**EU investment law at crossroads: open strategic autonomy in times of heightened security concerns**

1. Introduction

On 18th February 2021 the EU launched its new international trade policy. At the heart of the Commission’s new vision of trade policy is the idea of open strategic autonomy, defined as ‘the EU’s ability to make its own choices and shape the world around it through leadership and engagement, reflecting its strategic interests and values.’[[1]](#footnote-1) As a global trade actor, the EU is committed to remain open to multilateralism and economic liberalisation, while assertively promoting and defending its strategic interests and values,[[2]](#footnote-2) if necessary through autonomous means.[[3]](#footnote-3) One of the key goals is ‘to bring real benefits to EU companies and workers, implement and enforce trade agreements, and level the playing field’[[4]](#footnote-4) through EU trade policy that is fairer more resilient to Europeans, and greener for the entire world.[[5]](#footnote-5)

This article will examine the key pillars of the EU’s open strategic autonomy with a focus on its foreign investment policy—a crucial part of the Union’s trade strategy. In particular, the article will explore three concrete manifestations of open and strategic autonomy in the recent articulations of the EU’s investment policy: 1) the creation of the EU-wide FDI screening framework, 2) the proposal of new investigative and enforcement powers in relation to foreign investment subsidies, and 3) the proposal of new mechanisms to promote, implement and enforce EU values on sustainability, including human rights, environment and labour standards. The overarching objective of the article is to explore what the shift towards open strategic autonomy reveal about the forces at play in the making of EU investment policy and, more broadly, about the evolving attitudes towards globalised trade and investment in times marked by geopolitical tensions and economic uncertainty.

The article will begin with situating the emerging pillars of EU investment policy in a rapidly evolving regulatory space marked by growing concerns over national security, resilience and geopolitical stability. Section 2 will introduce the recently adopted and proposed instruments of investment policy and critically examine their genesis and justifications. The shared feature of the recent developments in EU investment policy is a growing appetite for a tighter and more rigorous scrutiny of foreign investment. Given that European investment treaties have long promoted the ideals of liberalisation and neutrality, the new emphasis on strategic autonomy and stronger domestic controls on capital inflows marks a tectonic change in EU investment policy. Does a move towards new and extensive layers of scrutiny on inward foreign investment signify the EU’s disenchantment with the idea of neutrality and open markets and its desire to look inward? Is the EU’s new investment policy protectionist?

The article argues that the notion of protectionism does not serve as an appropriate analytical device to explain the multitude of forces behind the evolution of EU investment policy. Drawing on the history of international investment law, including fresh archival data, Section 3 will highlight that fears over foreign control in sensitive or strategic sectors of national economies have long been an animating force in policy debates in domestic, bilateral and multilateral settings. Already in the 1970s, concerted efforts were undertaken to establish an effective international machinery to address the political, economic and distributive effects of foreign investment on states and communities. These efforts ultimately dwindled, giving way to international instruments that prioritised investment protection and portrayed foreign investment exclusively through the lens of its benefits for the host economies and societies. The EU’s move towards open strategic autonomy in its foreign investment policy represents a departure from these long-reigning orthodoxies. Yet why the move and why now? Section 4 charts the role of competing ideologies in the making of the successive iterations of EU trade policy. It argues that despite the primacy of security concerns, the most recent reorientation of EU investment policy is a consequence of increasing re-politicisation of trade agenda caused by deepening economic inequalities and the anxiety over global instability and the pace of technological change. The new pillars of EU investment policy therefore envisage a closer involvement by the state in mediating the uneven effects of globalisation on domestic companies and communities and in addressing the concomitant security concerns. However, as discussed in Section 5, this shift in the prevailing views on the relationship between markets, states and society is not evenly reflected across all dimensions of the EU’s investment policy. International investment agreements, a crucial part of the international legal machinery, are conspicuously absent in the recent articulations by the Commission of its new vision of a more resilient, fairer and sustainable trade and investment. Section 5 explores various facets of this misalignment and highlights the ways in which it might jeopardise the pursuit by the EU of open strategic autonomy in relation to foreign investment.

1. Unpacking the new dimensions of EU investment policy: towards more scrutiny and enforcement
	1. A new FDI screening framework: tightening the scrutiny of inward investment on security grounds

The Commission’s vision of new investment policy places considerable emphasis on resilience as ‘a new compass’[[6]](#footnote-6) in the Union’s pursuit of open strategic autonomy. It is therefore unsurprising that one of the first steps towards more assertive and defensive investment policy took shape of the announcement by the Commission of its intention to launch an EU-wide mechanism for scrutinising inward foreign investment. An important dimension of resilience is the ability to anticipate and contain threats to national security.[[7]](#footnote-7) In the context of foreign investment policy, this manifests itself in tightening of the rules on admission of inward investment, principally through screening mechanisms. National foreign investment screening comprises measures and processes that aim to prevent foreign investor from acquiring or taking control over a company, if such acquisition or control present a threat to national security or public order of the host state.

While FDI screening mechanisms are not an entirely new development – states have been exercising control and scrutiny of inward foreign investment for decades – the reasons for the increased prominence of such mechanisms in recent times have changed. Prior to the Covid-19 crisis, one of the key concerns behind the move towards closer scrutiny of inward FDI was linked to growing Chinese foreign investment in the EU. Not only were many of these investments concentrated in critical infrastructure, such as airports and seaports and such sectors as manufacturing, energy and transport, but also a bulk of these investments came from state-owned Chinese firms.[[8]](#footnote-8) Concerns were also raised by investments from state-owned enterprises from Russia and the United Arab Emirates, whose combined share in takeovers and acquisitions in the EU rose significantly between 2007-2017.

The genesis of the EU FDI screening framework is often linked to the acquisition in 2016 KUKA Aktiengesellschaft, a German robotics company, by a Chinese firm. Together with other similarly high-profile acquisitions, including a much-publicised threat of a takeover of Danone and the failed attempt to takeover the German semiconductor company Aixtron,[[9]](#footnote-9) growing Chinese investments on the continent prompted ‘concerns about the risk of a loss of core high-industrial technology assets as strategic sectors transfer to countries lacking market economy status’.[[10]](#footnote-10) Alarms were raised that foreign direct investment was being used as a vehicle to ‘steal’ key technologies or to buy political influence in the states of Central and Eastern Europe[[11]](#footnote-11) and thus ‘divide and conquer’ the EU.[[12]](#footnote-12) Earlier efforts to put in place EU-level safeguards against foreign acquisitions had emphasised the economic dimension,[[13]](#footnote-13) framing the issue as one of competitiveness rather than one of national security.

The new FDI screening framework has been in the making since 2017, with the Commission originally proposing an independent EU-level mechanism. However, this proposal did not make into the final text of the regulation. [[14]](#footnote-14) The Regulation leaves it to the ultimate authority of Member States to adopt concrete decisions on screening, making it unequivocal that each Member State has the sole responsibility for its national security and the right to protect its essential security interests.[[15]](#footnote-15) Although a decision to authorise or block foreign investment is left to Member States, the new framework places the Commission at the heart of a transnational information sharing system. The Commission is also to be included in the decision-making process in relation to an investment that is likely to ‘affect projects or programmes of EU interest on ground of security or public order.’ Such projects include the European GNSS programmes (e.g. Galileo), Copernicus and Horizon 2020, Trans-European networks for Transport, Energy, and Telecommunications.

National security, albeit broadly defined, is at the core of the new regulatory framework: despite the fact that original concerns over inward foreign investment were framed as an issue of economic competitiveness of EU enterprises and the EU’s technological leadership,[[16]](#footnote-16) the final text refers to national security as a principal *raison d’etre* for investment screening.[[17]](#footnote-17) The regulation also reflects significant shifts in prevailing understandings of what constitutes a threat to national security and public order. Originally, FDI screening was conceived as means of controlling inward foreign investment in the military and defence sectors. However, over the years both the scope of screening and its intensity have significantly evolved. Mirroring these global trends, the EU FDI screening framework adopts a broader notion of security and extends the scrutiny to inward foreign investment in strategic industries and critical infrastructure, from energy production and supply to water, transport, telecommunication, mineral resources, and the media.[[18]](#footnote-18) In line with policies of its “like minded” partners, such as the United States, the regulation brings within its scope such areas as critical technology and know-how, in particular artificial intelligence, robotics, semiconductors, quantum technologies as well as access to sensitive data of private individuals.[[19]](#footnote-19)

The onset of the COVID pandemic and concomitant disruptions in global supply chains, too, highlighted the need to revisit the prevailing definitions of emergency and national security and to clarify the list of strategic sectors and enterprises, notably by including healthcare and technology innovation firms therein.[[20]](#footnote-20) For instance, on 25th March 2020, the President of the EU Commission Ursula von der Leyen impelled Member States to make full use of existing national screening mechanisms and, to those Member States that had yet to establish a fully-fledged screening mechanism, to create them as a matter of urgency.[[21]](#footnote-21) The Commission also warned that the crisis precipitated by the onset of the Covid-19 pandemic presented an increased risk of attempts by foreign investors to take over healthcare capacities or research establishments, including those involved in the development of vaccines.[[22]](#footnote-22) Tightening foreign investment controls as a response to a major public health crisis was something observed across the globe, and only highlighted the timeliness of the EU’s new regulatory framework. Altogether, the changes in the scope and intensity of screening represent a profound shift towards a different understanding of the role of foreign investment in society.

* 1. Foreign investment subsidies: more scrutiny to ensure a level-playing field?

