

# European Union's Approach to Reforming International Investment Law

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## European Union's Approach to Reforming International Investment Law

Iveta Alexovičová  
Maastricht University, i.alexovicova@maastrichtuniversity.nl

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## European Union's Approach to Reforming International Investment Law

### Cover Page Footnote

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# EUROPEAN UNION'S APPROACH TO REFORMING INTERNATIONAL INVESTMENT LAW

Iveta Alexovičová

Faculty of Law, Maastricht University, The Netherlands  
Correspondence: [i.alexovicova@maastrichtuniversity.nl](mailto:i.alexovicova@maastrichtuniversity.nl)

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## Abstract

*The European Union (EU) continues to be a firm proponent of the international protection of foreign investments through a web of (mostly bilateral) investment agreements, initially developed and spread all over the world by its Member States. Nonetheless, shortly after acquiring its own competence in this area, the EU has joined efforts to reform the system in order to ensure greater balance between the investment protection and the states' right to regulate in pursuance of other legitimate policy objectives. The EU has developed its own reform approach covering both substantive and procedural features of the system, and adopted an increasingly diversified approach no longer involving investment protection in all cases. This contribution discusses the EU's approach to international investment law reform and highlights a number of standing concerns that do not seem to be effectively addressed in the EU's international investment agreements yet.*

**Keywords:** *European Union, international investment agreements, investment facilitation, ISDS, reform.*

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## I. INTRODUCTION

Unlike its Member States (MSs), the European Union (EU) is a relatively new player in international investment law (IIL). While it initially seemed the EU would largely continue pursuing the model of foreign investment protection developed by its MSs, the EU's approach has evolved over the past decade and a half. Searching for the most suitable way of addressing criticism against the system nowadays largely considered as unduly constraining states' regulatory space, the EU has joined the rest of the world occupied with the system's reform.

The need for a reform of the traditional approach to the international protection of foreign investments represented by the old-generation international investment agreements (IIAs) requires no extensive introduction. The old-generation IIAs have been widely criticized for imbalance between the foreign investment protection and the states' right to regulate in pursuance of other legitimate policy objectives without a duty to compensate for

adverse effects caused to protected investments. Broadly and vaguely worded provisions and a pro-investor biased investor-state dispute settlement (ISDS) system contained in most old-generation IIAs have become a source of serious concerns questioning the legitimacy of the system. Consequently, since at least the publication of the 2012 World Investment Report fittingly entitled “Towards a New Generation of Investment Policies”,<sup>1</sup> calls for reform have been omnipresent, and widely covered in academic literature<sup>2</sup> and policy documents.<sup>3</sup> Their overarching objective is to secure states’ regulatory space and IIL’s alignment with sustainable development.<sup>4</sup>

When effectively reaching the EU, the EU reacted by tightening investment protection standards and developing a new approach to ISDS not involving a traditional ad hoc arbitration. In addition, the EU has opened up to different types of agreements with investment provisions not involving investment protection. It also developed a number of unilateral measures pursuing policy objectives not (sufficiently) covered by IIAs. Together, these features represent the EU’s approach to reforming IIL and, with the exception of unilateral measures, they are the focus of this contribution. Its aim is to show how the EU policy has become not only more restrictive but also increasingly diverse with time, addressing some but certainly not all concerns. This may be due to the fact that the EU remains a firm proponent of the system, firmly believing that foreign investments are fundamental for generating sustainable economic growth and that the level playing field of EU investors abroad needs to be secured by ensuring their access to foreign markets and IIL protection.<sup>5</sup>

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<sup>1</sup> UNCTAD, “World Investment Report 2012 - Towards a New Generation of Investment Policies,” available at [https://unctad.org/system/files/official-document/wir2012\\_embargoed\\_en.pdf](https://unctad.org/system/files/official-document/wir2012_embargoed_en.pdf).

<sup>2</sup> Suzanne A. Spears, “The Quest for Policy Space in a New Generation of International Investment Agreements,” *Journal of International Economic Law* 13, no. 4 (2010): 1037, <https://doi.org/10.1093/jiel/jgq048>. Emma Aisbett, Barnali Choudhury, Olivier De Schutter, et. al., *Rethinking International Investment Governance: Principles for the 21st Century* (United States: Columbia Center on Sustainable Development, 2018), 24.

<sup>3</sup> Most notably, UNCTAD has been heavily involved in providing policy analysis and recommendations for IIL reform. E.g. UNCTAD, “Reform Package for International Investment Regime, 2018 Edition” (2018), 16-17.

<sup>4</sup> UNCTAD, “World Investment Report 2014 - Investing in the SDGs: an Action Plan,” available at [https://unctad.org/system/files/official-document/wir2014\\_en.pdf](https://unctad.org/system/files/official-document/wir2014_en.pdf). UNCTAD, “Investment Policy Framework for Sustainable Development” 2015, available at [https://unctad.org/system/files/official-document/diaepcb2015d5\\_en.pdf](https://unctad.org/system/files/official-document/diaepcb2015d5_en.pdf).

<sup>5</sup> “Access2Markets,” European Commission, accessed 1 June 2023, <https://trade.ec.europa.eu/access-to-markets/en/content/investment>.

At present, the EU's international investment policy is based on three main pillars: investment protection, investment liberalization and investment facilitation.<sup>6</sup> This contribution's structure broadly follows that logic. After briefly explaining the origins of the EU's investment policy in the following section, the contribution continues by discussing how the EU balances international protection of foreign investments with the states' right to regulate in its IIAs that offer such protection. Given the central position of this issue in IIL reform talks, that section constitutes the core of the present contribution. In the last section, attention turns to the EU's agreements that do not offer investment protection but, instead, pursue investment liberalization or facilitation. The contribution ends with a conclusion, while leaving aside EU's unilateral initiatives, which are outside this contribution's scope.<sup>7</sup>

## II. EU'S INITIAL ENGAGEMENT WITH INTERNATIONAL INVESTMENT POLICY

External trade relations with third countries have been part of the EU's competence since its outset, in stark contrast with the absence of competence in relation to international investment policy, granted only by the Treaty of Lisbon in December 2009.<sup>8</sup> Until then, it was the individual MSs pursuing IIAs negotiations.<sup>9</sup> In fact, the EU MSs were the pioneers and the champions in concluding IIAs, starting with the very first bilateral investment treaty (BIT) of 1959 between Germany and Pakistan and continuing with over 1400 treaties by 2020.<sup>10</sup> Their great majority are old-generation IIAs, meaning a

<sup>6</sup> *Ibid.*

<sup>7</sup> The most notable unilateral initiatives of the EU concern introduction of investment screening and imposition of due diligence on large corporations. – Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 Establishing a Framework for the Screening of Foreign Direct Investments into the Union (23 March 2019) OJ L 79 I and Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence (EU) 2019/1937, COM/2022/71 final, 2022/0051(COD), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52022PC0071>.

<sup>8</sup> Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, OJ C306, 17 December 2007, 1. 'Common Commercial Policy' including foreign direct investment is in Article 207(1) of the Treaty on the Functioning of the European Union, OJ C115, 9 May 2008, 47.

<sup>9</sup> A notable exception is the Energy Charter Treaty, discussed in section 2.4 below.

<sup>10</sup> The figures include the UK. By far the most BITs were concluded by the Western MSs, with the lead by the 6 founding members and the UK. A substantial number of these treaties concerned those with Central & Eastern European countries concluded before their EU accession. These "intra-EU" BITs were eventually declared incompatible with EU law by the Court of Justice in Judgment of 6 March 2018, *Slowakische Republik v Achmea BV*, C-284/16, ECLI:EU:C:2018:158, and subsequently mostly terminated.

broad coverage and strong protection of foreign investments, with no or very limited explicit safeguards for states' regulatory autonomy. While various EU MSs did adopt a new-generation Model BIT more recently, they have not concluded many IIAs since Lisbon and even fewer since the adoption of their new Models BIT.<sup>11</sup> This is undoubtedly due to the introduction of the EU's competence in this area.<sup>12</sup> Importantly, the MSs' new Models BIT typically broadly reflect the current EU approach.<sup>13</sup>

The EU itself has not adopted a formal model for IIA negotiations. The idea was expressly dismissed early onwards.<sup>14</sup> Instead, a case-by-case approach was advocated, taking into account specific negotiating context.<sup>15</sup> As a starting point, the EU was to "be inspired by" and "build upon" experience and best practices developed by the MSs while searching further guidance from "the best available standards" in order to secure "the highest possible level of legal protection and certainty" for EU investors abroad.<sup>16</sup> That said, and fully in line with the spirit of the time at which the EU entered the area

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<sup>11</sup> A Model BIT is a template adopted by the state as a starting point for its negotiations of BITs with other countries. Many EU MSs had an old-generation model, including France, Austria, Belgium-Luxembourg Economic Union (BLEU), Germany, UK, Netherlands, Croatia, Denmark, Finland, Greece, Sweden, Italy, Spain and Cyprus. More recently, the following MSs adopted a new-generation model: Czechia (2016), Slovakia (2016 and 2019), BLEU (2019), Netherlands (2019), Italy (2022). See "International Investment Agreements (IIA) Navigator," UNCTAD, accessed 1 June 2023, <https://investmentpolicy.unctad.org/international-investment-agreements>.

<sup>12</sup> Note that since Lisbon the EU MSs need authorization from the European Commission to conclude IIAs with third states and respect general rules set out in 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, OJ L 351, 40.

<sup>13</sup> Eric De Brabandere, "The 2019 Dutch Model Bilateral Investment Treaty: Navigating the Turbulent Ocean of Investment Treaty Reform," *ICSID Review - Foreign Investment Law Journal* 36, no. 2 (2021): 319, <http://dx.doi.org/10.1093/icsidreview/siab014>.

