



# ***EU TRADE POLICY***



FEDERICA, PHD.

*JEAN MONNET MODULE ON  
EU FOREIGN POLICY*



# WHAT IS THIS MODULE ABOUT...

- Which are the main features of the EU foreign trade and investment policy?
- What is the role of the EU within the World Trade Organization?
- Which is the role of the EU institutions in negotiating trade and investment agreements with third countries?
- What is the role of the EU Court of Justice in the EU trade and investment-related matters?

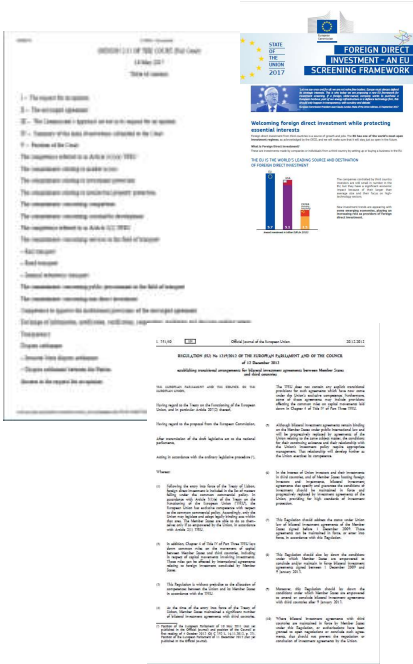
# LECTURES' AND SEMINARS' CONTENT

- the main features of the EU foreign trade policy and the role of the EU within the World Trade Organization (**Lecture No. 1**)
- the EU foreign investment policy (I): general regulatory framework (**Lecture No. 2**)
- the EU foreign investment policy (II): relationship with EU member states and with third countries (**Lecture No. 3**)
- the role of the EU institutions in negotiating trade and investment-related agreements with third countries (**Lecture No. 4**)
  
- the role of courts and tribunals in trade (and investment-related) matters (**Seminar No. 1**)
- web-sources and materials on EU trade policy (**Seminar No. 2**)

# LECTURE N. 2

## THE EU FOREIGN INVESTMENT POLICY

### Part. I – General regulatory framework



EUROPEAN COMMISSION  
COMMISSION REGULATION (EU) 2019/817 OF 18 May 2019  
laying down a framework for screening of foreign direct investments into critical technologies and infrastructure

**FOREIGN DIRECT INVESTMENT – AN EU SCREENING FRAMEWORK**

**Identifying foreign direct investments with protecting essential interests**

**TO SELECT THE WORLD LEADING COUNTRIES AND SECTORS OF FOREIGN INVESTMENT**

1. The request for information  
2. The information provided  
3. The Commission's approval and its assessment of the investment  
4. Transfer of the data to the Commission  
5. Review of the Case  
6. The Commission's decision to authorize or prohibit FDI  
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8. The Commission's decision to authorize or prohibit FDI  
9. The Commission's decision to authorize or prohibit FDI  
10. The Commission's decision to authorize or prohibit FDI



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**WORLD INVESTMENT REPORT 2018**  
Investment and Development in a Volatile World



**NAFTA**  
NORTH AMERICAN FREE TRADE AGREEMENT



**INTERNATIONAL ENERGY CHARTER**  
ENERGY CHARTER SECRETARIAT KNOWLEDGE CENTRE



**ICSID**  
INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES



**INVESTMENT POLICY HUB**



**INVESTMENT POLICY HUB**



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# 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?

# 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?



**HOST STATE**

**BILATERAL  
INVESTMENT  
TREATY (BIT)**

**HOME STATE**

(State of nationality of the investor)

STANDARDS OF  
PROTECTION of foreign  
investments/investors

TODAY:  
more than 3000 BITs

**FOREIGN INVESTOR**

- NATURAL PERSON
- JURIDICAL PERSONS (MNEs)

**What is an  
*investment*?**

- Financial contribution
- Certain duration
- Risk

# SOURCES OF INTERNATIONAL INVESTMENT LAW

## Treaty-law

- Bilateral investment treaties (BITs)
- Free trade agreements with investment provisions or instruments (NAFTA, ASEAN, MERCOSUR)
- Sectorial agreements (Energy Charter Treaty)
- Dispute settlement instruments and regimes (diplomatic protection , 1965 ICSID Convention)

*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

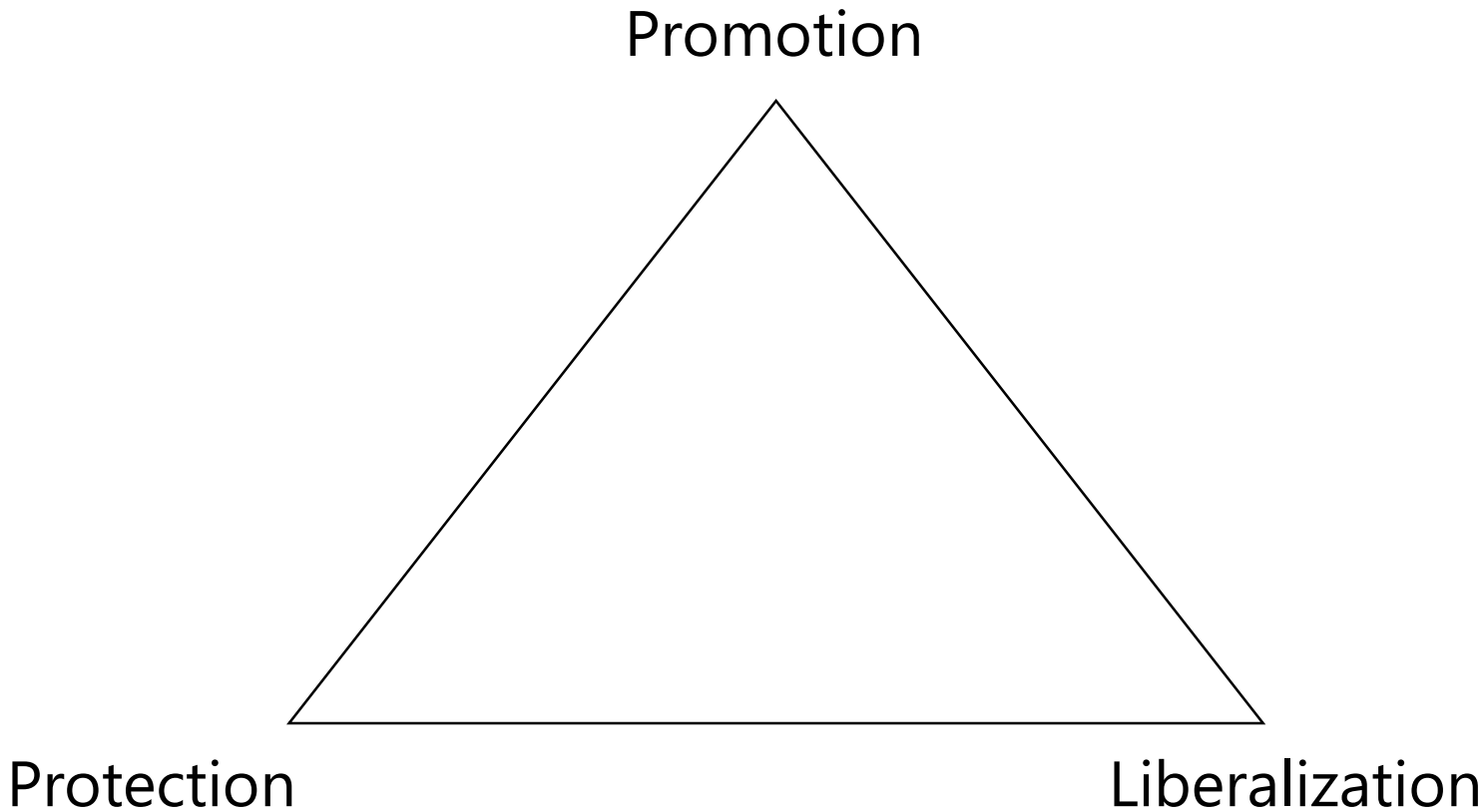
- 20 years ago or more, many countries had reservations about FDI and excluded or restricted FDI inflow
- Today, every single country seeks to attract FDI
- Unilateral efforts in FDI liberalization and promotion are complemented by efforts at 3 levels:
  - bilateral - eg. BITs, FTAs
  - regional – eg. 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)

# INTERNATIONAL FRAMEWORK FOR INVESTMENT: OBJECTIVES



# LECTURE N. 2

## THE EU FOREIGN INVESTMENT POLICY

### Part. I – General regulatory framework

**FOREIGN DIRECT INVESTMENT - AN EU SCREENING FRAMEWORK**

INDICATING FOREIGN DIRECT INVESTMENT WITH PROMOTING ESSENTIAL INTERESTS

TO SELECT THE WORLD LEADING COMPANIES AND SECTORS IN FOREIGN INVESTMENT

The chart shows three bars representing different categories of FDI: 'Essential Interests', 'Strategic Interests', and 'Other Interests'. The 'Essential Interests' bar is the tallest, followed by 'Strategic Interests', and 'Other Interests' is the shortest.

**WORLD INVESTMENT REPORT 2018**

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The image shows the cover of the World Investment Report 2018, which features a world map with a network of lines connecting various regions, symbolizing global investment flows.

