GLOBE GLOBAL GOVERNANCE AND THE EUROPEAN UNION Future Trends and Scenarios

# REPORT

## The Global Investment Regime and State Regulatory Space: Assessing the Governance Role of the European Union and its Member States


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## Abstract

The global investment protection regime comprises thousands of international investment agreements (IIAs), such as stand-alone bilateral investment treaties (BITs) and investment chapters in free trade agreements (FTAs). This paper examines the evolution of this regime, which has most often been tied to North-South economic and political relations, but more recently covers also South-South as well North-North relationships. We pay particular attention to the ways in which the European Union (EU) and its Member States' (MS) policies on investment protection in general, and regarding investor-state dispute settlement (ISDS) in particular, relate to developing countries and to development agendas. To do so, we rely on the concept of state regulatory space (SRS), which captures the balance between the protection of foreign investors' interests, on the one hand, and host states' ability to promote national development goals, on the other hand, in IIAs. We also investigate the current state-of-play with respect to the growing number of ISDS cases and efforts to reform the rules of international arbitration, in particular the EU's initiative to form a permanent multilateral investment court (MIC) and its involvement in efforts to reform ISDS through the United Nations Commission on International Trade Law (UNCITRAL). We find that MS have played a key role in shaping the regime, and that the EU itself is a leader in current attempts to reform it. Nevertheless, MS have divergent perspectives, both within the EU and regarding relations between the EU and other global actors, on how to change the existing rules such that they meet development needs. These disagreements hamper the creation of a coherent and unified approach to the global governance of foreign investment.

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## 1. Introduction

The international flow of foreign investment is governed not only by national laws and regulations but by thousands of distinct international investment agreements (IIAs)[1] that form a global governance regime through a variety of substantive protections extended to foreign investors in host states (Bonnitcha, Poulsen, and Waibel., 2017). Many IIAs include provisions on binding investor-state dispute settlement (ISDS), that enable private foreign investors to file large-scale arbitration claims against host governments, claiming compensation if these protections have not been respected. First signed in the late 1950s, often between a developed European country and a developing country, BITs were intended to encourage foreign investment flows to the latter, and in turn to foster economic development. The number of IIAs increased dramatically in the 1990s, resulting in a growing number of ISDS claims filed against developing as well as developed countries.

Such costly arbitrations, some of which have gained a high public profile, have created international tensions particularly over the last decade, due to the concern that they unduly constrain state regulatory space (SRS), a concept we present and discuss below, in areas of public policy, such as the environment, climate change, public health and human rights (Cotula, 2014). Moreover, states have begun to question the utility of IIAs in encouraging the inflow of foreign direct investment (FDI) and, more generally, fostering sustainable development. These concerns have spurred reform efforts – often referred to as a veritable 'backlash' (Waibel et al., 2010) – through a variety of methods such as termination or renegotiation of IIAs (Haftel and Thompson, 2018), aimed at reclaiming SRS and increasing the transparency, efficiency and accountability of ISDS. Indeed, in our assessment, the general global trend in IIAs renegotiated over the last decade has been towards regaining SRS, through recalibration of substantive protections, as well as ISDS (albeit to a lesser extent), especially by states that have gained experience with such investment claims (Thompson, Broude, and Haftel, 2019).

This working paper evaluates the complex role that the European Union (EU) and its Member States (MS) have been playing as global actors in this process over the lifetime of the regime, but with a focus on the last several years, in order to show how preferences for different future contours of international regimes are being shaped. The rise of ISDS and the 'backlash' referred to above have coincided with

[1] We use the general term IIA to encompass stand-alone bilateral investment treaties (BITs), multilateral investment treaties (such as the Energy Charter Treaty), and bilateral or regional free trade agreements (FTAs) that include an investment protection chapter.

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intricate processes of policy-making within the EU, triggered by the inclusion of FDI in the EU's Common Commercial Policy (CCP), in the Lisbon amendments to the EU Treaties, which entered into force in 2009.[2] This development of a 'common investment policy', originally conceived as being under the exclusive competence of the EU and thus transforming it into a key player in international investment law and politics (Hindelang, 2011), has indeed brought about assertive policy-making by the European Commission (EC), pursuing new IIAs, pushing for the establishment of a standing Multilateral Investment Court (MIC) as an alternative to the current dispersed ad hoc system of arbitration, and presenting progressive positions in the United Nations Commission on International Trade Law (UNCITRAL) Working Group III (UWGIII) reform discussions.

At the same time, however, MS have pushed back against the exclusivity of competence through controversial judicial and legislative means, e.g., regarding the status of intra-EU IIAs (IIAs between MS, whether in force or contemplated), and the legality under EU law of ISDS in latest-generation treaties promoted by the EC such as the Canada-EU Comprehensive Economic and Trade agreement (CETA) as well as IIAs with developing countries (such as the 2019 EU-Vietnam Investment Protection Agreement). Importantly, all EU branches of governance, including the European Parliament and the Court of Justice of the European Union (CJEU) have been involved in these processes, as are individual MS (including their national courts), as well as regional governments within MS and civil society.[3] Arguably, the development of European IIA policy over the last decade has reflected a 'three-level game' (international, regional (EU) and national) increasingly typical of EU international economic governance (Hwang and Kim, 2014, building on Putnam, 1988), if not a multi-stakeholder game 'on steroids'.

Having said that, the purpose of this working paper is not to examine the intra-EU processes of policy-making as such, although inevitably sight of these should not be lost. Rather, its aim is to assess the role of the EU, its institutions (especially the EC) and its MS on the global stage of IIA reform. Our general claim is that the EU has indeed taken a significant and influential leadership position for positive reform of IIAs and ISDS, which despite the messiness inherent in this field of governance, can be expected to leave a European 'signature' on the international investment regime for years to come. Nevertheless, MS have divergent perspectives, both within the EU and regarding relations between the EU and other global actors, on how to change the

[2] Articles 206-207 Treaty on the Functioning of the European Union (TFEU).

[3] Most famously, the pitch by Wallonia to block ratification of CETA. For more on the complexities of ratification of the CETA, see Hübner et al. (2017).

existing rules such that they meet current development needs. These disagreements hamper the creation of a coherent and unified approach to the global governance of foreign investment.

The working paper adopts a mixed-methods, quantitative and qualitative empirical approach, with two main segments. First, utilizing text-as-data analysis of all Intra- and Extra-EU IIAs and so-called 'Model BITs,' we trace shifts in EU and MS preferences regarding constraints on SRS over time, examining the extent to which they display divergence or convergence of preferences regarding their engagement with the global investment regime. We underscore the reality that such EU and MS IIAs have led the way in increasing SRS in IIAs.

Second, we conduct qualitative process-tracing with respect to the engagement of the EU and MS with the UW GIII discussions relating to reform of ISDS in a broad range of issues. Here, too, we highlight the fact that the EU is playing a key role in promoting significant and novel reform, albeit not yet realized. In particular, it spearheads the quest for a multilateralization of ISDS and the incorporation of improvements to the legitimacy and efficiency of the regime, e.g., through an improved appointment process for arbitrators and adjudicators, and an appeals mechanism, as well as other reforms and innovations discussed in the UW GIII forum.

In doing so, the working paper strives to provide EU decision-makers not only with a thorough account of the evolving state-of-the-art research in the field of international investment protection law and politics, but also with an assessment of the effectiveness of EU initiatives in this field in the promotion of its goals, including economic development, and with respect to reforming the international investment protection regime and the preservation of SRS.

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## 2. IIAs, Foreign Investment and Economic Development

The main purpose of IIAs is to provide foreign investors with protection against political risk in the host countries. Thus, most such treaties include provisions that guarantee standards of minimum or non-discriminatory treatment, such as most favored nation (MFN) treatment, national treatment (NT), full protection and security and fair and equitable treatment (FET); protection against expropriation without compliance with several conditions such as the right to adequate compensation; the freedom to transfer capital, and others. In addition, many of these treaties allow foreign investors to turn to international arbitration forums if they believe that the host government has violated their commitments under the agreement, without directly involving their home state.

Historically, most FDI flows between developed and developing countries have been unidirectional: from the former to the latter, often labelled 'North' to 'South.' Given that the developing countries have commonly been associated with heightened political risk, developed countries utilized IIAs to shield their investors from such a risk. It is not surprising, then, that many IIAs are North-South.[4]

One might wonder why developing countries would agree to sign IIAs that protect foreign investors and constrain their sovereignty (Guzman, 1998). Allegedly, they do so in order to attract foreign capital into their economies, a much needed ingredient of economic development and growth. In this respect, extant research suggests that IIAs can serve as a credible commitment to nondiscriminatory policies towards foreign investors and thus solve the so-called 'time inconsistency' problem (Haftel, 2010; Kerner, 2009; Vernon, 1971). In addition, IIAs can serve as a costly signal of their commitment to liberal economic policies and reforms (Büthe and Milner, 2009; Tobin and Rose-Ackerman, 2011) as well as a focal point for informal dispute resolution (Poulsen, 2020). Moreover, IIAs may induce a more efficient regulatory environment that is conducive to economic development (Bonnitcha et al., 2017). For all these reasons, IIAs may be instrumental in fostering development (Aaken and Lehmann, 2013), as well as the Right to Development and the Sustainable Development Goals (SDGs), if some conditions are satisfied, regarding international and domestic reforms (Fauchauld, 2021).

With these potential benefits in mind, IIAs can be said to have proliferated in two waves. The first wave started with the first BIT, signed between (then 'West')

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[4] Former communist countries are subsumed under the South. There are also numerous South-South IIAs, but very few North-North IIAs. With respect to the latter, it is commonly argued that low political risk and independent court systems obviate the need for protection through an international agreement. As we show in this paper, however, this reality is gradually changing.

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Germany and Pakistan in 1959, and lasted until the end of the Cold War. About four-hundred BITs were signed during these three decades, initially between Western European countries, such as Germany, Switzerland, the United Kingdom, and France, on one hand, and developing countries, mostly in Africa and Asia, on the other hand. Notably, these early BITs did not include ISDS provisions, as they are known today, despite the entry into force in 1966 of the convention establishing the International Centre for the Settlement of Investment Disputes (ICSID) with respect to many states, that was designed to facilitate ISDS. Evidently, most such IIAs were designed to institute substantive standards of treatment (Poulsen, 2020), not methods of dispute settlement. This started to change in the late 1980s, as non-European developed countries (e.g. the US, Canada, and Japan) and some communist (e.g., China and Romania) and Latin American countries joined the IIA trend. Consistent with the logic of making credible commitments, many of the IIAs signed in the late 1980s opened the door to ISDS (Jandhyala, Henisz and Mansfield, 2011).