<sup>14</sup> European Commission, "Communication, Towards a Comprehensive European International Investment Policy", 7 July 2010, Com(2010)343 Final, 6. The Council and the European Parliament expressed their views on the Communication, largely endorsing the Commission's views. – See Council of the European Union, "Conclusions on a Comprehensive European International Investment Policy, 3041st Foreign Affairs Council meeting," 25 October 2010, accessed 1 June 2023, [www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/EN/foraff/117328.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/117328.pdf) and European Parliament, "Resolution of 6 April 2011 on the Future European International Investment Policy", (2010/2203 (ini)), OJ C 296 E, 34.

<sup>15</sup> European Commission, "Communication, Towards a Comprehensive European International Investment Policy", 6.

<sup>16</sup> *Ibid.*, 5, 6 and 11. Council of the European Union, "Negotiating Directives for an Economic Integration Agreement with Canada," accessed 1 June 2023, <https://data.consilium.europa.eu/doc/document/ST-9036-2009-EXT-2/en/pdf>, as modified (with investment) <https://data.consilium.europa.eu/doc/document/ST-12838-2011-EXT-2/en/pdf>.

of international investment policymaking, the EU was aware of the need to actively protect its regulatory space.<sup>17</sup> Not yet speaking of a “reform” of the traditional international system of investment protection - after all, developed and pursued for decades by its own MSs - the EU was aware of the need to incorporate a greater balance between various interests in its investment policy. As noted below, however, it was not until 2014 that the EU would engage in the IIL reform discussions and develop its distinct approach.

The EU’s initial approach to investment policy is visible in the original 2013 version of the Comprehensive Economic and Trade Agreement (CETA), the EU’s first (trade) agreement covering investment protection, negotiated with Canada. This CETA version was used by scholars to discern what was aptly labelled as “the Invisible EU Model BIT” at that time.<sup>18</sup> While indeed largely reflective of the EU MSs’ past approach exposed in the inclusion of all traditional standards of investment protection and ISDS, the 2013 CETA version did contain new features revealing the EU’s – and Canada’s - appreciation of the need to ensure greater clarity of legal obligations created for states by IIAs, preventing their future expansive interpretation. Accordingly, the 2013 CETA version limited coverage to only “genuine” foreign investments and investors; excluded application of the most-favoured-nation (MFN) treatment to ISDS; curtailed the most controversial standard of investment protection, fair and equitable treatment (FET), by a newly developed definition; drew explicit distinction between indirect expropriation and bona fide regulatory measures; and addressed a number of concerns with ISDS, such as transparency, while retaining its main features of an ad hoc arbitration with arbitrators appointed by the disputing parties.

Despite being formally agreed upon by the negotiating parties, the 2013 CETA version did not make it for the signature. This was because the conclusion of CETA negotiations coincided with the launch of the EU’s negotiations of a Transatlantic Trade and Investment Partnership (TTIP) agreement with the United States. The latter received extensive attention and severe criticism from the civil society arguing, in particular, against the inclusion of ISDS. The EU public consultation on TTIP attracted unprecedented response and confirmed fierce opposition and serious concerns with IIAs (and ISDS) as

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<sup>17</sup> Council of the European Union, “Negotiating Directives for an Economic Integration Agreement with Canada.”

<sup>18</sup> M. Bungenberg and A. Reinisch, “Special Issue: The Anatomy of the (Invisible) EU Model BIT,” *The Journal of World Investment & Trade* 15, (2014): 375. The authors in this special issue relied on preliminary versions of CETA investment chapter leaked in May and November 2013, awaiting publication of an officially agreed text. August Reinisch, “Putting the Pieces Together ... an EU Model BIT?” *The Journal of World Investment & Trade* 15, (2014): 683.



negotiated at the time, resulting in the European Commission's decision to take a time off for reflection.<sup>19</sup> This backfired also on CETA. Subsequently to the reflection period, the EU asked Canada to renegotiate parts of CETA to the extent necessary for its alignment with the new EU's approach, in particular with respect to ISDS, consistently pursued by the EU ever since. The eventually signed 2016 CETA version<sup>20</sup> represents that new EU approach and is discussed in the next section.

### III. EU'S PROTOTYPE OF A NEW-GENERATION IIA WITH INVESTMENT PROTECTION

To date, the EU has negotiated several IIAs with third countries that offer investment protection. Apart from CETA, the EU has concluded such an agreement with Singapore<sup>21</sup> and Vietnam,<sup>22</sup> finalized negotiations with Mexico<sup>23</sup> and Chile<sup>24</sup> and continues negotiating with two other major economies India and Indonesia.<sup>25</sup> Substantively, all these agreements follow

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<sup>19</sup> European Commission, "Commission Staff Working Document, Report, Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)", SWD (2015) 3 final, 13 January 2015.

<sup>20</sup> The Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part; and Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States, both OJ [2017] L 11, 14.1.2017.

<sup>21</sup> Investment Protection Agreement between the European Union and its Member States of the one part, and the Republic of Singapore, of the other part, COM(2018) 194 final, signed on 19 October 2018 and is currently in the process of ratification by the EU Member States. The text of the signed agreement is available at [https://eur-lex.europa.eu/resource.html?uri=cellar:55d54e18-42e0-11e8-b5fe-01aa75ed71a1.0002.02/DOC\\_2&format=PDF](https://eur-lex.europa.eu/resource.html?uri=cellar:55d54e18-42e0-11e8-b5fe-01aa75ed71a1.0002.02/DOC_2&format=PDF).

<sup>22</sup> Investment Protection Agreement between the European Union and its Member States, of the one part, and the Socialist Republic of Viet Nam, of the other part, COM/2018/693 final, was signed on 30 June 2019 and is currently in the process of ratification. The text of the signed agreement is available at [https://eur-lex.europa.eu/resource.html?uri=cellar:2d9b97ac-d2e7-11e8-9424-01aa75ed71a1.0001.02/DOC\\_2&format=PDF](https://eur-lex.europa.eu/resource.html?uri=cellar:2d9b97ac-d2e7-11e8-9424-01aa75ed71a1.0001.02/DOC_2&format=PDF).

<sup>23</sup> The text of the investment chapter of this agreement is available for information purposes at [https://trade.ec.europa.eu/doclib/docs/2018/april/tradoc\\_156812.pdf](https://trade.ec.europa.eu/doclib/docs/2018/april/tradoc_156812.pdf). Although the agreement has only been reached 'in principle' and thus has not yet been signed, for simplicity reasons it is referred to as 'the EU-Mexico Agreement' in this contribution and entailing the investment chapter (which has not been numbered in the available text).

<sup>24</sup> The text of the investment chapter of this agreement agreed in principle can be consulted, for information purposes, at <https://circabc.europa.eu/rest/download/51f1e774-85de-44e9-a0e2-fb9c3922312b>. This agreement too is for the simplicity reasons referred to as 'EU-Chile Agreement' in this contribution.

<sup>25</sup> Information on these negotiations are provided on the European Commission website, available at <https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/negotia->

the blueprint of the final (2016) CETA version, though variations do exist in respect of specific provisions. With regard to the form, CETA is the only EU's IIA concluded as a free trade agreement (FTA) with an investment chapter. All subsequent agreements have – or are likely to have – a form of a separate investment protection agreement (IPA) concluded alongside an FTA between the same parties.<sup>26</sup>

This section discusses reform features in the EU's IIAs offering investment protection by considering first the limitations imposed in relation to the IIAs' personal scope, turning subsequently to substantive provisions and ISDS. Afterwards, it briefly addresses the EU's reformed approach to a specific multilateral IIA with investment protection to which both the EU and its MSs are a party, the Energy Charter Treaty (ECT) concluded back in 1994.<sup>27</sup> Itself an example par excellence of an old-generation IIA, the ECT has not escaped the EU's reform efforts.

## A. SCOPE OF APPLICATION

Old-generation IIAs typically provide for a broad definition of covered “investment” and “investor”, containing hardly any explicit limitation. Consequently, in principle, “every kind of asset” in the host state, owned or controlled, directly or indirectly, by an investor possessing the nationality of the other party to the treaty, falls within the IIA scope. That said, when confronted with the need to distinguish between “real” investments and other (commercial) activities, ISDS tribunals developed a set of criteria for setting the two apart, including a commitment of capital or other resources, certain duration and risk assumption.<sup>28</sup> New-generation IIAs often follow this approach, although they also tend to add a negative list of expressly excluded assets. This is the approach adopted by the EU too.

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<sup>26</sup> This is due to the decision of the EU Court of Justice on the division of competences between the EU and its Member States, which has ruled that only foreign direct investments fall under the exclusive EU competence whereas the competence with regard to portfolio investments and ISDS is shared with the MSs. – Court of Justice of the European Union, Opinion 1/17, 30 April 2019. As the EU's IIAs typically cover all three matters, they must be concluded as ‘mixed’ agreements, requiring ratification by the EU and all its MSs. In contrary, ‘pure’ trade agreements (with no investment chapter) are EU-only agreements with no need for the ratification process at the MSs’ level. To simplify ratification of trade agreements, after the Court’s decision, trade and investment were disconnected into two separate agreements.

<sup>27</sup> The Energy Charter Treaty, signed on 17 December 1994, 2080 UNTS 100, Nr. I-36116. The ECT does not cover only investments and their protection but also other issues such as trade and energy efficiency.

<sup>28</sup> Krista Nadakavukaren Schefer, *International Investment Law: Text, Cases and Materials* (Cheltenham: Edward Elgar Publishing, 2020), 82-89.

