5 Investment protection and dispute settlement in Bulgaria

This chapter provides an overview of provisions in both domestic legislation and Bulgaria's international investment agreements offering protections for investors. It looks into the rules of expropriation, contract enforcement and dispute settlement as well as the regimes for intellectual property rights and for access to land. It also reviews Bulgaria's international investment treaty practice and its legal framework for investor-state dispute settlement.

Introduction

The conditions faced by investors both when they establish and in their on-going business operations are only part of the overall investment environment. The previous chapter expanded on Bulgaria's measures in order to attract and retain FDI, as well as measures that might have an adverse effect in fulfilling this purpose (such as foregoing national treatment to foreign investors, this is, granting nationals better conditions to invest and conduct business than foreigners in like circumstances). However, for host economies to reap the benefits of foreign investment, additional policies should be in place to protect investments once established in the host country, allowing for a dual effect of attracting foreign investment and maximising the local benefits of FDI (Alfaro, 2016).

The protection of investment, combined with effective enforcement mechanisms, is an important pillar of a sound investment climate. Protecting investors from improper treatment can lower their perception of risks for new investments, and investors who perceive lower risks will generally make capital and resources available at a lower cost and with longer amortisation periods. Measures to ensure the protection of investments are taken at both domestic and international level. They include improving legal certainty and predictability, guarantees against expropriation, intellectual property rights protection, as well effective access to justice and effective dispute resolution mechanisms. This chapter addresses Bulgaria's measures for the protection of investment, at both the domestic and international level.

Bulgaria's domestic legal framework provides protection for investors in line with other EU policy regimes, reflecting the gradual adoption of the EU *acquis* and the country's transition towards a market economy. As an effective system of protection of intellectual property rights is an important precondition for attracting and retaining investment, Bulgaria has a modern legislation that is aligned with the EU norms and standards. The country is also arbitration-friendly. It has also made tangible progress in reducing delays related to contract enforcement as illustrated in the 2020 World Bank *Doing Business* report, in which Bulgaria ranked 42nd in the ease of enforcing contracts among 190 economies, moving up 33 spots since its 2015 ranking. This being said, challenges remain. Corruption in public administration, a weak judiciary, administrative delays and costs to enforce contracts and obtain reparations continue to hamper the country's investment climate and economic prospects, as discussed in Chapters 6 and 7 of this *Review*.

Protections afforded under Bulgaria's investment treaties are another important part of the legal framework for investment. Bulgaria has 62 investment treaties in force today. These treaties grant protections to certain foreign investors in addition to and independently from protections available under domestic law to all investors. Like treaties signed by many other countries, Bulgaria's investment treaties typically protect investments made by treaty-covered investors against expropriation and discrimination. They also give covered investors access to investor-state dispute settlement (ISDS) procedures, including international arbitration, in cases where they claim that the government has infringed these protections.

Bulgaria, like many other countries, has changed its approach to investment treaties in recent years. Some of this change corresponds to commitments that Bulgaria made as part of EU accession and a new role for the European Commission on investment policy in the EU since 2009. It also reflects Bulgaria's experiences facing claims by investors in arbitration cases under its older treaties – at least ten such cases to date – and intensification of policy debates regarding effects, designs and outcomes of investment treaties. Central in these debates is the desire of many governments to strike an appropriate balance in these treaties between investment protection and sovereign rights to regulate in the public interest. A new Bulgarian model BIT, which was approved by the Council of Ministers in November 2018, seeks to achieve a more balanced approach and serve as a basis for future treaty negotiations with non-EU countries. Bulgaria also participates in inter-governmental discussions regarding possible reforms of investment treaties, including UNCITRAL's Working Group III on ISDS Reform and the modernisation process for the Energy Charter Treaty, a prominent multilateral treaty to which Bulgaria is a party.

Like many other countries, Bulgaria still has a significant number of investment treaties with vague investment protections and ISDS provisions that may create unintended consequences in ISDS cases and ultimately undermine reform efforts. Updating existing treaties remains a separate challenge to negotiating new treaties with time, cost and resource allocation constraints. Recommendations to reconsider several aspects of the government's approach to investment treaties in this context are set out below. Whatever approach the government takes towards investment treaty making, these treaties should not be seen as a substitute for long-term improvements in the domestic business environment including through measures to improve the capacity, efficiency and independence of the domestic court system, the quality of the legal framework, and the strength of national institutions responsible for enforcing such legislation.

Domestic framework: Investor protection under Bulgarian law

Bulgaria offers a safe legal environment

Investor protection, together with effective and responsible public institutions that are sensitive to the needs of businesses and citizens, has been one of Bulgaria's key government priorities, as evidenced by strategic documents such as the "Vision, Goals and Priorities of the National Development Programme BULGARIA 2030" (Decision 33 of the Council of Ministers, 20 January 2020)[1] and NDP BULGARIA 2030 (Protocol 67 of the Council of Ministers, 2 December 2020).

Investor protection is guaranteed under Bulgaria's highest legal authority, the 1991 Constitution of Republic of Bulgaria (Articles 17, 19, 54, 117), as well as dedicated laws. The country's legal framework includes enforceable principles for the protection of private property, limits to the powers of administrative authorities and rules to ensure the predictability for the issuance and implementation of legislative acts/statutory instruments.

To ensure the policy stability and predictability of Bulgaria's legal framework, Article 4 of the Constitution asserts that the country shall be "governed by the rule of law". The practice of the Constitutional Court has repeatedly clarified this principle as comprising the application and consideration of both the principles of legal certainty (protecting investors against the arbitrary exercise of public power) and of substantive legality (requiring that laws must be laid down in advance[2]).[3] The implementation of these constitutional principles is found in Bulgaria's Code of Administrative Procedure (BCAP) (Article 4), which defines the limits of the powers of administrative authorities as well as the Bulgarian Statutory Instruments Act (Article 26), which provides for the preparation, issuance and implementation of the legislative acts/statutory instruments.

Moreover, according to Bulgaria's principle of proportionality, an administrative or legislative act, and the enforcement thereof, may not affect any rights and legitimate interests to a greater extent than the minimum necessary for the purpose for which the act is issued. In case an administrative act affects any rights or creates any obligations for individuals or companies, the more favourable measures shall be applied if the purpose of the law can likewise be achieved in this manner (BCAP, Article 6). Finally, Bulgaria protects foreign investors against changes in the national legislation. Any foreign investment made prior to the adoption of legislative changes imposing legal restrictions solely on foreign investments is to be governed by the legal provisions that were effective at the moment of implementation of the investment (IPA, Article 23).

As it will be developed below, Bulgaria is a party to various multilateral and bilateral agreements for the protection of investors, as well as to more than 130 agreements on mutual encouragement and protection of investments or avoidance of double taxation (Kolev and Targot, 2019).

Guarantees against expropriation

The right to expropriate is an undisputed prerogative of sovereign states, safeguarding their ability to pursue legitimate interests. Bulgaria's Constitution includes protections for local and foreign investors against forcible expropriation of property (Article 17.5). Property can only be expropriated by virtue of a law,[4] pursuant to State or municipal needs that cannot otherwise be met, and after fair compensation has been paid in advance.

Expropriation processes begin by a decision of public need by the Council of Ministers or a regional governor, and are regulated under the State Property Act (SPA) (Articles 32-40). Before commencing an expropriation process, a Detailed Development Plan (DDP) is published and discussed with the interested parties in order to determine the exact area(s) to be expropriated, the property appraisal and monetary compensation. According to the SPA, compensation will be calculated based on the market prices of properties with similar characteristics located near the expropriated property and determined before the DDP enters into force.

All decisions to expropriate are subject to appeal within 14 days of their notification. Expropriation actions by the Council of Ministers can be appealed directly to the Supreme Administrative Court, while a regional governor's expropriation can be appealed in the local administrative court at the location of the property. A property will only be seized after the monetary compensation has been transferred to the account of the owner and, in case the expropriated property is the sole home of the owner, three months after the payment of the compensation. The State Property Act includes additional protections in case of agricultural land and private forest territories, which must respect a certain size in order to avoid fragmentation of land and preserve their effective management and cultivation (Article 42.a).

Alternative dispute resolution mechanisms: Arbitration and mediation

Bulgaria's legal framework for arbitration is largely defined by the Act for International Commercial Arbitration (ICAA) – which regulates both international and domestic arbitration. In addition to the ICAA, provisions of the Civil Procedure Code are also applicable to arbitration proceedings. According to the latter, arbitration proceedings can be conducted on any property dispute, except for certain disputes such as real estate disputes, employment disputes, administrative and other public law disputes, and consumer related disputes (Article 19 and Supplementary Provisions of the 2006 Consumer Protection Act, Article 13, Item 1). Arbitration is also limited in cases of insolvency: once the proceedings have been initiated, all claims against the debtor must be filed before the insolvency court (Commerce Act, Article 637(6)).

The ICAA defines the rules applicable to international and national[5] commercial arbitration, based on a written arbitration agreement[6] when the place of arbitration is on the territory of the Republic of Bulgaria (Article 1(1)). Commercial arbitration under ICAA is open not only to private parties, but also to state or public entities having concluded arbitration agreements (ICAA, Article 3). Disputes include civil property proceedings resulting from foreign commercial relationships as well as disputes for filling in the gaps of a contract or its adaptation to changed circumstances (ICAA, Article 1(2)). Bulgaria is also party to the European Convention on International Commercial Arbitration since 1964.

Adopted in 1988, the ICAA is largely based on the UNCITRAL Model Law on International Commercial Arbitration (1985), thus transposing relevant regulations such as the right for the tribunal to resolve the dispute under the law chosen by the parties, the obligation for arbitrators to ensure equal treatment of the parties and equal opportunities to present their cases and the principle of competence-competence (ICAA, Articles 19, 22 and 38). In January 2017, responding to concerns regarding the proliferation of new arbitral institutions and the need to maintain the quality of their services (Draguiev and Georgiev, 2015), the ICAA was amended to explicitly provide eligibility criteria for arbitrators sitting in Bulgaria, who must, among other considerations, hold an university degree, have at least eight years' professional experience and

high moral qualities (Article 11). Foreign citizens may act as arbitrators only if the arbitration is international. Certain arbitral institutions impose further restrictions – for example, some institutions restrict the choice of arbitrators to their lists and permit the choice of unlisted arbitrators to international cases only (Emanuilov, 2019).

National courts cannot interfere with pending arbitration proceedings (e.g. accepting to hear a dispute or an appeal to an award that the parties had agreed to submit to international arbitration); however, they could refuse to enforce a unilateral arbitration clause that grants only one of the parties a choice between arbitration and state courts.[7]

Although about 40 arbitral institutions are active in Bulgaria, there is one major national arbitration institution, which is the Arbitration Court (AC) at the Bulgarian Chamber of Commerce and Industry (BCCI). The AC-BCCI has been by far the busiest arbitral institution in Bulgaria; for example, in 2018 it registered some 200 domestic and 30 international new arbitration cases.[8] Other important Bulgarian arbitral institutions are the Arbitration Court at the Bulgarian Industrial Association and the Arbitration Court at the Confederation of Employers and Industrialists in Bulgaria (KRIB Court of Arbitration).

Recognition of foreign arbitral awards are regulated by the Bulgarian International Commercial Arbitration Act of 1988 (Article 51) and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), which is part of Bulgaria's national law and with precedence over any conflicting provisions of domestic legislation since 1965 (1991 Constitution of the Republic of Bulgaria, Article 5(4)).

Mediation is also available as an alternative method of resolution of legal and non-legal disputes. According to the 2004 Mediation Act, mediation is possible in case of civil, commercial, labour, family and administrative disputes related to consumer rights, and other disputes between natural and/or legal persons, including for international disputes (Article 3(1)). The Mediation Act includes a non-exhaustive list of disputes subject to mediation, allowing for a broad approach to mediation in both national and international disputes. Agreements reached in a mediation process have the effect of an in-court settlement, subject to approval by regional courts in Bulgaria, who will verify it does not contradict the law or the principles of morality (Mediation Act, Article 18(1)). Bulgarian national law does not recognise foreign-based conciliation commissions and foreign-based mediation procedures. In case of out-of-court settlements, the general procedures for enforcement of contracts shall apply.

At the international level, Bulgaria is a party to the two founding instruments of the Permanent Court of Arbitration – the 1899 Convention for the Pacific Settlement of International Disputes and the 1907 Convention for the Pacific Settlement of International Disputes- since September 1900 and June 2000 respectively. Bulgaria is also a party to the Charter of the United Nations and thus the International Court of Justice since 1955, to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards since 1965 and to the 1965 Convention on the Settlement of Investment Disputes between State and Nationals of Other States (ICSID Convention) since 2001.

