

# The EU on the Investment Path – *Quo Vadis* Europe?

## The Future of EU BITs and other Investment Agreements

[Draft paper]

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### I. Introduction

The Treaty of Lisbon<sup>1</sup> inserted Foreign Direct Investment (FDI) into the existing framework of a broadened Common Commercial Policy (CCP). Article 206 of the Treaty on the Functioning of the European Union (TFEU)<sup>2</sup> now provides in a programmatic fashion:

“By establishing a customs union in accordance with Articles 28 to 32, the Union shall contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers.”

Article 207(1) TFEU is the central provision regarding the EU’s competence in the field of the CCP. It expressly lists various aspects of the CCP, now adding FDI matters to the treaty-making power:

“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. The common commercial policy shall be conducted in the context of the principles and objectives of the Union’s external action.”

As regards FDI matters to be negotiated and concluded under the new CCP, Article 207(4) first subparagraph TFEU provides for a special unanimity requirement:

“For the negotiation and conclusion of the agreements referred to in paragraph 3, the Council shall act by a qualified majority. For the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property, as well as foreign direct investment, the Council shall act unanimously where such agreements include provisions for which unanimity is required for the adoption of internal rules.”

These provisions correspond largely to the proposals that were already discussed during the drafting of a Constitution Treaty.<sup>3</sup> Even then it was suggested that FDI should be added to the

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<sup>1</sup> Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, signed 13 December 2007, 2007/C 306/01.

<sup>2</sup> European Union, Consolidated version of The Treaty on the Functioning of the European Union, May 2008, C 115/47.

<sup>3</sup> Treaty establishing a Constitution for Europe, Official Journal C 310 of 16 December 2004.

existing external trade powers, comprising trade in goods, services and intellectual property rights along the WTO-determined enlarged trade issues after the Uruguay Round.<sup>4</sup> While the extension to investment issues received some vigorous rejection by high-level state negotiators,<sup>5</sup> the matter did not appear to have attracted further attention during the subsequent negotiations. Also when the question of the enlargement of the EU's external trade powers was revived during the Lisbon Treaty negotiations, investment seemed to have received no particular attention.

## II. The scope of the new investment powers of the EU under an enlarged CCP

When EU Member States realized that the EU had gained a broad new investment competence as a result of the express inclusion of FDI into the treaty-making powers relating to the CCP, many of them tried to defend the remaining powers which they had enjoyed so far as part of their national investment protection policies. This also led to a lively academic debate about the scope of the new EU investment powers.<sup>6</sup> On the one hand, it was argued

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<sup>4</sup> CITE LIT on Uruguay Round ##.

<sup>5</sup> See French, German, and other objections: Proposition d'amendement à l'article III-212 Déposée par Monsieur de Villepin, available at <http://european-convention.eu.int/docs/treaty/pdf/866/Art%20III%20212%20de%20Villepin%20FR.pdf>; Suggestion for amendment of Article 24 by Mr. Joschka Fischer, CONV 685/03, available at <http://european-convention.eu.int/Docs/Treaty/pdf/866/Art24Fischer.pdf>; Suggestion for amendment of Article 24 by Mr David Heathcoat-Amory, available at <http://european-convention.eu.int/Docs/Treaty/pdf/866/Art24Heathcoat-Amory%20EN.pdf>.

<sup>6</sup> Existing literature on the various aspects of the new EU investment powers is already vast. See T. R. Braun, "For a Complementary European Investment Protection", in M. Bungenberg, J. Griebel & S. Hindelang (eds.), *European Yearbook of International Economic Law, Special Issue: International Investment Law and EU Law (2011)* 95-104; C. Brown and M. Alcover-Llubia, "The external investment policy of the European Union in the light of the entry into force of the Treaty of Lisbon", in Karl P. Sauvant (ed.), *Yearbook on International Investment Law & Policy (Oxford University Press, 2012)* 3; M. Burgstaller, "European Law and Investment Treaties", 26 *Journal of International Arbitration* (2009) 181-216; M. Burgstaller, "Vertical Allocation of Competences for Investment Treaties in the European Union", in J. Nakagawa (ed.), *Multilateralism and Regionalism in Global Economic Governance – Trade, Investment and Finance (2011)* 125-138; M. Bungenberg, J. Griebel & S. Hindelang (eds.), *European Yearbook of International Economic Law, Special Issue: International Investment Law and EU Law (2011)*; M. Bungenberg, "The Division of Competences between the EU and Its Member States in the Area of Investment Politics", in M. Bungenberg, J. Griebel & S. Hindelang (eds.), *European Yearbook of International Economic Law, Special Issue: International Investment Law and EU Law (2011)* 29-42; M. Bungenberg, "Going Global? The EU Common Commercial Policy After Lisbon", in C. Hermann and J.P. Terhechte (eds.), *European Yearbook of International Economic Law (2010)* 123-151; M. Bungenberg, "Außenbeziehungen und Außenhandelspolitik, EuR Beiheft (2009) 195-218; Marc Bungenberg, "The Politics of the European Union's Investment Treaty-Making", in Tomer Broude, Marc L. Busch and Amelia Porges (eds.), *The Politics of International Economic Law (CUP 2011)*, 133; N. J. Calamita, "The Making of Europe's International Investment Policy: Uncertain First Steps", 39 *Legal Issues of Economic Integration* (2012) 301-329; J. Ceysens, "Towards a Common Foreign Investment Policy? – Foreign Investment in the European Constitution", 32 *Legal Issues of Economic Integration* (2005) 259-291; 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?", 15 *J. Int'l Economic Law* (2012) 51-84; A. De Luca, "New developments on the scope of the EU Common Commercial policy under the Lisbon Treaty: Investment liberalization vs. investment protection" in K. P. Sauvant (ed.), *Yearbook on International Investment Law & Policy (Oxford University Press, 2012)* ##; A. Dimopoulos, *EU Foreign Investment Law (Oxford University Press, 2011)*; A. Dimopoulos, "The Common Commercial Policy after Lisbon: Establishing Parallelism between Internal and External Economic Relations?" *Croatian Yearbook of European Law and Policy* 4 (2008) 101-131; A. Dimopoulos, "The Compatibility of Future EU Investment Agreements with EU Law", 39 *Legal Issues of Economic Integration* (2012) 447-471; D. Ehlers/H.-M. Wolfgang/U. J. Schröder, *Bilaterale und regionale Handelsabkommen als Kernstück der "neuen" EG-Handelspolitik (2009)*; Th. Eilmansberger, "Bilateral

that the EU's investment powers would be limited to aspects concerning the admission of investments and not extend to traditional investment protection once an investment was made. On the other hand, the express choice of the term FDI was interpreted as limiting the EU's powers to FDI, excluding portfolio investments traditionally covered by modern investment treaties.<sup>7</sup> Both limitations would lead to a situation of *de facto* shared control between the EU

