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Decentral EU Investment Policy:

Convergence, Divergence and EU-Plus

Marc Bungenberg, Bianca Böhme & Lars Ruf

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Chair of Public Law, Public International Law, European Law and International Economic Law and Jean Monnet Chair of EU Constitutional Framework for International Dispute Settlement and Rule of Law

Prof. Dr. Marc Bungenberg, LL.M.

Saarland University

66123 Saarbrücken

Germany

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Abstract

The legal protection of investments around the globe is mainly influenced by a broad variety of international agreements, such as Free Trade Agreements (FTAs) with investment chapters, specific Investment Protection Agreements (IPAs) as well as Bilateral Investment Treaties (BITs). Within the EU, the past decades have shown fundamental changes in the way that negotiations and the conclusion of such agreements are carried out. The central approach with negotiations on an EU level has faced several problems, especially in light of the need for ratification by the Member States. On the other hand, there is also room for a decentral approach with negotiations of BITs by individual Member States being authorised by the European Commission. Although one might argue that the latter could lead to more fragmentation, it appears like various problems with the central approach have driven the EU to conduct its investment policy on a decentral level. This calls for a comparison of EU agreements and its Member States' BITs with regard to procedural and substantive investment protection standards. Through such a comparison, this paper intends to analyse the most recent trends and developments within the EU's international investment policy.

Keywords

EU Investment Policy – decentral approach – Investment Protection – substantive standards – procedural standards – BIT – IPA – FTA

Biography of the authors

Prof. Dr. iur. Marc Bungenberg, LL.M. is chair holder of the Chair of Public Law, Public International Law, European Law, International Economic Law and the Jean Monnet Chair for the EU Constitutional Framework for International Dispute Settlement and Rule of Law at Saarland University. He is also director of the Europa-Institut.

Bianca Böhme is a Research Associate and doctoral candidate at the chair for Public Law, Public International Law, European Law and International Economic Law of Prof. Dr. Marc Bungenberg at Saarland University and the Europa-Institut. Bianca researches and teaches in the fields of International Economic Law and International Dispute Resolution. Bianca holds an LL.M. degree in International Law, Investment, Trade and Arbitration from the University of Heidelberg and the Universidad de Chile and an LL.M. degree in European and International Law from the Europa-Institut in Saarbrücken, Germany.

Lars Ruf is a doctoral student and Research Assistant at the chair for Public Law, Public International Law, European Law and International Economic Law of Prof. Dr. Marc Bungenberg at Saarland University and the Europa-Institut. Lars has studied law in Germany (Dipl.-Jur., Saarland University) and the UK (LL.M., University of Exeter). He is specialising in European Competition Law, whilst his areas of interest also include Foreign Trade and Investment Law.

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Decentral EU Investment Policy: Convergence, Divergence and EU-Plus[*]

Marc Bungenberg, Bianca Böhme and Lars Ruf[**]

I. Introduction

In recent years, numerous Member States of the European Union (EU) are increasingly concluding new Bilateral Investment Treaties (BITs) and reforming existing ones. Even though Foreign Direct Investment (FDI) became an EU-exclusive competence with the entry into force of the Treaty of Lisbon in 2009, Regulation 1219/2012 permits Member States to continue concluding new BITs and to amend existing ones.[1] As its title suggests ("*transitional* arrangements for bilateral investment agreements between Member States and third countries"), Regulation 1219/2012 was intended to regulate Member States' international investment policies until the EU developed a proper international investment policy exercising its exclusive competence over Foreign Direct Investment (FDI). In fact, the European Commission (Commission) stated in 2010 that "[i]n the long run, we should achieve a situation where investors from the EU and from third countries will not need to rely on BITs entered into by one or the other Member State for an effective protection of its investment".[2] Accordingly, it appears that the original idea was that most investment negotiations take place at the EU level, relegating the Member States' national investment policies to a subordinated position (central approach).

Thirteen years later, the picture looks quite different. The EU's central approach has been complemented by a decentral approach, meaning the EU's international investment policy is directly implemented through Member States' BITs. This new approach has not been laid down or explained by means of any formal communication but can be regarded as the natural result of the EU's own struggle implementing the central approach. So far, the EU has negotiated investment protection standards with Canada, Mexico, Singapore and Vietnam, and has at least discussed this topic with the US, China, Japan and the UK. These negotiations have *inter alia* resulted in the conclusion of the EU-Canada Comprehensive and Economic Trade Agreement (CETA),[3] and the

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[**] Marc Bungenberg is Director of the Europa-Institut and Professor for Public Law, Public International Law and International Economic Law at Saarland University. Email: bungenberg@europainstitut.de. Bianca Böhme and Lars Ruf are Research Associates at the Chair of Prof. Bungenberg. Emails: boehme@europainstitut.de; ruf@europainstitut.de.

[1] Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries, OJ L 251/40.

[2] European Commission (2010), p. 11.

[3] See Council Decision (EU) 2017/38 of 28 October 2016 on the provisional application of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, OJ L 11/1080.

EU-Singapore[4] and EU-Vietnam[5] Investment Protection Agreements. However, at the time of writing none of these agreements have entered into force and there is no prospect of a sudden revival of the stagnated EU international investment policy any time soon. As a result, the central approach finds itself at a dead end due to the stalled ratification process of the EU's investment agreements in a number of Member States.[6]

While the central approach has stagnated, numerous Member States have actively pursued their own extra-EU investment negotiations recently. In 2020, the Commission published a report that provided notable information on Member States' treaty practice in the field of extra-EU investment protection between 2013 and 2019.[7] According to that report, the Commission received a total of 442 requests to authorise the opening of negotiations or the conclusion of Member States' BITs in accordance with the authorization mechanism provided under Regulation 1219/2012.[8] In addition, the Commission recently published a list of the implementing decisions issued to authorise the negotiation or conclusion of Member States' BITs.[9] The list indicates that more than 100 implementing decisions authorizing the conclusion of new Member States' BITs have been issued since March 2019. Those implementing decisions often allow a Member State to open negotiations with numerous third countries at the same time. By way of example, the Commission issued an implementing decision in October 2022 authorizing Hungary to open formal negotiations to conclude a BIT with the Principality of Andorra, the Republic of Maldives, the Federal Republic of Nigeria, the Republic of Ghana, the Republic of Cote d'Ivoire, the Republic of Peru, the Republic of Senegal, the Republic of Seychelles, the Republic of Sierra Leone, the United Republic of Tanzania, and the Republic of Uganda.[10]

The implementing decisions are not only notable in that they show the high activity of EU Member States engaging in extra-EU investment negotiations, they also illustrate how the Commission promotes but also conditions those negotiations by imposing a number of requirements emanating from the EU's international investment policy, which the Member States must implement in their own new BITs. In other words, the EU's international investment policy is shaped at a central level and then implemented at a decentral level through the Member States.[11]

This way of shaping Member States' investment policy even led the Commission to elaborate a set of "Model Clauses for Negotiation or Re-negotiation of Member States' Bilateral Investment Agreements with Third Countries" (Model Clauses). These Model Clauses, which are largely based on the provisions included in EU investment agreements, are contained in an informal document

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4 See Council Decision (EU) 2018/1676 of 15 October 2018 on the signing on behalf of the EU of the Investment Protection Agreement between the EU and its Member States, of the one part, and the Republic of Singapore, of the other part, OJ L 279/1.

5 See Council Decision (EU) 2019/1096 of 25 June 2018 on the signing on behalf of the EU of the Investment Protection Agreement between the EU and its Member States, of the one part, and the Socialist Republic of Vietnam, of the other part, OJ L 175/1.

6 On this, see *Bungenberg* (2022), pp. 907–976; *Rosas* (2021), pp. 27–46; *Stifter* (2022), Art. 8.44, paras. 24 ff.; *Griller* (2020), pp. 41 ff.; *Cremona* (2018), pp. 235 ff.

