



# ***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

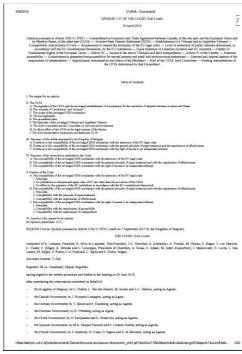
- the main features of the EU foreign trade policy and the role of the EU within the World Trade Organization (**Lecture No. 1**)
- the EU foreign investment policy (I): general regulatory framework (**Lecture No. 2**)
- the EU foreign investment policy (II): relationship with EU member states and with 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. 3

## THE EU FOREIGN INVESTMENT POLICY

### Part. II – Relationship with EU member states and with third countries



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Jean Monnet Module on EU Foreign Policy: EU Trade Policy

**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**

... transitional  
 ... are now come  
 ... Furthermore,  
 ... provisions  
 ... movements laid  
 ... in the TFEU.

**foreign direct investment**  
**portfolio investments**



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 — Internal and external 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

I. The request for an opinion  
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 A. The signature of the CETA and the envisaged establishment of a mechanism for the resolution of disputes between investors and States  
 B. The concepts of 'investment' and 'investor'  
 C. The scope of the envisaged ISDS mechanism  
 D. The law applicable  
 E. The procedural rules  
 F. The Members of the envisaged Tribunal and Appellate Tribunal  
 G. The Joint Committee and the Committee on Services and Investment  
 H. No direct effect of the CETA in the legal systems of the Parties  
 I. The Joint Interpretative Instrument and Statement No 36

... remain binding  
 ... national law and  
 ... elements of the  
 ... ; the conditions  
 ... relationship with  
 ... re appropriate  
 ... stop further as

... their investments  
 ... having foreign  
 ... investment  
 ... conditions of  
 ... in force and  
 ... cement of the  
 ... of investment



... to the common commercial policy. Accordingly, only the  
 ... Union may legislate and adopt legally binding acts within  
 ... The Member States...

(1) This Regulation should address the status under Union



**preliminary ruling**



3/5/2019 CURIA - Document  
 OPINION 2/15 OF THE COURT (Full Court)  
 16 May 2017  
 Table of contents

I – The request for an opinion  
 II – The envisaged agreement  
 III – The Commission's appraisal set out in its request for an opinion  
 IV – Summary of the main observations submitted to the Court  
 V – Position of the Court

The competence referred to in Article 3(1)(e) TFEU  
 The commitments relating to market access



**Amicus curiae**

# 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

# 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 [...] 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.*

# 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.

# EU INVESTMENT POLICY *VS MEMBER STATES*

INTRA-EU INVESTMENT AGREEMENTS?

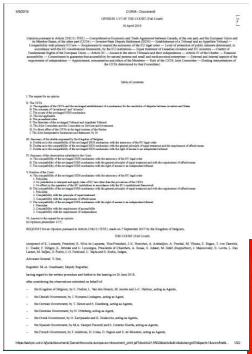
INVESTMENT AGREEMENTS OF MEMBER STATES WITH THIRD COUNTRIES?

# LECTURE N. 3



## THE EU FOREIGN INVESTMENT POLICY

### Part. II – Relationship with EU member states and with third countries



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# 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	EU	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			
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,			
Having regard to the proposal from the European Commission,	(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.
After transmission of the draft legislative act to the national parliaments,			
Acting in accordance with the ordinary legislative procedure (1),			
Whereas:	(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.
(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)(a) 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 3(1) TFEU.	(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.
(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.	(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.
(3) This Regulation is without prejudice to the allocation of competences between the Union and its Member States in accordance with the TFEU.	(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.
(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.	(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.
<small>(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 192 L, 14.11.2012, p. 23). Position of the European Parliament of 11 December 2012 (not yet published in the Official Journal).</small>			

# 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

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# 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.

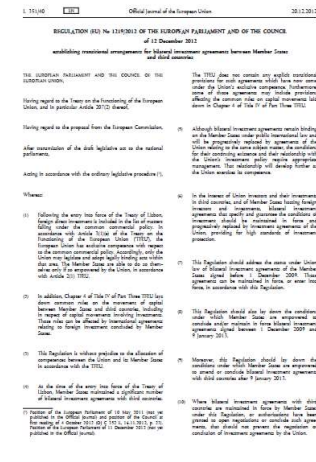
On **18 June 2015**, the Commission started infringement proceedings against five member States to terminate intra-EU BITs (Austria, Romania, Sweden, The Netherlands and Slovakia).