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Investment Treaties and EU Law”, 46 *Common Market Law Review* (2009) 383-429; A. Emch, “News from Luxembourg – Is the New EU Investment Law Taking Shape?”, 9 *Journal of World Investment and Trade* (2008) 497-517; J. Griebel, “Überlegungen zur Wahrnehmung der neuen EU-Kompetenz für ausländische Direktinvestitionen nach Inkrafttreten des Vertrags von Lissabon”, *Recht der Internationalen Wirtschaft* (2009) 469-474; Ch. Hermann, “Die Zukunft der mitgliedstaatlichen Investitionspolitik nach dem Vertrag von Lissabon”, 77 *Europäische Zeitschrift für Wirtschaftsrecht* (2010) 207-212; S. Hindelang and N. Maydell, “The EU's Common Investment Policy – Connecting the Dots”, in M. Bungenberg, J. Griebel & S. Hindelang (eds.), *European Yearbook of International Economic Law, Special Issue: International Investment Law and EU Law* (2011) 1-28; F. Hoffmeister and G. Ünüvar, “From BITS and Pieces towards European Investment Agreements”, in M. Bungenberg, A. Reinisch and Ch. Tietje (eds.), *EU and Investment Agreements. Open Questions and Remaining Challenges* (Nomos – Hart Publishing, 2013) 57-86; S. Johannsen, “Die Kompetenz der Europäischen Union für ausländische Direktinvestitionen nach dem Vertrag von Lissabon”, *Beiträge zum Transnationalen Wirtschaftsrecht No. 90* (2009); J. Karl, “The Competence for Foreign Direct Investment: New Powers for the European Union?”, 5 *Journal of World Investment and Trade* (2004) 413-448; M. Klamert and N. Maydell, “Lost in Exclusivity: Implied Non-Exclusive External Competences in Community Law”, 13 *European Foreign Affairs Review* (2008) 493-513; J. Kleinheisterkamp, “The Future of the BITs of European Member States after Lisbon”, 29 *ASA Bulletin* (2011) 212; M. Krajewski, “External Trade Law and the Constitution Treaty: Towards a Federal and More Democratic Common Commercial Policy?”, 42 *Common Market Law Review* (2005) 91-127; P. J. Kujper, “Foreign Direct Investment: The First Test of the Lisbon Improvements in the Domain of Trade Policy”, 37 *Legal Issues of Economic Integration* (2010) 261; L. Markert, “The Crucial Question of Future Investment Treaties: Balancing Investors' Rights and Regulatory Interests of Host States”, in M. Bungenberg, J. Griebel & S. Hindelang (eds.), *European Yearbook of International Economic Law, Special Issue: International Investment Law and EU Law* (2011) 145-171; 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) 73-92; C. Nowak, “Legal Arrangements for the Promotion and Protection of Foreign Investments Within the Framework of the EU Association Policy and European Neighbourhood Policy”, in M. Bungenberg, J. Griebel & S. Hindelang (eds.), *European Yearbook of International Economic Law, Special Issue: International Investment Law and EU Law* (2011) 105-138; F. Ortino and P. Eeckhout, “Towards and EU Policy on Foreign Direct Investment”, in A. Biondi et al. (eds.), *EU Law After Lisbon* (2011) 312; A. Reinisch, “The Division of Powers between the EU and its Member States ‘after Lisbon’”, in M. Bungenberg, J. Griebel & S. Hindelang (eds.), *European Yearbook of International Economic Law, Special Issue: International Investment Law and EU Law* (2011) 43-54; M. Sattorova, “Return to the Local Remedies Rule in European BITs? Power (Inequalities), Dispute Settlement, and Change in Investment Treaty Law”, 39 *Legal Issues of Economic Integration* (2012) 223-224; W. Shan, “Towards a Common European Community Policy on Investment Issues”, 2 *Journal of World Investment and Trade* (2001) 603-625; W. Shan and S. Zhang, “The Treaty of Lisbon: Half Way toward a Common Investment Policy”, 21 *European Journal of International Law* (2010) 1049; J. Ph. Terhechte, “Art. 351 TFEU, the Principle of Loyalty and the Future Role of the Member States' Bilateral Investment Treaties”, in M. Bungenberg, J. Griebel & S. Hindelang (eds.), *European Yearbook of International Economic Law, Special Issue: International Investment Law and EU Law* (2011) 79-94; Ch. Tietje, “Die Außenwirtschaftsverfassung der EU nach dem Vertrag von Lissabon”, *Beiträge zum Transnationalen Wirtschaftsrecht No. 83* (2009); Ch. Tietje, “Bilaterale Investitionsschutzverträge zwischen EU-Mitgliedstaaten (Intra-EU-BITs) als Herausforderung im Mehrebenensystem des Rechts”, *Beiträge zum Transnationalen Wirtschaftsrecht No. 104* (2011); St. Woolcock, “The potential impact of the Lisbon Treaty on EU External Trade policy”, *SIEPS – European Policy Analysis* 8/2008.

<sup>7</sup> Lisbon Treaty judgment, German Constitutional Court, 2 BvE 2/08, 30 June 2009, para. 379 (“The extension of the common commercial policy to “foreign direct investment” (Article 207.1 TFEU) confers exclusive competence on the European Union also in this area. 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 [...]. The consequence of this would be that exclusive competence only exists for investment of this

and its Member States, as they would require the conclusion of so-called mixed agreements to be negotiated and concluded by both the EU and its Member States.<sup>8</sup> Thus, the question was everything but “academic”. This limiting interpretation of the new investment powers of the EU was supported by valid arguments. The EU’s and earlier the EC’s CCP powers were traditionally aimed at reducing obstacles to international trade in order to pursue its trade liberalization credo. Previous enlargements of the CCP in the field of services were interpreted restrictively by the European Court of Justice (ECJ), limiting the EC’s power to the cross-border (trade equivalent) mode of supply in the language of the GATS.<sup>9</sup> And traditionally, the EC/EU acted in the field of investment only as regards liberalization and access/admission rules, as was evident in the so-called Minimum Platform on Investment,<sup>10</sup> as well as ensuing trade negotiations with third countries that incorporated investment liberalization, but excluded post-establishment investment protection.<sup>11</sup> This limiting interpretation could also find support in the language of the Lisbon Treaty amendments, in particular Article 206 TFEU which speaks of the “progressive abolition of restrictions on international trade and on foreign direct investment”, suggesting that the CCP is primarily concerned with access/admission aspects. By comparison Article 207(1) TFEU is more ambiguously worded. Its reference to the “conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, [...]” can be read as support of the limiting interpretation if one understands that “foreign direct investment” is the other subject-matter “the commercial aspects of” which may be addressed in CCP treaties. However, it is equally plausible to consider that “foreign direct investment” is the third field of “trade agreements” the EU may enter into, after those “relating to trade in goods and services” and those relating to “the commercial aspects of intellectual property”.

