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# Member State BITs after the Treaty of Lisbon: Solid Foundation or First Victims of EU Investment Policy?

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## RESEARCH PAPERS IN LAW

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# Member State BITs after the Treaty of Lisbon: Solid Foundation or First Victims of EU Investment Policy?

Luca Schicho (\*)

## 1. Introduction

This paper discusses the uncertain future of Member State BITs with third countries in the light of the developing EU investment policy. The question will be examined on the basis of the proposed Regulation establishing transitional arrangements for bilateral investment agreements between Member States and third countries presented by the Commission on 7 July 2010<sup>1</sup> and the European Parliament's Position adopted at first reading on 10 May 2011.<sup>2</sup> The proposed Regulation and the Commission Communication of the same day are meant to be the "first steps in the development of an EU international investment policy".<sup>3</sup>

The first chapters present the legal framework relevant for this question and its evolution to better understand the particular challenges of this transition process. The second chapter examines the relationship of EU law and investment law, with a brief introduction of the notion of investment law and the scope of the EU's new investment competence. The third chapter outlines the legal framework for the continuation and termination of treaties under international and EU law. The fourth chapter concerns BITs, first covering the particular nature of BITs and then the CJEU's judgments in the BIT Cases of 2009. The fifth chapter consists of a step by step analysis of the different provisions of the proposed Regulation.

## 2. Investment Law

### 2.1. The notion of investment law

Investment law is the body of rules aiming to limit political risk and thereby foster foreign investment. It consists of customary international law and an extensive network of bilateral and multilateral investment agreements. The "silent revolution in

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<sup>1</sup> Commission Proposal for a Regulation of the European Parliament and of the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries of 7 July 2010, COM(2010)344 final.

<sup>2</sup> European Parliament's Position adopted on 10 May 2011, T7-0206/2011.

<sup>3</sup> Commission Communication "Towards a comprehensive European international investment policy" of July 7, 2010, COM(2010)343 final, p. 7.

foreign investment law”<sup>4</sup> began in the 1960s with the conclusion of the first BITs<sup>5</sup> but started gaining its full momentum in the late 1990s<sup>6</sup> with the increasing resort by foreign investors to investment arbitration.<sup>7</sup> Due to the failure of the project for a *Multilateral Agreement on Investment* in the late 1990s, BITs constitute the most significant part of investment agreements.<sup>8</sup>

Foreign investment, in particular FDI, has been playing an increasingly important role in the world economy since the 1980s. In the period of 1983-89, global FDI flows annually grew by 28,9%, four times as fast as the growth of world income and three times as fast as world trade, but with 81% of FDI flows directed to developed countries.<sup>9</sup> A significant rise of FDI directed towards developing countries began in the 1990s. Nonetheless, FDI in developed countries has remained very extensive and economically highly important.<sup>10</sup> Thus, developed countries such as the EU Member States have an interest in promoting foreign investment, as both capital exporting and capital importing countries.

There is a broad consensus on the beneficial effects of FDI and a discussion of these goes beyond the scope of this paper. Investment law plays a decisive role both in attracting FDI<sup>11</sup> and in promoting investments abroad, strengthening the position of a country’s own investors.<sup>12</sup> A constant danger to investment law is the risk of politicisation of investment activity.<sup>13</sup> This in turn increases perceived political risk, which has a chilling effect on FDI, in particular by driving up costs for financing

<sup>4</sup> S.P. SUBEDI, *International Investment Law* (2008), p. 32.

<sup>5</sup> R. PREISWERK, *La protection des investissements privés dans les traités bilatéraux* (1963), p. 16.

<sup>6</sup> S. ROSE-ACKERMAN, “The Global BITs Regime and the Domestic Environment for Investment”, in K.P. SAUVANT, L.E. SACHS (eds.), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (2009), p. 311, at 318.

<sup>7</sup> J.W. SALACUSE, N.P. SULLIVAN, “Do BITs Really Work: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain”, in K.P. SAUVANT, L.E. SACHS (eds.), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (2009), p. 109, at 131.

<sup>8</sup> With NAFTA playing an important role in its region due to its Investment Chapter, see K.J. VANDERVELDE, “A Brief History of International Investment Agreements”, in K.P. SAUVANT, L.E. SACHS (eds.), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (2009), p. 3, at 22-23.

<sup>9</sup> E.M. GRAHAM, P.R. KRUGMAN, “The Surge in Foreign Direct Investment in the 1980ies”, in K.A. FROOT (ed.), *Foreign direct investment* (1993), p. 13, at 14.

<sup>10</sup> R.E. LIPSEY, “Foreign Direct Investment in the United States: Changes over Three Decades”, in K.A. FROOT (ed.), *Foreign direct investment* (1993), p. 113, at 143-144.

<sup>11</sup> J.-P. LAVIEC, *Protection et promotion des investissements : étude du droit international économique* (1985), p. 74; R. MCCULLOCH, “New Perspectives on Foreign Direct Investment”, in K.A. FROOT (ed.), *Foreign direct investment* (1993), p.37, at 48.

<sup>12</sup> Commission Communication, *supra* note 3, p. 4.

<sup>13</sup> S. WOLF, “Welthandelsrechtliche Rahmenbedingungen für die Liberalisierung ausländischer Direktinvestitionen – Multilaterale Investitionsverhandlungen oder Rückbesinnung auf bestehende Investitionsregelungen im Rahmen der WTO?”, *Beiträge zum Transnationalen Wirtschaftsrecht* No. 61, Halle 2006, p. 5

investments.<sup>14</sup> Thus, investment law makes an important contribution to economic development by promoting and securing FDI flows.

## 2.2. The scope of the EU's competence for foreign direct investment after the Lisbon Treaty

With the entry into force of the Lisbon Treaty on 1 December 2009, the importance of investment law is reflected in the EU's exclusive competence for FDI,<sup>15</sup> which the Commission describes as "a new frontier for the common commercial policy".<sup>16</sup> Art. 207(1) TFEU now provides that "The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, *foreign direct investment*, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. [...]" (emphasis added)

The central aim of this shift of competence is to enable the EU to benefit from the increased bargaining power that should enable the EU to "stand up to all major powers"<sup>17</sup> in future negotiations of investment agreements. The provision does not make reference to any particular kind of measures concerning foreign direct investments. Therefore, with a few exceptions,<sup>18</sup> the majority of authors suggest that for reasons of efficiency, the competence should be considered to encompass both investment promotion (i.e. liberalising market access for investors in the pre-establishment phase) and investment protection (i.e. protecting the investment in the post-establishment phase).<sup>19</sup> For many decades, protection from expropriation has

<sup>14</sup> E.H. FRY, *The Politics of International Investment* (1983), p. 56-57; P. EGGER, M. PFAFFERMAYR, "The Impact of Bilateral Investment Treaties on Foreign Direct Investment", in K.P. SAUVANT, L.E. SACHS (eds.), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (2009), p. 253, at 254.

<sup>15</sup> Previous moves in the direction of a EU investment policy such as the Minimum Platform on Investment had only limited success, see N. MAYDELL, "The European Community's Minimum Platform on Investment or the Trojan Horse of Investment Competence", in A. REINISCH, C. KNAHR (eds.), *International Investment Law in Context* (2008), p. 73; T. EILMANSBERGER, "Bilateral investment treaties and EU law", (2009) 46 *CMLRev.* 383, at 393.

<sup>16</sup> Commission Communication, *supra* note 3, p. 7.

<sup>17</sup> M. BURGSTALLER, "European Law and Investment Treaties", (2009) 26 *JIA* 181, at 214; P.J. KUJPER, "Foreign Direct Investment: The First Test of the Lisbon Improvements in the Domain of Trade Polity", (2010) 37 *Legal Issues of Economic Integration* 261, at 272.

<sup>18</sup> M. KRAJEWIKI, "External Trade Law and the Constitution Treaty: Towards a Federal and More Democratic Common Commercial Policy?", (2005) 42 *CMLRev.* 91, at 114; D. LECZYKIEWICZ, "Common Commercial Policy: The Expanding Competence of the European Union in the Area of International Trade", (2005) 6 *German Law Journal* 1673, at 1678.

<sup>19</sup> KUJPER, *supra* note 17, at 269; M. BUNGENBERG, "The Division of Competences Between the EU and Its Member States in the Area of Investment Politics", in M. BUNGENBERG et al. (eds.), *International*

been one of the central concerns of investment protection.<sup>20</sup> Some authors argue that competence regarding this field is precluded by Art. 345 TFEU<sup>21</sup> but the majority does not consider Art. 345 an obstacle to a Union competence for investment protection,<sup>22</sup> in particular in the light of the fact that the CJEU has interpreted the provision narrowly.<sup>23</sup> Therefore, the EU would be able to conclude investment agreements covering both market access and material standards of protection similar to those contained in most BITs.<sup>24</sup>

Art. 207 TFEU does not contain a definition of FDI. Numerous authors<sup>25</sup> suggest relying on Annex I of the Capital Liberalization Directive 88/361/EEC,<sup>26</sup> which defines direct investments as

“investments of all kinds by natural persons or commercial, industrial or financial undertakings, and which serve to establish or to maintain lasting and direct links between the person providing the capital and the entrepreneur to whom or the undertaking to which the capital is made available in order to carry on an economic activity. This concept must therefore be understood in its widest sense.”

Other reference points would be the OECD Benchmark Definition<sup>27</sup> or the IMF Balance of Payments Manual,<sup>28</sup> which both contain definitions of the term. FDI needs

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*Investment Law and EU Law* (2011), p. 29, at 36; W. SHAN, S. ZHANG, “The Treaty of Lisbon: Half Way toward a Common Investment Policy”, (2010) 21 EJIL 1049, at 1062-63; A. DIMOPOULOS, “Shifting the Emphasis from Investment Protection to Liberalization and Development: The EU as a New Global Actor in the Field of Foreign Investment”, (2010) 11 JWI&T 3, at FN 48; C.E. ANDERER, “Bilateral Investment Treaties and the EU Legal Order: Implications of the Lisbon Treaty”, (2010) 35 *Brooklyn Journal of International Law* 851, at 876.

<sup>20</sup> R. DOLZER, C. SCHREUER, *Principles of International Investment Law* (2008), p. 89.

<sup>21</sup> S. JOHANNSEN, “Die Kompetenz der Europäischen Union für ausländische Direktinvestitionen nach dem Vertrag von Lissabon”, Beiträge zum Transnationalen Wirtschaftsrecht No. 90, Halle 2009, p. 31; J. CEYSSENS, “Towards a Common Foreign Investment Policy? Foreign Investment in the European Commission”, (2005) 32 *Legal Issues of Economic Integration* 259, at 279–281.