- 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

(preliminary reference by the German Federal Court of Justice over whether EU law precluded the application of an arbitration clause in an IIA between EU member states.)



# ECJ - PRELIMINARY REFERENCE PROCEDURE

**when a national court or tribunal refers a question of EU law to the European Court of Justice (ECJ) for a preliminary ruling so as to enable the national court, on receiving that ruling, to decide the case before it**

Article 267 TFEU

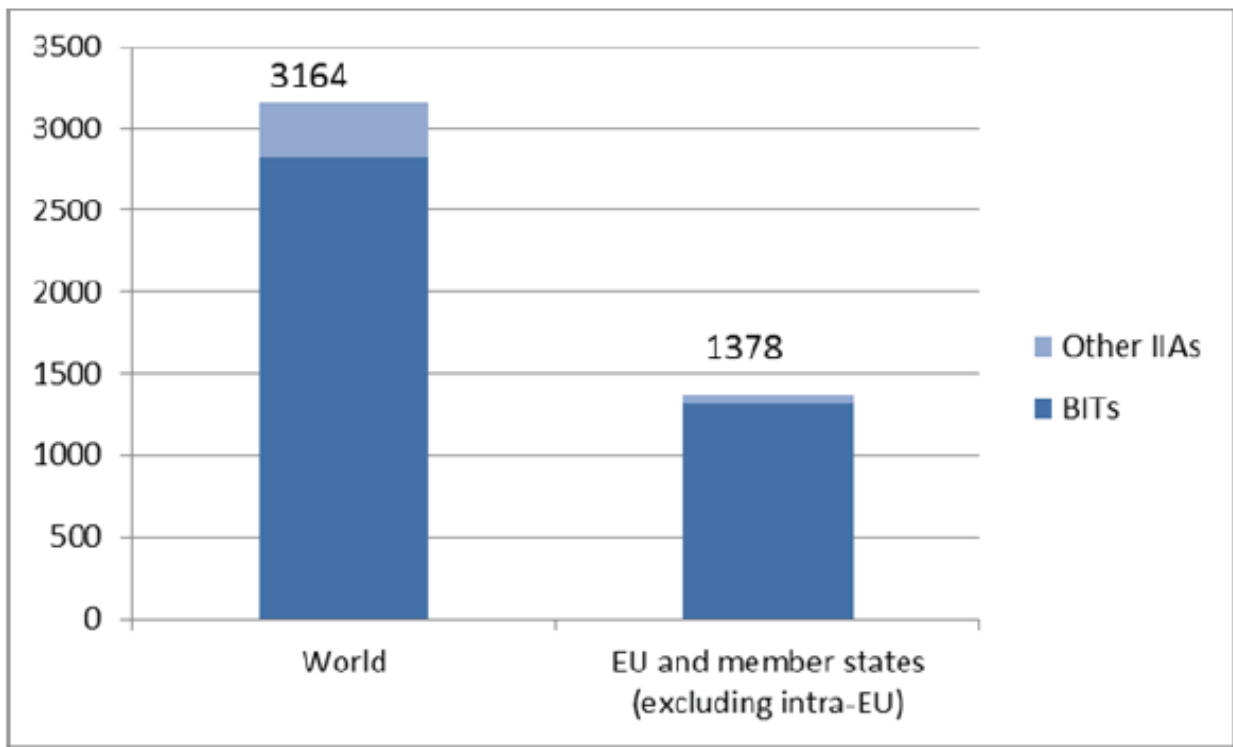
*'Where such a question is raised before any court or tribunal of a Member State, that court may, if it considers that a decision on the question is necessary to enable it to give judgment, require the Court of Justice to give a ruling thereon.'*

While lower courts have discretion as to whether to make references to the ECJ, Article 267 TFEU excludes such discretion in the case of final courts of appeal.