7 See European Commission (2020).

8 Ibid., p. 5. More details on the numbers provided in the Commission's Report can be found in *Bungenberg and Böhme* (2022), pp. 631 f.

9 The list can be found at: https://ec.europa.eu/transparency/documents-register/ searching for "bilateral investment agreements" (last accessed 20 February 2023).

10 Commission Implementing Decision C(2022)7177 of 13 October 2022.

11 *Bungenberg and Böhme* (2022), pp. 633 ff.

that is sent to Member States for their extra-EU investment negotiations. Even though the Model Clauses are non-binding, Member States appear to follow them quite closely in their own treaty-making practice. Unfortunately, they are not (yet) publicly available.

II. The new Member States' International Investment Policy

The following sections will take a closer look at recent Member States' (Model) BITs. The sample comprises the publicly available BITs concluded, and the Model BITs adopted from 2016 to 2023.[12] The analysis will show that there is a large convergence with the EU approach [**II.1**] with regard to most of the contents of those (Model) BITs. At the same time, there seems to be reduced space for divergent approaches in accordance with the old European "gold standard" [**II.2**]. Finally, some Member States' (Model) BITs go beyond the standards negotiated by the EU in its own investment agreements, thus indicating the potential for an EU-plus approach [**II.3**] with regard to certain issues. These three approaches are also reflected in the above-mentioned Model Clauses elaborated by the Commission.

1. Convergence with the EU approach

Most provisions on substantive investment protection contained in recent Member States' (Model) BITs closely follow the EU approach as envisaged in CETA and other EU agreements. A prominent example is the definition of the Fair and Equitable Treatment (FET) standard, where we may observe almost full convergence. Article 8.10 CETA defines the standard by enumerating a number of situations that constitute unfair and inequitable treatment, including denial of justice, a fundamental breach of due process, manifest arbitrariness, targeted discrimination, or harassment.[13]

Member States' BITs concluded in early 2016 still followed the old European gold standard[14], including an unqualified FET (and Full Protection and Security, FPS) clause without the "closed list" approach followed in EU investment agreements. By way of example, Article 3(1) of the Austria-Kyrgyzstan BIT[15] provides that

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[12] All referenced (Model) BITs can be found through the UNCTAD Investment Policy Hub's International Investment Agreements Navigator, available at: https://investmentpolicy.unctad.org/international-investment-agreements (last accessed 15 March 2023). The given analysis covers the period from 2016 to 2023, including the following: Czech Model BIT (2016), adopted 28/12/2016; Slovak Model BIT (2019); Dutch Model BIT (2019), adopted 22/3/2019; Belgium-Luxemburg Economic Union Model BIT (2019), adopted 28/3/2019; Italian Model BIT (2022), adopted August 2022; Austria-Kyrgyzstan BIT (2016), in force since 1/10/2017; Cambodia-Hungary BIT (2016), in force since 30/8/2017; Slovakia-UAE BIT (2016), in force since 5/2/2018; Iran-Slovakia BIT (2016), in force since 30/8/2017; Hungary-Iran BIT (2018), in force since 23/3/2022; Hungary-Tajikistan BIT (2017), in force since 4/11/2018; Lithuania-Turkey BIT (2018), signed 28/8/2018 but not yet in force; Belarus-Hungary BIT (2019), in force since 28/9/2019; Côte d'Ivoire-Portugal BIT (2019), signed 13/6/2019 but not yet in force; Cabo Verde-Hungary BIT (2019), in force since 2/5/2020; Hungary-Kyrgyzstan BIT (2020), in force since 10/4/2022; Hungary-UAE BIT (2021), in force since 10/4/2022; Hungary-Oman BIT (2022), signed 2/2/2022 but not yet in force; Hungary-San Marino BIT (2022), signed 21/9/2022 but not yet in force.

[13] See also Art. 2(4) EU-Singapore Investment Protection Agreement and Art. 2(5) EU-Vietnam Investment Protection Agreement.

[14] Titi defines the European gold standard as synonymous with the "highest levels of investment protection". See *Titi* (2015), p. 649.

[15] Signed on 22 April 2016 and entered into force on 1 October 2017, available at: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5500/download (last accessed 7 March 2023).

> "[e]ach Contracting Party shall accord to investments by investors of the other Contracting Party fair and equitable treatment and full and constant protection and security."

A similar clause can be found in Article 2(2) of the Cambodia-Hungary BIT[16], and in Article 2(2) of the 2016 Czech Model BIT. Hungary, which has been actively concluding new BITs in recent years, changed its policy with regard to the FET (and FPS) standard as of 2017. Since then, almost all Hungarian BITs[17] follow the same "closed list" approach as the EU. One notable example is the Hungary-Kyrgyzstan BIT concluded in 2020. While Kyrgyzstan still negotiated an unqualified FET standard with Austria in 2016, it accepted the EU approach in its BIT with Hungary in 2020. All other Member States' BITs[18] concluded since late 2016, as well as their Model BITs[19] adopted after 2016, equally started to follow the EU approach in this regard. The "closed list" approach, as first adopted in CETA, has even spread further. For instance, it can also be found in the latest Indian Model BIT.[20]

The FET (and FPS) standard is not the only example of convergence. Many other substantive protection standards, such as national treatment, transfer provisions or the prohibition of unlawful expropriation[21] are regulated in a very similar manner in EU investment agreements, recent Member States' (Model) BITs and the Commission's Model Clauses. In addition, a largely convergent approach within all of these instruments can be seen with regard to a number of general provisions, which may appear in the form of streamlined objectives, definitions or the agreements' scope of application.[22] Finally, many examples contain the clarification that the provisions of the agreement cannot be construed as preventing the Member States from discontinuing the granting

[16] Signed on 14 January 2016 and entered into force on 30 August 2017, available at: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5988/download (last accessed 7 March 2023).

[17] See Art. 2(3) the Hungary-Iran BIT (2017); Art. 2(3) Belarus-Hungary BIT (2019); Art. 2(3) Cabo Verde-Hungary BIT (2019); Art. 2(3) Hungary-Kyrgyzstan BIT (2020); Art. 2(3) Hungary-United Arab Emirates BIT (2022); and Art. 2(3) Hungary-Oman BIT (2022). The Hungary-Tajikistan BIT (2017) constitutes an exception to this trend. Art. 2(2) thereof follows the old gold standard by including an unqualified FET and FPS standard.

[18] See Art. 3(2) Iran-Slovakia BIT (2016); Art. 5(2) Lithuania-Turkey BIT (2018); Art. 5(2) Côte d'Ivoire-Portugal BIT (2019).

[19] Art. 5(2) Slovak Model BIT (2019); Art. 9(2) Dutch Model BIT (2019); Art. 4(3) Belgium-Luxembourg Economic Union Model BIT (2019); Art. 4(2) Italian Model BIT (2022).

[20] As noted by Dumberry, Art. 3.1 of the 2016 Indian Model BIT is particularly notable for following for dispensing with the term "fair and equitable", simply referring to a "violation of customary international law", which is then linked to a similar closed list as in the CETA. See *Dumberry* (2022), p. 260.

[21] On the CETA standard for expropriation, see *Kriebaum* (2022), pp. 297 ff; on the interplay between expropriation and the rule of law, see *Bungenberg* (2023), pp. 61 ff.

