CHAPTER 4

EU INVESTMENT POLICY: REGIONAL CONVERGENCE OR INTERNATIONAL STANDARDS?

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Introduction

Investment treaties were born in Europe. The first bilateral investment treaty (BIT) was signed between Germany and Pakistan in 1959. Similar agreements followed, concluded mainly by European countries. In contrast, the United States (US) only signed its first BIT in 1982 (with Panama).[1]

Today, the international investment agreements (IIAs) concluded by European countries represent around 42 percent of the total universe of these treaties (31 percent currently in force), including BITs and free trade agreements (FTAs) with investment chapters (Alschner, Elsig and Polanco 2021). Likewise, the majority of claimants and arbitrators in investor-state dispute settlement (ISDS) come from European countries (Behn et al. 2021).

Yet, the international regulation of foreign investments at the European level has been characterized by fragmentation. Although similar, European BITs have several differences, and a complex division of investment competences has existed between the member states and the European Union (EU) and its predecessors.

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During the different phases of the EU investment policy, we distinguish between two types of standardization: definitional and normative (Duina 2006), having in mind that some treaty passages do not clearly fall in any of these categories (or sometimes they do in both).

Definitional standardization relates to the issue of how foreign investment is defined (just foreign direct investment or also portfolio?) as well as the model/approach undertaken by the EU to regulate it (e.g., a "dual approach" of distinguishing between establishment and movement of capital, a standalone investment chapter or lumped in with services?).

Normative standardization refers to how investments should be promoted (cooperation, information, capacity-building), protected (standards of protection and dispute settlement mechanisms, like ISDS or an investment court system, that interpret or define the actual content of those standards), or liberalized (positive or negative list—more control over what is liberalized vs. default liberalization).

When possible, we also highlight the causal pathways for the various standardization outcomes (e.g., borrowing, spillover, etc.), keeping in mind the difference between explaining a pattern of standardization output and the ability or competence to standardize. In that sense, this chapter also explores how the EU increasingly got the competence to standardize investment policies for its member states and the tensions such process created and continues to create.

We also point out the limitations of standardization, highlighting the internal divergences between the EU and its member states (and also among the member states) in respect of investment policy and the general challenges faced by the existing international investment regime. Examples of these differences are reflected in the complex evolution

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of the common commercial policy to include investment and in the continuing signature of member state BITs. This chapter tries to explain the underlying worldviews that these approaches embody, from a Keynesian (control capital flows) to a neoliberal policy (liberalize capital flows) with differing attitudes to the desirability of short-term or long-term investment.

Together with providing some basic description of the pertinent EU primary law, we trace the evolution of the most relevant investment provisions included in the trade and investment agreements concluded by the EU over three phases identified by their main treaty (Rome, Maastricht, and Lisbon). Finally, the chapter examines whether the EU investment policy has created convergence for the EU and its member states and if IIAs concluded by the EU have influenced investment treaty-making in other regions of the world.

First Phase: Treaty of Rome

On March 25, 1957, the treaty establishing the European Economic Community (EEC) was signed in Rome (the Treaty of Rome hereinafter also the EEC Treaty). The agreement entered into force on January 1, 1958, and did not provide the EEC with legal competences in regulating international investment flows (Basedow 2016, 745).[2] The notion of "investment" was, in principle, alien to the EEC (Fernández-Pons, Polanco and Torrent 2017, 1328). Instead, the Treaty of Rome distinguished between "right of establishment" (ch.2, arts. 52–58) and "movement of capital" (ch.4, arts. 67–73).

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In parallel, EEC member states were signing BITs on their own. Those agreements granted strong protections to foreign investors, sharing remarkable similarities (Calamita 2012, 323), such as broad-based definitions for investors and investment; full compensation for direct and indirect expropriation; unqualified most-favoured-nation (MFN), national treatment (NT), and fair and equitable treatment (FET) standards; broad umbrella clauses; no exceptions for specific sectors; no filter mechanisms; and a broad choice of ISDS mechanisms as well as free choice of arbitrators (Lavranos 2013). Between 1957 and 1991, EEC member states concluded 212 BITs.

According to the Treaty of Rome's approach, the notions of establishment and movement of capital are different, even if there is a link between them. The establishment in a host state of a third-country national or company supposes the formation of a subsidiary, branch, or agency, or the total or partial acquisition of an existing entity. The capital needed for that purpose does not necessarily come from a third country and may be obtained in the host state's national financial market. In contrast, international capital movements involve transfers of monetary or financial assets between countries. They are not necessarily connected with the establishment in a different country from where the transfer originated. The rationale underlying the regulation of these two notions is distinct and generally managed by different governmental authorities. Right of establishment's regulation is a matter of sectoral policies (e.g., banking, telecommunications, energy) and the domain of their respective ministries. Capital movements' regulation depends on macroeconomic policy, including balance of payments, exchange rate, monetary stability, and inflation control, among other factors. It is the domain of the ministries of economy, finance, and central banks. Macroeconomic and sectoral policies do not always go in the

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same direction. For example, several countries have significantly liberalized access to capital from third countries. Still, they not always have entirely liberalized the establishment of foreign companies or the domestic companies' control by foreign capital in important sectors (e.g., air transport, audiovisual, or energy)(Fernández-Pons, Polanco and Torrent 2017, 1229–1330).

On the other hand, Article 69 EEC stated that the free movement of capital was only a subordinated treaty freedom. The liberalization of capital movements should only proceed through secondary legislation and to the extent necessary. Only in the 1980s, when EEC policy-makers shifted from Keynesian to neoliberal policies, were they willing to liberalize intra-EU capital (Basedow 2016, 746).

When the EEC started to develop its external economic relations primarily through Association Agreements either alone or accompanied by its member states (in the so-called mixed agreements),[3] it was inspired by the EEC Treaty itself. Such agreements mirrored the Treaty of Rome and adopted the same "dual" definitional standardization of including provisions on the right of establishment and the movement of capital, together with the setting up of mechanisms to enact secondary law, which created new substantive legal rules within the framework of the treaty (Fernández-Pons, Polanco and Torrent 2017, 1334). The legal basis for establishing an association with the Community was already present in the original version of the Treaty of Rome. While art. 113 foresaw the conclusion of trade agreements,[4] art. 238 considered the establishment of associations, [5] being an early and rare example of express external power granted to the Community (Bast 2009).