# 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.

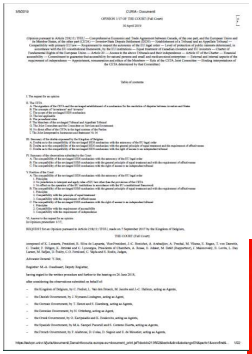


# LECTURE N. 3



## THE EU FOREIGN INVESTMENT POLICY

### Part. II – Relationship with EU member states and with third countries



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# 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)*

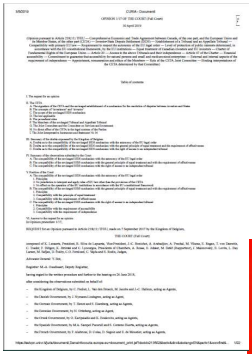
→ *PORTFOLIO INVESTMENT: investment in foreign financial instruments (e.g. bonds)*

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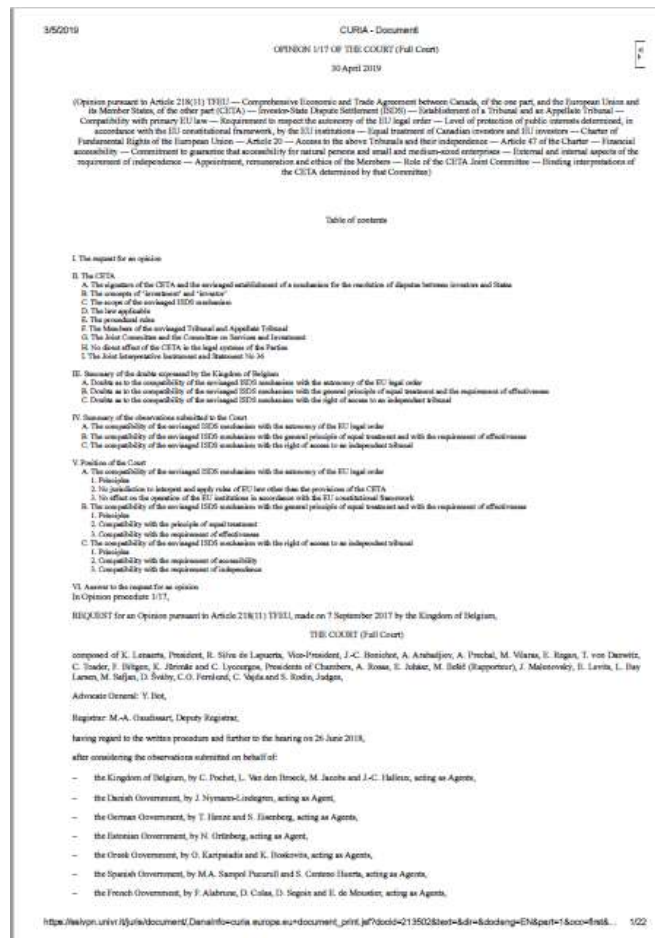


# IIAS AND EU LAW: COMPATIBILITY (?)

## 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.



# 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)

- USA
- 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

# THE STATE OF EU TRADE

2018



- EU & Customs union (Andorra, Monaco, San Marino, Turkey)
- European Economic Area (Norway, Iceland, Liechtenstein)
- Applied preferential trade agreement (FTA, EPA, DCFTA)
- Preferential agreement awaiting application
- Pending negotiations for a preferential trade agreement
- Potential preferential trade partners
- Pending negotiations for a stand-alone investment agreement
- Preferential agreement in the process of modernisation

@Trade EU  
#EUtrade

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# OVERVIEW OF FTA AND OTHER TRADE NEGOTIATIONS

Updated April 2019 – Updates in red

## FTA NEGOTIATIONS

Country	Negotiating Directives	Current Status	Next Steps
<b>NORTH AMERICA</b>			
<b>USA</b>	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.
<b>CANADA</b>	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.





**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. The aim of this agreement is to remove market access barriers to investment and provide a high level of protection to investors and investments in EU and China markets. 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 20<sup>th</sup> round of negotiations took place in Brussels from 25 to 27 February 2019.

Separate negotiations with China for an upgrade of the 1985 Trade and Economic Cooperation Agreement were launched in 2007 but have been stalled since 2011 due

The date for the next round is still to be decided.

to divergences between the mandates and expectations of the parties.