<sup>22</sup> A. DIMOPOULOS, “The Validity and Applicability of International Investment Agreements between EU Member States under EU and International law”, (2011) 48 *CMLRev.* 63, at 65; C. HERMANN, “Die Zukunft der mitgliedstaatlichen Investitionspolitik nach dem Vertrag von Lissabon”, [2010] *EuZW* 207, at 211; M. BUNGENBERG, “The Division of Competences Between the EU and Its Member States in the Area of Investment Politics”, in M. BUNGENBERG et al.(eds.), *International Investment Law and EU Law* (2011), p. 29, at 36-37; F. ORTINO, P. EECKHOUT, “Towards and EU Policy on Foreign Direct Investment”, in A. BIONDI et al. (eds.), *EU Law After Lisbon* (2011), p. 312, at 319.

<sup>23</sup> Cases C-92/92 and C-326/92 *Phil Collins* [1993] ECR I-5155, para. 22; Case C-30/90 *Commission v. UK* [1992] ECR I-829, para. 18.

<sup>24</sup> J. KARL, “The Competence for Foreign Direct Investment – New Powers for the European Union?”, (2006) 5 JWI&T 413, at 422; A. DIMOPOULOS, *EU Foreign Investment Law* (2011), p. 110.

<sup>25</sup> W. SHAN, S. ZHANG, “The Treaty of Lisbon: Half Way toward a Common Investment Policy”, (2010) 21 EJIL 1049, at 1059; A. REINISCH, “The Division of Powers Between the EU and Its Member States “After Lisbon””, in M. BUNGENBERG et al. (eds.), *International Investment Law and EU Law* (2011), p. 43, at 46-47.

<sup>26</sup> Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty, [1988] O.J.L178/11.

<sup>27</sup> According to the definition of the OECD, FDI reflects the objective of establishing a lasting interest by a resident enterprise in one economy (direct investor) in an enterprise (direct investment enterprise)

to be distinguished from portfolio investments such as non-controlling minority shares, loans or bonds only committed on a short-term basis.<sup>29</sup> However, such investments have been found to constitute investments in the sense of Art. 25 ICSID<sup>30</sup> by numerous investment tribunals<sup>31</sup> and are equally covered by most BITs and investment agreements.<sup>32</sup>

The use of the term “FDI” indicates that the exclusive competence for foreign investment does not extend to portfolio investments.<sup>33</sup> This was also affirmed by the German Constitutional Court, which explicitly referred to the scope of the FDI competence in its Lisbon Treaty judgment, stating that

“Much, however, argues in favour of assuming that the term ‘foreign direct investment’ only encompasses investment which serves to obtain a controlling interest in an enterprise (see Tietje, *Die Außenwirtschaftsverfassung der EU nach dem Vertrag von Lissabon*, 2009, pp. 15–16). The consequence of this would be that exclusive competence only exists for investment of this type whereas investment protection agreements that go beyond this would have to be concluded as mixed agreements.”<sup>34</sup>

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which is resident in an economy other than that of the direct investor. The lasting interest implies the existence of a long-term relationship between the direct investor and the direct investment enterprise and a significant degree of influence on the management of the enterprise. See OECD, *Benchmark Definition of Foreign Direct Investment*, 4th ed. (2008), available at <http://www.oecd.org/dataoecd/26/50/40193734.pdf> (accessed on 18 April 2012).

<sup>28</sup> Which defines “direct investment” as reflecting the objective of obtaining a lasting interest by an entity resident in one country in an enterprise resident in another economy. The lasting interest implies the existence of a long-term relationship between the direct investor and the enterprise and a significant degree of influence by the investor on the management of the enterprise. See IMF, *Balance of Payment Manual*, 5th ed. (1993), available at: [www.imf.org/external/pubs/ft/bopman/bopman.pdf](http://www.imf.org/external/pubs/ft/bopman/bopman.pdf) (accessed on 18 April 2012).

<sup>29</sup> J.-P. LAVIEC, *Protection et promotion des investissements : étude du droit international économique* (1985), p. 28.

<sup>30</sup> Which provides that “The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State [...] and a national of another Contracting State [...]” and equally contains no definition of what constitutes an investment, see C. SCHREUER et al., *The ICSID Convention: A Commentary*, 2<sup>nd</sup> ed. (2009), p. 114.

<sup>31</sup> *Ceskooslovenskaobchodnibanka v. Slovak Republic*, Decision on Objections to Jurisdiction of 24 May 1999, (1999) 14 ICSID Review – FILJ 251; also see A.R. RIVEIRA, D. ROVETTA, ‘The Ad Hoc Committee Annulment Decision in Malaysian Historical Salvors: The Meaning of ‘Investment’ Re-established?’ (2011) 6 *Global Trade and Customs Journal* 75; J. Ho, “The Meaning of ‘Investment’ in ICSID Arbitrations”, (2010) 26 *Arbitration International* 633.

<sup>32</sup> For example in Art. 1 of the United States Model BIT of 2004, available at <http://www.ustr.gov/sites/default/files/U.S.%20model%20BIT.pdf> (accessed on 18 April 2012); also see P. MUCHLINSKI, “The Framework of Investment Protection: The Content of BITs”, in K.P. SAUVANT, L.E. SACHS (eds.), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (2009), p. 37, at 40.

<sup>33</sup> JOHANNSEN, *supra* note 21, p. 31.

<sup>34</sup> German Constitutional Court, Lisbon Treaty, Judgment of 30 June 2009, available at [www.bundesverfassungsgericht.de/entscheidungen/es20090630\\_2bve000208en.html](http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html) (accessed on 18 April 2012), para. 379.

It can be expected that Member States will strongly oppose attempts to extend, in practice, the competence to portfolio investments, a position in which they are thus supported by the looming threat of a German Constitutional Court judgment holding Union acts with respect to portfolio investments *ultra vires*.

However, the Commission Communication seems to suggest that the EU investment competence under Art. 207 TFEU extends to all forms of investment, referring to the ability of the EU “to continue promoting investment, both direct investment and portfolio investment”.<sup>35</sup> Indeed, an exclusion of portfolio investments would be a serious obstacle for developing a comprehensive EU investment policy, as they are “inextricably linked in many bilateral agreements to direct investment”.<sup>36</sup> Recent trends in investment law are considered to have made the distinction increasingly obsolete.<sup>37</sup> EU investment protection agreements excluding portfolio investments would thus provide significantly less protection than standard BITs and thus not constitute a satisfactory replacement of Member State BITs.

One solution for this dilemma may be implied shared external competences. It has been argued that the EU could conclude international investment agreements also applying to such investments (as is usually the case in most BITs) based on implied shared external competences.<sup>38</sup> Art. 216(1) TFEU together with Art. 3(2) TFEU are considered a codification of the CJEU’s case law on implied exclusive competences, but do not codify or otherwise affect implied shared competences.<sup>39</sup> The requirement for the exercise of implied shared external competences is that concluding an agreement with a third country would facilitate the exercise of an internal EU competence. Exercising a shared external competence over portfolio investments would facilitate the exercise of internal competences since otherwise, the overlap of BIT provisions on portfolio investments and EU law would negatively affect the effectiveness of the EU’s of internal competences.<sup>40</sup> This would mean that, on the one hand, Member States would continue to be able to conclude BITs applicable to

<sup>35</sup> Commission Communication, *supra* note 3, p. 11.

<sup>36</sup> E. DENZA, “Bilateral Investment Treaties and EU rules on free transfer: Comment on Commission v Austria, Commission v Sweden and Commission v Finland”, (2010) 35 *ELRev.* 263, at 273.

<sup>37</sup> A. REINISCH, “The Division of Powers Between the EU and Its Member States “After Lisbon””, in M. BUNGENBERGET al. (eds.), *International Investment Law and EU Law* (2011), p. 43, at 49.

<sup>38</sup> A. DIMOPOULOS, *EU Foreign Investment Law* (2011), p. 104; S. HINDELANG, N. MAYDELL, “The EU’s Common Investment Policy – Connecting the Dots”, in M. BUNGENBERGET al.(eds.), *International Investment Law and EU Law* (2011), p. 1, at 24; for the opposite view, see C. TIETJE, “Die Außenwirtschaftsverfassung der EU nach dem Vertrag von Lissabon”, *Beiträge zum Transnationalen Wirtschaftsrecht* No. 83, Halle 2009, p. 16; T. EILMANSBERGER, “Bilateral investment treaties and EU law”, (2009) 46 *CMLRev.* 383, at 392.

<sup>39</sup> S. HINDELANG, N. MAYDELL, “The EU’s Common Investment Policy – Connecting the Dots”, in M. BUNGENBERGET al. (eds.), *International Investment Law and EU Law* (2011), p. 1, at 15, 17.

<sup>40</sup> *Ibid.*, at 25.



portfolio investments alone and on the other hand, the EU would not need to conclude agreements covering foreign investment in its entirety as a mixed agreement, but could do so on its own.<sup>41</sup>

How the Commission and Member States will finally address this problem remains to be seen, although the most likely option would be to continue the Commission's drive for Comprehensive Economic and Trade Agreements (concluded as mixed agreements) covering numerous aspects including investment protection. In the light of the numerous problems and controversies concerning the scope of this new competence, it has been correctly observed that only "one thing is clear: the transfer of FDI competence from the Member States to the EU has been done without considering the far-reaching consequences and legal difficulties that are associated with such a move."<sup>42</sup>

### **3. Continuation and termination of treaties**

This section discusses the legal framework for the continuation and terminations of treaties under international and EU law, which forms the background of the proposed Regulation. It is precisely the lack of a comprehensive and coordinated framework between these two fields of law that contributes to legal uncertainty concerning the future of Member State BITs and thus the urgency for the transitional framework that the proposed Regulation aims to create.

#### **3.1. Continuation and termination of treaties under international treaty law**

The termination of BITs between Member States and third States is subject to the customary rules of treaty law enshrined in the Vienna Convention on the Law of Treaties (VCLT). The Convention's *lex posterior* principle can only apply to intra-EU BITs.<sup>43</sup> With respect to BITs with third States, EU law cannot affect the rights of third States and the corresponding obligations of the Member States.<sup>44</sup>

<sup>41</sup> A. DIMOPOULOS, *EU Foreign Investment Law* (2011), p. 104-105; S. HINDELANG, N. MAYDELL, "The EU's Common Investment Policy – Connecting the Dots", in M. BUNGENBERGET al. (eds.), *International Investment Law and EU Law* (2011), p. 1, at 26.

<sup>42</sup> N. LAVRANOS, "New Developments in the Interaction between International Investment Law and EU Law", (2010) 9 *Law & Practice of International Courts and Tribunals* 409, at 440.

