EU TRADE POLICY

Federica Cristani, PhD
Jean Monnet Module on EU Foreign Policy

Lectures' and seminars' content

- The main features of the EU foreign trade policy
- The EU foreign investment policy
- The EU digital single market: an introductory overview

- Which consequences of the current global health crisis on the EU trade policy?

- Web-sources and materials on EU trade policy

Let’s build up our *list of most liked* ☺

- https://docs.google.com/document/d/1xjr14DVeYCx6oGT4FZSTVVoZjJ9hrQNxKLAG-WCKUZc/edit

EU FOREIGN TRADE POLICY

File Edit View Insert Format Tools Add-ons Help Last edit was yesterday at 18:25

100% Normal text Arial 11

EU FOREIGN TRADE POLICY

EU FOREIGN TRADE POLICY

Useful links and documents

Please feel free to add links related to EU foreign trade policy (trade-related governmental websites, articles from online newspapers, blogs, trade-related videos) to share with your colleagues. do not forget to add your name, so we all know who added the link :)

If you also want to add a short note/comment about it (why do you find it interesting, whether you agree or not or which questions it raises), you are more than welcome :)

At the end of the class, you will have a useful take-away table of EU trade-related links :)

Thank you very much in advance for any input!

Federica

Link	Notes (optional)	Your name
https://www.reuters.com/article/us-italy-m-a-government/italy-to-defend-strategic-companies-from-foreign-takeovers-idUSKBN21512L	Italy is introducing golden power mechanism: what about compliance with EU law?	Federica Cristani
https://unctad.org/en/pages/newsdetails.aspx?OriginalV	UNCTAD's estimates on FDI inflows	Federica Cristani

Lecture 20 April 2020: KEY WORDS

- Bretton Woods Conference
- Directorate-General for Trade
- Regional integration
- EU internal market
- Common commercial policy
- World Trade Organization
- UN Sustainable Development Goals

EU TRADE POLICY

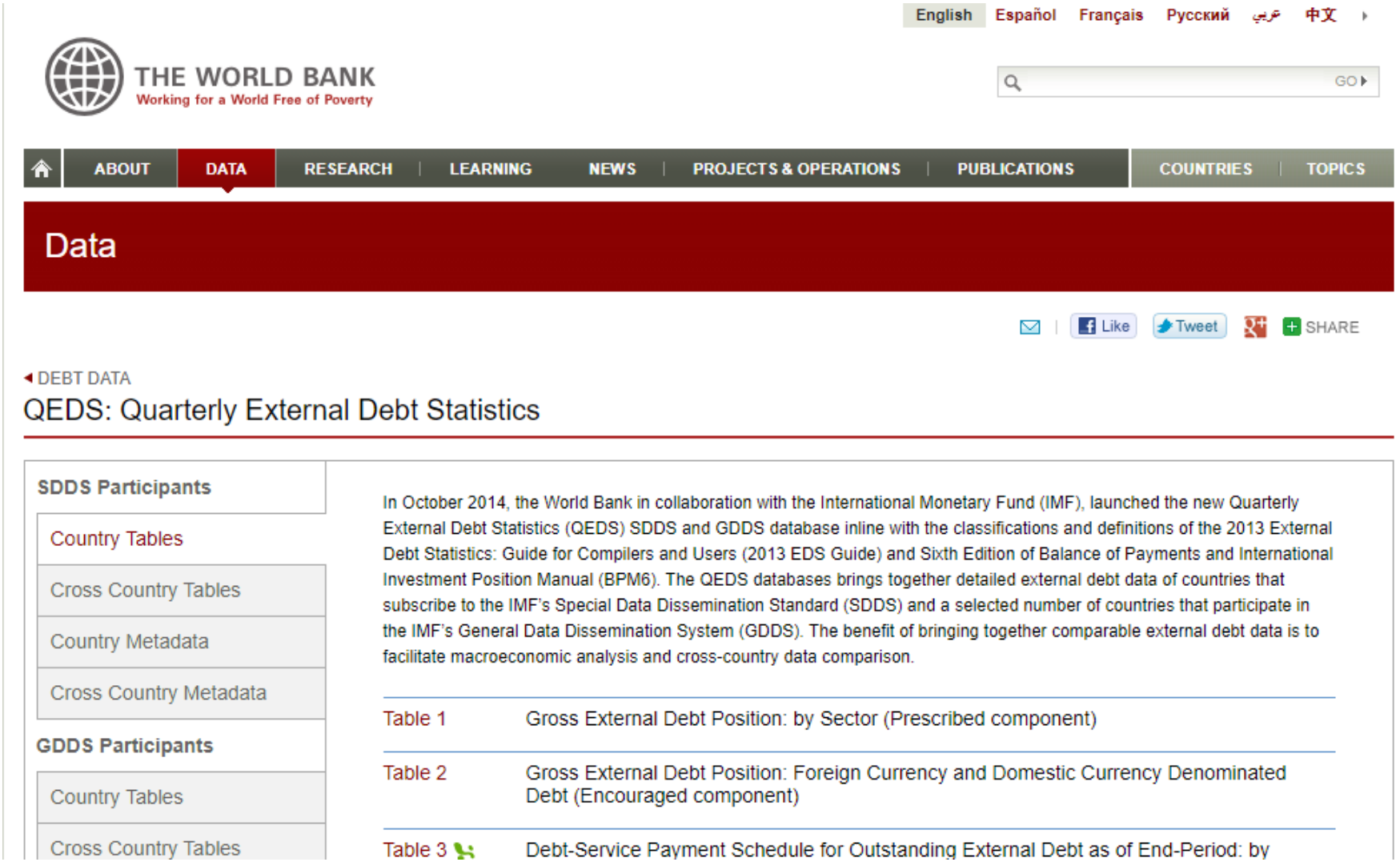
- Two dimensions:
  - ***Internal market:*** *among 27 member states (regional economic integration)*
  - ***Common commercial policy:*** *with non-EU third countries*

Data on EU external debt

- **External loan (or foreign debt)** is the total debt owed by a country to foreign creditors
  - *foreign creditors: government(s), corporations or citizens*
  - *debt: money owed to banks, foreign governments, IMF and/or World Bank*

- A **debt crisis** occurs if a country with a weak economy is not able to repay the external debt
  - *IMF keeps track of the country's external debt. The World Bank publishes a quarterly report on external debt statistics.*
- If a nation is unable or refuses to repay its external debt, it is said to be in a **sovereign default.**

http://datatopics.worldbank.org/debt/qeds



https://www.ecb.europa.eu/stats/balance_of_payments_and_external/external_debt/html/index.en.html

CEIC. Census and Economic Information Center.

- https://www.ceicdata.com/en/indicator/european-union/external-debt--of-nominal-gdp

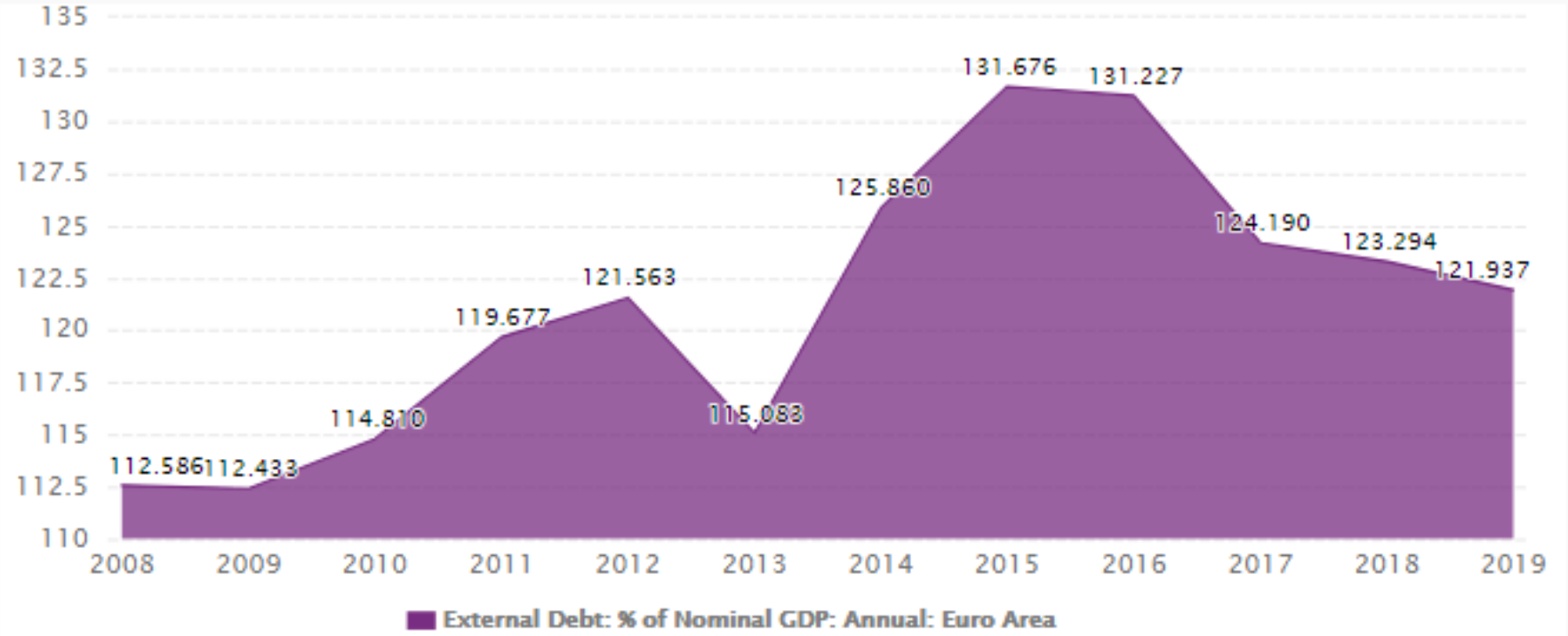
What was European Union's External Debt: % of GDP in 2019?

Last	Previous	Min	Max	Unit	Frequency	Range
▼ 121.9 2019	▼ 123.3 2018	112.4 2009	131.7 2015	%	Yearly	2008 - 2019 Updated on 20 Apr 2020

View European Union's External Debt: % of GDP from 2008 to 2019 in the chart:

MAX 1Y 5Y 10Y AREA

December 1, 2008 December 1, 2019 APPLY



LECTURES N. 2-3

THE EU FOREIGN INVESTMENT POLICY

Main questions

- Which is the scope of the exclusive competence of the EU under the CCP, as far as FDI are concerned?
  - *Which implications on the power of EU to conclude international treaties with third countries?*
  - *What about BITs of MSs?*

- EU as a new respondent in investor-State international arbitration?

FDI and FPI

Foreign Direct Investment (FDI)

- occurs when a firm invests directly in facilities to produce and/or market a product in a foreign country
- also occurs when a firm buys an existing enterprise in a foreign country

Foreign Portfolio Investment (FPI)

- investment in foreign financial instruments (e.g. bonds/stocks)

- **Direct investment** is seen as a long-term **investment** in the country's economy, while **portfolio investment** can be viewed as a short-term move to make money.

European Union (EU) foreign investment law

- Introduction of EU exclusive competence over foreign direct investment (FDI) after the Lisbon Treaty (2009)
  - *Inclusion of FDI into the EU Common Commercial Policy (CCP)*

- EU's competence on FDI
  - *investment activities in the EU by third country investors will be covered by both EU's and Member States' laws and acts*
  - *Whether the EU will (and should) be party to an international arbitration in case of disputes with foreign investors*

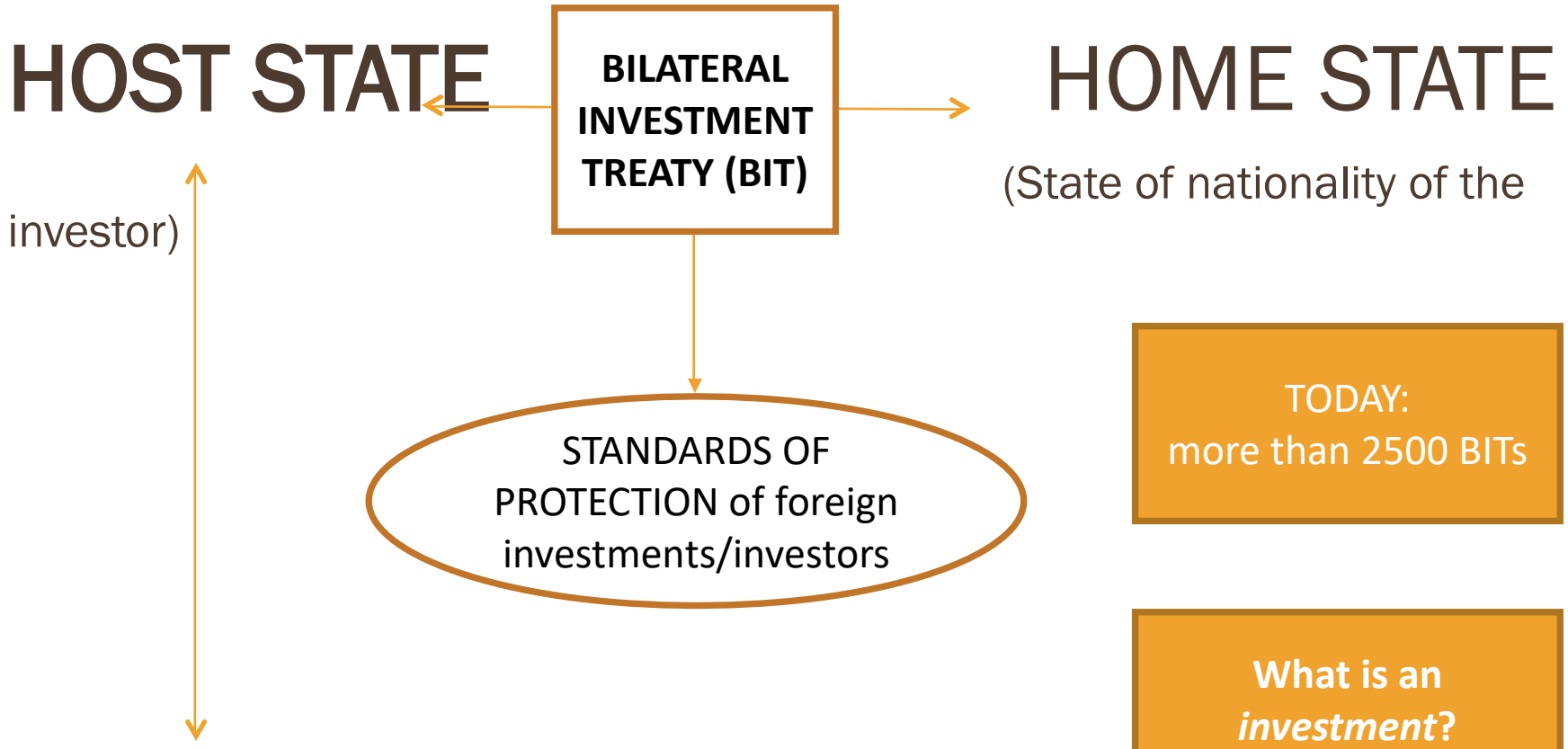
Competence over FDI: what we are talking about?

- **Understanding the regulation of FDI under international law**

- Which are the sources of international investment law?

- Which are the main actors in international investment law? In particular, who is a foreign investor?
- What is a foreign investment and which activities are covered by the notion of investment?

- Which are the main standards of protection of foreign investment?