Not surprisingly, it is this latter reading which is vigorously adopted by the EU Commission. The Commission considers that the EU’s investment power is not limited to the access/admission questions regarding investments. Rather, it comprises both the pre-

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type whereas investment protection agreements that go beyond this would have to be concluded as mixed agreements.”); available at

[http://www.bundesverfassungsgericht.de/entscheidungen/es20090630\\_2bve000208en.html](http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html).

<sup>8</sup> See R. Wessel, “The EU as a Party to International Agreements: Shared Competences, Mixed Responsibilities,” in A. Dashwood and M. Maresceau (eds.), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape* 152 (2008). See also A. Dashwood and C. Hillion (eds.), *The General Law of EC External Relations* (2000); C. Hillion and P. Koutrakos (eds.), *Mixed Agreements Revisited* (2010).

<sup>9</sup> See Opinion 1/94, Competence of the Community to conclude international agreements concerning services and the protection of intellectual property, ECJ, 15 November 1994, ECR I-5267, and the subsequent enlargements of the CCP by the Amsterdam and Nice Amendments to the EC Treaty. Cf. in general P. Eeckhout, *External Relations of the European Union* (2004).

<sup>10</sup> Council of the EU, Minimum Platform on Investment, 15375/06, 27 November 2006 (unpublished); based on a Commission to the Council, Council of the European Union, MD 381/06, ‘Note for the Attention of the 133 Committee, “Minimum Platform on Investment for EU FTAs – Provisions on Establishment in Template for a Title on ‘Establishment, Trade in Services and E-commerce”’ (28 July 2006). The content was considered confidential by the Council and never officially published. Requests for documents release by scholars were regularly denied. See Calamita, “The Making of Europe’s International Investment Policy: Uncertain First Steps”, *supra* note 6, 301, at footnote 19. For details of the content of the Minimum Platform see, however, N. Maydell, “The European Community’s Minimum Platform on Investment or the Trojan Horse of Investment Competence”, in A. Reinisch/C. Knahr, *supra* note 6.

<sup>11</sup> See footnote 14 to Article 7(10) Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, OJ L 127 (May 14, 2011) 6, expressly stating that investment protection is not covered by the section on establishment.

establishment as well as the post-establishment phase and would thus allow the EU to conclude treaties containing the traditional substantive treatment obligations of IIAs and procedural guarantees in the form of state-to-state and investor-to-state dispute settlement (ISDS), albeit in the adapted version of allowing the EU to (partly) replace its Member States as respondent.<sup>12</sup> The EU Commission equally rejects a narrow reading of its investment powers as powers limited to FDI. Though the wording, and thus the “ordinary meaning”, of the TFEU appears to be clear, the Commission in particular asserts that the EU’s investment power also includes an implied power concerning portfolio investments.<sup>13</sup>

A separate but related issue is the question whether the new investment power of the EU implies that BITs between Member States have become incompatible with EU Law and may have to be terminated.<sup>14</sup> While the Commission has clearly expressed this view,<sup>15</sup> investment tribunals have generally upheld their jurisdiction based on the continued validity of so-called intra-EU-BITs.<sup>16</sup>

### **III. The start of the debate on future EU IIAs**

As outlined above, the immediate aftermath of the entry-into-force of the Lisbon Treaty was dominated by the debate between the EU Commission and the EU Member States on the appropriate division of their respective powers in the field of investment. Much time and effort was spent on both sides to claim and to defend treaty-making powers as regards IIAs with third states which may have prevented them to devote sufficient energy to the fashioning of a new investment policy of the Union. The official and publicly available documents in this direction are still rather limited.

In July 2010, two Commission documents were made public. One is a Draft Regulation of the European Parliament and the Council establishing transitional arrangements for bilateral investment treaties between Member States and third countries;<sup>17</sup> the other is a Communication outlining the future EU investment policy.<sup>18</sup> This was followed by a Commission proposal in summer 2012 on a regulation addressing the issue of allocating financial responsibility between the EU and its Member States in case of investment arbitration.<sup>19</sup>

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<sup>12</sup> See *infra* text at note 86.

<sup>13</sup> See *infra* text at note 114.

<sup>14</sup> See *infra* text at note 177.

<sup>15</sup> See EC Letter of January 13, 2006, quoted in *Eastern Sugar v. Czech Republic, Eastern Sugar BV v. Czech Republic*, 27 March 2007, SCC Case No 088/2004, Partial Award, para. 119; European Commission Observations, 7 July 2010, quoted in *Eureko BV v. The Slovak Republic*, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, para. 180.

<sup>16</sup> *Eastern Sugar v. Czech Republic*, *supra* note 15; *Eureko BV v. The Slovak Republic*, *supra* note 15; see also *Czech Republic v. Eureko*, OLG Frankfurt, Case No. 26 SchH 11/10, Order, 10 May 2012.

<sup>17</sup> Commission Proposal of 7 July 2010 for a Regulation of the European Parliament and the Council establishing transitional arrangements for bilateral investment treaties between Member States and third countries, COM(2010) 344; available at [http://trade.ec.europa.eu/doclib/docs/2010/july/tradoc\\_146308.pdf](http://trade.ec.europa.eu/doclib/docs/2010/july/tradoc_146308.pdf).

<sup>18</sup> European Commission, Communication from the Commission to the European Parliament, The Council, the European Economic and Social Committee and the Committee of the Regions, Towards a comprehensive European international investment policy, 7 July 2010, COM(2010) 343 final 4; available at: [http://trade.ec.europa.eu/doclib/docs/2010/july/tradoc\\_146307.pdf](http://trade.ec.europa.eu/doclib/docs/2010/july/tradoc_146307.pdf).