<sup>43</sup> Art. 59, Vienna Convention on the Law of Treaties 1969, available at [http://untreaty.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf) (accessed on 18 April 2012)

<sup>44</sup> Arts. 30(4), 34, 39 VCLT; Art. 351 TFEU effectively affirms this principle; with regard to an application of Art. 27 VCLT, which prohibits States from invoking provisions of their internal law as justification for its failure to perform a treaty, to incompatibilities of BITs with EU law, see M. LICKOVA, "European Exceptionalism in International law", (2008) 19 *EJIL* 463, at 470; A.A. GHOURI, "Resolving

Unless Member States are able to rely on exceptional grounds for termination,<sup>45</sup> they would either have to terminate their BITs in conformity with its own provisions or by obtaining consent from the third State.<sup>46</sup> When BITs contain provisions regarding termination, the right to terminate is usually subject to a twelve months' notice.<sup>47</sup> Where the BIT contains no such provision, it could only be denounced, also subject to a twelve months' notice, where it is established that the parties intended to admit such possibility or where the nature of the treaty implies such right.<sup>48</sup>

### 3.2. Continuation and termination of treaties under EU law

The application of EU law does not affect the obligation of Member States to respect rights of third countries under previous agreements. In *Burgoa*, the CJEU held that pursuant to Art. 351 TFEU [ex. 234 EC], the application of the Treaty does not affect the duty to observe the rights of non-member countries under an agreement concluded prior to the entry into force of the Treaty or accession, and that the Community institutions are bound not to impede the performance of those obligations.<sup>49</sup>

In *Commission v. Portugal* [2000], the Court affirmed this, holding that

“the purpose of the first paragraph of Article 234 of the Treaty is to make it clear, in accordance with the principles of international law [...], that application of the EC Treaty is not to affect the duty of the Member State concerned to respect the rights of third countries under a prior agreement and to perform its obligations thereunder.”<sup>50</sup>

Consequently, a Member State must in all cases respect the rights which the third country derives from the agreement, but at the same time, it is under an obligation to denounce the agreement if it contains un-adjustable incompatibilities with EU law.<sup>51</sup> If the respective agreement expressly enables the contracting parties to denounce it, the Member State cannot invoke foreign-policy interests to delay denouncing the

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Incompatibilities of Bilateral Investment Treaties of the EU Member States with the EC Treaty: Individual and Collective Options”, (2010) 16 *ELJ* 806, at 815.

<sup>45</sup> Under Arts. 61 (*Supervening impossibility of performance*) or 62 (*Fundamental change of circumstances*). The latter option has been discussed but seems highly unlikely, see LAVRANOS, *supra* note 42, at 422.

<sup>46</sup> Art. 54 VCLT.

<sup>47</sup> A. CARSKA-SHEPPARD, “Issues Relevant to the Termination of Bilateral Investment Treaties”, (2009) 26 *JIA* 755, at 760.

<sup>48</sup> Art. 56 VCLT.

<sup>49</sup> Case 812/79 *Burgoa* [1980] ECR 2787, para. 11.

<sup>50</sup> Case C-84/98 *Commission v. Portugal* [2000], ECR I-5215, para. 53.

<sup>51</sup> *Ibid.*, 54, 58.

agreement.<sup>52</sup> This would be the case with respect to most BITs, which, as noted above, usually allow parties to denounce with twelve months' notice.

The rights of those third countries, corresponding to obligations of the respective Member State, remain unaffected – but the rights of the Member State under the agreement may very well be restricted under EU Law, which may preclude the Member State from exercising that right. For Example, in *Commission v. Italy*, [1962] Italy's right under GATT to charge a higher rate of duty conflicted with rights of other Member States and consequently, Italy was precluded from exercising that right.<sup>53</sup>

The fate of pre-accession agreements must be distinguished from agreements whose subject matter did not fall within the scope of an exclusive Union competence at the time of their conclusion, but came within the scope due to a subsequent change of the Treaty provisions. Under international law, such shifts of competence equally fall under the "*pacta tertiis*" principle and thus cannot affect the rights of third States.<sup>54</sup> The consequences of the shift under EU law are not clear.<sup>55</sup>

The possibility of applying Art. 351 TFEU by analogy to cases of supervening external competence is contentious.<sup>56</sup> In his Opinion in *Open Skies*, AG Tizzano held that concerning compatibility in terms of competence (opposed to the separate question of compatibility with specific provisions of the Treaty), "supervening external competence of the Community in matters previously regulated by agreements of the Member States does not suffice in itself to render those agreements incompatible with the rules and principles governing the division of powers".<sup>57</sup> In her Opinion *Intertanko*, AG Kokott stated that "Member States cannot in principle invoke agreements concluded after accession as against Community law"<sup>58</sup> but cautiously added, referring to the *Open Skies* judgment<sup>59</sup> that the respective jurisprudence

<sup>52</sup> *Ibid.*, paras. 55, 59; also see Case C-216/01 *BudějovickýBudvar* [2003], ECR I-13617, para. 171.

<sup>53</sup> Case 10/61 *Commission v. Italy*, [1962] ECR 1, at 10; also see Case C-324/93 *Evans Medical* [1995] ECR I-563, para.27; Case C-124/95 *Centro-Com* [1997] ECR-I -00081, para. 56.

<sup>54</sup> See *supra* note 44.

<sup>55</sup> F. ORTINO, P. EECKHOUT, "Towards and EU Policy on Foreign Direct Investment", in A. BIONDI et al. (eds.), *EU Law After Lisbon* (2011), p. 312, at 320.

<sup>56</sup> For a strong rejection of the analogous application see, in particular, A. DIMOPOULOS, *EU Foreign Investment Law* (2011), p. 306.

<sup>57</sup> Opinion of AG Tizzano in Case C-466/98 *Commission v. United Kingdom* [2002] ECR I-9427, para. 113.

<sup>58</sup> Opinion of AG Kokott in Case C-308/06 *Intertanko and Others* [2008] ECR I-04057, para. 77.

<sup>59</sup> Case C-466/98 *Commission v United Kingdom* ('open skies') [2002] ECR I-9427, paras. 26, 27.

“applies at least where the relevant Community powers already existed at the time the agreement was concluded.”<sup>60</sup>

Thus, the position indicated by the Advocate Generals and supported by a majority of authors,<sup>61</sup> is that a supervening external EU competence would not render agreements previously concluded with third countries incompatible with the division of powers between the Member States and the EU. The agreements would therefore remain in force and compatible with EU law, but the Member States would be under an obligation to adjust or terminate the agreements in so far as their content is incompatible with specific provisions of EU law.<sup>62</sup> However, in the light of the very extensive understanding of incompatibility with EU law which the CJEU embraced in the BITs cases in 2009, the impact of this distinction may be limited.<sup>63</sup>

### 3.3. Continuation and termination of treaties under the Council decisions on pre-existing trade agreements

A legal source “clearly inspiring the Commission proposal” were the two Council decisions issued in 1961 and 1969 in connection with the full entry into force of the CCP.<sup>64</sup> The Council Decision of 9 October 1961 provided for a 12 year transitional period pursuant to Arts. 8 and 111 EEC and prohibited Member States from concluding trade agreements valid beyond that transitional period.<sup>65</sup> Trade agreements neither foreseeing the entry into force of the CCP nor allowing an annual notice of termination would have to be terminated within one year of the issuing of the decision.<sup>66</sup> In doing so, Member States were to coordinate their action to agree on coinciding termination dates with each affected third State.<sup>67</sup> During the transitional period, Member States and the Commission were to jointly examine

<sup>60</sup> Opinion of AG Kokott in Case C-308/06 *The International Association of Independent Tanker Owners and Others* [2008] ECR I-04057, FN 58.

<sup>61</sup> T.C. HARTLEY, *The foundations of European Union law*, 7<sup>th</sup> ed. (2010), p. 195-6; T. EILMANSBERGER, “Bilateral investment treaties and EU law”, (2009) 46 CMLRev. 383, at 397; C. TIETJE, “Die Außenwirtschaftsverfassung der EU nach dem Vertrag von Lissabon”, Beiträge zum Transnationalen Wirtschaftsrecht No. 83, Halle 2009, p. 17; JOHANSEN, *supra* note 21, p. 23-26; C. TIETJE, “EU-Investitionsschutz und -förderung zwischen Übergangsregelungen und umfassender europäischer Auslandsinvestitionspolitik”, [2010] EuZW 647, at 650; J.P. TERHECHTE, Art. 351, the Principle of Loyalty and the Future Role of the Member States’ Bilateral Investment treaties”, in M. BUNGENBERG et al. (eds.), *International Investment Law and EU Law* (2011), p. 79, at 85.

<sup>62</sup> M. BURGSTALLER, “The Future of Bilateral Investment Treaties of EU Member States”, in M. BUNGENBERG et al. (eds.), *International Investment Law and EU Law* (2011), p. 55, at 67

<sup>63</sup> See below, p. 12, “The 2009 BIT cases”.

<sup>64</sup> KUJPER, *supra* note 17, at 266.

<sup>65</sup> Council Decision of 9 October 1961 on standardisation of the duration of trade agreements with third countries [1961] O.J. 71/1274, Art. 1.,

<sup>66</sup> *Ibid.*, Art. 2.

<sup>67</sup> *Ibid.*, Art. 4.

whether the trade agreements still in force constituted obstacles to the introduction of the CCP.<sup>68</sup>

The Council Decision of 29 December 1969 introduced a more flexible system,<sup>69</sup> allowing the Commission to propose to the Council to authorise the extension of the agreement for a specified period, if it found the agreement not to constitute an obstacle to the implementation of the CCP.<sup>70</sup> The practice of the Commission in applying the decisions was characterised by restraint in finding obstacles to the CCP, allowing Member States to maintain many trade agreements in force for 35 years until the final expiry of the authorisations in 2005.<sup>71</sup>

#### **4. Bilateral Investment Treaties**

This chapter shall briefly outline the particular features and functions of BITs and the 2009 judgments of the CJEU on the compatibility of certain BIT provisions with EU law. The impacts of the transitional framework envisaged by the proposed Regulation must be considered taking into account these particular features, such as the crucial importance of legal certainty under BITs and the perceived fields of conflict between EU law provisions affecting foreign investments and BIT protection.

##### **4.1. The particular nature of BITs**

BITs are, in the words of the Commission, “[t]he most visible manifestation of Member States’ policies on investment over the last 50 years”.<sup>72</sup> The first BIT was signed between Germany and Pakistan in 1959 and entered into force in 1962.<sup>73</sup> Since then, Germany has acted as a global leader in terms of BIT diplomacy, concluding around 130 BITs worldwide, followed by the United Kingdom, Italy and France with around 100 BITs each.<sup>74</sup> The main purpose of BITs is to resolve the dynamic inconsistency problem, that is, the problem that as a sovereign entity, the host State can subsequently change national rules and violate assurances given to

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<sup>68</sup> *Ibid.*, Art. 3.