The EU FDI screening regulation is only one of the pillars the EU trade policy, reflecting the move towards open strategic autonomy. In an effort to address risks and concerns posed by certain kinds of inward foreign investment, the Commission has also proposed a new set of rules concerning foreign investment subsidies. The roots of the Commission’s thinking on foreign subsidies lie in the same developments that precipitated the creation of the new investment screening framework. Much of the political backlash over foreign investments from China, Russia and the Gulf states revolved around the detrimental impact of such investments on a level-playing field for EU companies. As Sigmar Gabriel, then Vice Chancellor and Economy Minister of Germany put it in voicing his opposition to Chinese investments, ‘if you want to invest in other parts of the world, you can’t block those countries from investing in your own.’[[23]](#footnote-23) The concern over lack of reciprocity was echoed by Gunther Oettinger, then EU Digital Economy Commissioner, who expressed his consternation over the fact that ‘there are many countries, including…China, that make market access or corporate takeovers difficult or effectively impossible’[[24]](#footnote-24) for EU companies. This lack of reciprocity was exacerbated by the fact that a significant share of foreign investment into the EU came from state-owned enterprises.[[25]](#footnote-25) Among other things, state support is seen as conferring considerable advantage and enabling foreign state-owned investors to pay more than other domestic investors when buying stakes in European companies.[[26]](#footnote-26) As a result of the combined effect of EU state aid rules and WTO disciplines on subsidies, foreign investors have long been able to buy European businesses with support from their own governments. By contrast, European firms do not enjoy the same advantage in their foreign acquisitions.

The concern over detrimental effects of foreign investment subsidies on a level-playing field for European firms was so strong that the European Parliament’s resolution of 5 July 2017 urged the Commission to tackle the subsidisation of foreign state-owned investors.[[27]](#footnote-27) The result is the proposed 2022 EU Foreign Subsidies Regulation (FSR), a new legislative mechanism that seeks to empower the Commission to review investment transactions, including mergers and acquisitions, affected by foreign subsidies.[[28]](#footnote-28) Notably, while apparently driven by the desire to prevent the distortion of the internal market and to ensure the level-playing field across all economic sectors, the proposed regulation makes reference to the need to also scrutinise foreign investment in strategic assets such as critical infrastructure and innovative technologies.[[29]](#footnote-29) This highlights the way in which the EU’s approach to investment subsidisation complements and reinforces its approach to FDI screening. It is also evident that the draft Foreign Subsidies Regulation shares some of its origins with the FDI screening framework. Echoing the same foundational concerns over the loss of market leadership and competitiveness that lay behind the move towards tighter screening of foreign investment, the Commission’s White Paper stressed the importance of tackling ‘state sponsored unfair trading practices, which disregard market forces and abuse existing international rules, with a view to building up dominance across various sectors of economic activity.’[[30]](#footnote-30)

Yet compared with the new FDI screening framework, the Foreign Subsidies Regulation reaches further and deeper in its effort to institute new and effective controls on inward foreign investment in the EU. Closer analysis of the scope of new monitoring and investigative powers to be vested in the Commission shows that the regulation creates what is effectively another screening instrument, but this time it focuses exclusively on mergers and acquisitions. If adopted, the new mechanism will empower the Commission to investigate foreign businesses suspected of being supported with subsidies when investing in the EU and thus contributing to the distortion of the level-playing field. Foreign investors wishing to acquire a stake in a European business or seeking to participate in a public procurement procedure in the Union would be subject to checks and notification requirements to ascertain whether they are using subsidies in financing these deals. If it is found that foreign investors are using subsidies, the Commission will have recourse to a broad spectrum of remedies to address the distortive effect of such subsidies, ranging from blocking the transaction to demanding the repayment of a subsidy, a temporary commercial activity restriction, and divestment.[[31]](#footnote-31)

An in-depth analysis of the proposed text also reveals that, in addition to granting the Commission novel and substantive powers vis-à-vis foreign investors, the draft Foreign Subsidies Regulation seeks to address the resilience and competitiveness concerns by going beyond the scenarios involving threats to national security. In contrast with FDI screening whereby member states have the powers to scrutinise and, if necessary, block foreign investments in a range of strategic or sensitive sectors, the Foreign Subsidies Regulation aims to create an extra layer of control of inward foreign investment, this time across *all sectors* of economic activity. Another crucial difference is that, unlike the FDI Screening Regulation where the powers to design and enforce investment scrutiny remain in the hands of Member States, the Foreign Subsidies Regulation affords a considerably greater role for the EU by vesting the Commission with new centralised powers in relation to a certain (and broad) category of foreign investment. It is akin to extra-territorial extension of EU state aid rules to foreign investors subsidised by their home governments.

* 1. Promoting and enforcing EU values on sustainability: mandatory corporate due diligence

Despite their prominence in the emerging defensive policy instruments, resilience and competitiveness are not the only objectives foregrounded in the EU’s new approach to trade and investment. The openness element of the EU’s open strategic autonomy goes beyond the traditional commitment to open trade but also encompasses sustainability and fairness.[[32]](#footnote-32) In the Commission’s vision, ‘openness’ means the adherence to universal values, including human rights, core labour standards, the fight against climate change and biodiversity loss.[[33]](#footnote-33) To promote and enforce these values, one of the core objectives of EU trade policy in the medium term is to shape *‘*global rules for a more sustainable and fairer globalisation.’[[34]](#footnote-34) A crucial dimension of the EU’s open strategic autonomy with immediate relevance to its investment policy is the proposed new mechanism to promote, implement and enforce EU values on sustainability, including human rights and labour standards. To some, the relationship between these endeavours and international investment policy may not be immediately apparent. Yet the articulation of this strand of open strategic autonomy by the Commission reveals its significance for shaping the evolving investment policy both in the EU and beyond its borders.

To begin with, on 23 February 2022, the Commission adopted a proposal for a Directive on corporate sustainability due diligence. The principal aim of the Directive is to ‘foster sustainable and responsible corporate behaviour and to anchor human rights and environmental considerations in companies’ operations and corporate governance.’[[35]](#footnote-35) The proposed Directive establishes a **corporate due diligence duty** the core elements of which are ascertaining, bringing to an end, averting, mitigating and accounting for negative human rights and environmental impacts in the company’s own operations, their subsidiaries and their value chains. The draft Directive also requires certain large companies to put in place mechanisms to ensure that their business strategy is compatible with climate commitments in line with the Paris Agreement. It applies to EU companies but also, importantly, to non-EU companies active in the EU with turnover above certain thresholds. A failure to comply with corporate due diligence duties could result in sanctions ranging from a requirement from a supervising authority to cease or not to repeat the infringement, to sanctions and civil liability. Investment lawyers may not necessarily recognise the relevance of this new mechanism for international investment law, but just as is the case with the Foreign Subsidies Regulation the proposed mechanism for corporate due diligence in effect represents an extra-territorial application of EU standards on human rights, environment and labour to foreign investors. As one of the giants on the trade scene, the EU aspires to increase is global power and to ensure that its influence extend beyond its borders.[[36]](#footnote-36)

Since the Commission recognised that the pursuit of open strategic autonomy requires both internal and external action, it is perhaps unsurprising that its trade policy objectives concerning sustainability go beyond directives for the internal market but also foreground trade agreements as a vehicle to both create economic opportunities and promote sustainability. The EU’s vast network of trade agreements is seen as ‘an essential platform to engage’ with partners on issues such as climate change, biodiversity but also to promote respect for core human and labour rights.[[37]](#footnote-37) The signing of the EU-China Comprehensive Agreement on Investment (CAI) in 2021 is an illuminating example of open strategic autonomy in action. On the one hand, the CAI was hailed for securing certain commitments from China in respect of labour, human rights and sustainability. In what was seen as an unprecedented move, China undertook to make ‘continued and sustained efforts’ to ratify the fundamental conventions of the International Labour Organization (ILO), and agreed to a neutral and open scrutiny of labour abuses. On the other hand, following the introduction in March 2021 of sanctions targeting Chinese officials implicated in the human rights abuses in Xinjiang and the immediate retaliatory sanctions from China, the ratification of the CAI has been ‘justifiably frozen.’[[38]](#footnote-38) Still, the CAI provides an early example of the pursuit by the EU of open strategic autonomy through the parallel deployment of bilateral trade agreements and autonomous sanctions. It also illustrates the pitfalls of open strategic autonomy: the CAI ratification stalemate raises the questions whether it is feasible for the EU to assertively pursue further market openings in countries such as China whilst simultaneously defending and promoting human rights and labour standards.

1. The genesis of defensive investment policy: defending which values?

Why the shift towards open strategic autonomy and why now? Does the pursuit of more assertive and defensive investment policy mean a turn to protectionism – something that the EU’s multilateral and bilateral instruments on trade and investment have been conceived to counter and prevent? The genesis of all three instruments above—on FDI screening, foreign investment subsidies, and corporate sustainability due diligence—suggest that, aside from the concerns over national security and the erosion of certain universal values, fears over a loss of market leadership and domestic competitiveness have been one of the major driving forces behind the new developments in EU investment policy.[[39]](#footnote-39) For instance, it transpires that the federation of European trade unions, IndustriALL Europe, stressed its concerns over the fact that ‘state aid and dominant positions are prohibited inside the EU but allowed in other parts of the global economy creates an unequal playing field as foreign companies can use monopoly profits or state aid to acquire industrial assets in the EU.’[[40]](#footnote-40) It had urged the Commission ‘to grant decision powers at European level in case of state-led takeovers.’[[41]](#footnote-41)

Elsewhere, the growing trends towards tighter scrutiny of inward foreign investment across the globe has been explained as a combined effect of concerns relating to technological leadership, foreign control in sensitive or strategic sectors, and the proliferation of state-owned investments. According to the UNCTAD, as ‘cutting-edge technologies and knowhow have become a key factor for the international competitiveness of countries’, some states may have a strong interest in ensuring that such assets remain in domestic hands.’[[42]](#footnote-42) Besides, ‘many countries may find it necessary or desirable that other companies of strategic importance and critical infrastructure are not foreign controlled’, particularly in cases where the relevant foreign investor is state-owned or controlled.[[43]](#footnote-43) Yet these explanations are not entirely convincing. Technology has been a key factor of competitiveness since the 1960s, and state-owned enterprises have existed and thrived as investors both in the EU and beyond for a long time. In fact, as far as international investment agreements are concerned, the importance of treating state-owned foreign investors on par with other investors has long been acknowledged as an expression of the principle of investment neutrality such agreements were designed to safeguard.[[44]](#footnote-44)

The history of investment treaty negotiations in Europe reveal that European policymakers were cognisant of the need to extend protection to sovereign investments, including investments by state-owned enterprises. A notable example is the negotiation in the 1980s of an investment protection and promotion treaty between members of the European Economic Community and members of the Arab League.[[45]](#footnote-45) Since a high proportion of Arab investment in Europe originated from governments and state-owned entities, the Arab side insisted on the inclusion of such investments within the protective scope of the agreement. ‘We know very well why the Arabs would like Government investment included,’ noted the EEC negotiator, and it was conceded that ‘there would be a considerable imbalance’ in the proposed treaty ‘if nothing at all were done’ for such investments. [[46]](#footnote-46) The European side were ‘not enthusiastic but ‘could probably accept in the context of a package.’[[47]](#footnote-47) In the end, the European negotiators agreed to extend protection to state-owned investments, in return for the Arab side conceding to include express reference to natural resources in the scope of the treaty.[[48]](#footnote-48) Although the treaty never materialised due to the worsening of political and diplomatic relations, the negotiating history shows that state-owned investments have long been present in European markets and that the EU member states were prepared to treat them according to the principle of neutrality.