The EU's IIAs retain a broad definition of investment, with a non-exhaustive positive and a negative list of activities falling within or outside the definition, and accompanied by a reference to the above-mentioned investment characteristics. Apart from the limitations in the negative list (e.g. certain types of claims to money), the coverage of activities remains very broad and is not tight to an actual enterprise in the host state.<sup>29</sup> An enterprise-based approach, used by some countries nowadays,<sup>30</sup> would have limited the EU's IIAs scope more but would not be in line with the EU's wish to continue safeguarding a maximum possible protection to EU investors abroad, as long as they are genuinely EU investors.

With regard to the definition of covered investors, the EU has drawn lessons from the past where ISDS tribunals adopted an interpretative approach focusing solely on the definitions' wording and disregarding the treaties' context. That context suggests that only genuinely "foreign" investors should be covered. Nonetheless, tribunals have generally decided that, unless expressly stated to the contrary, also investors possessing the nationality of the other IIA party only formally, i.e. without a genuine relationship, were within the IIA scope.<sup>31</sup> The EU follows most other countries on this matter and excludes enterprises without a direct or indirect genuine relationship with the home state (the so-called "shell companies"). It does so by requiring not just a formal incorporation of an enterprise under the laws of the IIA party but also substantial business activities in the territory of that party.<sup>32</sup> That said, natural persons continue to be covered investors under the new-generation IIAs when they hold a passport of the treaty party, save for a few instances under which permanent residents are explicitly within the IIA scope as well.<sup>33</sup>

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<sup>29</sup> European Union-Canada Comprehensive Economic and Trade Agreement, art. 8.1. European Union-Singapore Investment Protection Agreement, art. 1.2. European Union-Vietnam Investment Protection Agreement, art. 1.2; European Union-Mexico Trade Agreement, art. 3. European Union-Chile Agreement, art. 10.1.

<sup>30</sup> Model Text for the Indian Bilateral Investment Treaty (India Model BIT) 2015, art. 1.4, text can be downloaded at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3560/download>. Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria, art. 1 available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5409/download>.

<sup>31</sup> Schefer, *International Investment Law*, 157 and 169; *Tokios Tokelés v. Ukraine*, ICSID Case no. ARB/02/18, Decision on Jurisdiction, 29 April 2004.

<sup>32</sup> European Union-Canada Comprehensive Economic and Trade Agreement, art. 8.1. European Union-Vietnam Investment Protection Agreement, art. 1.2(c). European Union-Singapore Investment Protection Agreement, art. 1.2(5). European Union-Mexico Trade Agreement, art. 3. European Union-Chile Agreement, art. 10.1(1).

<sup>33</sup> This is the case for Latvia in all EU's IIAs and for Canada in European Union-Canada Comprehensive Economic and Trade Agreement.

To some extent, the scope of application of the EU's IIAs is narrower when compared to the approach generally applied under the old-generation IIAs, although it remains fairly broad. It still covers investments by covered investors even if they are not directly related to the substantial business activities of that investor in the host state. It also continues to cover indirect investors<sup>34</sup> as well as portfolio investments<sup>35</sup> and nationals on the basis of their passport disregarding whether they have a genuine link with the home state.<sup>36</sup> The latter is less of an issue as natural persons are generally not as frequently engaged in foreign investment activities (and ISDS disputes) as enterprises. Indirect and portfolio investments, however, have been perceived with more suspicion and some third countries have decided to exclude them from the coverage of their new-generation IIAs.<sup>37</sup> This is not the case for the EU which limits investment protection to genuine(ly) foreign investments and investors while remaining open to otherwise a broad coverage of investments.

The EU also differs from some countries that limit protection to investments that contribute to sustainable development.<sup>38</sup> Although generally requiring such contribution may be a less desirable way forward, given possible interpretative difficulties,<sup>39</sup> it is less complicated to simply carve out from the IIA scope some specific - and particularly problematic - types of investments, like fossil fuels. After all, this has been (partly) successfully pursued - by the EU - with respect to the ECT.<sup>40</sup> Yet, even the most recent EU-Chile Agreement contains no comparable provision. This is in stark contrast with a recognition of the need to move away from fossil fuels and promote trade an investment in climate-friendly goods and services, found in the EU's parallel trade agreements.<sup>41</sup>

<sup>34</sup> Indirect investors are those holding the investment through another company or a number of companies. Issues with often a complex corporate structure of investors are discussed. See Schefer, *International Investment Law*, chapter 3, section 3.3.2.

<sup>35</sup> Unlike foreign direct investments, portfolio investments are passive investments in the form of securities or other financial assets but without direct ownership or control over an enterprise.

<sup>36</sup> The exception are dual nationals who are deemed to be exclusively the nationals of the party of their dominant or effective nationality. See European Union-Canada Comprehensive Economic and Trade Agreement, art. 8.1 and European Union-Mexico Trade Agreement, art. 3.

<sup>37</sup> The prominent example is India. See India Model BIT, art. 1.4(i). See also Morocco-Nigeria Bilateral Investment Treaty, art. 1.

<sup>38</sup> See also Morocco-Nigeria Bilateral Investment Treaty, art. 1. Agreement Between the Government of The Republic of Mauritius and the Government of the Arab Republic of Egypt on the Reciprocal Promotion and Protection of Investments, available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3285/download>, art. 1.

<sup>39</sup> On the past jurisprudence on the criterion of the contribution to sustainable development, see Nadakavukaren Schefer, *International Investment Law*, 98-100 and 110.

<sup>40</sup> See below, section 2.4.

<sup>41</sup> European Union-Singapore Investment Protection Agreement, art. 12.11(1)-(3) located in

## B. CORE SUBSTANTIVE OBLIGATIONS

The main objective of the reform of substantive IIA obligations is to ensure that they do not prevent states from regulating in pursuance of other legitimate policy objectives, such as environmental protection and sustainable development more generally, in fear of large compensation claims by adversely affected foreign investors. Under the old-generation IIAs, the most problematic substantive obligations in that regard proved to be the fair and equitable treatment (FET) obligation and the prohibition of indirect expropriation without compensation. Elements in national treatment (NT), MFN treatment, full protection and security (FPS) and umbrella clauses, and absence of exceptions justifying an obligation breach for legitimate reasons have also been regarded as problematic. Unlike some other countries, the EU has retained all mentioned obligations in its IIAs and decided to address the problematic elements by more conscious and precise drafting of the relevant provisions.

Before elaborating on each of them, it is worth noting that the EU's IIAs contain no obligations for investors, only for states. Consequently, they miss on an important element of the IIL reform aimed at achieving a greater balance not just between the obligations and the rights of states committing to international investment protection, but also between the committing states and benefitting investors. The need for the latter was painfully demonstrated in cases where a foreign investor secured compensation of damage from the host state in ISDS proceedings without being obliged to do the same for its harm to the state and its population.<sup>42</sup> Countries have addressed this asymmetry, built into the traditional IIAs, in various ways.<sup>43</sup> The EU only includes soft-law provisions directed to the state parties, encouraging them to “incorporate into their internal policies internationally recognised principles and guidelines of Corporate Social Responsibility / Responsible Business Conduct”.<sup>44</sup> For investors themselves, the EU's more recent IIA merely “reaffirm the importance of investors conducting a due diligence process to identify, prevent, mitigate, and account for the environmental and social risks

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chapter on Trade and Sustainable Development.

<sup>42</sup> The most recent landmark cases are *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award, 8 December 2016; and *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Award, Decision on Reconsideration and Award, and Decision on Counterclaims, both of 7 February 2017.

<sup>43</sup> Barnali Choudhury, “International Investment Law and Non-economic Issues,” *Vanderbilt Journal of Transnational Law* 53, no. 1 (2021): 53-54.

<sup>44</sup> European Union-Canada Comprehensive Economic and Trade Agreement, art. 22.3(2). European Union-Chile Trade Agreement, art. 10.23(1).

and impacts of its investment”.<sup>45</sup> While the EU is currently taking unilateral steps to increase due diligence by large corporations in their global value chains,<sup>46</sup> in its IIAs it follows the prevailing trend of soft-law approach, instead of joining more courageous countries including proper investor obligations in their IIAs.<sup>47</sup> This too seems in contrast to the EU’s preservation of almost all - even most controversial - obligations that states own to investors, discussed in the subsequent subsections.

## 1. FAIR AND EQUITABLE TREATMENT

FET is an obligation that appears in a vast majority of old-generation IIAs with no specification of its intended meaning, though some provide for a (rather unclear) link to (customary) international law (principles). Due to the absence of a definition and the ambiguity of the terms used (“fair” and “equitable”), there was little to limit expansive interpretation and application of this standard by ISDS tribunals, making it the most litigated - and most successfully litigated - standard of investment protection to date.<sup>48</sup> This has led to much resentment, not just against FET but also ISDS and IIAs as such, sparking the calls for reform.<sup>49</sup>

The FET obligation has been ruled by tribunals to be breached by arbitrary, unreasonable or discriminatory treatment, abusive or coercive conduct, behavior contrary to good faith, lack of transparency, consistency or respect for investor legitimate expectation as well as denial justice or due process.<sup>50</sup> While many of these obligations have not raised issues, the manner (and unpredictability) in applying arbitrariness, unreasonableness, transparency, consistency and the protection of legitimate obligations in disputes concerning state regulatory measures have been viewed as unduly favouring foreign

<sup>45</sup> European Union-Chile Trade Agreement, art. 10.23(2).

<sup>46</sup> Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence (EU) 2019/1937, COM/2022/71 final, 2022/0051(COD), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52022PC0071>.