<sup>69</sup> BURGSTALLER, “The Future”, *supra* note 62, at 68.

<sup>70</sup> Council Decision of 16 December 1969 on the progressive standardisation of agreements concerning commercial relations between Member States and third countries and on the negotiation of Community agreements [1969] O.J. L 326/39, Art. 3.

<sup>71</sup> F.M. ABBOTT, “Crosscurrents in European Union External Commercial Relations: The Controversy over the Germany-United States Treaty of Friendship”, [1994] *ZaöRV*, 756, at 769; KUJPER, *supra* note 17, at 267-268.

<sup>72</sup> Commission Communication, *supra* note 3, p. 7.

<sup>73</sup> W. SHAN, S. ZHANG, “The Treaty of Lisbon: Half Way toward a Common Investment Policy”, (2010) 21 *EJIL* 1049, at 1068.

<sup>74</sup> BURGSTALLER, “The Future”, *supra* note 62, at 55.

the investor.<sup>75</sup> This is achieved through binding commitments of the host State, which the investor can enforce through dispute settlement mechanisms beyond the control of the host State. BITs thus aim to “immunize” foreign investors from subsequent political changes and their impacts on economic policies.<sup>76</sup> In the light of this function, lack of legal certainty strikes at the very heart of BIT protection.

The two elements distinguishing contemporary BITs from previous bilateral agreements concerning investment are the widespread use of MFN and arbitration clauses.<sup>77</sup> MFN clauses provide that the host State shall grant foreign investors from the other State all benefits granted to any other foreign investors under other investment agreements. Arbitration clauses typically contain an offer by the host State to submit to investor-State arbitration in case of a dispute arising out of an investment. This grants foreign investors an effective and reliable mechanism to enforce claims against the host State, insulating them from possible deficiencies of the local judicial system.<sup>78</sup> Arbitration has also played a decisive role in depoliticising investment disputes.<sup>79</sup> As stated by an ICSID tribunal in *Gas Natural SDG v. Argentina*, such a provision “offered to foreign investors assurances that disputes that might flow from their investments would not be subject to the perceived hazards of delays and political pressures of adjudication”<sup>80</sup> in national courts. In many cases, it is only thanks to this mechanism that companies are willing to invest in the first place, as political risks are mitigated by the possibility of receiving compensation before international investment tribunals.<sup>81</sup>

<sup>75</sup> A. GUZMAN, “Explaining the Popularity of Bilateral Investment Treaties” in K.P. SAUVANT, L.E. SACHS (eds.), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (2009), p. 73, at 78-79.

<sup>76</sup> TIM BÜTHE AND HELEN V. MILNER, “Bilateral Investment Treaties and Foreign Direct Investment: A Political Analysis”, in K.P. SAUVANT, L.E. SACHS (eds.), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (2009), p. 171, at 182.

<sup>77</sup> LAVRANOS, *supra* note 42, at 413; C.E. ANDERER, “Bilateral Investment Treaties and the EU Legal Order: Implications of the Lisbon Treaty”, (2010) 35 *Brooklyn Journal of International Law* 851, at 859.

<sup>78</sup> For example, enforcing a contract via local courts in Bangladesh takes an average 1,442 days opposed to an average of 351 days within the OECD countries. See S.P. SUBEDI, *International Investment Law* (2008), p. 81, quoting a report on “Business and Governance”, *Financial Times*, 14 March 2007, p. 5.

<sup>79</sup> JOHANNSEN, *supra* note 21, p. 32.

<sup>80</sup> *Gas Natural SDG v the Argentine Republic*, Decision on Jurisdiction of 17 June 2005, available at <http://www.asil.org/pdfs/GasNat.v.Argentina.pdf> (accessed on 6 May 2011), para. 29.

<sup>81</sup> S.P. SUBEDI, *International Investment Law* (2008), p. 217; E. AISBETT, “Bilateral Investment Treaties and Foreign Direct Investment: Correlation Versus Causation”, in K.P. SAUVANT, L.E. SACHS (eds.), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (2009), p. 395, at 395.

#### 4.2. The 2009 BIT cases

In 2009, the CJEU proved that Art. 351(2) TFEU can be “a rather sharp tool”<sup>82</sup> by finding that the BITs of Austria, Sweden and Finland with third countries infringed EU law. The Commission had initiated infringement proceedings as it considered clauses guaranteeing investors the free transfer of payments connected with an investment capable of impeding the application of Council measures restricting the free movement of capital and payments under Arts. 64(2), 66 and 75 TFEU. A foreign investor affected by such measures, for example the freezing of assets used for financing terrorist activities, could therefore circumvent EU measures by invoking the BIT and thereby undermine the effectiveness of measures essential for combating international terrorism.<sup>83</sup>

No such measures had actually been taken by the Council and the case concerned the mere potential risk of conflict between obligations under the BITs and EU law.<sup>84</sup> Nonetheless, the CJEU found that the mere existence of BIT provisions capable of undermining the practical effectiveness of such measures already constituted an infringement of EU law.<sup>85</sup> By basing itself on the mere existence of such provisions, the CJEU embraced a broad understanding of incompatibility.<sup>86</sup> This approach has been criticized as going too far, as it extends the obligation of Member States to eliminate incompatibilities “at a stage when a conflict has not even materialized”.<sup>87</sup>

The Member States argued that they would, in case of an actual conflict of obligations, fulfil their obligations under EU law by entering into negotiations to modify the BITs with respect to the relevant clauses on transfer of payments. The CJEU rejected these arguments, finding that negotiations were neither quick nor reliable enough to meet the requirement of practical effectiveness.<sup>88</sup> All Member States would have to be capable of applying the Council measures immediately,

<sup>82</sup> J.P. TERHECHTE, “Art. 351 TFEU, the Principle of Loyalty and the Future Role of the Member State’s Bilateral Investment Treaties”, in M. BUNGENBERG et al. (eds.), *International Investment Law and EU Law* (2011), p. 79 at 86.

<sup>83</sup> K. SCHOLZ, “The Long Goodbye - The Commission’s Infringement Proceedings against Austria, Denmark, Finland and Sweden for Incompatibilities in their BITs with the EC Treaty”, Policy Papers on Transnational Economic Law No. 14, Halle 2005, at 6.

<sup>84</sup> BURGSTALLER, “The Future”, *supra* note 62, at 59.

<sup>85</sup> Case C-205/06 *Commission v. Austria* [2009], ECR I-01301, para. 37; Case C-249/06 *Commission v. Sweden* [2009], ECR I-01335, para. 38; Case C-118/07 *Commission v. Finland* [2009], ECR I-10889, para. 49.

<sup>86</sup> P. EECKHOUT, *EU External Relations Law*, 2nd ed. (2011), p. 432; M. CREMONA, “External relations and External Competence of the European Union”, in P. CRAIG, G. DE BURCA (eds.), *The Evolution of EU Law*, 2<sup>nd</sup> ed. (2011), p. 217, at 259.

<sup>87</sup> LAVRANOS, *supra* note 42, at 421-422.

<sup>88</sup> Case C-205/06 *Commission v. Austria* [2009], ECR I-01301, para. 40; Case C-249/06 *Commission v. Sweden* [2009], ECR I-01335, para. 41; A.A. GHOURI, “Resolving Incompatibilities of Bilateral Investment Treaties of the EU Member States with the EC Treaty: Individual and Collective Options”, (2010) 16 *ELJ* 806, at 810.

rather than having recourse to lengthy negotiations.<sup>89</sup> The Commission had also initiated infringement proceedings against Denmark, but Denmark succeeded in satisfying the Commission's demands by immediately terminating its respective BIT with Indonesia and renegotiating a new BIT with a clause allowing Denmark to *in eventu* apply such Council measures.<sup>90</sup>

The judgments have serious repercussions for the three Member States concerned, but also for all other Member States who have concluded similar BITs with third countries. For the three defendant Member States the judgment means that they will rapidly have to modify their agreements and ultimately, should the third countries be unwilling to accept such modifications (since the free transfer of payments is a guarantee of essential importance to foreign investors<sup>91</sup>), be obliged to terminate those BITs.<sup>92</sup> It should be kept in mind that most BITs contain clauses extending the protection provided therein for years after their termination, thus exposing Member States to damages claims from investors affected by such Council measures long after the original BIT was terminated.<sup>93</sup>

For the other Member States the judgment means that all BITs containing such clauses are at risk of being brought before the CJEU in future infringement proceedings, as the Court explicitly stated that the incompatibilities of BITs with the Treaty it had found “not limited to the Member State which is the defendant in the present case”.<sup>94</sup> Thus, they would need to modify their existing BITs to include a REIO (Regional Economic Integration Organisation) clause, which provides for a reservation in favour of obligations arising out of regional economic integration.<sup>95</sup>

## **5. The proposed Regulation**

This chapter examines the proposed Regulation at its current stage in the legislative process: The Commission made its proposal on 7 July 2010,<sup>96</sup> followed by EP Rapporteur Schlyter's Draft Report of 18 November 2010, the Draft Legislative

<sup>89</sup> BURGSTALLER, “The Future”, *supra* note 62, at 59.

<sup>90</sup> *Ibid.*

<sup>91</sup> E. Denza, “Bilateral Investment Treaties and EU rules on free transfer: Comment on Commission v Austria, Commission v Sweden and Commission v Finland”, (2010) 35 *ELRev.* 263, at 270.

<sup>92</sup> BURGSTALLER, “The Future”, *supra* note 62, at 59–60.

<sup>93</sup> A. RADU, “Foreign Investors in the EU—Which ‘Best Treatment’? Interactions Between Bilateral Investment Treaties and EU Law”, (2008) 14 *ELJ* 237, at 258; JOHANNSEN, *supra* note 21, p. 31.

<sup>94</sup> Case C-205/06 *Commission v. Austria* [2009], ECR I-01301, para. 43; Case C-249/06 *Commission v. Sweden* [2009], ECR I-01335, para. 43.

<sup>95</sup> J.P. TERHECHTE. “Art. 351 TFEU, the Principle of Loyalty and the Future Role of the Member State's Bilateral Investment Treaties”, in M. BUNGENBERGET al. (eds.), *International Investment Law and EU Law* (2011), p. 79 at 91.

<sup>96</sup> Regulation Proposal, *supra* note 1.