The second wave began in earnest in the early 1990s and winded down in the middle 2000s. During these years, many states concluded numerous IIAs, commonly as part of more comprehensive economic liberalization programs, that can be associated with the so-called 'Washington Consensus.' Thus, states signed about 2,200 IIAs between 1990 and 2004, many of which were BITs, but some were FTAs with an investment chapter, most notably, the North American Free Trade Agreement (NAFTA) and the unique sector-focused and multilateral Energy Charter Treaty (ECT). There is some debate regarding the causes of this shift, with several observers pointing to the competitive pressures that capital-importing countries were facing (Elkins, Guzman, and Simmons, 2006; Simmons, 2014), while others emphasize the idea that states signed IIAs in order to signal their adherence to prevailing neoliberal policies (the aforementioned Washington Consensus) (Jandhyala et al., 2011), and still others argue that many governments overestimated the benefits and underestimated the costs of IIAs (Poulsen, 2014, 2015). Be that as it may, this extensive network of agreements rendered the investment regime rather global, even if decentralized. Moreover, the growing number of investment claims based on IIAs since the mid-1990s began to attract the attention of various stakeholders and experts to this regime.

Two questions lie at the heart of the debate about the consequences of current global investment rules. The first focuses on the expected benefits of IIAs. That is, whether they indeed attract more FDI into the host country, and in turn enhance economic development. Research on the effect of IIAs on FDI inflows is rather mixed. Some studies find a positive effect (Falvey and Foster-McGregor, 2018; Frenkel and Walter, 2019; Haftel, 2010; Kerner, 2009), but others find a more conditional positive

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effect (Aisbett, Busse, and Nunnenkamp, 2018; Allee and Peinhardt, 2011; Tobin and Rose-Ackerman, 2011), or no effect at all (Aisbett, 2009; Hallward-Driemeier, 2003). In line with the latter, some studies suggest that the theoretical foundations of the IIA/FDI nexus are wobbly (Bonnitcha et al., 2017). While the jury is still out on this question, the lack of robust evidence about the ability of IIAs to attract FDI sowed doubt with respect to their value, at least in some quarters.

The second question revolves around the legitimacy and adequacy of the ISDS system. Foreign investors largely refrained from taking advantage of this tool until the mid-1990s. Since then, however, more than a thousand investment claims have been filed against host states, with more than fifty annual claims in the 2010s. Many of these claims involved significant monetary, regulatory, and political implications (Allee and Peinhardt, 2011; Moehlecke, 2020; Pelc, 2017; Wellhausen, 2016). As we discuss in greater detail in subsequent sections, this system is criticized for a lack of transparent and accountable process as well as for a pro-investor bias. These claims also resulted in host states' greater awareness of costs, potential or realized, associated with IIAs (Poulsen, 2014, 2015).

Given the uncertain benefits in terms of FDI and development and the apparent costs of ISDS, many host states have wondered whether relinquishing national sovereignty and delegating power to international arbitrators is justified and called for a "rebalancing" of investors' rights and host states' flexibility. Indeed, as foreign investors have increasingly challenged host governments with claims in international arbitration forums, some governments have responded with greater reluctance to sign new or ratify existing BITs (Haftel and Thompson, 2013; Jandhyala et al., 2011; Poulsen and Aisbett, 2013), greater propensity to update and revise their treaty templates (commonly known as 'Model BITs')[5] and renegotiate or denounce existing treaties (Haftel and Thompson, 2018; Thompson et al., 2019), as well as to seek annulment of costly awards handed down by arbitration panels (Simmons, 2014). Thus, the third phase of the IIA regime is characterized by a more selective conclusion of IIAs, greater attention to the content of investment agreements (see next section), as well as IIA renegotiation and termination. With this context in mind, we take a closer look at the role of the EU MS and the organization itself in the IIAs regime.

[5] The usage of Model BITs varies a great deal across countries (Brown, 2013; Schill, 2009). Some countries have revised their model several times, while others have refrained from adopting one at all. Some countries publicize their Model BITs, while others prefer to keep it confidential. Still others may use an existing IIA as an informal template for negotiations. We examine this phenomenon in a separate study.

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## 3. The Dynamics of European IIA Policymaking – A Decade of Flux

The EU as an economic bloc is one of the world's largest source and destination of FDI, and MS are a party to roughly one-third of all IIAs worldwide (approximately 1,400).[6] Famously, the first BIT program was led by Germany, with other Western European countries quickly following suit. The EC is not bashful when it states that "International investment rules were invented in Europe".[7] Some IIAs are among current MS ('intra-EU IIAs'), a fact that has led to significant tensions and legal complications in recent years, while many more IIAs are between MS (and more recently, the EU as a whole), and non-EU members, otherwise known as third-countries ('extra-EU IIAs').

Moreover, as recently as 2012, foreign investors from MS reportedly accounted for sixty percent of new ISDS cases (Titi, 2015: 648), and MS have clearly gained salience as respondent host states since then as well. Despite this significant historical, economic, legal and arbitral activity, the EU has not pulled its weight as a global governance actor until relatively recently. Until 2009, when the TFEU expressly included FDI in the CCP of the EU, IIAs were considered to be under the exclusive competence of MS and were guided by individual interests, traditions and constraints, sometimes with overt Model BITs, sometimes not (e.g., France did not make its Model BIT Public until 2006 (Titi, 2015)). In many respects, the FDI amendment of the TFEU was intended to consolidate the EU's harmonized role in influencing global investment policy, for the greater European interest, but with no prior agreement on the actual shape of EU-made IIAs – or on the fate of Intra- or Extra EU BITs. Combined with the increasing use of ISDS by investors, both within the EU and from outside, against MS policies and measures; frictions between arbitration and European court systems; and the rising international critique of IIAs at regional and global forums, this has resulted in a very dynamic yet uncertain series of events and developments in European IIA policies over the last decade.

In lieu of a detailed narrative of the development of EU IIA policy, which is beyond the scope of this paper, Table 1 presents a timeline of significant milestones in this ongoing process, since the signing of the Lisbon Treaty. In part, it is selective

[6] According to the EC, as of the end of 2018 (i.e., including the United Kingdom as an MS) outgoing FDI stocks held by investors residing in the EU amounted to €8,750 billion; incoming FDI stocks held by third country investors in the EU amounted to €7,197; see European Commission Directorate-General for Trade, https://ec.europa.eu/trade/policy/accessing-markets/investment/ (last visited September 19, 2020).

[7] See Kidane (2018), referring to EC, Concept Paper – "Investment in TTIP and Beyond – the Path for Reform - Enhancing the Right to Regulate and Moving from Current ad hoc Arbitration towards an Investment Court (2015), available at https://perma.cc/W8WT-238Y (last visited October 16, 2020).

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(such as in its reference to the *Vattenfall* cases) and necessarily incomplete. However, it is designed to provide an overview of the most relevant processes over the last decade or so, and the interaction between international, regional and national institutions at different focal points of decision-making. Other than providing a backdrop for subsequent sections, it is evident from Table 1 that the EU and its MS have been extremely active in the field of international investment law and policy, in a multiplicity of fora and with a highly complex set of legal and political constraints. We now turn to empirical analysis of some of the ways in which this frenzy of activity has impacted on global governance in this important field of policy.

**Table 1:** Key Events in EU IIA Policies, 2007-2020

| **Event** | **Date** | **Significance** |
|---|---|---|
| Lisbon amendments signed | Dec. 13, 2007 | Agreement to inclusion of FDI in EU CCP indicating exclusive competences. |
| *Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/09/6 – Notice of Arbitration under ECT and ICSID | April 2, 2009 | High profile intra-EU ISDS case concerning local government permits for a coal-fired power plant. The claim for 1.4 Billion USD was settled for an undisclosed amount. |
| TFEU enters into force | Dec. 1, 2009 | EU gains competences in FDI regulation. |
| *Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12 - Notice of Arbiration under ECT and ICSID. | May 31, 2012 | High profile intra-EU ISDS case concerning phasing out of nuclear power plants by Germany. The claim for 4.7 Billion Euro is still pending in various proceedings. |
| EU Regulation No. 1219/2012 establishing transitional arrangements for bilateral investment agreements between MS and third countries | 12 Dec., 2012 | Assertion of EU competence - regulation requiring EC approval for new and extended BITs between MS and third countries. |
| *Erbil Serter v. France*, ICSID Case no. ARB/13/22 – Notice of Arbitration under ICSID and Turkey-France BIT. | Sep. 10, 2013 | First significant extra-EU arbitration filing against EU host state. The case was discontinued but provides a benchmark for subsequent extra-EU cases against EU host states. |
| EU-Singapore FTA Investment Chapter negotiations concluded. | Oct., 2014 | First IIA concluded under EU competence. |
| EC Concept Paper on "Investment in TTIP – The | 12 Nov., 2015. | Policy statement of EC on ISDS in TTIP/CETA, replacing ad hoc arbitration |

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| Path Beyond"[8] | | with an investment court. |
| CETA signed, including investment chapter;[9] Walloon Parliament withholds approval of Belgium's ratification of CETA | Oct., 2016 | Reflecting local concerns about ISDS and SRS. |
| CJEU Opinion 2/15 regarding EU-Singapore FTA issued | 16 May, 2017 | Finding that some elements of investment in IIA ('non-direct investment') are not under exclusive EU competence. |
| UNCITRAL grants mandate to UN WGIII to discuss ISDS reform | July, 2017 | Commencement of new global forum for discussion of ISDS reform. |
| Belgium files request for CJEU Opinion 1/17 regarding CETA | Sep., 2017 | Significant legal issue regarding compatibility with EU law of the Investment Court System ("ICS") in CETA, which is a blueprint for the EU proposed MIC. |
| CJEU *Achmea* Ruling[10] | March 6, 2018 | Ruling by CJEU whereby intra-EU IIAs are incompatible with EU law and must be terminated. |
| UN WGIII 2nd Session on ISDS Reform | 23–27 April 2018 | EU submits detailed interventions for discussion. |
| Joint Declarations on Termination of Intra-EU IIAs | January 15-16, 2019 | Development of EU approach to implement *Achmea* ruling towards termination of intra-EU IIAs |
| CJEU Opinion 1/17 on CETA issued | April 30, 2019 | CJEU determines that the ISDS model in CETA – the ICS – is compatible with EU law, subject to conditions. |
| Treaty on Termination of Intra-EU BITs[11] | May 5, 2020 | Application of *Achmea* ruling regarding intra-EU IIAs, not covering ECT and not adopted by all EU Member States |

[8] See *Ibid*.

[9] OJ 2017 L 11, p. 23.

[10] *Slovak Republic v. Achmea B.V.*, CJEU Case C-284/16.

[11] Agreement for the Termination of Bilateral Investment Treaties Between the Member States of the European Union, EU Doc. A/T/BIT/en 1.

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## 4. The European Quest for Reclaiming State Regulatory Space

We first inquire into the ways by which the complex processes described in the previous sections have influenced negotiated outcomes in IIAs involving the EU and its MS, with respect to their content and in comparison with global trends in this respect. Has the ongoing pressure to reform IIAs and ISDS been reflected in the practice of MS, and especially, in that of the EU? And if so, is this practice different from global tendencies? Before answering these questions, we offer a brief discussion of our conceptual and methodological approach as we investigate variation in the content of IIAs.

