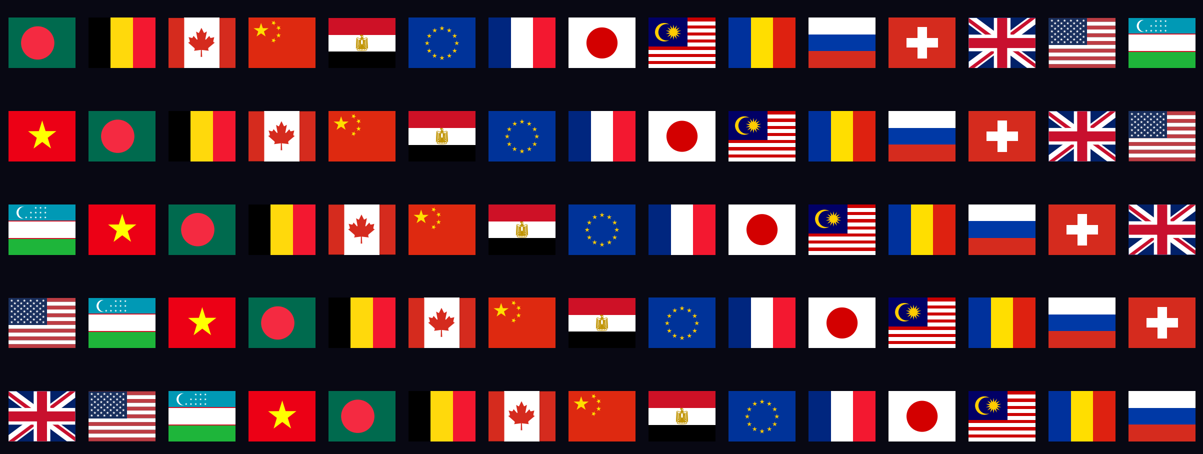
INVESTMENT TREATY ARBITRATION

European Union



LEXOLOGY
Getting The Deal Through

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Investment Treaty Arbitration

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Quick reference guide enabling side-by-side comparison of local insights, including into foreign investment profile and investment agreement legislation; international legal obligations under investment treaties and relevant conventions; foreign investment promotion, domestic laws, regulatory and disputes agencies; investment treaty practice; investment arbitration history; enforcement of awards against the state; and recent trends.

Generated 07 November 2022

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BACKGROUND

Foreign investment

What is the prevailing attitude towards foreign investment?

With more than 35 per cent of total EU assets belonging to foreign-owned companies, the European Union has one of the most open investment regimes in the world.

However, it is only since the Lisbon Treaty entered into force in 2009 that the European Union has enjoyed exclusive competence in the area of foreign direct investment (FDI). Prior to 2009, the European Union had exclusive competence over the conclusion of treaties relating to the pre-establishment phase of an investment. Member state competence covered the post-establishment phase. EU member states, therefore, focused on the conclusion of treaties offering protection to investments already established in a host state and not containing provisions relating to market access. The European Union itself negotiated and concluded agreements covering market access and the pre-establishment phase.

Although the entry into force of the Lisbon Treaty in 2009 changed this general position, in 2012, the European Union adopted Regulation 1219/2012 (the Grandfathering Regulation). That regulation created a framework that would still allow individual EU member states to conclude bilateral investment treaties (BITs) with third countries, subject to authorisation.

Despite the changes brought about by the Lisbon Treaty, it remained unclear whether the European Union could now conclude investment agreements with third countries alone and what the precise nature of its competence was in respect of investment, particularly in relation to FDI. Those questions were settled in 2017 when the Court of Justice of the European Union (CJEU) delivered Opinion 2/15. The CJEU confirmed the European Union's exclusive competence in respect of FDI. However, certain aspects of investment were found to fall within the European Union's shared competence (eg, portfolio investment). Importantly, the CJEU concluded that agreements providing for the establishment of an investor-state dispute settlement (ISDS) system require the consent of the member states as well.

The measures taken by the European Union in the field of FDI aim to establish a level playing field that prevents discrimination against EU investors abroad. They are also aimed at creating a predictable and transparent business environment to attract FDI in the European Union (while at the same time preserving the autonomy of the EU legal order and the autonomy of EU member states and their right to regulate their economies in the public interest).

In that respect, the European Union has adopted (or is in the process of adopting) two types of legislation. First, in March 2019, the European Union adopted Regulation 2019/452 establishing a framework for the screening and admission of FDI. This Regulation creates a system of cooperation and exchange of information, between EU member states, on investments from non-EU countries that may affect national security or public policy. Second, in June 2022, the Council of the European Union and the European Parliament reached a provisional agreement on the text of the proposed regulation on foreign subsidies distorting the internal market to tackle distortive effects caused by foreign subsidies, including when those subsidies facilitate investments in the European Union.

Law stated - 19 October 2022

What are the main sectors for foreign investment in the state?

According to the European Commission's 2022 staff working document on the screening of FDI into the European Union, the main sectors attracting FDI include IT or ICT; manufacturing; professional, scientific and technical services; finance and insurance; retail; transport; and accommodation.