Resolution of the Committee on International Trade of 13 April 2011<sup>97</sup> and the European Parliament's Position adopted at first reading on 10 May 2011.<sup>98</sup> The European Parliament's Position confirmed the Draft Legislative Resolution adopted by the Committee on International Trade in all relevant points, merely removing two short passages in Recital No. 5.<sup>99</sup>

The Regulation's object and purpose is to "authorise the continued existence of all investment agreements currently in force between Member States and third countries" and aims to provide for "an explicit guarantee of legal certainty as regards the conditions under which investors operate".<sup>100</sup> The Commission affirms that any legal uncertainty on the status and validity of these agreements would go "against the core rationale of investment protection, i.e. to provide legal certainty on the behaviour of host countries".<sup>101</sup> Indeed, continued legal uncertainty in this field would "make it difficult for the EU to attract new foreign investors who will likely forego opportunities in the EU to avoid the problems associated with an unstable investment regime".<sup>102</sup>

The Commission wants to pursue "an evolutionary handling of the entry into force of the TFEU, much like the introduction of the common commercial policy in the 1960s"<sup>103</sup> allowing a "gradual formulation and elaboration of an EU investment policy".<sup>104</sup> However, the proposal does not address the objectives, criteria and content of that new policy, which are reserved to the separate Commission Communication.<sup>105</sup>

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<sup>97</sup> Rapporteur C. SCHLYTER (Committee on International Trade), Draft Report on the proposal for a regulation of the European Parliament and of the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries of 18 November 2010, PE452.807; Committee on International Trade, Draft Legislative Resolution on the proposal for a regulation of the European Parliament and of the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries of 15 April 2011, A7-0148/2011.

<sup>98</sup> Parliament's Position, *supra* note 2.

<sup>99</sup> One referred to the fact that Member State BITs "remain binding on the parties under public international law", which is self-evident and not the subject matter of the Regulation, while the other referred to "new agreements that should provide for the best possible level of protection", which would seem redundant as the Recital No. 4 already refers to "the main goal of creating the best possible investment protection system for all Member States' investors".

<sup>100</sup> Regulation Proposal, *supra* note 1, p. 2.

<sup>101</sup> Regulation Proposal, *supra* note 1, p. 3

<sup>102</sup> C.E. ANDERER, "Bilateral Investment Treaties and the EU Legal Order: Implications of the Lisbon Treaty", (2010) 35 *Brooklyn Journal of International Law* 851, at 875.

<sup>103</sup> Another possible guide for the transitional mechanism, which the Commission seems to have considered less fitting, would have been the framework for air service agreements, in which Member States continued to conclude bilateral agreements for many years. See E. Denza, "Bilateral Investment Treaties and EU rules on free transfer: Comment on Commission v Austria, Commission v Sweden and Commission v Finland", (2010) 35 *ELRev.* 263, at 273.

<sup>104</sup> Regulation Proposal, *supra* note 1, p. 2

<sup>105</sup> *Ibid.*, p. 3.

### 5.1. Subject matter and scope (Art. 1)

Art. 1 provides that the Regulation “establishes the terms, conditions and the procedure under which Member States are authorised to maintain in force, amend or conclude” BITs with third countries. The Regulation thus completely excludes from its scope intra-EU BITs.<sup>106</sup> The main reason for this is that the exclusive FDI competence in Art. 207 is understood as part of the CCP and thus does not cover investment agreements within the EU. These are currently subject of informal negotiations between the Commission and Member States.<sup>107</sup> Although this debate also contributes to undermining legal certainty and investor confidence, both sides seem to prefer biding their time: The Commission may hope for individual Member States to push for the termination of BITs, such as the recent termination campaign undertaken by the Czech Republic, which has already led to the termination of its BITs with Italy and Denmark.<sup>108</sup> Member States reluctant to give up their BITs, on the other hand, may wait for further awards rejecting EU law based arguments against the validity of BITs such as *Eastern Sugar* and *Eureko*.<sup>109</sup>

The Parliament’s Position does not propose any changes on Art. 1, but amends the recitals to state the importance of ensuring the best possible protection for EU investors and legal certainty, notwithstanding the only transitional validity of BITs concluded by Member States.<sup>110</sup> This emphasis on the validity of BITs and ensuring rights of investors and legal certainty indicates that authorisations should only be withdrawn as a last resort.

### 5.2. The notification procedure to maintain agreements in force (Art. 2-3)

Member States shall notify the Commission, within thirty days of entry into force of the Regulation, of all their BITs with third countries that they either wish to maintain in

<sup>106</sup> *Ibid.*, Recital No. 15; for a comprehensive discussion of the structural problems arising in the context of intra-EU BITs, see C. TIETJE, “Bilaterale Investitionsschutzverträge zwischen EU-Mitgliedstaaten (Intra-EU-BITs) als Herausforderung im Mehrebenensystem des Rechts”, Beiträge zum Transnationalen Wirtschaftsrecht No. 104, Halle 2011.

<sup>107</sup> In the course of these negotiations, an initial invitation by the Commission to Member States to “review the need for such BITs agreements” did not cause “any visible action by the Member States”, see H. WEHLAND, “Intra-EU Investment agreements and arbitration: Is EC law an obstacle?”, (2009) 58 *ICLQ* 297, at 298; C. SÖDERLUND, “Intra-EU BIT Investment Protection and the EC Treaty”, (2007) 24 *JIA* 455, at 455.

<sup>108</sup> C.E. ANDERER, “Bilateral Investment Treaties and the EU Legal Order: Implications of the Lisbon Treaty”, (2010) 35 *Brooklyn Journal of International Law* 851, at 868; BURGSTALLER, “The Future”, *supra* note 62, at 59.

<sup>109</sup> *Eastern Sugar B.V. v. Czech Republic*, Partial Award of 27 March 2007, available at <http://ita.law.uvic.ca/documents/EasternSugar.pdf> (accessed on 18 April 2012); *Eureko B.V. v. Slovak Republic*, Award on Jurisdiction of 26 October 2010, available at <http://ita.law.uvic.ca/documents/EurekovSlovakRepublicAwardonJurisdiction.pdf> (accessed on 18 April 2012).

<sup>110</sup> Parliament’s Position, *supra* note 2, Recital No. 4.

force or permit to enter into force.<sup>111</sup> All BITs notified are automatically authorised and remain in force.<sup>112</sup>

Rapporteur Schlyter proposed to add that Art. 3 can authorise maintaining in force agreements only for a period of eight years after the entry into force of the Regulation because it would otherwise “allow the emergence of parallel, potentially incompatible investment regimes, thus adding to legal uncertainty” and contradicting the effective implementation of Article 207(1) of the TFEU.<sup>113</sup> This criticism is not convincing, because the policy choice is between the risk of parallel (or double) protection and the risk of no protection at all. It is evident that when it comes to legal certainty to foreign investors, the real concern is the latter, namely an end of BIT protection before proper Union agreements are in place.

The Parliament’s Position clearly rejects this thrust to reducing the temporal scope of the Regulation, leaving Art. 3 unchanged and instead extending the deadline for the state of play reports, thus further postponing an eventual termination of the authorisation system.<sup>114</sup>

### **5.3. Review of agreements (Art. 5)**

#### 5.3.1. The Commission’s review criteria

Art. 5 provides that the Commission is to review notified agreements by assessing, in particular, whether the agreements:

- “(a) conflict with the law of the Union other than the incompatibilities arising from the allocation of competences between the Union and its Member States, or
- (b) overlap, in part or in full, with an agreement of the Union in force with that third country and this specific overlap is not addressed in the latter agreement, or
- (c) constitute an obstacle to the development and the implementation of the Union’s policies relating to investment, including in particular the common commercial policy.”

The review is to be based on “quantitative and qualitative aspects of the agreements in place, as well as the possible obstacles the agreements could present to the

<sup>111</sup> Regulation Proposal, *supra* note 1, Art. 2.

<sup>112</sup> Regulation Proposal, *supra* note 1, Art. 3.

<sup>113</sup> Rapporteur SCHLYTER, Draft Report, *supra* note 97, p. 11, Amendment 10 (Art. 3).

<sup>114</sup> See below, p. 18, “The state of play reports”.

implementation of the common commercial policy”, in particular the undermining of on-going negotiations between the Union and a third country.<sup>115</sup> The first of the three criteria is self-explanatory. The second criterion relates to cases of overlap with Union agreements in the absence of a clause regulating the specific overlap in the latter. It has been criticized that the criterion relates to mere “overlaps”, which in themselves do not necessarily constitute incompatibilities with EU law, and thereby goes beyond what is necessary in the review process.<sup>116</sup>

The third criterion is the widest and potentially most contentious one. It refers to cases where “agreements constitute an obstacle to the development and the implementation of the Union's policies relating to investment”. According to the Commission, an agreement might, by its very existence, already constitute an obstacle to EU investment policy, in particular if “the existence of agreements undermines the willingness of a third country to negotiate with the Union”.<sup>117</sup> As this statement already implies, this provision would grant the Commission a broad margin of discretion for “attacking” Member State agreements with third countries envisaged for negotiations of Union agreements.

Unsurprisingly, the third criterion relating to obstacles to the EU investment policy has been criticized. Due to its vagueness, it has been accused of functioning as a “carte blanche” for the Commission to attack BITs on virtually any grounds and with consequently limited possibilities of judicial control.<sup>118</sup>

### 5.3.2. The Parliament's amendments

The Parliament's Position contains four important amendments to the review process: First, it replaces “shall review” by “may review” in the first paragraph, thereby acknowledging that due to the wide scope of the notification obligation, many BITs notified may be “harmless” and not require a special review under the Regulation.<sup>119</sup> This would also allow the Commission to concentrate on truly problematic BITs and avoid significant delays resulting from the administrative overload of reviewing in detail all BITs notified to it within thirty days after the entry into force of the Regulation.<sup>120</sup>

<sup>115</sup> Regulation Proposal, *supra* note 1, p. 4.

<sup>116</sup> TIETJE, “EU-Investitionsschutz und -förderung”, *supra* note 61, at 651.

<sup>117</sup> Regulation Proposal, *supra* note 1, p. 5

<sup>118</sup> TIETJE, “EU-Investitionsschutz und -förderung”, *supra* note 61, at 651.

<sup>119</sup> Parliament's Position, *supra* note 2, Art. 5(1).

<sup>120</sup> TIETJE, “EU-Investitionsschutz und -förderung”, *supra* note 61, at 650; for a more optimistic assessment, see A. DIMOPOULOS, *EU Foreign Investment Law* (2011), p. 319.

Second, Parliament's Position specifies that the "incompatibilities arising from the allocation of competences between the Union and its Member States" must concern the competence on foreign direct investment, and thereby limits the scope of the provision.<sup>121</sup> Third, the draft resolution removes the overlap criterion in (b), which is instead to be addressed in Art. 6, which provides that authorisation "shall be withdrawn where the Union has already ratified an agreement with the same third country relating to investment negotiated by the Commission."<sup>122</sup> This removes legal uncertainty as to how the Commission may interpret an "overlap, in part or in full" and ensures that if the Union concludes an agreement relating to investment, this shall be the only legal basis for investment protection.