<sup>19</sup> Commission Proposal of 21 July 2012 for a Regulation of the European Parliament and of the Council establishing a framework for managing financial responsibility linked to investor-state dispute settlement tribunals established by international agreements to which the European Union is party, COM(2012) 335; available at [http://trade.ec.europa.eu/doclib/docs/2012/june/tradoc\\_149567.pdf](http://trade.ec.europa.eu/doclib/docs/2012/june/tradoc_149567.pdf).

The Commission's International Investment Policy Communication received comments by the other EU institutions, most importantly among them were the Council Conclusions of 25 October 2010<sup>20</sup> and the European Parliament's resolution of 6 April 2011,<sup>21</sup> adopting a report of its International Trade Committee of 22 March 2011.<sup>22</sup> On 5 July 2011, the Commission adopted a Follow up to this resolution.<sup>23</sup> However, as of December 2012, the proposals have not led to the adoption of any formal legal instrument and, in particular, they have not yet been accompanied by a clear indication on the part of the EU how it intends to use its new investment power in order to structure future IIAs.<sup>24</sup> Thus, any assessments on the path the EU is likely to follow as regards IIAs must be based on inferences drawn from the scarce proposals available and some informally leaked documents from the negotiating process of comprehensive trade agreements with third states the EU Commission is currently engaged in.

At present, it is difficult to ascertain any clear directions from the three main EU players concerning future EU IIAs. Nevertheless, certain general positions have become apparent by now. While the Commission seems intent to assert its broad new investment powers as a question of principle, it is struggling to provide content to its exercise. Gradually, this content takes shape and now seems to encompass, in addition to market access provisions, all traditional investment protection standards, including ISDS. The position of the Council reflects the diverse interests of the Member States, which it represents in their entirety, ranging from those states which would prefer to keep the *status quo ante* and thus their sole responsibility for the conclusion of investment protection treaties to those which are content with the Lisbon shift of powers to the EU. The Council's compromise position appears to be its insistence on investment as an area of mixed competences between the Union and its members. As regards the substance of the EU's future IIA policy, the Council seems to favour a traditional "European" approach of strong investment protection including ISDS. The European Parliament equally has to find its new role after the Lisbon Treaty amendments of the CCP which gave it the right to be consulted during negotiations and requires its consent for treaty conclusions. While siding with the Commission in demanding broad investment powers for the EU, the Parliament seems to be developing its own position on the contents of future EU IIAs. In particular, it appears much more reluctant towards the traditional strong investor protection contained in many European BITs and has called for sufficient attention to be given to non-investment interests as well as the Union's right to regulate and pursue its policies without being hampered by concerns over investment claims. Thus, the Parliament's position on investment protection including ISDS is much more nuanced, if not reserved, than that of the two other main EU institutions.

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<sup>20</sup> Council of the EU, Conclusions on a comprehensive European international investment policy, 3041<sup>st</sup> Foreign Affairs Council Meeting, 25 October 2010; available at [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/EN/foraff/117328.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/117328.pdf).

<sup>21</sup> European Parliament resolution of 6 April 2011 on the future European international investment policy, (2010/2203 (INI)); available at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2011-0141&language=EN>.

<sup>22</sup> European Parliament, Committee on International Trade (Rapporteur: Kader Arif), Report on the Future of the European Investment Policy (2010/2203 (INI)), 22 March 2011, A7-0070/2011.

<sup>23</sup> European Commission, Follow up to the European Parliament Resolution on the future European international investment policy, adopted by the Commission on 5 July 2011.

<sup>24</sup> The Commission has expressly renounced the adoption of a Model BIT/IIA as used by most OECD members concluding investment treaties. See Commission Communication, COM (2010) 343 final 4, *supra* note 18, 6 (“[...] a one-size-fits-all model for investment agreements with 3rd countries would necessarily be neither feasible nor desirable.”).

#### IV. Current EU negotiations on IIAs or investment chapters in Free Trade Agreements (FTAs)

Making use of the EU's new investment treaty-making power, the EU Commission is currently engaged in negotiations with Canada, India and Singapore on comprehensive trade agreements which will include an investment chapter.<sup>25</sup> Though reports about the negotiating process are limited, some information can be gleaned from excerpts of the confidential Negotiating Directives issued by the Council which have been made public by NGOs.

For instance, the Council Negotiating Directives of 12 September 2011<sup>26</sup> concerning the negotiations with Canada, India and Singapore contain valuable information on the EU's official position with regard to a number of investment related issues. They comprise information confirming the EU Commission position that the EU now has a comprehensive investment power by outlining that an investment chapter should include fair and equitable treatment (FET), full protection and security, national treatment and most-favoured-nation (MFN) treatment as well as guarantees against uncompensated expropriation and an umbrella clause. As regards the level of detail, the instructions appear to favour the traditional European approach by adhering to a rather concise treaty text, without clarifications limiting the scope of FET and indirect expropriation as they are known from US and Canadian BITs as well as NAFTA.<sup>27</sup> In fact, avoidance of "NAFTA-contamination" was reportedly a specific wish of some Member State officials.<sup>28</sup> With regard to dispute settlement, the need for direct investor-state arbitration seems to be unquestioned, though the precise contours are still open given the difficulty of access to ICSID (and ICSID Additional Facility) dispute settlement which appear to be the Commission's favourite venues.<sup>29</sup>

Other negotiations announced in the Commission's 2010 Communication, such as those with China and potentially Russia,<sup>30</sup> have not yet materialized to an extent that would allow precise conclusions as to the emerging contours of future EU IIAs.

#### V. The emerging contours of future EU IIAs

Though the precise shape of EU investment agreements as currently negotiated with Canada, India and Singapore remains open to be finalized, the past negotiation process and, in particular, the Council Negotiating Directives concerning these states together with other official statements, in particular the 2010 Commission Communication on an international investment policy of the EU, permit the observer to make some inferences.

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<sup>25</sup> On the negotiations with Canada see C. Lévesque, "The Challenges of 'Marrying' Investment Liberalisation and Protection in the Canada-EU CETA", in M. Bungenberg, A. Reinisch and Ch. Tietje (eds.), *EU and Investment Agreements. Open Questions and Remaining Challenges* (Nomos – Hart Publishing, 2013) 121-146.