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**INVESTMENT POLICY HUB**

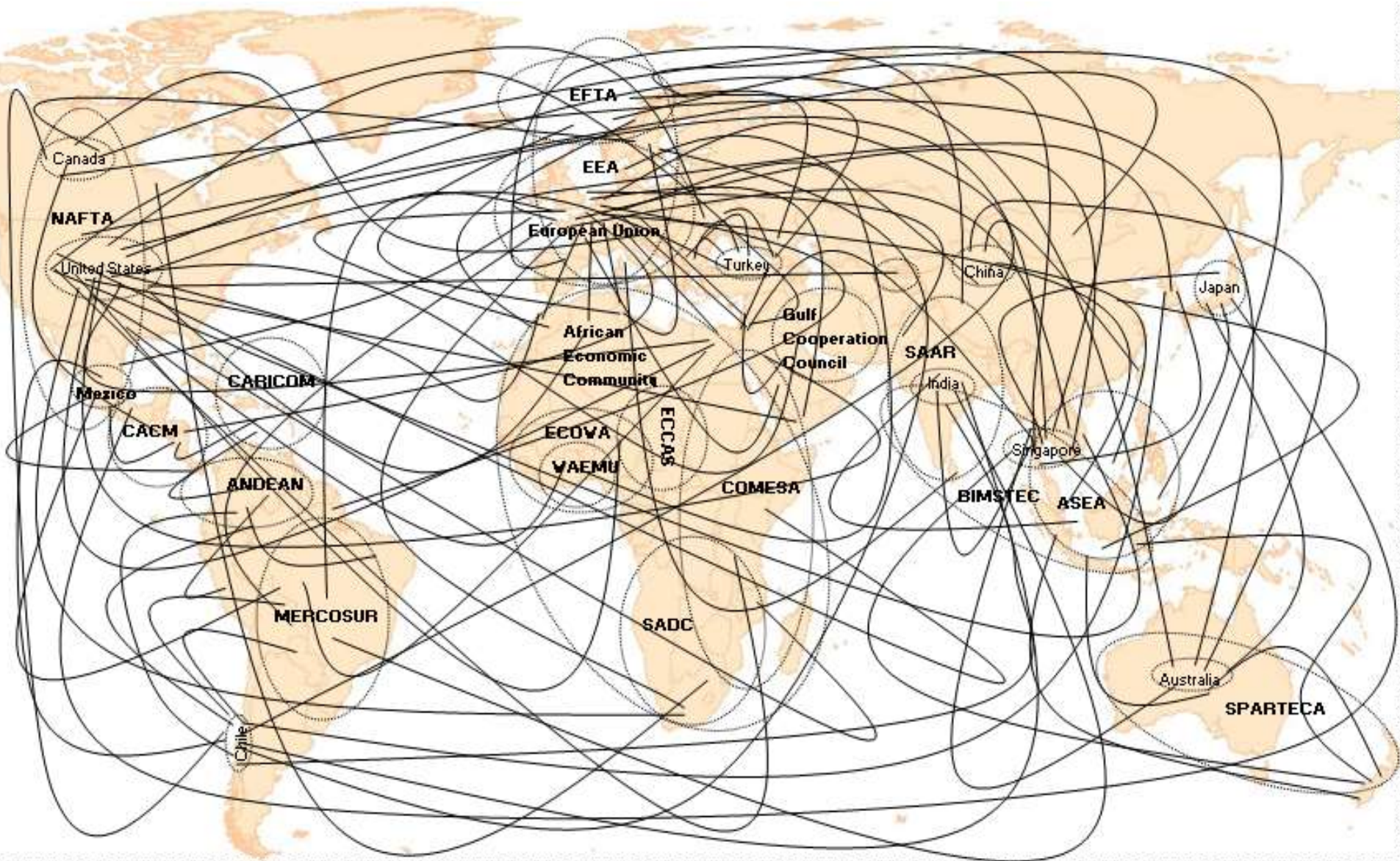
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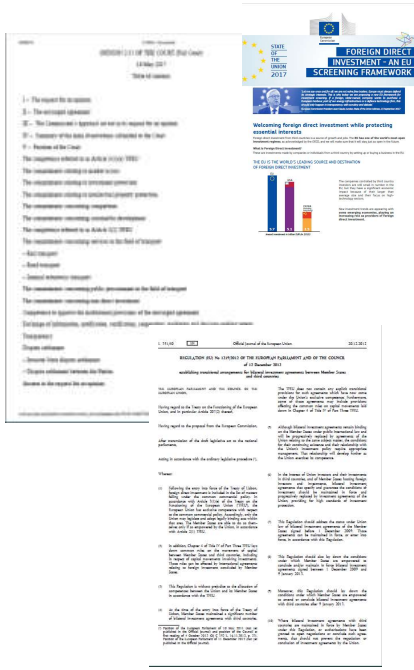
# THE SPAGHETTI BOWL OF IIAS



# LECTURE N. 2

## THE EU FOREIGN INVESTMENT POLICY

### Part. I – General regulatory framework



EUROPEAN COMMISSION  
REGULATION (EU) 2019/891 OF THE EUROPEAN PARLIAM...  
OF 14 May 2019  
laying down a framework for screening of foreign direct investment into the EU for security or public order reasons

1 - The purpose of this Regulation  
2 - The scope of this Regulation  
3 - The Commission's support and assistance for the Member States  
4 - Transparency of the data processing established in the Union  
5 - Review of the Union  
6 - The Commission's role in the Union  
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# NETWORK OF IIAS: MORE THAN 3000



Source: UNCTAD, IIA Navigator.

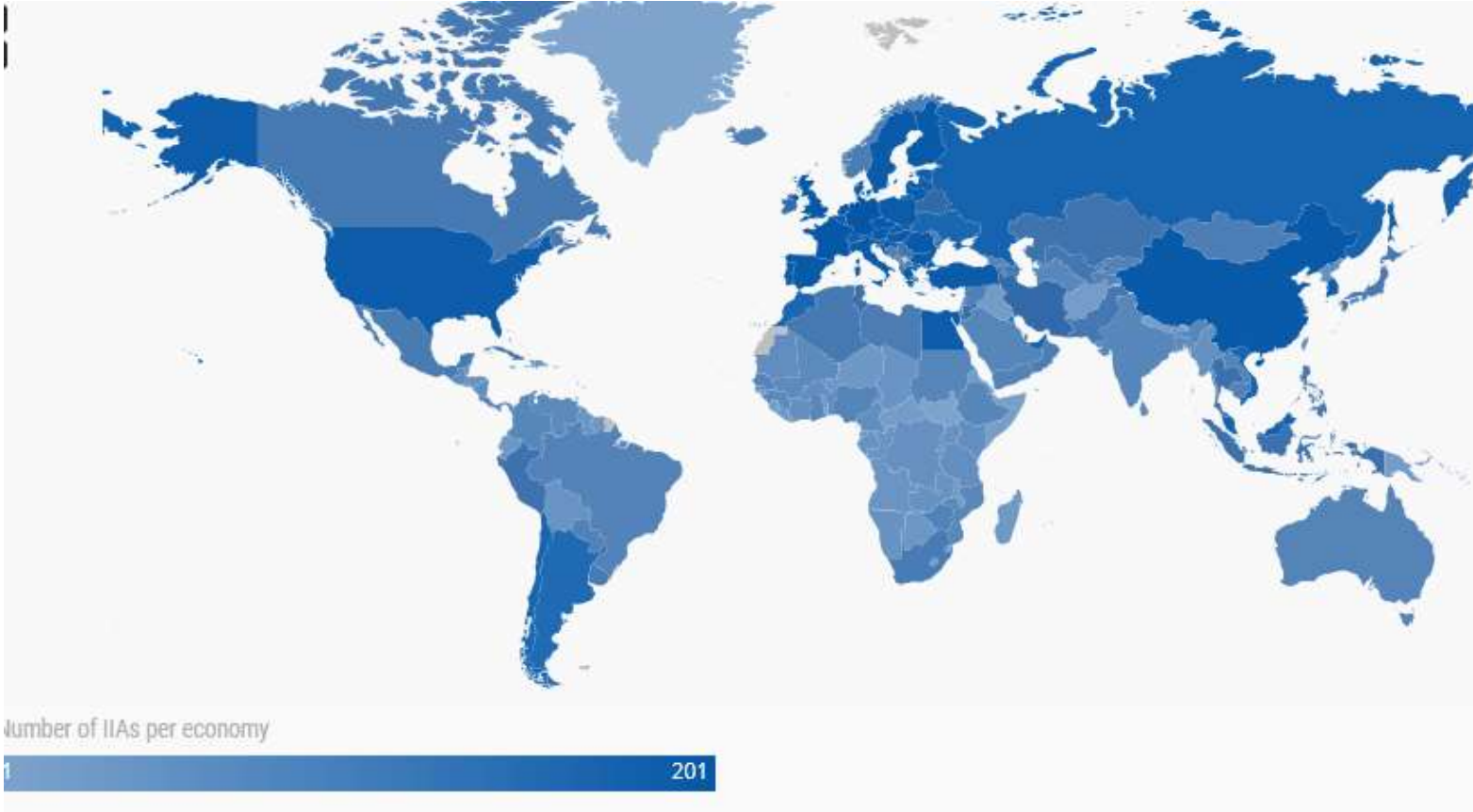
Note: The cumulative number of all signed IIAs, independently of whether they have entered into force, is 3,322. IIAs for which termination has entered into effect are not included.