Law stated - 19 October 2022

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Is there a net inflow or outflow of foreign direct investment?

In 2020, the European Union was a net recipient of FDI flows, as inward flows exceeded outward flows by €196 billion. According to the European Commission, the European Union has one of the world's most open investment regimes with more than 35 per cent of total EU assets belonging to foreign-owned companies. Flows of EU FDI to the rest of the world amounted to €8.589 billion at the end of 2020. At the end of 2020, investment capital held by the rest of the world in the EU amounted to €7.317 billion.

Law stated - 19 October 2022

Investment agreement legislation

Describe domestic legislation governing investment agreements with the state or state-owned entities.

Not applicable.

Law stated - 19 October 2022

INTERNATIONAL LEGAL OBLIGATIONS

Investment treaties

Identify and give brief details of the bilateral or multilateral investment treaties to which the state is a party, also indicating whether they are in force.

Since 2009, the European Union has sought to negotiate and conclude investment agreements with third countries. The European Union (together with its member states) has concluded three comprehensive trade and investment agreements with, respectively, Canada (Comprehensive and Economic Trade Agreement (CETA)), Singapore and Vietnam. However, as a result of Opinion 2/15, the agreements between the European Union and, respectively, Singapore and Vietnam, have been split. The provisions on investment protection in those agreements are therefore contained in distinct investment agreements (the EU-Singapore Investment Protection Agreement (EUSIPA) and the EU-Vietnam Investment Protection Agreement (EUVIPA)), separate from the provisions on trade liberalisation (which are contained in specific trade agreements). EUSIPA, EUVIPA and the provisions on investment protection and investor-state dispute settlement (ISDS) contained in CETA have, however, not yet entered into force. They await ratification by national (and even regional) parliaments in the EU member states.

On 24 December 2020, following the United Kingdom's withdrawal from the European Union, the European Union and the United Kingdom concluded the EU–UK Trade and Cooperation Agreement , which includes a section on 'services and investment'. However, those provisions on investment protection are limited to dealing with investment liberalisation, establishment, market access and non-discriminatory treatment, and are silent on ISDS. The EU–UK Trade and Cooperation Agreement entered into force on 1 May 2021.

In the meantime, on 30 December 2020, the European Union and the People's Republic of China also announced the conclusion, in principle, of a Comprehensive Agreement on Investment (EU–China CAI) . It is doubtful whether the European Parliament will ratify the EU–China CAI in the short or medium term. As it currently stands, the text of the EU–China CAI essentially focuses on investment liberalisation and the modes of supply of services. The EU–China CAI does not contain provisions on substantive investment protection or ISDS.

In addition to CETA, EUSIPA, EUVIPA, the EU–UK Trade and Cooperation Agreement and the EU–China CAI, the

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European Union is currently negotiating a number of other trade and investment agreements, including an agreement with Mexico. In April 2018, the parties reached an agreement in principle on the trade parts of the EU–Mexico agreement. In April 2020, they concluded the outstanding elements of their negotiations. The two parties are currently finalising the legal revision of the text. After translation into all EU languages, it will be transmitted to the EU member states and the European Parliament as part of the ratification process. The European Union and the Mercosur states (Argentina, Brazil Paraguay and Uruguay) reached a political agreement on a comprehensive trade agreement on 28 June 2019. Once the legal text is finalised, it will be translated into all EU languages and transmitted to the EU member states and the European Parliament for ratification. At present, ratification is postponed due to ongoing discussions about the trade and sustainability provisions of that agreement.

Finally, the European Union, together with the EU member states (with the notable exceptions of Italy, and in the future possibly Poland and Spain which recently announced their intention to withdraw from the Energy Charter Treaty (ECT)), is also a party to the ECT. The ECT is an international agreement that establishes a multilateral framework for cross-border cooperation in the energy sector. The ECT covers all aspects of commercial energy activities (including trade, transit and investments) and also contains ISDS provisions. The ECT entered into force in respect of the European Union on 16 April 1998. Negotiations in relation to the modernisation of the ECT, principally driven by the European Union, led to an agreement in principle concluded on 24 June 2022. Importantly, in a judgment of 2 September 2021 (C-741/19 – Komstroy), the Court of Justice of the European Union (CJEU) ruled that the ISDS arbitration provision in the ECT (article 26(2)(c) ECT) is not applicable to intra-EU investment disputes (disputes between an investor of one member state and another member state). The CJEU confirmed this ruling in Opinion 1/20 but refused to rule on the compatibility of the draft modernised ECT. The revised ECT excludes the possibility of resorting to ISDS when the parties are members of the same Regional Economic Integration Organisation, such as the European Union.

Law stated - 19 October 2022

If applicable, indicate whether the bilateral or multilateral investment treaties to which the state is a party extend to overseas territories.

The European Union itself does not have overseas territories distinct from the overseas territories of the EU member states.