[22] Art. 8.1 and 8.2 CETA; Ch. 1 EU-Viet Nam Investment Protection Agreement; Ch. 1 EU-Singapore Investment Protection Agreement; Art. 1 Czech Model BIT (2016); Art. 1 and 2 Slovakia Model BIT (2019); Art. 1 and 2 Dutch Model BIT (2019); Art. 1–3 Belgium-Luxemburg Economic Union Model BIT (2019); Art. 1–3 Italian Model BIT (2022); Art. 1 Austria-Kyrgyzstan BIT (2016); Art. 1 Cambodia-Hungary BIT (2016); Art. 1 and 2 Slovakia-UAE BIT (2016); Art. 1 and 2 Iran-Slovakia BIT (2016); Art. 1 Hungary-Iran BIT (2018); Art. 1 Hungary-Tajikistan BIT (2017); Art. 1 and 2 Lithuania-Turkey BIT (2018); Art. 1 Belarus-Hungary BIT (2019); Art. 1–3 Côte d'Ivoire-Portugal BIT (2019); Art. 1 Cabo Verde-Hungary BIT (2019); Art. 1 Hungary-Kyrgyzstan BIT (2020); Art. 1 Hungary-UAE BIT (2021); Art. 1 Hungary-Oman BIT (2022). Notable exceptions are some of the Member States' earlier (Model) BITs, such as: Czech Model BIT (2016); Belgium-Luxemburg Economic Union Model BIT (2019); Austria-Kyrgyzstan BIT (2016); Cambodia-Hungary BIT (2016); Slovakia-UAE BIT (2016); Iran-Slovakia BIT (2016); Hungary-Tajikistan BIT (2017).

of State aid or requesting its reimbursement where such action stems from an administrative or judicial decision.[23]

The Most Favoured Nation (MFN) standard is an example for almost full convergence. CETA clearly limits the scope of the MFN clause vis-à-vis the old gold standard. Member States' BITs used to include an unqualified MFN clause, which required host States to extend to foreign investors treatment no less favourable than that given to any third country. Some arbitral tribunals interpreted these provisions quite broadly, allowing the substantive and procedural standards contained in other BITs concluded by the host State with third countries to be imported to an agreement with less favourable standards.[24] Article 8.7 CETA clarifies the intended scope of the MFN clause by explicitly excluding the importation of substantive and procedural standards contained in other agreements.

This exclusion is now also expected of the Member States in their own agreements. Accordingly, the Commission's implementing decisions explicitly require Member States to provide in their BITs for

> "most-favoured nation treatment that would prevent the importation of standards of treatment and procedural rights from other investment agreements, and that would not require [the Member State] to extend to investors of the other Party the benefit of the treatment resulting from a process of economic integration."[25]

Recent Member States' BITs closely follow this instruction given by the Commission. By way of example, the 2016 Iran-Slovakia BIT still used the old gold standard, including an unqualified MFN provision in Article 4(1) thereof. Treaty practice started to change shortly thereafter – most BITs concluded after 2016 (and all BITs concluded since 2019) follow the EU approach by clarifying "for greater certainty" that "procedures for the resolution of investment disputes" and "substantive obligations" in other international investment treaties do not in themselves constitute "treatment" under the MFN provision.[26]

With regard to the exceptions from the MFN standard, there are minor differences between the central and decentral approach. CETA contains an exception for the recognition, accreditation and certification of services and the respective suppliers, which can also be found in the Model Clauses but not yet in many Member States' (Model) BITs.[27] The latter contain, however, additional exceptions for beneficial treatment granted from a process of economic integration or from an

23 Art. 8.9(4) CETA; Art. 2.2 EU-Singapore Investment Protection Agreement; Art. 4(4) Slovak Model BIT (2019); Art. 2(4) Dutch Model BIT (2019); Art. 6(4) Italian Model BIT (2022); Art. 4(4) Hungary-Iran BIT (2018); Art. 3(4) Lithuania-Turkey BIT (2018); Art. 3(3) Belarus-Hungary BIT (2019); Art. 6(5) Côte d'Ivoire-Portugal BIT (2019); Art. 3(3) Cabo Verde-Hungary BIT (2019); Art. 3(3) Hungary-Kyrgyzstan BIT (2020); Art. 3(2) Hungary-UAE BIT (2021); Art. 3(4) Hungary-Oman BIT (2022).

24 *Bungenberg and Reinisch* (2021), p. 464 f.

25 See Commission Implementing Decision of 13 October 2022 authorising Hungary to open formal negotiations to amend its bilateral investment agreement with, respectively, the Republic of Albania, the Argentine Republic, the Republic of Cuba, the Republic of Moldova, the Republic of Paraguay, the Swiss Confederation, the Eastern Republic of Uruguay, the Republic of Turkey, and the Republic of Uzbekistan.

26 See Art. 3(3) Hungary-Iran BIT (2017); Art. 4(3) Belarus-Hungary BIT (2019); Art. 8(2) Cote d'Ivoire-Portugal BIT (2019); Art. 4(3) Cabo Verde-Hungary BIT (2019); Art. 4(3) Hungary Kyrgyzstan BIT (2020); Art. 4(3) Hungary-United Arab Emirates BIT (2021); Art. 4(4) Hungary-Oman BIT (2022).

27 Art. 8.7(3) CETA; At the decentral level, this exception can only be found in Art. 5(3) lit. c Italian Model BIT (2022).

international agreement relating to (double) taxation.[28] CETA used to mention these exceptions in Article X.8(3)(a) and (b) of the 2013 Draft, but they did not make it into the final treaty text.[29] Instead, they can now be found somewhere else within the agreement. The exception for taxation treaties migrated to the general CETA Chapter on Exceptions (Article 28.7(6) CETA) and an "obscure" version of the exception for economic integration processes moved to an annex as envisaged by Article 8.15 CETA.[30]

Investor-State dispute settlement (ISDS) is a special case. The EU follows a rather atypical approach in its own investment agreements by providing for a permanent investment court structure (the so-called Investment Court System, ICS). Member States do not negotiate an ICS in their respective BITs but continue to provide for traditional arbitration for the resolution of investor-State disputes. In fact, it is questionable whether this approach of establishing a permanent court structure would be even eligible to be copied by Member States in their own BITs, as long as they negotiate individually instead of collectively with third countries.[31] In any case, even though the central and decentral approaches are clearly divergent in this regard, certain elements of procedural modernization can be found in both EU and Member States' agreements (and in the Model Clauses).[32] Examples of procedural convergence are:

- the reference to the UNCITRAL Rules on Transparency (or a comparable level of transparency);[33]
- the commitment to make investment disputes subject to a future appellate mechanism;[34]

[28] Art. 3(5) and (6) Czech Model BIT (2016); Art. 3(5) and (6) Belgium-Luxemburg Economic Union Model BIT (2019); Art. 5(3) Italian Model BIT (2022); Art. 3(4) Austria-Kyrgyzstan BIT (2016); Art. 3(5) Cambodia-Hungary BIT (2016); Art. 3(5) Hungary-Iran BIT (2018); Art. 3(3) and (5) Hungary-Tajikistan BIT (2017); Art. 5(8) lit. b Lithuania-Turkey BIT (2018); Art. 4(4) and (6) Belarus-Hungary BIT (2019); Art. 9 Côte d'Ivoire-Portugal BIT (2019); Art. 4(4) and (6) Cabo Verde-Hungary BIT (2019); Art. 4(4) and (6) Hungary-Kyrgyzstan BIT (2020); Art. 4(4) and (6) Hungary-UAE BIT (2021); Art. 4(5) and (7) Hungary-Oman BIT (2022).

[29] *Reinisch* (2022), mn. 34.

[30] Ibid., mn. 37 f.

[31] On the idea of a plurilateral re-negotiation, see *Bungenberg/Böhme* (2022), p. 639; *Griebel* (2010), p. 213.

[32] The existence of procedural convergence becomes apparent when analysing certain similarities between CETA, the EU-Singapore IPA and almost all of the Member States' (Model) BITs. It is noteworthy, however, that those similarities do not exist with regard to the EU-Viet Nam IPA. This could simply be reflective of the nature of IIAs, highlighting that the EU can only streamline its investment policy to the extent that international partners are willing to agree to.