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# 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)

# LECTURE N. 2

## THE EU FOREIGN INVESTMENT POLICY

### Part. I – General regulatory framework

**FOREIGN DIRECT INVESTMENT - AN EU SCREENING FRAMEWORK**

1 - The request for information  
2 - The screening process  
3 - The Commission's approval and its review for the investor  
4 - Termination of the data protection obligations in the CIAR  
5 - Review of the CIAR  
6 - The Commission's role in an Article 17(2) CIAR  
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# NAFTA (1994) NORTH AMERICAN FREE TRADE AGREEMENT CHAPTER XI – INVESTMENT PROTECTION



USA  
CANADA  
MEXICO

# 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

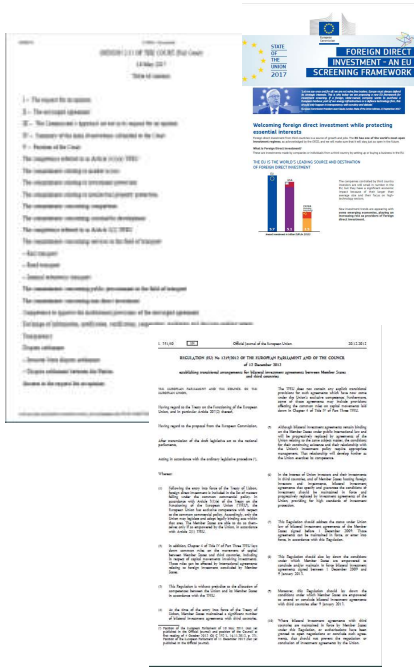




# LECTURE N. 2

## THE EU FOREIGN INVESTMENT POLICY

### Part. I – General regulatory framework



EUROPEAN COMMISSION  
REGULATION (EU) 2019/452 OF THE EUROPEAN PARLIAM...  
OF 17 March 2019  
laying down a framework for screening of foreign direct investment into the EU for security or public policy reasons

1 - The purpose of this Regulation  
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# ENERGY CHARTER TREATY (1994)

It covers the Euro-Asian region (51 parties)

Trade + investments in the energy sector

Dispute settlement (ICSID, UNCITRAL rules, Stockholm Chamber of Arbitration)



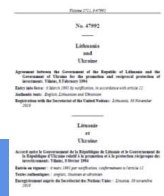
# LECTURE N. 2

## THE EU FOREIGN INVESTMENT POLICY

### Part. I – General regulatory framework

The image shows a document titled 'FOREIGN DIRECT INVESTMENT - AN EU SCREENING FRAMEWORK' with a date of 14 March 2017. It includes a table of contents and a bar chart. The bar chart has three bars of increasing height, with the tallest bar labeled 'EUROPEAN UNION'. The document text includes sections like '1 - The request for information', '2 - The investment operation', and '3 - The Commission's approval and its assessment of the investment'. It also mentions 'The Commission's screening of investment operations' and 'The Commission's screening of investment operations'.

The image shows the cover of the 'WORLD INVESTMENT REPORT 2018' published by UNCTAD. It features a world map with a network of lines connecting various regions, symbolizing global investment flows. The title 'WORLD INVESTMENT REPORT 2018' is prominently displayed in a green and white color scheme.



Federica Cristani, Phd

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# [HTTP://INVESTMENTPOLICYHUB.UNCTAD.ORG/IIA](http://investmentpolicyhub.unctad.org/IIA)

The screenshot displays the website [investmentpolicyhub.unctad.org/IIA/IiasByCountry#iiaInnerMenu](http://investmentpolicyhub.unctad.org/IIA/IiasByCountry#iiaInnerMenu). The page features a green header with the 'INVESTMENT HUB POLICY' logo and the UNCTAD logo. Below the header is a navigation bar with icons for 'Investment Policy Framework', 'Investment Policy Review', 'Investment Policy Monitor', 'International Investment Agreements', 'Investment Policy Blog', and 'Publications'. The main content area is titled 'International Investment Agreements Navigator' and contains a world map. A legend below the map indicates 'Number of IIAs per economy' with a value of 198. Navigation options include 'ABOUT', 'TERMINOLOGY', 'IIAs BY ECONOMY', 'IIAs BY COUNTRY GROUPING', 'MOST RECENT IIAs', and 'ADVANCED SEARCH'. The browser's address bar and various extension icons are visible at the top.

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# SOURCES OF INTERNATIONAL INVESTMENT LAW

## Treaty-law

- Bilateral investment treaties (BITs)
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*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*

# INVESTMENT-RELATED TREATY-BASED PROVISIONS ON THE PROTECTION OF THE ENVIRONMENT

*Hungary-Russian Federation BIT (1996)*

*Article 2. Promotion and reciprocal protection of investments*

3. This Agreement shall not preclude the application of either Contracting Party of measures, necessary for the maintenance of defence, national security and public order, protection of the environment, morality and public health.

# SOFT-LAW INSTRUMENTS BEARING ON INVESTMENT AND ENVIRONMENT

UN Conference on Environment and Development, Rio Declaration on Environment and Development, 12 August 1992

## *Principle 16*

National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.

# OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES, 2011

## VI. Environment

Enterprises should, within the framework of laws, regulations and administrative practices in the countries in which they operate, and in consideration of relevant international agreements, principles, objectives, and standards, take due account of the need to protect the environment, public health and safety, and generally to conduct their activities in a manner contributing to the wider goal of sustainable development.

In particular, enterprises should:

1. Establish and maintain a system of environmental management appropriate to the enterprise, including:

- a) collection and evaluation of adequate and timely information regarding the environmental, health, and safety impacts of their activities;
- b) establishment of measurable objectives and, where appropriate, targets for improved environmental performance and resource utilisation, including periodically reviewing the continuing relevance of these objectives; where appropriate, targets should be consistent with relevant national policies and international environmental commitments; and
- c) regular monitoring and verification of progress toward environmental, health, and safety objectives or targets.



# INVESTMENT-RELATED TREATY-BASED PROVISIONS ON HUMAN RIGHTS

*EFTA – Singapore FTA (2002)*

*Preamble*

The Republic of Iceland, the Principality of Liechtenstein, the Kingdom of Norway and the Swiss Confederation (hereinafter referred to as “the EFTA States”), and The Republic of Singapore [...]

REAFFIRMING their commitment to the principles set out in the United Nations Charter and the Universal Declaration of Human Rights. [...]

## **Canada – Colombia FTA (2011)**

### *Preamble*

Canada and the Republic of Colombia (“Colombia”) [...]

Affirming their commitment to respect the values and principles of democracy and promotion and protection of human rights and fundamental freedoms as proclaimed in the Universal Declaration of Human Rights. [...]

# CORPORATE SOCIAL RESPONSIBILITY (CSR): SOFT-LAW INSTRUMENTS DEALING WITH HUMAN RIGHTS OBLIGATIONS OF PRIVATE FOREIGN INVESTORS

*Commission on Transnational Corporations (ECOSOC)*

*Draft Code of Conduct on Transnational Corporations (1983)*

13. Transnational corporations should/shall respect human rights and fundamental freedoms in the countries in which they operate. In their social and industrial relations, transnational corporations should/shall not discriminate on the basis of race, colour, sex, religion, language, social, national and ethnic origin or political or other opinion. Transnational corporations should/shall conform to government policies designed to extend equality of opportunity and treatment. [...]

# ***“PRINCIPLES FOR RESPONSIBLE CONTRACTS: INTEGRATING THE MANAGEMENT OF HUMAN RIGHTS RISKS INTO STATE-INVESTOR CONTRACT NEGOTIATIONS: GUIDANCE FOR NEGOTIATORS”***

*REPORT OF THE SPECIAL REPRESENTATIVE OF THE SECRETARY-GENERAL, JOHN RUGGIE, ON THE ISSUE OF HUMAN RIGHTS AND TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES*

*21 MARCH 2011*

## II. Ten principles for integrating the management of human rights risks into contract negotiations

Principle 1. The parties should be adequately prepared and have the capacity to properly address the human rights implications of projects during negotiations. [...]

Principle 2. Responsibilities for the prevention and mitigation of human rights risks associated with the project and its activities should be clarified and agreed before the contract is finalized. [...]

Principle 3. The laws, regulations and standards governing the execution of the project should facilitate the prevention, mitigation and remediation of any negative human rights impacts throughout the life cycle of the project. [...]

Principle 4. Contractual stabilization clauses, if used, should be carefully drafted so that any protections for investors against future changes in law do not interfere with the State's bona fide efforts to implement laws, regulations or policies, in a nondiscriminatory manner, in order to meet its human rights obligations. [...]

Principle 5. Where the contract envisages that investors will provide additional services beyond the scope of the project, this should be carried out in a manner compatible with the State's human rights obligations and the investor's human rights responsibilities. [...]

Principle 6. Physical security for the project's facilities, installations or personnel should be provided in a manner consistent with human rights principles and standards. [...]

Principle 7. The project should have an effective community engagement plan through its life-cycle, starting at the earliest stages of the project. [...]

Principle 8. The State should be able to monitor the project's compliance with relevant standards to protect human rights, while providing necessary assurances for business investors against arbitrary interference in the project. [...]