Bulgaria actively participates in the initiative of the Secretary of the ICSID for the amendment of the ICSID Convention and ICSID Additional Facility Rules and is an active participant in the UNCITRAL Working group III Investor-State Dispute Settlement Reform, focused on reforms of investor-state dispute settlements in relation to the establishment of a multilateral investment court.

Protection of intellectual property rights

The protection of intellectual property (IP) rights is another important component of any policy aiming at attracting investment. Protection of IP rights fosters development and innovation since it safeguards associated research and development and give investors the confidence to share new technologies without fears of losing their ownership. It is widely acknowledged that a well-functioning and balanced IP system

is key to promoting innovation and creativity, which are the main drivers of development of knowledge-based economies (OECD, 2015).

Main traits of Bulgaria's IP rights system

Bulgaria grants constitutional-level protection to IP rights, in particular to artistic, scientific and technological creativity, as well as inventors' rights, copyrights and related rights (Articles 17 and 54 of the 1991 Constitution). Bulgaria is also a party to all international treaties and conventions on intellectual property administrated by the World Intellectual Property Organization (WIPO), with the exception of the Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications (adopted on 20 May 2015). National laws are aligned with EU directives, even going beyond the minimum requirements of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

Table 5.1. Bulgaria's regulations in force in 2020 on the protection of IP rights

Law on Patents and Utility models registration
Ordinance on drafting, filling and examination of patent
Ordinance on filling applications and supplementary protection certificates granting
Disputes Resolution Ordinance on Act on patents and registration of utility models
Instructions on the Patent and Utility model applications content
Instruction on the consideration of requests of provisional protection for the applications for the European patent and requests for effect on the territory of the Republic of Bulgaria of the granted European patent
Law on Trademarks and Geographical indications
Ordinance on drafting, filling and examination of Trademarks and Geographical indications applications
Ordinance on the procedure for drafting, submitting and examining oppositions on the Law on Trademarks and Geographical Indications
Disputes Resolution Ordinance on the Law on Trademarks and Geographical Indications
General Recommendation on the provisions considering the protection of the known trademarks, adopted by the Assembly of the Paris Union for the protection of Industrial Property and the WIPO General Assembly on its 34th series of the meetings of the Member States` Assemblies
Guidelines for the Application of Art. 11 and 12 of the Trademarks and Geographical Indications act
Law on Industrial designs
Ordinance on drafting, submitting and examination of the applications for registration of the Industrial designs
Law on topographies of integrated circuit
Instruction on drafting, submitting and formal examination of the applications for the topographies of integrated circuits
Law on the protection of new plant varieties and animal breeds
Instruction on the examination of the applications for the certificates for new plant varieties and animal breeds
Regulation on the border legal measures for the protection of the intellectual property rights
Ordinance for Representatives regarding Industrial Property
Ordinance on the Secret Patents
Organisational Structure Regulations of the Patent Office of Republic of Bulgaria
Tariff of Fees Collected by the Patent Office of Republic of Bulgaria
Regulation (EU) No 386/2012 of the European Parliament and of the Council of 19 April 2012 on entrusting the Office for Harmonization in the Internal Market (Trade Marks and Designs) with tasks related to the enforcement of intellectual property rights, including the assembling of public and private-sector representatives as a European Observatory on Infringements of Intellectual Property Rights
Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights)
Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions
Regulation (EC) No 1610/96 of the European Parliament and of the Council of 23 July 1996 concerning the creation of a supplementary protection certificate for plant protection products
Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights
Regulation (EC) No 469/2009 of the European Parliament and of the Council of 6 May 2009 concerning the supplementary protection certificate for medicinal products (Codified version)
Council Regulation (EC) No 491/2009 of 25 May 2009 amending Regulation (EC) No 1234/2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation)

Regulation (EC) No 110/2008 of the European Parliament and of the Council of 15 January 2008 on the definition, description, presentation, labelling and the protection of geographical indications of spirit drinks and repealing Council Regulation (EEC) No 1576/89
Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007
Regulation (EU) No 251/2014 of the European Parliament and of the Council of 26 February 2014 on the definition, description, presentation, labelling and the protection of geographical indications of aromatised wine products and repealing Council Regulation (EEC) No 1601/91
Regulation (EU) No 1151/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs
Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trademark (Text with EEA relevance)
Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks (Text with EEA relevance)
Commission Regulation (EC) No 2245/2002 of 21 October 2002 implementing Council Regulation (EC) No 6/2002 on Community designs
Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs
Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs
Council Regulation (EC) No 1650/2003 of 18 June 2003 amending Regulation (EC) No 2100/94 on Community plant variety rights
Paris Convention for the Protection of Industrial Property
Patent Co-operation Treaty (PCT)
Hague Agreement Concerning the International Registration of Industrial Designs
Madrid Agreement Concerning the International Registration of Marks and Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks
Lisbon Agreement for the Protection of Appellations of Origin and their International Registration
International Convention for the Protection of New Varieties of Plants (UPOV)
Vienna Agreement Establishing an International Classification of the Figurative Elements of Marks
Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks (as amended on 28 September 1979)
Locarno Agreement Establishing an International Classification for Industrial Designs
European Patent Convention (EPC), also known as the Convention on the Grant of European Patents
Strasbourg Agreement establishes the International Patent Classification (IPC) not available on the BPO`s site

Source: OECD Secretariat (2021) based on Bulgaria's replies to the OECD questionnaires.

Early during the market transition, through the 1993 Patent Law, the Bulgarian Patent Office was established as the authority overseeing the registration of intellectual property in Bulgaria. In parallel, a Copyright and Related Rights Directorate was created at the Ministry of Culture. In 2012, the Council for the Protection of Intellectual Property was created, headed by the Minister of Culture, as an advisory body for co-ordination and co-operation between state institutions, local governments and NGOs working in the field of IP protection (Decree 267 of 26 October 2012).

The average costs for registration of a trademark for three classes in Bulgaria is around EUR 300 and the process is completed in around six months. In 2019, out of 4 110 applications for trademarks, 3 467 of them were registered. As for inventions, utility models, designs, plant varieties and animal breeds, the average filling price is EUR150 and in 2019 Bulgaria registered up to 500 utility model registrations, while filings for patents where the substantive examination is required were about 200. For Geographic Indications (GI), the average cost is EUR 600, with 12 GIs for spirit drinks currently protected at EU level. To foster innovation and the protection of patents, in 2021 Bulgaria provided a 50% reduction in fees for micro, small and medium-sized enterprises, universities, schools, academic research organisations or registered inventors, as well as government-funded scientific organisations. In 2019, according to Bulgaria's replies to the OECD questionnaire, there were 52 filings for patents from universities and public research institutes.

Enforcement of intellectual property rights

Enforcement rules are the procedural complement of substantive protection. In Bulgaria, enforcement of IP rights is provided through civil, administrative, and criminal proceedings. In addition, investors can resort directly to the Bulgarian Patent Office, which is empowered to impose administrative penalties – fines or monetary sanctions – on infringers of rights of the owners of trademarks, GIs, patents, utility models and industrial designs. Administrative procedures at the Bulgarian Patent Office include cancellation and revocation of trademarks, cancellation of designs, invalidation of patents and cancellation of utility models.

Although there are no specialised courts that exclusively hear IP-related cases in Bulgaria, the decisions of the President of the Bulgarian Patent Office can be appealed before the Administrative court of Sofia City and the Supreme Administrative Court of Bulgaria. Civil cases concerning infringements of IP rights are also heard before the Sofia City Court.

Foreign authors enjoy the same rights as Bulgarian authors, unless otherwise provided by international treaties and agreements. Foreign legal entities and all persons with a domicile or seat outside Bulgaria may apply for the registration of a patent, trademark, GI and industrial design through their local IP representatives listed with Bulgaria's Patent Office.

The international registrations of patents under the Patent Co-operation Treaty, of trademarks in conformity with the Madrid Agreement, of geographical indications under the Lisbon Agreement, and of industrial designs under the Hague Convention have the same effect as if the applications were directly lodged and the registrations were made in Bulgaria in accordance to the relevant Bulgarian law. In addition, Bulgarian law will apply to foreign individuals and legal entities whose country of origin is a party to international agreements to which Bulgaria is a party as well. In case of no agreement, Bulgaria will apply the principle of reciprocity, that is, granting the same treatment as Bulgarian nationals and legal entities receive in the respective foreign country. This reciprocity treatment will be established by the Patent Office on a case-by-case basis.

Contract enforcement and dispute settlement

Appropriate contract enforcement is important for investment since it assures investors that their contractual rights will be respected and upheld. FDI recipient countries are encouraged to put in place non-bureaucratic, timely and straightforward settlement of contract disputes through an efficient and effective court system, both for private and state-related issues. In addition, alternative dispute resolution mechanisms such as arbitration, mediation and conciliation are vital to decongest the judicial system and grant alternatives to investors for resolving commercial disputes.

The Bulgarian legislation clearly defines the competent courts, judicial procedures for solving contractual disputes, requirements toward parties and rules for serving papers in the Civil Proceedings Code (State Gazette, Issue 59 of 20 July 2007, in force since 1 March 2008). Special provisions regarding the jurisdiction of the Bulgarian courts on international contractual disputes can also be found in the Private International Law Code (State Gazette, issue 42 of 17 May 2005, effective since 21st of May 2005).

Although court jurisdiction based on subject-matter cannot be contested, the parties may mutually decide to bring their dispute to a court located in another territorial jurisdiction within Bulgaria, with the exception of real estate-related disputes. In addition, Bulgaria has special rules to ensure fast settlement of contractual disputes, for example by reducing to two-weeks the terms for responding claims (instead of the one-month general term); allowing filing additional claims under the same dossier; the possibility for the court -upon parties' request- to examine and solve the dispute in a closed hearing;[9] and simplified claim enforcement when that claim is unlikely to be contested by the debtor (Civil Proceedings Code, Articles 109, 117 and Chapters XXXII and XXXVII). In addition to the ordinary civil courts, contractual disputes may be referred to alternative dispute settlement mechanism, such as domestic and international commercial arbitration, which are further explained below.

The cost and procedure of enforcing contracts

Contract enforcement in Bulgaria requires an effective court decision before the claim can be honoured. This entails costs for the investor in the form of state fees for the initiation of the process (equal to 4% of the material interest), additional costs for the collection of evidences, preparation of expert reports by specialists or for obtaining official documents from other public authorities. Such costs may vary, for example, the remuneration of the experts will depend on the complexity and the exhaustiveness of the report and can be estimated around BGN 100-600 (or EUR 50-300 on average) (Civil Proceedings Code, Chapter 8).

After a court decision is issued, the claimant will need to request the issuance of a writ of execution by the competent court. By law, this state fee is not costly, since it amounts to less than EUR 3. In case of requesting the recognition and enforcement of a non-EU foreign decision, the payable state fee ascends to BGN 50 or EUR 25. Nonetheless, parties face additional costs related with the execution of the court sentence, depending on whether it is enforced by a state or a private enforcement agent. Judgments rendered in another EU Member State, are enforceable in Bulgaria without the need to issue a writ of execution (Civil Proceedings Code, Article 622a). The rules for recognition and enforcement of foreign judgements are set forth in the Civil Proceedings Code (Part VII, Chapter LVII) and the Private International Law Code (Part IV, Chapter XII).

Contract enforcement simplification efforts

Efficient contract enforcement is essential to attracting investment, economic development and sustained growth. For many years, long and complex contract enforcement procedures in Bulgaria had been highlighted as one important barrier to doing business in the country. The judiciary – in principle the institution of choice for enforcing contracts- has not been trusted by companies as noted in previous chapters of this *Review*. Cross-country rankings, such as the World Bank's *Doing Business*, have regularly identified the number of procedures and time involved as an obstacle to doing business in Bulgaria. For example the 2015 *Doing Business* report noted that on average entrepreneurs in Bulgaria paid 23.8% of the claim value in attorneys, court and enforcement fees and needed 564 days to resolve a commercial dispute through the courts, while in countries such as Austria and Hungary entrepreneurs paid 18% and 15% of the claim value in attorneys and needed only 397 and 395 days respectively to resolve the same dispute. The whole procedure according to *Doing Business* 2015 took 38 separate steps. As a result, in *Doing Business 2015*, Bulgaria scored rather poorly, ranking 75th in the ease of enforcing contracts among 189 economies, and 18th out of 26 in the Europe and Central Asia region. According to the 2015 World Bank *Doing Business* database, under the indicator "Enforcing contracts", Bulgaria's distance to frontier was 61.27 compared to the OECD average of 69.82.