TODAY:
more than 2500 BITs

What is an *investment*?
- Financial contribution
- Certain duration
-Risk

- NATURAL PERSON
- JURIDICAL PERSONS (MNEs)

Sources of international investment law

- **Treaty-law**
  - *Bilateral investment treaties (BITs)*
  - *Free trade agreements with investment provisions or instruments*
  - *Sectorial agreements (Energy Charter Treaty)*

International investment agreements [IIAs]

- **Customary international law rules**
  - *General standards of protection of foreign investor/investment*

- **Soft-law instruments**
  - *Corporate Social Responsibility*
  - *[public interests] human rights / environmental concerns*

Investment arbitration case-law

Interface between national and international FDI policies

- 20 years ago or more, many countries had reservations about FDI and excluded or restricted FDI inflow

- Today, every single country seeks to attract FDI

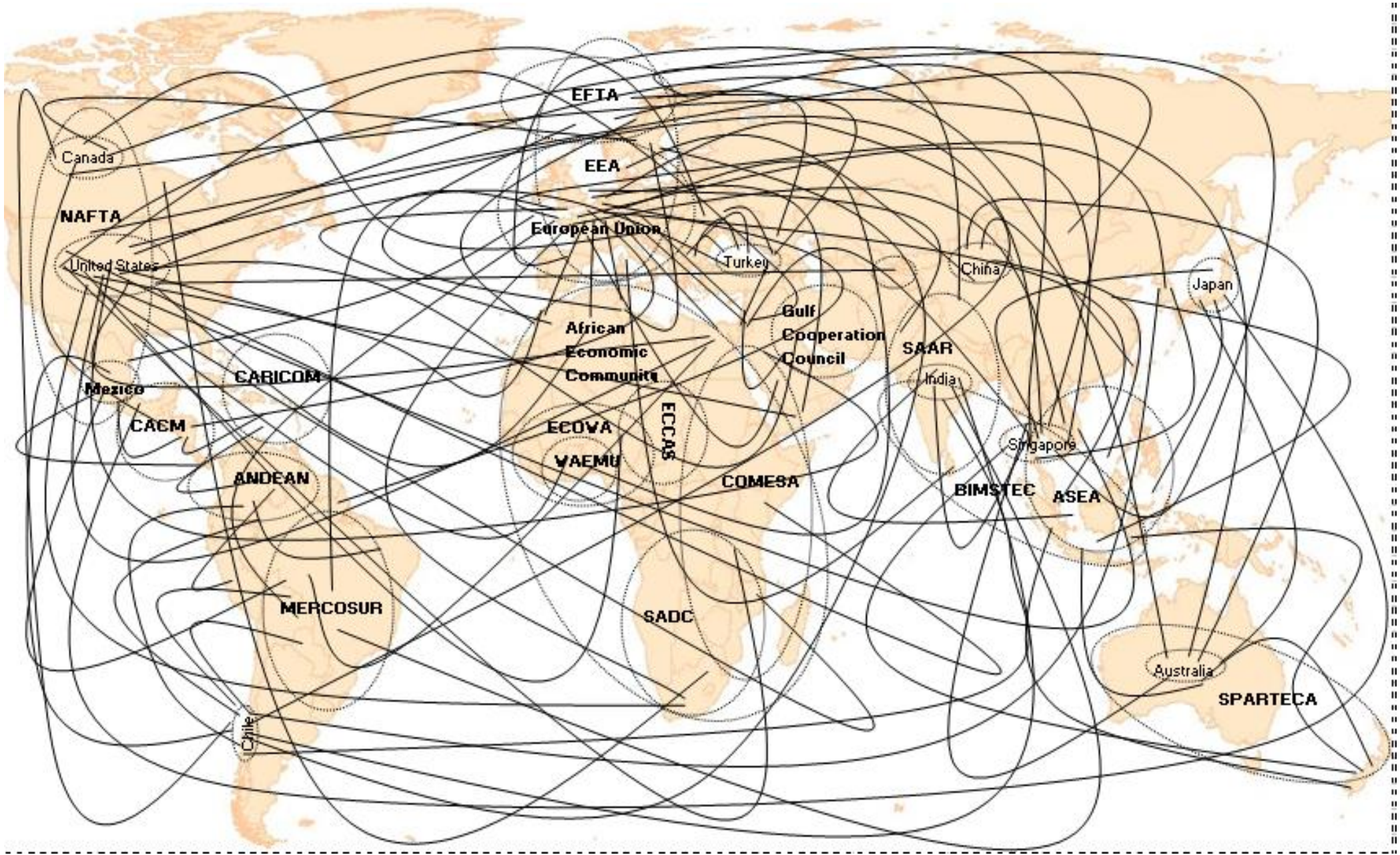
- Unilateral efforts in FDI liberalization and promotion are complemented by efforts at 3 levels:
  - *bilateral - eg. BITs, FTAs*
  - *regional – eg. NAFTA*
  - *multilateral – eg. GATS, TRIMs*

- IIAs have different purposes or objectives:
  - *investment protection*
  - *Investment promotion*
  - *Investment liberalisation.*

BITs

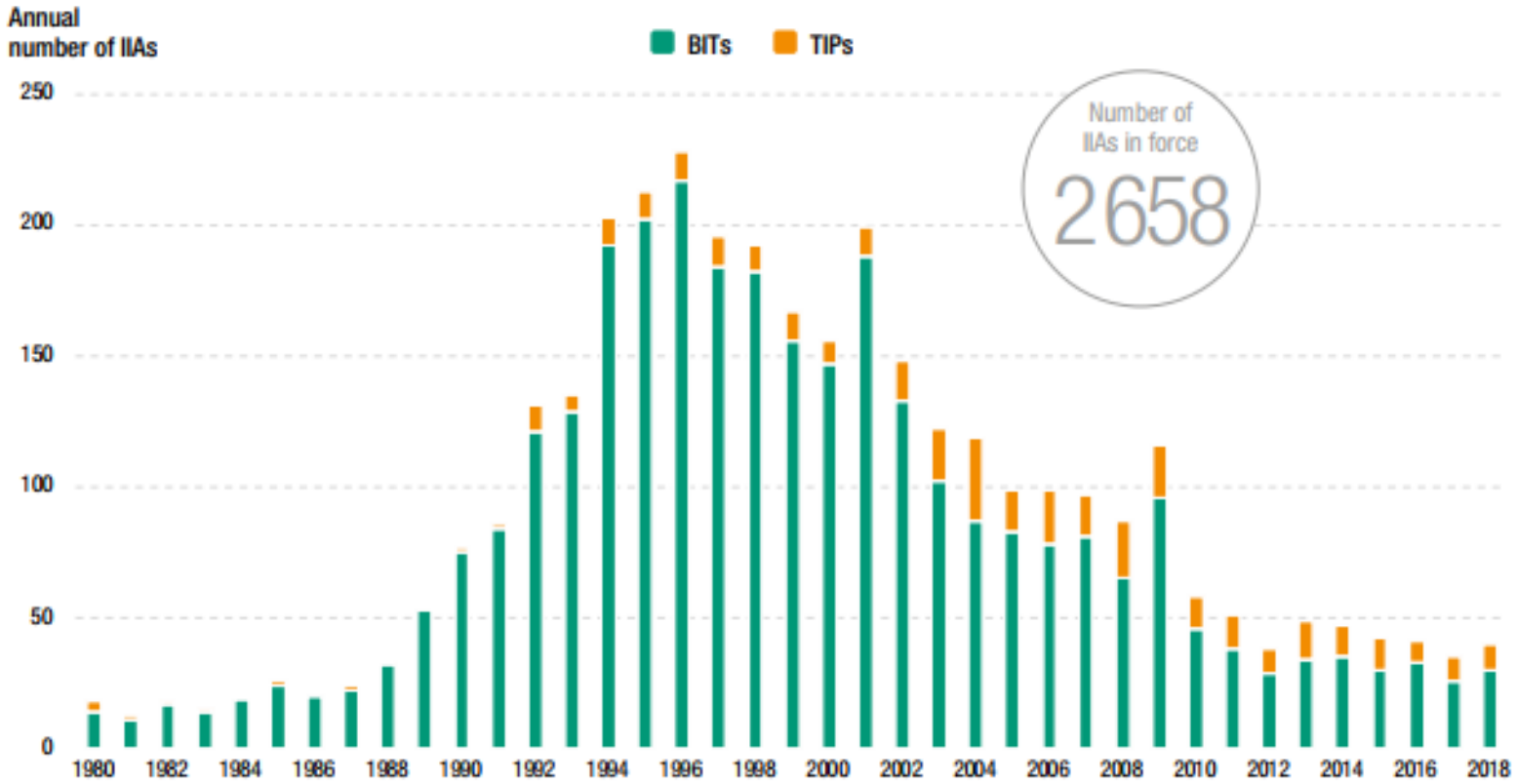
- Proliferation of BITs since the 1990s
- Rationale is international protection for foreign investors and to facilitate the flow of capitals between countries (typically a capital-exporting and a capital importing country)

The *spaghetti bowl* of IIAs

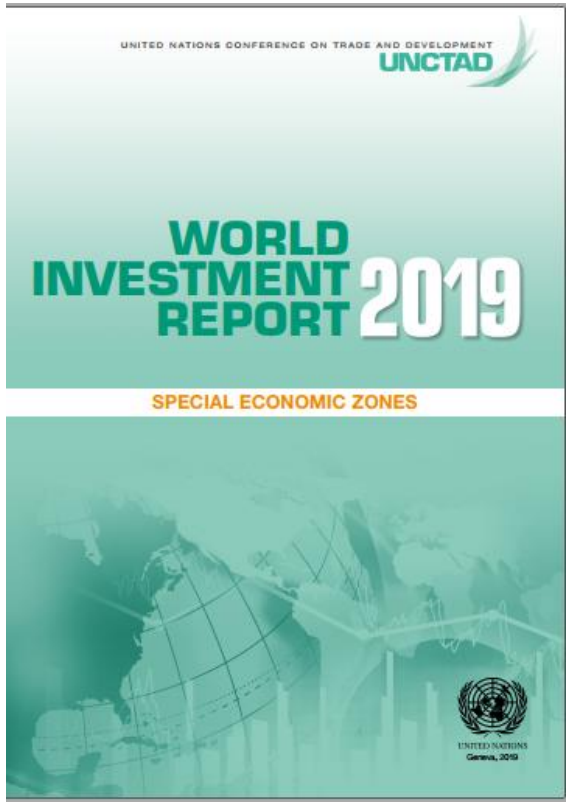


Network of IIAs

Figure III.7. | Number of IIAs signed, 1980–2018

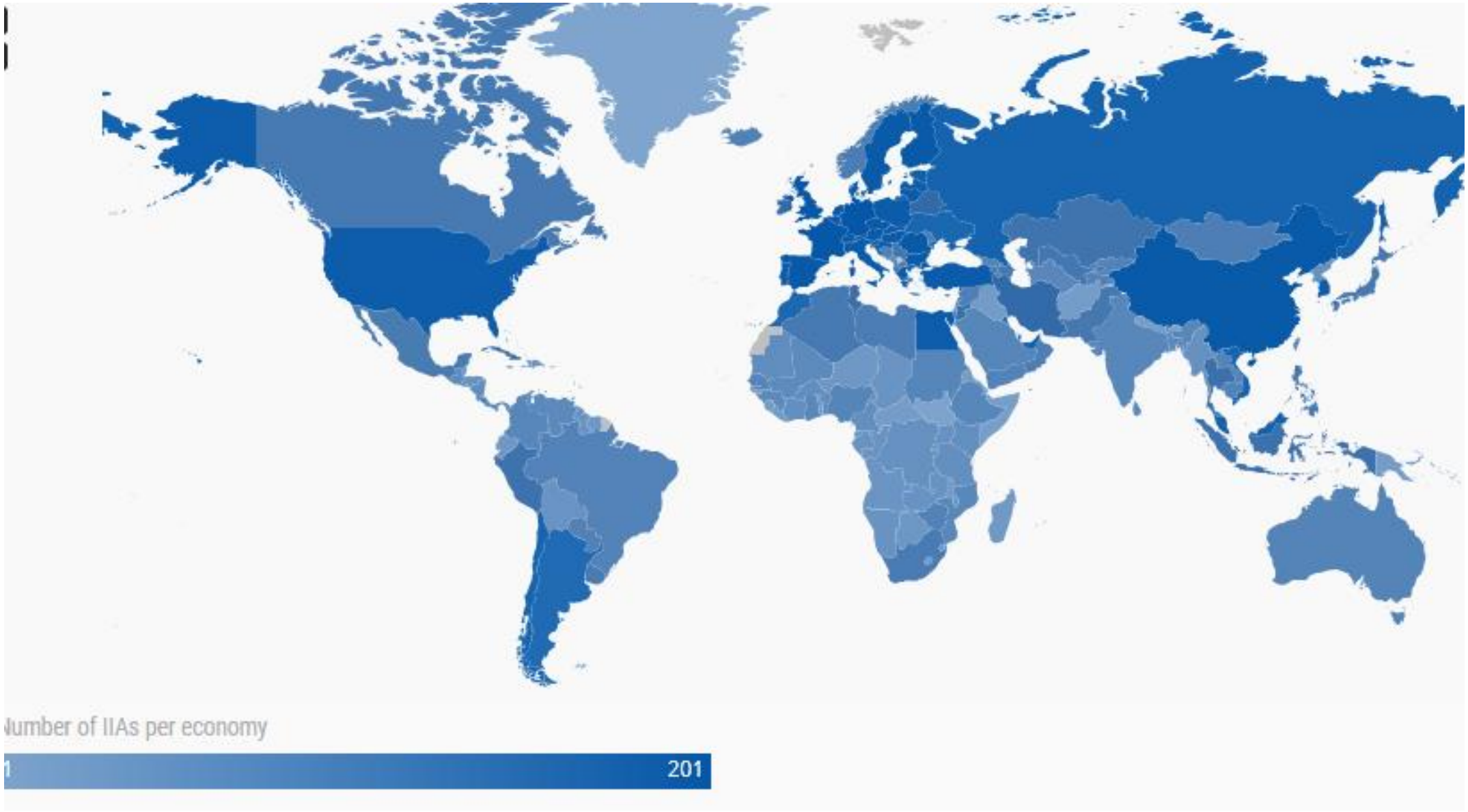


Source: UNCTAD, IIA Navigator.



Bilateral investment treaties (BITs) and Treaties with investment provisions (TIPs)

MAP OF IIAs (UNCTAD)



IIAs: Regional arrangements

- EU (after Lisbon competence to negotiate and conclude BITs with third countries)
- NAFTA (US/Canada/Mexico with investor-State dispute settlement mechanism)
- ASEAN (investment treaty among 10 south-east Asian countries, not including China)
- MERCOSUR (Brazil, Uruguay, Paraguay, Argentina, Venezuela with investment protocol)

NAFTA (1994)
NORTH AMERICAN FREE TRADE AGREEMENT
CHAPTER XI – INVESTMENT PROTECTION

NAFTA
NORTH AMERICAN FREE TRADE AGREEMENT

CBC | MENU

COVID-19 Local updates Live broadcast COVID-19 tra

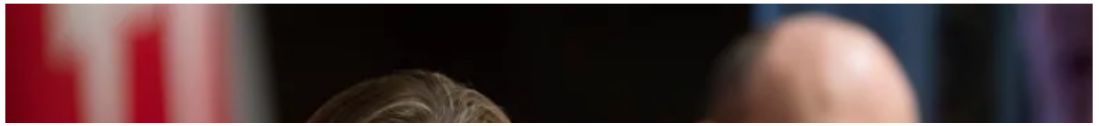
news Top Stories Local The National Poli

Politics

Canada notifies U.S. and Mexico it has ratified revised NAFTA

Reworked trade deal could take effect as early as July 1 if U.S., Mexico signal their readiness this month

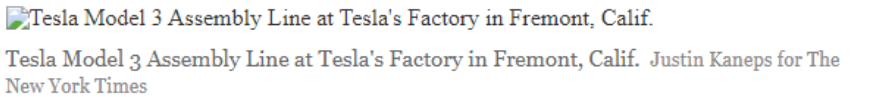
Janyce McGregor · CBC News · Posted: Apr 03, 2020 9:58 AM ET | Last Updated: April 4



The New York Times

Trump Just Signed the U.S.M.C.A. Here's What's in the New NAFTA.

A trade agreement with Mexico and Canada revises Mexico's labor laws and encourages more auto production in North America.



Tesla Model 3 Assembly Line at Tesla's Factory in Fremont, Calif.

