits, such as technology transfer, vary by sector of investment and host-country characteristics. Some authors suggest that foreign investment may substitute domestic investment, which suggests that there might be little added value in FDI. However, IIAs have the largest positive impacts on FDI in sectors that require large initial investments, such as extractive industries. Other authors have shown that an increase in FDI has a relatively higher positive impact on economic growth in economies with more developed financial systems, suggesting that the financial system plays a role in promoting growth through 'backward linkages'. However, a major challenge is the endogeneity issue, i.e. the question whether the IIA has an impact on FDI, or whether the IIA is part of an overall policy context, which would result in larger FDI amounts. IIAs could also be used as instruments to signal a country's intention to attract foreign investment. An August 2021 study suggests that, as high-income developing counties become net FDI senders, they conclude more protection IIAs.

In their October 2020 report on fossil fuel assets and IIAs, Kyla Tienhaara and Lorenzo Cotula of the International Institute for Environment and Development estimate that of the 257 foreign-owned coal power plants in their datasets, at least 75% are protected by a treaty with ISDS; 51 of these plants are protected by the ECT alone. According to the authors, the design of protection IIAs is of key importance for the energy transition. They recommend a set of policy actions, including the termination of treaties with ISDS, especially the older treaties that contain 'unqualified investment protections' and do not address sustainable development issue; termination could possibly be coordinated through a multilateral termination treaty. Moreover, modernising the ECT is essential, as it is the key treaty protecting coal energy, and the most frequently invoked treaty in history. Finally, the authors recommend broadening the forums for dialogue on the ISDS system reform currently conducted under the auspices of UNCITRAL.
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MAIN REFERENCES


Kaufmann-Kohler G. and Potestà M., Can the Mauritius Convention serve as a model for the reform of investor-State arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism?, Geneva Centre for International Dispute Settlement (CIDS), June 2016.


The future of EU international investment policy (2021/2176 INI), Legislative Observatory (OEIL), European Parliament.


ENDNOTES

1 Article 207 covers the following domains: 'a) the conclusion of tariff and trade agreements relating to trade in goods and services; b) the commercial aspects of intellectual property; c) foreign direct investment; d) the achievement of uniformity in measures of liberalisation; e) export policy and measures to protect trade'.

2 Last update 22 January 2022.

3 A 'level playing field' is the terminology used in international trade and finance to indicate a market or industry in which all participants compete under the same conditions. See for instance the definition provided by the Organisation for Economic Co-operation and Development (OECD).

4 The most prominent of these initiatives is the External Investment Plan (EIP) launched in 2017 for sub-Saharan Africa and the EU Neighbourhood. For further details and figures, see the European Commission's EIP factsheet.

5 Another term for 'international investment agreement' is 'bilateral investment treaty' (BIT). International investment may be covered by chapters in trade and economic agreements. For simplicity, 'IIA' will be used for both cases in this paper.

6 Although 'investment protection agreement' is usually abbreviated by 'IPA', for the sake of readability and coherence, this briefing will refer to the term as 'protection IIA'.

7 The 'IIA' terminology will include international investment provisions in broader economic and trade agreements, such as the Canada-EU Comprehensive Economic and Trade Agreement (CETA).

8 See EU-Canada Article 8.12 and EU-Vietnam Article 2.7.

9 The ISDS acronym is often linked with the traditional arbitral dispute settlement system. In this briefing, 'ISDS mechanism' is used as the generic term for the legal framework to settle disputes between private investors and states.

10 A description of the appointment rules under the ICSID Convention and the UNCITRAL Arbitration Rules, the two systems most frequently referred to, is provided in an earlier EPRS briefing.

11 See a June 2021 EPRS briefing, Multilateral investment court: Framework options, for a recent update on talks at UNCITRAL Working Group III (ISDS reform). The UNCITRAL text proposals are available to delegations for comments.

12 According to an additional specification for Vietnam, 'subsidy' covers investment incentives and investment assistance, e.g. production site assistance, human resources training, competitiveness strengthening activities (clause 4).

13 The MFN clause establishes that an IIA party should extend to the other party any advantage given to any other country. Although the typology is subject to variations, MFN provisions are also part of WTO agreements – GATT, GATS and TRIPS – and have become a cornerstone of IIAs.
To date, around 50 countries have adhered to the guidelines or are in the process of adhering.

The OECD has also established the Policy Framework for Investment (PFI), which provides a comprehensive and systematic approach to improve investment conditions and boost sustainable investment. The PFI was launched in 2006 and last updated in 2015. Under the PFI, round tables are organised in order to discuss and develop new forms of engagement to enhance ‘the role of private investment as a catalyst for sustainable development’. To complement the PFI, the OECD has developed innovative measures of the impact of FDI on sustainable development in host countries based on quality indicators.

For more recent updates, see the list of screening mechanisms publicly available on the Commission’s website.

The opinion of Advocate General Wathelet delivered on 19 September 2017 reached opposite conclusions, arguing that intra-EU bilateral investment treaties (BITs) and their ISDS mechanisms are not incompatible with EU law; the opinion contrasted with the Commission’s efforts to dissolve the intra-EU BITs.

The termination agreement has 23 signatories: Belgium, Bulgaria, Czechia, Denmark, Germany, Estonia, Greece, Spain, France, Croatia, Italy, Cyprus, Latvia, Lithuania, Luxembourg, Hungary, Malta, Netherlands, Poland, Portugal, Romania, Slovenia and Slovakia. For the status of contracting parties’ ratification, acceptance or approval of the agreement, see the Council’s Treaties and Agreements database.

Sunset clauses (sometimes also referred to as ‘survival’ or ‘grandfathering’ clauses) guarantee that existing investments at the time of termination continue to be protected during a certain period of time, typically between 5 and 20 years.

For instance, Erste Group Bank (Austria) declares that, although ‘in theory’, there is the same level of protection thanks to EU law, in practice ‘some local courts do tend to avoid seeing the investor’s position vis-à-vis the local law and the local government’.

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