<sup>47</sup> Most notably Morocco – Nigeria BIT, Art. 14, 17, 18 and 20.

<sup>48</sup> By the end of 2022, a FET breach was alleged in 652 known treaty-based investor-state disputes (out of 755 disputes for which data is available) and found in 179 out of 273 disputes decided thus far. No other investment standard has such a high rate of invocation or success; the second most litigated standard being indirect expropriation claimed in 520 disputes, of which 76 times successfully. See UNCTAD, “Investment Dispute Settlement Navigator,” accessed 1 June 2023, <https://investmentpolicy.unctad.org/investment-dispute-settlement>.

<sup>49</sup> UNCTAD, “The Changing IIA Landscape: New Treaties and Recent Policy Developments”, *IIA Issues Note* (2020), 6.

<sup>50</sup> For example, *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, para. 524. See also Rudolf Dolzer, “Fair and Equitable Treatment: Today’s Contours”, *Santa Clara Journal of International Law* 12 (2014).

investors over the state's right to regulate.<sup>51</sup>

The most contentious obligation red into FET is the protection of investors' legitimate expectations and the obligation to provide a degree of legal stability to foreign investments. The frustration with these (arguably too distinct) obligations rests not just on the unpredictable and inconsistent manner in which they have been interpreted and applied in comparable cases,<sup>52</sup> it goes deeper, into the very existence of these obligations. The latter has been contested, in particular though not only, in instances of FET expressly linked to international law.<sup>53</sup> Over time, that type of FET provision has become understood as not going beyond the minimum standard of treatment (MST) owed to all aliens (not just investors) under customary international law, requiring somehow lower level of protection than the autonomous FET standard specific to IIAs.<sup>54</sup> The actual difference between the two types of FET have sometimes been argued as more theoretical than real, though.<sup>55</sup> In addition, the precise level and content of protection under the FET linked to customary international law remains unclear. For this reason, qualification of FET by a reference to the MST as a viable option for FET reform is no longer recommended by UNCTAD.<sup>56</sup>

UNCTAD has been heavily engaged with development of policy options for IIL reform. With regard to FET it recommends a number of solutions - clarification by an exhaustive or illustrative list of specific obligations - positive, negative, or a combination thereof; an FET (explicit) omission; or

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<sup>51</sup> For an overview, see Iveta Alexovičová, "Risky Arbitrariness in the EU's Investment Treaties," in *Sustainable Europe and its Global Reach*, CLEER Paper 2022/02, Eva Kassoti and Andrea Ott, eds. (The Hague: Asser Institute, 2022), 75.

<sup>52</sup> Federico Ortino, "The Obligation of Regulatory Stability in the Fair and Equitable Treatment Standard: How Far Have We Come?" *Journal of International Economic Law* 21, no. 4 (2018): 845.

<sup>53</sup> *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Separate Opinion of Arbitrator Pedro Nikken, 30 July 2010. For criticism by commentators, see Christopher Campbell, "House of Cards: The Relevance of Legitimate Expectations under Fair and Equitable Treatment Provisions in Investment Treaty Law," *Journal of International Arbitration* 30, no. 4 (2013): 365. Muthucumaraswamy Sornarajah, *Resistance and Change in the International Law on the Foreign Investment* (Cambridge University Press, 2015), 257.

<sup>54</sup> UNCTAD, "Fair and Equitable Treatment, UNCTAD Series on Issues in International Investment Agreements II, A Sequel," 2012, 60.

<sup>55</sup> *Saluka Investments BV (The Netherlands) v. Czech Republic*, PCA Case No. 2001-04, Partial Award, 17 March 2006, para. 291; or *Murphy Exploration and Production Company International v. Republic of Ecuador II*, PCA Case No. 2012-16 (formerly AA 434), Partial Final Award, 6 May 2016, para. 208.

<sup>56</sup> UNCTAD, "Reform Package for International Investment Regime, 2018 Edition," 2018, 36. UNCTAD, "International Investment Agreements Reform Accelerator," 2020, 21.

its reduction to a mere political commitment.<sup>57</sup> Obviously, the safest way to go is an omission, but this is not the choice made by the EU. Instead, the EU has opted for an exhaustive list of specific obligations covered by the FET standard, with a possibility for the IIA parties to extend the list in the future. Accordingly, under the EU's IIAs, FET standard would be breached by measures that constitute denial of justice; fundamental breach of due process; manifest arbitrariness; targeted discrimination on manifestly wrongful grounds; or abusive treatment such as harassment or coercion.<sup>58</sup> EU's FET provisions provide for several clarifications, general<sup>59</sup> and more recently also specific for each covered ground.<sup>60</sup>

Defining FET obligations through an exhaustive list of obligations is the second safest option and certainly more predictable than linking it with the MST. And while the EU's list of included obligations is largely in line with the existing ISDS jurisprudence, it does omit the most problematic ones. Firstly, the protection of investors' expectations is not listed as a self-standing obligation under this standard, although tribunals are invited to take them into account when assessing FET claims. Secondly, there is no express reference to the obligation of consistency and coherence of state conduct, good faith, transparency, reasonableness or proportionality, all of which have served as a legal hook for requiring legal stability in the host state and/or the protection of investors' legitimate expectations.<sup>61</sup> Thirdly, the EU sets a higher threshold for FET breaches, requiring "fundamental" breach (of due process), "manifest" or "targeted" state conduct (amounting to arbitrariness or discrimination). Lastly, the states' right to regulate is explicitly reaffirmed through a self-standing provision.<sup>62</sup>

It has been argued elsewhere that the EU's FET definition may not be entirely bullet-proof against investors' regulatory claims,<sup>63</sup> and its omission would certainly have been a safer option from the perspective of states. That

<sup>57</sup> UNCTAD, "IIA Reform Accelerator", 21.

<sup>58</sup> CETA, Art. 8.10, EU – Singapore IPA, Article 2.4; EU – Vietnam IPA, Article 2.5; EU – Mexico Agreement, Article 15; EU-Chile Agreement, Art. 10.15. These provisions are not identical, though, and small differences exist.

<sup>59</sup> *Ibid.* Accordingly, a mere breach of domestic law and a breach of another provision of the present IIA or another international agreement do not constitute FET violation. Moreover, investors' legitimate expectations "may" be considered by tribunals when assessing FET claims with one of the covered grounds.

<sup>60</sup> *Ibid.* This is the only case for the two agreements not yet signed with Mexico and Chile, respectively.

<sup>61</sup> Alexovičová, "Risky Arbitrariness," 94-95.

<sup>62</sup> CETA, Art. 8.9, EU – Singapore IPA, Article 2.2; EU – Vietnam IPA, Article 2.2; EU – Mexico agreement, Article 1; EU-Chile Agreement, Art. 10.2.

<sup>63</sup> Alexovičová, "Risky Arbitrariness," 94-95.



said, the EU has certainly made regulatory challenges more difficult. It has even been argued that, partly also because of the high threshold required for finding a breach, success of FET challenges in general may have become close to impossible.<sup>64</sup>

## 2. INDIRECT EXPROPRIATION

Just like with FET, the EU continues to offer IIA protection against indirect expropriation whilst specifying factors to be considered for distinguishing it from a bona fide regulation. This is because in the past successful claims for compensation were made by investors arguing that a regulation had affected their investment in a manner equivalent to a taking, leaving them with “assets but no business”, therefore mandating compensation.<sup>65</sup> After FET, indirect expropriation has been the second most litigated - and found - breach in ISDS.<sup>66</sup> This met with much criticism for unduly constraining states’ regulatory autonomy.<sup>67</sup> Consequently, indirect expropriation is one of the IIAs provisions critical for IIL reform.

In line with general international law, IIAs provide for an obligation to compensate the investor if its investment has been taken by the host state, directly by a transfer of the property from the investor to the state, or indirectly, by depriving the investment of its economic value. However, old-generation IIAs contain no guidance on how to determine whether a state conduct reaches the threshold of resulting in indirect expropriation and/or whether regulatory measures should be considered as compensable takings too. When faced with these questions, ISDS tribunals have developed criteria for the threshold to be met – there must be a substantial deprivation of the control over and/or value of the investment that is, in principle, of indefinite duration. In such instances, an investment would be “neutralized”, mandating compensation from the host state. Unfortunately, the jurisprudence has not been fully consistent on details of each criterion, leading to uncertainty as to when such “neutralization” occurs. More importantly, tribunals disagreed on the issue of regulatory takings. Some tribunals have considered the policy objective

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<sup>64</sup> A. Reinisch, *Advanced Introduction to International Investment Law* (Cheltenham: Edward Elgar Publishing 2020), 103.

<sup>65</sup> For details, see Y. Fortier and Stephen L. Drymer, “Indirect Expropriation,” in *Building International Investment Law: The First 50 Years of ICSID*, Meg Kinnear, Geraldine R. Fischer, et. al., eds. (The Hague: Kluwer Law International 2015).

<sup>66</sup> UNCTAD, “Investment Dispute Settlement Navigator,” accessed 1 June 2023, <https://investmentpolicy.unctad.org/investment-dispute-settlement>.