Tesla Model 3 Assembly Line at Tesla's Factory in Fremont, Calif. Justin Kaneps for The New York Times


By Ana Swanson and Jim Tankersley

Jan. 29, 2020

194

WASHINGTON — President Trump signed the revised North

DR-CAFTA (2004)
DOMINICAN REPUBLIC – CENTRAL AMERICA FREE TRADE AGREEMENT
CHAPTER X – INVESTMENT PROTECTION

DOMINICAN REPUBLIC
USA
COSTA RICA
EL SALVADOR
GUATEMALA
HONDURAS
NICARAGUA

ASEAN (1967)
Association of Southeast Asian Nations

2012 ASEAN Comprehensive Investment Agreement (ACIA)

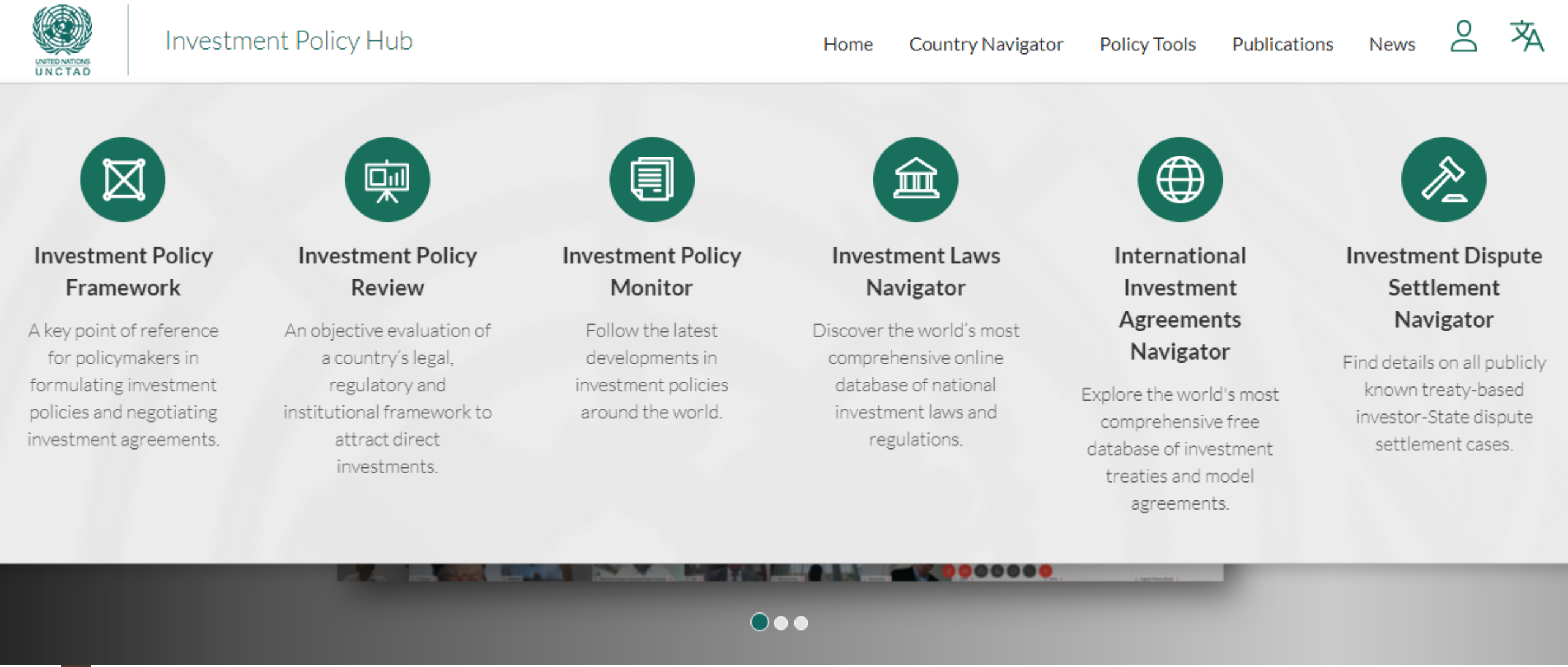
MERCOSUR (1991)
Mercado Común del Sur - Mercado Comum do Sul
- Southern Common Market

1994 Colonia Protocol for the Reciprocal Promotion and Protection of Mercosur Investments

Energy Charter Treaty (1994)

- It covers the Euro-Asian region (51 parties)
- Trade + investments in the energy sector
- Dispute settlement mechanim

HTTPS://INVESTMENTPOLICY.UNCTAD.ORG/



International Investment Agreements Navigator

Select country

Bilateral Investment Treaties (BITs)

Total: 2898
Total in force: 2339

Treaties with Investment Provisions (TIPs)

Total: 390
Total in force: 319

Mapping of IIA Content | Advanced Search

Most recent IIAs | IIAs by Economy | IIAs by Country Grouping | Model Agreements

Most recent IIAs

Display options

NO.	SHORT TITLE	STATUS	PARTIES	DATE OF SIGNATURE	DATE OF ENTRY INTO FORCE	TEXT
1	Brazil - India BIT (2020)	Signed (not in force)	Brazil, India	25/01/2020		Full text: en | pt
2	Japan - Morocco BIT (2020)	Signed (not in force)	Japan, Morocco	08/01/2020		Full text: en

What is an *investment*? The s.c. *Salini Test*

"The doctrine generally considers that investment infers: contributions, a certain duration of performance of the contract and participation in the risks of the transaction [...]. In reading the Convention's preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition. In reality, these various elements may be interdependent. Thus, the risks of the transaction may depend on the contributions and duration of performance of the contract [...]"

(*Salini Costruttori SpA and Italstrade SpA v. Morocco,* ICSID Case No. ARB/00/4, *Decision on Jurisdiction, 16 July 2001)*

What is an *investment*?

A) **Financial contribution (broad).** 'Contribution' is a generic term which includes financial investments, loans, assets, services, in other words EVERY COST, IN EVERY FORM, BORN BY A PARTY FOR AN ECONOMIC PURPOSE

B) **Certain duration (restricting the def.).** A sale or a contract with no effect after the single operation is not an investment. An investment implies a certain duration

C) **Risk.** The meaning of *risk* is clear: every operation which entails an element of uncertainty

D) some awards have added a fourth element (see *Joy Mining* and *Patrick Mitchell* cases), namely "**the regularity of profit and contribution to development for the foreign country**"

Who is the ‘investor’ under IIL ?

- Definition of ‘investor’ may be included in BITs or other investment agreements

- Netherlands - Argentina BIT (1994) , Article 1:
  - *For the purposes of the present Agreement […] (b) the term "investor" shall comprise with regard to either Contracting Party: i. natural persons having the nationality of that Contracting Party in accordance with its law; ii. […] legal persons constituted under the law of that Contracting Party and actually doing business under the laws in force in any part of the territory of that Contracting Party in which a place of effective management is situated; and iii. legal persons, wherever located, controlled, directly or indirectly, by nationals of that Contracting Party. […]*

- NAFTA, Article 1139. Definitions
  - *For purposes of this Chapter […] investor of a Party means a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment*

- Investors as natural persons

- Hussein Nuaman Soufraki v The United Arab Emirates, ICSID Case ARB/02/7, Award, 7 July 2004:
  - *“55. It is accepted in international law that nationality is within the domestic jurisdiction of the State, which settles, by its own legislation, the rules relating to the acquisition (and loss) of its nationality […].”*

- Investors as juridical persons: which nationality?

  - *Place of incorporation test and effective control test*

- Shareholders as investors

How to determine the (trans)nationality of a company?

The issue of group of companies and multinational enterprises

Tokios Tokelės v. Ukraine (ICSID Case No. ARB/02/18)

- Some Ukrainians established a company in Lithuania.
- They invest in Ukraine through this company.

- Question: are they protected by the Lithuania-Ukraine BIT?

  - *YES, the company is Lithuanian, so the 'foreign requirement' is satisfied*

  - *NO, they are not protected, since if we look at the nationality of the owners of the company we can easily say they are Ukrainian citizens investing in Ukraine. Thefore, the 'foreign requirement' is missing.*

Lithuania-Ukraine BIT

[https://investmentpolicyhubold.unctad.org/IIA/CountryBits/219#iiaInnerMenu]

ARTICLE 1. DEFINITIONS

For the purposes of this Agreement: [...]

2. Investor" means:

a. in respect of the Republic of Lithuania: -natural persons who are nationals of the Republic of Lithuania according to Lithuanian laws; any entity established in the territory of the Republic of Lithuania in conformity with its laws and regulations;

b. in respect of Ukraine: natural person who are nationals of the Ukraine according to Ukrainian laws; any entity established in the territory of the Ukraine in conformity with its laws and regulations;

c. in respect of either Contracting Party: any entity or organization established under the law of any third State which is, directly or indirectly, controlled by nationals of that Contracting Party or by entities having their seat in the territory of that Contracting Party; it being understood that control requires a substantial part in the ownership.

No. 47992

Lithuania
and
Ukraine

Agreement between the Government of the Republic of Lithuania and the Government of Ukraine for the promotion and reciprocal protection of investments. Vilnius, 8 February 1994

Entry into force: *6 March 1995 by notification, in accordance with article 12*

Authentic texts: *English, Lithuanian and Ukrainian*

Registration with the Secretariat of the United Nations: *Lithuania, 30 November 2010*

Lituanie
et
Ukraine

Accord entre le Gouvernement de la République de Lituanie et le Gouvernement de la République d'Ukraine relatif à la promotion et à la protection réciproque des investissements. Vilnius, 8 février 1994

Entrée en vigueur : *6 mars 1995 par notification, conformément à l'article 12*

Textes authentiques : *anglais, lituanien et ukrainien*

Enregistrement auprès du Secrétariat des Nations Unies : *Lituanie, 30 novembre 2010*

Ukraine’s arguments

- Ukraine does not question that the claimant is legally established under the Lithuanian laws

- Ukraine argues, however, that "the Claimant is not a "genuine entity"of Lithuania“, since:
  - *it is owned and controlled for the most part by Ukrainian citizens (99%)*
  - *2/3 of its management is Ukrainian*
  - *Tokios Tokeles has no business in Lithuania*
  - *Tokios Tokeles is an Ukrainian investor established in Lithuania, not a Lithuanian company investing in Ukraine*

The decision

- According to the arbitral tribunal**, Tokio Tokelés is a Lithuanian investor** under art. 1(2)(b) of the Lithuania-Ukraine BIT since:
  - *It is an "entity established in the territory of the Republic of Lithuania in conformity with its laws and regulations."*

- This approach is **consistent with contemporary practice of BITs**
  - *"We find no basis in the BIT [...] to set aside the Contracting Parties' agreed definition of corporate nationality with respect to investors of either party in favor of a test based on the nationality of the controlling shareholders. While some tribunals have taken a distinctive approach, we do not believe that arbitrators should read in to BITs limitations not found in the text nor evident from negotiating history sources".*

Standards of treatment of FDI under international law

1. *FAIR & EQUITABLE TREATMENT*
2. *FULL PROTECTION & SECURITY*
3. *INTERNATIONAL MINIMUM STANDARD*
4. *NATIONAL TREATMENT*
5. *MOST-FAVORED-NATION (MFN) TREATMENT*

1- FAIR & EQUITABLE TREATMENT

Netherlands - Argentina BIT (1994)

Article 3

1) Each Contracting Party shall ensure fair and equitable treatment to investments of investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors [...]

2- FULL PROTECTION & SECURITY

- Germany - Argentina BIT (1991)
  - *Article 4*

  Las inversiones de nacionales o sociedades de una de las Partes Contratantes gozaràn de plena protecciòn y seguridad jurìdica en el territorio de la otra Parte Contratante.

- Asian Agricultural Products Ltd (AAPL) v Sri Lanka, ICSID Case ARB/87/3, Final Award, 27 June 1990
  - *"47. […T]he words 'shall enjoy full protection and security' have to be construed according to the 'common use which custom has affixed' to them […]. In fact, similar expressions, or even stringer wordings like the 'most constant protection', were utilized since last century in a number of bilateral treaties concluded to encourage the flow of international economic exchanges and to provide the citizens and national companies established on the territory of the other Contracting Party with adequate treatment to them as well as to their property […]».*

3- INTERNATIONAL MINIMUM STANDARD

- Argentina - US BIT (1991)
  - *Article II*

  2. a) Investment shall [...] in no case be accorded treatment less than that required by international law.

- NAFTA
  - *Article 1105. Minimum Standard of Treatment*

  1. Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security [...]
- *NAFTA Free Trade Commission, Notes of Interpretation (31 July 2001)*
  - *"The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens"*

4 - NATIONAL TREATMENT

- US Model BIT (2012)
  - *Article 3. National Treatment*

  1. Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to its own investors […]

- *Pope & Talbot Inc v Canada, NAFTA Case, Award on the Merits of Phase 2, 10 April 2001*
  - *"75. The Tribunal must resolve this dispute by defining the meaning of "like circumstances." […] the meaning of the term will vary according to the facts of a given case. By their very nature, "circumstances" are context dependent and have no unalterable meaning across the spectrum of fact situations. And the concept of "like" can have a range of meanings, from "similar" all the way to "identical". In other words, the application of the like circumstances standard will require evaluation of the entire fact s […]".*

5- MOST-FAVORED-NATION (MFN) TREATMENT

ILC, Most-Favoured-Nation Clause, Report of the Working Group, 20 July 2007

"[…] A MFN clause is a provision […] under which a State agrees to accord to the other contracting partner treatment that is no less favourable than that which it accords to other or third States. […]»

EXPROPRIATION

- Requirements of legitimacy

  1) *Must be expressly provided by law*
  2) *Measures adopted for 'public utility'*
  3) *Non-discriminatory measures*
  4) *Compensation (fair compensation)*
     - cd. Hull Formula (*Diplomatic note by the US Secretary of State Cordell Hull - 1938*): "no government is entitled to expropriate private property, for whatever purpose, without provision for **prompt, adequate** and **effective payment** therefore."

- Direct or indirect (or creeping) expropriation

Indirect or 'creeping' expropriation

SD Myers Inc v Canada, NAFTA/UNCITRAL Case, Partial Award, 13 November 2000

"283. An expropriation usually amounts to a lasting removal of the ability of an owner to make use of its economic rights although it may be that, in some contexts and circumstances, it would be appropriate to view a deprivation as amounting to an expropriation, even if it were partial or temporary."

FDI and dispute settlement mechanisms

- PUBLIC INTERNATIONAL LAW

- A. Settlement of disputes through diplomacy

- B. Settlement of disputes before international tribunals or through arbitration
  - An international tribunal (e.g., ICJ, ITLOS).
  - A dispute resolution panel (e.g., WTO).
  - Arbitration
    - PCA
    - Ad hoc arbitration

HOST STATE ⟷ *HOME STATE*

State-to-State arbitration

- State-investor arbitration
- Investor-State arbitration

FOREIGN INVESTOR

Sources of international investment law

- **Treaty-law**
  - *Bilateral investment treaties (BITs)*
  - *Free trade agreements with investment provisions or instruments*
  - *Sectorial agreements (Energy Charter Treaty)*

International investment agreements [IIAs]

- **Customary international law rules**
  - *General standards of protection of foreign investor/investment*

- **Soft-law instruments**
  - *Corporate Social Responsibility*
  - *[public interests] human rights / environmental concerns*

Investment arbitration case-law

https://www.youtube.com/watch?v=ZkytJEt9BDs

INVESTOR-STATE/ STATE-INVESTOR DISPUTE SETTLEMENT

- Public contracts' jurisdictional clauses
  - *Contract claims*

- Treaty-based jurisdictional clauses
  - *Treaty claims*

Treaty-based jurisdictional clauses

E.g. Netherlands - Argentina BIT (1994), Article 10

The structure of a jurisdictional clause

- Attempt to solve the dispute in an amicable way
- Investment arbitration: WHICH kind of arbitration
  - *ICSID arbitral tribunal*
  - *Ad hoc arbitral tribunal*
    - UNCTRAL Arbitration Rules (2010)
    - International Chamber of Commerce, London Court of International Arbitration, Arbitration Institute of the Stockholm Chamber of Commerce, etc

Netherlands - Argentina BIT (1994)
Article 10

1) **Disputes between one Contracting Party and an investor of the other Contracting Party** regarding issues covered by this agreement **shall, if possible, be settled amicably.**

2) If such disputes cannot be settled according to the provisions of paragraph (1) of this article within a period of three months from the date on which either party to the dispute requested amicable settlement, **either party may submit the dispute to the administrative or judicial organs of the Contracting Party in the territory of which the investment has been made.**

3) **If within a period of 18months** from submissions of the dispute to the competent organs mentioned in paragraph (2) above, **these organs have not given a final decision or if the decision of the aforementioned organs has been given but the parties are still in dispute, then the investor concerned may resort to international arbitration or conciliation.** Each Contracting Party hereby consents to the submission of a dispute as referred to in paragraph (1) of this Article to international arbitration 4) [...]

5) Where the dispute is referred to international arbitration or conciliation, the **investor concerned may submit the dispute either to**:

(a) **The [...] I.C.S.I.D.** [...], once both Contracting Parties have become a party to the Convention [...]

(b) **An ad hoc arbitration tribunal to be established under the arbitration rules of the United Nations Commission on International Trade Law.** [UNCITRAL] [...]