<sup>26</sup> Council Negotiating Directives (Canada, India and Singapore), 12 September 2011; available at <http://www.bilaterals.org/spip.php?article20272&lang=en> as well as at <http://www.s2bnetwork.org/themes/eu-investment-policy/eu-documents/text-of-the-mandates.html>.

<sup>27</sup> See *infra* notes **Error! Bookmark not defined.** and **Error! Bookmark not defined.**

<sup>28</sup> Luke E. Peterson, "EU member-states approve negotiating guidelines for India, Singapore and Canada investment protection talks; some European governments fear "NAFTA-contamination", *Investment Arbitration Reporter*, 23 September 2011, available at [http://www.iareporter.com/articles/20110923\\_2](http://www.iareporter.com/articles/20110923_2).

<sup>29</sup> See *infra* text at note 84.

<sup>30</sup> The Commission Communication, COM (2010) 343 final 4, *supra* note 18, 7, mentions both states as potential future negotiation partners, and considers to negotiate even a stand-alone investment agreement with China. As regards a potential agreement with China see also W. Shan and Sh. Zhang, "The Potential EU-China BIT: Issues and Implications", in M. Bungenberg, A. Reinisch and Ch. Tietje (eds.), *EU and Investment Agreements. Open Questions and Remaining Challenges* (Nomos – Hart Publishing, 2013) 87-120.

In general, it seems that by now the EU is determined to seek a high level of protection for its investors abroad. The Council has acknowledged this aim by calling for “the highest possible level of legal protection and certainty for European investors in Canada/India/Singapore”<sup>31</sup> and Commission officials have asserted that the Commission would “go for the ‘gold standard’ of investment protection provisions,”<sup>32</sup> based on the existing practice of EU Member States.<sup>33</sup> This indicates the awareness of the need to go beyond a common lowest denominator when drafting future investment agreements.<sup>34</sup> While expecting that such a high level of investor protection will “increase Europe’s attractiveness as a destination for foreign investment,”<sup>35</sup> the 2010 Commission Communication<sup>36</sup> as well as the Council Negotiating Directives also admonish the need to guarantee an appropriate regulatory space for the EU and its Member States by cautioning that an EU investment agreement “shall be without prejudice to the right of the EU and the Member States to adopt and enforce, in accordance with their respective competences, measures necessary to pursue legitimate public policy objectives such as social, environmental, security, public health and safety in a non-discriminatory manner.”<sup>37</sup>

### A. *The scope of future EU IIAs*

As regards the scope of future investment agreements, the EU obviously plans to adhere to the concept of modern investment agreement practice to include both FDI and portfolio investments,<sup>38</sup> even if this comes at the price of not being able to exercise an exclusive CCP competence.<sup>39</sup> Indeed, investment agreements limited to FDI would be highly unusual and – because of the difficulty in distinguishing between FDI and portfolio investments in specific cases – might lead to protracted jurisdictional disputes not in the interest of investment protection. According to the Council Negotiating Directives with Canada, India and

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<sup>31</sup> Council Negotiating Directives (Canada, India and Singapore), *supra* note 26.

<sup>32</sup> Hoffmeister and Ünüvar, “From BITS and Pieces towards European Investment Agreements”, *supra* note 6, 70.

<sup>33</sup> Also the 2010 Commission Communication repeatedly mentions member State BIT provisions “that should inspire the negotiation of investment agreements at the EU level.” Commission Communication, COM (2010) 343 final 4, *supra* note 18, 8 (concerning umbrella clauses). Similarly, the Council considered that “provisions of future EU investment agreements” should be fleshed out “on the basis of the experience and the best practices of the Member States.” Council Conclusions, 3041<sup>st</sup> Foreign Affairs Council Meeting, *supra* note 20, para. 15. Also the EP considered “that future investment agreements concluded by the EU should be based on the best practices drawn from Member State experiences.” Parliament Resolution, *supra* note 21, para. 19.

<sup>34</sup> The Council Negotiating Directives (Canada, India and Singapore), *supra* note 26, expressly state that the provisions of the investment chapters to be negotiated “shall be built upon the Member States’ experience and best practise regarding their bilateral investment agreements.”

<sup>35</sup> The Council Negotiating Directives (Canada, India and Singapore), *supra* note 26.

<sup>36</sup> In order to allow the EU to pursue public policy objectives, the Commission Communication, COM (2010) 343 final 4, *supra* note 18, 8, recalls “that the Union’s trade and investment policy has to fit with the way the EU and its Member States regulate economic activity within the Union and across our borders. Investment agreements should be consistent with the other policies of the Union and its Member States, including policies on the protection of the environment, decent work, health and safety at work, consumer protection, cultural diversity, development policy and competition policy.”

<sup>37</sup> The Council Negotiating Directives (Canada, India and Singapore), *supra* note 26. As to the need to balance investor protection and the regulatory freedom of host states, see *infra* text starting at note 153.

<sup>38</sup> See *supra* note 13.

<sup>39</sup> The Council Negotiating Directives (Canada, India and Singapore), *supra* note 26, state that the Commission should aim at including “into the investment protection chapter of the agreement areas of mixed competence, such as portfolio investment, [...]” For a more expansive interpretation of the EU’s powers, see the Commission’s view *supra* note 13.



Singapore, the investment protection chapters of these agreements “shall cover a broad range of investors and their investments, intellectual property rights included, whether the investment is made before or after the entry into force of the agreement.”<sup>40</sup> Commentators have equally stressed that the EU should strive for a “broad definition of investment with a non-exhaustive list”.<sup>41</sup> This would imply that future EU IIAs are likely to contain a broad asset-based definition of “investment” as currently contained in most EU Member State BITs. Uncertainty may stem from the fact that the EP has expressly called for the exclusion of “speculative forms of investment”.<sup>42</sup> In practice it would appear difficult to distinguish between “speculative” and “non-speculative” portfolio (or even direct) investment.<sup>43</sup>

### ***B. Admission/access provisions***

Past agreements of the EC/EU dealing with investments largely addressed questions of admission only and did so by adopting a GATS-inspired market access approach, i.e. making specific commitments in specific areas.<sup>44</sup> The EU institutions have in general confirmed their intention to continue this policy of market access/liberalisation.<sup>45</sup> However, it is unclear whether the current market access approach will be continued or whether the EU will adopt the North American practice of extending national treatment to the admission phase in order to secure market access as found in NAFTA as well as US and Canadian BITs.<sup>46</sup>

### ***C. Substantive investment protection***

As regards substantive treatment of investments, it appears that future EU IIAs will include all the standards of treatment currently contained in EU Member State BITs. Again, the Council Negotiating Directives with Canada, India and Singapore are most instructive in this regard because they are most detailed. They contain basically all the treatment standards that can be found in modern BITs, from FET, full protection and security, national treatment and MFN,

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<sup>40</sup> The Council Negotiating Directives (Canada, India and Singapore), *supra* note 26, under “Scope”.