Fourth, the draft resolution restricts the scope of the third criterion, by raising the threshold to agreements constituting "serious obstacles".<sup>123</sup> Furthermore, they must be obstacles to "the conclusion of future Union agreements with third countries relating to investment" rather than merely to the development and implementation of EU investment policy.<sup>124</sup> The latter specification would significantly restrict the Commission's margin of discretion: In particular, it would not be sufficient for an agreement to merely reduce the incentives for a third State to conclude a Union agreement, as had been originally suggested by the Commission.<sup>125</sup> This would render the Commission's withdrawal practice both more predictable and more accessible to judicial control. Overall, this amendment seems helpful and capable of addressing concerns about an excessive margin of discretion otherwise granted to the Commission, which would inevitably constitute an obstacle to acceptance by the Council.

### 5.3.3. The state of play reports

Art. 5 also provides for a reporting system, under which the Commission shall, within five years, report to the European Parliament and the Council on the application of the Chapter and the need for its continued application. Should the report recommend to discontinue the application or to modify the provisions, it shall be accompanied by an appropriate legislative proposal. In particular, such a legislative proposal would have to clarify the legal position of agreements the amendment or termination of which is not consented to by the third country. Thus, a termination of the

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<sup>121</sup> *Ibid.*, Art. 5(1)(a).

<sup>122</sup> *Ibid.*, Art. 5(1).

<sup>123</sup> *Ibid.*, Art. 5(1)(c).

<sup>124</sup> *Ibid.*, Art. 5(1)(c).

<sup>125</sup> Regulation Proposal, *supra* note 1, p. 5

authorisation system could only occur with the consent of the Council and European Parliament. Until that moment, investors can trust in the continued validity of BITs unless the Commission finds the specific BIT in violation of one of the criteria enumerated in Art. 5(1).<sup>126</sup>

This cautious approach did not find the approval of Rapporteur Schlyter, who instead proposed an Article providing for expiry of the entire Regulation within eight years after its entry into force. By that time “all existing bilateral agreements of Member States with third countries shall be replaced by an agreement of the Union concerning investment”.<sup>127</sup> An extension of application could be granted by the European Parliament and the Council based on a report on the progress achieved in the replacement of Member State BITs presented by the Commission, however, such extension would be limited to a period of no longer than five years.<sup>128</sup>

This proposal appears fundamentally misconceived. The wording of the first part already indicates a problematic understanding of international negotiations: By requesting that “Member State BITs shall be replaced by a Union agreement”, the Rapporteur seems to ignore the fact it takes two not only to tango, but also to conclude international agreements. Even in the highly unlikely case that the over 150 third States which are currently tied to Member States in over 1.200 different BITs<sup>129</sup> were eager to replace these agreements within eight years, it seems illusory that the Commission could master the colossal task of completing negotiations with so many States within eight years.<sup>130</sup> A replacement of all Member State BITs by Union agreements is neither realistic within eight nor within thirteen years (in case of the possible five year extension). The only consequence of the proposed procedure would be that it would allow the European Parliament to exercise pressure over the Commission by threatening the “end of all BITs”.

However, Rapporteur Schlyter’s call on the European Parliament to restrict “the co-existence of BITs with the emergence of EU international investment treaties” was not heeded. Quite to the contrary, the European Parliament extended the originally envisaged maximum five year delay for the Commission’s state of play report to ten

<sup>126</sup> TIETJE, “EU-Investitionsschutz und -förderung”, *supra* note 61, at 651.

<sup>127</sup> Rapporteur SCHLYTER, Draft Report, *supra* note 97, p. 21, Amendment 26 (Art. 12a).

<sup>128</sup> *Ibid.*

<sup>129</sup> S.S. GUERIN, “Do the European Union’s Bilateral Investment Treaties Matter?”, CEPS Working Document No. 333, July 2010, available at <http://www.ceps.eu/ceps/download/3629> (accessed on 18 April 2012), p. 3.

<sup>130</sup> BURGSTALLER, “The Future”, *supra* note 62, at 69.

years,<sup>131</sup> acknowledging that replacing Member State BITs by Union agreements will be a lengthy process.

#### 5.4. Withdrawal of authorisation(Art. 6)

Art. 6(1) provides for the criteria under which the authorisation provided for in Article 3 may be withdrawn. The first three criteria mirror those set out in Art. 5. The fourth criterion states that authorisation may be withdrawn where “the Council has not taken a decision on the authorisation to open negotiations on an agreement which overlaps, in part or in full, with an agreement notified under Article 2, within one year of the submission of a recommendation by the Commission pursuant to Article 218(3) of the Treaty.”

Commentators have referred to the clause as a “blackmail provision”<sup>132</sup> and “vendetta clause”<sup>133</sup> allowing the Commission to exercise pressure on Member States hindering Council decisions on the authorisation to open negotiations. If the Commission indeed relied on the provision to withdraw authorisation of a bilateral agreement in full knowledge that there will be no Union agreement to replace it in the near future, the decision would directly weaken the legal protection of EU investors, thus running counter to the very purpose of EU investment policy.<sup>134</sup> Such action would severely undermine confidence of investors in the capacity and even the willingness of the Union to protect EU investors. It would be a very high price to pay for putting pressure on a single Member State. Interestingly enough, the Parliament’s position does not oppose this provision. The Parliament seems to feel that this is a dispute for the Commission and Council to settle between themselves.

Art. 6(2)-(4) provides for the procedure for the withdrawal of authorisation. First, the Commission shall deliver a reasoned opinion to the Member State concerned on the necessary steps to be taken to comply with the Regulation. Based on this opinion, there are to be consultations as already envisaged for the notification procedure, allowing both sides to address “the concerns giving rise to a possible withdrawal of authorisation”.<sup>135</sup> It is only if these consultations fail to resolve the matter that the Commission shall act, by withdrawing the authorisation for the agreement by a

<sup>131</sup> Parliament’s Position, *supra* note 2, Arts. 5(3), 12(1).

<sup>132</sup> LAVRANOS, *supra* note 42, at 428;

<sup>133</sup> J. KLEINHEISTERKAMP, “The future of the BITs of the European member states after Lisbon”, (2010) 29 ASA bulletin, 29 (1). pp. 212, at 218.

<sup>134</sup> A. DIMOPOULOS, *EU Foreign Investment Law* (2011), p. 322-323; it should be recalled that ensuring a high level of protection for EU investors is reiterated as a central objective in both the recitals of the Regulation Proposal and the Communication on EU Investment policy.

<sup>135</sup> Regulation Proposal, *supra* note 1, p. 5.

decision in accordance with the procedure referred to in Article 15(2). The precise conditions of that withdrawal shall also be stated in the decision together with the requirement to take “appropriate action, and where necessary terminate the relevant agreement”.<sup>136</sup>

The Parliament’s position slightly amends the procedure. It adds a passage at the beginning of Art. 6, providing that the authorisation “shall be withdrawn where the Union has already ratified an agreement with the same third country relating to investment negotiated by the Commission.”<sup>137</sup> Thus, the Commission shall have no discretion for maintaining in force Member State BITs in case of overlaps with newly concluded Union agreements. With regard to the criteria for review, the Parliament’s position mirrors its stance on Art. 5, deleting the second criterion and limiting the third to serious obstacles to Union agreements.<sup>138</sup>

Furthermore, the Rapporteur proposed an amendment of Art. 6(2) to ensure a smoother operation of withdrawals, by directly providing that the consultations between the Commission and the Member State shall, where appropriate, directly “lead to a decision authorising the opening of negotiations in the sense of Article 9.”<sup>139</sup> Such an amendment would be very helpful to speed up the procedure and allow Member States, where possible, to prevent gaps of protection arising from the potentially significant time span between a decision to withdraw authorisation and the completion of subsequently authorized negotiations for a new, EU law compatible BIT.

The Parliament’s position takes up and expands this suggestion, providing that the consultations “may include the possibility for Member States to renegotiate the agreement with the third country within an agreed period of time”.<sup>140</sup> Furthermore, in case of withdrawals, the Commission shall, where appropriate, immediately make a recommendation to the Council to authorise the negotiation of a Union agreement.<sup>141</sup>

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<sup>136</sup> *Ibid.*, Art. 6(3).

<sup>137</sup> Parliament’s Position, *supra* note 2, Art. 6(1).

<sup>138</sup> *Ibid.*, Art. 6(1)(a)-(c).

<sup>139</sup> Rapporteur SCHLYTER, Draft Report, *supra* note 97, p. 16, Amendment 18 (Art. 6(2)).

<sup>140</sup> Parliament’s Position, *supra* note 2, Art. 6(2).

<sup>141</sup> *Ibid.*, Art. 6(3).



## 5.5. Authorisation of Member States to amend or conclude new agreements(Art. 7-12)

### 5.5.1. Notification by the Member State

The authorisation procedure for pre-existing agreements is complemented by a procedure for the conclusion of new agreements, set out in Arts. 7-12. The procedure is “inspired by the empowerment mechanism<sup>142</sup> set by Regulation No 662/2009 of 13 July 2009 and No 774/2009 of 17 July 2009.<sup>143</sup> Its underlying ratio is that in the mixed framework consisting of “old” bilateral and “new” Union agreements, there may be cases in which one particular Member State is well placed to conclude a new agreement, while there is no outlook for the Union to do so. In such cases, the Member State may have recourse to this procedure. Furthermore, the procedure creates the framework in which Member States are to amend agreements, a measure that might be requested by the Commission in the course of its review under Art. 5.

Member States shall notify the Commission as soon as they intend to enter into negotiations and at least five calendar months before the envisaged beginning of formal negotiations.<sup>144</sup> The notification must include, in case of the negotiation of a new agreement, “relevant documentation and an indication of the provisions to be addressed in the negotiations, the objectives of the negotiations and any other relevant information.”<sup>145</sup> In case of intended amendments to an existing agreement, the notification shall indicate the provisions to be renegotiated.<sup>146</sup> Should the Commission find the information transmitted together with the notification insufficient, it may request additional information.<sup>147</sup>

Furthermore, the Commission shall make the notification (and, on request, the accompanying documentation), available to other Member States, subject to the requirements of confidentiality.<sup>148</sup> By notifying the other Member States of the intended agreement or amendment, the Commission involves them in the process of

<sup>142</sup> Regulation Proposal, *supra* note 1, p. 5.