CETA, EUSIPA, EUVIPA, EU-China CAI and the EU-UK Trade and Cooperation Agreement do not expressly state whether they apply to overseas territories of the EU member states. Those agreements merely address their territorial application by referring to the fact that they apply to the territories in which the Treaty on European Union and the Treaty on the Functioning of the European Union are applied and under the conditions laid down in those Treaties (article 1.3 CETA; article 4.13 EUSIPA; article 4.22 EUVIPA; article VI.16 EU-China CAI; and article 774 EU-UK Trade and Cooperation Agreement).

Those conditions are contained in article 52 of the Treaty on the European Union and article 355 of the Treaty on the Functioning of the European Union. However, they vary depending on the overseas territory in question. Consequently, the EU treaties do not apply uniformly and consistently to all overseas territories of the EU member states. The exact extent to which EU investment agreements apply to overseas territories has therefore not yet been settled.

Law stated - 19 October 2022

Has the state amended or entered into additional protocols affecting bilateral or multilateral investment treaties to which it is a party?

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Following Opinion 2/15 in which the CJEU found that the provisions on investment protection in the initial version of the EU–Singapore Free Trade Agreement covered also shared competences (and could, consequently, only be dealt with by the European Union and its member states acting together), the EU–Singapore Free Trade Agreement has been amended prior to its ratification. The initial EU–Singapore Free Trade Agreement has been split into two separate agreements. It now consists of (1) the EU–Singapore Trade Agreement (which deals with trade and foreign direct investment liberalisation) and (2) the EUSIPA (which encompasses investment protection and ISDS). The same approach was taken with respect to the EUVIPA. This approach to splitting up trade and investment protection elements is in line with the conclusions adopted by the Council of the European Union in its May 2018 report on the negotiation and conclusion of EU trade agreements; however, that approach is currently called into question in certain EU member states.

Furthermore, the European Union was a leading driver of the modernisation of the ECT. The first round of modernisation negotiations was opened in 2020. An agreement in principle was reached on 24 June 2022. While Italy already notified its withdrawal from the ECT in 2014, other EU member states are considering to follow suit. Poland proposed legislation in August 2022, to withdraw completely from the ECT, arguing that the modernised text was not going far enough. Recently, Spain also announced its intention to withdraw from the ECT.

The modernised text will allow contracting parties to exclude new fossil fuel related investments from investment protection after nine months and to phase out protections for existing investments after 10 years from the adoption of the modernised text. These phase-out periods are shorter than the 20-year period applicable if the European Union and its member states had withdrawn from the ECT.

In addition, the modernised ECT text will clarify that an investor from a contracting party that is part of a regional economic integration organisation, such as the European Union, may not initiate an ISDS claim against another contracting party member of the same organisation. Furthermore, the new definitions of 'investment' and 'investor' will clarify that only investors with substantive economic interests qualify for investment protection, while mailbox companies will be excluded.

Finally, in the modernised text the contracting parties commit to respecting fundamental labour principles, transparency and corporate social responsibility. These will be subject to ad-hoc dispute settlement procedures. If no contracting party objects, the modernised ECT text can formally be adopted at a conference planned for November 2022. In the European Union, the European Commission will need to obtain the approval of the Council and consent from the European Parliament before the changes can enter into force.

Law stated - 19 October 2022

Has the state unilaterally terminated any bilateral or multilateral investment treaty to which it is a party?

No, but significant qualifications apply. CETA, EUSIPA and EUVIPA provide that the member states' pre-existing bilateral investment treaties (BITs) with Canada, Singapore and Vietnam respectively will automatically be replaced and superseded by those agreements when they enter into force (article 30.8 CETA; article 4.12 EUSIPA; and article 4.20.4 EUVIPA). This option was not followed in the EU–China CAI, which explicitly provides that the CAI will not supersede previous agreements between EU member states or the European Union, on the one hand, and China, on the other hand (article VI.15).

The EU-UK Trade and Cooperation Agreement does not contain any provision on the termination of the BITs that are still in place between the United Kingdom and certain member states. Therefore, unless they are terminated on a unilateral basis by the United Kingdom or each respective member state, these BITs remain in force.

In addition, a number of EU member states have threatened to terminate the ECT if the modernisation process is

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unsuccessful. Following the agreement in principle reached on 26 June 2022, only Poland has so far taken steps to unilaterally terminate the ECT. However, Spain has also recently announced its intention to withdraw from the ECT. A sunset clause in the current text of the ECT provides that the ECT provisions still apply for 20 years following termination. The European Commission plans to accept the revised ECT rather than withdraw entirely from the ECT.

Law stated - 19 October 2022

Has the state entered into multiple bilateral or multilateral investment treaties with overlapping membership?

No. However, many EU member states had already entered into BITs with Canada, Singapore and Vietnam before the conclusion of CETA, EUSIPA and EUVIPA. The latter agreements provide that the member states' pre-existing BITs will automatically be replaced and superseded by those agreements (article 30.8 CETA; article 4.12 EUSIPA; and article 4.20.4 EUVIPA). This option was not followed in the EU–China CAI, which explicitly provides that it will not supersede previous agreements between member states of the European Union, on the one hand, and China, on the other hand (article VI.15). The EU–UK Trade and Cooperation Agreement does not contain any provision on the termination of the BITs that are still in place between the United Kingdom and certain member states. Therefore, unless they are terminated on a unilateral basis by the United Kingdom or each respective member state, these BITs currently remain in force.