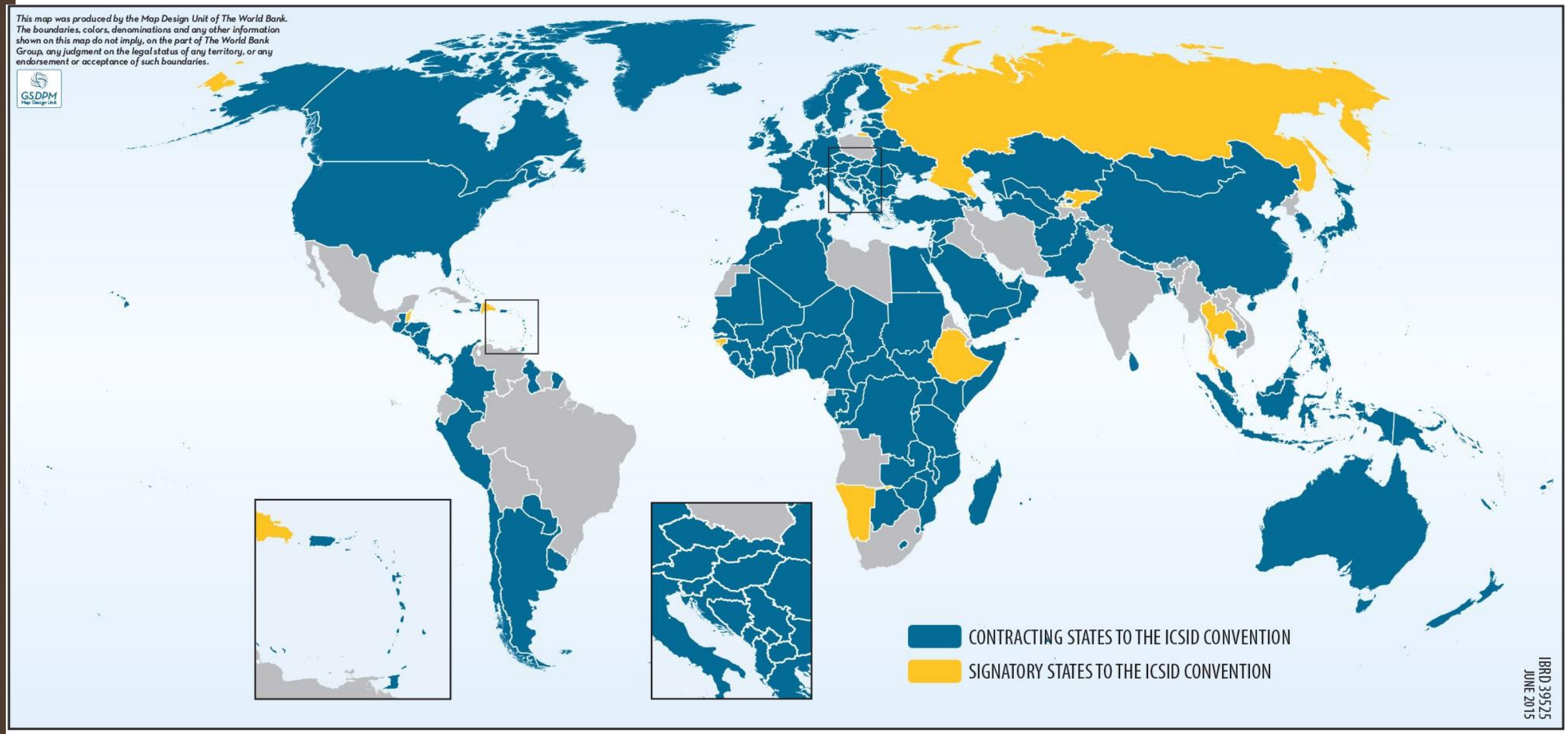
ICSID system

- Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965
  - *ICSID Convention*
  - *Washington Convention*

- Entered into force 14 October 1966
  - *139 members / 154 signatories*

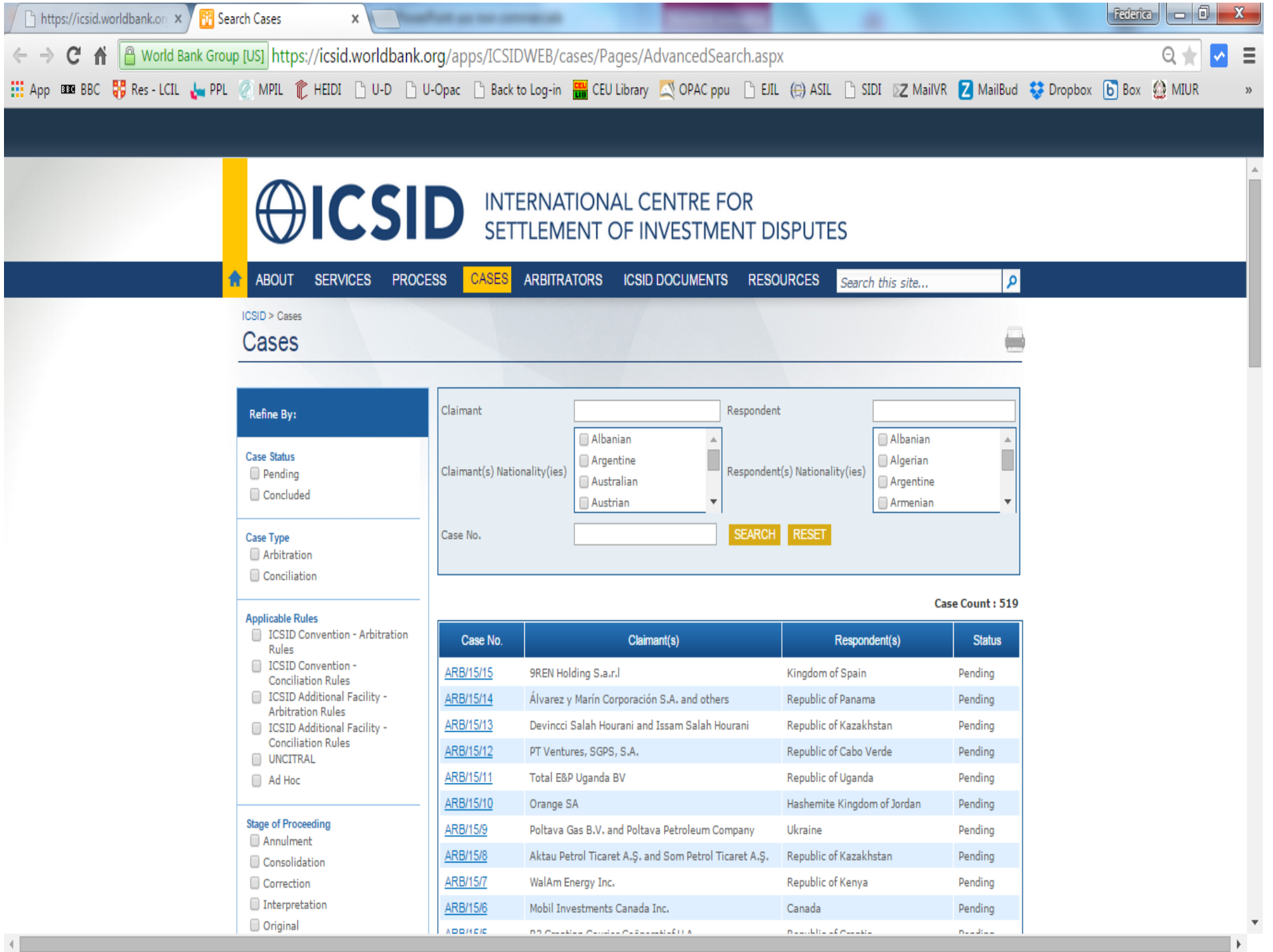
ICSID

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES



- Russian signed the ICSID Convention in 1992 but never ratified it
- Ukraine signed the ICSID Convention in 1998 and ratified it in 2000


Home
Federica
World Bank Group [US] https://icsid.worldbank.org/apps/ICSIDWEB/Pages/default.aspx
App BBC Res - LCIL PPL MPIL HEIDI U-D U-Opac Back to Log-in CEU Library OPAC ppu EJIL ASIL SIDI MailVR MailBud Dropbox Box MIUR
ICSID
INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
ABOUT SERVICES PROCESS CASES ARBITRATORS ICSID DOCUMENTS RESOURCES
Search this site...
CASES
RECENTLY REGISTERED
April 21, 2015
9REN Holding S.a.r.l v. Kingdom of Spain (ICSID Case No. ARB/15/15)
April 20, 2015
Álvarez y Marín Corporación S.A. and others v. Republic of Panama (ICSID Case No. ARB/15/14)
RECENTLY CONSTITUTED
April 24, 2015
Ioan Micula, Viorel Micula and others v. Romania (ICSID Case No. ARB/14/29)
April 7, 2015
Sodexo Pass International SAS v. Hungary (ICSID Case No. ARB/14/20)
RECENTLY PUBLISHED
April 22, 2015 - Elsamex, S.A. v. Republic of Honduras (ICSID Case No. ARB/09/4) Order Taking Note of the Discontinuance of the Proceeding (April 21, 2015)
April 21, 2015 - Spence International Investments et al. v. Republic of Costa Rica (ICSID Case No. UNCT/13/2) Procedural Order No. 1 (February


https://icsid.worldbank.org
Search Cases
Federica
World Bank Group [US] https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/AdvancedSearch.aspx
App BBC Res - LCIL PPL MPIL HEIDI U-D U-Opac Back to Log-in CEU Library OPAC ppu EJIL ASIL SIDI MailVR MailBud Dropbox Box MIUR
ICSID
INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
ABOUT SERVICES PROCESS CASES ARBITRATORS ICSID DOCUMENTS RESOURCES
Search this site...
ICSID > Cases
Cases
Refine By:
Case Status
Pending
Concluded
Case Type
Arbitration
Conciliation
Applicable Rules
ICSID Convention - Arbitration Rules
ICSID Convention - Conciliation Rules
ICSID Additional Facility - Arbitration Rules
ICSID Additional Facility - Conciliation Rules
UNCITRAL
Ad Hoc
Stage of Proceeding
Annulment
Consolidation
Correction
Interpretation
Original
Claimant
Respondent
Claimant(s) Nationality(ies)
Albanian
Argentine
Australian
Austrian
Respondent(s) Nationality(ies)
Albanian
Algerian
Argentine
Armenian
Case No.
SEARCH
RESET
Case Count : 519
Case No. | Claimant(s) | Respondent(s) | Status
ARB/15/15 | 9REN Holding S.a.r.l | Kingdom of Spain | Pending
ARB/15/14 | Álvarez y Marín Corporación S.A. and others | Republic of Panama | Pending
ARB/15/13 | Devincci Salah Hourani and Issam Salah Hourani | Republic of Kazakhstan | Pending
ARB/15/12 | PT Ventures, SGPS, S.A. | Republic of Cabo Verde | Pending
ARB/15/11 | Total E&P Uganda BV | Republic of Uganda | Pending
ARB/15/10 | Orange SA | Hashemite Kingdom of Jordan | Pending
ARB/15/9 | Poltava Gas B.V. and Poltava Petroleum Company | Ukraine | Pending
ARB/15/8 | Aktau Petrol Ticaret A.Ş. and Som Petrol Ticaret A.Ş. | Republic of Kazakhstan | Pending
ARB/15/7 | WalAm Energy Inc. | Republic of Kenya | Pending
ARB/15/6 | Mobil Investments Canada Inc. | Canada | Pending

EU FOREIGN INVESTMENT POLICY

- Before the entry into force of the Lisbon Treaty
  - *freedom of establishment and the free movement of capital*
  - *Intra-MSs BITs and BITs concluded by MSs with third countries*

- Lisbon Treaty: exclusive competence on the CCP covers, among others, FDI

EU common commercial policy

Article 206 TFEU

- “By establishing a customs union [...] the Union shall contribute, in the common interest, to the harmonious development of world trade, the **progressive abolition of restrictions** on **international trade and on foreign direct investment**, and the lowering of customs and other barriers.”

Article 207 TFEU

- 1. The **common commercial policy** shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. **The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.**

The Treaty of Lisbon makes the CCP part of the EU's foreign policy.

Article 207 TFEU

*[…] 2. The **European Parliament and the Council**, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the measures defining the framework for implementing the common commercial policy.*

*3. Where agreements with one or more third countries or international organisations need to be negotiated and concluded […t]he **Commission** shall make recommendations to the Council, which shall authorise it to open the necessary negotiations. The Council and the Commission shall be responsible for ensuring that the agreements negotiated are compatible with internal Union policies and rules. The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it. The Commission shall report regularly to the special committee and to the European Parliament on the progress of negotiations.*

European Commission

- Communication: *Towards a comprehensive European international investment policy* [7 July 2010] COM(2010) 343 final
  - *the EU must develop an international investment policy in order to increase EU competitiveness and contribute to the objectives of smart, sustainable and inclusive growth*

- Articles 206 and 207 TFEU call on the EU to contribute to a harmonious development and liberalization of world trade
- Article 205 TFEU: the common commercial policy should be guided by the general principles of the EU's external action, including promotion of democracy, the rule of law, further the respect of human rights and contribute to sustainable economic, social and environmental development

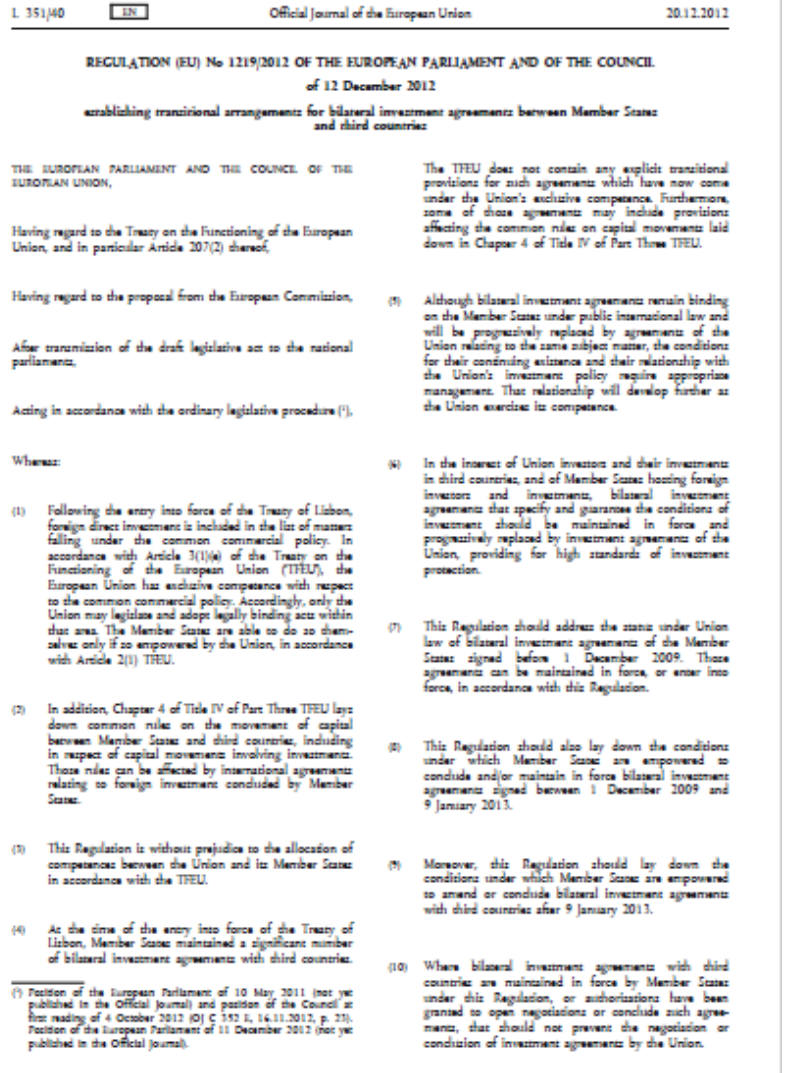
- However, to date, the EU has not defined a clear investment policy.

Regulation No 1219/2012 (1)

Regulation No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries [2012] OJ L 351/40.

It grants legal security to the existing BITs between member States and third countries and allows the European Commission to authorize member States to open formal negotiations with a third country to amend or conclude a BIT.

This means that the almost 1200 BITs concluded by EU member States will be in force until they are replaced by EU agreements.



L 351/40 EN Official Journal of the European Union 20.12.2012

REGULATION (EU) No 1219/2012 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
of 12 December 2012
establishing transitional arrangements for bilateral investment agreements between Member States and third countries

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 207(2) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Acting in accordance with the ordinary legislative procedure (1),

Whereas:

(1) Following the entry into force of the Treaty of Lisbon, foreign direct investment is included in the list of matters falling under the common commercial policy. In accordance with Article 3(1)(e) of the Treaty on the Functioning of the European Union (TFEU), the European Union has exclusive competence with respect to the common commercial policy. Accordingly, only the Union may legislate and adopt legally binding acts within that area. The Member States are able to do so themselves only if so empowered by the Union, in accordance with Article 2(1) TFEU.

(2) In addition, Chapter 4 of Title IV of Part Three TFEU lays down common rules on the movement of capital between Member States and third countries, including in respect of capital movements involving investments. Those rules can be affected by international agreements relating to foreign investment concluded by Member States.

(3) This Regulation is without prejudice to the allocation of competences between the Union and its Member States in accordance with the TFEU.

(4) At the time of the entry into force of the Treaty of Lisbon, Member States maintained a significant number of bilateral investment agreements with third countries. The TFEU does not contain any explicit transitional provisions for such agreements which have now come under the Union's exclusive competence. Furthermore, some of those agreements may include provisions affecting the common rules on capital movements laid down in Chapter 4 of Title IV of Part Three TFEU.

(5) Although bilateral investment agreements remain binding on the Member States under public international law and will be progressively replaced by agreements of the Union relating to the same subject matter, the conditions for their continuing existence and their relationship with the Union's investment policy require appropriate management. That relationship will develop further as the Union exercises its competence.

(6) In the interest of Union investors and their investments in third countries, and of Member States hosting foreign investors and investments, bilateral investment agreements that specify and guarantee the conditions of investment should be maintained in force and progressively replaced by investment agreements of the Union, providing for high standards of investment protection.

(7) This Regulation should address the status under Union law of bilateral investment agreements of the Member States signed before 1 December 2009. Those agreements can be maintained in force, or enter into force, in accordance with this Regulation.

(8) This Regulation should also lay down the conditions under which Member States are empowered to conclude and/or maintain in force bilateral investment agreements signed between 1 December 2009 and 9 January 2013.

(9) Moreover, this Regulation should lay down the conditions under which Member States are empowered to amend or conclude bilateral investment agreements with third countries after 9 January 2013.

(10) Where bilateral investment agreements with third countries are maintained in force by Member States under this Regulation, or authorisations have been granted to open negotiations or conclude such agreements, that should not prevent the negotiation or conclusion of investment agreements by the Union.