At a national level, historical records also reveal not aversion but a certain appetite, among European capitals, for foreign investment. Crucially, this appetite included the defence sector. In the 1980s, foreign investment from Saudi Arabia and Kuwait —both private and state-owned—in defence industries across Europe were seen as a means of invigorating exports of European equipment to Arab markets.[[49]](#footnote-49) European policymakers were cognisant that for Arab government investors such investments presented the opportunity to gain a reasonable rate of return, ‘a chance to get in on an inside track in regard to access to latest technology’ and ‘a point of pressure to help develop indigenous industry and technology transfer.’[[50]](#footnote-50) For the host states, these investments afforded an opening to extend sales, and while competition for Arab capital was stiff, policymakers saw it as ‘desirable to see such investment diluted to the extent that the shareholder was not in a position to influence overseas marketing policy’ of the relevant defence firms.’[[51]](#footnote-51)

At an international level, fears over foreign control in sensitive or strategic sectors of national economies have long been an animating force in policy debates in multilateral settings. So strong was the sentiment that in 1947 the final text of the Charter of the International Trade Organization codified the right of any member state ‘to take any appropriate safeguards necessary to ensure that foreign investment is not used as a basis for interference in its internal affairs or national policies’ and ‘to prescribe and give effect to other reasonable requirements with respect to existing and future investments.’[[52]](#footnote-52) Fearing that corporate entities can be used by some countries to pursue their interests, US treaty-makers ensured that a generation of post-1946 Friendship, Commerce and Navigation Treaties provided for piercing the corporate veil[[53]](#footnote-53) – something that was subsequently abandoned in contemporary investment treaties. In the 1970s, a number of US and UK scholars highlighted the growing trend among Western multinational corporations to move away from exporting commodities to controlling key sectors in domestic economies of host states and their preference for monopolising rather than diffusing technology and know-how.[[54]](#footnote-54) As one of these authors put it, foreign investment ‘created transnational interdependence that groups of governments (host and home) could attempt to manipulate for their own political purposes.’[[55]](#footnote-55) Reports by investigative American journalists in March 1972 revealed what subsequently became one of the most infamous instance of political interference by a foreign investor in the host state: the involvement of a US-headquartered International Telephone and Telegraph Company (ITT) in a CIA plot to thwart the election of Salvador Allende following his threats to nationalise ITT’s foreign investment in Chile.[[56]](#footnote-56)

In response to a complaint filed by Chile, the UN Social and Economic Council admitted that the international community had yet to ‘establish effective machinery for dealing with issues raised by the activities of these corporations.’[[57]](#footnote-57) An initial resolution was to work towards ‘a general agreement on multinational corporations having the force of an international treaty and containing provisions for machinery and sanctions,’ but at the time it was felt that serious negotiations on such an agreement were premature.[[58]](#footnote-58) In the language echoing contemporary concerns over foreign investments in the EU, a coalition of developing countries demanded, in their 1974 resolutions establishing a New International Economic Order, the sovereign right ‘to regulate and supervise activities of transnational corporations within its national jurisdictions and to take measures to ensure that such activities comply with its laws, rules, and regulations and conform with its economic and social policies.’[[59]](#footnote-59)

Yet the historical efforts to reach consensus on the rules governing foreign investors were thwarted by layers of disagreement both within developed countries, and between developed and developing countries. Western industry associations, including the International Chamber of Commerce, considered the UN ‘an enemy accomplice’ of developing states which had been vocal in raising concerns over foreign investor domination and called for a radical overhaul of international rules governing foreign investment.[[60]](#footnote-60) The NIEO agenda was met with staunch opposition from major capital exporting countries, including European states such as Belgium, Denmark Belgium, Denmark, the Federal Republic of Germany, Luxembourg, and the United Kingdom.[[61]](#footnote-61) UN-led discussions of a draft code of conduct for transnational corporations took almost two decades but were ultimately abandoned in 1992.[[62]](#footnote-62) At the same time, as the multilateral debates about the need to reign in powerful foreign investors came to a halt, bilateral investment treaties were in ascendance. Actively promoted by the World Bank and the IMF,[[63]](#footnote-63) investment treaties were conceived not to curb the powers of foreign investors and their ability to interfere in political affairs of host states, but instead to curb host states’ powers to adopt any measure that would undermine the sanctity of investors’ property and contractual rights and, ultimately, ‘the sanctity of capital mobility.’[[64]](#footnote-64) EU member states have been among the most active players on the scene, collectively responsible for creating a vast spaghetti bowl of investment treaties. Notably, the majority of these agreements implicitly extend their protections to state-owned investors.[[65]](#footnote-65)

Strongly resonating with the 1970s debates, the shared core of the three initiatives introduced by the Commission in pursuit of open and strategic autonomy in EU investment policy is a renewed appetite for subjecting foreign investment to rigorous scrutiny and controls domestically. The echoes of NIEO-era demands for the sovereign rights to reign in the powerful foreign investors can certainly be detected in then President of the European Commission, Jean-Claude Juncker’s annual State of the Union address in 2017 where he stressed that

Europe must always defend its strategic interests. … If a foreign, state-owned, company wants to purchase a European harbour, part of our energy infrastructure or a defence technology firm, this should only happen in transparency, with scrutiny and debate. It is a political responsibility to know what is going on in our own backyard so that we can protect our collective security if needed.[[66]](#footnote-66)

The EU’s move towards open strategic autonomy in its foreign investment policy is, in some respects, a welcome development as it signifies a departure from the old orthodoxies which have long portrayed foreign direct investment exclusively through the lens of its benefits for the host economies and societies. Ever since their inception in the post-war period, much of investment treaty texts and caselaw converged in describing foreign investment as an uncontested common good, a source of prosperity and societal advancement.[[67]](#footnote-67) The heated debates at the UN about the implications of foreign control in strategic sectors and the impact of foreign investment on domestic competitiveness seem to have been forgotten as a relic of the turbulent post-war history. As the direction of investment flows changed at the turn of the century and, in particular, with the proliferation of investment from third countries and the rise of new economic powers, including China, Russia and the Gulf states, there has been a discernible shift in the prevailing narratives. ‘We wouldn’t transfer title to the devil’ was how some in the United States Congress reacted to the earlier foreign investments of this kind, including a proposal by Dubai Ports World, a UAE government-controlled enterprise, to acquire a British company that controlled a number of United States ports, and the attempt by the China National Offshore Oil Corporation to acquire a stake in the American energy company UNOCAL.[[68]](#footnote-68) If until recently a foreign investor has been frequently portrayed as ‘the pre-eminent world citizen’[[69]](#footnote-69) deserving of extensive protections from host governments, today’s narratives concede that foreign investment can be a source of threat, instability and economic and political disruption. As one official from the Commission commented on the introduction of the FDI screening framework, although ‘foreign direct investment is an important source of economic growth’, ‘sometimes it can be a valid concern for our citizens.’[[70]](#footnote-70)

1. Defensive or protectionist? The making of investment policy in times of heightened security concerns

It could be argued, as some have done in their criticisms levelled against the Commission’s proposals on FDI screening and foreign investment subsidies, that the introduction of tighter and more extensive scrutiny of inward foreign investment is an expression of protectionism.[[71]](#footnote-71) Although much of the commentary surrounding the developments in EU investment policy primarily focus on China, the Commission was at pains to point out that a threat to national security and competitiveness does not exclusively emanate from certain countries, in particular non-market economies and those favouring state-owned enterprises and sovereign wealth funds to invest abroad. Yet some might point out that, until the recent emergence of new players from what were hitherto capital-importing states, fears over inward foreign direct investment had never quite become a matter of serious political concern and regulatory action in the EU. For a long time, international investment law and European investment treaties in particular promoted the ideals of liberalisation, neutrality and investment protection precisely because it was believed that investments would flow according to the familiar pattern, from industrialised countries of the global North to the developing countries of the global South. The introduction of investment screening and other controls on FDI from erstwhile capital-importing states can be interpreted as a sign of the EU’s disenchantment with the idea of neutrality and open markets and its desire to look inward and protect domestic economic actors. Is the EU’s new investment policy indeed protectionist?