In addition, taking into account that the European Union and its member states are all parties to CETA, EUSIPA and EUVIPA (and that ISDS proceedings might result from measures taken independently or jointly by the European Union and its member states), those agreements contain provisions on the determination of the appropriate respondent (ie, the European Union or a specific EU member state) in ISDS disputes (article 8.21 CETA; article 3.5 EUSIPA; and article 3.32 EUVIPA).

Furthermore, EU member states previously concluded, especially prior to the accession of certain countries to the European Union, agreements that became BITs between individual member states following accession: intra-EU BITs. However, in a judgment of 6 March 2018 (the Achmea judgment (Case C-284/16)), the CJEU found that those intra-EU BITs were incompatible with EU law because they violated the principle of autonomy of the EU legal order and jeopardised the effectiveness, primacy and direct effect of EU law and the principle of mutual trust between the EU member states. To comply with this judgment, 23 EU member states (with the notable exceptions of Austria, Sweden, Finland, Ireland and the United Kingdom (still a member state at that time)) signed a plurilateral agreement (the Plurilateral Agreement) on 5 May 2020 (which entered into force on 29 August 2020), terminating existing intra-EU BITs in force between them. The Plurilateral Agreement also prohibits the initiation of new intra-EU ISDS cases, introduces rules regarding the management of pending intra-EU ISDS cases and sets out alternatives to the recourse – by investors – to intra-EU ISDS arbitration proceedings.

The Plurilateral Agreement has so far been ratified by the 23 member states that signed the treaty. The European Commission opened infringement proceedings against Austria, Sweden, Finland and the United Kingdom (which was still a member state at the time) for their failure to terminate their intra-EU BITs. Ireland, which did not have intra-EU BITs in force, did not sign the Plurilateral Agreement.

Finally, the European Union and its member states (with the notable exception of Italy and possibly in the future Poland, which has proposed legislation to withdraw from the ECT, and also Spain), are also parties to the ECT, which establishes a multilateral framework for cross-border cooperation in the energy industry. The ECT covers all aspects of commercial energy activities (including trade, transit and investments) and also contains ISDS provisions. The ECT might therefore supplement some existing BITs concluded on an individual basis by the member states with third (non-EU) countries.

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ICSID Convention

Is the state party to the ICSID Convention?

No. However, all EU member states (with the exception of Poland) are parties to the ICSID Convention.

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Mauritius Convention

Is the state a party to the UN Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention)?

No. However, the texts of CETA (article 8.36) and of EUVIPA (article 3.46) incorporate the Mauritius Convention as a basis for the transparency provisions under those agreements.

Furthermore, some EU member states have already signed the Mauritius Convention (but none has ratified it).

Law stated - 19 October 2022

Investment treaty programme

Does the state have an investment treaty programme?

The European Union does not have an investment treaty programme as such. EU member states may, however, adopt an investment treaty programme in accordance with article 7 of the Grandfathering Regulation.

Following the entry into force of the Lisbon Treaty in 2009, the European Union has actively negotiated 'new generation EU agreements', which include commitments on investment but also on the liberalisation of trade in goods, as well as commitments on services, public procurement, sustainable development, competition, subsidies and regulatory issues. CETA, EUSIPA and EUVIPA are all 'new generation EU agreements'. Since Opinion 2/15, it is clear, however, that issues relating to ISDS require also the EU member states' consent. As a consequence, in its report on the negotiation and conclusion of EU trade agreements, the Council of the European Union announced its intention to decide, on a case-by-case basis, whether to treat trade and investment protection in single agreements with third countries or whether to split those provisions in separate agreements (as in the EUSIPA and EUVIPA).

Law stated - 19 October 2022

REGULATION OF INBOUND FOREIGN INVESTMENT

Government investment promotion programmes

Does the state have a foreign investment promotion programme?

The European Union itself does not have a specific programme for the promotion of foreign direct investment (FDI). EU member states may establish national (or sometimes regional) programmes for the promotion of FDI on their territory.

Nevertheless, in 2014, the European Union launched an ambitious infrastructure investment programme called Investment Plan for Europe (the Juncker Plan) to boost all investments, increase competitiveness and support long-term economic growth in Europe. The Juncker Plan had three objectives: to remove obstacles to investments; to provide visibility and technical assistance to investment projects; and to make smarter use of financial resources.

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By providing a total guarantee of €33.5 billion (through the EU budget and the European Investment Bank Group), the Juncker Plan aimed to generate a 1:15 multiplier effect. Each euro of public money was expected to generate €12 of investments from private investors and €3 of additional investments from the European Investment Bank. The Juncker Plan mobilised a total of €514 billion in additional investments across the European Union (exceeding its initial €500 billion target).