<sup>143</sup> Commission Regulation No 662/2009 of 13 July 2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries on particular matters concerning the law applicable to contractual and non- contractual obligations, [2009] O.J. L 200/52; Commission Regulation No 664/2009 of 7 July 2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries concerning jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters, matters of parental responsibility and matters relating to maintenance obligations, and the law applicable to matters relating to maintenance obligations, [2009] O.J. L 200/52.

<sup>144</sup> Regulation Proposal, *supra* note 1, Art. 8.

<sup>145</sup> *Ibid.*, Art. 8(2).

<sup>146</sup> *Ibid.*, Art. 8(2).

<sup>147</sup> *Ibid.*, Art. 8(5).

<sup>148</sup> *Ibid.*, Art. 8(3).

monitoring the negotiations of bilateral agreements, replacing a “Commission v. Member State” paradigm with one of “single Member State v. Union” in case of controversial agreements. The other Member States are thus granted at least five months to eventually voice their own concerns to the Commission. From a practical perspective, it is especially other Member States not having concluded any bilateral agreement with the third country in question that would have understandable concerns about the impact of a new bilateral agreement.

To meet precisely these concerns, the Parliament’s position adds an additional provision requiring the Commission to “consult the other Member States within thirty days to determine whether there would be added value in an agreement of the Union”.<sup>149</sup> This active role of other Member States would strengthen the role of the Commission and might render its decisions more acceptable to the Member State concerned.

#### 5.5.2. Review by the Commission

After receiving the notification, the Commission shall, pursuant to Art. 9,

“authorise the opening of formal negotiations unless it concludes that the opening of negotiations would

(a) be in conflict with the law of the Union other than the incompatibilities arising from the allocation of competence between the Union and its Member States, or

(b) undermine the objectives of negotiations underway or imminent between the Union and the third country concerned, or

(c) constitute an obstacle to the development and the implementation of the Union's policies relating to investment, including in particular the common commercial policy.”

Criteria (a) and (c) directly mirror the respective criteria under Arts. 5 and 6, while (b) adapts the issue of overlaps to the question of imminent negotiations. Thus, the criterion envisages cases where the bilateral negotiations would undermine negotiations underway or imminent between the Union and the third country concerned. It would be for the Commission to set out in its decision why, based on the information provided by the Member State, the opening of negotiations would constitute a threat to one of the interests contained in the three criteria.

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<sup>149</sup> Parliament’s Position, *supra* note 2, Art. 8(3a).

Instead of an outright refusal to authorise, the Commission also may require the Member State to include in such negotiation any appropriate clauses.<sup>150</sup> Such clauses may concern, for example, the conditions for termination of the agreement in the event of the subsequent conclusion of a Union agreement, provisions on capital transfers or most-favoured nation treatment to ensure equal treatment of all EU investors.<sup>151</sup>

This would seem to reflect the principle of proportionality, requiring the Commission to pursue the objective of safeguarding the interests enshrined in the three conditions by the least restrictive means available. On the one hand, virtually any concern could be addressed by requiring the inclusion of appropriate clauses, thus apparently leaving little scope for outright refusals to authorise. On the other hand, if the clause necessary to sufficiently safeguard the Union's interests would stand no chance of being accepted by the third country, it seems unlikely that the Commission would authorise the opening of negotiations conditioned upon including such clause. This is particularly so as some of the clauses that might be envisaged by the Commission (such as restrictions of dispute settlement mechanisms or exceptions to the free transfer of payments) would be highly contentious and function as "deal breakers" with third countries.

The respective decisions shall be taken within 90 days of receipt of the notification or the receipt of the additional information. The decision shall be taken in accordance with the procedure referred to in Article 15(2), which refers to Decision 1999/468/EC on the exercise of implementing powers conferred on the Commission.<sup>152</sup>

The Parliament's position amends the criteria in Art. 9 on a number of accounts. First, it reduces the criterion concerning parallel negotiations to "negotiations underway", removing the "imminent negotiations" envisaged in the original proposal.<sup>153</sup> Second, it adds an additional criterion for cases where the agreement would "not be in line with policies of the Union relating to investments".<sup>154</sup> Third, it reiterates the higher threshold of constituting a serious obstacle to the conclusion of future Union agreements.<sup>155</sup>

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<sup>150</sup> Regulation Proposal, *supra* note 1, Art. 9(2).

<sup>151</sup> *Ibid.*, p. 5.

<sup>152</sup> Council Decision of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission [1999] O.J. L 184/23.

<sup>153</sup> Parliament's Position, *supra* note 2, Art. 9(1)(b).

<sup>154</sup> *Ibid.*, Art. 9(1)(ba).

<sup>155</sup> *Ibid.*, Art. 9(1)(c).

Furthermore, it adds a new provision allowing the Commission to withhold authorisation if “a simple majority of Member States indicate their interest [...] in concluding an investment agreement of the Union with the third country concerned” and instead to propose a negotiating mandate to the Council.<sup>156</sup> In doing so, the Commission shall keep the European Parliament fully informed and take into consideration “the geographical priorities of the Union's investment strategy and the capacity of the Commission to negotiate a new agreement of the Union with the third country concerned”.<sup>157</sup>

The amendment would contribute to safeguard the rights of Member States “disadvantaged” in terms of investment protection and grant them an opportunity to influence the priorities of EU investment policy. By giving the disadvantaged Member States have a strong say, the question of creating an equal playing field between the Member States would be perceived less as a discretionary policy of the Commission. This may help replace lengthy struggles between the Commission and the Council with an open and result-oriented debate in which Member States can articulate their investment policy needs.

### 5.5.3. Cooperation during the negotiations

After authorising the opening of formal negotiations, the Commission “shall be kept informed of the progress and results throughout the different stages of negotiations and may request to participate in the negotiations”.<sup>158</sup> It remains to be seen how the Commission would use this right to request participation in practice. The explanatory memorandum suggests that the Commission would seek observer status in the negotiations “to ensure full transparency and consistency with the Union's investment policy”.<sup>159</sup> Such participation may depend largely on the perceived willingness of the third country to grant the Commission a role in the negotiations. On the one hand, including the Commission as a third party in already complicated bilateral negotiations may be a rather unattractive option, but on the other hand this may provide the third State with an opportunity to directly clarify and potentially settle contentious issues, especially as the Commission may otherwise subsequently refuse to authorise the final agreement.

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<sup>156</sup> *Ibid.*, Art. 9(3a).

<sup>157</sup> *Ibid.*

<sup>158</sup> Regulation Proposal, *supra* note 1, Art. 10.

<sup>159</sup> *Ibid.*, p. 5.

In case the Commission granted a conditional authorisation requesting the inclusion of certain clauses, it may be attractive for the negotiating Member State to directly involve the Commission in the negotiations and thereby transfer the burden of obtaining consent to those clauses by the third State to the Commission. In particular, this would help Member States avoid situations where third States use their consent to the Commission's requested clause as a bargaining tool to force concessions in other fields of the agreement.

The Parliament's position concretizes and limits the participation rights by providing that the Commission may participate as an observer but only "as far as the exclusive competence of the Union is concerned."<sup>160</sup>

Finally, Art. 11 regulates the procedure for authorising the final agreement. First, the Member State concerned shall notify the Commission of the outcome of negotiations and transmit the text of the agreement.<sup>161</sup>

Based on this notification, the Commission shall make an assessment as to whether the negotiated agreement does not conflict with any of the three criteria listed in Art. 9(1) and additionally whether it conflicts with the "appropriate clauses" if the Commission has required such pursuant to Article 9(2).<sup>162</sup> Only if the final agreement reached fulfils these requirements, the Commission shall authorise the Member State to sign and conclude the agreement.<sup>163</sup> This decision shall be taken within 90 days of receipt of the notification and all relevant additional information and in accordance with the procedure referred to in Article 15(2), thus under Decision 1999/468/EC.<sup>164</sup>

The Parliament's position leaves the procedure unchanged but reduces the delay of 90 days to 60 days<sup>165</sup> and changes the replaces the reference to Decision 1999/468/EC by a reference to Regulation (EU) No 182/2011.<sup>166</sup>

Art. 12 provides for a review of the need for a continued application of the chapter in the light of the practice of authorisation, based on "quantitative and qualitative aspects of the negotiations and agreements authorised".<sup>167</sup>

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<sup>160</sup> Parliament's Position, *supra* note 2, Art. 10

<sup>161</sup> Regulation Proposal, *supra* note 1, Art. 11(1); this obligation also applies to agreements negotiated prior to the entry into force of the Regulation but not concluded yet. These are not to be notified under Art. 2, pending a review under Art. 5, but must be notified for authorisation under Art. 11. Thus, Member States are precluded from unilaterally concluding any further agreements from the entry into force of the Regulation, even if the negotiations are already finished. This provision may provide for exciting conclusion sprints on behalf of Member States with "almost concluded" agreements.

<sup>162</sup> Regulation Proposal, *supra* note 1, Art. 11(3)(d).

<sup>163</sup> *Ibid.*, Art. 11(4)-(5).

<sup>164</sup> *Ibid.*, Art. 11(6).

<sup>165</sup> Parliament's Position, *supra* note 2, Art. 9(1)(b).

<sup>166</sup> *Ibid.*, Art. 15(2).

### **5.6. Involvement of the Commission in the continued operation of the agreements (Art. 13)**

Art. 13(1) provides that Member States shall

“inform the Commission without undue delay of all meetings which take place under the provisions of the agreement. The Commission shall be provided with the agenda and all relevant information permitting an understanding of the topics to be discussed. The Commission may request further information from the Member State concerned.”

Thus, the Commission has to be kept informed concerning all meetings related to the operation of the agreement. Furthermore, the provision states that

“Where an issue to be discussed might affect the implementation of the Union's policies relating to investment, including in particular the common commercial policy, the Commission can require the Member State concerned to take a particular position.”

Thereby, the Regulation creates a distinction between general matters related to the agreement and those which might affect the implementation of EU investment policy.<sup>168</sup> Concerning these, the Commission must not only be informed, it may determine the position which the Member State shall take on that question to ensure that there is no detrimental effect on EU investment policy.

The following subparagraphs concern cases where a Member State is faced with accusations of having violated an agreement or requests for dispute settlement under the auspices of the agreement<sup>169</sup> and cases where a Member State considers activating any relevant mechanisms for dispute settlement.<sup>170</sup> In the former case, the Member State shall inform the Commission without undue delay. In the latter case, the Member State shall seek the agreement of the Commission before activating the relevant dispute settlement mechanism.

In both cases, Art. 13 provides that

“[t]he Member State and the Commission shall fully cooperate

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<sup>167</sup> Regulation Proposal, *supra* note 1, p. 6.

<sup>168</sup> Here again Rapporteur Schlyter calls for a specification of that policy, as already proposed with regard to Art. 5(1), see Rapporteur SCHLYTER, Draft Report, *supra* note 97, p. 23, Amendment 28 (Art. 13(1)).