Since then, Bulgaria has made tangible progress in reforming its judiciary, as it will be further addressed in Chapter 7 of this *Review*. As a result, in the *Doing Business 2020* report, Bulgaria ranked 42nd in the ease of enforcing contracts among 190 economies, moving up 33 spots since its 2015 ranking. Still, there is room for improvement in terms of the number of procedures and time involved. According to some local observers, the average length of time required to obtain a final court resolution for enforcement of a contract in Bulgaria (including appealing procedures on second-instance and the Supreme Cassation Court) would be of four to five years (Mikov Attorneys, 2017). Afterwards, investors must conduct an enforcement procedure by a State or a private agent, which may take another two to three years.

Through the Inspectorate to the SJC, the Bulgarian Ministry of Justice has been working on a reform of its judicial system in order to address investors' concerns about the length of judicial procedures. For example, in February 2021, the Judges' College of the SJC adopted a roadmap to reorganise courts at district and appellate levels, which seeks to increase the number of judges significantly, allow for specialisation of judges, provide for mandatory court-ordered mediation in certain cases and improve overall efficiency in

court procedures by optimising judicial workload across courts and judges. If implemented effectively, these proposals could go a significant way towards addressing concerns with court efficiency in Bulgaria.

Investment treaties

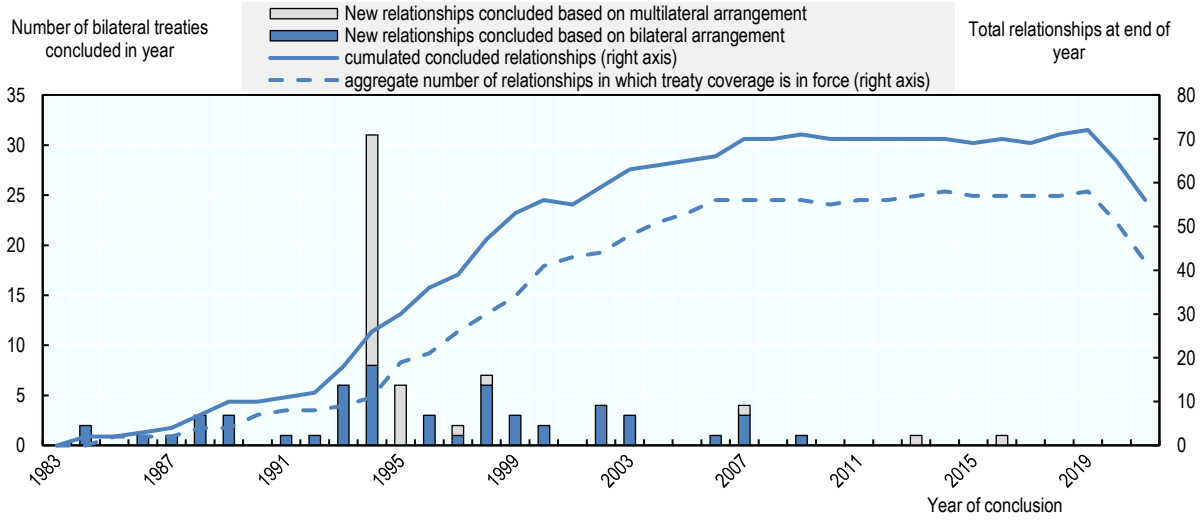
Bulgaria was party to 52 investment treaties in force as of June 2021. This included 51 bilateral investment treaties (BITs) and one multilateral trade and investment treaty – the Energy Charter Treaty (ECT) (see summary table in Annex 5.A). It is also a member country of two important multilateral treaties related to enforcement of arbitral awards issued in investor-state arbitration cases under investment treaties – the New York Convention (in force for Bulgaria since January 1962) and the Washington Convention (in force for Bulgaria since May 2001).

These numbers are likely to change in the near future. Almost a third of Bulgaria's BITs (19 in total) have recently been or will soon be terminated under an agreement between EU member states to terminate all BITs currently in force between them (the Intra-EU BIT Termination Agreement).[10] The Agreement was signed on 5 May 2020 and entered into force on 29 August 2020. It entered into force for Bulgaria on 13 December 2020 following the completion of Bulgaria's domestic ratification procedures. As of June 2021, 10 of 19 Bulgarian intra-EU BITs have been terminated under the Agreement.[11] The Ministry of Finance also advised during the process of preparing this *Review* that bilateral negotiations were underway to terminate existing Bulgarian BITs with Austria, Finland, Sweden and the United Kingdom, including sunset provisions that would extend treaty effects beyond termination.

Several other treaties signed by Bulgaria may also soon come into force. A trade and investment agreement concluded by the EU and its member states – the EU-Canada CETA (2016) – was not in force at the time of writing this *Review* but the parties apply provisionally some of the provisions in its investment chapter (notably on market access and non-discrimination). Bulgaria has signed two further investment agreements concluded by the EU and its member states with Singapore (2018) and Viet Nam (2019).[12] As of June 2021, the Bulgarian Parliament had not yet ratified these EU-led agreements.[13] None of them were in force pending the completion of ratification procedures in all 27 EU member states.[14] Bulgaria has also concluded six BITs that so far, according to Bulgaria's authorities, have not been not in force – with Austria (1981), Azerbaijan (2004), Ghana (1989), Democratic People's Republic of Korea (1999), Nigeria (1998) and Sudan (2002).

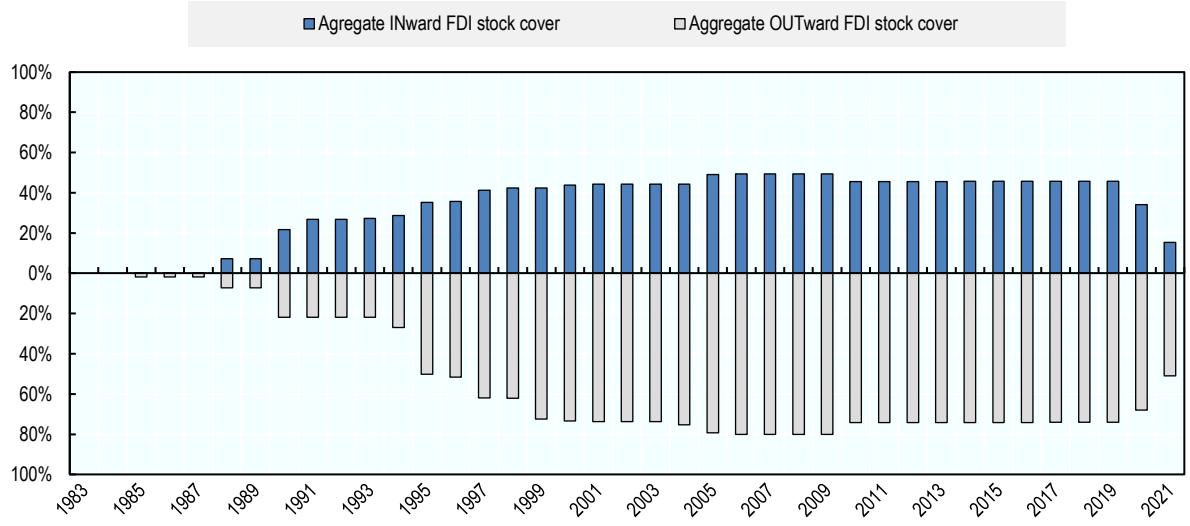
Bulgaria signed most of its investment treaties in the 1990s and early 2000s. A timeline appears in Figure 5.1. The government has not concluded a BIT since 2009. A significant development during this period was the transfer of exclusive competence over FDI, including negotiations for investment treaties, from EU member states to the EU in 2009 as a result of the Lisbon Treaty. EU member states are still able to negotiate and conclude investment treaties with non-EU partners provided they first seek approvals from the European Commission in line with EU Regulation No. 1219/2012. At the time of writing this *Review*, Bulgaria was negotiating possible BITs with Saudi Arabia, Türkiye and the United Arab Emirates under Commission-approved negotiating mandates.

Figure 5.1. Evolution of Bulgaria's investment treaty relationships



Source: OECD calculations based on OECD treaty database; Bulgarian Government.

Figure 5.2. Approximate evolution of Bulgaria's inward and outward FDI stock coverage from investment treaties in force



Note: This graph shows the approximate share of overall inward and outward FDI stock by matching investment treaty relationships in force as of October 2020 with aggregate immediate bilateral FDI data. FDI data shown here does not cover relationships or stock in country pairs where only the ECT is in force due to the lack of bilateral sector-specific FDI stock data.
Source: OECD calculations based on OECD investment treaty database. FDI data was taken from OECD FDI database and IMF Direct Investment Positions and reflects FDI stock as of 2018 rather than historical values.

Bulgaria's treaty making activity and choice of treaty partners has led to a significant coverage of its inward (approximately 46%) and outward (approximately 74%) FDI stock (see Figure 5.2). FDI trends are discussed in further detail in Chapter 2 but for current purposes it is notable that treaty relationships with the Netherlands cover significant portions of Bulgaria's inward (9%) and outward (9%) FDI stock. Treaty relationships with four other countries (Austria, Belgium, Luxembourg and Russia) also cover a significant portion of inward FDI stock (approximately 15% in total) and relationships with another three countries

(Republic of North Macedonia, Romania and Serbia) cover significant portions of outward FDI stock (approx. 39% in total). Many Bulgarian investment treaties in force today cover none of Bulgaria's FDI stock (inward or outward) or only negligible portions of it. This is a common phenomenon in many countries' treaty samples (Pohl, 2018).

Treaty use: ISDS claims under Bulgaria's investment treaties

Bulgaria has had several first-hand experiences defending formal legal claims brought by investors under investor-state dispute settlement (ISDS) provisions in its investment treaties. Based on publicly available information,[15] foreign investors have filed at least ten treaty-based claims against Bulgaria: nine under the auspices of the ICSID Convention[16] and one with an arbitral tribunal constituted under the UNCITRAL Arbitration Rules.[17]

Bulgaria's ISDS disputes have primarily concerned investments in power generation, waste management industrial processing and real estate projects. As of May 2021, four cases were still pending. At least one treaty-based ISDS claim has also been filed against one of Bulgaria's treaty partners by a Bulgarian investor operating abroad.[18]

Reconsidering Bulgaria's investment treaty policy

Bulgaria's investment treaty policy deserves continued attention. Many of Bulgaria's BITs in force today contain features often associated with older investment treaties concluded in great numbers in the 1990s and early 2000s. Such treaties are generally characterised by a lack of specificity of the meaning of key provisions and extensive protections for covered investors. Some of Bulgaria's most recent investment treaties – notably those concluded by the EU with Canada, Singapore and Viet Nam – contain more precise approaches in some areas. Bulgaria's older BITs nonetheless remain in force alongside these newer agreements and form an integral part of the country's legal framework for investment.

This scenario may expose Bulgaria to a range of unintended consequences, especially given the potential scope for ISDS claims under these treaties. While many countries have revised their approaches to negotiating new investment treaties in response to these and other concerns, retrospectively addressing older BITs has proven to be more challenging. Some governments have negotiated treaty amendments or joint interpretations with existing treaty partners to address individual treaties but these efforts can require significant time and resources. Ongoing multilateral initiatives at UNCITRAL and ICSID to consider possible reforms are primarily technical and narrow in scope (focussing on ISDS and ICSID's arbitration rules, respectively) while the ECT reform negotiations are focused on a particular sector and concern only ECT member countries.

Governments continue to weigh the growing consensus on the need to update older investment treaties with the potential benefits of these treaties. Some consider that investment protection provided under investment treaties can play an important role in fostering predictable rules for investment and providing more reliable, fair and enforceable remedies than domestic courts in some countries. Many also recognise that foreign investors are exposed to specific risks, at least under certain circumstances, and that such risks need to be mitigated to enable international investment. Government acceptance of legitimate constraints on policies can provide investors with greater certainty and predictability, lowering unwarranted risk and the cost of capital.

Investment treaties are also frequently promoted as a method of attracting FDI and this is a goal for many governments. Bulgaria's National Reform Programme (update 2022, April 2022) and the European Commission's 2020 Country Report on Bulgaria attest to the government's priority for attracting foreign investment to contribute to R&D as well as infrastructure upgrades, among other things. The fundamental assumption that international investment can contribute to prosperity, help overcome challenges such as the climate crisis and the need to transform economies, create employment, and address crises remains

valid. Most immediately, international investment has a central role to play in a sustainable recovery from the COVID-19 pandemic and in coping with negative economic impacts of the war in Ukraine. Despite many studies, however, it remains difficult to establish strong evidence that protection components of treaties help to attract investment (Pohl, 2018). Some studies suggest that treaties or instruments that reduce barriers and restrictions to foreign investments have more impact on FDI flows than BITs focused only on post-establishment protection (Mistura et al., 2019). These assumptions continue to be investigated by a growing strand of empirical literature on the purposes of investment treaties and how well they are being achieved.

