



**Publisher**

Tom Barnes  
tom.barnes@lbresearch.com

**Subscriptions**

Claire Bagnall  
claire.bagnall@lbresearch.com

**Head of business development**

Adam Sargent  
adam.sargent@gettingthedealthrough.com

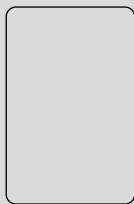
**Published by**

Law Business Research Ltd  
Meridian House, 34-35 Farringdon Street  
London, EC4A 4HL, UK

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. The information provided was verified between September and October 2021. Be advised that this is a developing area.

© Law Business Research Ltd 2021  
No photocopying without a CLA licence.  
First published 2013  
Ninth edition  
ISBN 978-1-83862-677-8

Printed and distributed by  
Encompass Print Solutions  
Tel: 0844 2480 112



---

# Investment Treaty Arbitration 2022

**Contributing editors**

**Stephen Jagusch QC and Epaminontas Triantafilou**  
Quinn Emanuel Urquhart & Sullivan LLP

---

Lexology Getting The Deal Through is delighted to publish the ninth edition of *Investment Treaty Arbitration*, which is available in print and online at [www.lexology.com/gtdt](http://www.lexology.com/gtdt).

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at [www.lexology.com/gtdt](http://www.lexology.com/gtdt).

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Stephen Jagusch QC and Epaminontas Triantafilou of Urquhart & Sullivan LLP, for their continued assistance with this volume.



London  
October 2021

---

Reproduced with permission from Law Business Research Ltd  
This article was first published in November 2021  
For further information please contact [editorial@gettingthedealthrough.com](mailto:editorial@gettingthedealthrough.com)

# Contents

<b>Austria</b>	<b>3</b>	<b>Malaysia</b>	<b>53</b>
Miloš Ivković OBLIN Rechtsanwälte GmbH		Tan Sri Dato' Cecil W M Abraham, Dato' Sunil Abraham and Syukran Syafiq Cecil Abraham & Partners	
<b>Bangladesh</b>	<b>9</b>	<b>Romania</b>	<b>58</b>
Junayed Ahmed Chowdhury and Maliha Ahmed Vertex International Consulting		Cristiana Irinel Stoica, Irina Andreea Micu, Daniel Aragea and Alin-Gabriel Oprea STOICA & Asociații	
<b>Belgium</b>	<b>15</b>	<b>Switzerland</b>	<b>65</b>
Xavier Taton and Guillaume Croisant Linklaters LLP		Kirstin Dodge, Nicole Cleis and Gabrielle Nater-Bass Homburger	
<b>China</b>	<b>21</b>	<b>Ukraine</b>	<b>70</b>
Lijun Cao, Sylvia Jiang and Angela Yan Zhong Lun Law Firm		Olexander Droug Sayenko Kharenko	
<b>Egypt</b>	<b>30</b>	<b>United Kingdom</b>	<b>82</b>
Girgis Abd El-Shahid and Inji Fathalla Shahid Law Firm		Stephen Jagusch QC and Epaminontas Triantafilou Quinn Emanuel Urquhart & Sullivan LLP	
<b>European Union</b>	<b>39</b>	<b>United States</b>	<b>88</b>
Nicholas Lawn, Isabelle Van Damme and Quentin Declève Van Bael & Bellis		David M Orta, Julianne Jaquith, Athina Manoli and Thalia Lamping Quinn Emanuel Urquhart & Sullivan LLP	
<b>Japan</b>	<b>46</b>		
Yoshimasa Furuta and Aoi Inoue Anderson Mōri & Tomotsune			

# European Union

Nicholas Lawn, Isabelle Van Damme and Quentin Declève

Van Bael & Bellis

## BACKGROUND

### Foreign investment

#### 1 | What is the prevailing attitude towards foreign investment?

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

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

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

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

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

In that respect, the European Union has adopted (or is in the process of adopting) two types of legislation. First, in March 2019, the European Union adopted Regulation 2019/452 establishing a framework for the screening and admission of FDI. This Regulation creates a system of cooperation and exchange of information, between EU member states,

on investments from non-EU countries that may affect national security or public policy. Secondly, in May 2021, the European Commission adopted a Proposal for a Regulation to tackle distortive effects caused by foreign subsidies, including when those subsidies facilitate investments in the European Union.

#### 2 | What are the main sectors for foreign investment in the state?

According to information published by the European Commission in its 2019 Staff Working document on FDI in the European Union, the main sectors attracting FDI include oil refining, pharmaceuticals, electronic and optical products, insurance and finance and electrical equipment.