Early studies of IIAs assumed, incorrectly, that their content is rather uniform (Dolzer and Stevens, 1995; Guzman, 1998; Vandevelde, 2000). More recent research has paid more attention to the differences between IIAs, underscoring the consequences of the treaties' legal status (Haftel, 2010; Haftel and Thompson, 2013) and especially their content (Allee and Peinhardt, 2010; Blake, 2013; Yackee, 2008; Link and Haftel, 2020), but examined only a limited number of substantive or procedural provisions. Other recent studies turned to computational text analyses to compare and contrast IIA content (Allee and Lugg, 2016; Alschner and Skougarevskiy, 2016a, 2016b). This method allows one to examine a large number of treaties and identify interesting trends in the evolution of treaty content as well as important similarities and differences across time and space. Nevertheless, it lacks a theoretically-grounded metric to guide the analysis, and suffers from some gaps in textual nuance in comparison with hand-coded text-as-data analysis (Broude, Haftel, and Thompson, 2017).

We take a different route, focusing on the concept of state regulatory space (SRS), which we define as *the extent of the ability of governments to freely legislate and implement regulations in given public policy domains*. Given that much of the debate over the legitimacy of the global investment regime emphasizes the trade-off between investor protection and the ability of host governments to autonomously manage their economic and social policies, SRS strikes at the heart of the issue (Cotula, 2014; Franck, 2005; Schill 2007; UNCTAD, 2012).

As we discuss in length elsewhere (Broude et al., 2017; Thompson et al., 2019), we conceptualize SRS as a continuum. At one extreme states have a great deal of flexibility to pursue policies they see fit, and are thus insulated from external pressure or influence attempts. At the other extreme, governments have little room to maneuver and are highly constrained by the ability of foreign investors to challenge their policies under IIAs and ISDS. Thus, the flipside of lower regulatory space is often, but not always, better treatment and greater protection of foreign investors in the host country.

To measure SRS, we build on UNCTAD's IIA Mapping Project.[12] This scheme examines the most important substantive and procedural provisions of IIAs and codes them on the inclusion or exclusion of various elements. We transformed this raw coding in various selected categories into measures that indicate, in our estimation, more or less SRS. All in all, we have classified all relevant provisions in ninety-one separate indicators subsumed under forty-two categories, which in turn are grouped under eight broader dimensions of IIAs that are central to SRS. Table 2 lists all the categories and dimensions included in our SRS measure. We then standardized the measure such that each IIA can range from low to high SRS, with zero indicating minimum SRS and one indicating maximum SRS (as afforded by the IIAs). We coded close to 2,800 IIAs, which is about 85% of existing IIAs, as well as close to a hundred Model BITs.

The preambular language of IIAs offers one useful illustration of our measurement of SRS. Most preambles state that the main goals of the IIA are to promote foreign investment and protect foreign investors. Some, but certainly not all IIAs, attempt to balance investor protection with other goals, such as the right to regulate, sustainable development, social investment policy, and environmental investment aspects. The more such objectives are mentioned, the higher the SRS score on this dimension. Along similar lines, most IIAs include the MFN standard, but some carve out treatment within the context of regional organization, matters related to taxation, or procedural rules. The more such exceptions appear in the IIA, the greater the regulatory space available to the host state, and the closer to one the value of SRS. With respect to ISDS, to the extent that it is included in an IIA, the SRS value increases with more exceptions, limitations, and conditions that restrict the ability of foreign investors to utilize it.

**Table 2:** Coding State Regulatory Space in IIAs: Variables, Dimensions and Categories

| Variable | Dimension | Category |
|---|---|---|
| **SRS Substantive** | *I. Preamble* | 1. Preamble |
| | *II. Scope and Definitions* | 2. Definition of Investment |
| | | 3. Definition of Investor |
| | | 4. Limiting Substantive Scope |
| | *III. Non Discrimination and other Standards of Treatment* | 5. Most Favoured Nation |
| | | 6. National Treatment |
| | | 7. Fair and Equitable Treatment |
| | | 8. Full Protection and Security |

[12] UNCTAD Mapping of IIA Content (last visited October 4, 2020).

| | | |
|---|---|---|
| | | 9. Prohibition on Unreasonable, Arbitrary and Discriminatory Measures |
| | *IV. Expropriation and other Substantive Obligations* | 10. Expropriation |
| | | 11. Compensation |
| | | 12. Prohibition on Performance Requirements |
| | | 13. Umbrella Clause |
| | | 14. Entry and Sojourn of Personnel |
| | | 15. Senior Management and/or Boards Mandatory Clause |
| | | 16. Free Transfers |
| | | 17. Subrogation Clause |
| | | 18. Non-Derogation Clause |
| | *V. Good Governance* | 19. Good Governance |
| | *VI. Flexibility* | 20. Denial of Benefits |
| | | 21. Scheduling & Reservations |
| | | 22. Essential Security Exception |
| | | 23. Public Policy Exceptions |
| | | 24. Prudential Carve-Outs |
| | | 25. Right to Regulate |
| | *VII. Institutional Issues and Final Provisions* | 26. Mechanism for Consultations between State Parties |
| | | 27. Institutional Framework |
| | | 28. Limiting Temporal Scope of IIA |
| | | 29. Pre-existing Disputes Covered |
| | | 30. Treaty Duration |
| | | 31. Automatic Renewal |
| | | 32. Modalities for Denunciation |
| | | 33. Length of Survival Clause |
| **SRS ISDS** | *VIII. Procedural Provisions* | 34. Alternatives to Arbitration |
| | | 35. Scope of Claims |
| | | 36. Limitation on Provisions Subject to ISDS |
| | | 37. Limitation on Scope of ISDS |
| | | 38. Type of Consent to Arbitration |
| | | 39. ISDS Rules: Domestic Courts Forum Selection |
| | | 40. Particular Features of ISDS |
| | | 41. Interpretation |
| | | 42. Transparency of Arbitral Proceedings |

With this methodological measure in hand, we take a closer look at IIAs signed by MS and by the EU itself, with particular attention to their evolution over time as well as cross-country variation on SRS. To keep things in perspective, we also compare

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EU-related agreements to the rest of the sample.[13] This analysis allows us to make two main observations. First, MS have developed divergent approaches to the global investment treaty regime, and these differences remain apparent in their approach to IIAs to this day. Second, IIAs signed by MS since the early 2010s reflect greater SRS compared to those signed in the 1990s and 2000s. They are still lagging somewhat behind global developments in this regard, with respect to new IIAs, however. In contrast, a handful of agreements signed by the EU itself have a much higher SRS level, compared to the global average. Thus, as competence in this issue-area is gradually transferred from MS to the EU, the latter is more clearly transforming into a forerunner in reforming the global investment treaty regime.

For a useful context, we begin with SRS in BITs signed in the 1990s. During these years, many states rushed to sign such agreements without much attention to their content and implications (Poulsen, 2014, 2015). The received wisdom was that there is little variation in the design of IIAs and that they reflect a great deal of investor protection at the expense of the host country's sovereignty (Elkins et al., 2006; Guzman, 1998). To assess the validity of this perception, we compare the average SRS of IIAs signed by the five MS with the largest BIT programs: Germany, the United Kingdom, France, the Netherlands, and the Belgium and Luxemburg Economic Union (BLEU). Taking advantage of our ability to disaggregate the composite SRS measure, we also compare SRS on key substantive provisions[14] vis-à-vis ISDS provisions.

As Figure 1 shows, the overall SRS (in gray) appears rather similar for all five programs, ranging from 0.16 for the UK to 0.21 to BLEU. At the same time, it is also apparent that some MS have been more interested in preserving SRS in their BITs than others, especially with respect to important substantive matters (in blue): French and BLEU BITs score significantly higher on such provisions, compared to the other three MS (and the UK (as an MS at the time, pre-Brexit) in particular). This observation highlights the lack of uniformity of EU MS IIAs, even during the 1990s, the heydays of seemingly 'simple' BITs. This finding is consistent with Titi's observation (2015: 649) that despite having an overall similar approach, "EU member state BITs have by no means been identical among them or even largely similar."

[13] 1,118 IIAs, about 40% of the sample, involve at least one MS. There are no IIAs signed between two MS, with the partial exception of two protocols amending existing BITs (Romania-Slovakia (2005) and Romania-Czech Republic (2008)). Nevertheless, close to 200 IIAs in our sample were concluded between current MS before at least one of them joined the EU.

[14] Key substantive provisions refer to those involving important standards of treatment (e.g. MFN, NT, and FET), direct and indirect expropriation, and compensation.

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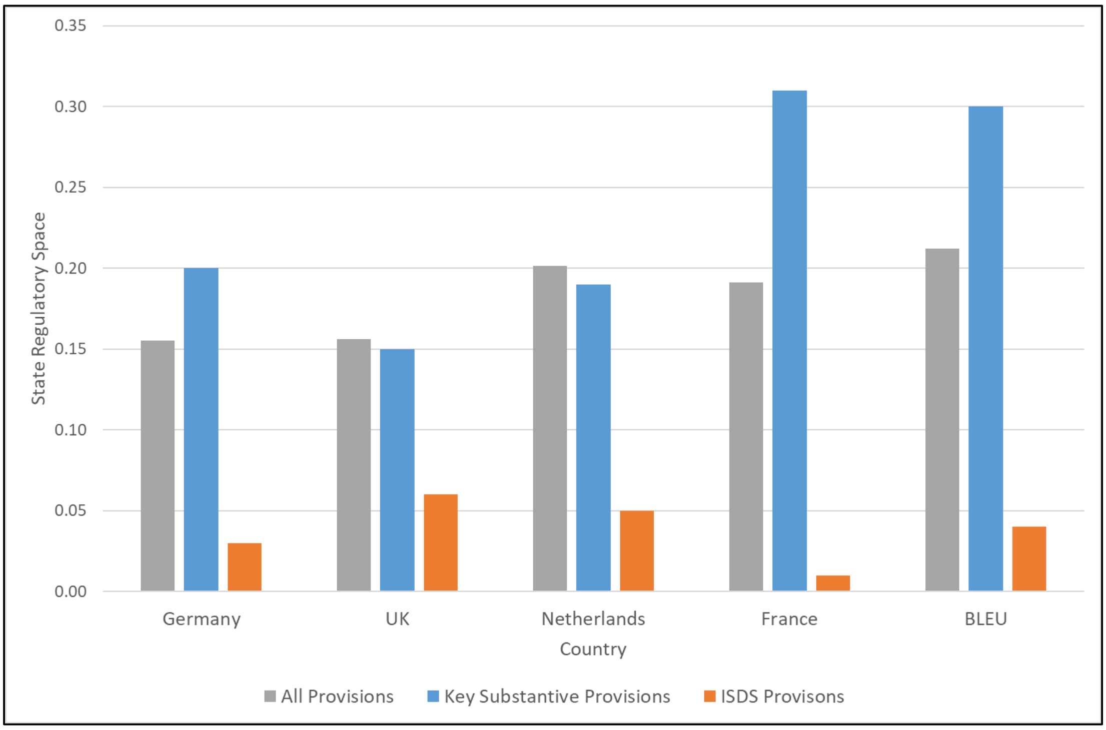
**Figure 1:** Mean SRS for IIAs signed by Five EU Countries, 1990-2000




This approach began to change in the late 2000s and early 2010s, as investment claims against host countries were mounting (Thompson et al., 2019; Haftel and Thompson, 2018; Poulsen and Aisbett, 2013), and the status of extra-EU BITs became less than clear in the shadow of the post-Lisbon developments detailed above. This adjustment was visible in two trends. First, MS concluded much fewer IIAs than in previous years. In our sample, they signed only eight IIAs in the years 2012-2016, compared to an *annual* average of fifty IIAs in the 1990s and about forty IIAs in the 2000s. Second, they have worked to increase SRS in those IIAs they did sign as well as in so called 'Model BITs.'