[33] Art. 8.36 CETA; Art. 3.16 and Annex 8 EU-Singapore IPA; Art. 8.5 Czech Model BIT (2016); Art. 15.7 Slovak Model BIT (2019); Art. 20(13) Dutch Model BIT (2019); Art. 19(O.1) Belgium-Luxemburg Economic Union Model BIT (2019); Art. 25(1) Italian Model BIT (2022); Art. 14(3) Austria-Kyrgyzstan BIT (2016); Art. 22(2) Slovakia-UAE BIT (2016); Art. 14(4) Iran-Slovakia BIT (2016); Art. 14(13) Hungary-Iran BIT (2018); Art. 12(15) Lithuania-Turkey BIT (2018); Art. 11(2) Belarus-Hungary BIT (2019); Art. 20(12) Côte d'Ivoire-Portugal BIT (2019); Art. 11 Cabo Verde-Hungary BIT (2019); Art. 11 Hungary-Kyrgyzstan BIT (2020); Art. 18 Hungary-UAE BIT (2021); Art. 12 Hungary-Oman BIT (2022).

[34] Art. 8.29 CETA; Art. 3.12 EU-Singapore IPA; Art. 8(17) Czech Model BIT (2016); Art. 28(4) Slovak Model BIT (2019); Art. 15(1) Dutch Model BIT (2019); Art. 21(2) Belgium-Luxemburg Economic Union Model BIT (2019); Art. 24(6) Italian Model BIT (2022); Art. 24(4) Iran-Slovakia BIT (2016); Art. 14(14) Hungary-Iran BIT (2018); Art. 19(5) Lithuania-Turkey BIT (2018); Art. 9(11) Belarus-Hungary BIT (2019); Art. 25(1) Côte d'Ivoire-Portugal BIT (2019); Art. 9(11) Cabo Verde-Hungary BIT (2019); Art. 9(11) Hungary-Kyrgyzstan BIT (2020); Art. 24(6) Hungary-UAE BIT (2021); Art. 10(11) Hungary-Oman BIT (2022).

- the clarification that the domestic law of the EU or the national law of the Member States can be used to interpret the consistency of measures with investment agreements but is not part of the applicable law;[35] and
- the reference to arbitrators' ethics, sometimes to a specific Code of Conduct.[36]

In sum, it is possible to identify a high degree of convergence between the central and decentral approach with regard to both substantive and procedural elements. Admittedly, (Member States') BITs have always developed a surprisingly uniform structure with similar wordings and guiding principles despite their bilateral nature.[37] In fact, the old European gold standard describes a largely uniform European approach to international investment law.[38] What is new is that this common approach is now coordinated at the central level, but mainly implemented at the decentral level. In the past, EU Member States pursued similar investment policies by their own will, without any coordination among them. Today, the Commission – influenced *inter alia* by the European Parliament – is controlling as well as ordering the EU international investment policy at both the central and decentral level, thus limiting Member States' own negotiation leeway.

In addition to these examples of (almost full) convergence, there is reduced room for Member States' own national investment policies, either diverging from the EU approach by staying in line with the old European gold standard [**II.2**] or by enhancing modern EU standards even further [**II.3**].

2. Divergence from the EU approach

One clear divergence between the central and decentral approach was already mentioned in the previous section: whereas the EU includes permanent court structures in its own investment agreements, Member States' BITs continue to rely on traditional investor-State arbitration, thus following the old European gold standard. Hence, the EU appears to follow a twofold approach when it comes to Investor-State Dispute Settlement (ISDS). Within UNCITRAL Working Group III, the Commission argues for a full and incremental reform of ISDS with a view of establishing a Multilateral Investment Court (MIC) in the long run. This long-term goal is also reflected in recent Member States' BITs. An example is Article 9(1) of the Hungary-San Marino BIT (2022), providing that

> "[t]he Contracting Parties shall pursue with each other and other trading partners the establishment of a multilateral investment tribunal and appellate mechanism for the

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35 Art. 8.31 CETA; Art. 3.13(2) EU-Singapore IPA; Art. 8(14) Czech Model BIT (2016); Art. 19(2) Slovak Model BIT (2019); Art. 20(12) Dutch Model BIT (2019); Art. 26 Italian Model BIT (2022); Art. 18(2) Slovakia-UAE BIT (2016); Art. 14(10) Hungary-Iran BIT (2018); Art. 12(13) Lithuania-Turkey BIT (2018); Art. 9(8) Belarus-Hungary BIT (2019); Art. 18(2) Côte d'Ivoire-Portugal BIT (2019); Art. 9(8) Cabo Verde-Hungary BIT (2019); Art. 9(8) Hungary-Kyrgyzstan BIT (2020); Art. 11(2) Hungary-UAE BIT (2021); Art. 10(8) Hungary-Oman BIT (2022).

36 Art. 8.30 CETA; Art. 3.11 EU-Singapore IPA; Art. 8(2) lit. c Czech Model BIT (2016); Art. 18(4) Slovak Model BIT (2019); Art. 20(6) Dutch Model BIT (2019); Art. 19(G.5) Belgium-Luxemburg Economic Union Model BIT (2019); Art. 27 Italian Model BIT (2022); Art. 14(1) lit. c (iii) Austria-Kyrgyzstan BIT (2016); Art. 8(3) lit. c Cambodia-Hungary BIT (2016); Art. 19(8) Slovakia-UAE BIT (2016); Art. 18(5) Iran-Slovakia BIT (2016); Art. 14(7) Hungary-Iran BIT (2018); Art. 8(2) lit. c Hungary-Tajikistan BIT (2017); Art. 12(8) Lithuania-Turkey BIT (2018); Art. 9(9) Belarus-Hungary BIT (2019); Art. 23 Côte d'Ivoire-Portugal BIT (2019); Art. 9(9) Cabo Verde-Hungary BIT (2019); Art. 9(9) Hungary-Kyrgyzstan BIT (2020); Art. 14 Hungary-UAE BIT (2021); Art. 10(9) Hungary-Oman BIT (2022).

37 *Schill* (2009), p. 65.

38 On this, see *Gaffney/Akçay* (2015), pp. 186 ff.

> resolution of investment disputes. Upon entry into force between the Contracting Parties of an international agreement providing for a multilateral investment tribunal and/or a multilateral appellate mechanism applicable to disputes under this Agreement, the relevant parts of this Agreement shall cease to apply".

Similar clauses can be found in other recent Member States' (Model) BITs[39] and the Commission's Model Clauses. Contemporaneously, these instruments continue to refer to traditional investor-State arbitration combined with elements of procedural modernisation.[40] In other words, the decentral approach allows for old-fashioned arbitration "wearing new clothes".

Another clear example of divergence between the central and decentral approach is market access. Recent Member States' BITs unequivocally deviate from the EU approach in this regard. Traditionally, International Investment Agreements (IIAs) have only provided for investment protection once the operation has been established in the host State (Controlled Market Access Model).[41] In addition, many IIAs provide that foreign investment is subject to the laws and regulations of the host State, thus heavily regulating what can and cannot enter the domestic market and under what conditions.[42] Some IIAs are slightly less restrictive with regard to market access, extending the non-discrimination principle to the pre-establishment phase (MFN and National Treatment-Based Entry Model).[43] Under these IIAs, the entry of foreign investment may only be regulated on a non-discriminatory basis.

CETA contains a unique market access clause in Article 8.4, which goes a step further with additional commitments by the Contracting Parties for the pre-establishment phase.[44] The first paragraph of Article 8.4 CETA lists a series of measures which are prohibited with regard to the pre-establishment phase, including limitations on

- the number of enterprises that may carry out a specific economic activity;
- the total value of transactions or assets;
- the total number of operations or the total quantity of output;
- the participation of foreign capital in terms of maximum percentage limit on foreign shareholding;
- the total number of natural persons that may be employed in a particular sector.