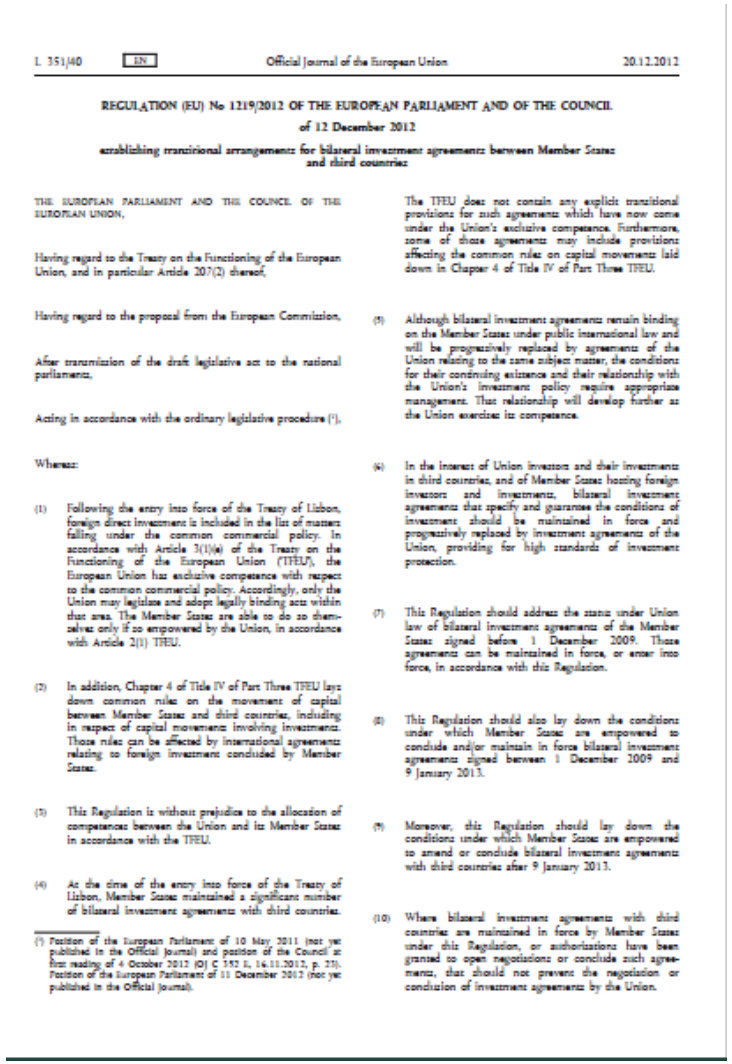
(1) Position of the European Parliament of 10 May 2011 (not yet published in the Official Journal) and position of the Council at first reading of 4 October 2012 (OJ C 351 E, 14.11.2012, p. 23). Position of the European Parliament of 11 December 2012 (not yet published in the Official Journal).

Regulation No 1219/2012 (2)

Conditions for EU members to modify existing agreements and negotiate or conclude new ones.

Those conditions are:

- that the agreement is not in conflict with EU law
- that the agreement is consistent with the EU's principles and objectives for external action
- that the Commission did not submit or decided to submit a recommendation to open negotiations with the non-EU country concerned
- that the agreement does not create a serious obstacle to the EU negotiating or concluding bilateral investment agreements with non-EU countries



L 351/40 EN Official Journal of the European Union 20.12.2012

REGULATION (EU) No 1219/2012 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
of 12 December 2012
establishing transitional arrangements for bilateral investment agreements between Member States and third countries

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 207(2) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Acting in accordance with the ordinary legislative procedure (1),

Whereas:

(1) Following the entry into force of the Treaty of Lisbon, foreign direct investment is included in the list of matters falling under the common commercial policy. In accordance with Article 3(1)(e) of the Treaty on the Functioning of the European Union (TFEU), the European Union has exclusive competence with respect to the common commercial policy. Accordingly, only the Union may legislate and adopt legally binding acts within that area. The Member States are able to do so themselves only if so empowered by the Union, in accordance with Article 2(1) TFEU.

(2) In addition, Chapter 4 of Title IV of Part Three TFEU lays down common rules on the movement of capital between Member States and third countries, including in respect of capital movements involving investments. Those rules can be affected by international agreements relating to foreign investment concluded by Member States.

(3) This Regulation is without prejudice to the allocation of competences between the Union and its Member States in accordance with the TFEU.

(4) At the time of the entry into force of the Treaty of Lisbon, Member States maintained a significant number of bilateral investment agreements with third countries. The TFEU does not contain any explicit transitional provisions for such agreements which have now come under the Union's exclusive competence. Furthermore, some of those agreements may include provisions affecting the common rules on capital movements laid down in Chapter 4 of Title IV of Part Three TFEU.

(5) Although bilateral investment agreements remain binding on the Member States under public international law and will be progressively replaced by agreements of the Union relating to the same subject matter, the conditions for their continuing existence and their relationship with the Union's investment policy require appropriate management. That relationship will develop further as the Union exercises its competence.

(6) In the interest of Union investors and their investments in third countries, and of Member States hosting foreign investors and investments, bilateral investment agreements that specify and guarantee the conditions of investment should be maintained in force and progressively replaced by investment agreements of the Union, providing for high standards of investment protection.

(7) This Regulation should address the status under Union law of bilateral investment agreements of the Member States signed before 1 December 2009. Those agreements can be maintained in force, or enter into force, in accordance with this Regulation.

(8) This Regulation should also lay down the conditions under which Member States are empowered to conclude and/or maintain in force bilateral investment agreements signed between 1 December 2009 and 9 January 2013.

(9) Moreover, this Regulation should lay down the conditions under which Member States are empowered to amend or conclude bilateral investment agreements with third countries after 9 January 2013.

(10) Where bilateral investment agreements with third countries are maintained in force by Member States under this Regulation, or authorisations have been granted to open negotiations or conclude such agreements, that should not prevent the negotiation or conclusion of investment agreements by the Union.

(1) Position of the European Parliament of 10 May 2011 (not yet published in the Official Journal) and position of the Council at first reading of 4 October 2012 (OJ C 353 E, 14.11.2012, p. 23). Position of the European Parliament of 11 December 2012 (not yet published in the Official Journal).

Intra-EU BITs (1)

- The Commission has requested several times that EU member States stop concluding intra-EU BITs and to terminate those already in force.

- On **18 June 2015**, the Commission started infringement proceedings against five member States to terminate intra-EU BITs (Austria, Romania, Sweden, The Netherlands and Slovakia).
  - *April 2016: Austria, Finland, France, Germany and the Netherlands proposed an EU-wide agreement to replace existing intra-EU BITs*
  - *2017: Romania terminated its intra-EU BITs*
  - *2018: The Netherlands announced the intention to terminate its intra-EU BITs*

- On **6 March 2018**, the Court of Justice of the European Union issued its decision in the **Achmea case** (C-284/16) between the Slovak Republic and Dutch insurer Achmea BV.
  - *the CJEU found investor-state dispute settlement provisions in intra-EU BITs to be incompatible with EU law*

Intra-EU BITs (2)

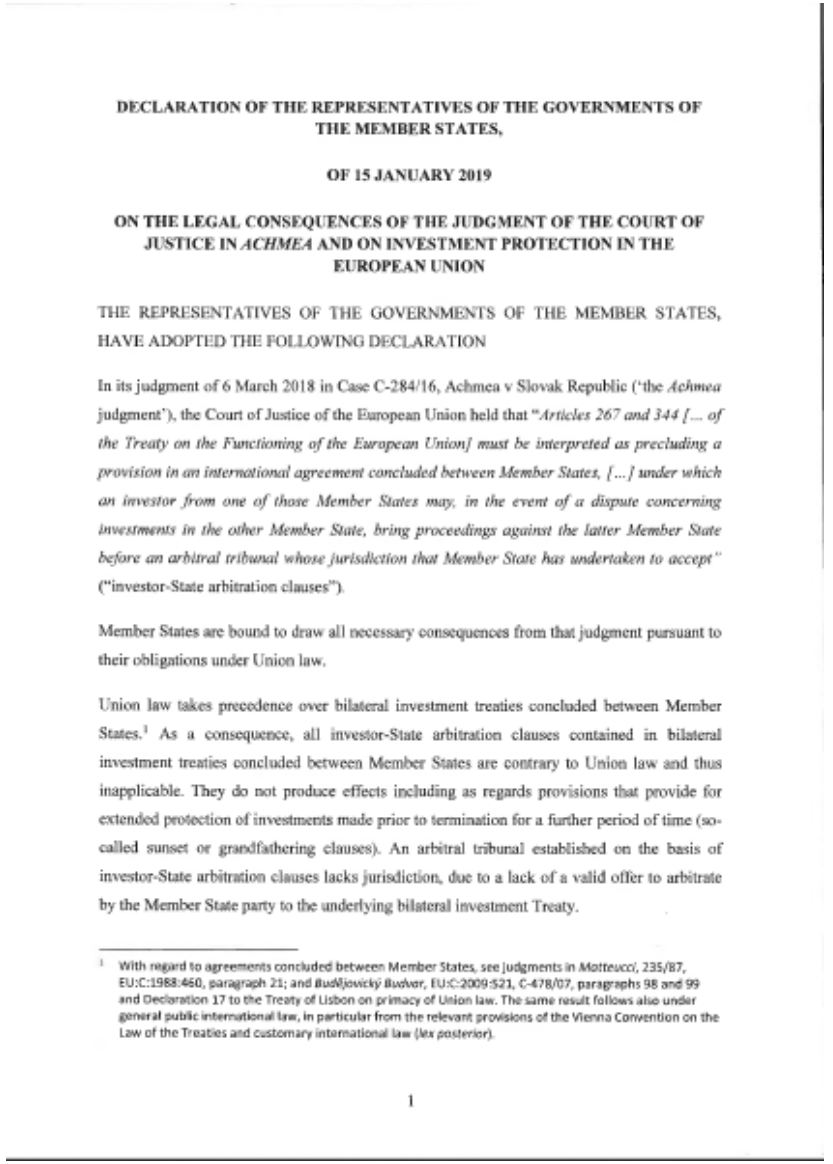
Declarations of EU member states in January 2019

Declaration of the representatives of the governments of the member states on the legal consequences of the judgment of the Court of Justice in Achmea and on investment protection in the European Union

https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/190117-bilateral-investment-treaties_en.pdf

On 24 October 2019, EU member states agreed on a plurilateral treaty for the termination of their intra-EU BITs

https://ec.europa.eu/info/publications/191024-bilateral-investment-treaties_en



DECLARATION OF THE REPRESENTATIVES OF THE GOVERNMENTS OF THE MEMBER STATES,

OF 15 JANUARY 2019

ON THE LEGAL CONSEQUENCES OF THE JUDGMENT OF THE COURT OF JUSTICE IN *ACHMEA* AND ON INVESTMENT PROTECTION IN THE EUROPEAN UNION

THE REPRESENTATIVES OF THE GOVERNMENTS OF THE MEMBER STATES, HAVE ADOPTED THE FOLLOWING DECLARATION

In its judgment of 6 March 2018 in Case C-284/16, Achmea v Slovak Republic ('the *Achmea* judgment'), the Court of Justice of the European Union held that "*Articles 267 and 344 [... of the Treaty on the Functioning of the European Union] must be interpreted as precluding a provision in an international agreement concluded between Member States, [...] under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept*" ("investor-State arbitration clauses").

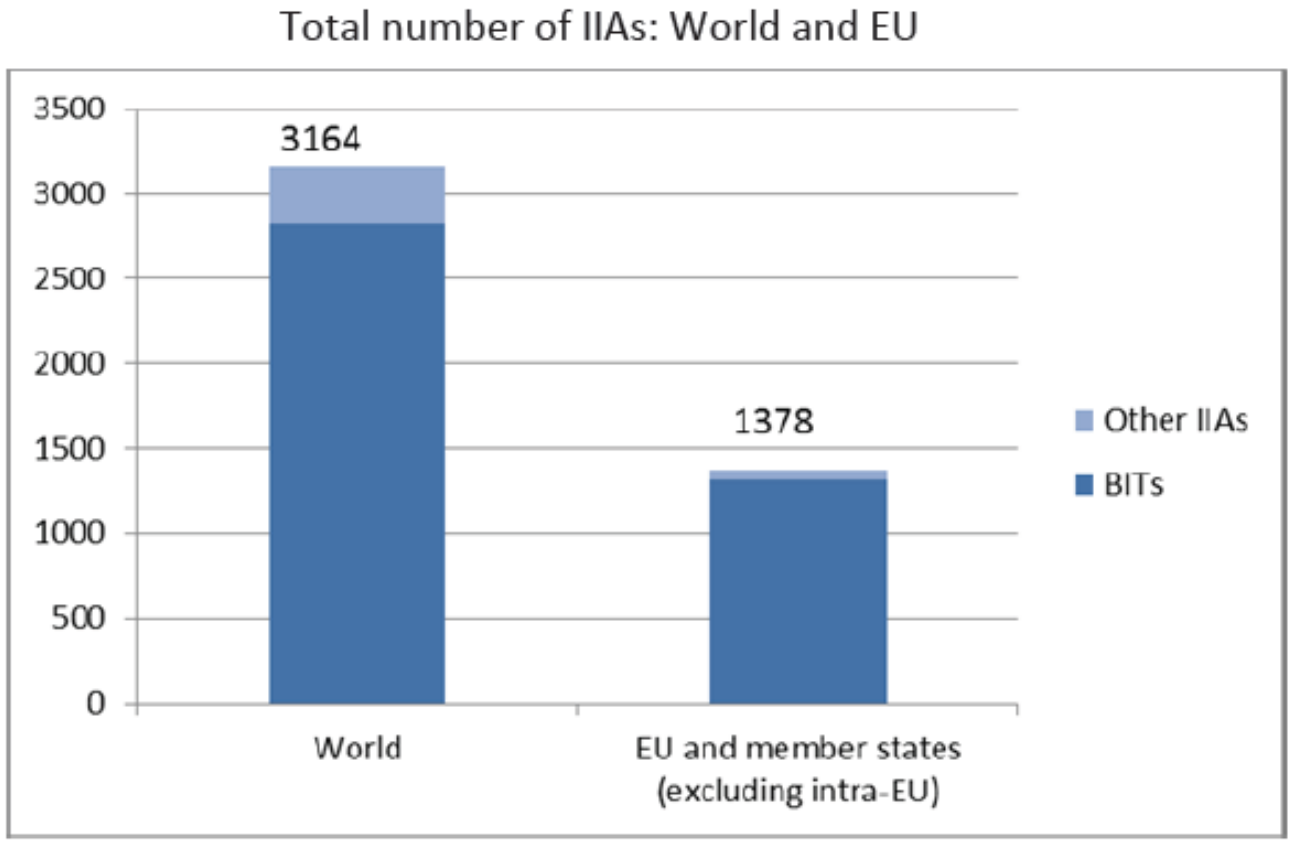
Member States are bound to draw all necessary consequences from that judgment pursuant to their obligations under Union law.

Union law takes precedence over bilateral investment treaties concluded between Member States.[1] As a consequence, all investor-State arbitration clauses contained in bilateral investment treaties concluded between Member States are contrary to Union law and thus inapplicable. They do not produce effects including as regards provisions that provide for extended protection of investments made prior to termination for a further period of time (so-called sunset or grandfathering clauses). An arbitral tribunal established on the basis of investor-State arbitration clauses lacks jurisdiction, due to a lack of a valid offer to arbitrate by the Member State party to the underlying bilateral investment Treaty.

[1] With regard to agreements concluded between Member States, see judgments in *Matteucci*, 235/87, EU:C:1988:460, paragraph 21; and *Budějovický Budvar*, EU:C:2009:521, C-478/07, paragraphs 98 and 99 and Declaration 17 to the Treaty of Lisbon on primacy of Union law. The same result follows also under general public international law, in particular from the relevant provisions of the Vienna Convention on the Law of the Treaties and customary international law (*lex posterior*).

1

EU and its member states are key actors in IIA rulemaking



Source: UNCTAD.

IIAs concluded by EU and its member states make more than 40% of all treaties concluded world-wide.

Addition of FDI to the EU CCP (1)

- The addition of the words "**foreign direct investment**" in Article 207 of the TFEU triggered a debate regarding the scope of the new competence.
- It raised, in particular, questions such as whether **portfolio investments** are also covered by the competence and the concomitant issue of whether the new treaties will be concluded as mixed agreements.