To illustrate this shift, Figure 2 compares Model BITs and/or IIAs of four EU MS – the Netherlands, France, Czechia, and Austria – in the 2010s and in earlier decades.[15] As it makes clear, SRS has increased dramatically for the first three countries, and more moderately for Austria. This upsurge is especially remarkable with respect to procedural provisions. SRS related to ISDS jumped about six-fold from the 1997 to the 2018 Dutch Model BIT and from Czech BITs signed in the 1990s to its 2016 Model BIT (and substantive SRS has increased about twofold for both countries).

[15] We selected these four cases because they are the only MS that have readily available Model BITs or IIAs from both time periods. Ideally, we would compare pairs of Model BITs. Unfortunately, with the exception of the Netherlands, MS did not publish such templates both before and after 2010. We therefore substitute Model BITs with a single IIA after 2010 (because they are in short supply during this time), and the mean for a large number of IIAs before 2010.

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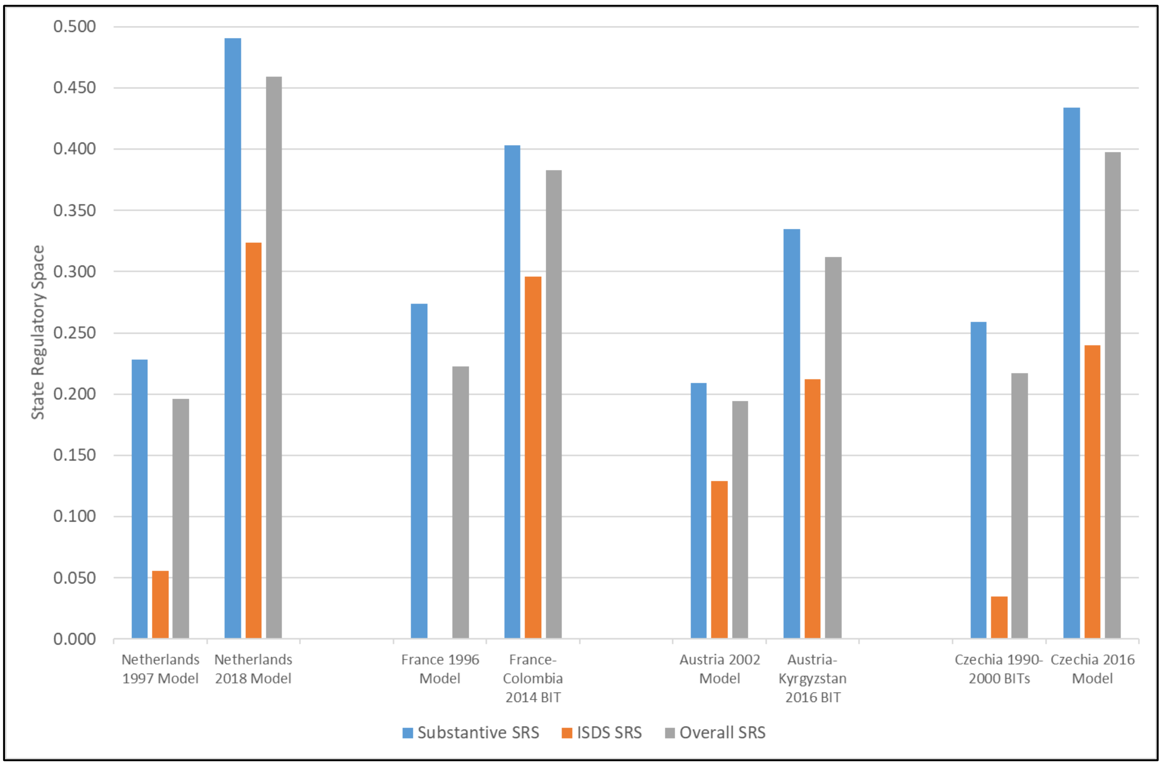
For France, SRS ISDS jumped from zero in its 1996 Model BIT to almost 0.30 in its 2014 IIA with Colombia. At the same time, there is no apparent convergence in SRS levels across these four countries. The varying levels of SRS on substantive and procedural provisions suggest, however, that MS continue to have different ideas on how to best design IIAs.

**Figure 2:** SRS for Model BITs and IIAs signed by Four MS




To better understand the implications of this shift, it is worthwhile to compare it to IIAs signed by the EU itself and IIAs not involving EU MS at all. To do this, Figure 3 shows the annual three-year moving average SRS for IIAs involving three groups of parties. First, in dark blue, those IIAs that involve at least one MS (from the year of accession for those members that joined the EU after 1957), thus including both current intra-EU and Extra-IIAs. Second, in light blue, those IIAs that involve at least one MS *as well as* six IIAs signed by the EU itself from 2012 to 2016 with Iraq, Georgia, Moldova, Ukraine, Kazakhstan, and Canada. The third group, in grey, includes all IIAs that do not include any party associated with the EU.

As Figure 3 indicates, SRS in IIAs of MS tracks pretty closely the trend in the global IIA regime as a whole. Early on, most BITs reflected high SRS, mostly because they lacked ISDS provisions. This has changed gradually, and led to BITs with a much

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lower SRS in the 1990s. It appears, however, that IIAs signed by MS have a consistently lower SRS compared to IIAs concluded by other states. This indicates that, on balance, MS preferred IIAs with a great deal of investor protection and had lower concern for host country's policy space (Titi, 2015). This makes sense, as several MS were leading capital exporters, e.g. Germany, France, the UK, and the Netherlands, while most non-EU countries with IIAs were capital importers, and moreover, many post-communist states continued well into the 1990s to have BITs with only limited ISDS.

SRS of IIAs by MS also tracks the global trend towards greater SRS from the late 2000s onwards. Here, it seems that MS as such somewhat lag behind other states and are more reluctant to forgo investors' protection. For example, the gap in average SRS between the two groups of IIAs increases from 0.01 in 2001 to 0.09 in 2016. Thus, the increase in SRS illustrated in Figure 2 is not unique to EU countries and, if anything, it appears that MS have been less enthusiastic about embracing investment treaty reforms, compared to policy leaders in the rest of the world. This can, however, be associated with the variegated understanding that extra-EU IIA policy will be taken over by the EU as a whole.

These relationships are turned on their head when IIAs signed by the EU itself are included in the analysis. Because these IIAs reflect a much higher than average SRS, they pull the entire EU average above the global mean in the 2010s.[16] Some caution is warranted, however. With the exception of CETA, the EU agreements in our sample are not full-fledged IIAs. They tackle only a limited number of substantive matters related to foreign investors' protection and have no ISDS provisions. They, moreover, do not replace existing BITs between MS and the partner countries.[17] As such, they are not the most reliable reflection of the EU's approach to the global investment protection regime. With this in mind, we take a closer look at investment commitments in CETA.

[16] Adding to that is the relatively small number of IIAs signed by MS in the 2010s, as already mentioned.

[17] Two IIAs that do include more substantial investment rules are those signed with Singapore and Vietnam in 2018 and 2019, respectively (neither of them have entered into force). We plan to add them to the analysis in the near future. They are reflective of EC policy and can be expected to be similar to CETA in their metrics.

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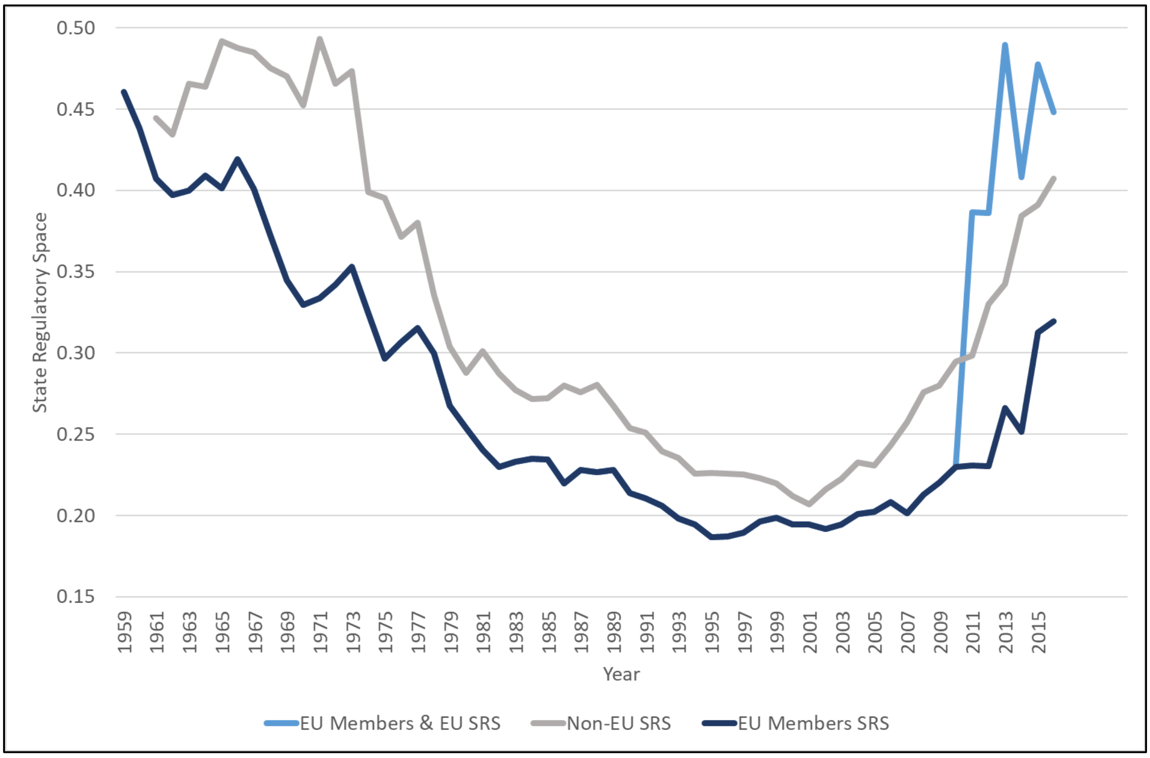
**Figure 3:** Annual Three-Year Moving Average of SRS in IIAs signed by MS, the EU, and the Rest of the World




Signed in 2016, CETA is a very significant agreement insofar as it is the first one signed by the EU with a third country that includes extensive investment provisions and the first to refer to an ICS and MIC. As such, we would submit that it represents the closest thing to an EU model agreement with developed countries, that is expected to gradually succeed national IIAs (though we acknowledge that Canada had an influence on the content of the agreement as well). Notably, its investment provisions have been virtually replicated in the 2019 BLEU Model BIT, after the Waloon-Belgian initiated CJEU Opinion 1/17 was issued in 2017. To have a better sense of how the EU's approach stacks up against other efforts to reform the investment treaty regime, we compare CETA to investment commitments in the 2016 Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), the 2015 Brazil Model BIT, and the 2015 India Model BIT. The CPTPP was negotiated between twelve countries and its design was heavily influenced by the United States (US). Even though the US eventually withdrew from the previous incarnation of this agreement, it still reflects its position on international investment law to an important extent (Allee and Lugg, 2016; Broude et al., 2017).[18] Brazil and India's Model BITs reflect the

[18] The CPTPP was re-signed and entered into force in 2018.