# INTERNATIONAL INVESTMENT AGREEMENTS WITH THIRD COUNTRIES:

## WHAT ABOUT THE SETTLEMENT OF DISPUTES?



INTERNATIONAL CENTRE FOR  
SETTLEMENT OF INVESTMENT DISPUTES



WORLD TRADE  
ORGANIZATION



INTERNATIONAL COURT OF JUSTICE



# 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

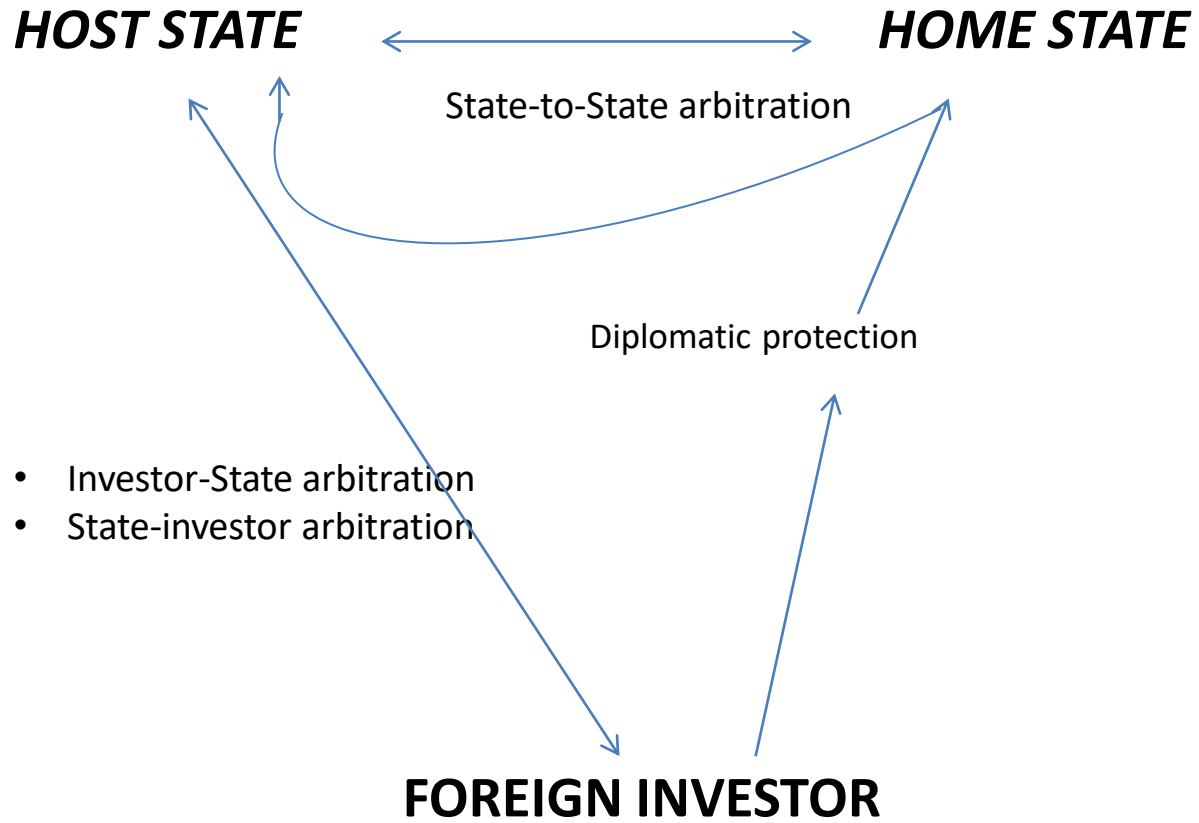


# INVESTMENT DISPUTE SETTLEMENT

DIPLOMATIC PROTECTION