The government is well aware of these and other debates through its participation in several inter-governmental discussions regarding possible reforms of investment treaties, including UNCITRAL's Working Group III on ISDS Reform and multilateral negotiations for possible updates to "modernise" the ECT. The ECT modernisation process may have particularly important implications for Bulgaria. The ECT is the most frequently invoked investment treaty in ISDS cases: investors have filed more than 130 known ISDS cases under the ECT since the first claim was filed under this treaty in 2001 (Energy Charter Secretariat, 2020). Five of Bulgaria's ten publicly known ISDS cases were filed under the ECT. Importantly, the Intra-EU BIT Termination Agreement expressly does not apply to the ECT, which means that the ECT will remain in force between Bulgaria and other EU members. Formal negotiations regarding possible reforms to the ECT began in November 2019. An approved list of topics for discussion includes all core investment protections and ISDS provisions. The Energy Charter Secretariat published a set of policy options identified by the ECT Members on the various topics in October 2019 (Energy Charter Secretariat, 2019). Most ECT governments do not appear to have released public negotiating mandates but the European Council approved negotiating directives in July 2019 and the EU publicly released its text proposals in May 2020 (European Commission, 2020). The EU has promoted reform of the ECT and in particular its investment protection components, which share many characteristics with other older investment treaties. Some of these proposals are addressed below. EU parliamentarians have also urged that the ECT revisions should align with the EU's climate change agenda (Urtasun, 2020).

The balance of this section examines four key aspects of possible reform – the scope of three frequently invoked protections (FET, MFN and indirect expropriation) as well as dispute settlement mechanisms and ISDS. It then briefly outlines some other possible aspects of investment treaty reform.

Vague provisions referring generally to "fair and equitable treatment" generate risks and costs, and should be addressed where possible

Most of Bulgaria's investment treaties in force today contain provisions that require Bulgaria to provide covered investors and/or their investments with FET.[19] Since the early 2000s, the FET standard has become the most frequent basis for claims in ISDS. Most FET provisions were agreed before the rise of ISDS claims related to this treatment standard. Starting around 2000, broad theories for the interpretation of FET provisions by arbitral tribunals emerged as the number of ISDS cases increased markedly. Based on public information, investors in at least two of the ten known ISDS cases brought against Bulgaria have relied on FET provisions in investment treaties.[20]

Most FET provisions in investment treaties do not provide specific guidance on what treatment should be considered fair and equitable. Arbitral tribunals in ISDS cases under investment treaties have taken different approaches to interpreting such "bare" FET provisions. This creates considerable uncertainty and high litigation costs for governments and investors alike. It has also resulted in some broad interpretations of bare FET provisions that go beyond the standards of investor protection in the domestic legal systems of some advanced economies. Governments have reacted to these developments in various ways, including by adopting more precise or restrictive approaches to FET or excluding FET in recent treaties (Box 5.1). These recent approaches in broader treaty practice can serve as a useful point of comparison for varying approaches to FET in Bulgaria's investment treaties.

Box 5.1. Recent approaches to the FET provision and ISDS for FET claims

States are becoming more active in the ways in which they specify, address or exclude FET-type obligations in their treaties and submissions in ISDS. Dissatisfaction with and uncertainties about FET and its scope have also led some governments to exclude it from their treaties or from the scope of ISDS. Some important recent approaches are outlined below.

The MST-FET approach: Express limitation of FET to the minimum standard of treatment under customary international law (MST). This approach has been used in a growing number of recent treaties, especially in treaties involving states from the Americas and Asia (Gaukrodger, 2017). In addition to using MST-FET, the CPTPP clarifies that the claimant must establish any asserted rule of MST-FET by demonstrating widespread state practice and *opinio juris* (Article 9.6 (3)-(5), Annex 9A). Evidence of these two components has rarely been provided by claimants or arbitrators in ISDS cases. This approach has since been replicated by other states (e.g. Australia-Indonesia CEPA (2019), Article 14.7). The NAFTA governments have further reformed their approach to MST-FET claims in the USMCA (see below).

Exclusion of FET from ISDS, investment arbitration or from treaties. The recently concluded USMCA (which replaced the North American Free Trade Agreement (1992) on 1 July 2020) includes MST-FET but generally excludes it from the scope of ISDS (except for a narrow class of cases involving certain government contracts) (Article 14.D.3). ISDS under the USMCA generally applies only to claims of direct expropriation and post-establishment discrimination (and only to Mexico-United States relations); only state-to-state dispute settlement (SSDS) is available for MST-FET claims. India's Model BIT does not refer to FET and instead identifies specific elements; Brazil's model treaty and recent treaties also exclude FET.

The definition approach: Stating what FET means or listing its elements. Recent treaties negotiated by the European Union, China, France and the Slovak Republic contain defined lists for the elements of FET. This approach can vary greatly depending on the nature of the list. Some lists include elements such as a denial of justice, manifest arbitrariness, fundamental breach of due process, targeted discrimination on manifestly wrongful grounds, and/or abusive treatment of investors. This approach likely results in a broader concept of FET than MST-FET, especially if state practice and *opinio juris* must be demonstrated to establish rules under MST-FET.

Clarifications of treatment excluded from FET. Some recent treaties have also clarified that FET does not protect investors from certain types of treatment. Starting with the Australia-Singapore FTA as revised in 2016, and followed by the CPTPP signed in March 2018 and the Korea-United States FTA as revised in 2018, several treaties now exclude government measures that may be inconsistent with an investor's expectations concerning its investment from giving rise to a breach of the FET provision.[21] Several recent treaties concluded by Australia clarify that the modification of government subsidies or grants is not protected under the FET provision.[22]

Some Bulgarian BITs adopt some of these more precise or restrictive approaches to FET. The EU trade and investment agreements with Canada, Singapore and Viet Nam contain defined lists for the elements for FET.[23] At least seven Bulgarian BITs exclude FET from the scope of ISDS.[24]

Other formulations of FET in Bulgaria's investment treaties may leave scope for broad interpretations by arbitral tribunals. Most of Bulgaria's treaties contain an unqualified or "bare" reference to FET without any further specific guidance on its meaning. Some contain several different references to "bare" FET in the same treaty, which may generate additional uncertainty as to how these provisions should be interpreted.[25] The prevalence of "bare" FET provisions and of varying approaches more generally creates uncertainty as to the scope of these FET obligations and exposure to unpredictable interpretations by arbitral tribunals in

ISDS cases. More specific approaches to FET provisions could improve predictability for the government, investors and arbitrators alike. They could also potentially contribute to preserving the government's right to regulate in the context of investment treaties (Gaukrodger, 2017a, 2017b). In some cases, governments may be able to achieve greater clarity on the scope of FET by agreeing on joint government interpretations of provisions in existing investment treaties with treaty partners.[26] In other cases, agreement on new treaty language may be required to reflect government intent and preclude undesirable interpretations.

Members of the ECT, including Bulgaria, are considering the scope of FET as part of the ECT modernisation process. Most ECT Members agree on the need to update the existing provision on FET in the ECT to clarify further its scope (Energy Charter Secretariat, 2019). Issues for discussion include whether FET should be linked to the MST under customary international law, whether FET should be linked to other substantive protections or a stand-alone provision, and whether FET should refer to the concept of legitimate expectations. Some ECT Members, such as Switzerland, Türkiye and the EU, propose a list-based definition of FET. Other Members propose MST-FET but are open to considering list-based formulations that are consistent with prevailing understandings of the content of MST-FET.

Most-favoured nation (MFN) treatment provisions in Bulgaria's investment treaties may have a range of unintended consequences

Almost all of Bulgaria's investment treaties provide for MFN treatment.[27] Like national treatment (NT) provisions, MFN clauses establish a relative standard: they require Bulgaria to treat covered investments at least as favourably as it treats comparable investments by investors from third countries. As with FET provisions, most of the MFN treatment provisions in Bulgaria's investment treaties and the global sample of investment treaties are vague with little guidance on how to interpret or apply them. More specific approaches to MFN treatment provisions could improve predictability for the government, investors and arbitrators alike (Box 5.2).

Bulgaria has had first-hand experience of these interpretations in at least two ISDS cases (*Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24) and *ST-AD GmbH v. Republic of Bulgaria*, UNCITRAL, PCA Case No. 2011-06) where the claimants sought to rely on an MFN provision to benefit from more favourable dispute resolution provisions in other Bulgarian investment treaties.

Some of Bulgaria's investment treaties include specifications or restrictions on MFN provisions that reflect these recent treaty practices and debates. Almost all Bulgarian BITs that contain such provisions exclude benefits granted under existing customs, economic or monetary unions, double taxation agreements and/or multilateral investment agreements from MFN treatment.[28] At least four of these treaties also require an assessment of MFN treatment with respect to comparable investments.[29] The EU's recent trade and investment agreements adopt a range of approaches to MFN treatment – three of them clarify that MFN treatment does not extend to ISDS or substantive provisions in other treaties[30] while one omits MFN treatment provisions altogether.[31] None of Bulgaria's BITs contains similar exclusions that apply to MFN provisions for either ISDS provisions or substantive protections in other investment treaties. While the current text of the ECT does not contain any such specifications, the EU and several other ECT Members propose to update it to include them (European Commission, 2020).

Box 5.2. Recent approaches to MFN treatment provisions and ISDS for MFN treatment claims

Recent investment treaty policies and debates over MFN have centred on three key issues outlined below.

MFN clauses and treaty shopping. ISDS arbitral tribunals have frequently interpreted MFN provisions to allow claimants in ISDS cases to engage in "treaty shopping".[32] These interpretations allow claimants to use MFN provisions to "import" provisions from other investment treaties that they consider more favourable than the provision in the treaty under which their case is filed.[33] This can create uncertainty and also dilute the effect of investment treaty reforms. While MFN claims in trade law have centred on domestic law treatment of traders from different countries, most claimant attempts to use MFN in ISDS have sought to use the clause to access other treaty provisions.

Some governments have clarified in recent treaties that MFN provisions cannot be used to engage in treaty shopping at all. Others have limited treaty shopping to the importation of substantive provisions or limited the application of MFN clauses to cases where government measures have been adopted or maintained under the third country treaty. Article 8.7(4) of the CETA between Canada, the EU and EU Member States, for example, clarifies that "substantive obligations in other international investment treaties do not in themselves constitute 'treatment', and thus cannot give rise to a breach of [the MFN provision], absent measures adopted or maintained by a Party pursuant to those obligations". The CETA also prohibits "treaty shopping" for procedural provisions. The USMCA similarly clarifies that treaty shopping is excluded under its MFN clause for both substantive and procedural matters (Article 14.D.3(1)(a)(i)(A), footnote 22): "For the purposes of this paragraph […] the "treatment" referred to in Article 14.5 (Most Favoured Nation Treatment) excludes provisions in other international trade or investment agreements that establish international dispute resolution procedures or impose substantive obligations".

Comparison criteria in MFN treatment provisions. A second area of interest and government action with regard to MFN treatment provisions involves the determination of what investments or investors are comparable. Many older-style treaties do not provide any specificity on this issue, leaving it to arbitral interpretations in ISDS. Some recent treaties provide that comparability requires "like circumstances". Further clarifications have also been added. For example, some recent clarifications have stated that deciding on whether there are "like circumstances" requires, among other things, consideration of whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives.[34]

Negative lists, carve-outs or conditions. A third area of interest and government action with regard to MFN treatment provisions involves exclusions or limitations. Some recent treaties include negative lists of exclusions from MFN clauses in their investment chapters. Thus, a schedule may specify exceptions to MFN treatment for existing benefits granted under customs unions, other international treaties or specific domestic law schemes.

Vague provisions referring to protection for indirect expropriation should be clarified where possible

All of Bulgaria's investment treaties contain provisions that protect covered investments from expropriation without compensation. Many of these provisions refer to direct takings of investor property by the government (direct expropriation) as well as other government measures that have effects equivalent to a direct taking without a formal transfer or outright seizure (commonly referred to as indirect expropriation). Provisions on indirect expropriation have become the second most frequently invoked basis for claims in ISDS cases after provisions on FET. As with FET and MFN treatment provisions, most of these provisions

in Bulgaria's treaties and the global sample of investment treaties are vague with little guidance on how to interpret or apply them.

Since 2003, some countries have included a range of clarifications on the scope of indirect expropriation in newly concluded investment treaties. Clarifications fall into four broad categories: (i) positive definitions of the concept of "indirect expropriation"; (ii) guidance on how to determine whether an indirect expropriation has occurred; (iii) clarifications that certain regulatory measures do not constitute indirect expropriation; and (iv) restrictions on the types of assets covered by this protection. None of Bulgaria's BITs contains any of these features. The EU's trade and investment agreements with Canada, Singapore and Viet Nam contain clarifications in categories (i), (ii) and (iii) above, albeit with some differences in treaty language used to express them.[35] The EU and other ECT Members have made proposals to update the existing ECT provisions on expropriation with these and other elements (Energy Charter Secretariat, 2019; European Commission, 2020).