Principle 9. Individuals and communities that are impacted by project activities, but not party to the contract, should have access to an effective non-judicial grievance mechanism. [...]

Principle 10. The contract's terms should be disclosed, and the scope and duration of exceptions to such disclosure should be based on compelling justifications. [...]

# 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, 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?

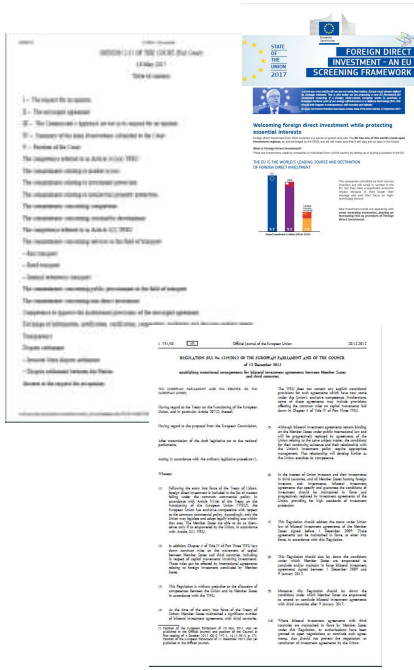
YES, the company is Lithuanian, so the 'foreign requirement' is satisfied

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.  
Therefore, the 'foreign requirement' is missing.

# LECTURE N. 2

## THE EU FOREIGN INVESTMENT POLICY

### Part. I – General regulatory framework



EUROPEAN COMMISSION  
REGULATION (EU) 2019/452 OF THE EUROPEAN PARLIAM...  
OF 17 March 2019  
on screening of foreign direct investments into the EU  
of critical technologies and infrastructure

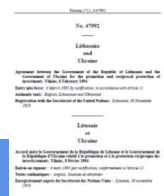
1 - The purpose of this Regulation  
2 - The scope of this Regulation  
3 - The Commission's approach and the role of the Member States  
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Federica Cristani, Phd

Jean Monnet Module on EU Foreign Policy: EU Trade Policy

# LITHUANIA-UKRAINE BIT

[<https://investmentpolicyhubold.unctad.org/IIA/CountryBits/219#iiInnerMenu>]

## 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.



# 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

1) An international tribunal (e.g., ICJ, ITLOS).

2) A dispute resolution panel (e.g., WTO).

3) Arbitration

- PCA

- Ad hoc arbitration



# THE LAW OF STATE RESPONSIBILITY (SR)

breach of an international obligation of a subject of international law → international responsibility

Which are the element of SR?

Which defences are available to avoid responsibility?

Which are the consequences of SR?

ILC' work on the SR (from 1949) → Draft Articles on Responsibility of States for Internationally Wrongful Act (Annex to GA Res. 56/83 of 12 December 2001 )

# THE ELEMENTS OF SR

## Article 2 ILCASR :

- internationally wrongful **act** (action or omission):
  - **attributable** to the State
  - constitutes a **breach** of an international obligation

# ESTABLISHING THE BREACH OF INTERNATIONAL OBLIGATIONS.

## Article 3 ILCASR

- 'The characterisation of an act of a State as internationally wrongful is **governed by international law**. Such characterisation is not affected by the characterisation of the same act as lawful by internal law'

## Article 12 ILCASR

- 'There is a breach of an international obligation by a State when **an act** of that State is **not in conformity with what is required of it by that obligation regardless of its origin or character.**'

Objective responsibility? (is fault/dolus needed?)

# CONDUCT OF STATE ORGAN

## ■ Article 4 ILCASR

- “1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.
2. An organ includes any person or entity which has that status in accordance with the internal law of the State. ”

## Article 33 UN Charter

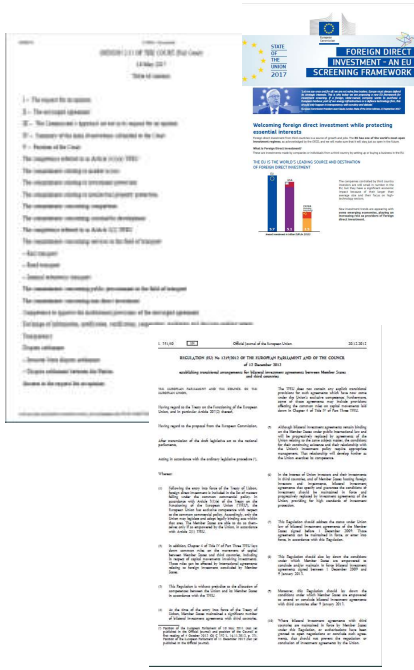
"1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by **negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.**

2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means."

# LECTURE N. 2

## THE EU FOREIGN INVESTMENT POLICY

### Part. I – General regulatory framework



EUROPEAN COMMISSION  
REGULATION (EU) 2019/891 OF THE EUROPEAN PARLIAM...  
OF 28 May 2019  
laying down a framework for screening of foreign direct investment into the EU for security or public order reasons

1 - The purpose of this Regulation  
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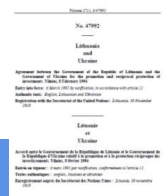
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# SETTLEMENT OF DISPUTES BEFORE INTERNATIONAL TRIBUNALS OF THROUGH ARBITRATION

- 1) An international tribunal (e.g., ICJ, ITLOS).
- 2) A dispute resolution panel (e.g., WTO).
- 3) Arbitration
  - PCA
  - *Ad hoc* arbitration



# INVESTMENT DISPUTE SETTLEMENT

DIPLOMATIC PROTECTION

JURISDICTIONAL CLAUSES IN INVESTMENT TREATIES

- *host State – home State investment disputes*
- *host State- foreign investor investment disputes*

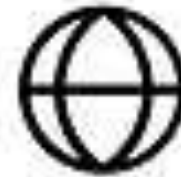


***HOST STATE***



***HOME STATE***

State-to-State arbitration



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- State-investor arbitration
- Investor-State arbitration

**FOREIGN INVESTOR**

# INVESTOR-STATE/ STATE-INVESTOR DISPUTE SETTLEMENT

## 1. Public contracts' jurisdictional clauses

- Contract claims

## 2. Treaty-based jurisdictional clauses

- Treaty claims

# ***SUEZ, SOCIEDAD GENERAL DE AGUAS DE BARCELONA SA AND VIVENDI UNIVERSAL SA V ARGENTINA - ICSID CASE ARB/03/19 DECISION ON LIABILITY, 30 JULY 2010***

“57. [...W]hile the rights of the parties under Argentine law were, according to the legal framework governing the Concession, to be judged by Argentine courts, the rights of the Claimants under the above-mentioned BITs are to be judged by this Tribunal. [...**T**]reaty **claims under a BIT are separate and distinct from any contract claims that the Claimants may have under Argentine Law.**”

# 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 18 months** 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:**

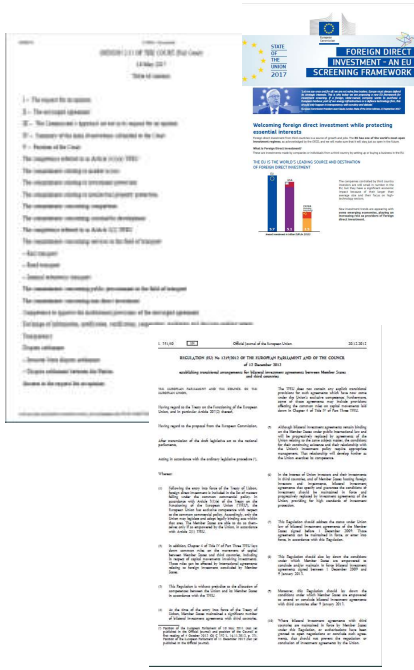
(a) **The [...] I.C.S.I.D.** [...], once both Contracting Parties have become a party to the Convention [...]

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

# LECTURE N. 2

## THE EU FOREIGN INVESTMENT POLICY

### Part. I – General regulatory framework



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8 - The Commission's role in an Article 4(1)(c) FDI  
9 - The Commission's role in an Article 4(1)(d) FDI  
10 - The Commission's role in an Article 4(1)(e) FDI  
11 - The Commission's role in an Article 4(1)(f) FDI  
12 - The Commission's role in an Article 4(1)(g) FDI  
13 - The Commission's role in an Article 4(1)(h) FDI  
14 - The Commission's role in an Article 4(1)(i) FDI  
15 - The Commission's role in an Article 4(1)(j) FDI  
16 - The Commission's role in an Article 4(1)(k) FDI  
17 - The Commission's role in an Article 4(1)(l) FDI  
18 - The Commission's role in an Article 4(1)(m) FDI  
19 - The Commission's role in an Article 4(1)(n) FDI  
20 - The Commission's role in an Article 4(1)(o) FDI  
21 - The Commission's role in an Article 4(1)(p) FDI  
22 - The Commission's role in an Article 4(1)(q) FDI  
23 - The Commission's role in an Article 4(1)(r) FDI  
24 - The Commission's role in an Article 4(1)(s) FDI  
25 - The Commission's role in an Article 4(1)(t) FDI  
26 - The Commission's role in an Article 4(1)(u) FDI  
27 - The Commission's role in an Article 4(1)(v) FDI  
28 - The Commission's role in an Article 4(1)(w) FDI  
29 - The Commission's role in an Article 4(1)(x) FDI  
30 - The Commission's role in an Article 4(1)(y) FDI  
31 - The Commission's role in an Article 4(1)(z) FDI