<sup>67</sup> Aniruddha Rajput, *Regulatory Freedom and Indirect Expropriation in Investment Arbitration* (The Hague: Kluwer Law International, 2018). Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (Cambridge University Press, 2015), 265. See also UNCTAD, “IIA Reform Accelerator”, 24.

behind a regulatory measure with a neutralizing effect on an investment to be irrelevant. In their view, compensation of damage caused to the investment, typically including future losses, would always be due if the damage is so severe as to neutralize the investment's economic value.<sup>68</sup> Other tribunals were willing to distinguish between non-compensatory regulation and indirect expropriation,<sup>69</sup> but even those tribunals have applied different approaches to distinguish one from another.<sup>70</sup>

In reaction, new-generation IIAs now typically provide for clarifications aimed at distinguishing non-compensatory regulation from indirect expropriation, often in a separate annex. The EU has followed suit. Accordingly, under the EU's IIAs, measures designed and applied to protect legitimate public policy objectives do not constitute indirect expropriation if they are not discriminatory unless, exceptionally, they have a manifestly excessive impact in light of their purpose.<sup>71</sup> Moreover, factors to be considered in determining whether indirect expropriation has occurred include not only measure's economic impact and duration, but also the measures' character (object, purpose, intent) and the extent of interference with investor's legitimate expectations.<sup>72</sup> By expressly clarifying that an adverse effect on the economic value of an investment in and of itself is not sufficient to find indirect expropriation,<sup>73</sup> the EU reject the so-called "sole effect" doctrine focusing solely on the existence of the investment's neutralization.

Just like with FET, the EU trusts that a more detailed wording of provisions relevant to indirect expropriation will be sufficient to balance investment protection with the states' right to regulate. Arguably, given the non-exhaustive nature of the list of factors to consider, and their broad resemblance of what already is typically considered by tribunals (extent and duration of the measures' economic impact, measures' legitimate purpose, non-discrimination, proportionality, respect for investors' legitimate expectations), the express rejection of the "sole effect" doctrine is the likely candidate for making the main difference. This is because it leaves tribunals with no choice but to distinguish between indirect expropriation and non-compensable regulation,

<sup>68</sup> E.g. *Compañía del Desarrollo de Santa Elena S.A. v Costa Rica*, ICSID Case No. ABR/96/1, Final Award, 17 February 2000, para. 72; *ADC Affiliate Limited and ADC & ADMC Management Limited v Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, paras. 423-424.

<sup>69</sup> E.g. *Methanex Corporation v United States*, UNCITRAL, Final Award on Jurisdiction and Merits, 3 August 2005, IV, D, para 7; *Saluka Investments B.V. (The Netherlands) v Czech Republic*, PCA Case No. 2001-04, Partial Award, 17 March 2006, para. 262.

<sup>70</sup> Nadakavukaren Schefer, *International Investment Law*, chapter 4, section 2.

<sup>71</sup> E.g. CETA, Annex 8-A, para. 3.

<sup>72</sup> "*Ibid.*", para. 2.

<sup>73</sup> "*Ibid.*", para. 2(a).

thereby providing legal certainty on the matter tainted by inconsistency and unpredictability in the past.

Despite its firm belief in the wording of its IIAs' provisions on expropriation, in 2022 the EU suggested further clarifications (for both FET and indirect expropriation) to be put for adoption by the CETA Joint Committee to ensure regulatory space for adopting i.a. climate, energy and health policies while preventing the ISDS misuse by investors.<sup>74</sup> The actual text of the clarification is yet to be made public. Therefore, one could only speculate about its precise content and added value to the existing definitions and clarifications. One possibility is that regulations concerning specific policy areas, like those mentioned, will be carved out from the scope of CETA investment chapter, or from ISDS, much like tobacco control measures are carved out from ISDS under Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).<sup>75</sup> However, this remains to be seen given the wording suggesting the list of policy areas is illustrative, which would not work in a context of a carve out.

### 3. OTHER SENSITIVE STANDARDS OF INVESTMENT PROTECTION AND EXCEPTIONS

The EU's approach to IIL reform to retain the traditional standards of investment protection (though drafted in a more detailed manner) is also visible in respect of other standards that have caused concerns in the past. And so the EU's IIAs continue to include NT and MFN provisions, the two obligations prohibiting discrimination against and between foreign investors on the basis of their origin, as well as FPS standard and umbrella clauses. A few exceptions exist, however. Most notably, the EU-Singapore IPA contains no MFN provision. Moreover, only this and the EU-Vietnam IPA include an umbrella clause, the other EU's IIAs negotiated thus far do not.

Turning to non-discrimination, despite numerous sectoral and other exemptions and exceptions provided for the NT and/or MFN obligation, scattered over the agreements at different places, the scope of protection offered by these two obligations is often broader than is the case under IIAs concluded by the EU MSs. This is due to the extension of NT and MFN to

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<sup>74</sup> European Commission, "Statement from the Commission on clarifications discussed with Germany regarding investment protection in the context of the CETA agreement", *Press Release*, 29 August 2022. The additional clarification was requested by the German government hoping to take the last hurdle for CETA's ratification by *Bundestag*. See Daniel Engel and Julia Bartos, "German Federal Government clears the way for CETA ISDS", 5 July 2022.

<sup>75</sup> On this carve out, see L. Gruszczynski, "The Trans-Pacific Partnership Agreement and the ISDS Carve-out for Tobacco Control Measures," *European Journal of Risk Regulation* 6, no. 4 (2015): 653.

the pre-establishment stage, i.e. to foreign investments to be made.<sup>76</sup> This is in line with a more general new trend in IIA negotiations globally<sup>77</sup> but also specifically with the EU's policy of market access liberalization for foreign investments, pursued also *vis-à-vis* countries with which the EU does not agree on investment protection.<sup>78</sup> Interestingly, no such market access is offered to investors covered by the EU-Singapore and EU-Vietnam IPAs.<sup>79</sup>

Addressing past concerns resulting from expansive interpretation in ISDS, the EU's IIAs explicitly clarify i.a. that MFN (where present) does not apply to dispute settlement and to obligations under other international agreements,<sup>80</sup> and that FPS is limited to physical (and not also legal) security of investments and investors.<sup>81</sup> Similarly, umbrella clauses are worded in an extensive language providing for a set of conditions to be met for an obligation undertaken by the host state outside the IIA to become an obligation under the IIA too. Most importantly, such obligation must be undertaken in a written form and linked to the exercise of governmental authority.<sup>82</sup> That said, as mentioned, umbrella clauses are not included in all EU's IIAs with investment protection, which may be the EU's concession to the other treaty party's preference.

In addition to a more detailed drafting, and various exemptions,<sup>83</sup> the EU's IIAs contain exceptions justifying a breach of a substantive obligation for legitimate reasons. The exceptions can be more or less specific, with some applying to a single obligation<sup>84</sup> or a specific type of measure,<sup>85</sup> others more generally. From among the latter, two exceptions deserve explicit mention – the so-called 'general exceptions' and the security exception. Both have been taken over from international trade treaties, be it by direct incorporation or

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<sup>76</sup> CETA, Art. 8.6 and 8.7, EU – Mexico agreement, Art. 7.1 and 8.1; EU-Chile Agreement, Art. 10.7(1) and 10.9(1).

<sup>77</sup> W. Shan and S. Zhang, "Market Access Provisions in the Potential EU Model BIT: Towards a "Global BIT 2.0"?", *Journal of World Investment and Trade* 15, no. 3-4 (2014): 452.

<sup>78</sup> See section 3.1.

<sup>79</sup> EU-Singapore IPAs, Art. 2.3; and EU-Vietnam IPA, Art. 2.3 and 2.4. This is without prejudice to market access available under the respective trade agreements, which however do not cover all foreign investors eligible for protection under the IPAs.

<sup>80</sup> EU-Mexico Agreement, Art. 8(4).

<sup>81</sup> EU-Chile Agreement, Art. 10.15(4).

<sup>82</sup> EU-Singapore IPA, Art. 2.4(6) and EU-Vietnam IPA, Art. 2.5(6).

<sup>83</sup> Apart from sectoral exemptions (preventing application of an obligation in economic sectors listed by each IIA party), other exemptions relate to e.g. non-conforming measures and their continuation and amendment or public procurement situations.

<sup>84</sup> E.g. CETA, Art. 8.13(3) relating to the freedom of transfers.

<sup>85</sup> E.g. CETA, Art. 8.9(4) concerning subsidies, Art. 28.7 on taxation measures and Art. 28.9 relating to culture.

replication,<sup>86</sup> enabling states to breach their treaty obligations in pursuance of other important policy objectives such as the protection of human health, the environment, and security. Unlike for trade, however, in the EU's IIAs the general exceptions apply only to non-discrimination and not to other obligations. The security exception applies across the board to all obligations undertaken in the relevant IIA.

Incorporation of exceptions and greater nuance in provisions with substantive investment protection is a welcome development. It reflects the new-generation nature of the EU's IIAs. However, despite the EU's conviction that "its" standards of protection are "clearly defined", thereby sufficiently safeguarding the regulatory space,<sup>87</sup> it could be argued that further clarity may be needed to achieve that goal. With regard to standards discussed in this section, arguably the most notable is the absence of a clarification on how to determine the existence of "like situations" for the purposes of NT and MFN. From all EU's IIAs negotiated thus far, only the latest EU-Chile Agreement notes in a footnote that this determination requires a "case-by-case, fact-based analysis and depends on the totality of the situations".<sup>88</sup>

The "like situations" requirement is part of the NT and MFN definition in all EU's IIAs. This is in line with the general understanding that discrimination exists only if those in similar circumstances are treated differently without a justifiable reason. The 'comparability' has long been recognized as a condition for NT and MFN in ISDS jurisprudence, whether expressly mentioned in the applicable IIA or not, but interpreted and applied in a different manner by ISDS tribunals. Some adopted a narrow understanding, considering only direct competitors comparable;<sup>89</sup> others a broader one looking at the economic sector;<sup>90</sup> and yet others even broader comparing foreign investors with all domestic producers<sup>91</sup> or investors subject to the same regulatory

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<sup>86</sup> CETA, Art. 28.3 incorporates Art. XX of the General Agreement on Trade and Tariffs (GATT) 1994, whereas EU-Vietnam IPA, Art. 4.6 replicates this provision, be it in an edited form. The security exception can be found in e.g. CETA, Art. 28.6; and EU-Singapore IPA, Art. 4.5. In all instances, the security exception provision very much reproduces Art. XXI of the GATT 1994.