The notion of protectionism so often invoked in condemning the move towards a tighter and more rigorous scrutiny of investment is too crude a descriptor to capture the multitude of forces behind the relevant political and regulatory shifts. These shifts reflect a recognition of the fact that even though it can be a force for good, foreign investment needs to be regulated, subjected to checks and conditions and indeed, harnessed to serve broader societal welfare. If the traditional international investment law and policy called for depoliticisation—less government and more markets—the push for open strategic autonomy in EU investment policy is a response to increasing politicisation and geopoliticisation of trade.[[72]](#footnote-72) The latter, in turn, has its roots in growing inequalities within the EU and globally. As Cohen put it, ‘Many are unhappy with how wealth and power have been allocated and anxious how these changes will allocate and reallocate them in the future.’[[73]](#footnote-73) The exclusion from the dividends of globalisation felt by certain demographic groups across the globe has brought trade and investment back into domestic political discourse in the EU and other developed economies, relentlessly pitting the traditional defenders of open markets against an increasingly vocal calls for more restrictions, redistribution and re-orientation in global economic relations.[[74]](#footnote-74)

EU trade policy has always been a product of an evolving compromise between different factions: those seeking to remove all obstacles to trade, those advocating for strategic protections of European companies, and those calling for market correcting mechanisms to safeguard social, environmental and human rights standards.[[75]](#footnote-75) Yet the defining feature of EU international trade policy since the 1980s was its commitment to neoliberal consensus[[76]](#footnote-76) which presented market openings and competitive liberalisation as something benefitting both business and citizens.[[77]](#footnote-77) While later iterations of trade strategy, particularly under Commissioner Lamy, placed more emphasis on social justice and sustainable development, both internal and external investment policy has never questioned the free trade orthodoxy.[[78]](#footnote-78) However, the deepening of inequalities and the recent intensification of political and economic tensions globally— and the growing sense of insecurity – increasingly cast doubt on ‘openness being an unalloyed good and economic efficiency being the only relevant goal.’[[79]](#footnote-79) While the relentless pursuit of competitive liberalisation and open markets created efficiencies and economic growth, the Commission’s 2021 trade policy acknowledges that ‘these developments sometimes have had a strong disruptive effect leading to growing inequalities and leaving some individuals and communities behind.’[[80]](#footnote-80)

The making of the Commission’s trade policy in 2020 reveal the dominance of two coalitions: one that opposes rolling back the EU’s commitment to free trade and the one that argues for more assertive and interventionist trade policy.[[81]](#footnote-81) What these erstwhile rival factions seem to increasingly converge on is ‘the need for a bigger role of the state, on an end to equating protections with protectionism, and on understanding trade policy as being about more than liberalization.’ [[82]](#footnote-82) The introduction of the new frameworks on foreign investment—from screening to policing the level-playing field and enforcing corporate sustainability due diligence—thus reflect a departure from the neoliberal orthodoxies towards a different understanding of the role of markets in regulating investors’ behaviour and their impact on the economy and society. It is a reflection of a shift in the balance between different competing policy concerns and drivers behind EU investment policy, a shift which is gradually transforming the contemporary policy debates about a fundamental choice ‘between the logic of markets and the logic of state.’[[83]](#footnote-83) The reorientation of EU investment policy is a consequence of ‘deepening disaffection over the allocation of wealth and resources punctuated by the global financial crisis, growing recognition of the crisis posed by climate change, and anxiety about the revolutionary changes of new technologies.’[[84]](#footnote-84)

1. Two faces of EU investment policy: the perils of adding new frameworks to an old edifice
	1. Investment treaty law: the promise of open markets and investment neutrality

The problem is that the emerging consensus between the rival ideological factions on the role of the state in mediating the effects of globalisation on domestic companies and communities is not evenly reflected in the EU’s new investment policy. The EU’s approach to foreign investment is increasingly interventionist at the supranational level and staunchly committed to strident economic liberalisation at the international level. While the EU policy innovations on screening, investment subsidies and corporate due diligence are underpinned by a sober and more nuanced vision of the impact of foreign investment on the economy and society, its international investment agreements reflect the long-held beliefs in foreign investments as an uncontested common good warranting the removal of all barriers to capital flows. Accommodation of socially-oriented non-economic concerns is where EU investment policy is most glaringly divided between its external and internal dimensions: the recent move towards stronger *enforcement* of human rights, environment and labour standards – despite its extraterritorial implications—remains an area for internal action, whereas externally the EU’s international investment policy is still defined by its almost undiluted adherence to the free trade and open markets orthodoxy. The underlying assumption of the EU’s international investment regime is that ‘markets will make better decisions in the global allocation of goods, labour, and investment than states would.’[[85]](#footnote-85)

Indeed, the need to rethink and adapt international investment agreements to the new geopolitical and economic realities remains entirely unacknowledged in the recent iteration of the EU’s new trade strategy. While recognising that ‘[g]lobal trade rules are in urgent need of being updated to reflect today’s economic environment and the challenges the global community faces’ and that ‘making globalisation more sustainable and fairer should be the underlying driver of trade policy, delivering on the expectations of Europeans and other people around the world’,[[86]](#footnote-86) the Commission’s plans to pursue open strategic autonomy are conspicuously silent on international investment agreements. If EU trade policy has never been a single coherent project but rather the outcome of competing projects, nowhere else is this incoherence so pronounced as in the EU’s approach to investment. In practice, this omission has significant implications for the EU’s ability to achieve the aims of its open strategic autonomy. International investment agreements may significantly hinder the enforcement of the EU’s new investment policy.

When examined against the backdrop of international investment agreements major European economies have keenly pursued over the last five decades, the new emphasis on strategic autonomy, unilateral measures and stronger domestic controls can be seen as an almost tectonic shift in EU investment policy. Ever since acquiring competence over FDI under the Lisbon Treaty, the EU has followed the well-trodden footsteps of its member states, viewing investment as a source of prosperity, with its international investment policy seeking to remove any obstacles to free movement of capital, technology and know-how. International investment agreements of the EU, much like those of Member States, reflect an unwavering commitment to open, liberalised frameworks for international investment. Conceived after the end of the World War II, international investment agreements—then primarily in the form of bilateral investment treaties—were premised on the ideas of economic liberalism. Core to the idea of liberal international investment policy were the principles of investment neutrality and investment security, that is the idea that that the market rather than the state should allocate capital, that the state should protect property and contract rights of investors.[[87]](#footnote-87)

Following the collapse of the Soviet Union and the spread of neoliberal economic policy calling for less government and more markets,[[88]](#footnote-88) the number of international investment agreements globally grew exponentially, with the newer stock of treaties foregrounding the principles of investment security and investment neutrality and severely curtailing the state’s right to regulate for the common good.[[89]](#footnote-89) Their principal objective became increasingly articulated as the need to place ‘legal limits on the authority of government, isolating economic from political power, and assigning to investment interests the highest possible protection.’[[90]](#footnote-90) Investment treaties of the EU member states not only never expressly require states to exercise their regulatory powers, but they rather constrain states’ ability to take action to address inadequacies or failures in the market.[[91]](#footnote-91) Neoliberal economic policy has traditionally denounced economic nationalism and its ‘misguided goals of national self-sufficiency, autarky, insulation and autonomy.’[[92]](#footnote-92) As one of the key pillars in the neoliberal architecture of international mechanisms designed to encase and enforce market freedoms[[93]](#footnote-93), the aim of international investment law was to sap nations of ‘their power to disrupt the world economy.’[[94]](#footnote-94)

In contemporary investment treaty law the primary role of nation states has been to guarantee legal security of investment, and to ensure that ‘the law of property and contract the world over was unified and administered on uniform principles.’[[95]](#footnote-95) Investment treaties were designed to serve as part of an international authority that is able to say ‘no to obstacles to the movement of goods, capital, and people, and thus, no to protections for infant industries.’[[96]](#footnote-96) International investment law was part of a wider enabling environment that would lure mobile capital flows in[[97]](#footnote-97). These ideas took the shape of legal obligations guaranteeing investors fair and equitable treatment, most constant protection and security, national and most-favoured nation (MFN) treatment, the prohibition of arbitrary or discriminatory treatment, the guarantee against prompt, adequate, and effective compensation for expropriation, and restrictions on the host state’s power to impose exchange controls.[[98]](#footnote-98)

* 1. When the worlds collide: investment treaties and the thorny issue of policy space

Given the time and circumstances of their birth, investment treaties did not envisage the need to accommodate national security—or, for that matter, economic security and sustainability concerns. The defensive instruments of investment policy, from investment screening to the scrutiny of foreign subsidies and the enforcement of corporate due diligence, enter the corpus of investment treaty law only in the form of exceptions and carve-outs. Crucially, the bulk of investment treaties of EU member states do not contain such exceptions. Neither do such provisions feature in the Energy Charter Treaty, a sectoral agreement containing the traditional arsenal of investment protections that have recently been deployed by investors against a number of EU member states. Some provisions for the right to regulate have been incorporated in the more recent EU investment agreements, in particular the investment chapter of the EU-Canada Comprehensive and Economic Trade Agreement (CETA), yet strong doubts remain over their overall effectiveness.

Consider, for instance, the compatibility of the FDI screening with the obligations contained in international investment agreements of EU member states. As critics have pointed out promptly in the wake of the Commission’s proposal, ‘it may even be possible that screening laws would need to be redesigned to conform to treaty obligations’[[99]](#footnote-99) precisely because the exercise of the right to screen foreign direct investment can clash with investment treaty obligations to provide fair and equitable treatment, to refrain from arbitrary and discriminatory treatment and otherwise guarantee the free transfer of funds. A number of investment disputes have already emerged challenging the host states’ exercise of screening powers. One such dispute is currently pending against Sweden, brought by a Chinese claimant, Huawei Technologies Co Ltd. The investor’s is disputing that a decision by the Swedish government to exclude Huawei equipment from the roll-out of the 5G network in Sweden is ‘blatantly discriminatory’, based on unfounded security allegations,[[100]](#footnote-100) and ‘deprives Huawei of the benefits of its long-term investments in the country.[[101]](#footnote-101) The 1982 China-Sweden Agreement on the Mutual Protection of Investments provides no explicit carve-outs or derogations to enable the state parties to intervene with foreign investments on national security grounds. A vast majority of member states’ bilateral investment agreements follow a similar drafting pattern.