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# ICSID SYSTEM

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

- ICSID Convention
- Washington Convention

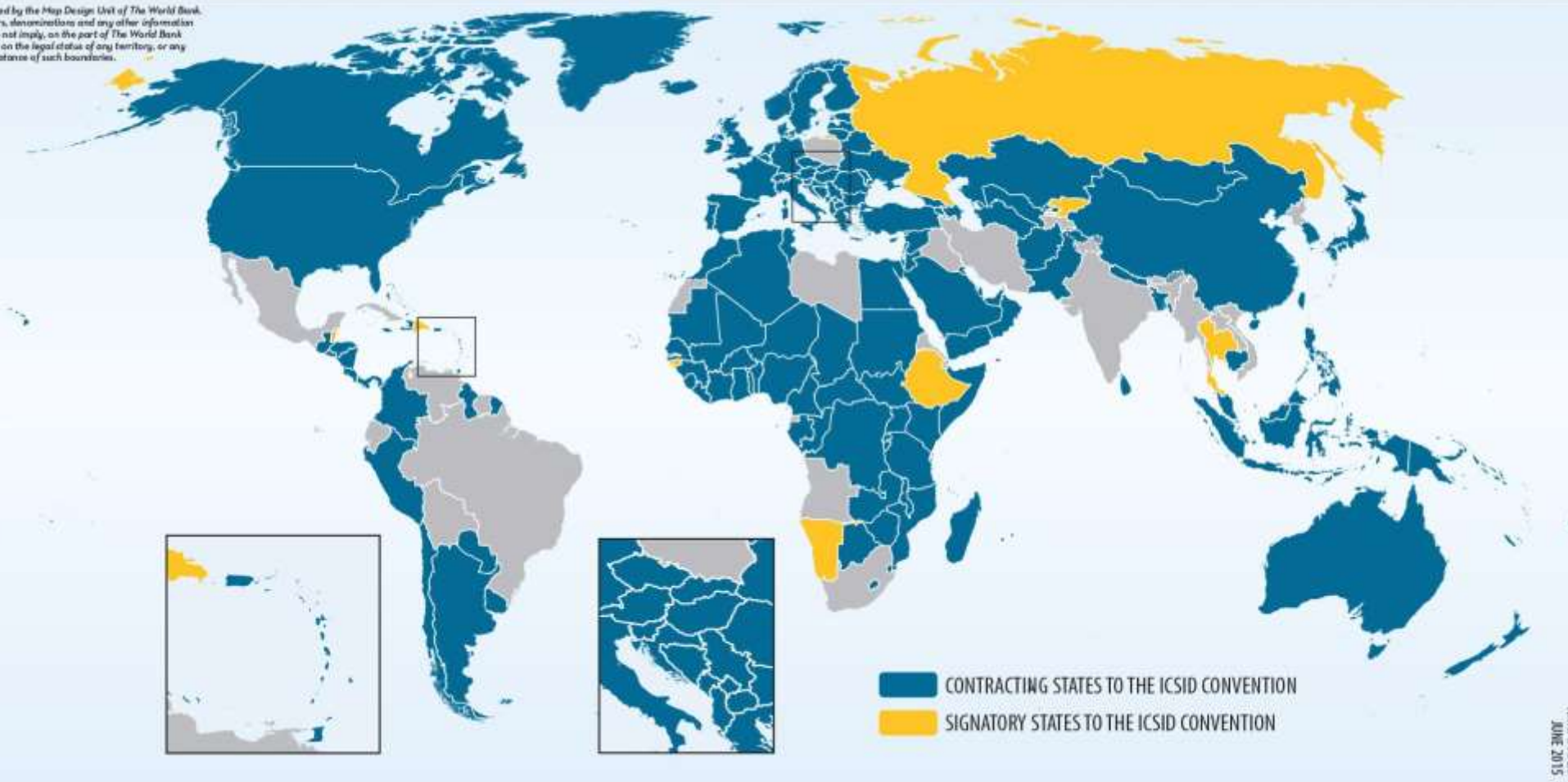
Entered into force 14 October 1966

- 139 members / 154 signatories



INTERNATIONAL CENTRE FOR  
SETTLEMENT OF INVESTMENT DISPUTES

Designed by the Map Design Unit of The World Bank. The map does not imply, on the part of The World Bank, any opinion on the legal status of any territory, or any status of such boundaries.



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



# ICSID SYSTEM

## Conciliation Rules

*Commission*: fact-finding functions and proposal of a solution for the dispute

## Arbitration Rules

*Final award*: binding to the parties to the dispute

*Art. 52 ICSID Convention*: Annulment procedure

*Art. 54 ICSID Convention*: enforcement of arbitral awards



# ICSID SYSTEM

Arbitral tribunals established *ad hoc*

No rule of precedent

- However, tendency of consistency

# ICSID JURISDICTION

## Article 25 Washington Convention

1. The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. [...]

**Legal Dispute** and **Investment** not defined in Convention

# APPLICABLE SUBSTANTIVE LAW

The applicable law as provided by the BIT jurisdictional clause (eg. *Uruguay - USA BIT (2006), Article 30. Governing Law*)

WHEN the BIT does not provide for the applicable law

- Article 42 ICSID: domestic law of the *host* State + relevant rules of international law

Decision *ex aequo et bono* (upon express request by the parties to the dispute)

# ARTICLE 42 ICSID CONVENTION

*1. The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute including its rules on the conflict of laws) and such rules of international law as may be applicable. [...]*

*3. Th[is... ] shall not prejudice the power of the Tribunal to decide a dispute ex aequo et bono if the parties so agree.*

# ARTICLE 52: ANNULMENT

(1) *Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:*

*(a) that the Tribunal was not properly constituted;*

*(b) that the Tribunal has manifestly exceeded its powers;*

*(c) that there was corruption on the part of a member of the Tribunal;*

*(d) that there has been a serious departure from a fundamental rule of procedure; or*

*(e) that the award has failed to state the reasons on which it is based.*

# CASES PENDING BEFORE ICSID

More than 82 cases

- 33 cases against Argentina
- 50 cases against other states

Recent European nationalities

- European parties (respondent) include Slovenia, Hungary, Albania, Poland, Estonia, Bulgaria, Ukraine
- Claimants are Italian, Finish, German, Greek, French, Dutch companies



# NGOS PARTICIPATION IN INVESTMENT ARBITRATION PROCEEDINGS AS *AMICI CURIAE*

Rules of Procedure for Arbitration Proceedings (ICSID Arbitration Rules) in effect from 10 April 2006

*new* Rule 37(2) → written amicus curiae submissions

- “(a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties; (b) the non-disputing party submission would address a matter within the scope of the dispute; and (c) the non-disputing party has a significant interest in the proceeding”.

*new* Rule 32(2) → attendance of non-parties at hearings

- “(2) Unless either party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements. The Tribunal shall for such cases establish procedures for the protection of proprietary or privileged information».



INTERNATIONAL CENTRE FOR  
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## 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



# INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

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## Cases

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**Case Status**

- Pending
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**Case Type**

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**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
<a href="#">ARB/15/15</a>	9REN Holding S.a.r.l	Kingdom of Spain	Pending
<a href="#">ARB/15/14</a>	Álvarez y Marín Corporación S.A. and others	Republic of Panama	Pending
<a href="#">ARB/15/13</a>	Devinci Salah Hourani and Issam Salah Hourani	Republic of Kazakhstan	Pending
<a href="#">ARB/15/12</a>	PT Ventures, SGPS, S.A.	Republic of Cabo Verde	Pending
<a href="#">ARB/15/11</a>	Total E&P Uganda BV	Republic of Uganda	Pending
<a href="#">ARB/15/10</a>	Orange SA	Hashemite Kingdom of Jordan	Pending
<a href="#">ARB/15/9</a>	Poltava Gas B.V. and Poltava Petroleum Company	Ukraine	Pending
<a href="#">ARB/15/8</a>	Aktau Petrol Ticaret A.Ş. and Som Petrol Ticaret A.Ş.	Republic of Kazakhstan	Pending
<a href="#">ARB/15/7</a>	WalAm Energy Inc.	Republic of Kenya	Pending
<a href="#">ARB/15/6</a>	Mobil Investments Canada Inc.	Canada	Pending
<a href="#">ARB/15/5</a>	BP Energy Services Company LLC	Republic of Costa Rica	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

# THE SINGLE MARKET AND THE COMMON COMMERCIAL POLICY

The **external trade policy of the EU** is referred to as the **Common Commercial Policy (CCP) (or trade policy or international trade policy)** to identify is a governmental policy governing trade with third countries.

The Treaty of Lisbon makes the CCP integrates the CCP within the EU external policies.