<sup>87</sup> The statement was made already with regard to the very first IIA, CETA. European Commission, "Investment Provisions in the EU-Canada Free Trade Agreement (CETA)," accessed 1 June 2023, [https://trade.ec.europa.eu/doclib/docs/2013/november/tradoc\\_151918.pdf](https://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151918.pdf). See also *Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States*, OJ L 11, 14.1.2017, 3–8, in particular paras. 2 and 6 (a),(b),(c) and (f).

<sup>88</sup> EU-Chile Agreement, footnotes 8 and 9 (for NT) and 11 and 12 (for MFN).

<sup>89</sup> *Sergei Paushok at al. v Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011, para. 315.

<sup>90</sup> *Pope & Talbot v Canada*, Award on the Merits of Phase 2, 10 April 2001, para. 78.

<sup>91</sup> *Occidental Exploration and Production Company v the Republic of Ecuador*, LCIA Case No.

regime.<sup>92</sup> The absence of the clarification in all other EU's IIAs is thus rather problematic in light of the divergent past jurisprudence. The clarification in the latest EU-Chile Agreement is thus welcome, more so as it follows the line of jurisprudence taking a “totality of circumstances” approach,<sup>93</sup> which has been gaining prevalence with time and allows for distinctions being made on the basis of states’ regulatory considerations. However, while understandable, this approach does not prevent a degree of uncertainty and unpredictability as to which situations will indeed be considered comparable in specific cases. Further guidance may therefore be desirable.

### C. INVESTOR-STATE DISPUTE SETTLEMENT

ISDS has been the most criticised feature of IIAs offering investment protection, with important concerns relating to the lack of independence and impartiality of arbitrators deciding investor-state disputes, lack of consistency and coherence of ISDS decisions and their occasional incorrectness, lack of transparency, and excessive duration and costs of ISDS proceedings.<sup>94</sup> Beyond such specific concerns, ISDS has also been challenged for its very existence due to its exclusivity for (wealthy) foreign investors (not domestic investors, not affected persons or community, and also not states vis-à-vis foreign investors), its lack of sensitivity towards public law nature of ISDS disputes, disregard for domestic courts, and inherent incentives to rule in favour of investors generating more arbitration “business” for (a relatively limited group of) lawyers involved in ISDS as arbitrators and counsels (even at the same time).<sup>95</sup>

ISDS reform is, therefore, at a core of the overall IIL reform. It takes place in variety ways and at different levels, including multinational. In fact, ISDS is the only IIL element where reform discussions are conducted multilaterally, under the auspices of UNCITRAL Working Group III (WGIII) established for

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UN3467 (UNCITRAL), Final Award, 1 July 2004, para. 173.

<sup>92</sup> *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware v Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015, para. 695.

<sup>93</sup> *Apotex Holdings Inc. and Apotex Inc. v United States*, ICSID Case No. ARB(AF)/12/1, Award, 25 August 2014, para. 476.

<sup>94</sup> G. Kaufmann-Kohler and M. Potestà, “Concept Paper Project: Matching Concerns and Solutions, Introduction,” *Academic Forum on ISDS*, 1, accessed 1 June 2023, [https://www.cids.ch/images/Documents/Academic-Forum/0\\_Introduction\\_to\\_project\\_-\\_Kaufmann-Kohler\\_Potest.pdf](https://www.cids.ch/images/Documents/Academic-Forum/0_Introduction_to_project_-_Kaufmann-Kohler_Potest.pdf).

<sup>95</sup> Among the most severe critics are M. Sornarajah and G. Van Harten. See Sornarajah, *Resistance and Change in the International Law*, 273. G. Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford Scholarship Online, 2009); and more recently G. Van Harten, *The Trouble with Foreign Investor Protection* (Oxford University Press, 2020).

this purpose.<sup>96</sup> Unlike ISDS, all other reform issues are being addressed solely in negotiations of new or renegotiations of old IIAs, bilaterally or plurilaterally by a limited number of countries.

The EU actively participates in WGIII, working towards the realization of its idea of a multilateral investment court (MIC). The decision to do away with a traditional *ad hoc* arbitration is a result of the above-mentioned 2014 public consultation on TTIP negotiations. Since then, the EU has been consistently lobbying for a standing two-instance court, both multilaterally as well as bilaterally in its own IIA negotiations. By now, establishment of a MIC is one of the possible reform options actively examined by the WGIII.<sup>97</sup>

In the meantime, the EU has been going forward with a two-instance Investment Court System in its IIAs. All EU's treaties with investment protection provide for it,<sup>98</sup> involving a Tribunal of First Instance and an Appeal Tribunal, both standing bodies composed of persons who are subject to the arguably most stringent safeguards of independence and impartiality currently in place for ISDS. The EU's IIAs also contain extensive provisions addressing various current concerns with ISDS, including tribunals members' appointment, qualification requirements and conflict of interest; parallel proceedings; abuse of process; counterclaims; costs; appeal; and transparency, to name the most salient matters. They also provide for an institutional safeguard of a balance of power between investment tribunals and states, allowing the latter to adopt interpretations of the relevant treaty provisions with a binding effect on the former.<sup>99</sup>

Despite the fact that the EU's tribunals are not real courts - their members are not (yet) full time judges and enforcement of awards is subject to rules applicable to international investment arbitration - there is no doubt that the EU's approach to ISDS reform is the most innovative one and that it effectively addresses various concerns with traditional ISDS. Importantly, it does help safeguarding independence and impartiality of the tribunals' members through a fixed term appointment and prohibition of double hatting (simultaneous

<sup>96</sup> UNCITRAL, "Working Group III: Investor-State Dispute Settlement Reform," accessed 1 June 2023, [https://uncitral.un.org/en/working\\_groups/3/investor-state](https://uncitral.un.org/en/working_groups/3/investor-state).

<sup>97</sup> Other options under consideration are an improvement of the existing *ad hoc* investment arbitration system; an appeal mechanism; and no investor-state arbitration (replacement by domestic adjudication or state-to-state arbitration).

<sup>98</sup> CETA, Chapter 8, Section F; EU-Singapore IPA, Chapter 3, Section A; EU-Vietnam IPA, Chapter 3, Section B; EU-Mexico Agreement, investment chapter, Section C; EU-Chile Agreement, Chapter 10, Section D.

<sup>99</sup> E.g. Art. 8.31(3) CETA. A joint interpretation is to be adopted by the CETA Joint Committee upon recommendation of the Committee on Services and Investment when serious concerns arise with regard to the interpretation and may have a specific date set for its application.

acting as a counsel, party-appointed expert or witness). It also brings more balance into a position of state *vis-à-vis* the investor in the proceedings by providing broad rules on counterclaims.

Nonetheless, some of the concerns relating to the legitimacy of the very existence of ISDS has not been addressed. For example, at least until a different decision is formally taken by the IIA parties, the tribunals' members will not receive a fixed salary but a retainer fee and an enumeration calculated in a way similar to arbitrators, i.e. depending on the caseload.<sup>100</sup> This continues creating incentives to generate decisions welcoming more - rather than fewer - disputes, which can only be brought by foreign investors. This is at odds with one of the classical safeguards of judicial independence. Moreover, foreign investors remain privileged over states as well as local investors, neither of which can bring a claim to the investment tribunal, perpetuating discrimination and inequality in favour of foreign corporations. This is further exacerbated by a lacking requirement to exhaust local remedies before resorting to international adjudication. Such disregard for domestic courts continues to be unique in international law, not even being available for (even the most serious) human rights violations. It is also in contrast to a lack of evidence on systemic failings of domestic courts in adjudicating claims brought by investors.<sup>101</sup> Another missed opportunity is the lack of standing of affected third parties in the proceedings, though this is finally remedied in the latest EU's agreement with Chile.<sup>102</sup> Lastly, the method of calculation of the investor's loss is absent, not preventing compensation being awarded far beyond what is common in other dispute settlement systems or ensuring a balance with other interests that may be served by the measure causing damage to the foreign investor.<sup>103</sup> All these issues continue to raise the question which public interest is being served by the ISDS and how balanced it is with other societal interests.

#### D. ENERGY CHARTER TREATY

Apart from IIAs that the EU has negotiated with its important trading partners, the EU is also a party to the ECT, the only existing multilateral investment agreement offering investment protection, specifically for

<sup>100</sup> EU-Vietnam IPA, Art. 3.38(14)-(17) and Art. 3.39(14)-(17).

<sup>101</sup> Maria Rocha, Martin D. Brauch & Tehtena Mebratu-Tsegaye, "Advocates Say ISDS is Necessary Because Domestic Courts are 'Inadequate' But Claims and Decisions Don't Reveal Systemic Failings," *Columbia Center on Sustainable Investment* (2021), 2.

<sup>102</sup> EU-Chile Agreement, Art. 10.48.

<sup>103</sup> On the latter, see e.g. J. Bonnitcha and S. Brewin, "Compensation Under Investment Treaties: What are the problems and what can be done?," *IISD Policy Brief* (2020). The EU's IIAs provide merely that monetary damages may not be greater than 'the loss suffered' but not what constitutes it.



investments in the energy sector. Concluded by 50+ countries in 1994, the ECT is a typical old-generation IIA containing the same standards of investment protection and ISDS as BITs concluded at the time. Hence, all the reasons for IIL reform apply to the ECT too.