<sup>41</sup> Hoffmeister and Ünüvar, “From BITS and Pieces towards European Investment Agreements”, *supra* note 6, 71.

<sup>42</sup> See Parliament Resolution, *supra* note 21, para. 11.

<sup>43</sup> See in detail *infra* text at note 109.

<sup>44</sup> CITE LIT ##. See e.g. the provisions on “commercial presence” of Article 65 *et seq.* Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part, OJ L 289/I/4 (November 30, 2008) 1, as well as Section C of Chapter 7 of the EU-Korea FTA, Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, OJ L 127 (May 14, 2011) 6, which provides for MFN treatment and specific market access commitments and national treatment in separate schedules.

<sup>45</sup> See Commission Communication, COM (2010) 343 final 4, *supra* note 18, 5 (“[...] our trade policy will seek to integrate investment liberalisation and investment protection”); Council Conclusions, 3041<sup>st</sup> Foreign Affairs Council Meeting, *supra* note 20, para. 6 (“The new EU international investment policy should increase the level of competitiveness of the Union and open new markets.”)

<sup>46</sup> See e.g. Article 1102(1) North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States, and the Government of the United States of America (NAFTA) (Dec. 17, 1992), 32 I.L.M. 289 (1993) (“Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.”); Article 3(1) Canadian Model FIPA 2004 (“Each Party shall accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory.”). See also the discussion in St. Woolcock, “The EU Approach to International Investment Policy after the Lisbon Treaty”, Study for the EP Committee on International Trade 2010, 31 *et seq.*

to compensation guarantees in case of expropriation and free transfer obligations.<sup>47</sup> In addition, they call for “rules concerning subrogation” which are typical in case an insurer compensates an investor and then needs to be able to raise claims against the host state.<sup>48</sup>

## 1. Umbrella clauses

The version of the leaked Negotiating Directives concerning Canada, India and Singapore is a bit more ambiguous with regard to umbrella clauses since they are mentioned with question marks under “other effective investment protection provisions”.<sup>49</sup> Indeed, umbrella clauses have been controversial in investment arbitration practice as regards their practical effect.<sup>50</sup> Some tribunals follow the approach of *SGS v. Pakistan* which rejected the view that “breaches of a contract [...] concluded with a State (widely considered to be a matter of municipal rather than international law) are automatically ‘elevated’ to the level of breaches of international law.”<sup>51</sup> Other tribunals adhere to the traditional view endorsed by *SGS v. Philippines* that an umbrella clause “makes it a breach of the BIT for the host State to fail to observe binding commitments, including contractual commitments, which it has assumed with regard to

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<sup>47</sup> Pursuant to the title “Standards of treatment” of the Council Negotiating Directives (Canada, India and Singapore), *supra* note 26, “the negotiations shall aim to include in particular but not exclusively the following standards of treatment and rules:

- a) fair and equitable treatment, including a prohibition of unreasonable, arbitrary or discriminatory measures,
- b) unqualified national treatment
- c) unqualified most-favoured nation treatment,
- d) protection against direct and indirect expropriation, including the right to prompt, adequate and effective compensation
- e) full protection and security of investors and investments,
- f) other effective protection provisions, such as ‘umbrella clause’?
- g) free transfer of funds of capital and payments by investors
- h) rules concerning subrogation.”

Except for subrogation provisions, all these standards can also be found in the Commission Communication, COM (2010) 343 final 4, *supra* note 18, 8-9. See also the Council Conclusions, 3041<sup>st</sup> Foreign Affairs Council Meeting, *supra* note 20, para. 14, according to which the Council “STRESSES the need to ensure the inclusion in the substance of future negotiations of the fundamental standards of “fair and equitable treatment”, non-discrimination (“most-favored-nation treatment” and “national treatment”), “full protection and security” treatment of investors and investments, protection against expropriation (including the right to prompt, adequate and effective compensation), free transfer of funds of capital and payments by investors, as well as other effective protection provisions (such as, where appropriate, the so-called “umbrella clauses”) and dispute settlement mechanisms and CONSIDERS that these principles should be the main pillars of future EU investment agreements.”

<sup>48</sup> See R. Dolzer and Ch. Schreuer, *Principles of International Investment Law* (2<sup>nd</sup> ed., 2008) ##.

<sup>49</sup> The Council Negotiating Directives (Canada, India and Singapore), *supra* note 26, provide under “Standards of Treatment” (“f) other effective protection provisions, such as ‘umbrella clause?’”).

<sup>50</sup> See C. Schreuer, “Travelling the BIT Route: Of Waiting Periods, Umbrella. Clauses and Forks in the Road”, 5 *The Journal of World Investment and Trade* 231 (2004); A. Sinclair, “The Origins of the Umbrella Clause in the International Law of Investment Protection”, 20 *Arbitration International* 411 (2004); T. Wälde, “The ‘Umbrella’ Clause on Investment Arbitration—A Comment on Original Intentions and Recent Cases”, 6 *The Journal of World Investment and Trade* 183 (2005); S. Alexandrov, “Breaches of Contract and Breaches of Treaty – The Jurisdiction of Treaty-based Arbitration Tribunals to Decide Breach of Contract Claims in *SGS v Pakistan* and *SGS v Philippines*”, 5 *The Journal of World Investment and Trade* 555 (2004).