Clarifications such as these are likely to improve predictability as to the scope of indirect expropriation and reduce the possibility for unintended interpretations in ISDS cases. They are also likely to continue to feature in debates regarding the balance between investment protections and governments' rights to regulate in investment treaties, including as part of ongoing discussions at the OECD. The impact of these clarifications may depend, however, on the scope of other provisions in the same treaty such as FET that have often been invoked in ISDS cases as a substitute basis for indirect expropriation claims. It also remains to be seen how arbitrators interpret such provisions as very few investor-state arbitrations have been brought under treaties that contain these features. At least one government (Brazil) has responded to this residual uncertainty by excluding indirect expropriation altogether from its investment treaties concluded since 2015 through clear language to that effect.

Bulgaria's investment treaties contain relatively few specifications or clarifications in dispute settlement provisions

Many investment treaties allow covered foreign investors to bring claims against host states in investor-state arbitration, in addition or as an alternative to domestic remedies. Investor-state arbitration generally involves *ad hoc* arbitration tribunals that adjudicate disputes in an approach derived from international commercial arbitration. Investor-state dispute settlement (ISDS) provisions appear in all of Bulgaria's investment treaties in force today. State-state dispute settlement (SSDS) is also an option under these treaties.

Recent treaty practice has seen both greater specification of ISDS and, in some cases, replacement of investor-state arbitration with more court-like systems. Treaties like the CPTPP and the EU-Canada CETA are among some recent treaties that have included investor-state arbitration reforms to reduce possible exposure to unintended consequences of ISDS. Common features in these treaties include time limits for claims, possibilities for summary dismissal of unmeritorious claims, mandatory transparency requirements, provisions for non-disputing party participation and possibilities for joint interpretations of the treaty by the state parties that are binding on the arbitral tribunal. The United States – Mexico – Canada Agreement (USMCA) contains many similar investor-state arbitration reforms but has reduced the scope for ISDS claims to direct expropriation and post-establishment discrimination (and only to Mexico-United States relations); only state-to-state dispute settlement (SSDS) is available for claims under other provisions, such as MST-FET claims. The EU, which supports the concept of a multilateral investment court, has included court-like dispute settlement in all its recent investment protection treaties. Brazil's treaties omit ISDS and designate domestic entities ("National Focal Points") to act as an ombudsperson by evaluating investor grievances and proposing solutions to a Joint Committee comprised of government representatives from both states. Under this model, state-state dispute settlement is also available if necessary. South Africa has terminated its BITs with European countries. South African domestic legislation governs the claims of

foreign investors against the government in domestic courts and provides for the possibility of case-by-case agreement to arbitration.

ISDS provisions in some Bulgarian investment treaties contain reform elements that reflect recent treaty practice. Some of Bulgaria's BITs restrict the scope of ISDS to certain treatment provisions, such as expropriation and non-discrimination guarantees,[36] while others clarify that certain types of government conduct cannot be litigated under the treaty.[37] At least 16 Bulgarian BITs specify the governing law for ISDS cases, albeit using different formulations.[38] The EU's trade and investment agreements with Canada, Singapore and Viet Nam all contain detailed ISDS provisions with various reform elements. Once in force, investor claims under these treaties will be resolved through a court-like system including a first instance tribunal and an appellate tribunal, the members of which will be drawn from a standing body of 15 individuals appointed for fixed terms by the treaty parties. These treaties also envisage the creation of a multilateral investment court in the future.

The MoE has advised that Bulgaria's model BIT, approved by the Council of Ministers in November 2018, contains provisions addressing many of these issues on ISDS reform but no new treaties have yet been concluded under this model as of February 2021.The majority of Bulgaria's investment treaties, however, contain no such specifications regarding investor-state arbitration procedures. They thus leave substantial decision-making power to arbitrators or investors and their legal counsel. For example, in ISDS, the appointing authority in a case plays a key role notably because it chooses or influences the choice of the important chair of the typical three-person tribunal (Gaukrodger, 2018). Some Bulgarian treaties – including BITs with the Russian Federation (1993), Mongolia (2000), Albania (1994), and Denmark (1994) – remove this choice by providing for a single forum for investor-state arbitration. Other Bulgarian BITs include other types of limitations[39] but most Bulgarian treaties give claimants and their counsel a choice between at least two and as many as three different arbitration institutions at the time they file a claim.[40] This allows investors to choose or influence the choice of appointing authority and exacerbates the competition for cases between arbitration institutions (Gaukrodger, 2018).

Multilateral reform efforts for ISDS are underway in several fora, including at UNCITRAL and ICSID. The Bulgarian government participates actively as an observer in these discussions. Possible ISDS reforms under consideration at UNCITRAL and in the ECT modernisation process (no decisions have yet been reached) include both structural-type reforms (a permanent multilateral investment court with government-selected judges or a permanent appellate tribunal) as well as more incremental reforms such as a code of conduct for arbitrators or adjudicators.

Clearer specification of investment protection provisions would help to reflect government intent and ensure policy space for government regulation

Specifications on key provisions in investment treaties play an important role calibrating the balance between investor protection and governments' right to regulate. The MoE has advised that Bulgaria's model BIT, approved by the Council of Ministers in November 2018, was designed with this balance in mind. It is also an important part of the EU's policy on investment treaties and its proposals for a reformed approach to investment dispute settlement based on a court-like model for ISDS. Specifications seeking to achieve this balance should reflect policy choices informed by Bulgaria's priorities. Policy-makers need to consider the costs and benefits of these choices and their potential impact on foreign and domestic investors, together with the government's legitimate regulatory interests and potential exposure to ISDS claims and damages.

There are a range of techniques that governments can use to affect the balance between the right to regulate and investor protections under investment treaties (Gaukrodger, 2017a). The most obvious technique involves decisions about whether to include or exclude particular provisions, whether to draft them narrowly or broadly, precisely or in broader terms. The most important provisions in this regard are likely to be those most often the focus of alleged breach in investor claims such as the FET provision.

Depending on whether the parties wish to clarify original intent or revise a provision, it may be possible to clarify language through joint interpretations agreed with treaty partners or treaty amendments. These types of government action have been relatively rare in recent years, however, and can require significant time and resources to engage with individual treaty partners. Replacement of older investment treaties by consent in the context of new treaty negotiations may also be appropriate in some cases.

The government's experience with the COVID-19 pandemic and the impact of the war in Ukraine on Bulgaria's national economy may cause it to recalibrate the appropriate balance between investor protections and the right to regulate. Measures taken by governments to protect their societies and economies during the pandemic and the war in Ukraine have affected companies and investors. Investment treaties should be drafted with sufficient precision to provide flexibility for governments to respond effectively to the crisis and to take vital measures such as securing quick access to essential goods and services. While it may be too early to assess the consequences of the pandemic and the war in Ukraine for this area of investment policy, it is likely that experiences with the two events may refocus government attention on the balance between investor protection and governments' right to regulate, especially in times of crisis (OECD, 2020). Governments have been addressing the balance between investment protection and the right to regulate in investment treaties through analysis and discussion at the OECD (Gaukrodger, 2017a, 2017b).

Opportunities for investment treaties to address investor responsibilities

The OECD is currently considering how trade and investment treaties can affect business responsibilities including through their impact on policy space for governments, their provisions that buttress domestic law or its enforcement, or their provisions that directly address business by, for example, encouraging observance of RBC standards (Gaukrodger, 2020).

Some Bulgarian investment treaties contain provisions on RBC-related objectives and investor responsibilities. These provisions vary in terms of scope and level of generality; some are binding on arbitral tribunals in ISDS or SSDS but others may not be. Most notably, the EU's trade and investment agreements with Canada, Singapore and Viet Nam contain provisions aimed at preserving space for government policy making in RBC-related areas,[41] clarify that the expropriation provisions shall not restrict the parties' ability to regulate to achieve specified public interest objectives such as public health, safety and environmental protection[42] and exclude investments procured by corruption from the scope of ISDS.[43] These agreements also contain dedicated chapters on trade and sustainable development, labour and the environment that reaffirm government duties to regulate in key RBC-related areas.[44] Treaty provisions that buttress domestic law or its enforcement in key areas in host states remain rare but they are increasing in importance. Some EU trade treaties further buttress domestic law by clarifying the parties' understanding that it is inappropriate to encourage investment by relaxing environmental or health measures.[45]

Almost all of Bulgaria's BITs contain provisions that address investors directly on RBC-related issues. Most Bulgarian BITs contain legality requirements that restrict the scope of treaty protections to investments made in accordance with Bulgarian law. These requirements appear most frequently in provisions defining covered investments but also appear in provisions on the scope of application of the treaty. Some Bulgarian treaties also contain hortatory language in the preamble or substantive provisions reaffirming the importance of encouraging companies to respect corporate social responsibility norms.

Investment treaties concluded by some other governments address investor responsibilities in various other ways. For example, some treaties impose obligations on investors to uphold human rights and maintain an environmental management system; exclude the possibility for ISDS in relation to government measures relating to the treaty's environmental and labour provisions; refer to the parties' commitments to implement international standards related to RBC; and recognise that investments should contribute to the economic development of the host state (Gordon et. al., 2014; Gaukrodger, 2020).

The MoE has advised that Bulgaria's model BIT, approved by the Council of Ministers in November 2018, contains provisions on sustainable development and public welfare considerations but no new treaties have yet been concluded under this model. The government may wish to engage with ongoing intergovernmental discussions on this topic, including as part of the ECT modernisation process and at the OECD. Some ECT Members including the EU propose to update the ECT by including new provisions addressing sustainable development and RBC-related objectives (European Commission, 2020c).

Addressing the unique approach to claims for reflective loss in ISDS

Bulgaria should continue to engage in multilateral fora such as at the OECD and UNCITRAL to develop proposals to address the unique approach to claims for shareholders' reflective loss in ISDS. Shareholders incur reflective loss if a company in which they hold shares suffers a loss that results, in turn, in the shareholders suffering a commensurate loss, typically a loss in value of the shares. In contrast to the approach of domestic laws in many countries, many investment treaties have been interpreted to allow ISDS claims by covered shareholders for losses incurred by companies in which they own shares.

Governments have been considering these issues at the OECD since 2013 (OECD, 2016; Gaukrodger, 2014a, 2014b, 2013; Summary of 19th FOI Roundtable, October 2013, pp. 12-19; Summary of 18th FOI Roundtable, March 2013, pp. 4-9). Ongoing discussions at UNCITRAL's Working Group III on ISDS Reform are considering possible reforms to address these issues, which were underlined in a recent UNCITRAL Secretariat note (UNCITRAL, 2019d). At the request of the Working Group, these discussions are being conducted jointly with the OECD. Given that the current approach towards reflective loss in ISDS provides claimants with exceptional benefits and greatly expands the number of actual and potential ISDS cases, however, only government-led reform is likely to address the issues.

Evaluating overlaps between investment treaties

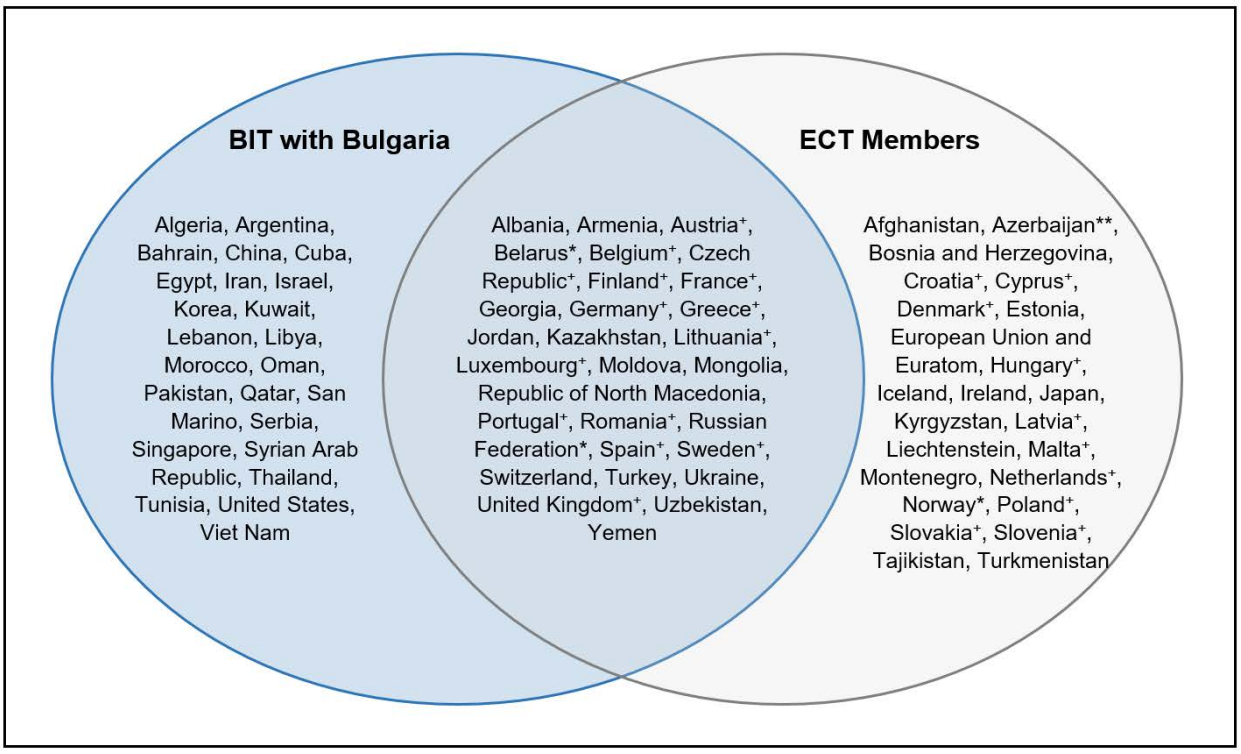
Bulgaria has two investment treaties – namely a BIT and the ECT – in force with 29 countries as of December 2021 (Figure 5.3).