While various EU MSs have seen most claims raised under the ECT brought against their regulatory actions for some time now,<sup>104</sup> it was only in 2017 that the EU initiated a process towards the ECT “modernization”. The push came in reaction to two specific concerns of the EU. The first related to the refusal of ECT tribunals to reject jurisdiction in the so-called intra-EU disputes.<sup>105</sup> This is contrary to the longstanding position of the European Commission, eventually confirmed by the Court of Justice, that ISDS between an investor from one MS against another MS is incompatible with EU law.<sup>106</sup> Secondly, and perhaps more importantly, the ECT has become an increasingly salient point of criticism by civil society and politicians in the EU, a forerunner of global climate action. For protecting all types of investments in the energy sector, including fossil fuels, through vaguely formulated standards of protection and problematic ISDS, the ECT is increasingly seen as a serious obstacle for taking necessary climate action by ECT parties.<sup>107</sup>

The EU took the lead in the negotiations on ECT modernization, concluding after 15 rounds by reaching an agreement in principle in June 2022. However, the adoption of the agreement, initially planned for the end of 2022, was postponed first to April 2023 and then indefinitely.<sup>108</sup> This was due

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<sup>104</sup> According to the UNCTAD Investment Dispute Settlement Navigator, by the end of 2022, 110 out of the total 157 disputes initiated under the ECT were brought against an EU MS, Spain most frequently (51). A great majority concerned scaling down investment incentive programmes for renewable energy investments. See e.g. M. Schmidl, “The Renewable Energy Saga from Charanne v. Spain to The PV Investors v. Spain: Trying to See the Wood for the Trees,” *Kluwer Arbitration Blog* (2021). Recently, an ECT dispute was initiated against the EU itself. - *Nord Stream 2 AG v. European Union*, PCA Case No. 2020-07, pending.

<sup>105</sup> By the end of 2022, 96 intra-EU disputes have been initiated under the ECT and the intra-EU jurisdictional objection was accepted only in *Green Power Partners K/S and SCE Solar Don Benito APS v The Kingdom of Spain*, SSC Arbitration V (2016/135), Award, 16 June 2022, paras. 477-478.

<sup>106</sup> See note 10 and, specifically for ISDS under the ECT, Judgment of 2 September 2021, *République de Moldavie v Komstroy LLC.*, Case C-741/19, ECLI:EU:C:2021:655.

<sup>107</sup> Council of the European Union, Council Decision 10745/19 ADD 1, Negotiating Directives for the Modernisation of the Energy Charter Treaty, 2 July 2019. See also “Open Letter on the Energy Charter Treaty (ECT)”, signed by 278 environmental, climate, consumer, development, and trade related civil society groups, and trade unions, 9 December 2019, accessed 1 June 2023 <https://corporateeurope.org/sites/default/files/2019-12/Open%20letter%20on%20the%20Energy%20Charter%20Treaty.pdf>.

<sup>108</sup> E. Brouwer, “Planned Vote on Modernised ECT is Postponed, as EU Member States and Institutions Discuss Way Forward,” *Investment Arbitration Reporter* (2023).

to the decision of some EU MSs, ECT parties in their own right alongside the EU, to withdraw from the ECT despite – or because of – the outcome of the modernization process. The main reason was the continuation of the protection of existing investments in fossil fuels for at least another 10 years after the entry into force of the modernized ECT, which itself is likely to take several years. This is regarded as a significant failure to align the ECT with the Paris Agreement and the EU climate change ambitions. In reaction to the EU MSs decision, the European Commission eventually admitted insufficient support for the adoption of the text of modernized ECT at the EU level, recommending the EU’s “coordinated withdrawal” from the treaty.<sup>109</sup> It remains to be seen when and how this will take place.

#### **IV. EU’S IIAS WITH NO INVESTMENT PROTECTION**

Not all EU trading partners are keen on offering investment protection and/or direct access of investors to – in the case of the EU - an investment court. Some important economies have adopted a more cautious approach especially with the regard to the latter. In their case, the EU has negotiated a different type of agreement with investment provisions, omitting protection. This also applies to countries where the EU itself may not wish to go as far as, or is not interested in, offering investment protection and/or access to ISDS. The following subsections discuss such other types of agreements concluded by the EU thus far, starting with agreements liberalizing market access for foreign investments and continuing with the most recent agreement focusing on investment facilitation.

##### **A. INVESTMENT LIBERALIZATION**

Provisions concerning market access for foreign (direct) investments have been a part of the EU’s agreements for some time now. In particular the EU’s FTAs include provisions on market access for providers of services seeking establishment in the territory of other FTA parties, typically through opening a branch or creating a subsidiary. Such move always results in a foreign direct investment being made. Rules regulating market access for these investments have been a typical part of all modern international trade agreements for decades, whether multilateral, regional or bilateral.<sup>110</sup>

<sup>109</sup> V. Djanic, “European Commission Recommends Coordinated EU Withdrawal from Energy Charter Treaty,” *EUobserver* (2023). See also Non-paper from the European Commission, Next steps as regards the EU, Euratom and Member States’ membership in the Energy Charter Treaty,” accessed 1 June 2023, [https://www.euractiv.com/wp-content/uploads/sites/2/2023/02/Non-paper\\_ECT\\_nextsteps.pdf](https://www.euractiv.com/wp-content/uploads/sites/2/2023/02/Non-paper_ECT_nextsteps.pdf).

<sup>110</sup> Multilaterally the rules are enshrined in the General Agreement on Trade in Services (GATS)

More recently, however, the EU has been including a separate chapter in its FTAs setting out rules on “investment liberalization”, going beyond the traditional scope relating to trade in services. They provide for market access of any covered foreign investor and investment, defined similarly as in other investment (but not trade) agreements. Most notably, and typically subject to a long list of exemptions and exceptions, investment liberalization chapters offer NT and MFN to foreign investors at both pre-establishment and post-establishment stage and prohibit imposition of certain performance requirements as a condition for the establishment or operation of investments. In doing so, they resemble the same standards of investment protection commonly found in IIAs. Importantly, however, the investment liberalization chapters do not offer investment protection through other typical investment standards and do not offer ISDS.

Undoubtedly, the investment liberalization approach was used when either the EU, its trading partner, or both, were not willing to go as far as to guarantee mutual protection of investments beyond the mere market access and non-discrimination. Thus far, this has been the case with Japan (in place),<sup>111</sup> MERCOSUR (agreed),<sup>112</sup> New Zealand (agreed)<sup>113</sup> and the United Kingdom (in place).<sup>114</sup> From among notable agreements currently under negotiations, the agreement with Australia envisages a (mere) investment liberalization chapter,<sup>115</sup> unlike agreements with India and Indonesia, where negotiations include also investment protection and ISDS.<sup>116</sup> The EU also negotiates an IPA with Japan although no discussions are foreseen at present due to Japan’s

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of the World Trade Organization. An example of an EU’s FTA is the EU-Korea FTA.

<sup>111</sup> Agreement between the European Union and Japan for an Economic Partnership, OJ L 330, 27 December 2018. Investment liberalization is addressed in Chapter 8.

<sup>112</sup> EU – MERCOSUR Trade Agreement, with information on the agreed text available at [https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/mercosur/eu-mercosur-agreement\\_en](https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/mercosur/eu-mercosur-agreement_en). Investment liberalization is mentioned on p. 9 of the document summarizing the negotiating results.

<sup>113</sup> EU – New Zealand Trade Agreement, with the agreed text available at [https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/new-zealand/eu-new-zealand-agreement\\_en](https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/new-zealand/eu-new-zealand-agreement_en). Investment liberalization is addressed in Chapter 10.

<sup>114</sup> Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, OJ L 149, 30 April 2021. Investment liberalization is addressed in Part Two, Title II, Chapter 2.

<sup>115</sup> Council of the European Union, Negotiating directives for a Free Trade Agreement with Australia, Decision No. 7663/18, ADD 1, 12. It is also worth noting that these negotiations only relate to foreign direct investment.

<sup>116</sup> “Overview of FTA and Other Trade Negotiations”, European Commission, 3, accessed 1 June 2023, file:///C:/Users/Iveta/Desktop/EU%20approach%20to%20IIL%20reform/Negotiations%20state%20of%20play.pdf.

unwillingness to accept the EU's investment court system.<sup>117</sup>

Interestingly, an investment liberalization chapter is also included in the Comprehensive Agreement on Investment (CAI) agreed (not yet signed) with China.<sup>118</sup> This agreement also provides for further negotiations on investment protection and ISDS,<sup>119</sup> be it that the future of the entire endeavour (including the currently agreed agreement) is far from certain due to strong unrelated political differences between the parties.<sup>120</sup>

CAI contains another remarkable feature absent in other EU's investment agreements or chapters – an “investment and sustainable development” chapter.<sup>121</sup> This chapter resembles well-known ‘trade and sustainable development’ chapters contained in all modern EU's FTAs. That said, CAI goes beyond the traditional environment and labour provisions contained therein and includes also provisions on corporate social responsibility (CSR) and climate change. The CAI's sustainability chapter is first of its kind in the EU's IIAs, although they do have similar CSR provisions. Arguably, the inclusion of the chapter in CAI is a reflection of the CAI's scope being limited to investments and not also trade. In all other cases, there is either an investment chapter in an FTA or an agreement concluded alongside an FTA and, as mentioned, EU's FTAs contain a sustainability chapter too. It is an important milestone nonetheless given that it has been taken over the most recent type of a self-standing investment agreement concluded by the EU with Angola in 2022, discussed in the next section.