*The European Parliament has rights equal with the Council in adopting EU trade legislation, and must give its consent before the Council can ratify international trade agreements. In addition, the Lisbon Treaty broadened the exclusive competence of the EU to encompass foreign direct investment.*

After the entry into force of the Lisbon Treaty the CCP covers:

- *trade in goods and services;*
- *commercial aspects of intellectual property; and*
- *foreign direct investment.*

# 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 [...] the 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.*

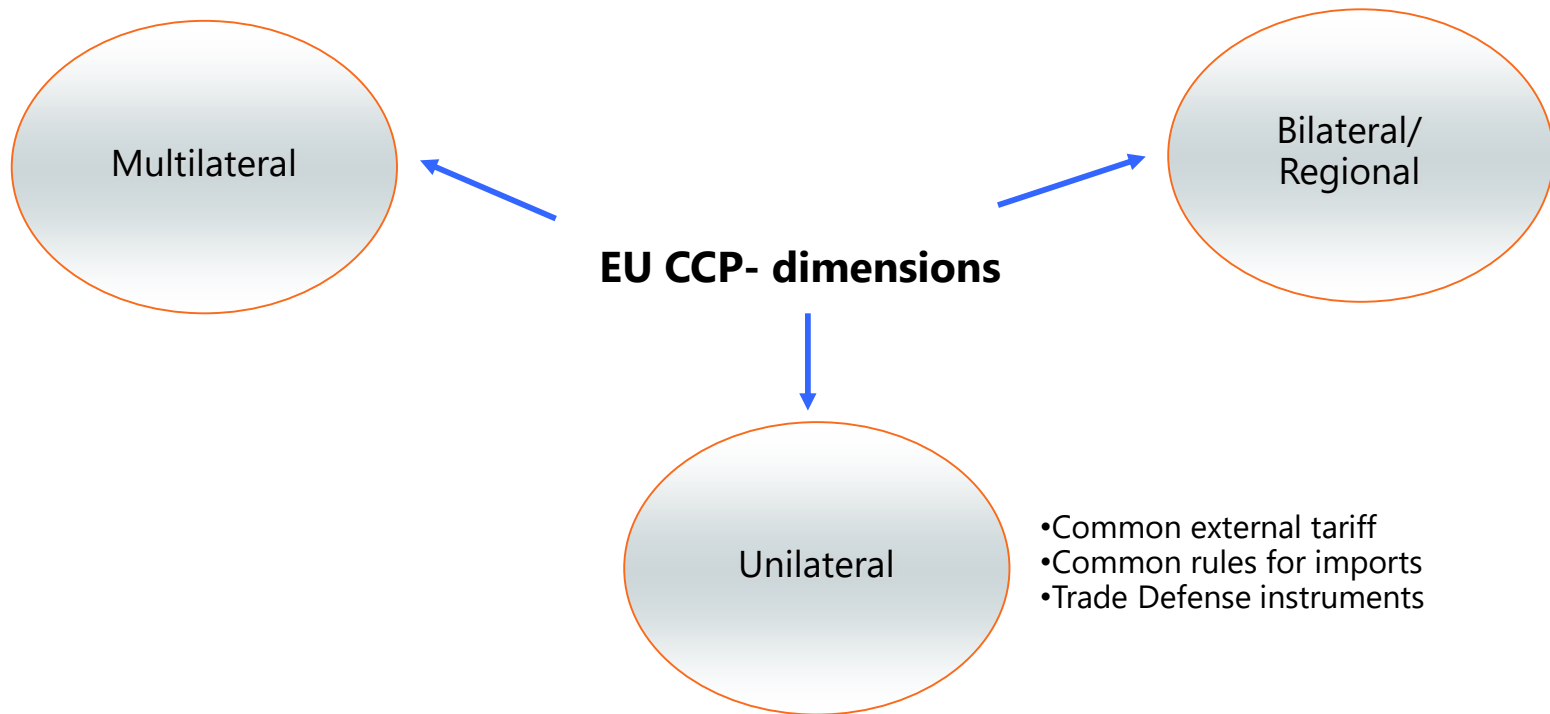
*4. For the negotiation and conclusion of the agreements referred to in paragraph 3, the Council shall act by a qualified majority. **For the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property, as well as foreign direct investment,** the Council shall act unanimously where such agreements include provisions for which unanimity is required for the adoption of internal rules.*

*[...] 6. The exercise of the competences conferred by this Article in the field of the common commercial policy shall not affect the delimitation of competences between the Union and the Member States, and shall not lead to harmonisation of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonisation.*

# MAIN FEATURES OF THE CCP

External trade policy is an **exclusive European competence**

- MS are precluded to conclude individual trade policies
- EU institutions competent to adopt EU trade legislation and enter into bilateral or multilateral trade agreements





# AREAS OF EU TRADE POLICY

## Global trade

EU trade policy makes sure that Europe's trade adapts to a fast-changing world. EU also works with the World Trade Organization to keep the global economy open and based on fair rules.

## Opening foreign markets

The EU opens markets by making trade deals with partner countries or regions.

## Trade disputes and defence

The EU ensures that mechanisms of settlement of trade disputes are provided and that EU exporters are protected against unfair trade

## Morals, values, ethics

The EU includes rules about the environment, labour rights, and sustainable development in its trade deals.

# 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

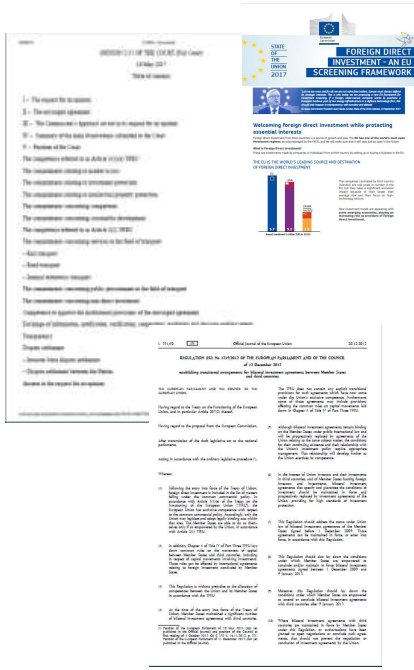
Article 205 TFEU: the common commercial policy should be guided by the general principles of the EU's external action, including promotion of democracy, the rule of law, further the respect of human rights and contribute to sustainable economic, social and environmental development

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

# LECTURE N. 2

## THE EU FOREIGN INVESTMENT POLICY

### Part. I – General regulatory framework



EUROPEAN COMMISSION  
REGULATION (EU) 2019/897 OF THE EUROPEAN PARLIAM...  
OF 28 May 2019  
laying down a framework for screening of foreign direct investments into critical technologies and critical infrastructure

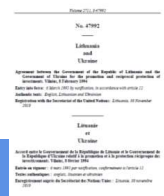
1 - The purpose of this Regulation  
2 - The scope of this Regulation  
3 - The Commission's support and assistance for the Member States  
4 - Transparency of the data processing activities in the Union  
5 - Review of the Union  
6 - The Commission's role in the Union  
7 - The Commission's role in the Union  
8 - The Commission's role in the Union  
9 - The Commission's role in the Union  
10 - The Commission's role in the Union



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INVESTMENT POLICY HUB



INVESTMENT POLICY HUB



NAFTA  
NORTH AMERICAN FREE TRADE AGREEMENT



INTERNATIONAL ENERGY CHARTER  
ENERGY CHARTER SECRETARIAT KNOWLEDGE CENTRE



Federica Cristani, Phd

Jean Monnet Module on EU Foreign Policy: EU Trade 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	LEU	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,	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.		
Having regard to the Treaty on the Functioning of the European Union, and in particular Article 207(2) thereof,	(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.		
Having regard to the proposal from the European Commission,	(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.		
After transmission of the draft legislative act to the national parliaments,	(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.		
Acting in accordance with the ordinary legislative procedure (1),	(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.		
Whereas:	(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.		
(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.	(10) Where bilateral investment agreements with third countries are maintained in force by Member States under this Regulation, or authorizations have been granted to open negotiations or conclude such agreements, that should not prevent the negotiation or conclusion of investment agreements by the Union.		
(2) In addition, Chapter 4 of Title IV of Part Three TFEU lays down common rules on the movements 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.			
(5) 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 2011 (OJ C 352 L 14.11.2012, p. 21). 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.

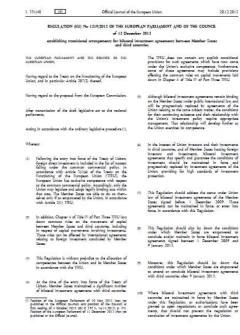
Those conditions are:

- 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 315/40	LEU	Official Journal of the European Union	20.12.2012
<b>REGULATION (EU) No 1219/2012 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL</b> of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries			
<p>THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,</p> <p>Having regard to the Treaty on the Functioning of the European Union, and in particular Article 207(2) thereof,</p> <p>Having regard to the proposal from the European Commission,</p> <p>After transmission of the draft legislative act to the national parliaments,</p> <p>Acting in accordance with the ordinary legislative procedure (1),</p> <p>Whereas:</p>		<p>(1) 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.</p> <p>(2) 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.</p> <p>(3) This Regulation should address the status under Union law of bilateral investment agreements of the Member States signed before 11 December 2009. Those agreements can be maintained in force, or enter into force, in accordance with this Regulation.</p> <p>(4) 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.</p> <p>(5) 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.</p> <p>(6) Where bilateral investment agreements with third countries are maintained in force by Member States under this Regulation, or modifications have been granted to open negotiations or conclude such agreements, that should not prevent the negotiation or conclusion of investment agreements by the Union.</p>	
<p>(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 311(4) 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 211 TFEU.</p> <p>(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.</p> <p>(3) This Regulation is without prejudice to the allocation of competence between the Union and its Member States in accordance with the TFEU.</p> <p>(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.</p>			
<p>(1) Position of the European Parliament of 10 May 2011 (not yet published in the Official Journal) and position of the Council as first reading of 4 October 2012 (OJ C 152 L 14.11.2012, p. 27). Position of the European Parliament of 11 December 2012 (not yet published in the Official Journal).</p>			