These prohibited measures come *inter alia* in the form of numerical quotas, monopolies, or the requirement of an economic needs test, and constitute an obstacle to the overall goal of international trade and investment law to achieve a broad level of liberalization.[45] CETA's broad market access obligations go further than the level of liberalization currently provided under the

[39] Art. 8(17) Czech Model BIT (2016); Art. 28(4) Slovak Model BIT (2019); Art. 15(1) Dutch Model BIT (2019); Art. 21(2) Belgium-Luxemburg Economic Union Model BIT (2019); Art. 24(6) Italian Model BIT (2022); Art. 24(4) Iran-Slovakia BIT (2016); Art. 14(14) Hungary-Iran BIT (2018); Art. 19(5) Lithuania-Turkey BIT (2018); Art. 9(11) Belarus-Hungary BIT (2019); Art. 25(1) Côte d'Ivoire-Portugal BIT (2019); Art. 9(11) Cabo Verde-Hungary BIT (2019); Art. 9(11) Hungary-Kyrgyzstan BIT (2020); Art. 24(6) Hungary-UAE BIT (2021); Art. 10(11) Hungary-Oman BIT (2022).

[40] See supra Section 2.1.

[41] *Shan and Zhang* (2014), pp. 439 f.; *de Mestral and Vanhonnaeker* (2022), p. 169; *Bungenberg and Blandfort* (2020), p. 161.

[42] *De Mestral and Vanhonnaeker* (2022), p. 162, 169.

[43] Ibid., pp. 169 f.

[44] *Bungenberg and Reinisch* (2021), p. 461.

[45] *See Gómez Palacio and Muchlinski* (2008), pp. 228 f.

General Agreement on Trade in Services (GATS) as part of the law of the World Trade Organization (WTO). The GATS provides for a positive-list approach, creating the right to establishment only for those sectors, where express commitments are made by the Contracting Parties. CETA opts for a negative-list approach instead. Accordingly, the measures prohibited under Art. 8.4 CETA extend to all sectors except those carved out in the Contracting Parties' schedules under Annex II.[46]

At the same time, this progressive liberalization under CETA is limited through the second paragraph of Article 8.4, which lists a series of measures potentially impeding market access, which are deemed consistent with the first paragraph.[47] The regulatory practices mentioned in paragraph 2 aim *inter alia* at ensuring fair competition in sensitive sectors, such as energy, transport and telecommunications or the conservation and protection of natural resources and the environment. Moreover, a Contracting Party's decision to deny market access to an investor is not subject to ISDS, whereas State-to-State dispute settlement remains available. In sum, CETA's market access clause under the investment chapter may be deemed the most progressive of its kind but still remains subject to certain limitations that preserve States' sovereign regulatory autonomy.[48]

In conformity with the development described in the previous section, one could have expected that the Member States would equally be required to adapt their market access policy under investment agreements convergent to the EU approach, thus making express commitments for the pre-establishment phase in their BITs. However, the topic of market access is not dealt with at all at the decentral level. To the contrary, the Commission's Model Clauses merely clarify that Member States' BITs should not cover the pre-establishment phase or matters of market access. In a uniform manner, *none* of the Member States' BITs concluded or the Model BITs adopted since 2016 follow the EU approach. By contrast, all of them stick to the old European gold standard, thus subjecting the admission of foreign investment to domestic laws. By way of example, Article 2(1) of the Austria-Kyrgyzstan BIT (2016) merely provides that

> "[e]ach Contracting Party shall, according to its laws and regulations, promote and admit investments by investors of the other Contracting Party."

A similar clause is included in recent Hungarian BITs, for instance Article 2(1) of the Hungary-Oman BIT (2022), whereby

> "[e]ach Contracting Party shall encourage and create favourable conditions for Investors of the other Contracting Party to make Investments in its Territory and shall admit such Investments in accordance with its laws and regulations."[49]

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46 *De Mestral and Vanhonnaeker* (2022), p. 172.

47 Ibid.

48 *Bungenberg and Reinisch* (2021), p. 461.

49 See also other Member States' BITs: Art. 2(1) Austria-Kyrgyzstan BIT (2016); Art. 2(1) Cambodia-Hungary BIT (2016); Art. 2(1) and (2) Slovakia-United Arab Emirates BIT (2016); Art. 2(5) Iran-Slovakia BIT (2016); Art. 12(2) Hungary-Iran BIT (2017); Art. 2(1) Hungary-Tajikistan BIT (2017); Art. 2(4) Lithuania-Turkey BIT (2018); Art. 2(1) Belarus-Hungary BIT (2019); Art. 4(1) Côte d'Ivoire-Portugal BIT (2019); Art. 2(1) Cabo Verde-Hungary BIT; Art. 2(1) Hungary-Kyrgyzstan BIT (2020); Art. 2(1) Hungary-United Arab Emirates BIT (2021); and Art. 2(1) Hungary-Oman BIT (2022).

The Italian Model BIT (2022) is even more definite when it comes to market access.[50] Accordingly, Article 3 thereof clarifies "for greater certainty" that the agreement "provides only post-establishment protection and does not cover the pre-establishment phase or matters of market access", thus following the same wording as the Model Clauses. These examples show that Member States' (Model) BITs do not provide for international commitments with regard to market access, subjecting the pre-establishment phase entirely to domestic law and thus significantly deviating from the EU approach.

This disparity between negotiations at the central and decentral level is, however, in line with the EU's investment policy. Naturally, the commitments made in EU investment agreements, which are concluded by both the EU and its Member States, extend to the entire EU territory, and thus, also to the territory of the Member States. However, they are only made with regard to selected third countries, such as Canada, which the EU trusts enough to make such a commitment. Notably, no provisions on market access were included in the EU-Singapore or EU-Vietnam IPAs either – CETA remains an exception so far. The Commission's implementing decisions for Member States' BITs equally do not mention market access, and the Model Clauses limit investment protection to the post-establishment phase. In other words, Member States are not expected to include a similarly broad market access clause as followed by the EU in CETA.

Since provisions on market access of foreign direct investments unequivocally fall under the Common Commercial Policy (CCP),[51] the EU could have demanded its Member States to adopt a more progressive stance in their BITs. However, the decision to carve out market access of the harmonised EU approach is consistent with other EU instruments, in particular its cooperative screening mechanism established under Regulation 2019/452[52] (EU Screening Regulation). The purpose of the EU Screening Regulation is stated in Article 2(4) thereof, according to which the Regulation sets out the terms to "assess, investigate, authorise, condition, prohibit or unwind foreign direct investments on grounds of security or public order". In accordance with Article 3(1) of the EU Screening Regulation, "Member States may maintain, amend or adopt mechanisms to screen foreign direct investments in their territory on the grounds of security or public order". Hence, the general responsibility for the screening of foreign investment lies not with the EU but with the Member States, who may decide whether they want to establish a respective administrative procedure within their national laws.[53] In light of this screening regime, the decision to allow Member States to keep their respective standard with regard to market access under investment agreements appears to be a consistent approach. The Member States may decide for themselves which foreign direct investments are able to access their markets, and which investments pose a threat to their national security or public order. Similarly, they may decide for themselves whether they want to establish a national screening mechanism in accordance with the EU Screening Regulation.

As this section has shown, despite the general trend towards a harmonised EU approach, there is still room for divergent approaches at the central and decentral level. In addition, there is also room

[50] See also other Model BITs: Art. 2(1) of the Czech Model BIT (2016); Art. 3(1) of the Slovak Model BIT (2019); Art. 3(1) and (2) Dutch Model BIT (2019); Art. 4(1) Belgium-Luxembourg Economic Union Model BIT (2019); and Art. 3 Italian Model BIT (2022).

[51] *Shan and Zhang* (2010), pp. 1049 ff.; *Herrmann and Müller-Ibold* (2016), pp. 646 f.; *Bungenberg* (2010), p. 143.

[52] Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union.

[53] *Bungenberg and Blandfort* (2020), p. 171.

for an EU-plus approach for those Member States that want to go beyond EU standards, as will be shown in the ensuing section.