Building on the success of the Juncker Plan, the InvestEU Programme (2021–2027) further aims to boost investments, innovation and job creation in Europe and to mobilise at least €650 billion in additional investments in the next long-term EU budget.

Law stated - 19 October 2022

Applicable domestic laws

Identify the domestic laws that apply to foreign investors and foreign investment, including any requirements of admission or registration of investments.

The European Union does not subject foreign investments to specific rules. However, the FDI Screening Regulation, which entered into force in October 2020, puts in place a system of cooperation and exchange of information, between EU member states, on investments from non-EU countries that may affect national security or public policy.

In addition, in June 2022, the Council of the European Union and the European Parliament reached a provisional agreement on the text of the proposal for a Regulation to tackle distortive effects caused by foreign subsidies, including when those subsidies facilitate investments in the European Union.

Finally, FDI must still comply with the domestic legislation and regulations in place in each specific EU member state.

Law stated - 19 October 2022

Relevant regulatory agency

Identify the state agency that regulates and promotes inbound foreign investment.

There is no EU agency regulating and promoting inbound foreign investments. EU member states may establish national (or sometimes regional) agencies for promoting FDI on their territory. Screenings of FDI are carried out at member state level. The competent Commission department in charge of FDI screenings is the Directorate-General for Trade.

Law stated - 19 October 2022

Relevant dispute agency

Identify the state agency that must be served with process in a dispute with a foreign investor.

Prior to the submission of a claim (and irrespective of whether the dispute will ultimately be initiated against the European Union or an EU member state), the Comprehensive and Economic Trade Agreement (CETA), the EU-Singapore Investment Protection Agreement (EUSIPA) and the EU-Vietnam Investment Protection Agreement (EUVIPA) provide that the investor must deliver to the European Union a ‘notice to submit a claim’ requesting the European Union to determine whether the European Union itself or an EU member state will be the respondent in the dispute (article 8.21 CETA; article 3.5 EUSIPA; and article 3.32 EUVIPA).

Once the determination of the respondent has been made, the investor may initiate the proceedings through a proper

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notice of arbitration.

However, CETA, EUSIPA and EUVIPA do not specify which institution of the European Union must be served with the ‘notice to submit a claim’, and, potentially, with the notice of arbitration. CETA merely provides (article 8.23.8) that the European Union and Canada will notify each other of the place of delivery of notices and other documents by the investors and that this information will be made publicly available. EUSIPA and EUVIPA do not contain such a provision. As a default, it is the European Commission that represents the European Union in international judicial proceedings.

So far, only one investor-state arbitration has been initiated against the European Union (pursuant to the UNICTRAL Arbitration Rules 1976 and the Energy Charter Treaty (ECT)). Based on publicly available information, the claimant (Nord Stream 2 AG) served the notice for arbitration on the EU Commission represented by its president and other senior officials (such as the Director-General for the EU Commission’s Legal Service and the Director-General for Trade). The notice of dispute in the PNB Banka case (a further ECT dispute in respect of which no arbitration has yet been commenced) was also served on the European Commission (via the president of the Commission) and the European Commission expressly confirmed in that case that it is responsible for handling investor-state disputes (Directorate-General for Trade, Unit F2).

Law stated - 19 October 2022

INVESTMENT TREATY PRACTICE

Model BIT

Does the state have a model BIT?

The European Union does not have a model BIT. However, the new generation of EU trade and investment agreements cover, in addition to investment protection and investor-state dispute settlement (ISDS), commitments on liberalisation of trade in goods, as well as commitments on services, public procurement, sustainable development, competition, subsidies and regulatory issues. Following Opinion 2/15 of the Court of Justice of the European Union (CJEU), the Council of the European Union announced, in its report on the negotiation and conclusion of EU trade agreements, that it will decide, on a case-by-case basis, whether to treat trade and investment protection in single agreements with third countries (per the Comprehensive and Economic Trade Agreement (CETA)) or whether to split those provisions into separate trade agreements and investment agreements (per the EU–Singapore Investment Protection Agreement (EUSIPA) and the EU–Vietnam Investment Protection Agreement (EUVIPA)).

Law stated - 19 October 2022

Preparatory materials

Does the state have a central repository of treaty preparatory materials? Are such materials publicly available?

The European Union does not have a central repository of treaty preparatory materials. However, some information regarding treaty negotiations and parliamentary ratification is publicly available on the websites of the EU Commission (DG Trade) and the European Parliament and in the Official Journal of the European Union.

In addition, interested parties can seek access to specific documents by filing a request under Regulation 1049/2001 regarding public access to EU Parliament, Council and EU Commission documents.

Preparatory materials of the Energy Charter Treaty (ECT) can be consulted at the Energy Charter Secretariat (Boulevard de la Woluwe 46, 1200 Woluwe-Saint-Lambert, Brussels, Belgium).

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Scope and coverage

What is the typical scope of coverage of investment treaties?

CETA, EUSIPA, EUVIPA and the EU–China CAI cover a broad range of investments. However, they all contain some restrictions for investments and activities carried out in the exercise of government activities or official authority or audiovisual services. They also all exclude subsidies and procurement from the scope of the non-discrimination standards.