# INTRA-EU BITS

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

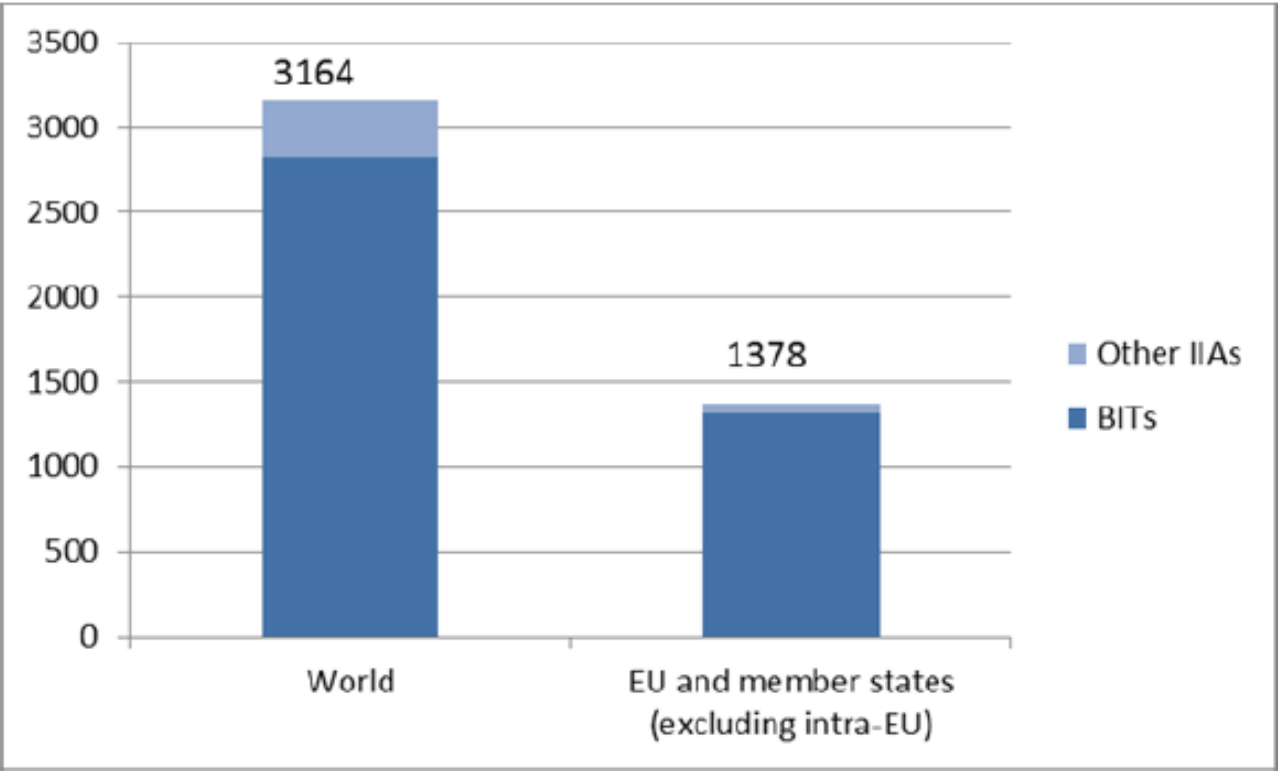
On **6 March 2018**, the Court of Justice of the European Union issued its decision in the **Achmea case** (C-284/16) between the Slovak Republic and Dutch insurer Achmea BV.

- the CJEU found investor-state dispute settlement provisions in intra-EU BITs to be incompatible with EU law



# EU and its member states are key actors in IIA rulemaking

Total number of IIAs: World and EU



Source: UNCTAD.

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



# Bilateral agreements – State of play





# 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.

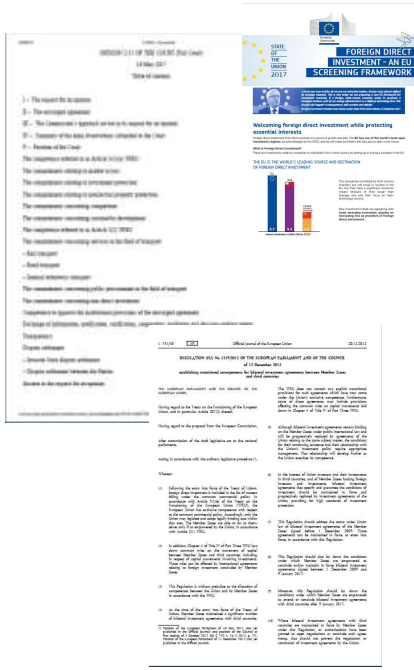
→ *FOREIGN DIRECT INVESTMENT: when a firm invests directly in facilities to produce and/or market a product in a foreign country; when a firm buys an existing enterprise in a foreign country (it involves establishing a direct business interest in a foreign country)*

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

# LECTURE N. 2

## THE EU FOREIGN INVESTMENT POLICY

### Part. I – General regulatory framework



EUROPEAN COMMISSION  
REGULATION (EU) 2019/458 OF THE EUROPEAN PARLIAM...  
OF 14 March 2019  
on screening of foreign direct investments into critical technologies and critical infrastructure

1 - The purpose of this regulation  
2 - The scope of this regulation  
3 - The Commission's approach and how it assessed the risk involved  
4 - Types of FDI that are screened  
5 - Review of the Case  
6 - The Commission's role in an Article 17(1) FDI  
7 - The Commission's role in an Article 17(2) FDI  
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INTERNATIONAL ENERGY CHARTER  
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INVESTMENT POLICY HUB  
UNITED NATIONS UNCTAD



ICSID  
INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES



LE PARLEMENT EUROPEEN



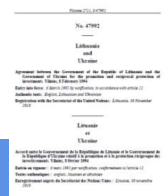
WORLD TRADE ORGANIZATION



INTERNATIONAL COURT OF JUSTICE



INTERNATIONAL COURT OF JUSTICE



INVESTMENT POLICY HUB



Federica Cristani, Phd

Jean Monnet Module on EU Foreign Policy: EU Trade Policy

# ADDITION OF FDI TO THE EU CCP (2)

**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

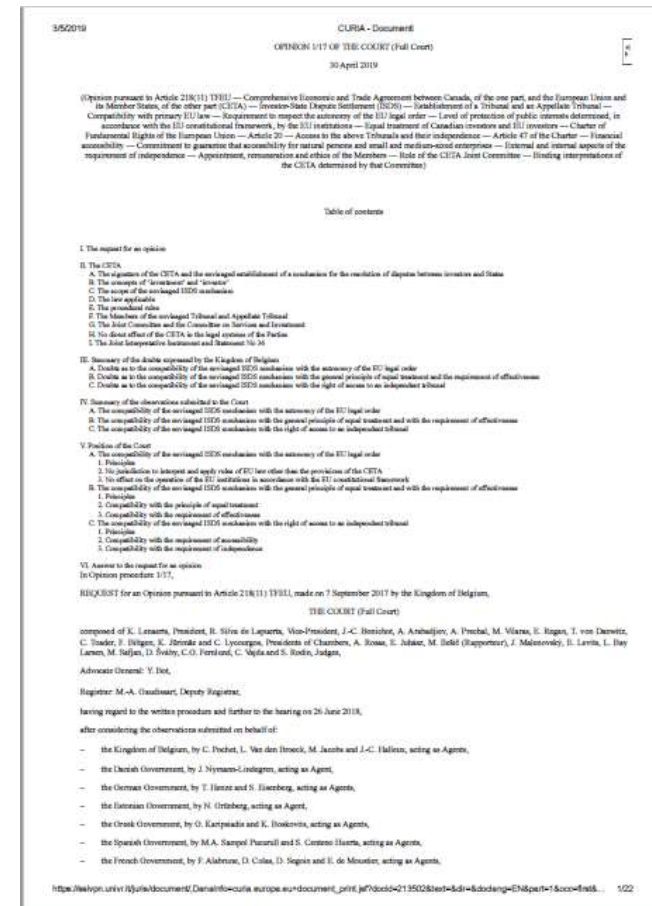
*In either event, the negotiation of such agreements, whether they are mixed or concluded as EU-only agreements, generally lies with the Commission*



# IIAS AND EU LAW: COMPATIBILITY (?)

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

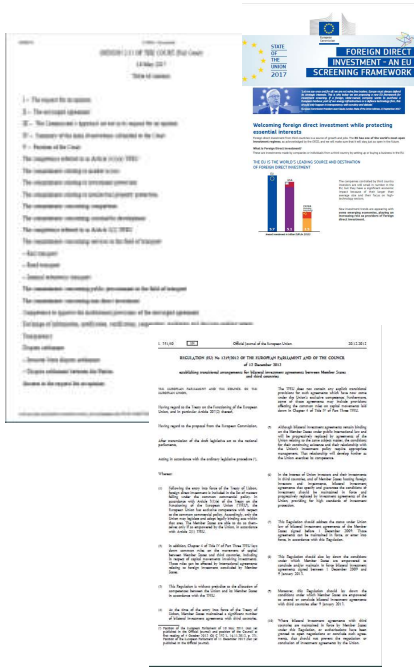
- the investor-state dispute settlement provisions of the Canada-EU's Comprehensive Economic and Trade Agreement ("CETA") are compatible with EU Law
- CETA provides for a new hybrid, two-tier system with a first instance and an appellate tribunal to hear investor-state disputes
- the Court has confirmed 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.