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But this development was not automatic. In fact, the first association agreement (signed with Greece on July 9, 1961) did not include provisions on the right of establishment or movement of capital. This treaty only had a "best efforts" provision to encourage all means of investment in Greece of capital from EEC countries likely to contribute to the development of the Greek economy (art. 62). [6]

The Convention between the EEC and the 18 Associated African States and Madagascar, signed on July 20, 1963, in Yaoundé (Cameroon), was the first EEC Agreement that contained provisions on establishment, services, payments, and capital movements (Title III, arts. 29–38). These notably included NT and MFN treatment concerning establishment (art. 30) and the commitment to not introduce restrictions to capital movements or make them more restrictive (art. 37).[7] The treaty was later followed by the second Yaoundé Convention, signed on July 29, 1969, and the First and Second Lomé Conventions, signed, respectively, on February 28, 1975, and October 31, 1979, which kept the same scheme as the First Yaoundé Convention.

A third EEC agreement was signed with Turkey in Ankara on September 12, 1963, and entered into force on December 1, 1964 (European Parliament no date-b).[8] This treaty did not include provisions on establishment or movement of capital in its initial text, but it did in its additional financial protocol, signed in Brussels on November 23, 1970. The protocol is one of the earliest examples of mechanisms to enact secondary law, establishing that a council of association shall determine the timetable and rules for the progressive abolition of restrictions on freedom of establishment (art. 41). A similar mechanism had already been established in the 1969 Second Yaoundé Convention (art. 34).

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A temporary change in investment policies took place after the Ankara Agreement and throughout the 1980s, which can be seen as an early manifestation of normative standardization. During that time, the EEC essentially concluded Cooperation Agreements merely including the encouragement of investment as one of several cooperative activities, with the Association of Southeast Asian Nations (1980), Yugoslavia (1980), China (1985), Pakistan (1985), and Central America (1985). The same pattern was followed in cooperation agreements concluded even in the early 1990s with Uruguay (1991) and Paraguay (1992).

Exceptions in this regard are the Third and Fourth Lomé Convention. The Third Lomé Convention, signed on December 8, 1984, is the first EEC Agreement, including an investment chapter in Title IV ("Investment, Capital Movements, Establishment and Services"). Yet, a closer examination of those provisions (arts. 240–247) reveals that the abovementioned EEC model focused on the right of establishment and movement of capital had not changed, as the investment provisions are largely about cooperation, promotion, and information, and not centered on investment protection, as the large majority of European BITs did at that time.

In contrast, the Fourth Lomé Convention does not contain provisions on the right of establishment. Instead, it includes an investment chapter (ch.3, strangely as part of Title III "Development Finance Cooperation"). Besides a section on investment promotion (arts. 258 and 259), the chapter has sections on investment financing (arts. 263–266), investment support (art. 267–272), and, notably, investment protection (arts. 260–262). However, the latter section essentially affirms the importance of concluding investment

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promotion and protection agreements between the Africa, Caribbean and Pacific Group of States and the EEC member states, providing some guidelines about their content, like the principle of non-discrimination. The only direct obligation concerning investment protection is to accord FET to private investors, surprisingly found in the investment promotion section (art. 258b). But again, this did not mean the complete abandonment of the EEC model described before, as this agreement also includes a dedicated section on capital movements (arts. 273 and 274).

It is important to note that if we examine other agreements concluded in this period (1957–91), the definitional standardization of including provisions on the right of establishment and movement of capital in trade or investment agreements was largely not followed outside the EEC. Compared to 511 BITs with binding clauses on investment protection concluded during the same period, provisions on the right of establishment are only found in nine agreements: Iran-United Kingdom Treaty of Commerce, Establishment and Navigation (1959); Japan-United Kingdom Treaty of Commerce, Establishment and Navigation (1962); Germany-Spain Treaty of Establishment (1970), which also includes provisions on expropriation, NT, and MFN; Central African Economic and Monetary Community Convention on Liberalization (1973); the Caribbean Community and Common Market (CARICOM) Treaty (1973); France-Senegal Agreement on Establishment (1974); Economic Community of West African States Protocol on Movement of Persons and Establishment (1979); Economic Community of Central African States Treaty (1983); and African Economic Community Treaty (1991). Except for the latter, these agreements did not include provisions on capital movements. In contrast, clauses guaranteeing the transfer of funds, including capital but also profits,

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payments, and compensation, were commonplace in the BITs concluded at that time. According to the Electronic Database of Investment Treaties, such a provision is found at least in 447 BITs (Alschner, Elsig and Polanco 2021).

The causal pathway of the divide between BITs and EEC Agreements concerning investment persisted, mainly due to the EEC's lack of competency in this matter. This was not for the lack of trying from the side of the European Commission (EC). In 1972 and 1975, the Commission published two draft regulations, one of which foresaw the creation of a European investment guarantee agency, insuring European investors against non-commercial investment risks in third countries. Access to those investment guarantees would be conditional on the existence or conclusion of BITs between the EU, and the concerned third countries, which was seen as an indirect push for a European BITs program. The Commission's draft regulation was met with hesitation and rejection based on the lack of competence of the EEC in these matters and was finally unsuccessful. (Basedow 2016, 746–47)

Second Phase: The Maastricht Treaty

The Treaty on European Union (TEU), also known as the Maastricht Treaty, was signed on February 7, 1992 (in force since November 1, 1993), and formally created the EU. At the same time, the EEC Treaty was incorporated into the EU and renamed the Treaty establishing the European Community (TEC).