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

According to the European Commission, the European Union has one of the world's most open investment regimes with more than 35 per cent of total EU assets belonging to foreign-owned companies. Flows of EU FDI to the rest of the world amounted to €8,990 billion at the end of 2019. At the end of 2018, FDI into the European Union from non-EU investors amounted to €7,138 billion.

### Investment agreement legislation

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

Not applicable.

## INTERNATIONAL LEGAL OBLIGATIONS

### Investment treaties

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

Since 2009, the European Union has sought to negotiate and conclude investment agreements with third countries. The European Union (together with its member states) has concluded three comprehensive trade and investment agreements with, respectively, Canada (Comprehensive and Economic Trade Agreement (CETA)), Singapore and Vietnam. However, as a result of opinion 2/15, the agreements between the European Union and, respectively, Singapore and Vietnam, have been split. The provisions on investment protection in those agreements are therefore contained in distinct investment agreements (the EU-Singapore Investment Protection Agreement (EUSIPA) and the EU-Vietnam Investment Protection Agreement (EUVIPA)), separate from the provisions on trade liberalisation (which are contained in specific trade agreements). EUSIPA, EUVIPA and the provisions on investment

protection and investor-state dispute settlement (ISDS) contained in CETA have, however, not yet entered into force. They await ratification by national (and even regional) parliaments in the EU member states.

On 24 December 2020, following the United Kingdom's withdrawal from the European Union, the European Union and the United Kingdom concluded the EU-UK Trade and Cooperation Agreement, which includes a section on 'services and investment'. However, those provisions on investment protection are limited to dealing with investment liberalisation, establishment, market access and non-discriminatory treatment, and are silent on ISDS. The EU-UK Trade and Cooperation Agreement entered into force on 1 May 2021. In the meantime, on 30 December 2020, the European Union and the People's Republic of China also announced the conclusion, in principle, of a Comprehensive Agreement on Investment (EU-China CAI). It is doubtful whether the European Parliament will ratify the EU-China CAI in the short or medium term. As it currently stands, the text of the EU-China CAI essentially focuses on investment liberalisation and the modes of supply of services. The EU-China CAI does not contain provisions on substantive investment protection or ISDS.

In addition to CETA, EUSIPA, EUVIPA, the EU-UK Trade and Cooperation Agreement and the EU-China CAI, the European Union is currently negotiating a number of other trade and investment agreements, including an agreement with Mexico. In April 2018, the parties reached an agreement in principle on the trade parts of the EU-Mexico agreement. In April 2020, they concluded the outstanding elements of their negotiations. The two parties are currently finalising the legal revision of the text. After translation into all EU languages, it will be transmitted to the EU member states and the European Parliament as part of the ratification process.

Finally, the European Union, together with the EU member states (with the notable exception of Italy), is also a party to the Energy Charter Treaty (ECT). The ECT is an international agreement that establishes a multilateral framework for cross-border cooperation in the energy sector. The ECT covers all aspects of commercial energy activities (including trade, transit and investments) and also contains ISDS provisions. The ECT entered into force in respect of the European Union on 16 April 1998. Negotiations in relation to the modernisation of the ECT are underway. Importantly, in a judgment of 2 September 2021 (C-741/19 – *Komstroy*), the Court of Justice of the European Union (CJEU) ruled that the ISDS arbitration provision in the ECT (article 26(2)(c) ECT) is not applicable to intra-EU investment disputes (disputes between an investor of one member state and another member state).

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

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

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

Those conditions are contained in article 52 of the Treaty on the European Union and article 355 of the Treaty on the Functioning of the European Union. However, they vary depending on the overseas territory in question. Consequently, the EU treaties do not apply uniformly and consistently to all overseas territories of the EU member states.

The exact extent to which EU investment agreements apply to overseas territories has therefore not yet been settled.

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

No. However, following Opinion 2/15 in which the CJEU found that the provisions on investment protection in the initial version of the EU-Singapore Free Trade Agreement covered also shared competences (and could, consequently, only be dealt with by the European Union and its member states acting together), the EU-Singapore Free Trade Agreement has been amended prior to its ratification. The initial EU-Singapore Free Trade Agreement has been split into two separate agreements. It now consists of (1) the EU-Singapore Trade Agreement (which deals with trade and foreign direct investment liberalisation) and (2) the EUSIPA (which encompasses investment protection and ISDS). The same approach was taken with respect to the EUVIPA. This approach to splitting up trade and investment protection elements is in line with the conclusions adopted by the Council of the European Union in its May 2018 report on the negotiation and conclusion of EU trade agreements.