<sup>51</sup> *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction, 6 August 2003, para. 172. See also *Salini Costruttori S.p.A and Italstrade S.p.A v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction of 15 November 2004; *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 April 2006, para. 85; *Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic*, ICSID Case No. ARB/03/13, Decision on Jurisdiction, 27 July 2006, para. 113.

specific investments. But it does not convert the issue of the extent or content of such obligations into an issue of international law.”<sup>52</sup> It may be that the EU has not yet decided whether it would endorse the potentially far-reaching implications of an umbrella clause, though the 2010 Commission Communication suggest that umbrella clauses are regarded as valuable tools for the protection of contractual rights of investors.<sup>53</sup>

## 2. Non-discrimination standards

With regard to the main substantive standards it appears that the EU is determined to follow the path of traditional short formulations found in most EU Member State BITs, though it is difficult to judge this from the available documents alone. The wording of the Council Negotiating Directives with Canada, India and Singapore may be viewed as mere headings.<sup>54</sup>

While the Commission has asserted that “non-discrimination should continue to be a key ingredient of EU investment negotiations,”<sup>55</sup> it remains unclear whether future national treatment and MFN clauses should be limited to the post-establishment phase or extend to the admission phase, thus *de facto* allowing for market access.<sup>56</sup>

On the basis of present EU documents it is also not clear whether the institutions have formed an opinion on whether a MFN clause should encompass dispute settlement as in the *Maffezini* case<sup>57</sup> or not.<sup>58</sup> This indecision may result from the fact that investment jurisprudence is highly inconsistent, with tribunals disagreeing sharply whether MFN clause should permitted claimants to invoke more favourable procedural, maybe even jurisdictional,<sup>59</sup> provisions in third country BITs or at least to overcome procedural obstacles, such as waiting periods,<sup>60</sup> or whether it would not permit so.<sup>61</sup>

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<sup>52</sup> *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction, 29 January 2004, para. 128. See also *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, para. 53; *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction, 29 May 2009.

<sup>53</sup> Commission Communication, COM (2010) 343 final 4, *supra* note 18, 8 (“They have been traditionally used in Member States BITs and are an important element among others that should inspire the negotiation of investment agreements at the EU level.”).

<sup>54</sup> See text *supra* at note 47.

<sup>55</sup> Commission Communication, COM (2010) 343 final 4, *supra* note 18, 8.

<sup>56</sup> As regards the different option to provide for market access, see *supra* text at note 44.

<sup>57</sup> *Emilio Agustín Maffezini v. Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction, 25 January 2000.

<sup>58</sup> See also S. Fietta, “Most Favoured Nation Treatment and Dispute Resolution under Bilateral Investment Treaties: A Turning Point?”, 8 Int’l Arb. L. Rev. (2005) 131-138; E. Gaillard, “Establishing Jurisdiction through a Most-Favored-Nation Clause”, 233 NYLJ (2005) 1, 3; K. Hobér, “MFN Clauses and Dispute Resolution in Investment Treaties: Have we reached the end of the road?”, in Ch. Binder, U. Kriebaum, A. Reinisch and St. Wittich (eds.), *International Investment Law for the 21<sup>st</sup> Century* (Oxford University Press, 2009) 31-41; A. Reinisch, “How Narrow are Narrow Dispute Settlement Clauses in Investment Treaties?”, 2 J. Int’l Disp. Settlement (2011) 115-174.

<sup>59</sup> *RosInvestCo UK Ltd. v. The Russian Federation*, Award on Jurisdiction 2007, SCC Case No. Arb. V079/2005.

<sup>60</sup> See, e.g., *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004; *Impreglio S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, 21 June 2011; *Hochtief AG v. Argentina*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, 24 October 2011.

<sup>61</sup> In *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, para. 223, the tribunal held that “an MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them.” The tribunal in

Finally, with regard to the Council's directives suggesting that the Commission should negotiate "unqualified" national treatment and MFN provisions, it may be unclear whether this implies that such clauses should follow the traditional "European" approach of merely providing for non-discrimination<sup>62</sup> or whether it would allow specifications to "like circumstances" as often found in North American IIAs<sup>63, 64</sup>. However, the Parliament's wish clearly suggests that such a specification should be adopted.<sup>65</sup>

### 3. Fair and equitable treatment as well as full protection and security

Concerning FET and full protection and security, the EU seems determined to continue the traditional IIA policy of its Member States to adopt short provisions. Already the 2010 Commission Communication qualified these standards as "an important element among others that should inspire the negotiation of investment agreements at the EU level."<sup>66</sup> Indeed, there are good arguments in favour of the straightforward versions of FET omitting any references to the "international minimum standard", as found in NAFTA,<sup>67</sup> or US BITs,<sup>68</sup> or qualifications of the full protection and security to include "legal protection", as found in some German BITs<sup>69, 70</sup>.

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*Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, 8 December 2008, even denied the avoidance of waiting periods.

<sup>62</sup> See e.g. Article 3(1) Austria/Ukraine BIT ("Each Contracting Party shall accord to investors of the other Contracting Party and their investments treatment no less favourable than that which it accords to its own investors and their investments or to investors in third States and their investments.").

<sup>63</sup> See e.g. Article 3(1) Canadian Model FIPA 2004, text *supra* 46.

<sup>64</sup> It was asserted that the express mandate in the Council Negotiating Directives (Canada, India and Singapore) that the non-discrimination standards of MFN and national treatment should be "unqualified" (see *supra* note 47) implied that they should not include any reference to "like circumstances" as they can be found e.g. in US and Canadian BITs as well as in NAFTA (See *supra* note 46). See Hoffmeister and Ünüvar, "From BITS and Pieces towards European Investment Agreements", *supra* note 6, 71. However, it may also be that the intention merely was to clarify that the Council did not wish to have any conditional MFN or national treatment contained in the future investment chapters under negotiation.

<sup>65</sup> Parliament Resolution, *supra* note 21, para. 19 ("non-discrimination (national treatment and most favoured nation), with a more precise wording in the definition mentioning that foreign and national investors must operate 'in like circumstances'").

<sup>66</sup> Commission Communication, COM (2010) 343 final 4, *supra* note 18, 8.

<sup>67</sup> Article 1105 NAFTA ("Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.") In NAFTA Free Trade Commission, Clarifications Related to NAFTA Chapter 11 (2001) this was held to be co-extensive, and thus limited, to the protection available under the international minimum standard ("1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party. 2. The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.").

<sup>68</sup> Article 5 US Model BIT 2004 ("1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security. 2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights.")

<sup>69</sup> Article 4 (1) Germany/Argentina BIT ("Investments by nationals or companies of either Contracting Party shall enjoy full legal protection and full legal security in the territory of the other Contracting Party.").