Previously, in March 1991, the EC published a report on the functioning of the EU, discussing advisable modifications to the European treaties. The Commission proposed a far-ranging reform to the common commercial policy (CCP), including, among others,

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the regulation of trade in services, intellectual property rights, capital movements, establishment, investment protection and liberalization, through trade agreements and autonomous measures. Advancing a broad interpretation, the Commission held that the CCP already encompassed the regulation of these issues and merely sought to "clarify" but not to broaden the scope of the EU's competences. The member states did not receive the Commission's investment recommendations well and rejected them. However, the Maastricht Treaty established a common external regime governing capital flows between the member states and third countries, which had had a spillover effect. It unintentionally provided the EU with a shared competence to regulate investment market access, as cross-border capital movements constitute an essential component of foreign affiliates' establishment and subsequent operation (Basedow 2016, 749).

Following the EEC Treaty's approach, TEC provisions on the movement of capital differed from those on establishment.[9] The latter were mainly rules on NT and MFN treatment, guaranteeing that any treatment more favourable than that granted to nationals or third countries would also be extended to EC companies and subsidiaries. These obligations were subject to a negative list of exemptions. However, one of the new provisions (art. 73c, later art. 57 TEC, and now art. 64 Treaty on the Functioning of the European Union (TFEU)) made a very tangential insertion of the terms "direct investment" concerning possible exceptions to the general principle of free movement of capital (Fernández-Pons, Polanco and Torrent 2017, 1334).

The Maastricht Treaty also replaced articles 113 and 228 of the EEC Treaty, which, as discussed, were the legal basis for establishing an association with the European Community. Yet, the treaty repeated that the CCP should be based on uniform principles,

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particularly regarding the conclusion of trade agreements, but it did not mention investment.

According to Basedow, the Commission remained determined to have the member states recognize under the CCP, the EU's exclusive competence to regulate all new issues of the Uruguay Round, including international investment (Basedow 2016, 751). In Opinions 1/94 and 2/92, the Court of Justice of the European Union (CJEU) ascribed neither an exclusive explicit nor implicit investment competence to the EU as part of the CCP and held that the European Community retained competences regarding single issues of foreign direct investment (FDI) regulation related to the internal market (Herrmann and Hoffmann 2021, 2229).

Opinion 1/94[10] was the result of the disagreement between the Commission and the member states over whether the CCP's scope enabled the European Community to conclude the World Trade Organization (WTO) Agreement and its annexes alone—a position supported by the Commission and firmly rejected by the member states—or if it had to be concluded as a mixed agreement (CJEU 1994). The Court sided with the member states and found that the WTO Agreement had to be concluded as a mixed one since the Union did not hold all necessary competences. Furthermore, it held that where it is apparent that the subject matter of an international agreement or convention falls partly within the competence of the Community and of the member states, the requirement of unity in the European Community's international representation calls for close cooperation between the member states and the Community institutions, both in the process of negotiation and conclusion and in the fulfilment of the commitments entered into.

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Opinion 2/92[11] (CJEU 1995) resulted from another discrepancy concerning the European Community's participation in the Organisation for Economic Co-operation and Development (OECD) Third Revised Decision on National Treatment (OECD 1991),[12] a legal instrument stipulating that OECD countries should grant NT to established investors from other OECD countries. The Commission claimed that the European Community had exclusive competence to adhere to such a decision, based again on a broad interpretation of the CCP. As expected, several member states refused the Commission's position. Recognizing that the competence of the Community in this regard did not cover all the matters to which that decision relates, the CJEU held that the member states and the European Community were jointly competent to adhere to it.

We have to wait until the Treaty of Amsterdam (signed on October 2, 1997, and in force since May 1, 1999) to include the possibility that EC international negotiations may extend to agreements on services and intellectual property—which tangentially could also affect investment (e.g., "market presence" or mode 3 of trade in services), through a modification of TEC art. 113. In 1995, in an internal report, the Commission had advised extending the scope of the CCP to include trade in services, intellectual property, and FDI, for the latter was not retained (Basedow 2016, 755).

Even though the Maastricht Treaty (or the Treaty of Amsterdam) did not imply a fundamental change from the European Community policy on trade agreements concerning investments, two distinctive patterns appeared in this period (1992–2009). One is keeping the definitional standardization of a "dual" model of agreements with provisions on establishment and capital movements, and another is the normative

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standardization of cooperation agreements with non-binding provisions on investment promotion and protection. Some agreements include both types of standardization.

The first example of EC agreements keeping the "dual" model is the 1992 European Economic Area Agreement, between the EU and three European Free Trade Association (EFTA) States (Iceland, Liechtenstein, and Norway), which included sections on the right of establishment (arts. 31–35) and movement of capital (arts. 40–45), and did not include provisions concerning investment, besides some exceptions allowing the EFTA states to continue applying domestic legislation regulating foreign ownership and/or ownership by non-residents (Annex XIII).

In the early 1990s, macro-political changes lead to changes in the EU's approach. In the context of the disintegration of the Soviet bloc, the issue of foreign investment became particularly relevant. Detailed provisions concerning establishment and treatment after establishment (sometimes called "operation") appeared in the so-called Europe Agreements: association agreements concluded between 1991 and 1995 with Central and Eastern European countries that formed the legal framework for their EU accession process in 2004–2007.[13] The same definitional standardization was used in the partnership and cooperation agreements with some of the former Soviet Union States, like the Russian Federation (1994), Ukraine (1994), Moldova (1994), Kazakhstan (1995), Kyrgzstan (1995), Belarus (1995), Georgia (1996), Armenia (1996), Azerbaijan (1996), and Uzbekistan (1996). These treaties also included normative standardization provisions on cooperation for investment promotion and protection (e.g., information on investment opportunities and improvement of investment climate), without binding investment

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protection standards, as European BITs did then. The same format was followed in the agreement with North Macedonia (2001).

A similar template was followed in the association agreement with Chile (2002) and the "Euro-Mediterranean" agreements concluded by the EU with its so-called Southern Neighbourhood countries: Tunisia (1995), Israel (1995), Morocco (1996), Jordan (1997), Egypt (2001), Algeria (2002), and Lebanon (2002) (European Commission no date-a).[14]

A partial exception among the Euro-Mediterranean agreements is the one with Palestine (1997), which only includes provisions on payments and capital movements as well as cooperation on investment promotion, but not on the right of establishment. The same model was followed in the association agreement with Mexico (1997). Along the same lines, the agreement with South Africa (1999) includes provisions on capital movements and investment promotion, but concerning the right of establishment only reconfirms the obligations undertaken by the parties in the General Agreement on Trade in Services (GATS).