The European Union is also involved in the process for modernising the Energy Charter Treaty (ECT). Negotiations commenced in July 2020. In Case C-741/19 *Komstroy*, the CJEU ruled that the ISDS arbitration provision in the ECT (article 26(2)(c) ECT) is not applicable to intra-EU investment disputes (disputes between an investor of one member state and another member state).

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

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

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

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

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

a unilateral basis by the United Kingdom or each respective member state, these BITs remain in force.

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

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

The Plurilateral Agreement has so far been ratified by 17 of the member states that signed the treaty. It remains to be ratified by Belgium, Czech Republic, Italy, Luxembourg, Portugal and Romania.

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

### ICSID Convention

#### 10 | Is the state party to the ICSID Convention?

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

### Mauritius Convention

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

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

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

### Investment treaty programme

#### 12 | Does the state have an investment treaty programme?

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

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

## REGULATION OF INBOUND FOREIGN INVESTMENT

### Government investment promotion programmes

#### 13 | Does the state have a foreign investment promotion programme?

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

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

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

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

### Applicable domestic laws

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

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

In addition, in May 2021, the European Commission adopted a proposal for a Regulation to tackle distortive effects caused by foreign subsidies, including when those subsidies facilitate investments in the European Union.

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

### Relevant regulatory agency

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

There is no EU agency regulating and promoting inbound foreign investments. EU member states may establish national (or sometimes regional) agencies for the promotion of FDI on their territory.

### Relevant dispute agency

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

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

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

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

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

## INVESTMENT TREATY PRACTICE

### Model BIT

17 | Does the state have a model BIT?

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

Agreement (CETA)) or whether to split those provisions into separate trade agreements and investment agreements (per the EU-Singapore Investment Protection Agreement (EUSIPA) and the EU-Vietnam Investment Protection Agreement (EUVIPA)).

### Preparatory materials

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

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

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

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

### Scope and coverage

19 | What is the typical scope of coverage of investment treaties?

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

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

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

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

Finally, with respect to the ECT, the CJEU ruled, in *Komstroy*, that a mere contract for the supply of electricity did not fall within the definition of 'investment' under article 1(6) of the ECT if such a contract is not 'connected' to an investment. Although the CJEU's decision is in principle binding on the courts of EU member states, it remains an open question as to whether arbitral tribunals, established under the ECT, will follow the approach taken by the CJEU in *Komstroy* in relation to the definition of 'investment' in the ECT.

### Protections

20 | What substantive protections are typically available?

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

- national treatment protection;
- most favoured nation treatment protection (this protective standard is however not offered in EUSIPA);
- fair and equitable treatment;
- full protection and security;

- compensation in the event of nationalisation or expropriation;
- compensation for losses owing to war, or other armed conflict, revolution, state of national emergency or other events such as riots or revolts; and
- a guarantee as to the repatriation and transfer of profits and other returns.

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

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

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

### Dispute resolution

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

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

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

### Confidentiality

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

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

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

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

### Insurance

- 23 | Does the state have an investment insurance agency or programme?

The European Union does not have an investment insurance agency or programme. However, EU member states may have such an agency or offer such a programme at the national level.

## INVESTMENT ARBITRATION HISTORY

### Number of arbitrations

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

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

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

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

### Industries and sectors

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

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

### Selecting arbitrator

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

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

Irrespective of this pending dispute (which concerns an alleged violation of the ECT), the current investment agreements concluded by the European Union (Comprehensive and Economic Trade Agreement (CETA), the EU–Singapore Investment Protection Agreement (EUSIPA) and the EU–Vietnam Investment Protection Agreement (EUVIPA)) all provide for the establishment of an Investment Court System whereby the investment disputes under those agreements will be argued before a specific, permanent and independent investment tribunal comprised



of an equal number of (1) nationals of the European Union; (2) nationals of the other state party to the agreement; and (3) nationals of third countries. The members of the investment tribunals are to be appointed for a term of four years (article 3.38 EUVIPA), five years (article 8.27 CETA) or eight years (article 3.9 EUSIPA).