In addition, each agreement has its own specific restrictions and exclusions. For instance, CETA (article 8.2), EUVIPA and the EU–China CAI contain some restrictions for air services (article 2.1). The national treatment and most favoured nation treatment provisions in EUVIPA also contain additional restrictions (for instance, they do not apply to mining, manufacturing and processing of nuclear materials or to the production of arms, ammunition and war material (article 2.1)).

The provisions on investment protection in the EU-UK Trade and Cooperation Agreement are limited to dealing with investment liberalisation, establishment, market access and non-discriminatory treatment.

Importantly, both the EU–China CAI and the EU–UK Trade and Cooperation Agreement are silent on ISDS.

Finally, with respect to the ECT, the CJEU ruled, in Komstroy (Case C-741/19) , that a mere contract for the supply of electricity did not fall within the definition of 'investment' under article 1(6) of the ECT if such a contract is not 'connected' to an investment. Although the CJEU's decision is binding on the courts of EU member states, it remains an open question as to whether arbitral tribunals, established under the ECT, will follow the approach taken by the CJEU in Komstroy in relation to the definition of 'investment' in the ECT. Publicly available information indicates that the definition of 'investment' was clarified as part of the modernisation process. However, the amended text is not yet adopted and ratified.

Law stated - 19 October 2022

Protections

What substantive protections are typically available?

CETA, EUSIPA and EUVIPA typically provide investors with the following protection:

- national treatment protection;
- most favoured nation treatment protection (this protective standard is however not offered in EUSIPA);
- fair and equitable treatment;
- full protection and security;
- compensation in the event of nationalisation or expropriation;
- compensation for losses owing to war, or other armed conflict, revolution, state of national emergency or other events such as riots or revolts; and
- a guarantee as to the repatriation and transfer of profits and other returns.

The EU–China CAI mainly focuses on market access commitments, the need for non-discrimination (national treatment and most favoured nation treatment) and transparency. This agreement does not contain specific provisions on fair and equitable treatment or full protection and security.

The provisions on investment protections in the EU–UK Trade and Cooperation Agreement are limited to dealing with

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investment liberalisation, establishment, market access and non-discriminatory treatment.

Importantly, both the EU–China CAI and the EU–UK Trade and Cooperation Agreement are silent on ISDS.

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Dispute resolution

What are the most commonly used dispute resolution options for investment disputes between foreign investors and your state?

The European Union has not been involved in a sufficient number of arbitrations to fully address this question. The European Union has only been involved in one ISDS arbitration (still pending) initiated by Nord Stream 2 AG (the Swiss subsidiary of Russian gas company Gazprom). The case was initiated pursuant to the ECT and the United Nations Commission on International Trade Law 1976 (UNCITRAL) arbitration rules.

Irrespective of this pending dispute (which is based on the ECT), the current investment agreements concluded by the European Union (CETA, EUSIPA and EUVIPA) all provide for the establishment of an Investment Court System whereby investment disputes under those agreements will be argued before a specific, permanent and independent investment tribunal, with potential recourse to an appeal tribunal. Under the Investment Court System, claims can be submitted under (1) the ICSID Convention and Rules of Procedure for Arbitration Proceedings; (2) the ICSID Additional Facility Rules if the ICSID Convention and Rules of Procedure for Arbitration Proceedings do not apply; (3) the UNCITRAL Arbitration Rules; or (4) any other rules agreed by the disputing parties (article 8.23 CETA; article 3.6 EUSIPA; and article 3.33 EUVIPA).

Law stated - 19 October 2022

Confidentiality

Does the state have an established practice of requiring confidentiality in investment arbitration?

The European Union has not been involved in a sufficient number of arbitrations to fully address this question. The European Union has only been involved in one ISDS arbitration (still pending) initiated by Nord Stream 2 AG (the Swiss subsidiary of Russian gas company Gazprom). The dispute is currently administered by the Permanent Court of Arbitration and non-confidential versions of the procedural documents are available on the website of that institution.

Irrespective of this pending dispute (which is based on the ECT), the current investment agreements concluded by the European Union (CETA, EUSIPA and EUVIPA) all provide for the establishment of an Investment Court System with increased transparency requirements. For instance, CETA and EUVIPA incorporate the UN Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention). In addition, those agreements also provide that hearings will, in principle, be open to the public (to the extent that confidential information remains protected).

Although not incorporating the Mauritius Convention as a basis for its provisions on transparency, EUSIPA also contains some specific provisions guaranteeing transparency (article 3.16).

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Insurance

Does the state have an investment insurance agency or programme?

The European Union does not have an investment insurance agency or programme. However, EU member states might

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have such an agency or offer such a programme at the national level.

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INVESTMENT ARBITRATION HISTORY

Number of arbitrations

How many known investment treaty arbitrations has the state been involved in?

The European Union is involved in one pending investor-state dispute settlement (ISDS) dispute initiated by Nord Stream 2 AG (the Swiss subsidiary of Russian gas company Gazprom). The dispute is administered by the Permanent Court of Arbitration.