Another partial exception to this model is the Cotonou Agreement (2000), which replaced the Lomé Conventions. This agreement does not have sections on the "right of establishment" and "movement of capital" as the other treaties mentioned above. Instead, it includes provisions for the promotion of private investment, primarily considering cooperation activities (arts. 21, 22, 23, 24, 29, 34, 37, 74) but also concrete investment promotion commitments (see art. 75, e.g., support capacity-building for investment promotion agencies, disseminate investment information, and maintain a predictable and secure investment climate), investment finance and support (art. 76, including loans and advisory services), and investment guarantees (art. 77, including insurance and

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reinsurance schemes).[15] The agreement also includes provisions on investment protection (art. 78), essentially promoting the conclusion of BITs, which could also provide the basis for insurance and guarantee schemes, and agreements related to specific investment projects.

It is important to note that all the agreements mentioned also shared an important feature found in the association agreements concluded under the EEC Treaty: They all set up joint councils and committees endowed with extensive competences to produce secondary law. Certain agreements were notably expanded using this technique (e.g., with Mexico and Chile).

However, in parallel, during the same period: From the early 1990s until 2009, several agreements concluded by the EU did not follow the described "dual" definitional standardization. Such treaties, largely cooperation agreements,[16] only consider provisions to promote investments and improve the investment climate, without including the right of establishment or capital transfers. In one of these agreements—with Sri Lanka—the competence of member states to conclude BITs with substantive standards of protection is explicitly recognized, with both parties acknowledging existing agreements between Sri Lanka and some EC member states and supporting further BITs with others based on the principles of non-discrimination and reciprocity (art. 5).

The Treaty of Nice, signed on February 26, 2001 (in force since February 1, 2003), amended the TEU and the TEC. According to art. 310 of the consolidated text of the agreement, the Community may conclude with one or more states or international organizations agreements establishing an association involving reciprocal rights and obligations, common action, and special procedure. The new version of TEC art. 133

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brought the regulation of trade in services and intellectual property, under the scope of the CCP.

However, this change in the treaty text did not mean a departure from the two policy standards described before. Some agreements followed the “dual” model with detailed provisions on the right of establishment/capital movements and some basic clauses on cooperation for investment promotion and protection,[17] and others the “cooperation” model, only including provisions on investment promotion and improvement of the investment climate.[18]

As in the first phase, the relation between EC trade agreements and BITs concluded by the member states is virtually non-existent. Just a handful of agreements acknowledge some connection between these two different levels of investment policy.

For example, the association agreement with Mexico includes, as part of investment promotion, the support for the conclusion of agreements to promote and protect investments (and also of the agreements to avoid dual taxation). The same provision is also found in the 2002 agreement with Chile[19] (which also has detailed provisions on exceptions to national treatment in Annex X) and the 2003 agreement with the Andean Community.

The Cotonou Agreement notably fosters the conclusion of investment promotion and protection agreements (Annex II, art. 15). This normative approach considers the principles of irretroactivity and non-discrimination between contracting states or against each other concerning third countries. Likewise, it promotes the study clauses for a model protection agreement, including legal guarantees to ensure FET and protection of foreign

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investors, MFN clause, protection against expropriation and nationalization, transfer of capital and profits, and international arbitration in the event of disputes between investor and host state.

As in the first phase, if we examine other agreements concluded in this period (1992–2009), neither the dual or cooperation models were largely followed neither in trade nor investment agreements outside the EU. Provisions on the right of establishment are only found in 19 treaties: CARICOM-Venezuela Trade and Investment Agreement (1992); Common Market for Eastern and Southern Africa (COMESA) Treaty (1993); West African Economic and Monetary Union Treaty (1994); Colombia, Mexico and Venezuela FTA (1994); Canada-Chile FTA (1996); Mexico-Nicaragua FTA (1997); North Macedonia-Turkey FTA (1999); East African Community Treaty (1999); France-Senegal Agreement on Establishment (2000); revised Treaty of Chaguaramas establishing CARICOM (2001); European Free Trade (EFTA) Convention (2001); Central American Common Market (CACM) Agreement on Trade and Services (2002) and its Protocol (2007); Chile-US FTA (2003); Morocco-Turkey FTA (2004); Faroe Islands–Iceland FTA (2005); EFTA-Egypt FTA (2007); Canada-Peru FTA (2008); and the Canada-Colombia FTA (2008). However, several of these agreements only recognize the right of establishment for specific sectors (e.g., financial services or insurance providers) and include binding investment protection provisions (e.g., the COMESA Treaty) or chapters.[20]

In contrast, 2,433 BITs concluded in the same period had binding investment protection provisions. Of these, 1,114 involved the EU member states. Among them, 2,304 treaties included provisions guaranteeing the transfer of funds (1,084 by the EU member states),

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including capital but also profits, payments, and compensations (Alschner, Elsig and Polanco 2021). More importantly, during this period, several "intra-EU BITs" were still in force, meaning agreements concluded between the original EU member states and countries that later became part of the Union but were not terminated at the moment of their accession.

The cause behind this persistent divide between BITs and EC Agreements regarding investment is again a spillover effect of the European Community's lack of competency in this matter. As CJEU's Opinions 1/94 and 1/92 attest, the EC unsuccessfully intended to change this pattern, but the Commission's efforts will finally be rewarded in the next phase.

Third Phase: Treaty of Lisbon

The Treaty of Lisbon, signed on December 13, 2007 (in force since December 1, 2009), amended the TEU and the TEC, renaming the latter the TFEU. As a result, the European Community formally ceased to exist, and its institutions were directly absorbed by the EU. This made the Union the formal successor institution of the Community.