<sup>169</sup> Regulation Proposal, *supra* note 1, Art. 13(2).

<sup>170</sup> Regulation Proposal, *supra* note 1, Art. 13(3).

and take all necessary measures to ensure an effective defence (Art. 13(2))

in the conduct of procedures within the relevant mechanisms (Art. 13(3))

which may include, where appropriate, that the Commission participates in the procedure.”

This provision aims to ensure that the Commission may be involved in dispute settlement procedures. The background to this may be the currently rather unsatisfactory track record of Commission involvement in investment arbitration cases such as Eastern Sugar and Eureko. At least in the Eastern Sugar arbitration, this resulted from the fact that the Commission was only notified of the arbitration at a later stage and thus unable to assist the Member State in preparing a comprehensive defence strategy with regard to the EU law aspects of the dispute.<sup>171</sup>

By providing for its participation in secondary Union law, the Commission aims to strengthen its position and role in future investment arbitrations. The precise form of such participation is also not clear. The wording “participate in the procedure” leaves a significant margin of possibilities, reaching from providing support to the Member State preparing its defence, over the submission of separate observations (as the Commission already did in Eastern Sugar and Eureko) to an actual participation as a party in its own right. The latter option would correspond to the Commission’s suggestion that investment arbitration cases by foreign investors in the Union should be initiated against the Union itself as a sole defendant rather than the Member States.<sup>172</sup> However, this option is not compatible with ICSID arbitration, which is only available to States parties to the ICSID convention.<sup>173</sup> Union accession to the convention would require a respective amendment of the convention which may be desirable, but is, despite strikingly optimistic suggestions in that regard in the Commission Communication,<sup>174</sup> highly unlikely.<sup>175</sup> Consequently, the relevant dispute settlement mechanisms have been described as overall rather ill-suited for the EU.<sup>176</sup>

<sup>171</sup> TIETJE, “EU-Investitionsschutz und -förderung”, *supra* note 61, at 652.

<sup>172</sup> Commission Communication, *supra* note 3, p. 10.

<sup>173</sup> C. SCHREUER et al., *The ICSID Convention: A Commentary*, 2<sup>nd</sup> ed. (2009), p. 186; J.-P. LAVIEC, *Protection et promotion des investissements : étude du droit international économique* (1985), p. 280.

<sup>174</sup> Where reference is made to the fact that “The European Communities successfully negotiated the amendment of and subsequent accession to a number of international agreements/organisations”. See Commission Communication, *supra* note 3, p. 10.

<sup>175</sup> Authors are quite unanimous in this point, as no one outside the EU has any real interest in such an amendment, and all contracting parties would expect something return from the EU for such an amendment, see A. REINISCH, “The Division of Powers Between the EU and Its Member States “After

Another interesting question is who would be the true beneficiary of such a stronger involvement of the Commission in dispute settlement procedures. Such involvement would raise difficult questions both with regard to the bearing of procedural costs and the right of the Commission to refuse or of Member States to request participation. Considering the significant administrative burden that might arise from participation in such proceedings,<sup>177</sup> it would seem necessary to grant the Commission a sufficient degree of discretion in determining whether and how extensively to participate in proceedings.

Interestingly, Rapporteur Schlyter proposed replacing the term “all necessary measures to ensure an effective defence which may include, where appropriate, that the Commission participates in the procedure” with “all necessary measures to ensure that the Commission participates in the procedure to the broadest extent possible”.<sup>178</sup> A possible explanation for this inclination to maximize the role of the Commission in dispute settlement procedures may be the desire of some MEPs to indirectly influence the proceedings. This would seem rather counterproductive, as such a move would entail a high risk of politicisation of investment disputes, thereby undermining one of the most important achievements of investment law.<sup>179</sup>

The Parliament’s position did not follow the suggestion, leaving the text of Art. 13 unchanged, with exception of tautologically adding that the provisions shall apply to the activation of dispute settlement mechanisms “against a third country”.<sup>180</sup>

## **6. Conclusions and outlook**

Overall, the Commission proposal constitutes an important first step towards an effective and balanced framework for the continuation of Member State BITs. It has, at the time of writing, been received positively by some<sup>181</sup> and with significant criticism<sup>182</sup> by other authors.

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Lisbon”, in M. BUNGENBERGET al. (eds.), *International Investment Law and EU Law* (2011), p. 43, at 53; BURGSTALLER, “The Future”, *supra* note 62, at 71.

<sup>176</sup> LAVRANOS, *supra* note 42, at 428.

<sup>177</sup> Commission Consultations on Investment Policy, Question 09, Tradoc\_146566, Vienna Investment Group Position Paper (August 2010), available at [http://trade.ec.europa.eu/doclib/docs/2010/september/tradoc\\_146566.pdf](http://trade.ec.europa.eu/doclib/docs/2010/september/tradoc_146566.pdf) (accessed on 18 April 2012), p.2.

<sup>178</sup> Rapporteur SCHLYTER, Draft Report, *supra* note 97, p. 23, Amendment 28 (Art. 13(2))

<sup>179</sup> JOHANNSEN, *supra* note 21, p. 32.

<sup>180</sup> Parliament’s Position, *supra* note 2, Art. 13(3).

<sup>181</sup> KUJPER, *supra* note 17, at 267-268; A. DIMOPOULOS, *EU Foreign Investment Law* (2011), p. 319.

<sup>182</sup> LAVRANOS, *supra* note 42, at 426; TIETJE, “EU-Investitionsschutz und -förderung”, *supra* note 61, at 652.



Three main conclusions can already be drawn. First, the Commission aims for a gradual transition,<sup>183</sup> where Member State BITs shall be “progressively replaced by future agreements of the Union relating to the same subject matter”.<sup>184</sup> Meanwhile, the current legal framework founded on Member State BITs can and will largely remain in force. However, it may only do so under the terms, conditions and procedure set out in the Regulation – that is, under the watchful eye of the Commission. By maintaining in force the existing framework of Member State BITs, the Commission can concentrate its resources on negotiating the most essential agreements, thereby allowing the Union to “go where its investors would like to go”.<sup>185</sup> In the short term, this means focusing on negotiations for Comprehensive Economic and Trade Agreements with Canada, India, Singapore and Mercosur. In the short to medium term, the Commission envisages a possible stand-alone investment agreement with China and a comprehensive agreement possibly including foreign investment with Russia.<sup>186</sup> In itself, this strategy seems to properly balance the interests of individual Member States in maintaining BIT protection as long as necessary and the need to create the regulatory space for developing a comprehensive EU investment policy.

Second, certain aspects of the proposed Regulation, such as the vague grounds for withdrawal of authorisation, would grant the Commission a very wide discretionary power and have thus already raised serious concerns. Member State representatives have expressed their opposition to such wide discretion, which would amount to “a permanent veto on Member States’ BITs”.<sup>187</sup> Should these concerns not be successfully addressed, the adoption of the Regulation may be delayed (perpetuating a climate of legal uncertainty) or lead, in its application, to disruptive “inter-institutional trench warfare”,<sup>188</sup> which might turn this new frontier for the CCP and its promising green fields into a no man’s land of lost opportunities.

As the Parliament’s position and its amendments demonstrate, the increased role of the European Parliament<sup>189</sup> will have a decisive impact on the proposed Regulation and the future of Member State BITs. On the one hand, some MEPs are openly hostile to the currently prevalent system of investment protection. A prominent

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<sup>183</sup> KUJPER, *supra* note 17, at 267.

<sup>184</sup> Regulation Proposal, *supra* note 1, Recital No. 4.

<sup>185</sup> Commission Communication, *supra* note 3, p. 6.

<sup>186</sup> *Ibid.*, p. 7

<sup>187</sup> LAVRANOS, *supra* note 42, at 426.

<sup>188</sup> KUJPER, *supra* note 17, at 270.

<sup>189</sup> R. LEAL-ARCAS, “The European Union’s Trade and Investment Policy after the Treaty of Lisbon”, (2010) 11 *Journal of World Investment and Trade* 463, at 498.

example is Rapporteur Schlyter himself, who referred to BIT's as "neo-colonial" instruments for the exploitation of developing countries.<sup>190</sup> The central objective of these forces would be to push for a short-lived framework and make the continuation of Member State BITs conditional upon granting the European Parliament extensive influence over future negotiations of Union investment agreements. This influence would likely go beyond the influence national parliaments usually enjoy and consequently put the Commission at a disadvantage vis-à-vis national authorities negotiating investment agreements, thereby weakening the European bargaining power that this transfer of competence was meant to strengthen.

On the other hand, it appears that a majority of MEPs has a more balanced approach to investment protection. The Parliament's position, which was adopted with a majority of 345 to 246, rejects a series of highly problematic proposals by the Rapporteur, limits the originally too broadly formulated powers of the Commission for the review of BITs<sup>191</sup> and also contains genuinely promising improvements to strengthen cooperation between the institutions and the Member States. In particular the proposed Arts. 8(3a) and 9(3a) would allow "disadvantaged" Member States to play an active role in determining the future of Member State BITs. This would in turn allow the Commission to avoid a role as "prosecutor" of BITs and instead act as a mediator and coordinator, ensuring that the investment-related interests of all Member States are taken into account.

The ball is now in the Council's court, which held debates on the regulation on 13 May 2011 and 16 March 2012. The Press Release of 13 May 2011 affirmed the Council's determination to seek an agreement that would allow the regulation to enter into force "as soon as possible".<sup>192</sup> The more recent Press Release of 16 March 2012 stated that the Council "welcomed progress made so far, in particular the confirmation that the Commission services were in the process of establishing a new informal compromise that could bridge remaining differences between Parliament and Council."<sup>193</sup> This process has taken place in the form of five informal trilogue meetings held with the Parliament. The Press Release concludes stating that "the parties are now aiming for an early second reading agreement."<sup>194</sup> But almost one year after the adoption of the Parliament's position and without any clear progress

<sup>190</sup> LAVRANOS, *supra* note 42, at 430.

<sup>191</sup> J. CHAISSE, "Promises and Pitfalls of the European Union Policy on Foreign Investment--How will the New EU Competence on FDI affect the Emerging Global Regime?", (2012) 15 *Journal of International Economic Law*, 51, at 83.

<sup>192</sup> Press Release, 3086th Council meeting, Brussels, 13 May 2011.

<sup>193</sup> Press Release, 3154th Council meeting, Brussels, 16 March 2012.

<sup>194</sup> *Ibid.*

towards an agreement, it seems the feared “inter-institutional trench warfare”<sup>195</sup> may already be under way, claiming legal certainty for Member State BITs as its first victim.

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<sup>195</sup> KUJPER, *supra* note 17, at 270.



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