3. EU-plus Approach

Several of the recent Member States' (Model) BITs contain provisions on the protection of non-investment policy interests that go beyond the standards embodied in EU investment agreements. These non-investment policy interests mostly reflect the areas of sustainable environmental and social development, which have become more and more important in international investment law throughout the last decade.[54] Recent IIAs reflect this trend by safeguarding the host State's regulatory space with regard to the protection of the environment, labour standards and human rights, among others. The EU's international investment policy is in line with this overall trend by reaffirming the Contracting Parties' right to regulate in Article 8.9 CETA to achieve legitimate policy objectives, such as "the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity".[55] This list entails a two-fold guarantee for CETA's Contracting Parties to be able to use regulation to strengthen public policy objectives and to protect public welfare from negative aspects of inbound investments.[56]

CETA's preamble specifically highlights the Contracting Parties' right to regulate in the sense of Article 8.9[57] and demands the implementation of the agreement to be consistent with the enforcement and enhancement of the Contracting Parties' levels of labour and environmental protection.[58] In addition to this, the Contracting Parties reaffirm their "commitment to promote sustainable development",[59] explicitly recognise their "strong attachment to democracy and to fundamental rights",[60] and encourage enterprises operating within their territory "to respect internationally recognized guidelines and principles of corporate social responsibilities".[61]

Furthermore, CETA Chapters 23 ("Trade and Labour") and 24 ("Trade and Environment") reaffirm the Contracting Parties' right to regulate with regard to labour and environmental standards. The fact that the titles of these chapters do not specifically refer to investment should not deceive their relevance in this regard. Both chapters include specific provisions regarding the right to regulate, seeking to "ensure that […] laws and policies provide for and encourage high levels of […] protection"[62], and recognizing "that it is inappropriate to encourage trade or investment by weakening or reducing the levels of protection afforded in their […] law"[63]. Hence, the chapters on labour and environment do not only reaffirm the right to regulate but oblige the Contracting Parties to abstain from lowering their level of protection in order to attract foreign investment.[64] Despite the fact that CETA does not include specific investor obligations regarding

54 See amongst others *Nowrot* (2014), pp. 612–644; *Chi* (2017).

55 Art. 8.9 CETA, para. 1.

56 Schacherer (2022), p. 243.

57 CETA Preamble, Recitals 6 and 8.

58 CETA Preamble, Recital 11.

59 CETA Preamble, Recital 9.

60 CETA Preamble, Recital 4.

61 CETA Preamble, Recital 10.

62 Art. 23.2 and Art. 24.3 CETA.

63 Art. 23.3 and Art. 24.5 CETA.

64 *Titi* (2019), p. 162; *Schacherer* (2022), p. 240.

the protection of labour and the environment, the given legal construction is viewed as significant and "beyond minimum standards"[65]. Furthermore, Chapter 22 indicates that

> "the Parties agree that the rights and obligations under Chapters Twenty-Three (Trade and Labour) and Twenty-Four (Trade and Environment) are to be considered in the context of this Agreement."[66]

Hence, even though there is no explicit reference to sustainable development in CETA's Investment Chapter, the presence of these policy objectives in the Preamble and Chapters 22–24 indicate that they "will most likely have an impact on the interpretation of the investment protection standards under CETA".[67] CETA's direct reference to the right to regulate and its indirect inclusion of sustainable development into the Investment Chapter constitute a "ground-breaking change" in comparison to the old European gold standard, showing the EU's attempt to safeguard host States' regulatory autonomy.[68] Traditional Member States' BITs, by contrast, barely touched upon value-based policy objectives, exclusively focusing on investment protection standards.

The EU's approach of preserving extensive policy space, limiting investment protection for the benefit of sustainable environmental and social development, has equally found its way into the current landscape of Member States' BITs. In some of those BITs, the reservation of regulatory space is implemented through "General Exceptions" clauses with a focus on financial stability and essential security interests.[69] The majority of the analysed (Model) BITs , however, go a step further by including a clause on the right to regulate that strongly resembles the wording of Article 8.9 CETA.[70] Additionally, largely all (Model) BITs contain CETA-like best endeavour positions and clauses that prohibit lowering environmental and labour standards to attract foreign investment.[71] By way of example, Article 3(2) of the Slovak Model BIT (2019) provides that

> "[t]he Contracting Parties recognise that it is inappropriate to weaken or reduce the level of protection provided by domestic health, safety, labour or environmental laws, regulations or standards with the sole intention to encourage investment. (…)".

However, even though Member States' (Model) BITs are largely convergent with the EU approach when it comes to the right to regulate, the Commission's implementing decisions appear to require

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[65] *Bartels* (2017), p. 4.

[66] Art. 22.2 CETA.

[67] *Schacherer* (2019), p. 236.

[68] *Overduin* (2021), para. 15.61.

[69] Art. 13 Cambodia-Hungary BIT (2016); Art. 13 Slovakia-UAE BIT (2016); Art. 11 Iran-Slovakia BIT (2016); Art. 13 Hungary-Tajikistan BIT (2017); Art. 16 Belarus-Hungary BIT (2019); Art. 16 Hungary-San Marino BIT (2022).

[70] Art. 12 Czech Model BIT (2016); Art. 4 Slovak Model BIT (2019); Art. 2 Dutch Model BIT (2019); Art. 17 Belgium-Luxemburg Economic Union Model BIT (2019); Art. 6 Italian Model BIT (2022); Art. 4 Hungary-Iran BIT (2017); Art. 3 Lithuania-Turkey BIT; Art. 6 Côte d'Ivoire-Portugal BIT (2019); Art. 3 Cabo Verde-Hungary BIT (2019); Art. 3 Hungary-Kyrgyzstan BIT (2020); Art. 3 Hungary-UAE BIT (2021); Art. 3 Hungary-Oman BIT (2022).

[71] Art. 6 Dutch Model BIT (2019); Art. 15 Belgium-Luxemburg Economic Union Model BIT (2019); Art. 20 and 22 Italian Model BIT (2022); Art. 2(3) Cambodia-Hungary BIT (2016); Art. 12(1) and (2) Slovakia-UAE BIT (2016); Art. 10(1) and (2) Iran-Slovakia BIT (2016); Art. 2(6) Hungary-Iran BIT (2017); Art. 2(3) Hungary-Tajikistan BIT (2017); Art. 17(1) and (2) Lithuania-Turkey BIT; Art. 2(7) Belarus-Hungary BIT (2019); Art. 16 Côte d'Ivoire-Portugal BIT (2019); Art. 2 (8) Cabo Verde-Hungary BIT (2019); Art. 2(7) Hungary-Kyrgyzstan BIT (2020); Art. 2(7) Hungary-UAE BIT (2021); Art. 2(7) Hungary-Oman BIT (2022).

Member States to go a step further when it comes to sustainable development by including in their BITs

- "Provisions on climate change and clean energy transition in line with the Paris Agreement and relevant EU agreements and EU positions in ongoing negotiations;
- Prohibition of investment enhancement by lowering or relaxing domestic environmental or labour legislation and standards, or by failing to effectively enforce such legislation and standards;
- Provisions promoting human rights and international labour standards, as well as internationally recognized standards of responsible business conduct, such as the OECD Guidelines for Multinational Enterprises, the UN Guiding Principles on Business and Human Rights and the International Labour Organisation Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy".[72]

The Commission's Model Clauses go yet another step further in this regard, suggesting precise wording for the inclusion of provisions promoting these non-investment interests. The suggested preamble is similar to the one included in CETA and other EU agreements, referring *inter alia* to "sustainable development in the economic, social and environmental dimensions", "high levels of environmental and labour protection through relevant internationally recognised standards", and international commitments under "the Charter of the United Nations and having regard to the principles articulated in the Universal Declaration of Human Rights". In addition, the Model Clauses contain provisions on "General Exceptions", "Security Exceptions" and "Temporary Safeguard Measures", which all appear to be strongly influenced by Articles XIX to XXI of the General Agreement on Tariffs and Trade (GATT). Furthermore, the Model Clauses include provisions on "Corporate Social Responsibility and Responsible Business Conduct", "Investment and Environment", "Investment and Climate Change", "Investment and Labour" as well as an obligation for the Contracting Parties' to enter into dialogue and cooperate on investment-related sustainable development issues.