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perspectives of these two important large and emerging countries on the direction the IIA regime should take.

Figure 4 depicts overall SRS in the four texts as well as the values on each of its eight dimensions. Surprisingly, perhaps, CETA and CPTPP have an almost identical score on overall SRS: 0.494 and 0.493, respectively. Notably, these are much higher values than traditional BITs, most Model BITs, and even FTAs with an investment chapter that include ISDS provisions.[19] This highlights the reality that these two agreements reflect a genuine effort of the parties to respond to the growing criticism of global investment rules and to reclaim regulatory flexibility in several ways. It also suggests that a synthesis of the two approaches is possible, but, as we discuss next, important differences remain. As Figure 4 shows, however, these values are lower than India's and Brazil's templates, suggesting that the latter, and Brazil in particular, tilt the balance in favor of host state flexibility even further than the EU and the US.

These different approaches are apparent with a more fine-grained comparison of different provisions. There are several similarities between the CETA and the CPTPP, as both keep the main elements of earlier IIAs in place. Thus, they refer to the main standards of protection, MFN, NT, and FET, include indirect expropriation, and a binding ISDS. At the same time, both CETA and the CPTPP emphasize the need to strike a balance between investor protection and other policy goals. This is apparent, for example, in the language included in the preamble, the incorporation of several references to good governance, and numerous exceptions for and limitation on the scope of substantive protections. Even so, they do not go as far as India's and Brazil's Model BITs. On substantive matters, the former excludes MFN and the latter excludes FET. On procedural matters, India's model requires an effort to exhaust local remedies for five years and Brazil's excludes it altogether.[20]

[19] Thus, for example, the five other IIAs signed by the EU as well as recent agreements based on the 2015 Brazilian template, all lacking ISDS provisions, score higher on SRS.

[20] Instead, Brazil's template provides for consultation and mediation through a Joint Committee and an Ombudsmen.

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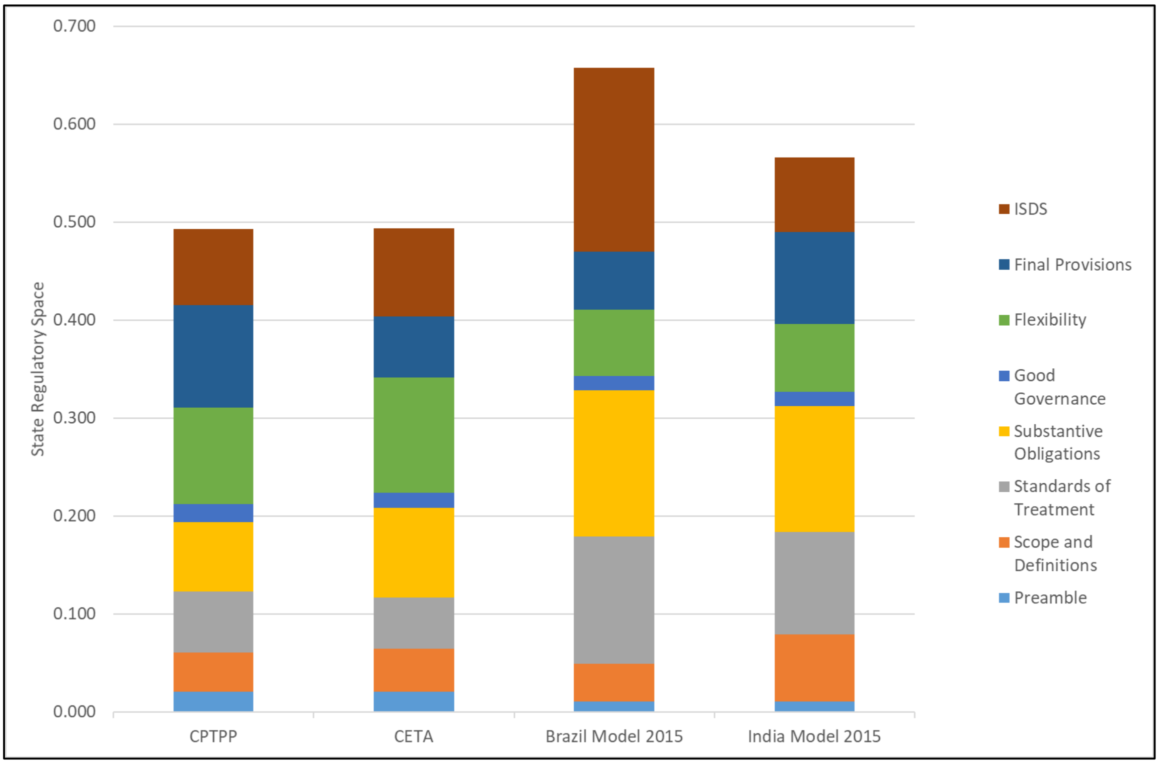
**Figure 4:** SRS in CETA, CPTPP, 2015 Brazil Model BIT, and 2015 India Model BIT




The relative similarity between CETA and the CPTPP might suggest that leading Western powers can develop an agreed-upon template that could potentially set global standards. While this is not impossible, one should keep in mind several important differences between the two agreements. On substantive matters, CPTPP includes a more restricted definition of FET, but CETA contains more public policy exceptions (subsumed under Flexibility). In another important difference, the CPTPP does not include a survival clause, which protects foreign investors in case the agreement was terminated for several more years after the termination. There are more substantial differences with respect to procedural rules. CETA includes more limitations on the scope of claims, while CPTPP goes further on rules related to interpretation and transparency. We should note, however, that our SRS measure captures ISDS-related rules incompletely, because it does not take into account the possibility of a permanent investment court, such as the MIC. This is, of course, a very significant innovation that was not anticipated when UNCTAD developed its mapping guidelines. Given that such a MIC is yet to be established and operate, its implications for SRS remain to be seen. Nevertheless, it seems safe to assume that it will result is greater SRS compared to the current arbitration system, as discussed in other parts of this paper.

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Other developments should be noted here, in this comparative context, such as the 2016 Morocco-Nigeria BIT, which as an intra-African BIT is very progressive in terms of substantive content while preserving ISDS (and it is not entirely clear to what extent it indirectly affects EU investor's interests in the state parties; and the conclusion of the US-Mexico-Canada FTA (USMCA), which has all but done away with ISDS within the North American economic bloc, arguably reducing comparative SRS for the EU vis-à-vis Canada under the CETA, but providing EU investors in Canada with advantages in comparison with US investors.

Be that as it may, it appears that the EU, as a collective actor, is a leader in the current efforts to reform the global IIA regime and to tilt the balance in favor of greater SRS. As policy-making authority in this area continues to shift from MS to the EU, this approach should become ever more apparent. The EU is not the only actor that is moving in this direction, as the comparison between CETA and other notable agreements and templates makes clear. Thus, if the EU and MS hope to shape global rules in relations to the protection of foreign investment, they ought to increase efforts to unify their positions and speak in one voice.

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## 5. Europe on the Global Stage: Its Influence on the UNCITRAL Reform Talks

On this background, in the following and concluding section we shift gears and address qualitatively a forum of evolving global governance that the EU and its MS have been deeply engaged with over the last years, namely, the work of the UNCITRAL Working Group III (UN WGIII) since 2017, when it began discussing ISDS reforms. UNCITRAL is a subsidiary body of the UN General Assembly, established in 1966, with the mandate of promoting progressive harmonization and unification of 'international trade law," which in practice has been most related to private commerce and investment protection. It is thus associated with several international conventions that were designed without international investment law in mind but have had significant impacts in the investment protection universe, such as the Convention on Contracts for the International Sale of Goods, as well as the Model Law on International Commercial Arbitration, and perhaps most importantly for ISDS, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the 'New York Convention'), the UNCITRAL Arbitration Rules, that by election of the parties to an IIA and/or to a dispute, govern a large part of ISDS cases and their enforcement, alongside ICSID.

In July, 2017, at the 50th Session of UNCITRAL, one of its Working Groups – as a subset of the Membership which enables participation also of observers – was charged with a broad mandate of discussions regarding the reform of ISDS. On the one hand, this can be considered to be a major development, as it represents the first multilateral forum for discussing elements of the international investment regime since the failed OECD-sponsored negotiations towards a multilateral investment agreement in the 1990s. On the other hand, it must be acknowledged that UNCITRAL debates at the level of 'hard law' are only as good as the decisions and treaties they produce. In any case, UNCITRAL WGIII has provided an important forum or sounding board for ideas that states and other actors are pursuing and promoting with respect to ISDS, as a central component of the international investment protection regime.

UN WG III was initially tasked with identifying concerns, their necessity and making recommendations to the UNCITRAL as a whole, in three categories, that were divisible into important sub-categories: (1) consistency, coherence, predictability and correctness of arbitral awards;[21] (2) concerns pertaining to arbitrators and decision-

[21] A/CN.9/WG.III/WP.150, *Possible Reform of Investor-State Dispute settlement (ISDS): Consistency and Related Matters*, Note by the Secretariat, United Nations Commission on International Trade Law, Working Group III (Investor-State Dispute, Settlement Reform), Thirty-sixth session, Vienna, 29 October–2 November 2018.

makers;[22] and (3) concerns pertaining to cost and duration of ISDS cases.[23] Subsequently, the WG agenda was augmented with reference to the issue of third-party funding. In this section we ask to what extent have the EU and MS been significant actors and perhaps leaders in these discussions. To this end we have tracked the formal interventions of the EU and MS in each of the UN WGIII sessions since the establishment of the mandate (with the current exception of a session held online in October, 2020).

The summary of each Session below is based on the Working Group's reports, working papers, and state party submissions, as well as audio recordings of the discussions themselves (whose transcriptions have not been made available). Overall, it is evident that the EU and its MS not only participate more than most UNCITRAL party states, but seem to lead the reform and the discussions themselves. Moreover, it is clear that MS are generally united in their opinions on ISDS, on the global stage of UNCITRAL WGIII.