JURISDICTIONAL CLAUSES IN INVESTMENT TREATIES

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



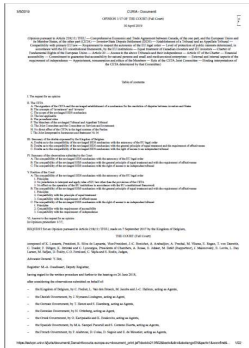


• LECTURE N. 3



• THE EU FOREIGN INVESTMENT POLICY

Part. II – Relationship with EU member states with third countries



# ICSID SYSTEM

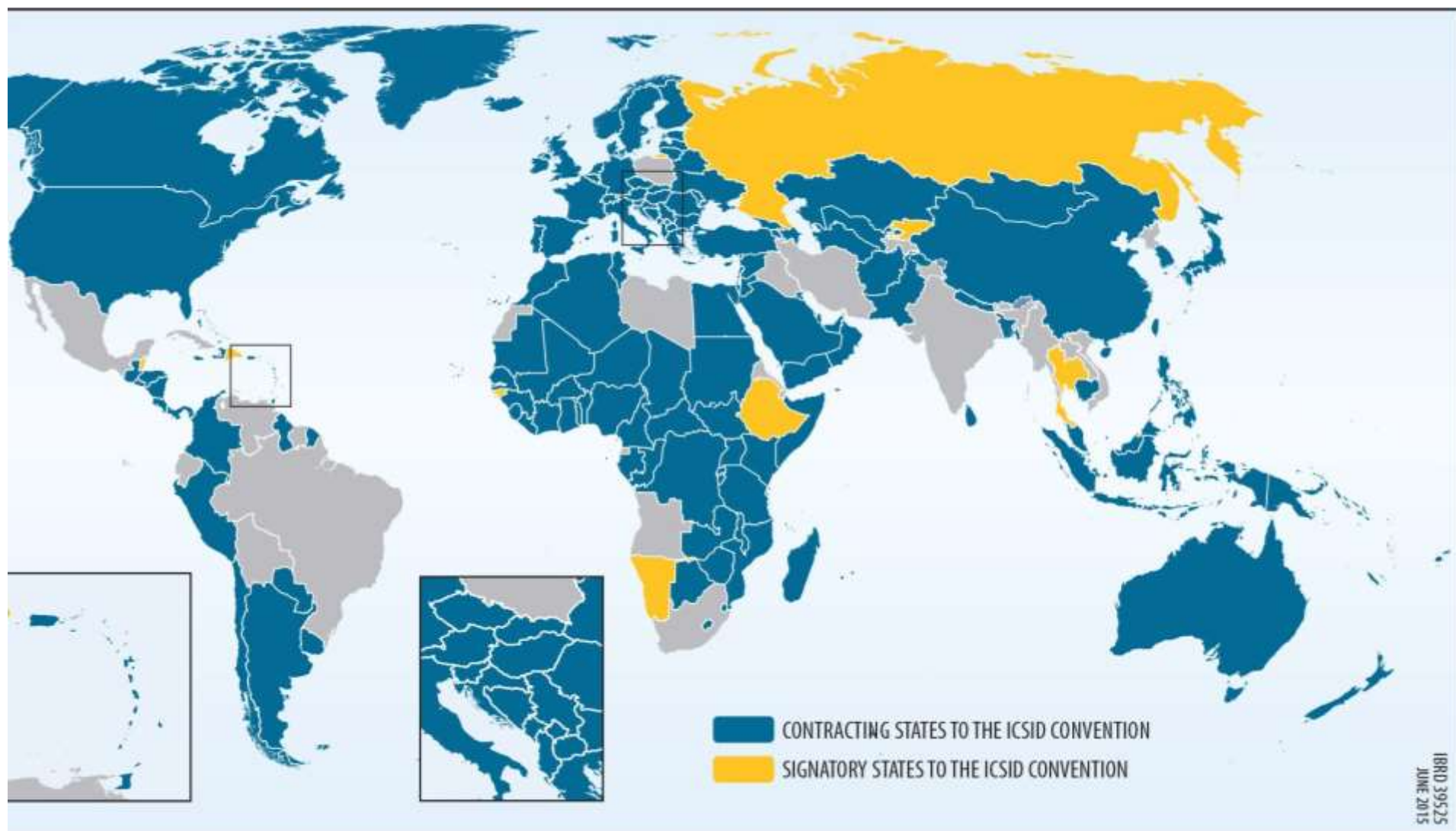
Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965