→*FOREIGN DIRECT INVESTMENT: when a firm invests directly in facilities to produce and/or market a product in a foreign country; when a firm buys an existing enterprise in a foreign country (it involves establishing a direct business interest in a foreign country)*

→*PORTFOLIO INVESTMENT: investment in foreign financial instruments (e.g. bonds)*

CJEU - OPINION 2/15 (16 May 2017) [Free Trade Agreement with Singapore]

- ‘foreign direct investment’ term in the TFEU includes both investment liberalization in the pre-establishment phase and substantive investment protection post-establishment

- however, portfolio investment and ISDS are not covered by Article 207(1) TFEU and remained under shared competences

Division of competences:

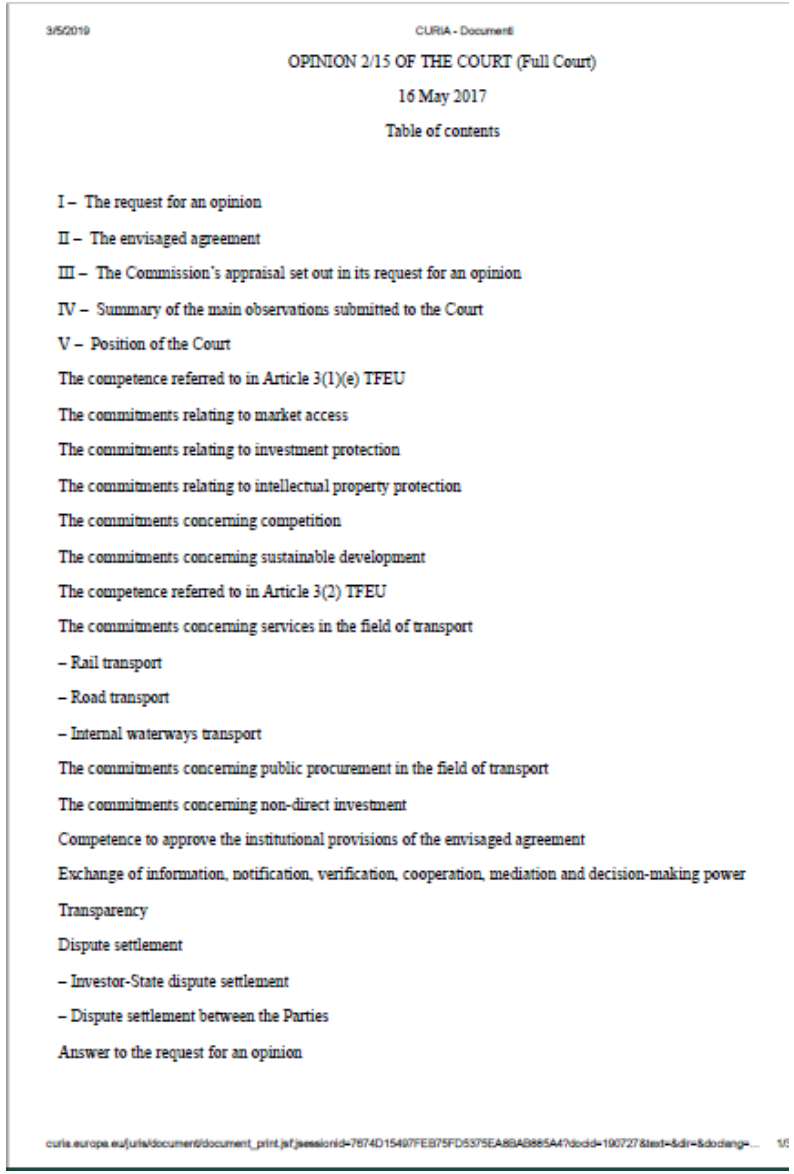
agreements covering both foreign direct and portfolio investments and/or ISDS will be concluded as mixed agreements

agreements covering only FDI will be concluded exclusively by the EU

Practical consequences:

As regards the free trade agreements with Singapore and Vietnam, the investment chapters that were originally part of the respective agreements have been sourced into separate investment agreements in order to keep the trade aspects of the agreements under exclusive Union competence

In either event, the negotiation of such agreements, whether they are mixed or concluded as EU-only agreements, generally lies with the Commission



3/5/2019 CURIA - Document

OPINION 2/15 OF THE COURT (Full Court)

16 May 2017

Table of contents

curia.europa.eu/juris/document/document_print.jsf;jsessionid=7674D15497FEB75FD5375EA8BAB885A4?docid=190727&text=&dir=&doclang=... 1/

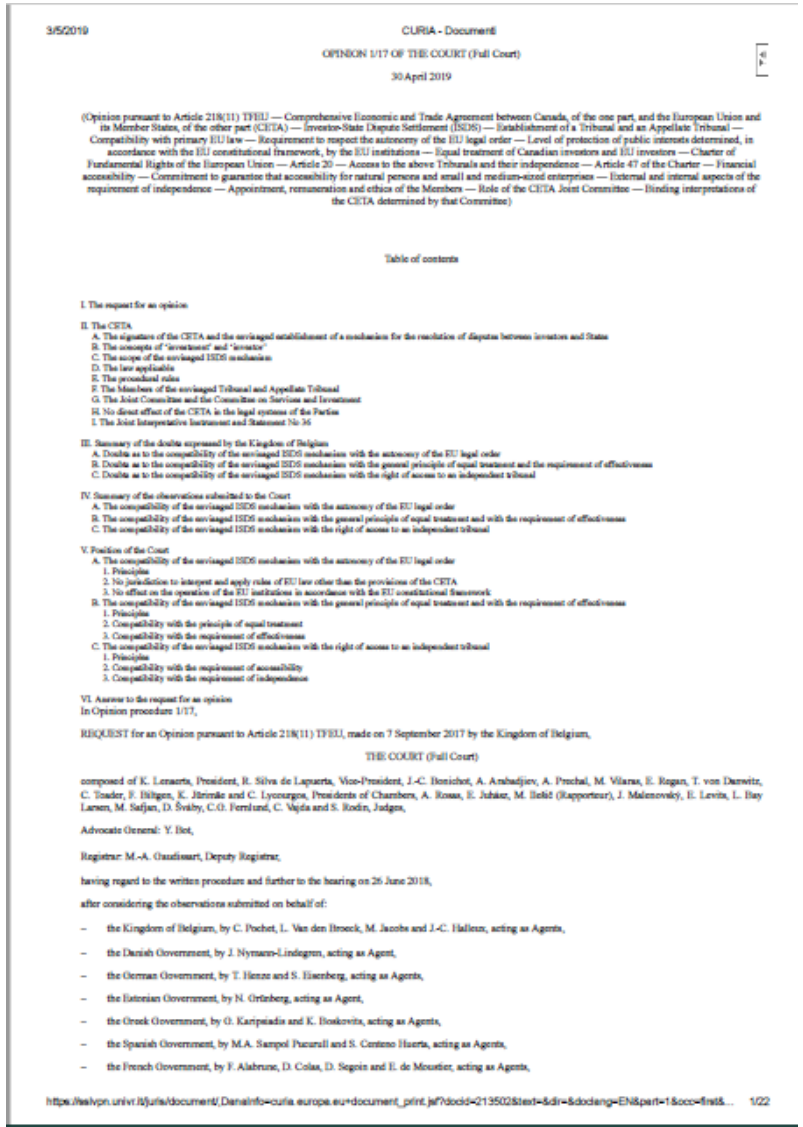
IIAS AND EU LAW: COMPATIBILITY (?)

CJEU - OPINION 1/17 (30 April 2019) [Free Trade Agreement with Canada]

- the investor-state dispute settlement provisions of the Canada-EU's Comprehensive Economic and Trade Agreement ("CETA") are compatible with EU Law

- CETA provides for a new hybrid, two-tier system with a first instance and an appellate tribunal to hear investor-state disputes

- the Court has confirmed that this mechanism is compatible with EU law, as tribunals would not be in a position to apply or interpret EU law (other than those provisions relating to CETA) and thus to affect the autonomy of EU law.



3/5/2019 CURIA - Document

OPINION 1/17 OF THE COURT (Full Court)

30 April 2019

(Opinion pursuant to Article 218(11) TFEU — Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part (CETA) — Investor-State Dispute Settlement (ISDS) — Establishment of a Tribunal and an Appellate Tribunal — Compatibility with primary EU law — Requirement to respect the autonomy of the EU legal order — Level of protection of public interests determined, in accordance with the EU constitutional framework, by the EU institutions — Equal treatment of Canadian investors and EU investors — Charter of Fundamental Rights of the European Union — Article 20 — Access to the above Tribunals and their independence — Article 47 of the Charter — Financial accessibility — Commitment to guarantee that accessibility for natural persons and small and medium-sized enterprises — External and internal aspects of the requirement of independence — Appointment, remuneration and ethics of the Members — Role of the CETA Joint Committee — Binding interpretations of the CETA determined by that Committee)

Table of contents

In Opinion procedure 1/17,

REQUEST for an Opinion pursuant to Article 218(11) TFEU, made on 7 September 2017 by the Kingdom of Belgium,

THE COURT (Full Court)

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, J.-C. Bonichot, A. Arabadjiev, A. Prechal, M. Vilaras, E. Regan, T. von Danwitz, C. Toader, F. Biltgen, K. Jürimäe and C. Lycourgos, Presidents of Chambers, A. Rosas, E. Juhász, M. Ilešič (Rapporteur), J. Malenovský, E. Levits, L. Bay Larsen, M. Safjan, D. Šváby, C.G. Fernlund, C. Vajda and S. Rodin, Judges,

Advocate General: Y. Bot,

Registrar: M.-A. Gaudissart, Deputy Registrar,

having regard to the written procedure and further to the hearing on 26 June 2018,

after considering the observations submitted on behalf of:

– the Kingdom of Belgium, by C. Pochet, L. Van den Broeck, M. Jacobs and J.-C. Halleux, acting as Agents,

– the Danish Government, by J. Nymann-Lindegren, acting as Agent,

– the German Government, by T. Henze and S. Eisenberg, acting as Agents,

– the Estonian Government, by N. Grünberg, acting as Agent,

– the Greek Government, by G. Karipsiadis and K. Boskovits, acting as Agents,

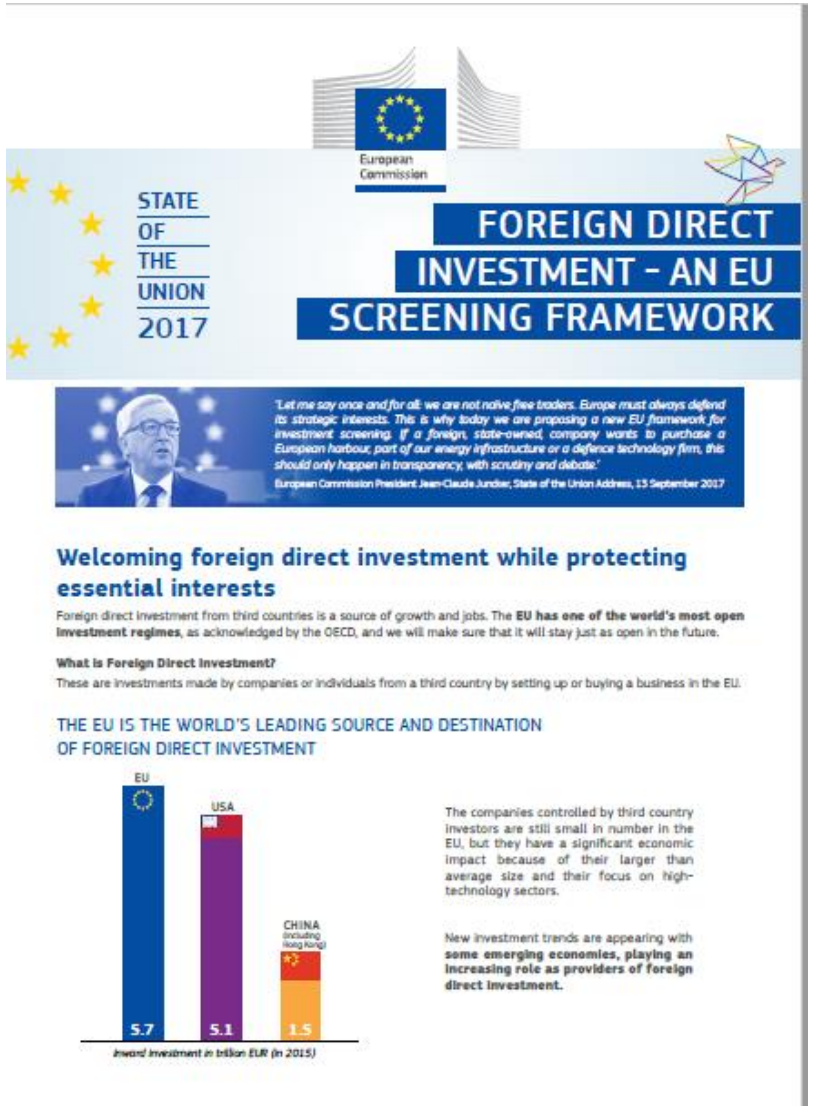
– the Spanish Government, by M.A. Sampol Pucurull and S. Centeno Huerta, acting as Agents,

– the French Government, by F. Alabrune, D. Colas, D. Segoin and E. de Moustier, acting as Agents,

Regulation (EU) 2019/452

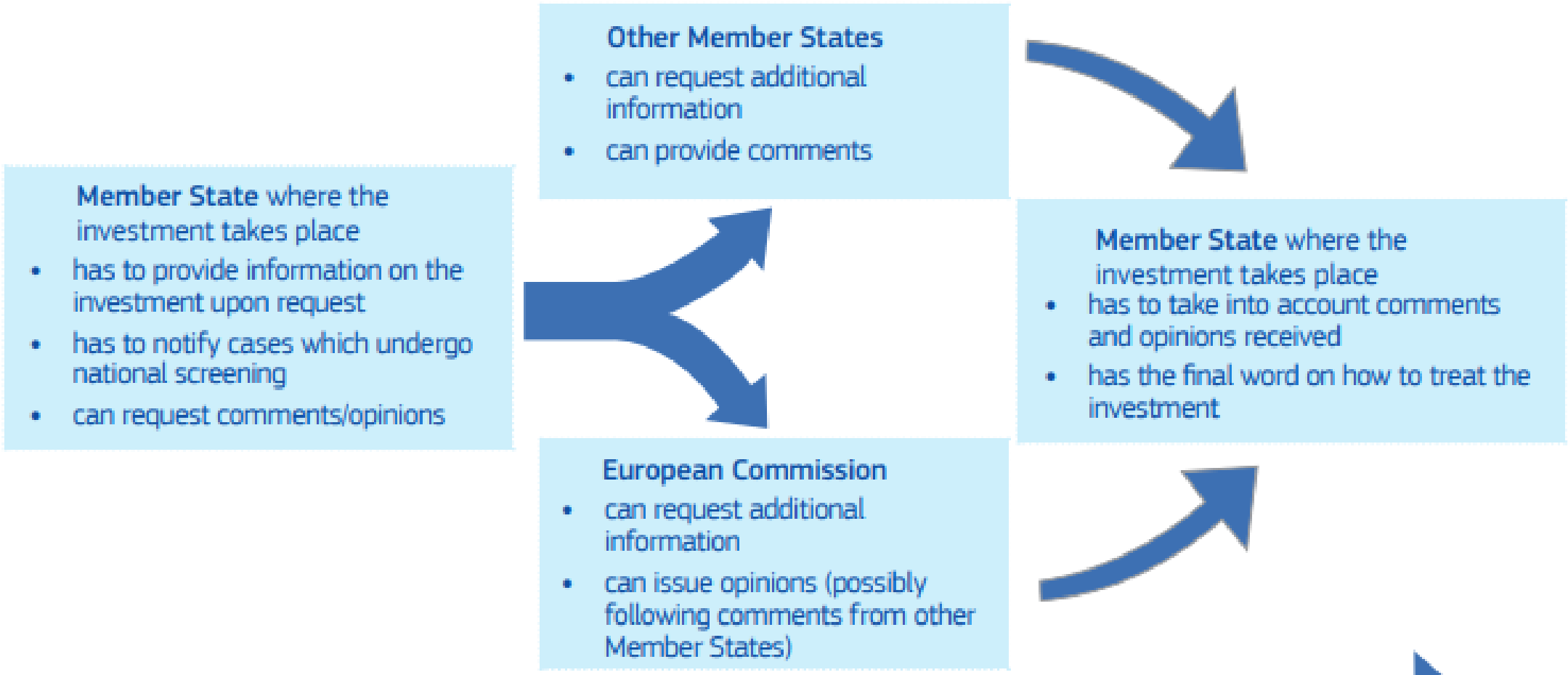
Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for screening of foreign direct investments into the Union

- The Regulation establishes a 'mechanism for cooperation between Member States, and between Member States and the Commission, with regard to foreign direct investments likely to affect security or public order
- The principal instruments of cooperation are mechanisms for notifications and for sharing information on FDI screening among Member States and between Member States and the Commission and the possibility for the Commission to issue non-binding opinions to Member States regarding the screening of concrete FDI projects



EU FRAMEWORK FOR SCREENING INVESTMENTS

Member States and the Commission will, for the first time, have the possibility to cooperate on incoming foreign direct investment affecting security and public order.



WHAT INFORMATION WILL BE EXCHANGED?

- Who is the investor and the target company?
- In which sectors do they operate and where?
- What is the value of the investment and where the funding is coming from?
- When does the transaction take place?

PROJECTS & PROGRAMMES OF UNION INTEREST

- The Regulation lists several EU funded projects and programmes which may be relevant for security and public order, and which will deserve a particular attention from the Commission.
- That list includes for instance Galileo, Horizon 2020, Trans-European Networks and the European Defence Industrial Development Programme. The list will be updated as necessary.