In addition, on 24 May 2019, investors in a wind park (AS PNB Banka and others) located in Latvia, which were affected by measures taken by the European Central Bank, put the European Union on notice of an ISDS dispute under the ECT. However, according to publicly available information, no arbitration has as of yet been commenced in respect of this dispute.

The European Union has, however, intervened as a third party in numerous intra-EU ISDS proceedings supporting the position that those proceedings are contrary to EU law.

Law stated - 19 October 2022

Industries and sectors

Do the investment arbitrations involving the state usually concern specific industries or investment sectors?

The European Union has not been involved in a sufficient number of arbitrations to fully address this question. The European Union has only been involved in one ISDS case (still pending) initiated by Nord Stream 2 AG (the Swiss subsidiary of Russian gas company Gazprom). The dispute concerns the energy sector. The other pending dispute (in which no arbitration has as of yet been commenced) also concerns the energy sector.

Law stated - 19 October 2022

Selecting arbitrator

Does the state have a history of using default mechanisms for appointment of arbitral tribunals or does the state have a history of appointing specific arbitrators?

The European Union has not been involved in a sufficient number of arbitrations to fully address this question. The European Union has only been involved in one ISDS case (still pending) initiated by Nord Stream 2 AG (the Swiss subsidiary of Russian gas company Gazprom). In that dispute, the European Union appointed a specific arbitrator (namely Professor Philippe Sands KC).

Irrespective of this pending dispute (which concerns an alleged violation of the ECT), the current investment agreements concluded by the European Union (Comprehensive and Economic Trade Agreement (CETA), the EU–Singapore Investment Protection Agreement (EUSIPA) and the EU–Vietnam Investment Protection Agreement (EUVIPA)) all provide for the establishment of an Investment Court System whereby the investment disputes under those agreements will be decided by a specific, permanent and independent investment tribunal comprised of an equal number of (1) nationals of the European Union; (2) nationals of the other state party to the agreement; and (3) nationals

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of third countries. The members of the investment tribunals are to be appointed for a term of four years (article 3.38 EUVIPA), five years (article 8.27 CETA) or eight years (article 3.9 EUSIPA).

Law stated - 19 October 2022

Defence

Does the state typically defend itself against investment claims? Give details of the state's internal counsel for investment disputes.

The European Union has not been involved in a sufficient number of arbitrations to fully address this question. The European Union has only been involved in one ISDS case (still pending) initiated by Nord Stream 2 AG (the Swiss subsidiary of Russian gas company Gazprom). In that dispute, the European Union is defending itself and is principally represented by the Legal Service of the EU Commission.

Law stated - 19 October 2022

ENFORCEMENT OF AWARDS AGAINST THE STATE

Enforcement agreements

Is the state party to any international agreements regarding enforcement, such as the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards?

The European Union is not a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention) or the ICSID Convention. However, all EU member states are parties to the New York Convention and, with the exception of Poland, to the ICSID Convention.

Law stated - 19 October 2022

Award compliance

Does the state usually comply voluntarily with investment treaty awards rendered against it?

Not applicable. No publicly available investment treaty award has yet been rendered against the European Union.

Law stated - 19 October 2022

Unfavourable awards

If not, does the state appeal to its domestic courts or the courts where the arbitration was seated against unfavourable awards?

Not applicable. No publicly available investment treaty award has yet been rendered against the European Union.

Law stated - 19 October 2022

Provisions hindering enforcement

Give details of any domestic legal provisions that may hinder the enforcement of awards against the state within its territory.

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Legal provisions on enforcement of awards against sovereign states and international organisations are adopted at the national level by each EU member state. The Comprehensive and Economic Trade Agreement (CETA), the EU–Singapore Investment Protection Agreement (EUSIPA) and the EU–Vietnam Investment Protection Agreement (EUVIPA) explicitly provide that the execution of the award handed down under those agreements is governed by the laws concerning the execution of judgments or awards in force where the execution is sought (article 8.41.4 CETA; article 3.22.3 EUSIPA; and article 3.57.5 EUVIPA).

However, pursuant to article 343 of the Treaty on the Functioning of the European Union and Protocol No. 7 to that Treaty, the European Union enjoys, in the territory of the EU member states, the privileges and immunities that are necessary for the performance of its tasks. In particular, Article 1 of Protocol No. 7 provides that the premises and buildings of the European Union are inviolable and that the property and assets of the European Union may not be the subject of any administrative or legal measure of constraint without the authorisation of the Court of Justice of the European Union.

In addition, Regulation 912/2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals contains provisions on the allocation of payments between the European Union and its member states, in respect of awards handed down in investor-state dispute settlement proceedings initiated under international agreements to which the European Union is a party. Under article 18 of that Regulation, when presented with a request for payment of an award in proceedings in which the European Union is the respondent, the Commission is obliged to pay such an award except where a member state has accepted financial responsibility.