- ICSID Convention
- Washington Convention

Entered into force 14 October 1966

- 139 members / 154 signatories





IBRD 39525  
JUNE 2015

- 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



INTERNATIONAL CENTRE FOR  
SETTLEMENT OF INVESTMENT DISPUTES

# ICSID SYSTEM

Arbitral tribunals established *ad hoc*

No rule of precedent

- However, tendency of consistency



INTERNATIONAL CENTRE FOR  
SETTLEMENT OF INVESTMENT DISPUTES

# 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



INTERNATIONAL CENTRE FOR  
SETTLEMENT OF INVESTMENT DISPUTES

# 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)



INTERNATIONAL CENTRE FOR  
SETTLEMENT OF INVESTMENT DISPUTES

## 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.*



INTERNATIONAL CENTRE FOR  
SETTLEMENT OF INVESTMENT DISPUTES



# 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  
SETTLEMENT OF INVESTMENT DISPUTES

# ICSID INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES



## 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

**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

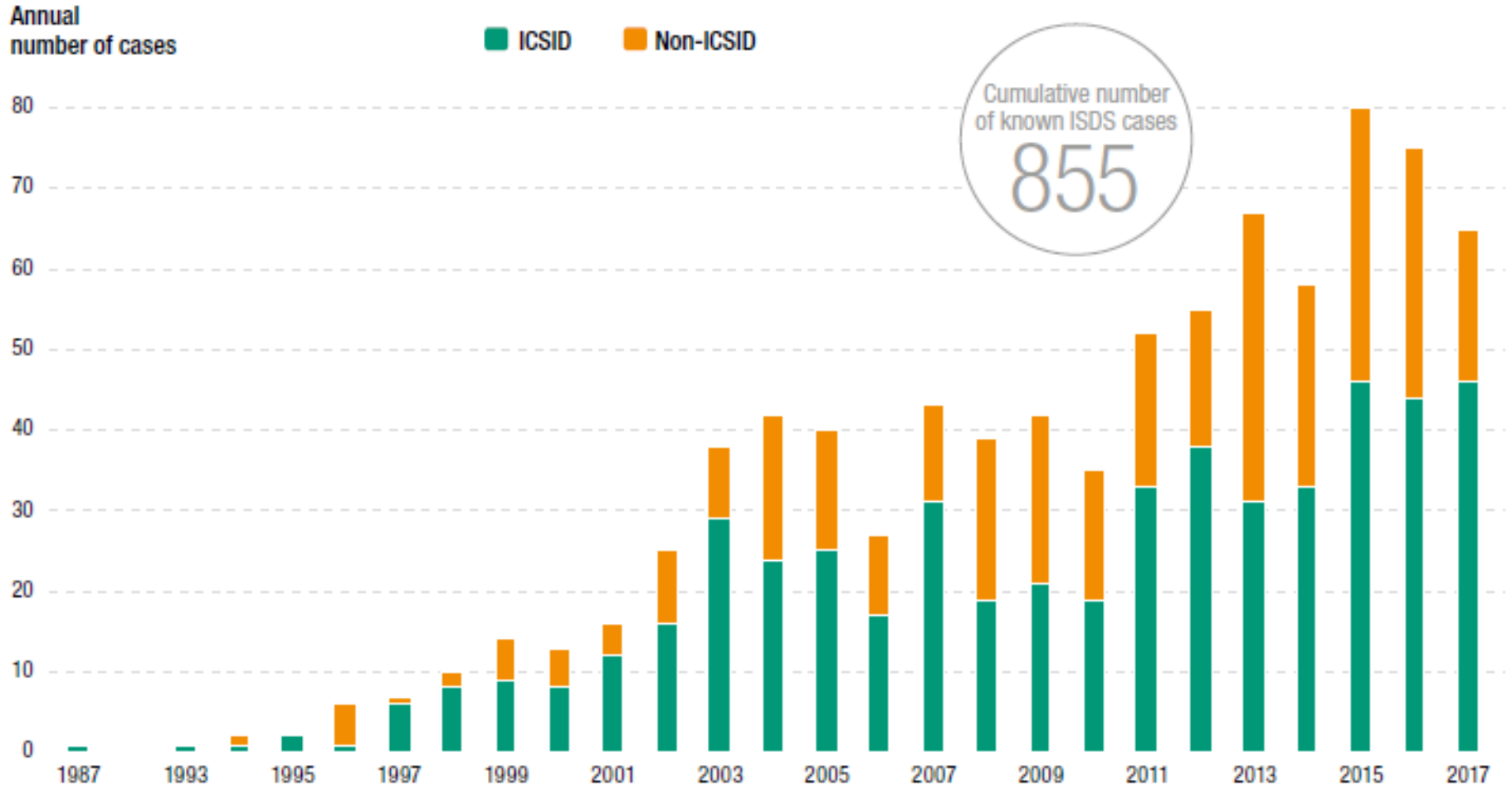
Case No.:

**SEARCH** **RESET**

Case Count : 519

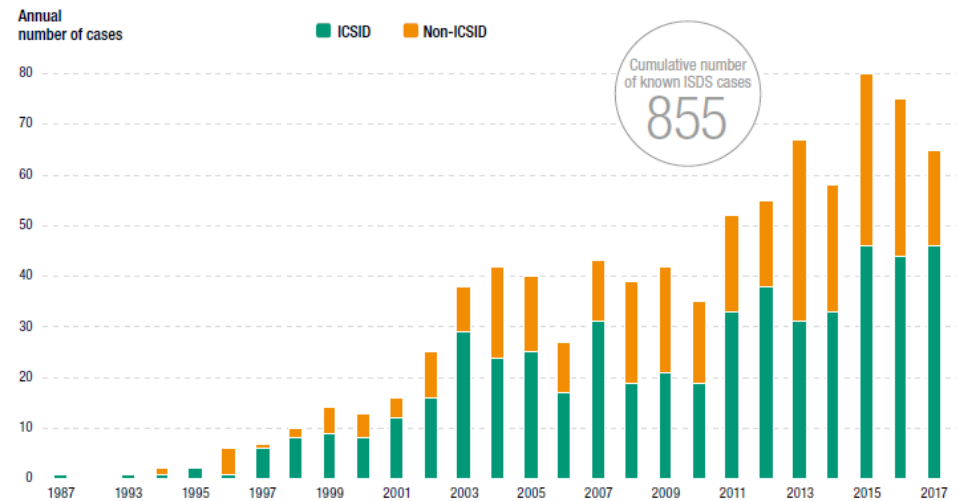
Case No.	Claimant(s)	Respondent(s)	Status
<a href="#">ARB/15/15</a>	9REN Holding S.a.r.l	Kingdom of Spain	Pending
<a href="#">ARB/15/14</a>	Álvarez y Marín Corporación S.A. and others	Republic of Panama	Pending
<a href="#">ARB/15/13</a>	Devinci Salah Hourani and Issam Salah Hourani	Republic of Kazakhstan	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>	B2 Creative Services Co. (Formerly B2)	Republic of Croatia	Pending

# TRENDS IN KNOWN TREATY-BASES ISDS (1987-2017)



# INTERNATIONAL INVESTMENT AGREEMENTS WITH THIRD COUNTRIES:

## WHAT ABOUT THE COMPATIBILITY OF ISDS WITH EU LAW?



# EU AS A NEW RESPONDENT IN INVESTOR-STATE INTERNATIONAL ARBITRATION?

- investor-State arbitrations
  - investor-EU arbitrations.
- 
- What about the allocation of responsibility and financial liability between the EU and its MSs?

# 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 *amicus curiae*

*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)

# ***MICULA V ROMANIA, ICSID CASE***

Sweden-Romania BIT

Award in favor to Micula (December 2013)

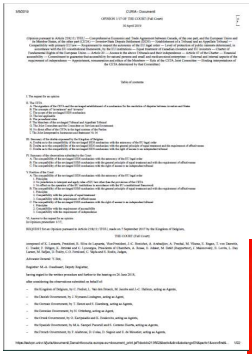
30 March 2015: EU Commission concluded that compensation paid by Romania breaches EU State aid rules and orders Romania to recover compensation

# LECTURE N. 3



## THE EU FOREIGN INVESTMENT POLICY

### Part. II – Relationship with EU member states and with third countries



# 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:

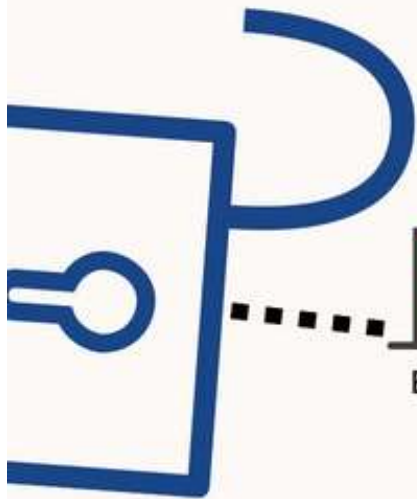
- 1) Clearer and more precise **investment protection standards**, i.e. the rules, as set out in CETA, that arbitration tribunals will apply;
- 2) New and clearer rules on the conduct of **procedures** in arbitration tribunals

# CETA in 60 seconds

## What is it?



# What does it do?



European firms can bid for Canadian public contracts



Opens the door to recognising European qualifications in Canada



European firms can sell services in Canada

# What it protects?



Bans the sale in Canada of imitations of 140 European delicacies



Governments can regulate as usual



Public services stay public



EU standards are upheld

# Why do it?



CETA puts people and the environment centre-stage...