CRITERIA THAT MAY BE TAKEN INTO CONSIDERATION

• The Regulation sets an indicative list of factors to help Member States and the Commission determine whether an investment is likely to affect security or public order. That list includes the effects of the investment on:

- critical infrastructure,
- critical technologies,
- the supply of critical inputs, such as energy or raw materials
- access to sensitive information or the ability to control information, or
- the freedom and pluralism of the media.

https://www.youtube.com/watch?v=lcdbG2Lro_4

Power of EU to conclude international treaties with third countries

- According to Article 47 TEU, the EU has international personality.
  - *In the fields of its competence, it may conclude international agreements which are binding on the institutions and its Member States (Articles 216(2) and 218 TFEU)*

- The EU is already party to one agreement with the possibility for investor-State dispute settlement (the Energy Charter Treaty)

- Other agreements under negotiation (or at the last stages of negotiations or already concluded)
  - *Canada*
  - *Singapore*
  - *China*

The negotiating process

The Commission is the negotiator

- On behalf of the 28 Member States

The Council is the decision maker

- Mandate = determined by the Council on the basis of a Commission proposal
- The Commission negotiates on the basis of this mandate
- The Council approves the result of the negotiation (generally by qualified majority)

The European Parliament

- Is informed by the Commission of trade policy developments

https://www.youtube.com/watch?v=orlSwnr1mxw

European Commission

OVERVIEW OF FTA AND OTHER TRADE NEGOTIATIONS

Updated February 2020 – Updates in red

FTA NEGOTIATIONS

Country	Negotiating Directives	Current Status	Next Steps
NORTH AMERICA			
USA	Negotiating directives obtained in April 2019	The Council of the EU approved two mandates on 15 April 2019 for an agreement on (1) the elimination of tariffs for industrial goods and on (2) conformity assessment.	Further steps to be determined.
CANADA	Negotiating directives obtained in April 2009	The European Commission has adopted on 5 July 2016 draft proposals for Council Decisions on the signature, provisional application and conclusion of the Comprehensive Economic and Trade Agreement (CETA) and submitted this to the Council for adoption. The Council has adopted the CETA proposal on 28 October to allow the signature and the provisional application of CETA. The agreement was signed on 30 October 2016 during the EU Canada bilateral Summit. The European Parliament gave its consent to CETA on 15 February 2017.	On 21 September 2017, the agreement has provisionally entered into force. It will enter into force fully and definitively when all EU Member States parliaments have ratified the Agreement.

		The latest Dialogue on Trade with Belarus one took place in Brussels on 19 December 2019.	
KYRGYZSTAN	College adopted joint recommendations to the Council on 2 June 2017	College authorised the Commission and the HRVP to negotiate a new agreement (Enhanced Partnership Cooperation Agreement) with the Kyrgyz Republic, building on the provisions of the existing PCA which dates from 1995. The Council has approved the negotiations directives on 9 October 2017. Negotiations have started on 19 December 2017 and were concluded during the 7th round which took place in Bishkek on June 2019. The new Agreement concluded with the Kyrgyz Republic was initialed in Bishkek on 6 July 2019 in the margins of the EU-Central Asia Ministerial meeting.	The text is presently undergoing legal scrubbing.
UZBEKISTAN	College adopted joint recommendations to the Council on 14 May 2018	The Council issued negotiating directives in July 2018 and the negotiations on the Trade title of the agreement were launched in February 2019, with four rounds held in 2019.	The next round of negotiations is scheduled for 2-5 March 2020, in Tashkent.

CHINA – Investment	The Council authorised the Commission to initiate negotiations for a comprehensive EU-China investment agreement on 18 October 2013. The mandate to launch negotiations on a new Partnership and Cooperation Agreement with China was approved by the Council in December 2005.	Negotiations of a comprehensive EU-China investment agreement were formally launched at the EU-China Summit of 21 November 2013 in Beijing. With this agreement, the EU seeks to create new investment opportunities for European companies by opening China's market and eliminating discriminatory laws and practices. Provisions on investment protection should ensure a high level of protection for European companies, while preserving governments' right to regulate. It will replace the 26 existing Bilateral Investment Treaties between 27 individual EU Member States and China by one single comprehensive investment Agreement. In 2016 the EU and China negotiators reached clear conclusions on an ambitious and comprehensive scope for the EU-China investment agreement and established a joint negotiating text.	The next round takes place on the week of 2 March via videoconference.

ISDS and future EU investment agreements

- The Commission has highlighted the need to design a new investment dispute settlement system
  - *to prevent investors from bringing multiple or frivolous claims*
  - *to make the arbitration system more transparent*
  - *to allow stakeholders, such as NGOs, to make submissions and*
  - *to enhance consistency in arbitral case law.*

The EU and international dispute settlements

- ECJ held that an international agreement providing for a system of courts that can take binding decisions on the institutions is in principle compatible with EU law

- However, the Court recalled that third-party arbitration cannot substitute the role of the Court in interpreting EU law
  - *the autonomy of EU law should not be affected.*

- (*ECJ, Opinion 1/91 – FTA with EFTA countries*)

EU as *amicus curiae* in ICSID arbitrations

- *Electrabel v Hungary* ICSID case
  - *Access permitted as amicuc curiase*

- *Iberdrola v. Guatemala* ICSID case (Spain-Guatemala BIT)
  - *the Commission claimed to have a 'systemic interest' in the interpretation given to investment treaties concluded by EU member-states. However, the ad hoc Annulment Committee rejected the request.*

- *AES v. Hungary* ICSID
- Series of international arbitrations involving the Czech Republic against investors in the photovoltaic (solar)

CANADA

- **Comprehensive Economic Trade Agreement (CETA)** between Canada and EU
  - *Negotiations are now over*
  - *The agreement was signed on 30 October 2016 during the EU Canada bilateral Summit. The European Parliament gave its consent to CETA on 15 February 2017.*
  - *On 21 September 2017, the agreement has provisionally entered into force. It will enter into force fully and definitively when all EU Member States parliaments have ratified the Agreement.*

CETA represents a significant break with the past, at two different levels:

- 1) Clearer and more precise **investment protection standards**, i.e. the rules, as set out in CETA, that arbitration tribunals will apply;
- 2) New and clearer rules on the conduct of **procedures** in arbitration tribunals

CETA overview: The 7 main parts of the agreement

1. Trade in goods
2. Trade in services
3. Public procurement
4. Investment
5. Intellectual property
6. Sustainable development
7. Smaller companies

Trade
Policy
Policy making
EU position in world trade
EU and WTO
Countries and regions
Negotiations and agreements
Development
Statistics
Accessing markets
Import and export rules
Trade policy and you

In focus

EU-CANADA
COMPREHENSIVE ECONOMIC AND TRADE AGREEMENT (CETA)

CETA is a new trade agreement between the EU and Canada.

It cuts tariffs and makes it easier to export goods and services, benefitting people and businesses in both the EU and Canada.

CETA entered into force provisionally on 21 September 2017, meaning most of the agreement now applies.

National parliaments in EU countries – and in some cases regional ones too – will then need to approve CETA before it can take full effect.

- Press Release: EU-Canada trade agreement celebrates first birthday
- Information on the new EU Domestic Advisory Groups

About CETA

https://www.youtube.com/watch?v=kJUKU8EneZk

CETA - CHAPTER EIGHT - INVESTMENT

- Measures to open up investment between the EU and Canada and protect investors and ensure that governments treat them fairly.

- The chapter:
  - *removes barriers to foreign investment*
  - *allows EU investors to transfer their capital in Canada back to the EU, and vice versa*
  - *puts in place transparent, stable and predictable rules governing investment*
  - *sets up a new Investment Court System, or ICS*

New, precise standards on investment protection

ARTICLE 8.10 Treatment of investors and of covered investments

1. Each Party shall accord in its territory to covered investments of the other Party and to investors with respect to their covered investments ***fair and equitable treatment and full protection and security*** *[…].*

2. A Party ***breaches the obligation of fair and equitable treatment*** *referenced in paragraph 1 if a measure or series of measures constitutes:*

(a) denial of justice in criminal, civil or administrative proceedings;

(b) fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings;

(c) manifest arbitrariness;

(d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;

(e) abusive treatment of investors, such as coercion, duress and harassment; or

(f) a breach of any further elements of the fair and equitable treatment obligation […]

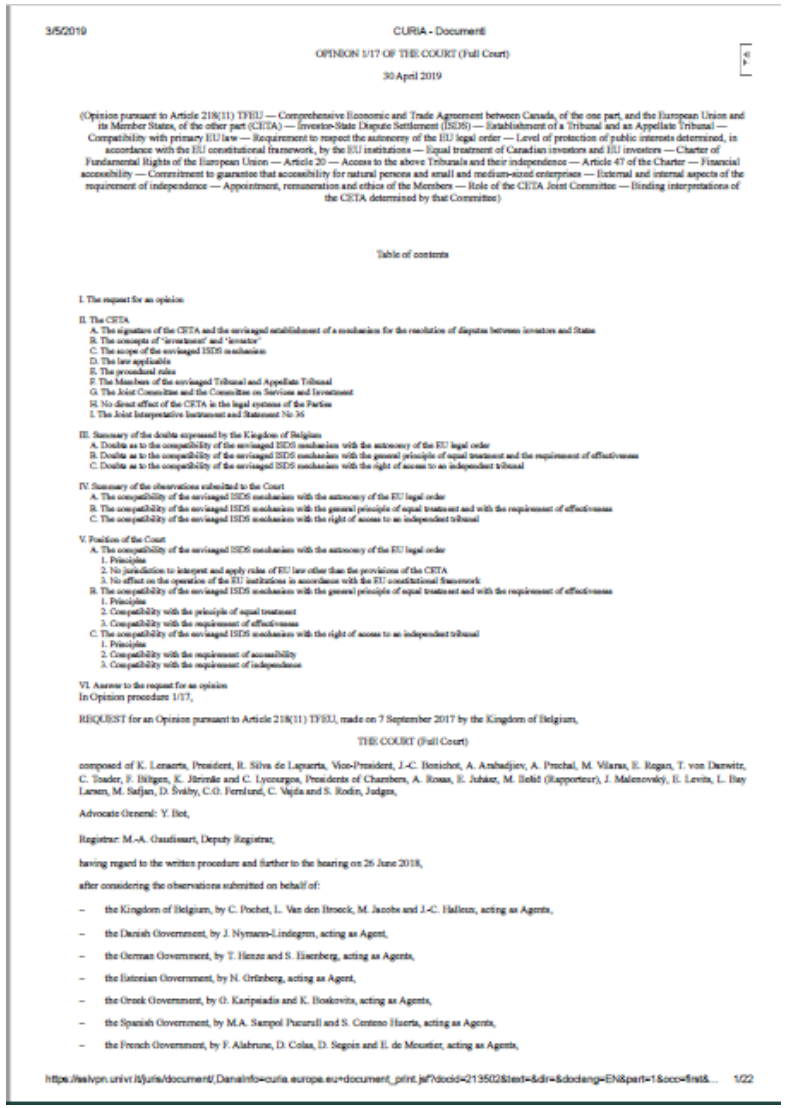
CETA - New rules for ISDS

- Main features of the new **Investment Court System**
  - *a permanent court inspired by public international courts*
  - *made up of a Tribunal of First Instance and an Appeal Tribunal*
  - *not based on temporary ad hoc tribunals*
  - *professional and independent adjudicators*
  - *appointed for long terms of office by both parties taking into account all interests at stake*
  - *held to the highest ethical standards through a strict code of conduct*
  - *will work transparently by opening up hearings to the public; publishing documents submitted during cases; allowing interested parties (NGOs, trade unions, citizens' representatives) to intervene in the proceedings and make submissions.*

CJEU - OPINION 1/17 (30 April 2019) [Free Trade Agreement with Canada]

- the investor-state dispute settlement provisions of the Canada-EU's Comprehensive Economic and Trade Agreement ("CETA") are compatible with EU Law

- the Court has confirmed that this mechanism is compatible with EU law, as tribunals would not be in a position to apply or interpret EU law (other than those provisions relating to CETA) and thus to affect the autonomy of EU law.



3/5/2019 CURIA - Document

OPINION 1/17 OF THE COURT (Full Court)

30 April 2019

(Opinion pursuant to Article 218(11) TFEU — Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part (CETA) — Investor-State Dispute Settlement (ISDS) — Establishment of a Tribunal and an Appellate Tribunal — Compatibility with primary EU law — Requirement to respect the autonomy of the EU legal order — Level of protection of public interests determined, in accordance with the EU constitutional framework, by the EU institutions — Equal treatment of Canadian investors and EU investors — Charter of Fundamental Rights of the European Union — Article 20 — Access to the above Tribunals and their independence — Article 47 of the Charter — Financial accessibility — Commitment to guarantee that accessibility for natural persons and small and medium-sized enterprises — External and internal aspects of the requirement of independence — Appointment, remuneration and ethics of the Members — Role of the CETA Joint Committee — Binding interpretations of the CETA determined by that Committee)

Table of contents

In Opinion procedure 1/17,

REQUEST for an Opinion pursuant to Article 218(11) TFEU, made on 7 September 2017 by the Kingdom of Belgium,

THE COURT (Full Court)

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, J.-C. Bonichot, A. Arabadjiev, A. Prechal, M. Vilaras, E. Regan, T. von Danwitz, C. Toader, F. Biltgen, K. Jürimäe and C. Lycourgos, Presidents of Chambers, A. Rosas, E. Juhász, M. Ilešič (Rapporteur), J. Malenovský, E. Levits, L. Bay Larsen, M. Safjan, D. Šváby, C.G. Fernlund, C. Vajda and S. Rodin, Judges,

Advocate General: Y. Bot,

Registrar: M.-A. Gaudissart, Deputy Registrar,

having regard to the written procedure and further to the hearing on 26 June 2018,

after considering the observations submitted on behalf of:

– the Kingdom of Belgium, by C. Pochet, L. Van den Broeck, M. Jacobs and J.-C. Halleux, acting as Agents,

– the Danish Government, by J. Nymann-Lindegren, acting as Agent,

– the German Government, by T. Henze and S. Eisenberg, acting as Agents,

– the Estonian Government, by N. Grünberg, acting as Agent,

– the Greek Government, by G. Karipsiadis and K. Boskovits, acting as Agents,

– the Spanish Government, by M.A. Sampol Pucurull and S. Centeno Huerta, acting as Agents,

– the French Government, by F. Alabrune, D. Colas, D. Segoin and E. de Moustier, acting as Agents,

The Multilateral Investment Court project

- Since 2015 the European Commission has been working to establish a Multilateral Investment Court.

The idea is that the Multilateral Investment Court would:

- *have a **first instance tribunal***
- *have an **appeal tribunal***
- *have **tenured, highly qualified judges**, obliged to adhere to the strictest ethical standards and a dedicated secretariat.*
- *be a **permanent body***
- *rule on disputes arising **under future and existing investment treaties***
- ***prevent disputing parties from choosing** which judges ruled on their case*

- For the EU, the Multilateral Investment Court would replace the bilateral investment court systems included in EU trade and investment agreements.

  Both the **EU-Canada Comprehensive Economic Trade Agreement (CETA)** and the **EU-Vietnam Free Trade Agreement** foresee setting up a permanent multilateral mechanism and contain a reference to it.

EU on-going negotiations

- **FREE TRADE AGREEMENTS:**

- ASEAN member States
- MALAYSIA
- VIETNAM
- THAILAND
- INDONESIA
- PHILIPPINES
- MYANMAR
- INDIA
- AUSTRALIA
- NEW ZEALAND
- MERCORSUR member States
- MEXICO
- CHILE
- TURKEY
- BOSNIA AND HERZEGOVINA
- SERBIA

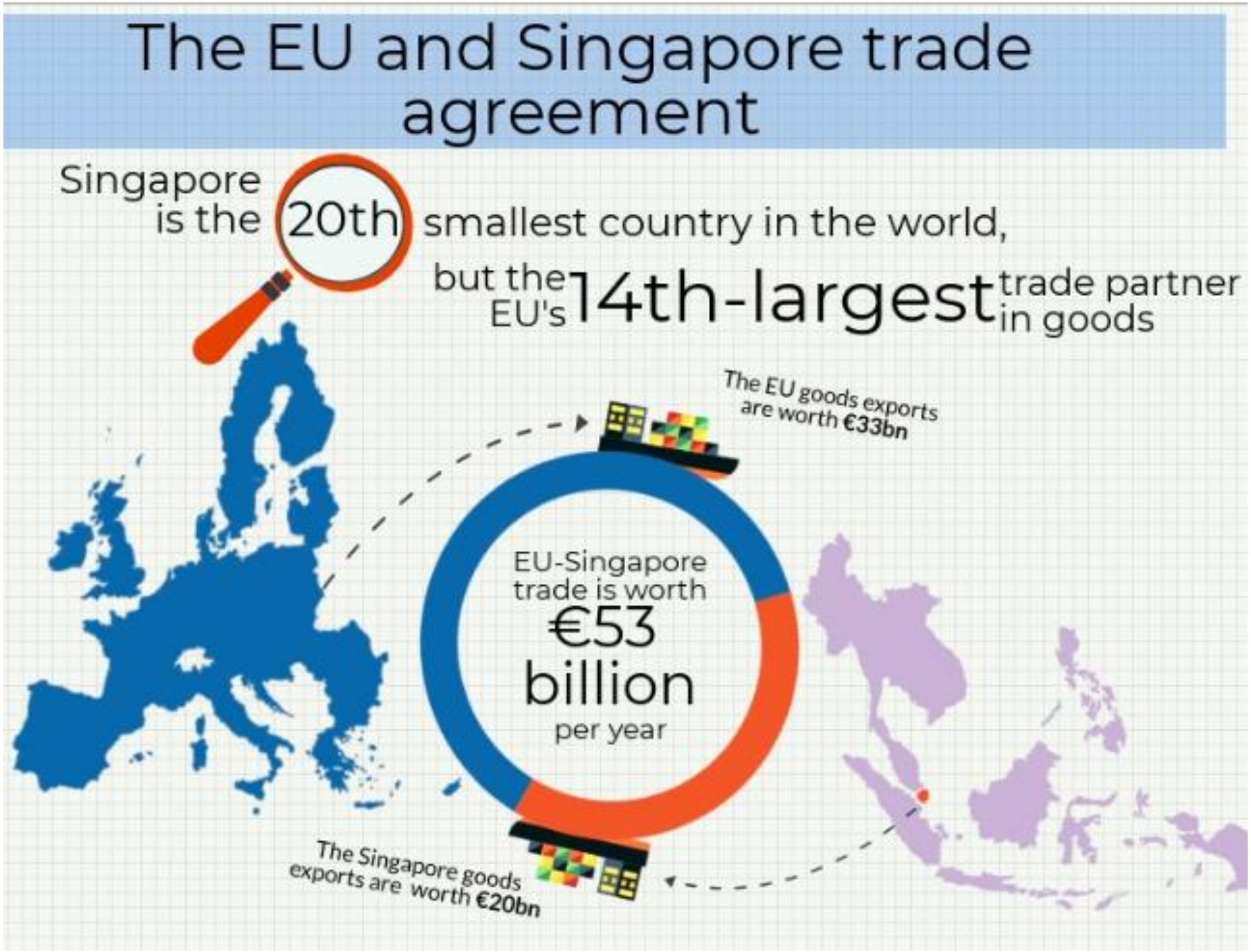
Singapore

- The European Union and Singapore have negotiated a **Free Trade Agreement** and an **Investment Protection Agreement**.