### Defence

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

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

## ENFORCEMENT OF AWARDS AGAINST THE STATE

### Enforcement agreements

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

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

### Award compliance

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

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

### Unfavourable awards

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

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

### Provisions hindering enforcement

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

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

However, pursuant to article 343 of the Treaty on the Functioning of the European Union and Protocol No. 7 to that Treaty, the European

## VAN BAEL & BELLIS

**Nicholas Lawn**  
nlawn@vbb.com

**Isabelle Van Damme**  
ivandamme@vbb.com

**Quentin Declève**  
qdeclève@vbb.com

Glaverbel Building  
Chaussée de la Hulpe 166 Terhulpsesteenweg  
B-1170 Brussels  
Belgium

5 Chancery Lane  
London WC2A 1LG  
United Kingdom

Tel: +32 2 647 73 50 / +44 20 7406 1471  
Fax: +32 2 640 64 99  
www.vbb.com

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

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

## UPDATE AND TRENDS

### Key developments of the past year

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

In the European Union, the investor-state dispute settlement (ISDS) debate mainly focuses on the implications of the *Achmea* judgment and the entry into force of the Plurilateral Agreement. It cannot be excluded that there will be further litigation, including before the Court of Justice of the European Union (CJEU), regarding the exact consequences of the Plurilateral Agreement on investors' rights. In addition, given that the Plurilateral Agreement seeks to remove pending intra-EU ISDS proceedings from the jurisdiction of arbitral tribunals by incentivising the use of either alternative methods of dispute

resolution or the national courts of the member states, it remains to be seen how such alternatives will operate in practice.

Another contested issue relates to the effects of the *Komstroy* judgment handed down on 2 September 2021 on the exclusion of intra-EU ISDS proceedings initiated pursuant to the Energy Charter Treaty (ECT) (which is a multilateral treaty that also comprises non-EU countries). Further developments in this field are expected in the coming months.

The question of whether payments made by an EU member state to an investor by virtue of an ISDS arbitral award constitute illegal state aid under EU law is also unresolved. Although the EU Commission initially considered, in the *Micula* decision (Decision (EU) 2015/1470), that those payments constituted illegal state aid, this decision was annulled by the EU General Court (cases T-624/15, T-694/15 and T-704/15) in 2019. An appeal against that judgment is currently pending before the Court of Justice of the European Union (case C-368/19P). In the meantime, on 19 July 2021, the EU Commission announced that it had opened an in-depth investigation with respect to the compatibility, with EU state aid rules, of an arbitration award to be paid by Spain in favour of another investor (Case SA.54155).

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

## Other titles available in this series

Acquisition Finance	Dispute Resolution	Investment Treaty Arbitration	Public M&A
Advertising & Marketing	Distribution & Agency	Islamic Finance & Markets	Public Procurement
Agribusiness	Domains & Domain Names	Joint Ventures	Public-Private Partnerships
Air Transport	Dominance	Labour & Employment	Rail Transport
Anti-Corruption Regulation	Drone Regulation	Legal Privilege & Professional Secrecy	Real Estate
Anti-Money Laundering	Electricity Regulation	Licensing	Real Estate M&A
Appeals	Energy Disputes	Life Sciences	Renewable Energy
Arbitration	Enforcement of Foreign Judgments	Litigation Funding	Restructuring & Insolvency
Art Law	Environment & Climate Regulation	Loans & Secured Financing	Right of Publicity
Asset Recovery	Equity Derivatives	Luxury & Fashion	Risk & Compliance Management
Automotive	Executive Compensation & Employee Benefits	M&A Litigation	Securities Finance
Aviation Finance & Leasing	Financial Services Compliance	Mediation	Securities Litigation
Aviation Liability	Financial Services Litigation	Merger Control	Shareholder Activism & Engagement
Banking Regulation	Fintech	Mining	Ship Finance
Business & Human Rights	Foreign Investment Review	Oil Regulation	Shipbuilding
Cartel Regulation	Franchise	Partnerships	Shipping
Class Actions	Fund Management	Patents	Sovereign Immunity
Cloud Computing	Gaming	Pensions & Retirement Plans	Sports Law
Commercial Contracts	Gas Regulation	Pharma & Medical Device Regulation	State Aid
Competition Compliance	Government Investigations	Pharmaceutical Antitrust	Structured Finance & Securitisation
Complex Commercial Litigation	Government Relations	Ports & Terminals	Tax Controversy
Construction	Healthcare Enforcement & Litigation	Private Antitrust Litigation	Tax on Inbound Investment
Copyright	Healthcare M&A	Private Banking & Wealth Management	Technology M&A
Corporate Governance	High-Yield Debt	Private Client	Telecoms & Media
Corporate Immigration	Initial Public Offerings	Private Equity	Trade & Customs
Corporate Reorganisations	Insurance & Reinsurance	Private M&A	Trademarks
Cybersecurity	Insurance Litigation	Product Liability	Transfer Pricing
Data Protection & Privacy	Intellectual Property & Antitrust	Product Recall	Vertical Agreements
Debt Capital Markets		Project Finance	
Defence & Security			
Procurement			
Digital Business			

Also available digitally

[lexology.com/gtdt](https://www.lexology.com/gtdt)