Overlapping investment treaties that apply to investments by investors from the same country may raise some policy concerns. As a general matter, Bulgaria should strive to minimise inconsistencies between international obligations entered into with different countries. In the case of the ECT, any potential overlap with protections offered under BITs with the same partners applies to investments in energy or energy-related sectors – while the ECT applies only to these sectors, Bulgaria's BITs apply to investments in all sectors. In practice, this means that covered foreign investors in Bulgaria's energy or energy-related sectors may be able to rely on more favourably worded provisions in Bulgaria's older BITs in their dealings with the government or in ISDS disputes. This approach could potentially undermine the impact of the ongoing ECT modernisation process if investors in the energy sector can circumvent reforms to ECT provisions by relying on older BITs that are still in force.

Bulgaria may wish to evaluate the likely impact of these overlaps in treaty protection for investments in energy or energy-related sectors. It may also wish to consider engaging with relevant treaty partners to consider these overlaps and how they could be addressed as part of the ongoing ECT modernisation process.

Despite the concerns that may arise with overlapping treaties, some governments may consider that they need to provide certain extra incentives or guarantees to some treaty partners over others in order to attract FDI. This may be because they expect that investors from those countries are less likely to invest their capital in the absence of such treatment or assess that the broader benefits associated with attracting FDI from those countries are particularly lucrative. Some governments may also consider that similar provisions in different treaties, while framed differently, are likely to be interpreted in a consistent way. The balance between these interests and assessments is a delicate one and may evolve over time.

Figure 5.3. Overview of Bulgaria's overlapping investment treaty relationships in force as of December 2021



Note: *Belarus, Norway and the Russian Federation have signed but not ratified the ECT; Belarus applies the treaty provisionally. **Bulgaria has signed a BIT with Azerbaijan but it is not in force. + Bulgaria's BITs with EU member states are set to be terminated under the Intra-EU BIT Termination Agreement; 10 of these 19 BIT have already been terminated under the Agreement as of April 2021. The Ministry of Finance also advised during the process of preparing this *Review* that bilateral negotiations are underway to terminate existing Bulgarian BITs with Austria, Finland, Sweden and the United Kingdom, including sunset provisions that would extend treaty effects beyond termination.
Source: OECD investment treaty database.

Developing approaches to prevention of ISDS claims and ISDS case management

Bulgaria may wish to prioritise the development of strategies to prevent and achieve early settlement of investment-related disputes, as well as its approach to case management of ISDS cases. Aside from participating in inter-governmental discussions on these topics, the government may wish to consider taking certain steps at a domestic level.

There is currently no dedicated unit responsible for handling investor grievances before they become ISDS cases under investment treaties. The Litigation Department of the Ministry of Finance (MoF) co-ordinates Bulgaria's legal representation in arbitrations and foreign court proceedings, including any related settlement negotiations, annulment proceedings or enforcement actions. MFA acts as a repository for original versions and certified copies of Bulgaria's concluded treaties.

The government may wish to consider drawing on examples of institutional frameworks in other countries for the prevention of investment disputes and policy-setting activities. At a domestic level, some countries, such as Colombia and Peru, have adopted comprehensive legislative and regulatory frameworks to encourage the early detection and resolution of investment disputes (OECD, 2018b; Joubin-Bret, 2015). Other countries, such as Chile, have opted for an informal prevention system where sectoral agencies directly manage disputes with investors. Some countries including Croatia and Thailand have reported successful outcomes with inter-ministerial committees established to advise line agencies on investor

grievances and formulate proposals to update and revise the government's policies regarding investment treaties and domestic legal frameworks for investment protection. As noted above, Brazil does not include ISDS in its investment treaties but instead establishes with each treaty partner a Focal Point or ombudsman within each government to address investor grievances, with a Joint Committee of government representatives to oversee the administration of the agreement. Korea has also had a successful track-record of early dispute resolution with its Foreign Investment Ombudsman since it was established in 1999 (Nicolas, Thomsen and Bang, 2013). It may also be worth exploring options to build awareness within government ministries, agencies and local or sub-national government entities regarding Bulgaria's obligations under investment treaties and the potential impact that government decisions may have on investor rights under these treaties. Internal written guidelines or a handbook could be a useful way to disseminate this information and encourage continuity of institutional knowledge as personnel changes occur over time.

The government may also wish to explore ways to share and learn from its experiences with ISDS and those of other governments. Several states that have been frequent respondents in ISDS cases – including Argentina, Canada, Mexico, Spain and the United States – have developed dedicated teams of government lawyers to advise the government on investment disputes and investment treaty policy. Nurturing an internal expertise to evaluate investor claims candidly before a legal dispute arises can be an important step in preventing time and cost protracted and costly legal disputes.

Procedural considerations: Exit and renegotiation

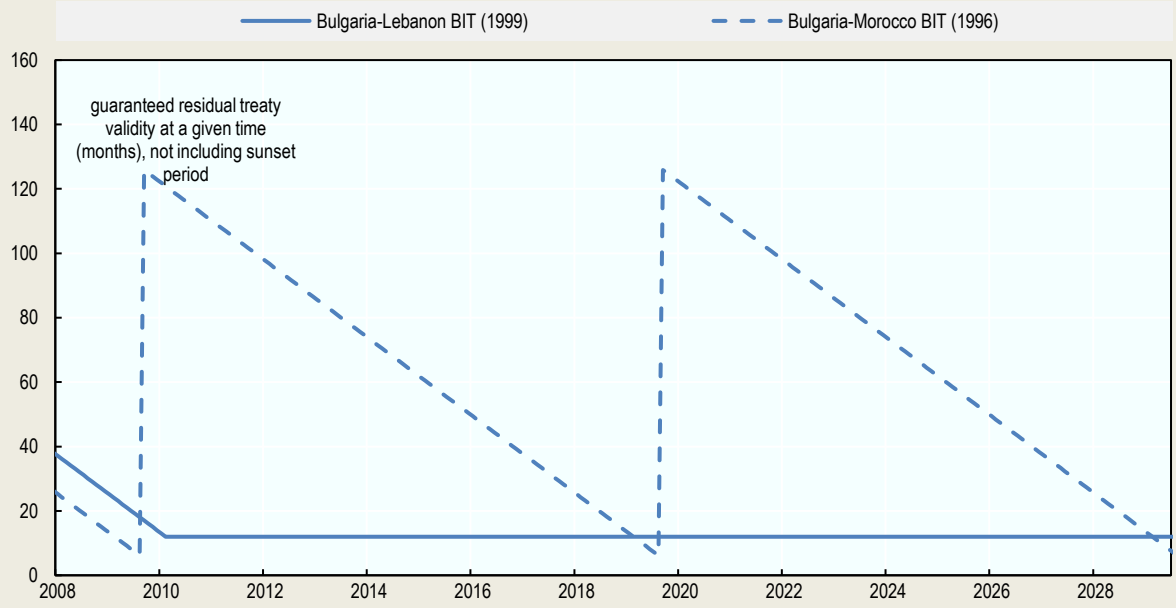
A growing number of countries are considering ways to replace, update or exit older investment treaties that no longer reflect governments' current priorities. Bulgaria is currently following this course with Türkiye: ongoing negotiations seek to replace an existing BIT concluded in 1994 with a new treaty in line with the government's 2018 model BIT. Negotiations are also underway with Austria, Finland, Sweden and the United Kingdom to terminate existing BITs. Review and renegotiation of investment treaties takes time and significant governmental resources and the option to terminate a treaty is not necessarily available at any moment, as the relevant provisions on temporal validity in the treaty may place limits on exit options (Box 5.3).

Box 5.3. Designs of temporal validity provisions in investment treaties

Unlike most international treaties, which can be denounced at relatively short notice, investment treaties typically contain clauses that extend their temporal validity for significant periods of time. Three designs can be found, often cumulatively in the same agreement. First, most investment treaties set and initial validity period of often 10 years or more, counting from the treaty's entry into force. After that period, many treaties only allow states parties to denounce the treaty at the end of specific intervals of often 10 years or more. Finally, treaty obligations almost universally continue to apply for a sunset period after the termination of the treaty, again for periods of typically 10 years or more. Many treaties thus bind the treaty parties for at least two decades, and in some extreme cases for up to 50 years.

Treaty designs that automatically extend the validity of the treaty for fixed terms are included in around 30% of the global treaty stock, but this design has been used less frequently in recent years. This design tends to prolong the period for which states parties are bound without granting additional benefits in terms of predictability for investors: on the contrary, the oscillating residual treaty validity is hard to predict without detailed study (see illustrative comparison in Figure 5.4).

Figure 5.4. Residual validity of treaties depending on the design of their validity clause



Note: Adapted from OECD work on temporal validity of investment treaties (Pohl, 2013).
Source: OECD calculations based on OECD investment treaty database.

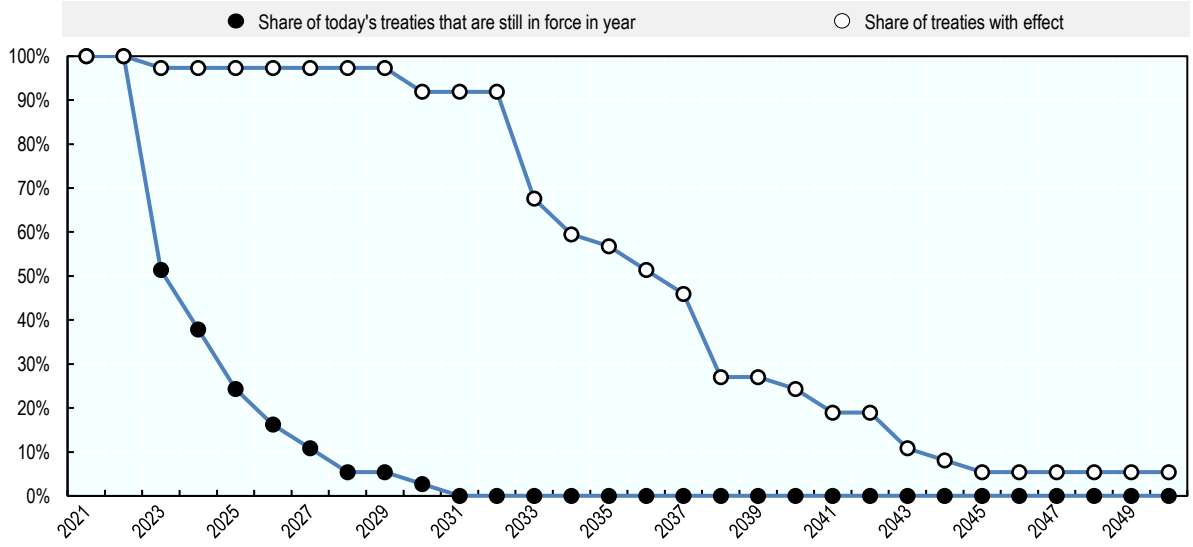
Many Bulgarian investment treaties in force today contain temporal validity provisions that will operate to delay possibilities for unilateral exit from the treaty. Most of Bulgaria's investment treaties contain an initial validity period of 10 or 15 years. Bulgaria's BIT with Kuwait (1997) has a longer initial validity period of 25 years. At least 31 of Bulgaria's BITs in force today provide for an automatic renewal period after the period of initial validity and allow either treaty party to denounce the treaty within six or 12 months (depending on the treaty) of the expiry of the renewed period. Treaties that renew for fixed terms require more monitoring as they limit the possibilities to update or unilaterally end the agreement. If no termination occurs in the defined notice period, the treaty automatically renews for the agreed period, thereby

committing Bulgaria to these treaties for a further six or ten years in most cases – and 25 years in the case of the BIT with Kuwait (1997) – before the next opportunity to terminate the treaty will arise.