To shield foreign investment policy from the scope of dispute settlement provisions under investment treaties such treaties could list the relevant foreign investment policy instruments as a ‘non-conforming measure’. Although carve-outs afford considerable policy space to the screening authorities, they are rarely found in the first-generation investment treaties of EU member states[[102]](#footnote-102), that is agreements which were signed between 1960s and 2008. Furthermore, the non-conforming measures clauses do not always cover all potentially relevant obligations—it is quite common for exclusions of this kind to extend only to select obligations such as national treatment and MFN.[[103]](#footnote-103) The narrow framing of such derogations means that some of the most potent investment protections, such as the fair and equitable treatment obligation and the expropriation clause, remain available to claimant investors. In particular, fair and equitable treatment supplies ample grounds for an investment screening decision to be found in breach: although investment screening itself is not unlawful, the lack of transparency, inconsistency, or evidence of arbitrariness and discrimination might give rise to a successful claim by the investor.[[104]](#footnote-104)

The limits of public policy exceptions and carve-outs in disputes involving national investment screening measures were demonstrated in a recent arbitral award in *Global Telecom Holding v Canada*.[[105]](#footnote-105) In 2008, the claimant, an Egypt-based company GTH, formed a joint venture with certain Canadian investors with a view to obtaining a wireless spectrum license. The applicable Canadian legislation at the time the investor’s entry to the market mandated that telecoms companies be at least 80% Canadian-owned and foreign investors could not own more than one third of the controlling shares. GHT’s investment provided for an option to acquire a controlling stake in the join venture in case if the relevant laws on foreign investment in the telecoms sector were to be relaxed. GTH attempted to take advantage of this opportunity to convert its non-voting shares into voting shares, but its efforts were thwarted by the national security review under the Investment Canada Act. The reasoning of the national security review was confidential but reports suggest that the authorities had concerns over the fact that the Netherlands-based and Russian owned VimpelCom became the largest shareholder in GTH.[[106]](#footnote-106) The investor eventually exited the Canadian market and brought a case against Canada under the Egypt-Canada Bilateral Investment Treaty, arguing that by preventing GTH from becoming a controlling stakeholder in the joint venture, the Canadian authorities acted in a discriminatory manner and in breach of the fair and equitable treatment standard. In a manner uncommon for the first generation investment treaties, the agreement at hand contained various carve-outs and reservations which Canada lent on in its defence. One such reservation precluded claims concerning the acquisition of a company or shares thereof from the scope of investment arbitration. The tribunal, however, interpreted this carve-out narrowly: in its view, the relevant clause applied to acquisitions rather than conversion of non-voting shares into voting shares. The majority opined that carve-outs and exclusions ought not be construed broadly and that an interpretation going beyond the explicit wording of the treaty would go against its object and purpose, which was primarily to encourage and create favourable conditions for investors to make investments.[[107]](#footnote-107)

The reasoning of the tribunal in *Global Telecom Holding v Canada* is representative of the prevailing approaches in investment arbitration jurisprudence. It demonstrates the pitfalls of relying on treaty carve-outs and exclusions in a quest to reconcile investment protection with the pursuit of competing policy objectives. It is evident that even in cases where investment treaties contain security exceptions and carve-outs for investment screening, the scope of such clauses can be disputed and it is ultimately for arbitral tribunals to decide on their applicability. The exercise of weighing and balancing of the rights of investors and the state’s right to regulate in investment arbitration is in some respects reminiscent of EU jurisprudence where economic freedoms have long been construed as primary rights and public policy measures as exceptions, with interpretive canons mandating that those rights be interpreted widely and exceptions defined as narrowly as possible.[[108]](#footnote-108) The similar emphasis on the primacy of investor rights has certainly been a feature of both investment treaty texts and arbitral jurisprudence. As one investment tribunal put it, there is nothing extraordinary in affording higher protection to foreign investor rights:[[109]](#footnote-109) since investment treaties contain undertakings which are ‘explicitly designed to induce foreigners to make investments in reliance upon them, instrument of the latter kind should not be diluted’[[110]](#footnote-110)by the notions such as margins of appreciation or other interpretive devices utilised in other international regimes. In some cases, arbitral tribunals pointed to the lack of references to public policy objectives in investment treaty texts as a ground for interpreting investment protection as a principal and overriding treaty goal, prioritising investor rights over the State’s right to regulate. In one such case, the treaty preamble listed among its objectives the intention to ‘create and maintain favourable conditions for investments by investors of one Contracting party in the territory of the other.’ The tribunal concluded that it was ‘legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered investments.’[[111]](#footnote-111)

The foreign subsidies regulation too, is likely to clash with investment treaty law. The regulation seeks to address market distortions and ensure a better level playing field for EU businesses through closer monitoring and remedying of anticompetitive effect of subsidies. The clash between competition law and policy and the investment treaty regime has generated a considerable body of critique, with some arguing that the two regimes are systemically incompatible.[[112]](#footnote-112) While competition policy has traditionally aimed to safeguard fair market conditions for businesses,[[113]](#footnote-113) its operation in the domestic sphere can fall afoul of investment treaty disciplines that have increasingly come to be utilised as a means of shielding foreign investors from domestic regulatory action. Under international investment law, the pursuit by host authorities of competition policy objectives constitutes a legitimate exercise of regulatory powers, except in cases involving unfair, non-transparent, inconsistent or discriminatory treatment of the investor. As arbitral caselaw and the commentary accompanying it reveal, investors have challenged measures taken by competition authorities in a considerable number of disputes. While much of this caselaw has involved issues of subsidisation of a company by the host government, the exercise by the Commission of new investigative and enforcement powers against foreign investors subsidised by their home governments might give rise to investor claims. Arbitral jurisprudence offers examples whereby an otherwise legitimate exercise of investigative and enforcement powers by host authorities can be disputed in cases where a similarly situated competitor escaped enforcement.[[114]](#footnote-114) The foreign subsidies regulation purportedly aims to increase ‘the EU’s capacity to pursue its interests and enforce its rights’, yet the effect of international investment agreements has been to constrain such capacity.

Another crucial dimension of the international investment regime that fundamentally collides with the objectives of EU investment policy, including on foreign subsidies and state-owned enterprises, is that investment treaties and arbitral caselaw have often maintained that the source of foreign capital is irrelevant in determining whether an investor is eligible to treaty protection. Such reading of investment treaties has produced outcomes starkly in contrast with the Commission’s keen interest in identifying and, where necessary, precluding foreign investments supported with state funds. As mentioned earlier, the vast majority of investment treaties of EU member states implicitly grant protection to state-owned enterprises.[[115]](#footnote-115) In recent arbitration practice, attempts by respondent states to deflect the claims by pointing to the source of capital have not been successful. A notable example in *Masdar v Spain*,[[116]](#footnote-116) one of the cases among many brought against Spain disputing its renewable energy incentives framework. The investor-claimant, Masdar Solar & Wind Cooperatif U.A., was incorporated in the Netherlands, but was owned and controlled by Abu Dhabi Future Energy Company (ADFEC), which in turn was controlled by Mubadala Development Company, an enterprise fully owned the government of Abu Dhabi. The dispute concerned the Spanish solar power regulatory framework which was amended in the aftermath of the financial crisis of 2008, with feed-in-tariffs replaced by a commitment to ensure a ‘reasonable rate of return.’ Masdar claimed that the changes to the regulatory framework breached the fair and equitable treatment clause and the prohibition of arbitrary measures in the Energy Charter Treaty. The government of Spain objected that the claimant could not be considered as an investor having substantial economic activities in the Netherlands and as such the government was within its right to deny the claimant the benefits of investment protection. It argued that Masdar was a mere ‘shell’ or ‘mailbox’: the company’s address was at Schiphol Airport, the accounts were summary, it had no employees, and was wholly financially dependent upon the Abu Dhabi government.[[117]](#footnote-117) The tribunal was not persuaded as it held that ‘substantial business activities’ implied the materiality, not the magnitude of business activities.[[118]](#footnote-118) The *Masdar* award draws on a number of precedents that followed the similar line of reasoning. It is one of the many awards where tribunals similarly found the source of capital or the state ownership and control thereof to be immaterial for the application of investment treaty protections.

The proposal for mandatory corporate due diligence, too, is at odds with investment treaty law. Laudable though its aims to enhance and enforce corporate compliance with human rights, environmental and labour standard are, the proposal ostensibly aspires to build ‘a more sustainable and fairer globalisation’[[119]](#footnote-119) at a time when EU investment agreements, both those of its member states and those concluded by the Union, continue to resist the incorporation of enforceable obligations that could offer a basis to hold investors accountable for the negative impact of their activities on local communities and the environment. International investment law has long been criticised for its asymmetry as it grants investors enforceable rights but does not hold them to enforceable obligations.[[120]](#footnote-120) Both the supporters and detractors of the international investment regime concede that it is ‘designed to redress the mistreatment of foreign investors, not foreign investor wrongdoing.’[[121]](#footnote-121) To rectify this imbalance between the rights and responsibilities of investors, ‘as a very modest starting point, the treaties could allow states to bring claims against any foreign investor or a related company that brings a claim in circumstances where the investor has not met a specific standard of good corporate conduct.’[[122]](#footnote-122) Yet when host states have attempted to use investment treaties and arbitration to challenge the misconduct of foreign investors, arbitral tribunals either dismissed those counter-claims or found no appropriate legal basis for investor responsibility.[[123]](#footnote-123)

States have yet to comprehensively address investor sustainability due diligence obligations in an actual investment treaty. As one of the world’s largest exporters and importers of foreign direct investment, the European Union exercises considerable leverage in the ongoing reform of international investment law.[[124]](#footnote-124) However, its most recent investment treaty texts feature no comprehensive and enforceable investor obligations. Not only do existing investment treaties fail to hold investors accountable for the harmful effect of their operations on human rights and the environment, but national regulatory measures aimed at enforcing corporate due diligence may clash with investment treaty obligations. More broadly, reconciling investment protection with international standards on human rights, environment and labour is akin to ‘aiming at two moving targets.[[125]](#footnote-125)’ The harmonisation of competing host state’s obligations to protect investments on one hand and to enforce human rights and sustainability standards ‘will always be a difficult exercise and sometimes compliance with both sets of obligations will be virtually impossible.’[[126]](#footnote-126)