It is notable that the instructions given at the central level through the Commission's implementing decisions and the Model Clauses appear to go beyond the standards negotiated by the EU within its own agreements. A particular issue that arises under CETA is that it follows a rather fragmented approach that leaves room for interpretation regarding the interdependence of certain chapters and specific clauses. In fact, CETA's Investment Chapter does not explicitly refer to sustainable development in its operative part. Instead, it mostly deals with non-economic concerns in its preamble and other chapters. Even though they are relevant for the interpretation of the Investment Chapter in light of its context and purpose, no direct legal obligations are created that way.[73] At the decentral level, sustainable development is dealt with in the agreement itself, therefore leaving less interpretative uncertainty *inter alia* about the consideration of environmental and labour standards in relation to investment protection standards.[74]

Arguably, CETA's fragmented approach is partially owed to its overall structure as a comprehensive economic and trade agreement. However, the EU-Singapore and EU-Vietnam

72 See Commission Implementing Decision C(2022)7177 of 13 October 2022, Art. 2(1)(h).

73 *Kriebaum* (2022), pp. 8 f.; *Böhme* (2022), p. 256 f.

74 For a detailed analysis on how the presence of sustainable development aspects within CETA's treaty body and connected instruments impacts the interpretation of CETA, see *Schacherer* (2019), pp. 207–238.

IPAs equally fall short of provisions on non-investment interests despite their condensed legal structure. In fact, in both agreements, the term "sustainable development" can only be found in the preamble but nowhere in their operative part. Similar to CETA, there is merely a provision whereby the Contracting Parties reaffirm their right to regulate.[75] In contrast, some of the recent Member States' (Model) BITs include standards on the protection of non-investment interests that go beyond the CETA-like use of positive reinforcement, the recognition of their importance, cooperation, public awareness and dialogue. By way of example, numerous Member States' (Model) BITs use a specific clause under the heading "Environmental [and Labour] Rights and other Standards" which stands out by imposing standards of conduct on protected investors in the following terms:

> "Investors and investments *should* apply national, and internationally accepted, standards of corporate governance for the sector involved, in particular for transparency and accounting practices. Investors and their investments *should* strive to make the maximum feasible contributions to the sustainable development of the Host State and local community through appropriate levels of socially responsible practices."[76] [emphasis added]

Another example is Article 7(1) of the 2019 Dutch Model BIT, which provides that

> "[i]nvestors and their investment *shall* comply with domestic laws and regulations of the host state, including laws and regulations on human rights, environmental protection and labor laws". [emphasis added]

These clauses are notable because they directly impose standards of conduct on protected investors. Not even the Commission's Model Clauses suggest wording in that direction. The Model Clauses' extensive provisions on the environment, climate change, and corporate social responsibility only contain obligations for the Contracting Parties but do not directly address protected investors. EU investment agreements are even less progressive in this regard – they mostly contain language of mere positive reinforcement in their preamble and refer to the Contracting Parties' right to regulate. Certain Member States' (Model) BITs, by contrast, go beyond EU standards by providing the potential for a significant step towards genuine investor obligations.

This difference is important considering that only legally binding obligations can be enforced.[77] The language used in the provisions of the Member States' (Model) BITs mentioned above could be used as legal basis for enforcement, for instance, through counter-claims by the host State or by rendering the treaty-based investment protection conditional upon the observance of these obligations.[78] Article 7(4) of the 2019 Dutch Model BIT refers to the home State's jurisdiction as another possible means of enforcement in case the investor's decisions made in relation to its

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75 Art. 2.2(1) EU-Singapore IPA and Art. 2.2(1) EU-Vietnam IPA.

76 Art. 10(3) Iran-Slovakia BIT (2016); Art. 17(3) Lithuania-Turkey BIT (2018); Art. 12(3) Slovakia-UAE BIT (2016) contains the first sentence of the quoted clause. Art. 17 Côte d'Ivoire-Portugal BIT (2019) contains a Corporate Social Responsibility (CSR) clause with slightly softer wording, obliging the Contracting Parties to "encourage investors […] to voluntarily incorporate in their activities internationally recognized corporate social responsibility standards, such as the OECD […] Guidelines for Multinational Enterprises".

77 *Böhme* (2022), p. 259.

78 *Kriebaum* (2018), p. 36.

investment lead to "significant damage, personal injuries or loss of life in the host state".[79] Finally, another option of enforcement is to take the investor's non-compliance into account at the quantum stage.[80] This approach is followed in Article 23 of the 2019 Dutch Model BIT, which reads:

> "Without prejudice to national administrative or criminal law procedure, a Tribunal, in deciding the amount of compensation, is expected to take into account non-compliance by the investor with its commitments under the UN Guiding Principles on Business and Human Rights, and the OECD Guidelines for Multinational Enterprises".[81]

As a result, there seems to be room for an EU-plus approach for those Member States that want to go beyond the standards enshrined in EU investment agreements. Some of these standards even go beyond what is required in the Commission's implementing decisions or recommended in the Model Clauses.

III. Conclusion

The main goal of this contribution was to shed light on the way the EU is currently conducting its international investment policy. The sources thereof span an ever-more differentiated net of FTAs and IPAs, informal communications such as the Model Clauses, the Commission's Implementing Decisions as well as Member States' (Model) BITs. Since the EU has seemingly come to a dead-end with regard to the ratification of FTAs and IPAs, the implementation of the EU's international investment policy has mostly shifted from a central to a decentral approach, with Member States being the main driver of negotiations. Hence, in order to decipher a "European" investment policy, it was deemed necessary to compare the former central approach with the current decentral approach. The analysis of the aforementioned policy instruments has resulted in three key takeaways:

1) Member States' (Model) BITs show a large amount of *convergence* with the EU's FTAs and IPAs, indicating that the Member States are currently implementing *European* investment policy.
2) In some aspects, the Member States' (Model) BITs, the corresponding Commission Implementing Decisions and the Model Clauses show *divergence* to the central EU approach seen in FTAs and IPAs.
3) Lastly, there seems to be potential for an *EU-plus approach*, which has so far materialised especially with regard to the promotion of value-based objectives through the Member States' own investment protection policies.

The sections above have highlighted how these aspects are reflected in the different investment policy instruments of the EU and its Member States. The reason for the described developments can be manifold. IIAs are a complex political matter by nature – a certain amount of deviance can be down to national trends within EU Member States as well as their negotiating partners. In

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[79] Art. 7(4) of the 2019 Dutch Model BIT reads: "[i]nvestors shall be liable in accordance with the rules concerning jurisdiction of their home State for the acts or decisions made in relation to the investment where such acts or decisions lead to significant damage, personal injuries or loss of life in the host state".

[80] *Böhme* (2022), p. 260.

[81] As noted by *Abel*, it is notable how Art. 23 of the Dutch Model BIT provides legally non-binding CSR norms with legal effect allowing tribunals to modify the calculation method of damages after evaluating investors' behaviour towards human rights. See *Abel* (2021), p. 227.

general, there seems to be a pattern of pragmatism in the landscape of European investment policy. Its implementation at the central level has not been the most successful in recent years. As a result, the Commission now uses the respective communications and legislative instruments to give guidance and authorisation to the Member States, which appear to be willing to "take the driver's seat". The fact that the analysis has shown some differing aspects does not necessarily mean that there is a lack of coordination between the EU's Member States and institutions. In contrast, the conclusion could be drawn that the EU's investment policy shows a certain amount of flexibility to account for the differences when negotiating at a central or decentral level. In particular, the described EU-plus approach highlights the potential for willing Member States to take further steps to establish new trends in international investment protection – paving the way for other Member States, the EU, or even third countries to follow.