This treaty expanded the EU's influence on investment policies by transferring the exclusive competence for the regulation of FDI within the matters covered by the CCP, and, therefore, fully in the EU's hands. Until then, the European Community did not have exclusive but shared competence in international investment matters. The reasons behind this change are not completely clear. As we have seen, the member states had shown great keenness to retain national control over foreign investment rather than see it move into EU competence (Chaisse 2012, 56). When preparing the European Constitution, no

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discussion was held on the extension of the CCP to investment. Only a passing comment was made in a 300-page impact assessment on the treaty of Lisbon by the House of Lords (Shan and Zhang 2010, 1049–50). It is also unclear why the term FDI was used instead of "international investment" (Basedow 2016, 761).

Regardless of this critical change, the TFEU kept distinguishing between "Capital and payment" (ch.4, arts. 63–66) and the "Right of establishment" (ch.2, arts. 49–55). The main focus of the latter is not market access liberalization but guaranteeing national treatment. Article 49 TFEU states that "[…] restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. […] Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms […], under the conditions laid down for its own nationals by the law of the country where such establishment is effected […]."

Article 50 confers the EU extensive competence to produce uniform law through secondary law, stipulating that: "In order to attain freedom of establishment as regards a particular activity, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall act by means of directives […]."

Chapter 4 on Capital and Payments follows an entirely different approach from the chapter on the right of establishment. Article 63 TFEU imposes a general obligation to liberalize market access (both to and from the EU member states and to and from third countries). The following articles introduce specific exceptions and confer on the EU

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some competences to enact secondary law, limited mainly to movements of capital from and to third countries.

Alongside the conclusion of trade agreements, as foreseen in TFEU art. 207 (ex art. 133 TEC), a legal basis to establish association agreements with the EU is found in TFEU art. 217 (ex art. 238 TEC), complemented by arts. 216, 218, and 219, mainly using modified provisions of the preceding treaties.

But this time, the change led to a new definitional standardization in the treatment of establishment and investment in EU trade agreements. The primary examples of this approach are the Comprehensive Economic and Trade Agreement with Canada (CETA) (2016) and the agreements with Singapore (2018) and Vietnam (2019). In July 2020, a Commission's communication mentioned broader policy objectives for future negotiations, like promoting the rule of law, human rights, sustainable development, and the OECD guidelines for multinationals (Calamita 2012, 62–63).

The new EU investment competency is the cause of this important change in the Union's investment standardization. However, the "old" EU standard did not wholly vanish and was still clearly perceptible in the first wave of association agreements negotiated after the Treaty of Lisbon. In fact, the first agreement concluded under the Treaty of Lisbon, with the Republic of Korea FTA (2010), kept the "classic" dual distinction between the right of establishment, and payments and capital movements.[21] The same happens in the EU-Iraq Partnership and Cooperation Agreement (2012), EU-Colombia-Peru FTA (2012), and EU-Central America Association Agreement (2012). In these two last agreements, investment protection, including ISDS, is explicitly excluded from the treaty. In the EU-Ukraine Association Agreement (2014), its central provision on establishment

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(art. 88, in ch.6, section 2) envisages only national treatment and MFN treatment, and no article on "market access" is included. The same model is followed in the agreements with Georgia (2014), Moldova (2014), Kosovo (2015), Kazakhstan (2015),[22] and Armenia (2017). Finally, the Economic Partnership Agreement (EPA) with the Southern African Development Community (2016) includes a section on payments and capital movements but not on the right of establishment. According to art. 74, parties merely agree to cooperate on investment and may in the future consider negotiating an agreement on investment in economic sectors other than services.

The significant definitional change in the EU external investment policy, took place during the failed negotiations of the Transatlantic Trade and Investment Partnership (TTIP) between the EU and the US, which started in 2013 and met with strong opposition from civil society, particularly in Europe. After the US halted the negotiations in 2018, in 2019, the EC declared negotiations obsolete and no longer relevant. The EU Proposal for the TTIP included an investment chapter for the first time (European Commission no date-b).[23]

The new approach has two distinctive features. First, unlike member state BITs that did not contain provisions liberalizing investment, a key feature of the new EU investment agreements is their emphasis on investment liberalization together with investment protection (Dimopoulos 2020, 2272). It separates clearly the international exchanges of services (or cross-border supply of services), defined as modes 1 and 2 of GATS, and that on investment/establishment, applicable to all sectors. Therefore, establishment (GATS mode 3) is no longer treated differently according to whether it relates to services sectors or other sectors. Second, a separate chapter on investment includes the typical provisions

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found in BITs, but with several clarifications about standards of treatment or protection that had been subject to ISDS cases, like FET and indirect expropriation. By the time the Treaty of Lisbon entered into force, the EU member states had concluded more than 1,100 BITs, but the majority did not include such clarifications.

In these two features, the EU agreements partially borrowed the model mainly developed by the US after the early North American Free Trade Agreement (NAFTA) ISDS arbitrations, found in the US Model BITs of 2008 and 2012 but most importantly in treaties like the Central America-Dominican Republic Free Trade Agreement and the Trans-Pacific Partnership. Indeed, in a 2011 Resolution, the European Parliament explicitly recalls the experience of Canada and the US under NAFTA, noting that these states “have adapted their model BITs in order to restrict the breadth of interpretation by the arbitration and ensure better protection of their public intervention domain” (European Parliament 2011).[24]

Likewise, CETA introduced a significant change to EU agreements’ scope of obligations: the “positive list” method was replaced by that of the “negative list” both in the services and investment/establishment chapters. This is also a feature traditionally present in agreements concluded by the US. It means that foreign investors are treated like domestic investors, as the treaty’s terms apply to all sectors except those expressly listed as exclusions, and not only if a sector is included in the schedule of commitments. This change is particularly relevant when applied to market access in the investment/establishment chapter. Due to the negative list method, the agreement must include extremely long annexes/schedules of reservations and exceptions and a list of carved-out sectors.