# LECTURE N. 2

## THE EU FOREIGN INVESTMENT POLICY

### Part. I – General regulatory framework



EUROPEAN COMMISSION  
REGULATION (EU) 2019/897 OF THE EUROPEAN PARLIAM...  
17 October 2019  
Foreign Direct Investment

**FOREIGN DIRECT INVESTMENT – AN EU SCREENING FRAMEWORK**

**Indicating Foreign Direct Investment with protecting essential interests**

**TO EU: THE WORLD LEADING COURSE AND STRUCTURE OF FOREIGN INVESTMENT**

1 - The request for inclusion  
2 - The proposed operation  
3 - The Commission's approval and its assessment of the operation  
4 - Transparency of the data processing submitted to the Commission  
5 - Review of the Case  
6 - The Commission's referral to an Article 65(1)(b) TFEU  
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20 - The Commission's referral to an Article 65(1)(b) TFEU



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**INTERNATIONAL ENERGY CHARTER**  
ENERGY CHARTER SECRETARIAT KNOWLEDGE CENTRE



**ICSID**  
INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES



COU COUR DE JUSTICE



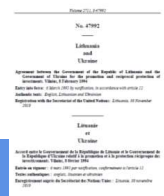
**WORLD TRADE ORGANIZATION**



INTERNATIONAL COURT OF JUSTICE



INTERNATIONAL COURT OF JUSTICE



**INVESTMENT POLICY HUB**



**INVESTMENT POLICY HUB**



Federica Cristani, Phd

Jean Monnet Module on EU Foreign Policy: EU Trade Policy

# 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

**STATE OF THE UNION 2017**

**FOREIGN DIRECT INVESTMENT - AN EU SCREENING FRAMEWORK**

*"Let me say once and for all: we are not naive free traders. Europe must always defend its strategic interests. This is why today we are proposing a new EU framework for investment screening: if a foreign, state-owned company wants to purchase a European harbour, part of our energy infrastructure or a defence technology firm, this should only happen in transparency, with scrutiny and debate."*

European Commission President Jean-Claude Juncker, State of the Union Address, 13 September 2017

**Welcoming foreign direct investment while protecting essential interests**

Foreign direct investment from third countries is a source of growth and jobs. The EU has one of the world's most open investment regimes, as acknowledged by the OECD, and we will make sure that it will stay just as open in the future.

**What is Foreign Direct Investment?**

These are investments made by companies or individuals from a third country by setting up or buying a business in the EU.

**THE EU IS THE WORLD'S LEADING SOURCE AND DESTINATION OF FOREIGN DIRECT INVESTMENT**

Region	Investment (billion EUR)
EU	5.7
USA	5.1
CHINA (including Hong Kong)	1.5

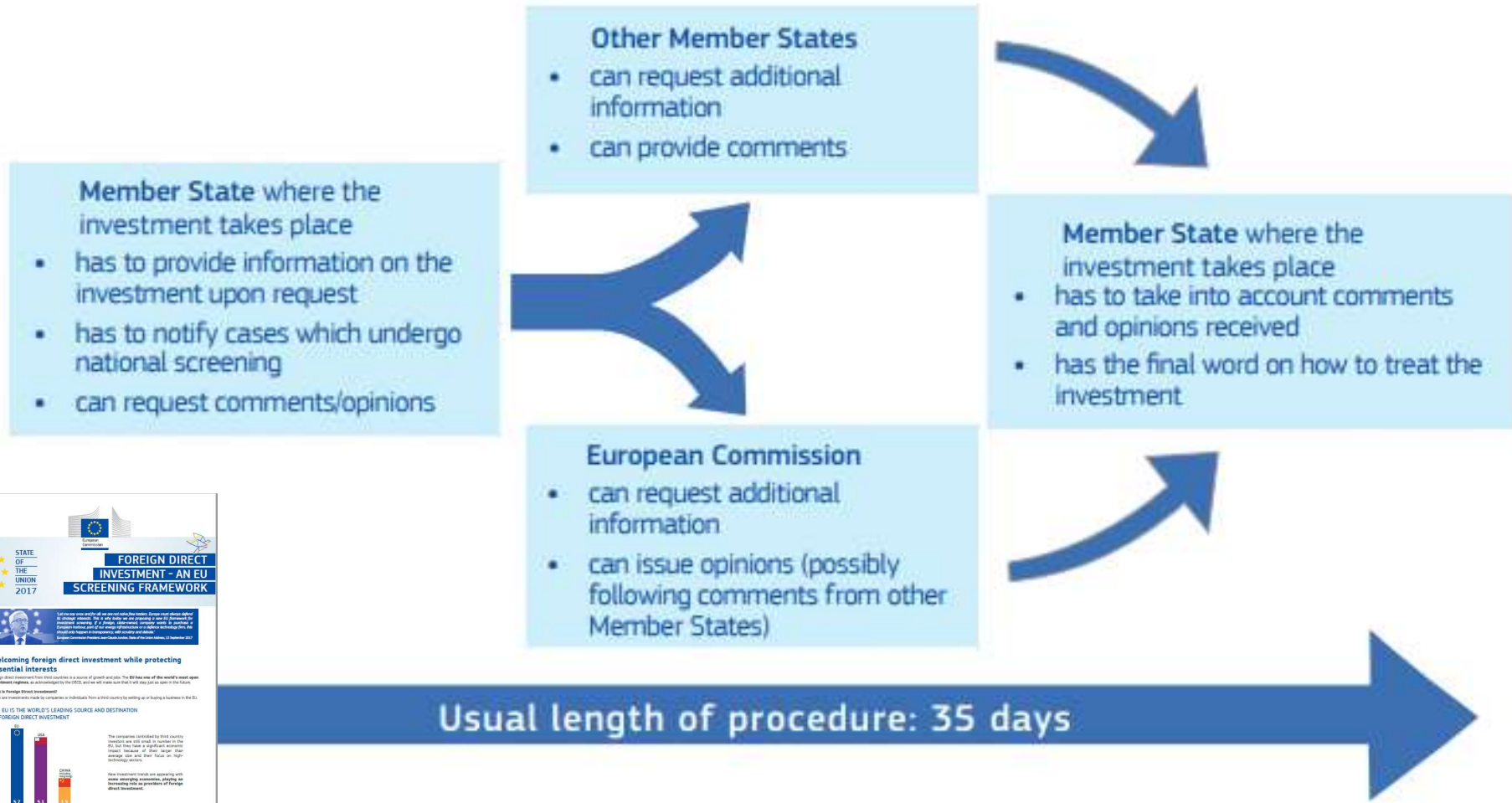
Investment in billion EUR (in 2015)

The companies controlled by third country investors are still small in number in the EU, but they have a significant economic impact because of their larger than average size and their focus on high-technology sectors.

New investment trends are appearing with some emerging economies, playing an increasing role as providers of foreign direct investment.

# 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.



**STATE OF THE UNION 2017**

**FOREIGN DIRECT INVESTMENT - AN EU SCREENING FRAMEWORK**

Let us welcome and support foreign direct investment. Europe must show itself as an open economy. It is a key to our growth and jobs. The EU has one of the world's most open investment regimes as measured by the OECD, and it will remain so. We will keep it open. This is our goal.

**Welcoming foreign direct investment while protecting essential interests**

Foreign direct investment from third countries is a source of growth and jobs. The EU has one of the world's most open investment regimes as measured by the OECD, and it will remain so. We will keep it open. This is our goal.

**What is Foreign Direct Investment?**

There are two main ways to compare or identify firms from a third country by setting up a business in the EU.

**THE EU IS THE WORLD'S LEADING SOURCE AND DESTINATION OF FOREIGN DIRECT INVESTMENT**

The companies controlled by third country investors are not only in Europe in the EU, but they have a significant economic impact. Europe is their largest average size and their focus on high-tech research.

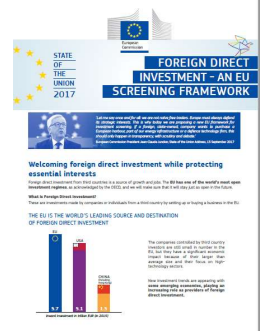
New investment trends are appearing with more emerging economies, driving an increasing role as providers of Foreign Direct Investment.



Federica Cristani, Phd



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## 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.



# LECTURE N. 2

## THE EU FOREIGN INVESTMENT POLICY

### Part. I – General regulatory framework

EUROPEAN COMMISSION  
COMMISSION REGULATION (EU) 2019/817 OF 18 May 2019  
laying down a framework for screening of foreign direct investments into critical technologies and critical infrastructure  
2019/0100 (RFP)

1. The purpose of this Regulation  
2. The scope of this Regulation  
3. The Commission's approach and the assessment of the investment  
4. Types of FDI that are screened under this Regulation  
5. Review of the Case  
6. The Commission's role in an Article 17(2) FDI case  
7. The Commission's role in an Article 17(1) FDI case  
8. The Commission's role in an Article 17(3) FDI case  
9. The Commission's role in an Article 17(4) FDI case  
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