## B. INVESTMENT FACILITATION

At the end of 2022, after a relatively short period of formal negotiations, the EU concluded its first investment agreement with an African country, Angola.<sup>122</sup> Apart from being the first with an African country, it is also the first of its kind.

<sup>117</sup> *Ibid.*, 16, stating that an agreement has been reached on substantive provisions.

<sup>118</sup> EU-China Comprehensive Agreement on Investment (CIA), with the agreed text available at [https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/china/eu-china-agreement/eu-china-agreement-principle\\_en](https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/china/eu-china-agreement/eu-china-agreement-principle_en). Investment liberalization is addressed in Section II.

<sup>119</sup> *Ibid.*, Section VI, Sub-section 2, Art. 3.

<sup>120</sup> European Commission, “Overview of FTA and Other Trade Negotiations”, 16.

<sup>121</sup> EU-China CIA, Section IV.

<sup>122</sup> EU – Angola Sustainable Investment Facilitation Agreement, agreed in principle on 18 November 2022. The text of the agreement is available at [https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/southern-african-development-community-sadc/eu-angola-negotiations\\_en](https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/southern-african-development-community-sadc/eu-angola-negotiations_en). The four negotiation rounds took place between June 2021 and November 2022 – “EU Trade Relationships by Country/region”, European Commission, accessed 1 June 2023, <https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/72235373-fb69-4840-90d1-dfd2c7476b27>.

The Sustainable Investment Facilitation Agreement (SIFA) between the EU and Africa is, as the name suggests, an agreement on investment facilitation, rather than investment liberalization, let alone investment protection. In fact, the latter are expressly excluded from the agreement's scope.<sup>123</sup>

While some EU MSs have concluded a traditional BIT with investment protection with African countries in the past,<sup>124</sup> and the EU is open to the idea as well, it has a more diverse approach to African investments. In its 2018 Communication on a new Africa-Europe Alliance for Sustainable Investment and Jobs, the Commission pledged to help to improve Africa's capacity to compete in attracting investment and do so by developing a strengthened dialogue and cooperation on the investment climate and, where appropriate, investment protection.<sup>125</sup> An important step towards the improvement of the investment climate of any country is "investment facilitation", a popular buzzword in international investment policy at present. It relates to easing investment-making through greater transparency and predictability of measures relevant to foreign investments, streamlining of authorization procedures, and facilitation of interaction between stakeholders (e.g. by establishment of focal points and consultations).

EU-Angola SIFA, which contains relatively elaborate provisions on these matters, is not the first known IIA with investment facilitation at its core. From 2015 onwards, Brazil has developed and concluded Cooperation and Facilitation Investment Agreements (CFIAs) with various countries, including indeed Angola.<sup>126</sup> They have been praised as a possible alternative to traditional investment protection treaties, especially for developing countries.<sup>127</sup> Unlike SIFA, however, Brazil's CFIAs often do contain some of the less controversial

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<sup>123</sup> Art. 1.2(3) EU-Angola SIFA. Note that MFN is provided for in Art. 1.4 but only for the application of the provisions of SIFA itself.

<sup>124</sup> According to the information in the UNCTAD IIA Navigator, Angola has BITs in place with Portugal, Germany, and Italy. The BITs concluded with France and Spain, respectively, are not in force.

<sup>125</sup> Communication from the Commission to the European Parliament, the European Council and the Council, Communication on a new Africa-Europe Alliance for Sustainable Investment and Jobs: Taking our partnership for investment and jobs to the next level, COM(2018) 643 final, 8.

<sup>126</sup> According to the UNCTAD IIA Navigator, Brazil signed 13 such CFIAs since 2015, all of them with other developing countries. This includes relatively strong economies Mexico and India.

<sup>127</sup> H. Choer Moraes and F. Hees, "Breaking the BIT Mold: Brazil's Pioneering Approach to Investment Agreements," *American Journal of International Law Unbound* 112 (2018); Y. Tang, "Investment Facilitation for Development and the Reform of International Investment Dispute Settlement Mechanism: The Choice of Developing Countries," *Journal of International Dispute Settlement* 13, no. 4 (2022).

investment protection standards, such as NT and MFN, MST under CIL, direct expropriation, compensation for losses and freedom of transfer of funds. They also typically contain provisions on investor obligations, CSR, sustainability and dispute prevention.<sup>128</sup> That said, the most controversial features of investment protection treaties – FET, indirect expropriation, umbrella clause, ISDS – are indeed excluded from CFIAAs. Instead, provisions on investment facilitation and cooperation between the parties can be found there.

The EU-Angola SIFA does not go as far as Brazil’s CFIAAs and is truly “merely” investment facilitation agreement, containing no investment protection standards while incorporating the CFIAAs’ idea of dispute prevention (always involving the treaty parties, never directly investors). SIFA is also stronger on sustainability, containing an entire ‘investment and sustainable development’ chapter,<sup>129</sup> similar – though not identical - to that in the EU-China CIA and, to some extent, also to “trade and sustainable development” chapters in EU’s FTAs, widely discussed in academic literature.<sup>130</sup> An in-depth analysis of the SIFA sustainability chapter is beyond the scope of this paper but it is worth noting that it addresses issues relating to promotion of sustainable investments and CSR, it contains commitments to effectively implement multilateral environmental and labour agreements and specific provisions on climate change and gender equality. Moreover, just like other EU’s sustainability chapters, this one too is a combination of legally binding commitments on some of these issues and soft-law provisions on others, while acknowledging states’ right to regulate and determine their own appropriate level of protection.<sup>131</sup>

As exceptional as it currently is, the EU-Angola SIFA is likely to be followed by other agreements of this type. When announcing the conclusion of the agreement, the Commission revealed that it was pursuing SIFAs with other African countries too.<sup>132</sup> This reaffirms the argument that the EU’s

<sup>128</sup> E.g. the most recent Brazil-India CFIAA of 2020, available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5912/download>.

<sup>129</sup> EU-Angola SIFA, Chapter V.

<sup>130</sup> Gracia Marín Durán, “The EU’s Evolving Approach to Environmental Sustainability in Free Trade Agreements,” *Faculty of Laws University College London Law Research Paper* No. 03/2023, available at <https://ssrn.com/abstract=4373632>. Denise Prévost and Iveta Alexovičová, “Mind the compliance gap: managing trustworthy partnerships for sustainable development in the European Union’s free trade agreements,” *International Journal of Public Law and Policy* 6, no. 3 (2019). Katerina Hradilová and Ondrej Svoboda, “Sustainable development chapters in the EU free trade agreements: searching for effectiveness,” *Journal of World Trade* 52, no. 6 (2018): 1021.

<sup>131</sup> For the right to regulate, see EU-Angola SIFA, Chapter V, Art. 5.2.

<sup>132</sup> European Commission, “EU and Angola conclude first-ever Sustainable Investment Facilitation Agreement”, *Press Release*, 18 November 2022.

approach to reforming IIL entails diversification of international investment policy, heavily depending on the EU's negotiating partner.

## V. CONCLUSION

When negotiating its IIAs, the EU has been mindful of the need to align investment protection with safeguarding states' regulatory space. This is reflected in a more detailed and more careful drafting of almost all standards of investment protection in the EU's IIAs offering them, occasionally further refined in subsequent agreements. In this sense, the EU's IIAs are a product of the time in which they are negotiated, the time of an ongoing reform of the system. The EU's reform efforts have not gone as far as to reject the system largely created by its Member States.

Indeed, even the EU's most far-reaching reform element – concerning ISDS – does not relinquish the idea of a privileged direct access of foreign investors to international adjudication, bypassing domestic judiciary of the host state and discriminating against local investors and communities left without equal access to justice.

With respect to substantive protection, the EU has not been willing to renounce the most controversial standard of investment protection, fair and equitable treatment, not even by removing its name for the treaties. This could easily be done while maintaining the 'reformed' content, just as some countries have done.<sup>133</sup> By retaining the name, the EU risks the past jurisprudence will partly continue to live on under its IIAs.

The EU also remains an advocate of a system which extends both substantive and procedural protection to investments not necessarily contributing to sustainable development, even those causing the climate change which the EU tries to fight with unprecedented efforts. Furthermore, the EU continues to stand by the system in which foreign investors benefit from protection without themselves being subject to any enforceable obligations. While it may not be easy to subject private persons to obligations effectively enforceable under public international law, it is not difficult to simply restrict foreign investors' access to protection – or at least its enforcement – by requiring compliance with well-defined corporate social responsibility standards. If CSR enforcement can be done unilaterally by adoption of domestic (or EU) legislation, it can also be done by including such requirement in international treaties.

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<sup>133</sup> This approach has been adopted e.g. by India - India Model BIT of 2015, Art. 3.1.

Hence, in reforming IIL, despite various commendable moves, the EU has not gone as far as to effectively address all past concerns. With regard to the scope and substantive protection, further improvements are likely to come with recognition of remaining problems, either through future legal scholarship, jurisprudence, or civil or political pressure. With regard to ISDS, however, the EU continues to turn a deaf ear to issues that undermine the legitimacy of the system.

What is remarkable is the EU's further diversification of its policy. Not so much with regard to treaties which provide for investment liberalization without investment protection and ISDS. This is clearly a result of political preferences on one or both negotiating sides. More interesting is the newest type of the treaty focusing on investment facilitation. Time will show whether this type of the treaty will eventually be converted into one with investment protection. In the meantime, it would be interesting to learn whether such investment facilitation treaty will not bring more (balanced) benefits to states and their population than even the most "reformed" investment protection treaty that continues to offer ISDS. Future empirical research on this would be most welcome.

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