Even if Bulgaria were to terminate unilaterally some or all of its treaties, most of them would continue to apply for a survival period of at least 10 years or more (often referred to as "sunset" clauses). These provisions are often intended to provide a measure of legal certainty for investors who frequently make long-term capital commitments in the host country. This situation may leave the government potentially exposed to ISDS claims far beyond the termination date. An extreme case is Bulgaria's BIT with Libya (1999), which appears to envisage survival effects for an unlimited duration following termination. Treaty partners may be able to agree mutually to replace or exit an older treaty in such a way that the survival provisions no longer apply.

As a hypothetical example to illustrate the possible effects of these clauses, as of 20 December 21 the earliest occasion that the government could unilaterally withdraw from all of its investment treaties is 2031 (taking into account the automatic renewal periods in some treaties) and the effects of post-termination "sunset" periods could last beyond 2045 even if appropriate actions were started today (Figure 5.5).

Figure 5.5. Projection of the temporal validity of Bulgaria's investment treaties



Note: Projections based on a hypothetical scenario of unilateral denunciation of all treaties in the available sample at the earliest possible occasion. Line with black dots shows the share of Bulgaria's existing treaties that would remain in force in a given year. Line with white dots shows the share of those treaties that would remain in effect in a given year based on applicable sunset periods.
Source: Calculations based on OECD investment treaty database.

Unilateral action is not the only option to update or address older investment treaties but the impact of temporal validity provisions may influence how treaty amendments or agreed exits can be negotiated with treaty partners, especially if the renewal period is imminent. Bulgaria may therefore wish to consider whether the current design of its temporal validity provisions can serve its interests in future discussions with treaty partners.

Outlook and policy recommendations

The protection of investment, combined with effective enforcement mechanisms, is an important pillar of a sound investment climate. Bulgaria's domestic legal framework provides protection for investors in line

with other EU policy regimes, reflecting the gradual adoption of the EU *acquis* and the country's transition towards a market economy. Bulgaria also benefits from a modern IP legislation that is aligned with the EU norms and standards. Constitutional-level protection to IP rights, in particular to artistic, scientific and technological creativity, as well as inventors' rights, copyrights and related rights, is an important precondition for attracting and retaining investment. Bulgaria is also a party to most international treaties and conventions on intellectual property administrated by the WIPO and its national laws are aligned with EU directives, even going beyond the minimum requirements of the WTO TRIPS.

Contract enforcement is important for investment, since it assures investors that their contractual rights will be respected and upheld, Bulgaria has made sure to create an arbitration and mediation-friendly legal system and is currently making progress in reducing delays related to contract enforcement. Challenges nevertheless remain in the area of contract enforcement, associated to a weak judiciary, delays and additional costs to enforce contracts and obtain reparations, hampering the country's investment climate and economic prospects.

Bulgaria's investment treaty policy also deserves continued attention. Although the EC now plays an important role in setting investment policy for EU member states, the government should be proactive in evaluating whether its existing BITs – many of which were concluded decades ago – align with current priorities. These treaties may play an important role in attracting or retaining FDI in Bulgaria or treaty partner countries for Bulgarian investors abroad but evidence of this impact may be needed to assess whether these and other objectives are being fulfilled. Some aspects of Bulgaria's older BITs discussed in this chapter may render them out of step with EU and/or Bulgarian assessments of the appropriate balance between investor protection and the right to regulate. A more balanced approach in the new model BIT approved by the Cabinet in 2018 represents an important achievement for future treaty negotiations but seeking to update existing treaties is a separate challenge with time, cost and resource allocation constraints. The government is keenly aware of these issues through its participation in reform processes at UNCITRAL and for the ECT as well as EU-led action to terminate intra-EU BITs. Continued engagement in government and other action on investment treaty reforms should be an important part of the government's strategy to address these issues.

Policy recommendations

- Consider recognising foreign-based conciliation commissions and foreign-based mediation procedures as an alternative method of resolution of legal and non-legal disputes, as done with mediation that takes place in Bulgaria. This would avoid the current burdensome requirement for out-of-court settlements to undergo the general procedures for enforcement of contracts.
- Take additional steps to reduce the length of judicial procedures. These measures should include specific rules of procedure to prevent or limit dilatory measures and fixed time limits for the performance of each judiciary step, eliminating the need of interested parties to resort to the superior court to avoid time-delaying tactics.
- Continue to reassess and update the government's priorities with respect to investment treaty policy. An important issue in this regard is an evaluation of the appropriate balance between investor protections and the government's right to regulate, and how to achieve that balance in practice. Clearer specification of key provisions in older BITs would likely help to reflect government intent and ensure policy space for government regulation. It has proven difficult for governments to update older treaties but some multilateral reform initiatives are underway. Depending on whether the parties wish to clarify original intent or revise a provision, it may be possible to clarify language through joint interpretations agreed with treaty partners or treaty amendments. Replacement of older investment treaties by consent may also be an appropriate option in some cases.

- Continue to participate actively in and follow closely government and other action on investment treaty reforms at the OECD, UNCITRAL and for the ECT. Consideration of reforms and policy discussions on frequently invoked provisions in ISDS cases and whether investment treaties are achieving their intended purposes are of particular importance in current investment treaty policy. Emerging issues such as the possible role for trade and investment treaties in fostering responsible business conduct as well as ongoing discussions about treaties and sustainable development also merit close attention and participation.
- Continue to develop ISDS dispute prevention and case management tools. The government advised during the course of this Review that there is currently no dedicated unit responsible for handling investor grievances before they become ISDS cases under investment treaties. The government may wish to consider drawing on examples of institutional frameworks in other countries for the prevention of investment disputes and policy-setting activities. It may also wish to consider ways to promote awareness-raising and inter-ministerial co-operation regarding the government's investment treaty policy and the significance of investment treaty obligations for the day-to-day functions of line agencies.

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Annex 5.A. Overview of Bulgaria's investment treaties

Annex Table 5.A.1. Bulgaria's bilateral investment treaties – in force as of July 2021

No	Treaty partner	Date of signature	Date of entry into force
1	Bahrain	26-06-2009	22-12-2011
2	Qatar	08-11-2007 (Bulgaria) 11-11-2007 (Qatar)	20-05-2008
3	San Marino	23-02-2007	26-07-2007
4	Oman	03-02-2007	22-10-2014
5	Korea	12-06-2006	16-11-2006
6	Lithuania	21-11-2005	25-04-2006
7	Singapore	15-09-2003	10-02-2006
8	Thailand	11-09-2003	12-08-2004
9	Jordan	07-08-2002	19-04-2003
10	Yemen	12-04-2002	11-04-2003
11	Pakistan	12-02-2002	26-10-2005
12	Tunisia	24-11-2000	15-10-2003
13	Mongolia	06-06-2000	26-03-2003
14	Syrian Arab Republic	21-05-2000	10-11-2001
15	Libya	19-11-1999	19-01-2004
16	Kazakhstan	15-09-1999	20-08-2001
17	Lebanon	01-06-1999	16-02-2000
18	Czech Republic	17-03-1999	30-09-2000
19	Republic of North Macedonia	22-02-1999	05-06-1999
20	Cuba	16-12-1998	24-05-2000
21	Iran	13-11-1998	24-08-2003
22	Algeria	25-10-1998	06-06-2002
23	Uzbekistan	24-06-1998	31-03-1999
24	Egypt	15-03-1998	08-06-2000
25	Finland	03-10-1997	16-04-1999
26	Kuwait	17-06-1997	16-09-1998
27	Austria	22-01-1997	01-11-1997
28	Viet Nam	19-09-1996	15-05-1998
29	Morocco	22-05-1996	19-02-2000
30	Moldova	17-04-1996	11-06-1997
31	Belarus	21-02-1996	11-11-1997
32	Serbia	13-02-1996	09-01-1997
33	United Kingdom	11-12-1995	24-06-1997
34	Spain	05-09-1995	22-04-1998
35	Armenia	10-04-1995	27-03-1996
36	Georgia	19-01-1995	06-08-1999
37	Ukraine	08-12-1994	10-12-1995
38	Türkiye	06-07-1994	18-09-1997
39	Romania	01-06-1994	23-05-1995
40	Albania	27-04-1994	28-01-1996
41	Sweden	19-04-1994	01-04-1995

No	Treaty partner	Date of signature	Date of entry into force
42	Israel	06-12-1993	17-12-1996
43	Argentina	21-09-1993	11-03-1997
44	Russian Federation	08-06-1993	19-12-2005
45	Portugal	27-05-1993	20-11-2000
46	Greece	12-03-1993	29-04-1995
47	United States	23-09-1992	02-06-1994
48	Switzerland	28-10-1991	26-10-1993
49	China	27-06-1989	21-08-1994 (China) 24-08-1994 (Bulgaria)
50	France	05-04-1989	01-05-1990
51	BLEU (Belgium-Luxembourg Economic Union)	25-10-1988	29-05-1991
52	Germany	12-04-1986	10-03-1988

Note: Listed in descending chronological order based on date of signature. Dates appear in dd-mm-yyyy format. It is difficult to be precise about the exact status of Bulgaria's BITs due to some inconsistencies in publicly available information, especially entry into force dates. Full-text versions of some but not all Bulgarian BITs are available on the Bulgarian State Gazette website: https://dv.parliament.bg/. The Ministry of Foreign Affairs acts as a repository for originals and certified transcripts of Bulgaria's treaties under the Law on International Treaties but the MFA does not maintain an electronic database for these treaties. The Bulgarian Government confirmed during the preparation of this *Review* that the list of BITs in force above is accurate as of September 2020. Some of the information published by Bulgaria on its investment treaties, in particular with respect to dates of signature and entry into force, may nonetheless be inconsistent with information published by Bulgaria's treaty partners. For example, information published on the State Gazette website indicates that the Bulgaria-Qatar BIT was signed on 8 November 2007 while Qatar's legislation portal and its Official Gazette (https://www.almeezan.qa/) indicates 11 November 2007; similarly, the State Gazette indicates that the Bulgaria-China BIT (1989) entered into force on 24 August 1994 while China's Ministry of Commerce (http://tfs.mofcom.gov.cn/) indicates 21 August 1989. Online databases of investment treaties maintained by third parties such as UNCTAD and ICSID indicate a range of other conflicting dates that have not been taken into account for the purposes of this chapter.
Source: OECD investment treaty database; Bulgarian Government.

Annex Table 5.A.2. Bulgaria's bilateral investment treaties – terminated

No	Treaty partner	Date of signature	Date of entry into force	Effective date of termination	Type of termination
1	Indonesia	13-09-2003	25-01-2005	25-01-2015	Unilaterally denounced
2	Latvia	04-12-2003	23-07-2004	28-02-2021	Mutual agreement
3	Netherlands	06-10-1999	01-03-2001	31-03-2021	Mutual agreement
4	India	26-10-1998	23-09-1999	30-03-2017	Unilaterally denounced
5	Slovenia	30-06-1998	26-11-2000	10-03-2021	Mutual agreement
6	Croatia	25-06-1996	20-02-1998	13-12-2020	Mutual agreement
7	Hungary	08-06-1994	07-09-1995	13-12-2020	Mutual agreement
8	Poland	11-04-1994	09-03-1995	04-04-2021	Mutual agreement
9	Slovak Republic	21-07-1994	09-03-1995	13-12-2020	Mutual agreement
10	Denmark	14-04-1993	20-05-1995	13-12-2020	Mutual agreement
11	Italy	05-12-1988	27-12-1990	01-09-2008	Unilaterally denounced
12	Netherlands	08-03-1988	24-05-1990	01-03-2001	Replaced
13	Cyprus	12-11-1987	18-05-1988	13-12-2020	Mutual agreement
14	Finland	16-02-1984	16-07-1985	16-04-1999	Replaced
15	Malta	12-06-1984	07-02-1985	13-12-2020	Mutual agreement

Source: OECD investment treaty database; Bulgarian Government.

Annex Table 5.A.3. Bulgaria's bilateral investment treaties – signed but not in force

No	Treaty partner	Date of signature
1	Azerbaijan	07-10-2004
2	Sudan	03-04-2002
3	Democratic People's Republic of Korea	16-06-1999
4	Nigeria	21-12-1998
5	Ghana	20-10-1989
6	Austria	15-05-1981

Source: OECD investment treaty database; Bulgarian Government.