Bibliography

ABEL, PATRICK, *International Investor Obligations - Towards Individual International Responsibility for the Public Interest in International Investment Law*, Nomos, 2022

BALTAG, CRINA; JOSHI, RIDDHI; DUGGAL, KABIR, *Recent Trends in Investment Arbitration on the Right to Regulate, Environment, Health and Corporate Social Responsibility: Too Much or Too Little?*, ICSID Review, 2023, pp. 1–41

BARTELS, LORAND, *Human Rights, Labour Standards and Environmental Standards in CETA*, University of Cambridge Legal Studies Research Paper Series, Paper No. 13/2017, 2017

BÖHME, BIANCA, *Enhancing Supply Chain Responsibilities through International Investment Agreements*, Zeitschrift für Europarechtliche Studien (ZEuS), 2022, Vol. 25(2), pp. 251–264

BUNGENBERG, MARC, *(Direct and Indirect) Expropriation and the Rule of Law*, in: Reinisch, August; Schill, Stephan (eds.), Investment Protection Standards and the Rule of Law, Oxford University Press, 2023, pp. 61–80

BUNGENBERG, MARC, *Europäische Internationale Investitionspolitik*, in: von Arnauld, Andreas; Bungenberg, Marc (eds.), Enzyklopädie Europarecht, Band 12: Europäische Außenbeziehungen, 2nd ed., Nomos, 2022, pp. 907–976

BUNGENBERG, MARC, *Going Global? The EU Common Commercial Policy After Lisbon*, in: Herrmann, Christoph; Terhechte, Jörg (eds.), European Yearbook of International Economic Law, Springer, 2010, pp. 123–151

BUNGENBERG, MARC; BLANDFORT, FABIAN, *Investment Screening – a new Era of European Protectionism?*, Law and Practice of the Common Commercial Policy, Brill Nijhoff, 2020, pp. 161–184

BUNGENBERG, MARC; BÖHME, BIANCA, *Under the Radar – The Return of Member States in EU Investment Policy*, Journal of International Economic Law, 2022, Vol. 25(4), pp. 627–642

BUNGENBERG, MARC; REINISCH, AUGUST, *A Paradigm Change: The CETA Investment Chapter*, Zeitschrift für Europarechtliche Studien (ZEuS), 2021, Vol. 24(3), pp. 437–484

CHI, MANJIAO, *Integrating Sustainable Development in International Investment Law: Normative Incompatibility, System Integration and Governance Implications*, Routledge, 2017

CREMONA, MARISE, Shaping EU Trade Policy Post-Lisbon: Opinion 2/15 of 16 May 2017, European Constitutional Law Review, 2018, Vol. 14(1), pp. 231–259

DE MESTRAL, ARMAND; VANHONNAEKER, LUKAS, *Article 8.4*, in: Bungenberg, Marc; Reinisch, August (eds.), CETA Investment Law, Beck/Hart/Nomos, 2022, pp. 159–174

DUMBERRY, PATRICK, *Article 8.10*, in: Bungenberg, Marc; Reinisch, August (eds.), CETA Investment Law, Beck/Hart/Nomos, 2022, pp. 256–276

EUROPEAN COMMISSION, Towards a Comprehensive European International Investment Policy, COM(2010) 343 final

EUROPEAN COMMISSION, Report from the Commission to the European Parliament and the Council on the Application of Regulation (EU) No 1219/2012, COM(2020) 132 final

GAFFNEY, JOHN P.; AKÇAY, ZEYNEP, *European Bilateral Approaches*, in: Bungenberg, Marc et al (eds.), International Investment Law - A Handbook, Beck/Hart/Nomos, 2015, pp. 186–201

GRIEBEL, JÖRN, *Die neue EU-Kompetenz für ausländische Direktinvestitionen – Chance für einen multilateralen Ansatz im internationalen Investitionsrecht*, in: Bungenberg, Marc et al (eds.), Internationaler Investitionsschutz und Europarecht, Nomos, 2010, pp. 211–22

GRILLER, STEFAN, *Die Gemeinsame Handelspolitik unter Kontrolle (sub-)nationaler Parlamente und Referenden*, in: Herrmann, Christoph (ed.), Europarecht, 2020, Beiheft 2, pp. 41–76

HERRMANN, CHRISTOPH; MÜLLER-IBOLD, TILL, *Die Entwicklung des europäischen Außenwirtschaftsrechts*, Europäische Zeitschrift für Wirtschaftsrecht (EuZW), 2016, Vol. 27(17), pp. 646–653

KRIEBAUM, URSULA, *Article 8.12*, in: Bungenberg, Marc; Reinisch, August (eds.), CETA Investment Law, Beck/Hart/Nomos, 2022, pp. 297–336

KRIEBAUM, URSULA, *International Investment Law and Sustainable Development*, in: McInereny-Langford, Siobhan; McCorquodale, Robert (eds), The Role of International Law in Development, 15/08/2022, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4298374 (last accessed 30 March 2023)

KRIEBAUM, URSULA, *Human Rights and International Investment Law*, in: Radi, Yannick (ed.), Research Handbook on Human Rights and Investment, Edward Elgar Publishing, 2018, pp. 13–40

NOWROT, KARSTEN, *How to Include Environmental Protection, Human Rights and Sustainability in International Investment Law*, The Journal of World Investment & Trade, 2014, Vol. 15(3-4), pp. 612–644

OVERDUIN, DORIEKE, *Investment Chapter in CETA: Groundbreaking or much ado about nothing?*, in: Mata Dona, José R.; Lavranos, Nikos (eds.), International Arbitration and EU Law, Edward Elgar Publishing, 2021, pp. 338–359

PALACIO, IGNACIO GÓMEZ; MUCHLINSKI, PETER T., *Admission and Establishment*, in: Muchlinski, Peter T.; Ortino, Federico; Schreuer, Christoph (eds.), The Oxford Handbook of International Investment Law, Oxford University Press, 2008, pp. 227–258

REINISCH, AUGUST, *Article 8.7*, in: Bungenberg, Marc; Reinisch, August (eds.), CETA Investment Law, Beck/Hart/Nomos, 2022, pp. 216–230

ROSAS, ALLAN, *Mixity and the Common Commercial Policy after Opinion 2/15*, in: Hahn, Michael; Van der Loo, Guillaume (eds.), Law and Practice of the Common Commercial Policy - The first 10 years after the Treaty of Lisbon, Brill, 2021, pp. 27–46

SCHACHERER, STEFANIE, *Article 8.9*, in: Bungenberg, Marc; Reinisch, August (eds.), CETA Investment Law, Beck/Hart/Nomos, 2022, pp. 236–255

SCHACHERER, STEFANIE, *The CETA Investment Chapter and Sustainable Development: Interpretative Issues*, in: Mbengue, Makane M; Schacherer, Stefanie (eds.), Foreign Investment Under the Comprehensive Economic and Trade Agreement (CETA), Studies in European Economic Law and Regulation, 2019, Vol. 15, pp. 207–238

SCHILL, STEPHAN, *The Multilateralization of International Investment Law*, Cambridge University Press, 2009

SHAN, WENHUA; ZHANG, SHENG, *Market Access Provisions in the Potential EU Model BIT: Towards a Global BIT 2.0*, Journal of World Investment & Trade, 2014, Vol. 15(3-4), pp. 422–453

SHAN, WENHUA; ZHANG, SHENG, *The Treaty of Lisbon: Half Way Toward a Common Investment Policy*, European Journal of International Law, 2011, Vol. 21, pp. 1049–1073

STIFTER, LUKAS, *Art. 8.44*, in: Bungenberg, Marc; Reinisch August (eds.), CETA Investment Law- Article-by-Article Commentary, Nomos, 2022, pp. 945–954

TITI, CATHARINE, *International Investment Law and the European Union: Towards a New Generation of International Investment Agreements*, European Journal of International Law, 2015, Vol. 16(3), pp. 639–661

TITI, CATHARINE, *The Right to Regulate*, in: Mbengue, Makane M; Schacherer, Stefanie (eds.), Foreign Investment Under the Comprehensive Economic and Trade Agreement (CETA), 2019, pp. 159–184