Notably, although the EU’s new vision for trade and investment policy underscores the centrality of sustainability and fairness, the emerging instruments so far do very little to address the lack of inclusion. This is a critical omission. The political backlash against globalised trade has compelled key trade actors to recognise that trade must be made more inclusive. There is growing recognition in trade policy circles that international trade redistributes wealth, favouring some over others,[[127]](#footnote-127) such recognition of distributional effects of foreign investment—and the need for a more inclusive rules framework—is still absent in the major policy discussions on foreign investment. While the proposed corporate sustainability due diligence regulation is designed to prevent negative effects of foreign investment (“do no harm” obligations), what remains missing is a discussion of how investment policies can be redesigned to maximize the positive contribution that investors can bring to societies, or “doing good” for the communities that host them.[[128]](#footnote-128)

The debate about incompatibility between investment treaties and sustainability goals has received heightened attention in recent times, with a number of EU member states announcing their decision to withdraw from the Energy Charter Treaty due to the failure of the recent modernisation efforts to align the treaty with climate goals under the Paris Agreement.[[129]](#footnote-129) While the growing and rather vocal disenchantment with the Energy Charter Treaty signals another landmark development in the history of EU investment treaty law, it is important to note that the fundamental clash between investment protection and sustainability objectives is not an issue confined to energy investments only. The existing bilateral investment treaties of member states, in particular those of Germany, Luxembourg and the Netherlands, not only follow the same drafting patterns as the much-debated Energy Charter Treaty but are also responsible for a significant share of investor-state disputes where states’ regulatory powers were challenged. While the Commission’s vision of the new trade policy strongly emphasises the sustainability dimension, national regulatory measures in pursuit of such policy objectives may be disputed under the existing bilateral investment treaties.

* 1. Not enough: investment treaty reform and the (illusory) promise of change

An argument that is frequently levelled in response to the criticisms of investment treaties and their clash with the EU’s new investment policy objectives is that the more recent generation of treaties negotiated by the Commission have been modernised to ensure that ‘investments get protection without undermining the state’s sovereign rights to regulate and to protect the interests of the citizens.’[[130]](#footnote-130) The Commission points out that ‘EU investment protection agreements do not limit any State's sovereign right to regulate in the defence of public interest’ and that such treaties ‘explicitly state that the investment protection rules do not affect the right of the State to change its legal and regulatory framework.’[[131]](#footnote-131) While acknowledging that the first generation investment treaties contained vague protections that ‘have opened the door to possible abuse’, the Commission highlights that its more recent agreements introduce more clarity in the scope of investment protections while reaffirming ‘the right to regulate and to achieve legitimate policy objectives, such as public health, safety, environment, public morals and the promotion and protection of cultural diversity.’[[132]](#footnote-132) The new investment treaties now also require that investors comply with domestic laws of the host state.

The more recent EU investment treaty texts are indeed a vast improvement on the vague and sparsely worded drafting templates behind the first generation. The more detailed formulation of the fair and equitable treatment, non-discrimination and expropriation provisions might help curb excessive and wide-reaching interpretations produced by arbitral tribunals in the context of disputes under the old investment treaties. Fundamentally, however, the modernisation of investment agreements does not alter their nature: just like the old generation the major thrust of these agreements is to enable investors to challenge a wide range of governmental measures. The addition of declaratory clauses affirming the state parties’ right to regulate does not counter the effect of substantive protections such treaties continue to guarantee. Some of the new formulations have been criticised for reinforcing investment protections: the much contested but often deployed ‘legitimate expectations’ of investors are now expressly covered in the new EU agreements.[[133]](#footnote-133) Furthermore, recent arbitration awards under the treaties which contained similar clarifications and the affirmation of the right to regulate defeat some of the Commission’s arguments about the effect of its modernisation efforts. For instance, in the much-criticised *Bear Creek v Peru* and *Eco Oro v Colombia*,[[134]](#footnote-134) arbitral tribunals ignored the explicit hierarchy between public policy objectives and investment protection and concluded that, even in the presence of treaty exceptions for public policy measures, the states were under an obligation to compensate investors for the economic loss caused by such measures. It has been pointed out that the incorporation into investment treaties of public policy exceptions, carve-outs or requirements to comply with domestic laws so far has not led to interpretations compatible with human rights and sustainability standards.[[135]](#footnote-135) Just like the first generation treaties, the new investment agreements of the EU follow the original design which was based on the perceived need to insulate investors from governmental interference of any kind, be it for protectionist reasons or the pursuit of non-economic, social policy objectives.

1. Conclusion

When launching its new open, sustainable and assertive trade policy, the Commission unequivocally recognised that ‘[g]lobal trade rules are in urgent need of being updated to reflect today’s economic environment and the challenges the global community faces.’[[136]](#footnote-136) This article has demonstrated that the newly introduced pillars of the EU’s more defensive and sustainable approach to investment mirror profound transformations in the prevailing thinking about the impact of foreign investment on the economy and society. There is growing consensus that foreign investment can be not only the source of economic growth but also have significant implications for geopolitical stability and the protection of human rights, environment protection and labour standards. Whilst acknowledging that the inexorable pursuit of open markets has exacerbated inequalities and left behind individuals and communities globally, the Commission’s vision of new investment policy foregrounds the importance of fair and level-playing field, sustainability and universal values. Although some of the recently proposed policy mechanisms might go some way to address the concerns underpinning the EU’s move towards open strategic autonomy in global economic relations, there is a fundamental and systemic clash between the key pillars of the emerging EU investment policy. Just like the Janus-faced corporation, one arm of EU investment policy purportedly seeks to ensure sustainable, fairer and secure growth, while the other continues to enforce disciplines designed to constrain state powers to pursue public policy objectives. The adoption of new instruments on investment scrutiny, level-playing field and corporate due diligence represent a dramatic departure from the old orthodoxies on the role of investment in the political, economic and social relations globally and domestically. By contrast, despite the recent modernisation efforts, international investment agreements continue to operate in a manner that does not enable but rather hinder a move towards fairer and sustainable economic policy. At the same time, when looking at the emerging contours of EU investment policy as a whole, the move towards tighter scrutiny and closer oversight of foreign investment alone cannot alleviate the root causes beneath the heightened security and resilience concerns. Stopping China, reigning in state-owned investments and levelling the playing field will not be enough to address globalise trade’s ‘dichotomous impact on economies and societies.'[[137]](#footnote-137) What is needed is not only the closer alignment between the internal and external dimensions of EU investment policy but also a systematic foregrounding of social agenda to address the uneven material effects of globalised trade and investment.