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A third distinctive feature—this time a pure European creation—also appeared during the failed TTIP negotiations: the replacement of the most common ISDS mechanism—investor-state arbitration—with a new investment court system (ICS), including standing tribunals of first instance and an appellate tribunal. It was then added to the negotiations with Vietnam and included in its initially agreed text. The Commission advanced the idea of an ICS as a solution to several disadvantages of investor-state arbitration (conflict of interests and lack of consistency, among others). But some have criticized this policy as a rebranding of ISDS, which keeps the central tenets of a system that empowers corporations to sue States (Eberhardt 2016).

CETA originally only included several provisions to "improve" ISDS similar to those provided in the initial text of the EU-Singapore FTA (2014). However, an important change was made in the "scrubbed" version of the agreement on February 29, 2016. Now, the investment chapter includes the establishment of an investment tribunal and an appellate tribunal for resolving disputes between investors and states, abandoning the investor-state arbitration system. Until now, the only other EU agreements that contain ICS are the EU-Vietnam and EU-Singapore Investment Protection Agreements (IPAs). Earlier versions of both treaties considered that feature in the same text of the FTAs. The removal of their investment chapters was a consequence of CJEU Opinion 2/15 of May 16, 2017, concerning the competence of the EU to conclude the FTA with Singapore and the additional ratification by the member states' parliaments. According to the CJEU, all subject matters of that agreement fall within the scope of the CCP, with the crucial exceptions of non-direct forms of investments and ISDS. Although the Court granted

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much leeway to the EU in exercising exclusive treaty-making powers, it still required that the agreement be ratified at a national level, which is something that CETA's ratification process has proven to be challenging to achieve. Recently, the Irish Supreme Court precluded the ratification of the agreement unless changes are made to the domestic legislation governing arbitration. (Baker 2022)

The segregation of investment issues from trade agreements to improve the chances of their ratification[25] negatively impacts the EU's ability to use its unitary political weight to shape the standardization of investment rules and discontinue the EU's short-lived policy of including trade and investment jointly together in one comprehensive economic agreement (Hainbach 2018). The inclusion of the ICS is also being debated in the process of the modernization of the EU FTAs with Mexico and Chile (which also include the features of investment liberalization and investment protection).

However, the EU definitional standard concerning external investment has not been wholly consistent. Even an intermediate third model has appeared between the classic "dual" model and the most recent liberalization model. For example, in the EU-Japan EPA (2018), there is a chapter on capital movements, payments, and transfers, and a section exclusively devoted to investment liberalization. Still, there are no provisions on investment protection or dispute settlement, and both topics have been left for later negotiations, even though the EC declared, that for the EU, "ISDS is dead" (European Commission - Trade 2017). A similar format has been followed in the post-Brexit EU-UK Trade and Cooperation Agreement (2020).

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In contrast, the text of the future replacement of the Cotonou Agreement, the EU-Organisation of African, Caribbean, and Pacific States Partnership Agreement (initialed on April 15, 2021) only includes clauses on investment facilitation and mobilization of sustainable and responsible investment. No provisions on establishment, capital movements, investment protection, liberalization, or dispute settlement are included, which is an important departure from earlier agreements with these countries. Furthermore, the Comprehensive Agreement on Investment with China–text "in principle" made public on January 22, 2021, includes sections on investment liberalization, domestic regulatory framework, and sustainable development. Notably, dispute settlement provisions include neither investor-state arbitration nor ICS but a state-to-state mechanism (including both mediation and arbitration).

However, the EU has been consistent in the rejection of investor-state arbitration as a normative standard and has not concluded any agreement with this feature in recent years (the latest it was the earliest version of CETA). At the same, the EU has been able to install the idea of the ICS as a feasible alternative, and the proposal of a multilateral investment court is now part of the discussions taking place since November 2017 in the UN Commission on International Trade Law Working Group III on Investor-State Dispute Settlement Reform (UNCITRAL 2022).[26] This is not short of remarkable, considering that none of the EU treaties that include ICS are currently in force. (The provisional application of CETA does not include investment disputes (OJEU 2017),[27] and the IPAs with Vietnam and Singapore have not been ratified.) Also, outside the abovementioned three concluded by the EU, no other investment agreements currently include ICS.

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The EU has also been relatively successful in "putting the house in order" concerning intra-EU BITs. After years of asking the member states to terminate them, the fervent opposition of some member states was met with the CJEU ruling in the *Achmea* case, where the Court decided that the arbitration clause contained in art. 8 of the 1991 Netherlands-Slovakia BIT has an adverse effect on the autonomy of EU law and was incompatible with it (CJEU 2018).[28] In a subsequent decision, the CJEU declared that the individual rights deriving from EU law must be protected within the framework of the judicial system of the member states (CJEU 2021b).[29] Furthermore, the Court also held that the Energy Charter Treaty (ECT)—an agreement establishing a multilateral framework for cross-border cooperation and protection in the energy industry and the basis of more than 145 ISDS cases—must be interpreted as not being applicable to disputes between an EU member state and an investor of another member state concerning an investment made by the latter in the first member state (CJEU 2021a).[30] In contrast, a couple of years before *Achmea*, in a "non-paper" of April 2016, Austria, Finland, France, Germany, and the Netherlands acknowledged that, in parallel to terminating intra-EU BITs, it was necessary to afford European investors with modern guarantees on substantive and procedural investment protection to maintain a level playing field vis-à-vis their foreign competitors (Council of the European Union, Trade Policy Committee (Services and Investment) 2016).

Following the declarations of January 15–16, 2019, on the legal consequences of the judgment of the CJEU in *Achmea* and on investment protection in the EU, on October 24, 2019, EU member states agreed on a plurilateral treaty for the termination of intra-EU

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BITs. The agreement was signed by 23 member states on May 5, 2020, and entered into force on August 29, 2020 (OJEU 2020).[31] Yet, some member states have not signed the agreement (Belgium, Luxembourg, Portugal, and Italy—although the latter has unilaterally terminated its intra-EU BITs).