## I. 34th Session, 27 November to 1 December 2017, Vienna

This Session focused on considering the possible ISDS reforms as expressed in the Note by the Secretariat. According to the Working Group Report for this session, the EU itself participated as an observer (according to its UN status), while MS such as France, Germany, Greece, Hungary, Italy, Poland, Romania, Spain, and the UK (at the time). No specific submissions were noted by the EU or its MS at this point.

## II. 35th Session, 23-24 April 2018, New York

*The EU Submission*: Prior to this session, on 12 December 2017, the EU made a submission concerning possible ISDS reforms. The submission was aimed "to identify and consider concerns as regards the current system of investor to state dispute settlement (ISDS)," in accordance with the UN WGIII mandate, and therefore did not discuss which reforms might be desirable. The paper discusses the general framework of the current system, claiming that there is a number of problematic characteristics

[22] A/CN.9/WG.III/WP.151, *Possible Reform of Investor-State Dispute settlement (ISDS): Ensuring Independence and Impartiality on the part of Arbitrators and Decision Makers in ISDS*, Note by the Secretariat, United Nations Commission on International Trade Law, Working Group III (Investor-State Dispute, Settlement Reform), Thirty-sixth session, Vienna, 29 October–2 November 2018; A/CN.9/WG.III/WP.152, *Possible Reform of Investor-State Dispute settlement (ISDS): Arbitrators and Decision Makers: Appointment* Mechanisms and Related Issues, Note by the Secretariat, United Nations Commission on International Trade Law, Working Group III (Investor-State Dispute, Settlement Reform), Thirty-sixth session, Vienna, 29 October–2 November 2018.

[23] A/CN.9/WG.III/WP.151, *Possible Reform of Investor-State Dispute settlement (ISDS): Cost and Duration*, Note by the Secretariat, United Nations Commission on International Trade Law, Working Group III (Investor-State Dispute, Settlement Reform), Thirty-sixth session, Vienna, 29 October–2 November 2018.

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which arise from the public law and international law features of the regime, which are also found in similar conflicts which are normally settled “before standing bodies.” Finally, the paper raised concerns as to “the current dispute settlement mechanisms for the investment regime,” among which it listed the lack of consistency and predictability of the ad-hoc system, concerns on the “perception generated by the system,” the “limited systematic checks on correctness and consistency,” the problematic nature of the appointment process, the significant costs and the lack of transparency in the current regime. Clearly, the EU was putting its weight behind the UN WGIII agenda, which it had previously contributed to.

*The Session*: The EU acted as an observer in this session (again, in its formal UN status) while some of its MS attended as members and participated in the session. It must be noted that the EU and the Swiss Agency for Development and Cooperation (not an EU MS, but a strongly associated state) “provided contributions to the UNCITRAL trust fund, in order to allow participation of developing States in the deliberations of the Working Group.” This session focused on the possible options for ISDS reform, based on the discussion in Part II of the previous session, the notes by the Secretariat on Possible Reform, the submissions from the EU, International Intergovernmental organizations, and Thailand. It can be inferred that a large part of the report is based on the claims made in the EU submission, as it discusses the issues of incoherence and inconsistency, review mechanisms, the problems arising out of the method of appointing arbitrators, and the lack of transparency in the system. While the report cites the EU Submission and states that it was brought up for discussion, it does not directly link its conclusions to the EU’s arguments.

### III. 36th Session, 29 October- 2 November 2018, Vienna

This session was “devoted to considering and reaching a decision on whether reforms were desirable in light of those identified concerns, implementing the second phase of the mandate.” The concerns raised were divided into the three broad categories noted above “those pertaining to lack of consistency, coherence, predictability and correctness of arbitral decisions by ISDS tribunals; those pertaining to arbitrators and decision makers; and those pertaining to cost and duration of ISDS cases.”

#### 1) Possible reform of ISDS

The discussion in the session focused on the “lack of framework to address multiple proceedings.” The different states raised their proposals to address cases of multiple and parallel proceedings. The US brought up several solutions for consideration, among them mechanisms “where investors need to make a decision upfront and waive their right to pursue parallel claims,” statutes of limitations and consolidation proceedings. It also suggested that the amendments to ICSID be considered, as well as the provision in the US-Korea BIT.

The EU briefly stated that it considers that it is desirable to work on this issue and that it goes beyond the question of consistency that was discussed. It asked to focus on “the possibility of indirect claims or … at different points of the ownership structure of investors, and secondly, as mentioned by the US and China,” circumstances of shareholder claims. The delegate added that he noted the points made by the US on possible solutions.

Germany did not address the EU’s remarks, but raised the issue of the lack of incentives available for consolidation of proceedings, claiming that the previous attempts to resolve the issue of parallel and multiple proceedings have failed because the system does not provide incentives to consolidate proceedings. Parties prefer to hold parallel proceedings because they have more control of the chosen arbitrators, and because in terms of risk management, parallel proceedings are better- the more proceedings they hold, the greater their chances of winning and paying less damages.

### 2) Possible reform of ISDS - Consistency and related matters

The discussion on this working paper focused on the Working Group’s third concern- “the limits of the current mechanisms to address inconsistency and incorrectness of decisions.” The EU stated in this discussion that it is desirable to examine possible options that would address the fact that current review mechanisms are limited. The EU delegate stated: “the question of correctness also entails looking at specific decisions that are manifestly legally incorrect. We may have a concern that one may have a manifestly factually incorrect decision, and this must be addressed as well under the decision of consistency.”

Croatia supported the EU, stating that the most visible lacuna in the current system is that arbitral awards that are substantially or factually incorrect, can survive, and that leads to incoherence. Thus, it supported further work on this issue. The Austrian delegation added that the mechanisms discussed were not new but were rather built upon the idea of joint interpretative declarations, which derived from the Vienna convention. It asked to highlight that the use of this idea has been very limited in the past. The working group eventually concluded that the development of reforms by UNCITRAL is desirable to address concerns to the fact that many existing treaties have no mechanisms at all address inconsistency and incorrectness of decisions.

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### 3) Possible reform of ISDS

"Ensuring independence and impartiality on the part of arbitrators and decision makers in ISDS" and "Arbitrators and decision makers: appointment mechanisms and related issues"[24] The discussion focused on the question of whether it was desirable that the Working Group made decisions concerning the independence and impartiality of arbitrators and decision makers in ISDS. This included the option of codes of conduct.

The EU and MS displayed significant involvement in this discussion. The UK stated that arbitrators must be appropriately qualified, and thus must have experience in international law and must be familiar with commercial concepts. "The UK agrees that reform is desirable, and that while some of this may be addressed by treaty drafting, a more collective approach may be of the greatest additional value." Evidence to this is the work of multilateral institutions such as ICSID. The Swiss delegation added that the significant negative perception of ISDS is enough to justify reform. The Polish delegation stated that despite the efforts made to improve the transparency and impartiality of arbitrators, concerns on this issue have persisted for two reasons: the limited number of individuals repeatedly appointed in ISDS cases, and the fact that some individuals subsequently act as consuls or arbitrators in different ISDS proceedings. The practice of double-hatting and repeated appointment of arbitrators creates an impression of bias. Therefore, Poland too supports reform that would create a clear legal standard of impartiality. It also added that reform on review mechanisms must be flexible.

The Romanian delegation also discussed the lack of diversity in the selection of arbitrators and added that entire geographic regions are unrepresented among arbitrators. It echoed the position of the EU and its Member States. Germany stated that while recent treaties include guidelines that improve the situation, they cannot ensure full independence and impartiality because "you have to give the arbitrators the room to earn money elsewhere." It questioned the current system's capacity to accommodate the suggested reforms and stated that it believes that only a multilateral system can ensure a clear international standard of impartiality. Denmark echoed the EU and other MS, clarifying that "a multilateral solution is the direction we should go." Spain and the Netherlands represented the same opinions, stating that it was in support of substantial multilateral reform to achieve impartiality.

The EU delegation stated that amending treaties was not a sufficient solution, and a structural reform was necessary. It stated that the potential solution is to create permanent judges and a permanent court, which would get rid of the problem of

[24] See fn. 21-23 *supra*.

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dependence, but would open a huge question of guaranteeing that these new judges will themselves be free of political interference.

## IV. 37th Session, 1-5 April 2019, New York

This session focused on third party funding and considered additional concerns that could be subject to reform, among them alternative dispute resolution methods, exhaustion of local remedies, third-party participation, counterclaims, regulatory chill, and calculation of damages.

The EU and MS made a written submission concerning the work-plan for WGIII. It suggested that "the Working Group approach phase three of its work in four related steps." The first step "involves the identification and proposal by governments of their preferred reform options, in conceptual form, on which they would like to see the Working Group eventually develop solutions." The second step would require the working group to decide which of the reform options "should be the subject of further work." The third step "would involve a discussion and decision in respect of the priority to be given, the sequencing of the deliberations, the possibility of multiple tracks, coordination with other international organizations and intersessional work of the options identified in Step 2." The fourth step involved "developing concrete solutions and text proposals, which could be adopted or endorsed by the UNCITRAL Commission and, ultimately, the General Assembly of the United Nations." In addition, the EU submission encouraged the active participation of all delegations (no doubt including developing countries).

## V. 38th Session, 14-18 October 2019, Vienna

In this session, the Working Group decided it "would first focus on developing a project schedule on how to move the reform options forward in parallel, and then consider identified reform options without making a decision at this stage." The EU delegation made comments on the workplan put forward, stating that it accepts the workplan but is concerned that there will be less time given over to matters such as the creation of permanent structures. It agreed that there will be equal time to discuss different times of reform options, but this is on the understanding that when the Working Group returns to work in Autumn 2020, the first discussions are given over to discussions on an appellate mechanism and a permanent structure. The EU delegate clarified that it speaks for its 28 Member States, and the German delegation noted that this would be more time-efficient than having all Member States make the same points. The EU delegation reiterated the necessary balance in its view, and stated that it does not agree to postpone discussion over the above issues. It also added that discussion on mechanisms States must be only after a thorough consideration of the merits and

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demerits of each proposal.

Later, the discussion shifted to the proposal to establish an advisory center, which could be of key importance for engagement of developing countries in the international investment regime. The EU delegation stated that the EU and MS support the establishment of an advisory center, but expressed concerns that the creation of an advisory center would not permit them to respond to the concerns raised by the Working Group, such as consistency and predictability, and will not make a significant change in terms of costs. The delegate stated that the question of "what do we do that ensures a reasonable and facilitated access to small and medium sized companies." That is something that the EU wants to encourage. The issue of access to the mechanism was also raised, and the EU delegation said that certain criteria should be developed concerning the rates and fees of services. It stated that a developing country should not have to pay as much as a developed country.

In terms of structure for the advisory center, the EU believes that the WTO model (of an advisory center) cannot be applied necessarily, and therefore the Working Group needs to think about the structure and fitting it into the necessary environment. Finally, the EU delegate added that the Working Group must build in the possibility that the structure may evolve, that they may want to start with a limited scope and then have it extended. Whatever reform is developed must have space to evolve with time. Finland, Germany, Switzerland, and Spain expressed support for the EU delegation's statements. Switzerland specifically said that the center should not discuss "political issues" such as the drafting of IIAs, and that in establishing the center, financial considerations should be borne in mind.  The focus of the center's work, in Switzerland's opinion, should be on the arbitral proceedings, support during the arbitrations and promoting settlements to shorten proceedings.