1. COM (2021) 66 final, “Trade Policy Review - An Open, Sustainable and Assertive Trade Policy”, at p.4. [↑](#footnote-ref-1)
2. Article 21 of the Treaty on European Union (TEU) requires the Union to promote the values on which the Union is founded in the conduct of external relations, including ‘democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.’ [↑](#footnote-ref-2)
3. COM (2021) 66 final, “Trade Policy Review - An Open, Sustainable and Assertive Trade Policy”, at p. 4 [↑](#footnote-ref-3)
4. ‘An Open, Sustainable and Assertive Trade Policy: Open Strategic Autonomy’, https://trade.ec.europa.eu/doclib/docs/2021/february/tradoc\_159434.pdf [↑](#footnote-ref-4)
5. Ibid. [↑](#footnote-ref-5)
6. At p. 7. [↑](#footnote-ref-6)
7. OECD, Keys to Resilient Supply Chains, https://www.oecd.org/trade/resilient-supply-chains/. [↑](#footnote-ref-7)
8. Bungenberg and Hazarika, “Chinese Foreign Investments in the European Union Energy Sector: The Regulation of Security Concerns”, 20 Journal of World Investment & Trade (2019) 375. [↑](#footnote-ref-8)
9. Wernicke, “Investment Screening: The Return of Protectionism? A Business Perspective”, at 29. See also Gadocha, “Assessing the EU Framework Regulation for the Screening of FDI—What is the Effect of Chinese Investors?”, 6 The Chinese Journal of Global Governance (2020) 36, at 46. [↑](#footnote-ref-9)
10. Warchol, “The Birth of the EU Screening Regulation” in Hindelang and Moberg (Eds.), *A Common European Law on Investment Screening (CELIS)*, Yearbook of Socio-Economic Constitutions 2020 (Springer, 2021) at 56. [↑](#footnote-ref-10)
11. Bohman and Ljungwall, ‘The Strategic Rationale for European Engagement in China’s Belt and Road Initiative, The Swedish Institute of International Affairs, UI Brief N6, 2018. [↑](#footnote-ref-11)
12. Meunier, “Divide and conquer? China and the cacophony of foreign investment rules in the EU” 21 J Eur Public Policy (2014) 996. [↑](#footnote-ref-12)
13. See Warchol at 57, discussing the letter sent France, Italy and Germany in February 2017 asking the European Commission to work on legal measures for a screening that would grant additional protection based on economic criteria. [↑](#footnote-ref-13)
14. 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, O.J. L 79I , 21.3.2019, (hereinafter the FDI Screening Regulation). [↑](#footnote-ref-14)
15. Art 1(2) [↑](#footnote-ref-15)
16. Simon, “Investment Screening: The Return of Protectionism? A Political Account” in Hindelang and Moberg (Eds.), *A Common European Law on Investment Screening*, 43, at 45. [↑](#footnote-ref-16)
17. The national security framing is also motivated by the need to demonstrate compliance with obligations under WTO law (see para 3 of the recitals to the FDI screening Regulation). [↑](#footnote-ref-17)
18. See, eg, Article 4(1) of the FDI Screening Regulation. [↑](#footnote-ref-18)
19. Ibid, paragraphs (b) and (d). See also UNCTAD, National Security-Related Screening Mechanisms for Foreign Investment: An Analysis of Recent Policy Developments (December 2019) 2. [↑](#footnote-ref-19)
20. In July 2022, the OECD reported that policy adjustments to include critical health infrastructure within the scope of screening in 21 OECD countries. OECD, “Investment screening in times of COVID-19–and beyond”, 07 July 2022. [↑](#footnote-ref-20)
21. Brussels, 25.3.2020 COM (2020) 1981, “Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe’s strategic assets, ahead of the application of Regulation (EU) 2019/452 (FDI Screening Regulation)”. [↑](#footnote-ref-21)
22. ibid [↑](#footnote-ref-22)
23. See Gadocha, “Assessing the EU Framework Regulation for the Screening of FDI”, 47, citing Die Welt, Gabriel wirft China Foulspiel bei Übernahmen vor (October 29, 2016). [↑](#footnote-ref-23)
24. ibid 47 [↑](#footnote-ref-24)
25. Poitiers and Dominguez-Jimenez (2020), “Europe’s China problem: investment screening and state aid”, Bruegel Blog, 2 July 2020. [↑](#footnote-ref-25)
26. Simon, “Investment Screening: The Return of Protectionism? A Political Account”, at 46. [↑](#footnote-ref-26)
27. European Parliament, Resolution on building an ambitious EU industrial strategy as a strategic priority for growth, employment and innovation in Europe (2017/2732(RSP), Nr. 19. [↑](#footnote-ref-27)
28. Proposal for a Regulation of The European Parliament and
of The Council on foreign subsidies distorting the internal market, Brussels 17 May 2021, COM(2021) 223 final. [↑](#footnote-ref-28)
29. Ibid, paragraph 2 of recitals. [↑](#footnote-ref-29)
30. European Commission White Paper on levelling the playing field as regards foreign subsidies, Brussels, 17.6.2020 COM (2020) 253 final. [↑](#footnote-ref-30)
31. Ibid. [↑](#footnote-ref-31)
32. COM (2021) 66 final, “Trade Policy Review - An Open, Sustainable and Assertive Trade Policy”, at p. 4. [↑](#footnote-ref-32)
33. Ibid at p. 6. [↑](#footnote-ref-33)
34. Ibid at p. 10. [↑](#footnote-ref-34)
35. Proposal for a Directive of The European Parliament and of The Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937COM/2022/71 final. [↑](#footnote-ref-35)
36. Gammage and Syrpis, “Sovereignty Fictions in the United Kingdom’s Trade Agenda”, 71 ICLQ (2022) 563, at p. 579. [↑](#footnote-ref-36)
37. COM (2021) 66 final, “Trade Policy Review - An Open, Sustainable and Assertive Trade Policy”, at pp. 12-13. [↑](#footnote-ref-37)
38. #  European Parliament, “MEPs refuse any agreement with China whilst sanctions are in place”, 20 May 2021.

 [↑](#footnote-ref-38)
39. Simon, “Investment Screening: The Return of Protectionism? A Political Account”, at p.45. [↑](#footnote-ref-39)
40. ibid, citing IndustriAll (2018), Policy Brief 2018-1, p. 5 [↑](#footnote-ref-40)
41. Ibid. [↑](#footnote-ref-41)
42. UNCTAD, National Security-Related Screening Mechanisms for Foreign Investment: An Analysis of Recent Policy Developments, 2. [↑](#footnote-ref-42)
43. ibid [↑](#footnote-ref-43)
44. See Du, “Chinese State-Owned Enterprises and International Investment Law” in Delimatsis, Dimitropoulos and Gourgourinis (Eds.) State Capitalism and International Investment Law (Bloomsbury, 2023) pp. 161-183. [↑](#footnote-ref-44)
45. Denza and Poulsen, “The Euro-Arab Investment Treaty that Nearly Was”, 69 ICLQ (2020) 267. [↑](#footnote-ref-45)
46. Denza to Yarnell 23 June 1982 FCO 69/959, at 77. [↑](#footnote-ref-46)
47. Gowlland to Yarnell 29 Nov 1982 FCO 69/960, at 103 [↑](#footnote-ref-47)
48. Richmond to Makepeace, 6 December 1985, FCO 98/2270, at 21. [↑](#footnote-ref-48)
49. Investment by Arab Oil Producers in European Defence Industries, 13 October 1983, File 8/4987 [↑](#footnote-ref-49)
50. Ibid. [↑](#footnote-ref-50)
51. ibid [↑](#footnote-ref-51)
52. ITO Charter Art 12(1)c. [↑](#footnote-ref-52)
53. Lustig, *Veiled Power* (OUP, 2020) at p.188. [↑](#footnote-ref-53)
54. Lustig 198, citing Osvaldo Sunkel, “Big Business and ‘Dependencia,” 50 Foreign Affairs (1972) 517. [↑](#footnote-ref-54)
55. Nye, “Multinational Corporations in World Politics”, 53 Foreign Affairs (1974) 153, at p. 157. [↑](#footnote-ref-55)
56. See Lustig, 205-9. [↑](#footnote-ref-56)
57. 53 U.N.ESCOR (1822nd Mtg.)19, 22, U.N.Doc. E/SR.1822 (1972). [↑](#footnote-ref-57)
58. Lustig, at p. 210. [↑](#footnote-ref-58)
59. G.A. Res.3281 (XXIX), Charter of Economic Rights and Duties of States (Dec.12, 1974) [↑](#footnote-ref-59)
60. Slobodian, *Globalists:* *The End of Empire and the Birth of Neoliberalism* (Harvard University Press, 2018) 139. [↑](#footnote-ref-60)
61. Austria, France, Ireland, Italy, the Netherlands, and Spain were among those states that abstained. See Gosovic and Ruggie, “On the creation of a new international economic order: issue linkage and the Seventh Special Session of the UN General Assembly”, 30(2) International Organization (1976) 309, at p. 311. [↑](#footnote-ref-61)
62. Lustig, *Veiled Power*, at p. 213. [↑](#footnote-ref-62)
63. See St John, *The Rise of Investor-State Arbitration: Politics, Law, and Unintended Consequences* (OUP, 2018); and Poulsen, *Bounded Rationality and Economic Diplomacy*: *The politics of investment treaties in developing countries* (CUP, 2015). [↑](#footnote-ref-63)
64. Slobodian, *Globalists*, 145. [↑](#footnote-ref-64)
65. See Mark Feldman, “State-owned Enterprises as Claimants in International Investment Arbitration”, 31 ICSID Review (2016) 24. [↑](#footnote-ref-65)
66. EC President, J. C. Juncker annual speech on State of the Union 2017, Strasbourg, 13/9/2017 <http://europa.eu/rapid/press-release_SPEECH-17-3165_en.htm>. [↑](#footnote-ref-66)
67. See, for instance, one classical textbook on international investment law describing investment as a catalyst of economic growth, a higher living standard and good governance: Dolzer and Schreuer, *Principles of international investment law* (OUP, 2008) 10. [↑](#footnote-ref-67)
68. For the contemporaneous accounts, see Feng, “ “We Wouldn’t Transfer Title to the Devil”: Consequences of Congressional Politicisation of Foreign Direct Investment on National Security Grounds”, 42 NYU J Intl L & Pol (2009) 253 (noting that ‘there is a sense that FDI may serve as a tool for foreign governments to gain footholds in vital industries, to siphon off valuable or sensitive American technologies, or simply to provide a means for sabotage’); also Saxon, “It’s Just Business, or Is It? How Business and Politics Collide with Sovereign Wealth Funds”, 32 Hastings Intl & Comp L Rev (2009) 693. [↑](#footnote-ref-68)
69. Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy’s Promise* (CUP, 2008) at p. 188. [↑](#footnote-ref-69)
70. Warchol, “The Birth of the EU Screening Regulation”, at p. 54. [↑](#footnote-ref-70)
71. #  See, e.g. Wernicke, “Investment Screening: The Return of Protectionism? A Business Perspective” in Hindelang and Moberg (Eds.), *A Common European Law on Investment Screening*, at p. 29; also Bungenberg and Blandfort, “Investment Screening – a New Era of European Protectionism?” in Hahn and Van der Loo (Eds.) *Law and Practice of the Common Commercial Policy: The first 10 years after the Treaty of Lisbon* (Brill, 2020) 161.