... so it'll help the EU shape the ground rules of trade



## What's next?



European governments in the Council have approved CETA



The European Parliament approved CETA in February 2017



EU parliaments vote on CETA

# 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



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	Queijo S. Jorge	Cheese
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# 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**

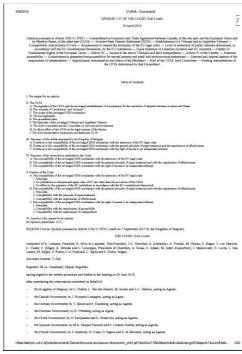
- a permanent court inspired by public international courts
- made up of a Tribunal of First Instance and an Appeal Tribunal
- not based on temporary ad hoc tribunals
- professional and independent adjudicators
  - appointed for long terms of office by both parties taking into account all interests at 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.

# LECTURE N. 3



## THE EU FOREIGN INVESTMENT POLICY

### Part. II – Relationship with EU member states and with third countries



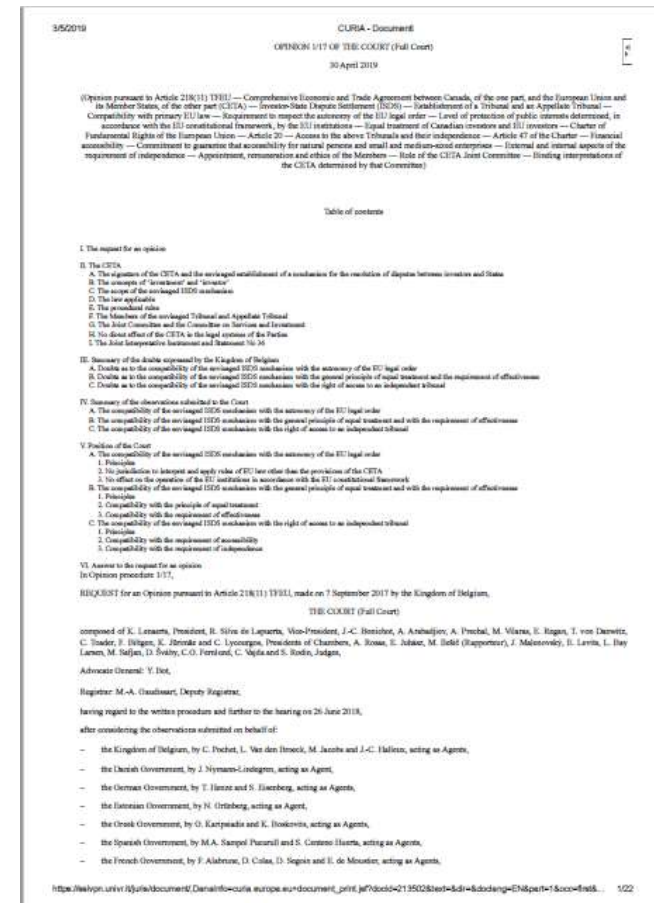
Federica Cristani, Phd

Jean Monnet Module on EU Foreign Policy: EU Trade Policy

# 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.



# THE MULTILATERAL INVESTMENT COURT PROJECT

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

The overall objective for creating a Multilateral Investment Court is to set up a permanent body to decide investment disputes. It would build on the EU's groundbreaking approach on its bilateral FTAs and be a major departure from the system of investor-to-State dispute settlement (ISDS) based on ad hoc commercial arbitration.

A Multilateral Investment Court, like the approach in the FTAs, would bring the key features of domestic and international courts to investment adjudication.

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.



# LECTURE N. 3

## THE EU FOREIGN INVESTMENT POLICY

### Part. II – Relationship with EU member states and with third countries



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