Regarding the code of conduct for arbitrators or adjudicators, as the case may be, the delegation of Spain stated that the code would be a tool in the road to a structural reform of the system, but that to avoid overlaps with other codes of conduct, it should be compulsory or binding and that compliance with the obligations should be strict.  The code of conduct should, according to Spain, avoid situations where nominated arbitrators evade their responsibilities by abandoning a case. The EU delegation later stated that the code of conduct would not be sufficient to address all of the concerns raised by the Working Group, and that it favors a more structural initiative. It added that the EU has agreed on a clear set of rules in its agreements with Canada and Mexico and is willing to bring to discussion its experience. It noted that it was important that the code of conduct apply to the arbitrators directly instead of the parties.

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The delegation of Switzerland stated that although there are rules at the level of the seat of arbitration, it is necessary for ICSID and UNCITRAL to establish a uniform code of conduct that could also be a useful tool for treaty negotiators, meaning it could be incorporated into treaties instead of negotiating the issue case by case. It added that there should be a distinction between a permanent body of adjudicators and ad hoc arbitrators. Regarding the latter, the delegate stated that there should be strong regulation against double-hatting, repeat appointments by the same parties, and issue conflicts.

The UK delegation highlighted the importance of having standards that arbitrators follow and procedures to deal with arbitrators that do not follow these standards. It further noted that the code should be different for standing mechanism as it may be for the current ad-hoc system. The delegation stated that it is necessary to provide flexibility to make sure than unseen scenarios can be captured while not opening up the scope for frivolous cases. Further, it suggested that the code of conduct provide standards for impartiality as well as the duty of expedition, and should include broad and balanced disclosure standard, and adequate sanctions.

The delegations of the Czech Republic, Austria, Iceland, the EU, Romania and France reiterated the same points made above. The Icelandic delegation expressed satisfaction with the general unanimity of opinions expressed by all the delegations. It also agreed that a distinction must be made between the codes that would apply to the permanent body and the ad-hoc tribunals. The EU delegation supported the Swiss delegation’s concern, but said that the codes to apply to the permanent arbitration body and the ad-hoc system should be discussed in parallel, and one should not be postponed to discuss the other. The Romanian delegation supported the opinion of the EU and its Member States as well as Singapore. It reiterated the EU delegation’s concerns that the code of conduct would not solve all the concerns raised by the Working Group members.

Regarding third party funding, the Swiss delegation later stated that it does not support limited third-party funding, as this is supported by the “freedom of business”. However, it does support regulation of disclosure of third-party funding, but only at the request of the tribunal with case by case decisions based on the concrete circumstances. It added that there should be a broad definition of third-party funding, and that there should be no reimbursement by the losing party of the funding costs. The EU delegation also stated that the ban of third-party funding is not necessary, as it is an important tool to access of justice especially for small and medium sized enterprises. The UK echoed the opinions made by the EU and its Member States. It added that third party funding should be regulated only in situations where they are problematic, such as in situations of conflict of interest. Parties should be able to use third party funding with no regards to their financial abilities. The final discussions of the session focused mainly on the drafting of the report. The EU and its Member States participated significantly in these discussions, but their comments were mostly textual.

## VI. Resumed 38th Session 20-24 January 2020, Vienna

In the resumed 38th session, "the Working Group began to consider the following reform options: (i) stand-alone review or appellate mechanism; (ii) standing multilateral investment court; and (iii) selection and appointment of arbitrators and adjudicators." It is here, perhaps, that the EU's positions and agenda on the development of a multilateral, judicialized system of ISDS has perhaps received the strongest expression so far.

The EU delegation expressed its support for establishing an appeal mechanism to ensure legal correctness of decisions, and to ensure coherence, consistency and predictability over time. It stated that the goal of achieving coherence would best be achieved with a permanent first-instance structure. It addressed the issue of the scope of the appeal and stated that the scope should be confined to errors of law and facts. This is what the EU sees in its recent IIAs and in the WTO appellate body's system of review. The Austrian delegation aligned itself with the EU's opinion and highlighted the importance of establishing an appeal mechanism for cases of manifest factual errors. The Swiss delegation expressed the same view as the EU but expressed concern over the impact of the appeal mechanism over the cost and duration of arbitral proceedings. It believed that a full review would not be the right option, and that it should be limited in the beginning to errors of law, and the aim would be to have narrow scope over errors of fact. The German and Spanish delegations established that their opinion is aligned with that of the EU.

The EU later stated that as a matter of principle, not every decision on jurisdiction should be subject to appeal, as this could cause manipulations. The Spanish delegation said that it could be more efficient to have a decision on the jurisdiction issues before a decision on the substance. With the current system and the way it works, which could be identical to first and second instance, jurisdiction decisions are dealt with separately in terms of substance, and a separate decision as to jurisdiction as opposed to merit is usually based on clear legal arguments not linked to the substance, that is why arbitral tribunals have decided to split their analysis regarding the merits and the jurisdiction. In these cases, there is a ruling on jurisdiction which decides to continue processing the case and it could be interesting to explore the possibility of whether it could be subject to appeal or not, because it could save

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time and costs should that complaint be taken on board. Spain believes that there is no risk of abusing the mechanism because it is self-regulating. Therefore, it offered to have a short deadline for the jurisdiction decision, which would lead to a quick and efficient solution in terms of time and costs.

Regarding the relationship between the first and second instance, the EU delegation stated that it considered that the possibility of remand is desirable, because it does not believe that it is a good idea to allow the appeal tribunal to make new assessments of facts. Rather it is better that it sends the case back to the first instance tribunal. It added that the appeal tribunal should be given the power to make final decisions if the facts that are before it allow it to do so. The delegation added that it wants to avoid duplication of proceedings in various cases. Once there is a legitimate appeal tribunal there should not be a need for this, in the EU's view. Finally, on the effect of the appeal decisions on the contracting parties, the EU expressed its view that the decisions should be followed by an appeal tribunal to assure that the decisions will not be reversed or modified. It insisted that this would work better in a system of a permanent appeal mechanism than in an ad-hoc mechanism.

Later in the discussions, the Swiss delegation expressed concerns, again, over the impact of the appeal mechanism on the cost and duration of arbitration proceedings. The Icelandic delegation reiterated the same concerns. The EU delegation then briefly discussed the same issue, and expressed its surprise with the argument made by the US and Israel that following the case law of an appeal tribunal would create more work for parties from countries that do not opt into the appeal mechanism. It claimed that on the contrary, it will make it easier to find previous case law and will not create more work than counsels from these states currently have.

Regarding the enforcement mechanism of the appeal tribunal's decisions, the German delegation expressed its belief that an inherent permanent mechanism is necessary, one that would allow enforcement in a large number of Member States, and not just on a bi-lateral level. It also expressed common belief with the EU, that enforcement through the New York convention is possible. It presented the example of ICSID and its inherent enforcement mechanism (in contrast with the UNCITRAL's reliance on the New York Convention and other mechanisms) as an instance of an efficient mechanism. The French delegation stated that additional work on the issue of enforceability would be of great importance. The EU delegation reiterated the importance of an effective enforcement mechanism. It addressed the question of how precisely to do this and what is the specific language to do so. There are a number of examples of text provisions which are already in use that could be the basis for the work as the Working Group moves forward on this aspect. The EU suggested that the

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Working Group work on the basis of Article 54 of the ICSID convention. Concerning countries that are not part of the mechanism, it believes that the EU's recent treaties provide examples for drafting in this regard.

Regarding the nomination of arbitrators, the Swiss delegation highlighted that it found it important that adjudicators have experience and legal knowledge, and insisted on a multilayered and transparent election mechanism, as well as a screening mechanism to process adjudicators. It added that the permanent tribunal must fulfill a goal of diversity in terms of gender and country of origin. Finally, it highlighted the importance of the impartiality of the arbitrators in the election process and on the whole. It noted that successful examples of such mechanisms are found in the European Court of Human Rights and other bodies. The Spanish delegation echoed the same opinions, adding that the qualifications of arbitrators in international law and investment law are equally important. It again supported the establishment of a permanent body, and asked that linguistic diversity be included as an element borne in mind under the heading of diversity, as this is crucial to cover the full range of disputes of cases brought before the permanent body.  The delegation added that it is important to make the system efficient and attractive, to encourage investors to turn to ISDS rather than other forms of dispute settlement.  The Austrian delegation also echoed the EU Member States' opinions, but added that it believes that the arbitrators in the permanent tribunal should be nominated by public entities (states) rather than by private parties, as this would be problematic in terms of independence and impartiality, and because the establishment of the permanent body is in itself a public act. The German and UK delegations agreed with the other EU Member States' opinions and highlighted the issue of diversity.

The EU delegation responded to the notion that appointment in a permanent structure would favor States, and said that this is the wrong way of thinking about appointment, because when States are appointing to a permanent body they are interested in ensuring that the balance (between encouraging investment and regulatory freedom), as they have negotiated in their treaties, is maintained. It also highlighted the importance of gender diversity. The French delegation stated that the mode of selection would be the best mechanism to ensure impartiality and independence. The Belgian and Swedish delegations echoed the same statements made by other EU MS.  The following discussions in the session regarded the textual drafting aspect of the Session report. The EU delegation participated significantly in this discussion, but its MS were relatively inactive.

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## VII. 39th Session 30 March- 3 April 2020, New York

This Session was delayed until further notice due to Covid-19.

## VIII. 40th Session (Scheduled for 5-9 October 2020, Vienna)

Towards this session, the EU reproduced its submissions from the 37th session, regarding the steps to be taken by the Working Group. It also included, as an annex, the submission made in the Working Group's 35th Session. The session was ultimately held online in October, 2020, and its analysis is not included in this working paper.

While the UN WGIII discussions are ongoing, impaired as they are by Covid-19 constraints, it can be noted that the EU has taken a leading role in defining and navigating the discussions, with an agenda that reflects the post-Lisbon consolidation of investment protection as part of the EU CCP. In this respect the EC has been quite dominant, while cognizant of the particular concerns of MS, while the latter have taken a supporting role in the Working Group, including European states with strong institutional ties to the EU (mainly Switzerland and Iceland). This can be noted almost across the board of issues, and although the EU is only an observer in the UN WGIII, it appears that its authority to represent has been supported and no significant challenges by MS presented. In the UN WGIII, the voice of the EU and its MS is relatively harmonious, including vis-à-vis development issues, which are not salient in the discussions, with the possible exception of an advisory center.

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## 6. Conclusions

This working paper shows that in the area of international investment protection – BITs and IIAs - the EU and its MS have for a variety of reasons taken an important leading role over the last decade, especially in the last few years. With respect to SRS, MS IIAs have become more and more concerned with guardianship of national regulatory policies; and the EU as a collective player even more so. In the more granular areas of ISDS, reflected in positions taken in the UN WGIII, the EU has been highly involved and influential, although it remains to be seen how these reforms will play out in practice.