Annex Table 5.A.4. Bulgaria's trade agreements containing investment protections, investment liberalisation provisions and/or ISDS

No	Treaty	Date of signature for Bulgaria	Date of entry into force	Date of entry into force for Bulgaria
1	EU-Viet Nam Investment Protection Agreement	30-06-2019	-	-
2	EU-Singapore Investment Protection Agreement	19-10-2018	-	-
3	EU-Canada Comprehensive Economic and Trade Agreement	30-10-2016	21-09-2017 (provisional)	21-09-2017 (provisional)
4	Energy Charter Treaty	17-12-1994	16-04-1998	16-04-1998

Source: OECD investment treaty database; Bulgarian Government.

Notes

[1] English version available at: www.minfin.bg/en/1394

[2] Article 14.3 and 14.3 of the Bulgarian Statutory Instruments Act allows, exceptionally for a normative act to be retroactive, however, this retroactive force can never apply to provisions envisaging sanctions, unless they are lighter than the ones revoked.

[3] See Judgment of the Constitutional Court of the Republic of Bulgaria No. 1 of 27 January 2005 on constitutional case no. 8/2004 and Decision No. 13/2018 of 27 July 2018.

[4] The main laws regulating the forcible expropriation of property are the Property Act, the State Property Act (SPA), the Spatial Development Act and the Municipal Property Act. Other laws that may deal with specific expropriations are the Agricultural Land Conservation Act, Property Act and Use of Land Act, Energy Act, Protected Areas Act, Roads Act, Underground Resources Act, Maritime Spaces, Inland Waterways and Ports of the Republic of Bulgaria Act, Safe Use of Nuclear Energy Act and Cultural Heritage Act.

[5] An arbitration is deemed international if one or all of the parties to it are seated (for legal entities) or resident (for individuals) outside of Bulgaria. Respectively, an arbitration is domestic when all parties are seated or resident in Bulgaria.

[6] The arbitration agreement may consist of an arbitration clause or a separate statement (ICAA, Art. 7(3)). This means the Minutes of the arbitration proceedings can also be considered a written arbitration agreement or the written response of the defendant during an arbitration process without questioning the jurisdiction of the arbitration.

[7] Supreme Court of Cassation Decision 71 of 2 September 2011, Commercial Case 1193/2010, Second Commercial Chamber.

[8] Anna Rizova and Oleg Temnikov, "Bulgaria", *The International Arbitration Review,* Edition 11, July 2020.

[9] In particular, if the dispute concerns trade, industrial, invention or fiscal secrets, the public announcement of which would harm defendable interests (Civil Proceedings Code, Article 136).

[10] Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union, Official Journal of the European Union, 29 May 2020, L169/1-41, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22020A0529(01)&from=EN.

[11] Up-to-date information on the entry into force of the Intra-EU BIT Termination Agreement for the Member States and the termination status of related Bulgarian BITs appears at: https://www.consilium.europa.eu/bg/documents-publications/treaties-agreements/agreement/?id=2019049&DocLanguage=en.

[12] Bulgaria signed the two investment protection agreements with Viet Nam and Singapore, which are of a mixed type (i.e. between the EU and its Member States, on the one hand, and Singapore or Vietnam, on the other), in its national capacity and will ratify them at the national level. Related free trade agreements with Viet Nam and Singapore (as well as Japan) are signed and concluded by the EU only in its exclusive capacity; Bulgaria and the other EU Member States are not parties to these related trade agreements.

[13] The ratification procedure for EU-Canada CETA in Bulgaria is now at the stage of first reading. Updates on legislative developments for this ratification process appear at: https://www.parliament.bg/bg/bills/ID/157055/.

[14] Several other EU trade agreements such as the EU-Japan Economic Partnership Agreement (2018) contain investment liberalisation commitments without provisions on substantive investment protections or ISDS. Other EU trade agreements such as the EU-Armenia Comprehensive and Enhanced Partnership Agreement (2017) contain hortatory provisions on the contribution of FDI to sustainable development and envisage future negotiations regarding an investment chapter but do not currently contain provisions on investment protection.

[15] The discussion here refers to known claims only. The number of actual ISDS claims against Bulgaria may be higher on account of confidential pending cases.

[16] *Moti Ramot and Rami Levy v. Republic of Bulgaria* (ICSID Case No. ARB/18/47); *ACF Renewable Energy Limited v. Republic of Bulgaria* (ICSID Case No. ARB/18/1); *ČEZ, a.s. v. Republic of Bulgaria* (ICSID Case No. ARB/16/24); *State General Reserve Fund of the Sultanate of Oman v. Republic of Bulgaria* (ICSID Case No. ARB/15/43); *ENERGO-PRO a.s. v. Republic of Bulgaria* (ICSID Case No. ARB/15/19); *EVN AG v. Republic of Bulgaria* (ICSID Case No. ARB/13/17); *Novera AD, Novera Properties B.V. and Novera Properties N.V. v. Republic of Bulgaria* (ICSID Case No. ARB/12/16); *Accession Eastern Europe Capital AB and Mezzanine Management Sweden AB v. Republic of Bulgaria* (ICSID Case No. ARB/11/3); *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24).

[17] *ST-AD GmbH v. Republic of Bulgaria*, UNCITRAL, PCA Case No. 2011-06.

[18] *Kornikom EOOD v. Republic of Serbia* (ICSID Case No. ARB/19/12).

[19] Based on publicly available information, at least five Bulgarian BITs contain no reference to fair and equitable treatment – BITs with Cyprus (1987), Malta (1984), Qatar (2007), Sweden (1994), Türkiye (1994). Most Bulgarian treaties refer to "fair and equitable" treatment but some refer to "fair and impartial" treatment (e.g. BITs with Libya (1999), Jordan (2002), Yemen (2002), Mongolia (2000), Pakistan (2002), San Marino (2007) and Tunisia (2000)) and others to "just and equitable" treatment (Bulgaria-France BIT (1989)).

[20] See *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24) under the ECT; *ST-AD GmbH v. Republic of Bulgaria*, UNCITRAL, PCA Case No. 2011-06. The discussion here refers only to known claims. The number of actual FET claims against Bulgaria may be higher on account of confidential pending cases claims.

[21] See also Argentina-Japan BIT (2018); Australia-Peru FTA (2018); USMCA (2018); Australia-Hong Kong Investment Agreement (2019); Australia-Indonesia CEPA (2019). Recent EU treaties such as the EU-Singapore Investment Protection Agreement and the EU-Viet Nam Investment Protection Agreement also contain clarifications relating to investor expectations. However, they clarify certain exclusions of liability generally rather than referring specifically to the FET provision.

[22] Australia-Singapore FTA (2003), as amended in 2016, Article 6(5); Australia-Peru FTA (2018), Article 8.6(5); Australia-Uruguay BIT (2019), Article 4(5); Australia-Indonesia Comprehensive Economic Partnership Agreement (2019), Article 14.2(3).

[23] For example, Article 2.4 (2) of the EU-Singapore IPA clarifies that: "A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if its measure or series of measures constitute: (a) denial of justice in criminal, civil and administrative proceedings; (b) a fundamental breach of due process; (c) manifestly arbitrary conduct; (d) harassment, coercion, abuse of power or similar bad faith conduct."

[24] See Bulgaria's BITs with Iran (1998), Libya (1999), Mongolia (2000), Kazakhstan (1999), Pakistan (2002), Russian Federation (1993) and Yemen (2002).

[25] Multiple references to FET occur in preamble text as well as a substantive provision of the treaty (see, for example, Bulgaria's BITs with Denmark (1993), Finland (1997), Jordan (2002), Pakistan (2002), the Netherlands (1999) and the United-States (1992)) or in several different substantive provisions (see, for example, Bulgaria BITs with Libya (1999), Indonesia (2003), Korea (2006) and Latvia (2003)). Other formulations of FET in Bulgarian treaties may also leave scope for broad interpretations by arbitral tribunals. For example, the Bulgaria-United States BIT (1992) refers to FET as "in no case… less than that required by international law" but does not define FET as MST-FET. Such a formulation creates a "floor" for FET, rather than a "ceiling" that would limit FET to the protections already afforded under international law. There is no guidance in this BIT or any other Bulgarian BIT about the extent to which protections may exceed those under international law.

[26] Gaukrodger, D. (2016) (reviewing the applicable law on joint interpretations of investment treaties without express provisions on the issue); Gordon, K. and Pohl, J. (2015). For a recent example of a joint interpretation, see the Joint Interpretative Declaration between Columbia and India (2018) regarding the Columbia-India BIT (2009).

[27] Notably there are no provisions on MFN treatment in the EU-Singapore Investment Protection Agreement (2018).

[28] Some of the EU's trade and investment agreements contain more detailed sector-specific exclusions. See, for example, the EU-Viet Nam Investment Protection Agreement (2019), which provides that MFN treatment does not apply to government subsidies or investments in some sectors (e.g. audio-visual services, mining, manufacturing and processing of nuclear materials, production of or trade in arms, munitions and war material, national maritime cabotage, domestic and international air transport services, and services supplied and activities performed in the exercise of governmental authority).

[29] See the EU's trade and investment agreements with Canada, Singapore and Viet Nam, as well as the Argentina-Bulgaria BIT (1993) and the EU-Japan Economic Partnership Agreement (2018).

[30] EU-Canada CETA (2016); EU-Vietnam FTA (2018); EU-Japan Economic Partnership Agreement (2018).

[31] EU-Singapore Investment Protection Agreement (2018).

[32] Treaty shopping is a concept used broadly herein to describe the power for a beneficial owner of an investment to choose between investment treaties or between provisions of different investment treaties. See further detail on treaty shopping below.

[33] For a recent discussion of the uncertainty surrounding the interpretation of MFN clauses in ISDS, see Batifort, S. and Benton Heath, J. (2018), "The New Debate on the Interpretation of MFN Clauses in Investment Treaties: Putting the Brakes on Multilateralization", *American Journal of International Law*, Volume 111, Issue 4 (October 2017), pp. 873-913.

[34] See, for example, United States-Mexico-Canada Agreement (2018), Article 14.5(4) ("For greater certainty, whether treatment is accorded in 'like circumstances' under this Article depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives"); CPTPP (2018), "Note on Interpretation of 'In Like Circumstances'", www.mfat.govt.nz/assets/Trans-Pacific-Partnership/Other-documents/Interpretation-of-In-Like-Circumstances.pdf

[35] EU-Canada CETA (2016), Annex 8-A; EU-Singapore Investment Protection Agreement (2018), Annex 1; EU-Viet Nam Investment Protection Agreement (2019), Annex 4.

[36] See Bulgaria's BITs with Poland (1994), United Kingdom (1995), Romania (1994), the Netherlands (1988), Kuwait (1997), Indonesia (2003), Italy (1988), Greece (1993), Hungary (1994), Spain (1995), Latvia (2003), Germany (1986), Qatar (2007), France (1989), Egypt (1998), Denmark (1993), Croatia (1996), China (1989), the Slovak Republic (1998), Belgium/Luxembourg (1988), Iran (1998), Libya (1999), Mongolia (2000), Kazakhstan (1999), Pakistan (2002), the Russian Federation (2003), San Marino (2007), Türkiye (1994), Yemen (2002), and Albania (1994).

[37] For example, the Argentina-Bulgaria BIT (1993) provides that: "the denial of an investment authorization shall not itself constitute a dispute between an investor and a Contracting Party."

[38] See Bulgaria's BITs with Egypt (1998), Thailand (2003), Slovenia (1998), the Slovak Republic (1994), Latvia (2003), Lebanon (1990), France (1989), China (1989), Algeria (1998), Jordan (2002), Kazakhstan (1999), Mongolia (2000), Pakistan (2002), Yemen (2002), Argentina (1993) and Albania (1994).

[39] For example, under the Bulgaria-Singapore BIT (2003), investors can choose between ICSID or UNCITRAL arbitration in case of a dispute regarding expropriation, compensation for losses, repatriation, or subrogation, but have no choice other than ICSID arbitration for a dispute that concerns other subject matters.

[40] For example, under the Bulgaria-Oman BIT (2007), covered investors may choose to submit a dispute to international arbitration the UNCITRAL Arbitration Rules, the ICSID Arbitration Rules or an *ad hoc* arbitral tribunal.

[41] See, for example, EU-Singapore Investment Protection Agreement (2018), Article 2.2.

[42] See, for example, EU-Canada CETA (2016), Annex 8-A.

[43] See, for example, EU-Viet Nam Investment Protection Agreement (2019), Article 3.27.

[44] See, for example, EU-Canada CETA (2016), Chapter 22 (Trade and Sustainable Development), Chapter 23 (Trade and Labour) and Chapter 24 (Trade and Environment).

[45] See, for example, Armenia-EU Comprehensive and Enhanced Partnership Agreement (2017), Article 276.