- The agreements aim to:
- - remove nearly all customs duties and get rid of overlapping bureaucracy
- - improve trade for goods like electronics, food products and pharmaceuticals
- - stimulate green growth, remove trade obstacles for green tech and create opportunities for environmental services
- - encourage EU companies to invest more in Singapore, and Singaporean companies to invest more in the EU.

- The EU-Singapore trade and investment agreements were signed on **19 October 2018.** Following the European Parliament's consent to the agreements on 13 February 2019; it entered into force on 21 November 2019

The EU and Singapore trade agreement



CJEU - OPINION 2/15 (16 May 2017) [Free Trade Agreement with Singapore]

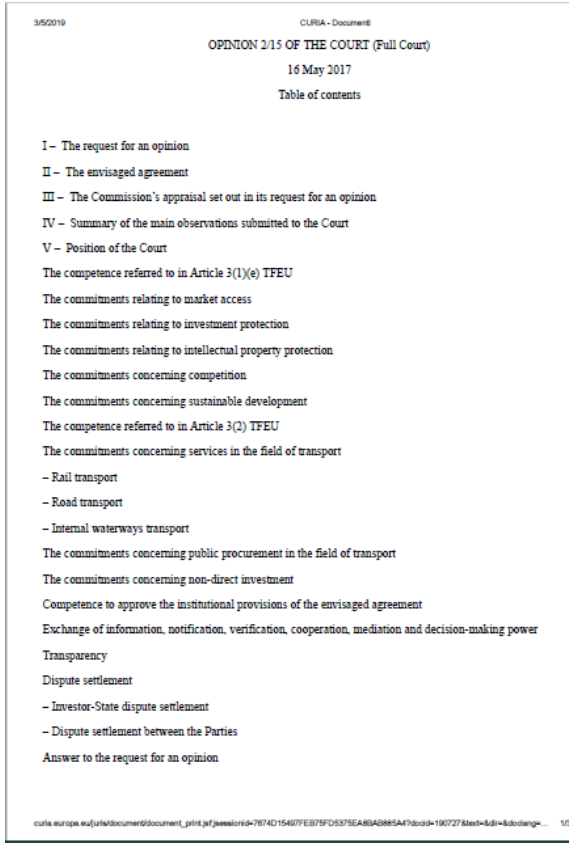
- - ‘foreign direct investment’ term in the TFEU includes both investment liberalization in the pre-establishment phase and substantive investment protection post-establishment
- - however, portfolio investment and ISDS are not covered by Article 207(1) TFEU and remained under shared competences

- *Division of competences:*

- agreements covering both foreign direct and portfolio investments and/or ISDS will be concluded as mixed agreements
- agreements covering only FDI will be concluded exclusively by the EU

- *Practical consequences:*
- As regards the free trade agreements with Singapore and Vietnam, the investment chapters that were originally part of the respective agreements have been sourced into separate investment agreements in order to keep the trade aspects of the agreements under exclusive Union competence

- *In either event, the negotiation of such agreements, whether they are mixed or concluded as EU-only agreements, generally lies with the Commission*



3/5/2019 CURIA - Documents

OPINION 2/15 OF THE COURT (Full Court)

16 May 2017

Table of contents

USA

- Transatlantic Trade and Investment Partnership (TTIP)
  - ***Directives for the negotiation*** *on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America adopted by the* ***Council*** *on the* ***17 June 2013***
- The TTIP negotiations were launched in 2013 and ended without conclusion (after 11 rounds of negotiations) at the end of 2016.

Free Trade Agreements

There are three main types of agreements:

- **Customs Unions**
  - *eliminate customs duties in bilateral trade*
  - *establish a joint customs tariff for foreign importers.*

- **Association Agreements, Stabilisation Agreements, (Deep and Comprehensive) Free Trade Agreements and Economic Partnership Agreements**
  - *remove or reduce customs tariffs in bilateral trade.*

- **Partnership and Cooperation Agreements**
  - *provide a general framework for bilateral economic relations*
  - *leave customs tariffs as they are*

EU-Ukraine

- The EU and Ukraine have provisionally applied their **Deep and Comprehensive Free Trade Agreement (DCFTA) since 1 January 2016.** This agreement means both sides will mutually open their markets for goods and services based on predictable and enforceable trade rules

- This is part of the broader **Association Agreement (AA)** whose political and cooperation provisions have been provisionally applied since November 2014.

- Autonomous Trade Measures (ATMs) for Ukraine topping up the concessions included in the EU-Ukraine Association Agreement/its Deep and Comprehensive Free Trade Area (DCFTA) for several industrial goods and agricultural products entered into force in October 2017.

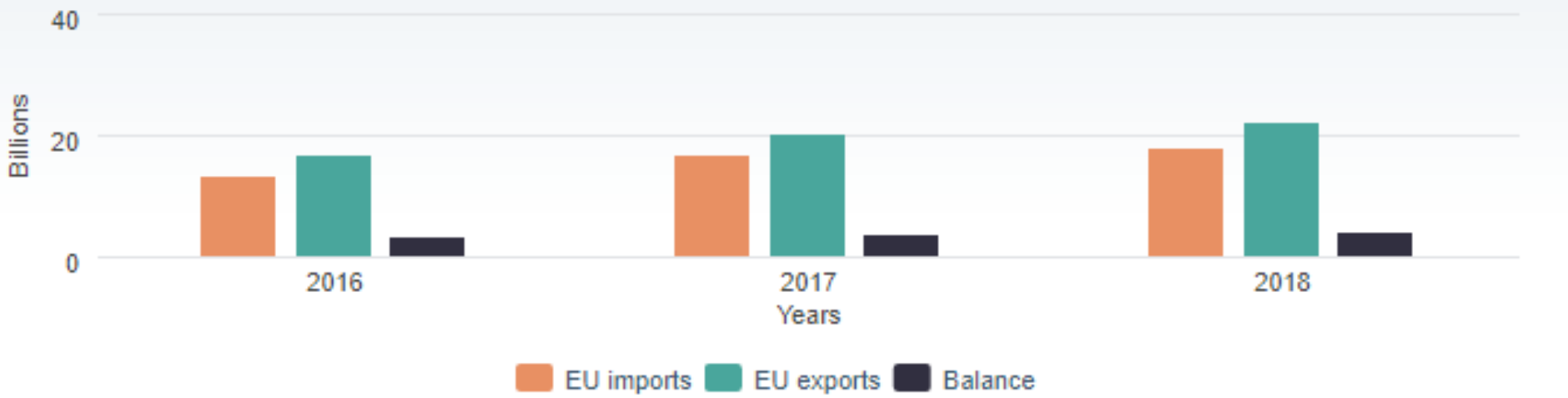
Trade picture

- The EU is Ukraine's largest trading partner, accounting for more than a third of its trade. It is also its main source of Foreign Direct Investment (FDI).

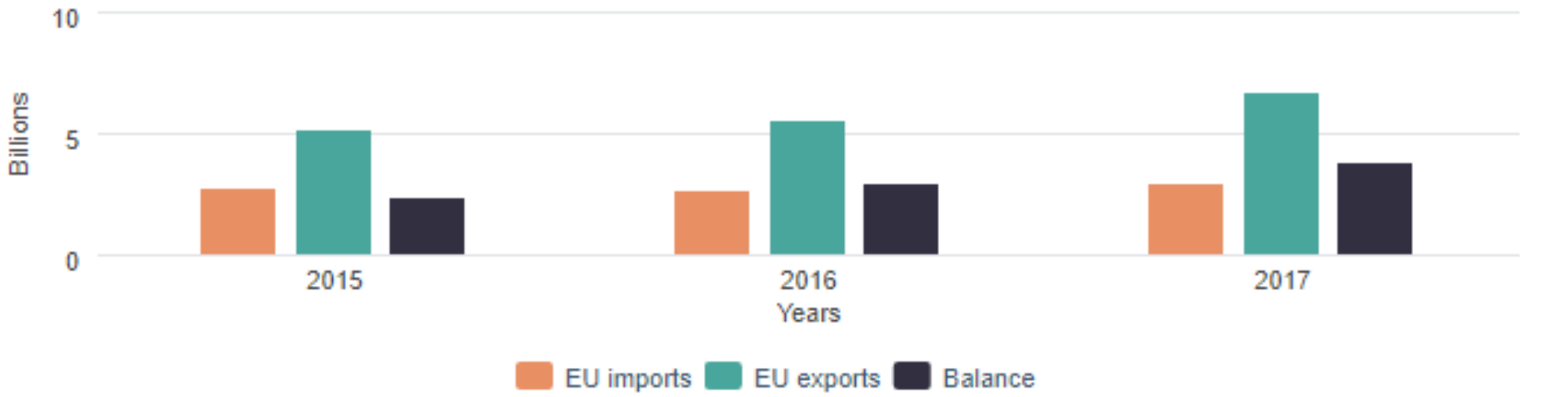
- Main Ukraine exports to the EU: raw materials (iron, steel, mining products, agricultural products), chemical products and machinery
- Main EU exports to Ukraine: machinery and transport equipment, chemicals, and manufactured goods.

- The EU is a large investor in Ukraine.

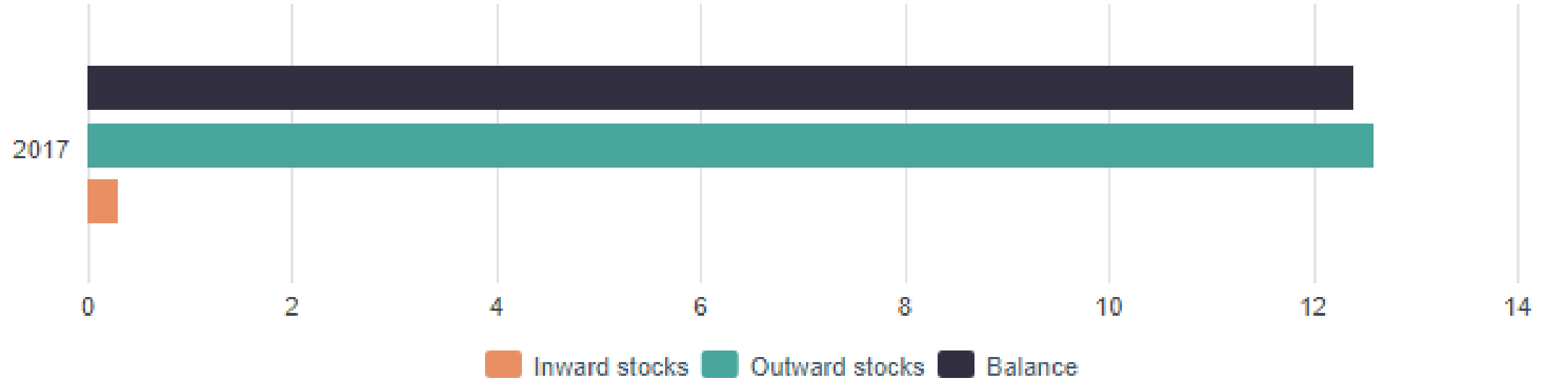
EU-Ukraine: Trade in goods



EU-Ukraine: Trade in services



EU-Ukraine: Foreign direct investment



Date of retrieval: 17/04/2019

Association Agreement (AA) and Deep and Comprehensive Free Trade Agreement (DCFTA)

- the AA/DCFTA aims to boost trade in goods and services between the EU and Ukraine by gradually cutting tariffs and bringing Ukraine's rules in line with the EU's in certain industrial sectors and agricultural products.

- Ukraine is aligning its legislation to the EU's in trade-related areas such as:
  - *competition*
  - *public procurement*
  - *customs and trade facilitation*
  - *protection of intellectual property rights*
  - *trade-related energy aspects, including investment, transit and transport*

EU–Ukraine Association Agreement

- 2009 Eastern Partnership → joint initiative between the EU, EU countries and the eastern European partner countries

- On 27 June 2014→ Georgia, Moldova and Ukraine signed Association Agreements with EU
  - *strengthens energy security*
  - *supports economic and social development*

EASTERN NEIGHBOURHOOD COUNTIRES

- GEORGIA
  - *Association Agreement, including the Deep and Comprehensive Free Trade Area (DCFTA), signed on 27 June 2014*

- MOLDOVA
  - *Association Agreement, including the Deep and Comprehensive Free Trade Area (DCFTA), signed 27 June 2014*

EU–Ukraine Association Agreement

Purpose/ principle of the agreement

Formulation of common objectives:

- harmonious economic relations,
- sustainable development,

Forms of cooperation (implememententing instruments)

- the exchange of scientific and technical information;
- training activities and mobility programmes for scientists, researchers in both sides

EU-Ukraine Association Agreement

- over 1200 pages

- Preamble
- Seven Titles
  - *General Principles;*
  - *Political Cooperation and Foreign and Security Policy*
  - *Justice Freedom and Security*
  - *Trade and Trade related matters*
  - *Economic and Sector Cooperation*
  - *Financial Cooperation with Anti-Fraud Provisions*
  - *Institutional, General and Final Provisions;*

- 43 Annexes
- Three Protocols.

Deep and Comprehensive Free Trade Agreement (DCFTA) (1)

- 23 April 2014: entry into force of the EU's Autonomous Trade Measures (ATM)
  - *Ukrainian exporters enjoy access to the EU market without import tariffs by the EU*

- From 1 January 2016 AA/DCFTA provisionally applies
  - *process of tariff liberalisation*

Deep and Comprehensive Free Trade Agreement (DCFTA) (2)

- mutual opening of markets for most goods and services
- binding provisions on gradual approximation with EU norms and standards in trade and trade-related areas
  - *sanitary and phytosanitary rules*
  - *intellectual property rights*
  - *trade facilitation*
  - *public procurement*
  - *Competition*
  - ***Investment protection***
  - *transit and transport*

Deep and Comprehensive Free Trade Agreement (DCFTA) (3)

- Chapter 14 Dispute Settlement

- based on the model of the WTO Dispute Settlement Understanding
  - *Consultation*
  - *arbitration panel (3 experts)*
  - *[amicus curiae]*

Trade partnerships and effects on international dispute settlements

- *Protecting Trade by Legalizing Political Disputes: Why Countries Bring Cases to the International Court of Justice*
  - *Christina L Davis Julia C Morse - International Studies Quarterly, Volume 62, Issue 4, December 2018, Pages 709–722,https://doi.org/10.1093/isq/sqy022*
- countries are more likely to file ICJ cases against important trading partners than against states with low levels of shared trade.
- **Economic interdependence changes the incentives for how states resolve their disputes**

  - *Trade encourages the use of the ICJ. In the midst of a conflict, states face uncertain political relations and risk that an escalating dispute could spill over to harm trade*

	TRADE – RELATED ISSUES	INVESTMENT-RELATED ISSUES
EUROPEAN UNION	X	X
WTO	X	
UNITED NATIONS	X	X
CJEU	X	X
WTO DSB	X	
PCA	X	X
ICSID		X
BIT		X
FTA	X	X
CETA	X	X
DCFTA	X	X

International actors

Dispute settlement mechanisms

International investment agreements [IIAs]

International investment law: summary

https://www.youtube.com/watch?v=dJygJc0LaVU