The post-Lisbon shift in competences regarding both intra- and extra-EU investment protection agreements has been largely settled through a series of legal and political engagements between the EC and MS, that is not entirely concluded, as an ongoing story. The purpose of this working paper is not to examine the intra-EU processes of policy-making as such, although inevitably sight of these should not be lost. Rather, its aim is to assess the role of the EU, its institutions (especially the EC) and its MS on the global stage of IIA reform. The combination of the quantitative and qualitative analyses above demonstrates several points.

First, the EC has to date succeeded in navigating its global position as a policy and governance leader in the area of international investment protection, with a strong consolidation of external investment protection policy, despite (and perhaps because of) the complex intra-EU dynamics that have elicited both political and judicial processes. Second, in substance, the EU and its MS have taken reasoned stances towards balanced approaches to the substance of IIAs, that take into account both interests of investors, and the preservation of SRS. This holds true with respect to European as well as global economic development. Third, the EC ongoing agenda to develop an ISDS system that is multilateralized, more structured, transparent, consistent and coherent, in particular through the initiative for an investment court system or multilateral investment court, however far-reaching, has gained acceptance in EU IIAs and permeated multilateral discussions such as in the UN WGIII.

These observations carry significant caveats, however, primarily geopolitical. It is not clear that the EU and MS policies and positions have had or will have an impact on the conduct of significant economic players, mainly the US and China, whose IIA policies have followed similar trajectories in terms of reclaiming SRS, but not adopted many of the ideas the EU has promoted in UN WGIII.

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## 7. Bibliography

Aaken, Anne van and Tobias A. Lehmann. 2013. Sustainable Development and International Investment Law. In *Prospects in International Investment Law and Policy: World Trade Forum*, eds. Roberto Echandi and Pierre Sauvé. 317-339.

Aisbett, Emma. 2009. "Bilateral Investment Treaties and Foreign Direct Investment: Correlation versus Causation," In Karl P. Sauvant and Lisa Sachs (eds.), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows*. New York: Oxford University Press.

Aisbett, Emma, Matthias Busse, and Peter Nunnenkamp. 2017. Bilateral investment treaties as deterrents of host-country discretion: The impact of investor-state disputes on foreign direct investment in developing countries. *Review of World Economics* 154: 1-37.

Alschner, Wolfgang, and Dmitriy Skougarevskiy. 2016a. Mapping the Universe of International Investment Agreements. *Journal of International Economic Law* 19 (3): 561-588.

Alschner, Wolfgang, and Dmitriy Skougarevskiy. 2016b. The New Gold Standard? Empirically Situating the Trans-Pacific Partnership in the Investment Treaty Universe. *The Journal of World Investment & Trade* 17 (3): 339-373.

Allee, Todd and Andrew Lugg. 2016. Who Wrote the Rules for the Trans-Pacific Partnership? *Research and Politics* (July-September): 1-9.

Allee, Todd, and Clint Peinhardt. 2010. Delegating differences: Bilateral investment treaties and bargaining over dispute resolution provisions. *International Studies Quarterly* 54 (1): 1-26.

Allee, Todd, and Clint Peinhardt. 2011. Contingent credibility: The impact of investment treaty violations on foreign direct investment. *International Organization* 65(3): 401–432.

Blake, Daniel J. 2013. Thinking Ahead: Time Horizons and the Legalization of International Investment Agreements. *International Organization* 67 (4): 797-827.

Bonnitcha, Jonathan, Lauge N. Skovgaard Poulsen, and Michael Waibel. 2017. *The Political Economy of the Investment Regime*. Oxford: Oxford University Press.

Broude, Tomer, Yoram Z. Haftel, and Alexander Thompson. 2017. The Trans-Pacific Partnership and Regulatory Space: A Comparison of Treaty Texts. *Journal of*

*International Economic Law* 20 (2):391-417.

Brown, Chester. 2013. Introduction: The Development and Importance of the Model Bilateral Investment Treaty. In *Commentaries on Selected Model Investment Treaties*, ed. Chester Brown. Oxford University Press.

Büthe, Tim, and Helen V. Milner. 2009. "Bilateral Investment Treaties and Foreign Direct Invest: A Political Analysis," In Karl P. Sauvant and Lisa Sachs (eds.) *The Effect of Bilateral Investment Treaties and Double Taxation Treaties on Foreign Direct Investment Flows.* New York: Oxford University Press.

Cotula, Lorenzo. 2014. Do Investment Treaties Unduly Constrain Regulatory Space? *Questions of International Law* 9:19-31.

Dolzer, Rudolf and Margrete Stevens. 1995. *Bilateral Investment Treaties*. Boston: Martinus Nijhoff.

Elkins, Zachary, Andrew T. Guzman, and Beth A. Simmons. 2006. Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000. *International Organization* 60: 811-46.

Falvey, Rod, and Neil Foster-McGregor. 2018. North-South foreign direct investment and bilateral investment treaties. *The World Economy* 41 (1): 2-28.

Fauchauld, Ole Kristian. 2021 (forthcoming) International Investment Law in Support of the Right to Development?. *Leiden Journal of International Law* (mimeo on file with authors).

Franck, Susan D. 2005. *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions. Fordham Law Review 73(4): 1521-1625.*

Frenkel, Michael, and Benedikt Walter. 2019. Do bilateral investment treaties attract foreign direct investment? The role of international dispute settlement provisions. *The World Economy* 42 (5): 1316-1342.

Guzman, Andrew T. 1998. Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties. *Virginia Journal of International Law* 38: 640-688.

Haftel, Yoram Z. 2010. Ratification counts: US investment treaties and FDI flows into developing countries. *Review of International Political Economy* 17 (2): 348-377.

Funded by the Horizon 2020 Framework Programme of the European Union. Grant agreement number 822654

Haftel, Yoram Z., and Alexander Thompson. 2013. Delayed Ratification: The Domestic Fate of Bilateral Investment Treaties. *International Organization* 67 (2): 355-387.

Haftel, Yoram Z., and Alexander Thompson. 2018. When Do States Renegotiate Investment Agreements? The Impact of Arbitration. *Review of International Organizations* 13(1): 25-48.

Hallward-Driemeier, Mary. 2003. Do Bilateral Treaties Attract FDI? Only a Bit … and They Could Bite. Policy Research Working Paper 3121, Washington DC: World Bank.

Hindelang, Steffen and Niklas Maydell. 2011. The EU's Common Investment Policy – Connecting the Dots. In: Marc Bungenberg, Joern Griebel, Steffen Hindelang (eds.), "*International Investment Law and EU Law*" - *European Yearbook of International Economic Law*. Springer, Berlin, Heidelberg. 1-27.

Hübner, Kurt, Anne-Sophie Deman and Tugce Balik. 2017. EU and trade policy-making: the contentious case of CETA. *Journal of European Integration*. 39(7):843-857.

Hwang, Ki-Sik and Hyun-Jung Kim. 2014. Three-Level Game Theory and the Strategy of EU-Korea FTA Negotiation. *Journal of East Asian Affairs*. 28(1):85-130.

*Jandhyala, Srividya, Witold J. Henisz and Edward W. Mansfield. 2011. Three Waves of BITs: The Global Diffusion of Foreign Investment Policy. Journal of Conflict Resolution 55(6):* 1047-1073.

Kerner, Andrew. 2009. Why should I believe you? The costs and consequences of bilateral investment treaties. *International Studies Quarterly* 53 (1): 73-102.

Kidane, Won. 2018. Contemporary International Investment Law Trends and Africa's Dilemmas in the Draft Pan-African Investment Code. *The George Washington International Law Review* 50: 523-579.

Link, Morr, and Yoram Z. Haftel. 2019. Islamic legal tradition and the choice of investment arbitration forums. *Review of International Political Economy*.

Moehlecke, Carolina. 2020. The Chilling Effect of International Investment Disputes: Limited Challenges to State Sovereignty. *International Studies Quarterly* 64 (1): 1-12.

Pelc, Krzysztof J. 2017. What Explains the Low Success Rate of Investor-State Disputes? *International Organization* 71 (3): 559-583.

Poulsen, Lauge N. Skovgaard. 2014. Bounded Rationality and the Diffusion of Modern Investment Treaties. *International Studies Quarterly* 58: 1-14.

Poulsen, Lauge N. Skovgaard. 2015. *Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries*. Cambridge, UK: Cambridge University Press.

Poulsen, Lauge N. Skovgaard. 2020. Beyond Credible Commitments:(Investment) Treaties as Focal Points. *International Studies Quarterly* 64 (1): 26-34.

Poulsen, Lauge N. Skovgaard and Emma Aisbett. 2013. When the Claim Hits: Bilateral Investment Treaties and Bounded Rational Learning. *World Politics* 65 (2): 273-313.

Putnam, Robert D. 1988. Diplomacy and Domestic Politics: The Logic of Two-Level Games". *International Organization*. 42(3):427–460.

Schill, Stephan W. 2007. Do Investment Treaties Chill Unilateral State Regulation to Mitigate Climate Change? *Journal of International Arbitration* 24 (5): 469-477.

Schill, Stephan W. 2009. *The Multilateralization of International Investment Law*. Cambridge University Press.

Simmons, Beth A. 2014. Bargaining over BITs, arbitrating awards: The regime for protection and promotion of international investment. *World Politics* 66(1): 12-46.

Thompson, Alexander, Tomer Broude and Yoram Z. Haftel. 2019. Once Bitten, Twice Shy? Investment Disputes, State Sovereignty, and Change in Treaty Design. *International Organization*. 73(4):859-880.

Titi, Catherine. 2015. International Investment Law and the European Union: Towards a New Generation of International Investment Agreements. *European Journal of International Law*. 26(3):639-661.

Tobin, Jennifer L., and Susan Rose-Ackerman. 2011. When BITs have some bite: The political-economic environment for bilateral investment treaties. *The Review of International Organizations* 6 (1): 1-32.

UNCTAD. 2012. *Investment Policy Framework for Sustainable Development*. Geneva: United Nations.

Vandevelde, Kenneth J. 2000. The Economics of Bilateral Investment Treaties. *Harvard International Law Journal* 41: 469-502.

Funded by the Horizon 2020 Framework Programme of the European Union. Grant agreement number 822654

Vernon, Raymond. 1971. Sovereignty at bay: The multinational spread of US enterprises. New York: Basic Books.

Waibel, Michael, Asha Kaushal, Kyo-Hwa Liz Chung and Clair Balchin, eds. 2010. *The Backlash Against Investment Arbitration: Perceptions and Reality*. New York: Wolters Kluwer.

Wellhausen, Rachel L. 2016. Recent trends in investor–state dispute settlement." *Journal of International Dispute Settlement* 7 (1): 117-135.

Yackee, Jason W. 2008. Bilateral Investment Treaties, Credible Commitment, and the Rule of (International) Law: Do BITs Promote Foreign Direct Investment? *Law and Society Review* 42 (4): 805-832.

Funded by the Horizon 2020 Framework Programme of the European Union. Grant agreement number 822654