The CJEU efforts to assert EU dominance over IIAs—when the dispute concerns EU member states—have been recently reaffirmed by a decision of an ISDS arbitral tribunal in a dispute against Spain under the ECT. On June 16, 2002, the tribunal in *Green Power* v. *Spain* declined jurisdiction over claims brought by two Danish claimants against Spain. It decided that the case could not proceed due to its intra-EU nature, upholding the primacy of EU Law, described as "lex superior" overriding the ECT with respect to the relevant States (Denmark, Spain, and Sweden—being the latter the seat of the arbitration) (SCC 2022).[32]

Consolidating the triumph of this approach, on June 24, 2022, the Energy Charter Conference agreed, among other issues, to introduce an article to the ECT clarifying that investment dispute settlement shall not apply among contracting parties members of the same Regional Economic Integration Organisation, explicitly mentioning the EU (Energy Chart Secretariat 2022).[33]

Yet, the EU's competence to regulate foreign investment is still not absolute. While it is true that the EU is now exclusively competent to regulate FDI, and member states have largely lost the necessary competences to pursue their own international investment policies (Basedow 2016, 744), they still retain a key competence for non-FDI investment.

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The notion of "investment" has been traditionally used, including the distinction between "portfolio" and direct investment. However, differentiating between these two types is not easy. Portfolio investment is defined as "cross-border transactions and positions involving equity or debt securities, other than those included in direct investment or reserve assets" (IMF 2009, 110), which, unsatisfactorily, makes the definition circular and dependent on what is defined as direct investment. Furthermore, the distinction is often described as depending on imprecise distinctions like short term/long term or the existence or absence of "a lasting interest" (Galeza and Chan 2015, 34–35).

Regulation 1219/2012 addresses the status of the member states' BITs under EU law and establishes the terms, conditions, and procedures under which they are authorized to amend or conclude such agreements. It stipulates that BITs concluded by the member states before their EU accession can still be maintained until the EU concludes an investment agreement with the respective counterparts. The Commission may authorize member states to open new negotiations to amend or sign a BIT with third countries if the EU has not yet concluded an agreement with them (European Parliament 2012).[34]

This has left a door open for the member states willing to pursue independent investment treaty-making (and not as part of trade or association agreements). As a result, recent years have seen the development of Model BITs from the Czech Republic (2016), Slovakia (2016, 2019), Belgium-Luxembourg Economic Union (2019), Netherlands (2019), and Italy (2021). Since the entry into force of the Treaty of Lisbon, 35 BITs have been concluded by the EU member states.[35]

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Conclusion

Although investment treaties were first created in Europe, for a long time, the agreements concluded by the EEC, the European Community, and the EU treated investment as an alien notion, which was largely part of the regulatory domain of member states. Several causal pathways explain the evolution of EU investment policy, with some borrowing and some creation. But the evolution of the definitional European investment standards in the past decades is mainly the reaction to the changes in competency between the member states and the Community/Union.

Under the aegis of the Treaty of Rome, the investment competence of the Community was limited, and EEC agreements with "dual" provisions on the right of establishment and movement of capital coexisted with hundreds of BITs concluded by the member states, with binding provisions on investment protection and ISDS. These treaties—and not the ones concluded by the EEC—created a de facto "gold standard" of investment treaties which was followed around the world, particularly in the 1990s, after the success of the Washington Consensus.

After some changes introduced by the Treaties of Maastricht, Amsterdam, and Nice, the European Community's investment competence expanded slightly. However, this did not imply a fundamental change in the external investment policy. In fact, besides continuing with the negotiation and conclusion of agreements following the "dual" approach, a second model arose, only including cooperation commitments on investment promotion. During these periods, the European Commission's entrepreneurship was decisive in extending the EU's competences in international investment policy (Basedow 2016, 767). After finally succeeding with the inclusion of FDI as part of the common commercial

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policy in the Treaty of Lisbon, the Commission could implement a new policy of EU agreements which included investment liberalization, updated standards of investment promotion, a new dispute settlement mechanism (the ICS) born as a response to the intensive backlash against investor-state arbitration. However, after more than a decade of these new competences, there is still some lack of consistency in EU agreements, which do not always follow the same model.

Yet, in recent years, the EU has been successful in two key normative standards: presenting the ICS as a feasible alternative to investor-state arbitration and in the termination of intra-EU BITs decided incompatible with EU law—a position that the Commission had held for several years.

However, there is still some room for inconsistency, because of the remaining competences of member states to conclude investment treaties (separated from trade or association agreements), which involve non-FDI (or portfolio) investment, a possibility that has been used several times in the last decade.

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Notes

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[1] However, since the end of World War II, the US started a program of Friendship, Commerce and Navigation agreements, which also included investment provisions quite similar to early BITs (Vandevelde 2017).
[2] The only mentions of investment are the establishment of a "European Investment Bank" (Title IV), and the prohibition of agreements between enterprises consisting in the limitation or control of investment, which was deemed incompatible with the common market (EEC Treaty art. 85b).
[3] Mixed agreements are international treaties where the EU and the member states act together because the competence is shared, concurrent, or there is an exclusive competence of the member states. As a result, these agreements must additionally be ratified through the domestic procedure of established by each member state (European Parliament 2016).
[4] EEC Art. 113:

> 1. […] the common commercial policy shall be based on uniform principles, particularly in regard to tariff amendments, the conclusion of tariff or trade agreements, the alignment of measures of liberalisation, export policy and protective commercial measures including measures to be taken in cases of dumping or subsidies.
> 2. The Commission shall submit proposals to the Council for the putting into effect of this common commercial policy.
> 3. Where agreements with third countries require to be negotiated, the Commission shall make recommendations to the Council, which will authorise the Commission to open the necessary negotiations.
> The Commission shall conduct these negotiations in consultation with a special Committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it.
> 4. The Council shall, when exercising the powers conferred upon it by this Article, act by means of a qualified majority vote.

[5] EEC art. 238:

> The Community may conclude with a third country, a union of States or an international organization agreements creating an association embodying reciprocal rights and obligations, joint actions and special procedures.
> Such agreements shall be concluded by the Council acting by means of a unanimous vote and after consulting the Assembly.
> Where such agreements involve amendments to this Treaty, such amendments shall be subject to prior adoption in accordance with the procedure laid down in Article 236.