 [↑](#footnote-ref-71)
72. See Schmitz and Seidl, “As open as possible, as autonomous as necessary: Understanding the Rise of Open Strategic Autonomy in EU trade policy”, JCMS (2022) 2. [↑](#footnote-ref-72)
73. Cohen, “Nations and Markets” 23 JIEL (2020) 793, at p. 813. [↑](#footnote-ref-73)
74. Velut, Siles-Brügge and Dalingwater, “Rethinking the Dynamics of Inclusion and Exclusion in Trade Politics”, 27 New Political Economy (2022) 547. [↑](#footnote-ref-74)
75. Schmitz and Seidl, “As open as possible, as autonomous as necessary”, at p. 4, see also Slobodian, *Globalists*, at p. 190, discussing the idea of social market economy - ‘free market principles with attention to welfare and labour concerns’ that gained some traction in the early years of the European integration project. [↑](#footnote-ref-75)
76. European Commission (1996) “The Global Challenge of International Trade: A Market Access Strategy for the European Union”. [↑](#footnote-ref-76)
77. Siles-Brügge, *Constructing European Union Trade Policy: A Global idea of Europe* (Palgrave Macmillan, 2014) at p. 62. [↑](#footnote-ref-77)
78. Ibid at p.79, see also Schmitz and Seidl, “As open as possible, as autonomous as necessary”, at p. 7. [↑](#footnote-ref-78)
79. Schmiz and Seidl, “As open as possible, as autonomous as necessary” at p. 11. [↑](#footnote-ref-79)
80. COM (2021) 66 final, “Trade Policy Review - An Open, Sustainable and Assertive Trade Policy”, at p.1. [↑](#footnote-ref-80)
81. Schmitz and Seidl, “As open as possible, as autonomous as necessary”, at p. 10. [↑](#footnote-ref-81)
82. Ibid at p. 11. [↑](#footnote-ref-82)
83. Cohen, “Nations and Markets”, at p. 794. [↑](#footnote-ref-83)
84. Ibid, at pp. 812-813. [↑](#footnote-ref-84)
85. Ibid, at p. 804. [↑](#footnote-ref-85)
86. COM (2021) 66 final, “Trade Policy Review - An Open, Sustainable and Assertive Trade Policy”, at p.10. [↑](#footnote-ref-86)
87. Vandevelde, “The liberal vision of the international law on foreign investment” in Lim (Ed.) *Alternative Visions of the International Law on Foreign Investment* (CUP, 2016) p. 48. [↑](#footnote-ref-87)
88. Schneiderman, *Resisting Economic Globalization: Critical Theory and International Investment Law* (Palgrave Macmillan, 2013) p. 24. [↑](#footnote-ref-88)
89. Vandevelde, ibid, p. 60. [↑](#footnote-ref-89)
90. Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy’s Promise* (CUP, 2008) p. 4. [↑](#footnote-ref-90)
91. See Vandevelde, “The liberal vision of the international law on foreign investment”, at p. 63. [↑](#footnote-ref-91)
92. Slobodian, *Globalists*, at p. 93. [↑](#footnote-ref-92)
93. Ibid. [↑](#footnote-ref-93)
94. Ibid 95. [↑](#footnote-ref-94)
95. Ibid 101. [↑](#footnote-ref-95)
96. Ibid 122. [↑](#footnote-ref-96)
97. See Ostransky, “State Capitalism, ‘Normal’ Capitalism and Other Capitalisms? The Discreet Place of State in Neoliberal International Investment Law” in Delimatsis, Dimitropoulos and Gourgourinis (Eds.) State Capitalism and International Investment Law (Bloomsbury, 2023); and Carroll, Gonzalez-Vicente, Jarvis, “Capital, Conflict and Convergence: A political understanding of neoliberalism and its relationship to capitalist transformation”, 16 Globalizations (2019), at 778. [↑](#footnote-ref-97)
98. Vandevelde, “The liberal vision of the international law on foreign investment”, at p. 55. [↑](#footnote-ref-98)
99. Pohl, “The Impact of Investment Treaty Commitments on the Design and Operation of EU Investment Screening Mechanisms” in Hindelang and Moberg (Eds.), *A Common European Law on Investment Screening (CELIS)*, Yearbook of Socio-Economic Constitutions 2020 (Springer, 2021) at 765. [↑](#footnote-ref-99)
100. #  *Huawei v Sweden*, ICSID Case No. ARB/22/2, Request for Arbitration, 7 January 2022, para 9.

 [↑](#footnote-ref-100)
101. Ibid para 8. [↑](#footnote-ref-101)
102. See Voon and Merriman, “Is Australia’s Foreign Investment Screening Policy Consistent with International Investment Law?”, 23 Melbourne Journal of International Law (2022) 1, at 12. [↑](#footnote-ref-102)
103. Voon and Merryman, see also German Model Treaty 2007 which makes exceptions for public security and public order measures in its national treatment and MFN clause. [↑](#footnote-ref-103)
104. Voon and Merryman, at p. 31. [↑](#footnote-ref-104)
105. #  *Global Telecom Holding S.A.E. v. Canada*, ICSID Case No. ARB/16/16, Award, 27 March 2020.

 [↑](#footnote-ref-105)
106. Charlotin, “Analysis: in Global Telecom v. Canada, arbitrators unanimously reject FET, FPS and free transfer claims, but disagree on national treatment argument and foreign acquisition review exception”, IA Reporter, April 29, 2020. [↑](#footnote-ref-106)
107. See para 333 of the award. [↑](#footnote-ref-107)
108. Niamh Nic Shuibhne, *The Coherence of EU Free Movement Law: Constitutional Responsibility and the Court of Justice* (OUP, 2013) at p. 26. [↑](#footnote-ref-108)
109. *Renta 4 SVSA, Ahorro Corporación Emergentes FI, Ahorro Corporación Eurofondo FI, Rovime Inversiones SICAV SA, Quasar de Valors SICAV SA, Orgor de Valores SICAV SA, GBI 9000 SICAV SA v The Russian Federation*, SCC No 24/2007, Award (20 July 2012) para 21. [↑](#footnote-ref-109)
110. Ibid paras 21–23 [↑](#footnote-ref-110)
111. See eg SGS *Société Générale de Surveillance SA v Philippines* , Decision on Objections to Jurisdiction and Separate Declaration, 29 January 2004 , ICSID Case No ARB/02/6, para 116. [↑](#footnote-ref-111)
112. Paschalidis, ‘The Impact of EU State Aid Law on International Investment Law and Arbitration’ in Fach Go´mez, Gourgourinis and Titi (Eds.) European Yearbook of International Economic Law. Special Issue: *International Investment Law and Competition Law* (Springer, 2020) at p. 179. [↑](#footnote-ref-112)
113. Barto´k and Miroudot, ‘The Interaction amongst Trade, Investment and Competition Policies’ (2008) 60 OECD Trade Policy Papers 4. [↑](#footnote-ref-113)
114. See *International Thunderbird Gaming Corporation v Mexico*, Award, 26 January 2006. [↑](#footnote-ref-114)
115. See Feldman, “State-owned Enterprises as Claimants in International Investment Arbitration”, also Walid Ben Hamida, “Sovereign FDI and international investment agreements: questions relating to the
qualification of sovereign entities and the admission of their investments under investment agreements”, 9 Law & Practice of International Courts and Tribunals (2010)17. See also the Investment Protection Agreement between the European Union and its Member States, of the one part, and the
Republic of Singapore, of the other part (signed 15 October 2018, not in force), Article 4.8. The agreement appears to implicitly cover sovereign wealth funds. [↑](#footnote-ref-115)
116. *Masdar Solar & Wind Cooperatif U.A. v Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018. [↑](#footnote-ref-116)
117. Ibid para 230 [↑](#footnote-ref-117)
118. Ibid paras 253-4 [↑](#footnote-ref-118)
119. COM (2021) 66 final, “Trade Policy Review - An Open, Sustainable and Assertive Trade Policy”, at p. 10. [↑](#footnote-ref-119)
120. For discussions of various manifestations of this asymmetry, see Gathii and Puig, “Investor Responsibility: The Next Frontier in International Investment Law”, 113 AJIL Unbound (2019)1. [↑](#footnote-ref-120)
121. Ibid at p. 1. [↑](#footnote-ref-121)
122. van Harten, ‘Reforming the system of international investment dispute settlement’ in Lim (Ed.) *Alternative Visions of the International Law on Foreign Investment* (CUP, 2016), at 123. [↑](#footnote-ref-122)
123. Gathii and Puig, “Investor Responsibility”. [↑](#footnote-ref-123)
124. Puig & Shaffer, “Imperfect Alternatives: Institutional Choice and the Reform of Investment Law”, 112 AJIL (2018) 361, at 367. [↑](#footnote-ref-124)
125. Simma, “Foreign Investment Arbitration: A Place for Human Rights?”, 60 ICLQ (2011) 573, at 591. [↑](#footnote-ref-125)
126. ibid [↑](#footnote-ref-126)
127. Gregory Shaffer, “Retooling Trade Agreements for Social Inclusion,” U Ill L Rev (2019) 1. [↑](#footnote-ref-127)
128. UNCTAD, *World Investment Report 2015: Reforming International Investment Governance*, 126. For further discussion, see Sattorova, “The Foreign Investor as a Good Citizen: Investor Obligations to Do Good” in Ho and Sattorova (Eds.) *Investors’ International Law* (Bloomsbury, 2021) 45. [↑](#footnote-ref-128)
129. Simon, “Another blow for Energy Charter Treaty as Luxembourg announces exit”, 18 Nov 2022, Euractiv; see also The Guardian, “France becomes latest country to leave controversial energy charter treaty”, 21 October 2022. [↑](#footnote-ref-129)
130. European Commission, New Investment Protection Agreements Better protection for investors – and better protection for citizen, https://trade.ec.europa.eu/doclib/docs/2020/july/tradoc\_158908.pdf [↑](#footnote-ref-130)
131. Ibid. [↑](#footnote-ref-131)
132. Ibid [↑](#footnote-ref-132)
133. By contrast, the recent investment chapters in US FTAs tend to expressly exclude the protection of legitimate expectations from the scope of the fair and equitable treatment standard. The idea that investors are entitled to the protection of their legitimate expectations was a cornerstone in recent disputed brought against Spain and Italy in connection with the changes in their regulatory frameworks on renewable energy incentives. It served as a device enabling the investors to successfully claim damages, with a small number of arbitrators dissenting and arguing that legitimate expectations should not be seen as part of the corpus of international investment law. [↑](#footnote-ref-133)
134. #  See Paine, “*Bear Creek Mining Corporation v Republic of Peru*: Judging the Social License of Foreign Investments and Applying New Style Investment Treaties”, 33 ICSID Review (2018) 340–348; **Heath** “Eco Oro and the twilight of policy exceptionalism”, Investment Treaty News, 20 December 2021.

 [↑](#footnote-ref-134)
135. Davitti, *Investment and Human Rights in Armed Conflict: Charting an Elusive Intersection* (Hart Publishing, 2019) at p. 189. [↑](#footnote-ref-135)
136. “Trade Policy Review - An Open, Sustainable and Assertive Trade Policy”, at p.10. [↑](#footnote-ref-136)
137. Ibid. [↑](#footnote-ref-137)