Moreover, as the Court of Justice of the European Union (CJEU) ruled that intra-EU investor-state arbitration is incompatible with EU law (see Komstroy and Achmea), and the courts of the EU member states are bound by the rulings of the CJEU, national courts in EU member states may not enforce arbitration awards handed down in favour of an EU investor against an EU member state. Although not in the context of an enforcement action, the member states' obligations in this regard are illustrated by the Paris Court of Appeal's decision in Republic of Poland v Strabag SE . In that case, the Paris Court of Appeal set aside a partial arbitral award rendered in a dispute based on a bilateral investment treaty between Poland and Austria on the ground that, based upon the Achmea judgment, the arbitration clause in the intra-EU bilateral investment treaty at stake was incompatible with EU law.

Law stated - 19 October 2022

UPDATE AND TRENDS

Key developments of the past year

Are there any emerging trends or hot topics in your jurisdiction?

In the past year, a number of key judgments confirmed the finding in the Achmea judgment according to which intra-EU arbitration clauses are incompatible with EU law. First, in Komstroy, the Court of Justice of the European Union (CJEU) confirmed that intra-EU arbitration under the ECT is incompatible with EU law. This was also confirmed in Opinion 1/20. Second, in the case PL Holdings (case C-109/20), the CJEU held that investors also cannot rely on an ad-hoc arbitration agreement with identical content to an arbitration clause in an intra-EU BIT. At the member state level, the Paris Court of Appeal in Republic of Poland v Strabag SE set aside an arbitral award handed down in favour of an investor, relying on the Achmea judgment. Finally, in Green Power Partners v The Kingdom of Spain (Stockholm Chamber of Commerce Arbitration V (2016/135) an arbitral tribunal held for the first time that it had no jurisdiction over an intra-EU dispute (under the ECT) based on the intra-EU jurisdictional objection resulting from Achmea and Komstroy.

Regarding the Plurilateral Agreement (which has now been ratified by all signatories), it cannot be excluded that there will be further litigation, including before the CJEU, concerning its exact consequences on investors' rights. In addition, given that the Plurilateral Agreement seeks to remove pending intra-EU investor-state dispute settlement

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(ISDS) proceedings from the jurisdiction of arbitral tribunals by incentivising the use of either alternative methods of dispute resolution or the national courts of the member states, it remains to be seen how such alternatives will operate in practice.

The question of whether payments made by an EU member state to an investor by virtue of an ISDS arbitral award constitute illegal state aid under EU law has been addressed by the EU courts. Although the EU Commission initially considered, in the Micula decision (Decision (EU) 2015/1470), that those payments constituted illegal state aid, this decision was annulled by the EU General Court (cases T-624/15, T-694/15 and T-704/15) in 2019. On appeal the CJEU set aside the judgment of the General Court in its entirety after finding that the European Commission had indeed been entitled to find that the payments were illegal state aid (case C-638/19P). Furthermore, by a letter dated 26 October 2021 the EU Commission informed Spain that it should not pay an arbitration award pending the outcome of the European Commission's formal investigation in favour of another investor as this would violate EU law (case SA.54155).

At the multilateral level, the European Union is continuing to advocate for the creation of a Multilateral Investment Court (which is largely based on the features of the Investment Court System in the Comprehensive and Economic Trade Agreement (CETA), the EU–Singapore Investment Protection Agreement and the EU–Vietnam Investment Protection Agreement) as a means for replacing the traditional ISDS mechanism. Such a Multilateral Investment Court would consist of a specific, permanent and independent investment tribunal and an appeal tribunal to hear future ISDS disputes. Discussions on the establishment of such a Multilateral Investment Court are currently being held within the United Nations Commission on International Trade Law (UNCITRAL) Working Group III. The fact that, in its Opinion 1/17 of 30 April 2019, the CJEU confirmed the validity, under EU law, of the Investment Court System in CETA, further encourages the European Union to pursue its agenda of reforming traditional ISDS by establishing such a Multilateral Investment Court.

Further, the European Union has been active in the negotiations for the modernisation of the ECT, which resulted in an agreement in principle concluded on 24 June 2022. Significantly, the modernised text clarifies that an investor from a contracting party that is part of a regional economic integration organisation, such as the European Union, cannot initiate ISDS claims against another contracting party member of the same organisation. If no contracting party objects, the modernised ECT text can formally be adopted at a conference planned for November 2022.

Law stated - 19 October 2022

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Jurisdictions

Jurisdiction	Firm
Bangladesh	Vertex International Consulting
Belgium	Linklaters LLP
Canada	Wasel & Wasel
China	Zhong Lun Law Firm
Egypt	Shahid Law Firm
European Union	Van Bael & Bellis
France	Laborde Law
Japan	Anderson Mōri & Tomotsune
Malaysia	Cecil Abraham & Partners
Romania	STOICA & Asociații
Russia	BGP Litigation
Switzerland	Schellenberg Wittmer
United Kingdom	Quinn Emanuel Urquhart & Sullivan LLP
USA	Quinn Emanuel Urquhart & Sullivan LLP
Uzbekistan	Putilin Dispute Management
Vietnam	LNT & Partners

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