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[6] Agreement establishing an association between the European Economic Community and Greece, https://www.cvce.eu/en/obj/agreement_establishing_an_association_between_the_european_economic_community_and_greece_9_july_1961-en-ea36b530-f7ee-46f3-a26b-5dc4ea1a5508.html.
[7] Unless mentioned otherwise, the agreements cited in this chapter are accessible at the Electronic Database of Investment Treaties: https://edit.wti.org/.
[8] Agreement establishing an Association between the European Economic Community and Turkey https://www.europarl.europa.eu/delegations/en/d-tr/documents/eu-texts.
[9] However, the Chapter "Capital" was renamed "Capital and payments," and art. 67–73 were substituted for art. 73b–73g.
[10] Opinion of the Court of 15 November 1994. Competence of the Community to conclude international agreements concerning services and the protection of intellectual property - Article 228 (6) of the EC Treaty https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61994CV0001.
[11] Opinion 2/92 pursuant to the second subparagraph of Article 228(1)of the EC Treaty, 24 March 1995. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61992CV0002_SUM&from=FR (accessed June 24, 2022).
[12] OECD, Third *Revised Decision of the OECD Legal Instruments Council concerning National Treatment* (December 12, 1991).
[13] Agreements signed bilaterally with Hungary (1991), Poland (1991), Romania (1993), Czech Republic (1993), Slovakia (1993), Bulgaria (1993), Latvia (1995), Estonia (1995), Lithuania (1995), and Slovenia (1995).
[14] European Commission , Trade, Southern Neighbourhood [online], available at: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/southern-neighbourhood_en (accessed June 27, 2022).
[15] We find a similar scheme in the Overseas Association Decision of 2001, between the EU and the Overseas Countries and Territories, which included provisions on investment promotion, investment support and financing. Council Decision of 27 November 2001 on the association of the overseas countries and territories with the European Community (European Council 2001). Interestingly, the most recent decision of 2021 reverts to the traditional format including provisions on payments and capital movements and right to establishment and does not include investment provisions (European Council 2021).
[16] These are the agreements with Macao (1992), Mongolia (1992), Brazil (1992), India (1993), Sri Lanka (1994), Viet Nam (1995), Nepal (1995), and the Southern Common Market (which includes Argentina, Brazil (again), Paraguay and Uruguay (1995)), South Korea (1996), Cambodia (1997), Laos (1997), Yemen (1997), and Pakistan (2001).
[17] See, for example, the Agreement with Tajikistan (2004); the Interim Agreement with Cameroon (2009), which only include provisions on capital movements and reiterates GATS commitments concerning establishment; and the Stabilisation and Association Agreement between the EU and the Western Balkan countries (Albania (2006), Montenegro (2007), Serbia (2008), and Bosnia (2008)).
[18] See, for example, the agreements with the Andean Community (2003), which includes Bolivia, Colombia, Ecuador, and Peru; the Stepping Stone Economic Partnership Agreement with Côte d'Ivoire (2008); and the Interim Agreement with the Southern

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African Development Community (2009), which includes Botswana, Lesotho, Mozambique, Namibia, and Eswatini; and the Interim Agreement with Eastern and South African States (2009), which includes Comoros, Madagascar, Mauritius, Seychelles, Zambia, and Zimbabwe.

[19] Under article 134, parties to the EU-Chile Association Agreement confirm their rights and obligations existing under any bilateral or multilateral agreements to which they are parties.

[20] See, for example, the Colombia, Mexico, and Venezuela FTA, Canada-Chile FTA, Mexico-Nicaragua FTA, Chile-US FTA, the CACM Agreement and Protocol, Canada-Peru FTA, and the Canada-Colombia FTA.

[21] A provision on improving the investment environment is included in the establishment Chapter Seven (art. 7.10).

[22] Art. 56 of this agreement considers the possibility of future negotiations, including general principles of investment protection, after a review to identify joint barriers to investment.

[23] European Commission. Commission draft text TTIP – investment https://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf.

[24] European Parliament. Resolution of 6 April 2011 on the future European international investment policy [online], available at: https://www.europarl.europa.eu/doceo/document/TA-7-2011-0141_EN.html (accessed June 27, 2022).

[25] The EU-Singapore FTA entered into force on November 21, 2019, and the EU-Vietnam FTA entered into force on August 1, 2020. However, both IPAs will enter into force after it has been ratified by all EU member states. As of February 2022, only twelve member states have ratified it. The IPA with Vietnam has already been ratified by that country.

[26] UNCITRAL, Working Group III: Investor-State Dispute Settlement Reform https://uncitral.un.org/en/working_groups/3/investor-state.

[27] Official Journal of the European Union. Notice concerning the provisional application of 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 https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22017X0916(02)&rid=1.

[28] Judgment of the Court (Grand Chamber) of 6 March 2018, Slovak Republic v. Achmea B.V. (Case C-284/16), §21, 59.

[29] Judgment of the Court (Grand Chamber) of 26 October 2021, Republiken Polen v PL Holdings Sàrl, §68.

[30] Judgment of the Court (Grand Chamber) of 2 September 2021, République de Moldavie v Komstroy LLC, § 65.

[31] Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union [online], available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22020A0529(01).

[32] Green Power Partners K/S and SCE Solar don Benito APS v. Spain (SCC), Award, 16 June 2022, §469-470.

[33] Energy Charter Secretariat, Decision of the Energy Charter Conference, CCDEC 2022 10 GEN (Brussels, 24 June 2022) [online], available at:

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https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2022/CCDEC2022 10.pdf (accessed June 27, 2022).

[34] 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, [2012] OJ L351/40.

[35] See, for example, the Colombia-Spain BIT (2021), Hungary-Kyrgyzstan BIT (2020), Belarus-Hungary BIT (2019), Lithuania-Turkey BIT (2018), Iran-Luxembourg BIT (2017), Slovakia-United Arab Emirates BIT (2016), Denmark-North Macedonia BIT (2015), Colombia-France BIT (2014), Austria-Nigeria BIT (2013), Haiti-Spain BIT (2012), India-Slovenia BIT (2011), and Austria-Tajikistan BIT (2010).

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