<sup>70</sup> On the basis of such an express clause, the tribunal in *Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/08, Award, 6 February 2007, para. 303, held that "[...] the obligation to provide full protection and security is wider than "physical" protection and security. It is difficult to understand how the physical security of an intangible

References to the “international minimum standard” in FET clauses have been regarded as limitations to the customary international law standard, in particular by NAFTA tribunals,<sup>71</sup> which have the potential to considerably lower the level of investor protection and, conversely, increase the regulatory discretion of host states. This latter consequence may have inspired the Parliament to call for the inclusion of FET clauses “defined on the basis of the level of treatment established by international customary law.”<sup>72</sup>

#### 4. Transfer clauses

The Council Negotiating Directives with Canada, India and Singapore may again be relied upon to presume that future EU IIAs will routinely include guarantees on the “free transfer of funds of capital and payments by investors.”<sup>73</sup> Already the 2010 Commission Communication stated that “EU clauses ensuring the free transfer of funds of capital and payments by investors should be included.”<sup>74</sup> Given the Commission’s rigorous approach to defend the EU’s capacity to impose limits on such free transfer obligations for political reasons at any time,<sup>75</sup> it is to be expected that future free transfer clauses will contain express exceptions allowing the EU legislator to adopt restrictive measures under Article 66<sup>76</sup> and 215 TFEU.<sup>77</sup> It

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asset would be achieved. In the instant case, “security” is qualified by “legal”. In its ordinary meaning “legal security” has been defined as “the quality of the legal system which implies certainty in its norms and, consequently, their foreseeable application.”

<sup>71</sup> See *Mondev International Ltd. v. USA*, ICSID Case No. ARB(AF)/99/2, ICSID Additional Facility Award, 11 October 2002, para. 122; *United Parcel Service of America Inc. v. Canada*, Decision on Jurisdiction, 22 November 2002, para. 97; *ADF Group Inc. v. USA*, Case No. ARB(AF)/00/1, ICSID Additional Facility Award, 9 January 2003, para. 199; *Loewen v. USA*, ICSID Case No. ARB (AF)/98/3, Award, 26 June 2003, paras. 125-127; *Waste Management, Inc. v. Mexico*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, paras. 90-91; *Methanex v. USA*, UNCITRAL (NAFTA), Final Award, 3 August 2005, Part II, Ch. H, para. 23. See also the interpretation of the 2001 NAFTA Free Commission, *supra* note 67.

<sup>72</sup> Parliament Resolution, *supra* note 21, para. 19.

<sup>73</sup> Council Negotiating Directives (Canada, India and Singapore), *supra* note 26, under “Standards of Treatment.”

<sup>74</sup> Commission Communication, COM (2010) 343 final 4, *supra* note 18, 9.

<sup>75</sup> Case C-205/06, *European Commission v. Austria*, ECJ, 3 March 2009, ECR I-1301; Case C-249/06, *European Commission v. Kingdom of Sweden*, ECJ, 3 March 2009, ECR I-1335 Case C-118/07, *European Commission v. Finland*, ECJ, 19 November 2009, ECR I-10889. In these cases the ECJ found that even the mere possibility of a potential obstruction of the EU’s regulatory power to adopt transfer restrictions by capital transfer clauses in Member State BITs was sufficient to lead to an incompatibility with EU law. See also E. Denza, “Bilateral Investment Treaties and EU rules on free transfer: Comment on Commission v Austria, Commission v Sweden and Commission v Finland”, 35 ELRev. (2010) 263; N. Lavranos, “New Developments in the Interaction between International Investment Law and EU Law”, 9 Law & Practice of International Courts & Tribunals (2010) 409; A. Reinisch, “European Court of Justice: *Commission of the European Communities v. Austria and Sweden* (March 3, 2009) Introductory Note”, 48 ILM (2009) 470-472.

<sup>76</sup> Article 66 TFEU (“Where, in exceptional circumstances, movements of capital to or from third countries cause, or threaten to cause, serious difficulties for the operation of economic and monetary union, the Council, on a proposal from the Commission and after consulting the European Central Bank, may take safeguard measures with regard to third countries for a period not exceeding six months if such measures are strictly necessary.”).

<sup>77</sup> Article 215(1) TFEU (“Where a decision, adopted in accordance with Chapter 2 of Title V of the Treaty on European Union, provides for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, the Council, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, shall adopt the necessary measures. It shall inform the European Parliament thereof.”).

has been suggested that such an exception could resemble the security exception of the EU-Korea FTA.<sup>78</sup>

## 5. Expropriation

The question whether the EU has the power to adopt expropriation clauses in future IIAs has been controversial since the time the enlargement of the CCP was negotiated. While many commentators and apparently also EU Member States have referred to the exclusion of issues of property ownership from the scope of the TFEU and thus of the EU's external investment power,<sup>79</sup> the Commission seems determined to include expropriation among the topics the EU has the competence to deal with. Again the absence of any clear EU template makes it difficult to infer the precise scope and content of a potential EU expropriation clause. However, the pieces found in different documents may be put together to form a discernible mosaic. While the Council Negotiating Directives with Canada, India and Singapore speak of "protection against direct and indirect expropriation, including the right to prompt, adequate and effective compensation"<sup>80</sup>, the 2010 Commission Communication admonishes that the "Union should include precise clauses covering this issue [i.e. that expropriation measures should be non-discriminatory and proportionate to attain their legitimate objective] into its own future investment or trade agreements."<sup>81</sup> It would thus appear that any future expropriation clauses are likely to closely resemble the clauses found in existing EU Member State BITs. Whether it will also contain an attempt to more closely define the notion of indirect expropriation, as can be found in some more recent North American BITs<sup>82</sup> remains to be seen.<sup>83</sup>

### *D. The place of investor-state dispute settlement in the EU's investment architecture*

In the initial phase of the discussion of a new EU external investment policy, the EU's institutions unsettled the investment community by their apparent reluctance towards investor-state dispute settlement. While the Commission was silent for a considerable period of time, it eventually came forward with a positive assessment. Still, the Parliament in particular voiced concern<sup>84</sup> about the far-reaching implications of ISDS that might compromise the right to regulate.<sup>85</sup>

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<sup>78</sup> See Hoffmeister and Ünüvar, "From BITS and Pieces towards European Investment Agreements", *supra* note 6, 73, referring to Article 15.9 of the EU-Korea FTA, Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, OJ L 127 (May 14, 2011) 6, which is in turn inspired by the Article XXI GATT.

<sup>79</sup> See e.g. Ch. Tietje, "Die Außenwirtschaftsverfassung der EU nach dem Vertrag von Lissabon", 83 *Beiträge zum Transnationalen Wirtschaftsrecht* (2009) 16; T. R. Braun, "Für einen komplementären, europäischen Investitionsschutz", in M. Bungenberg, J. Griebel and S. Hindelang (eds.), *Internationaler Investitionsschutz und Europarecht* (Nomos 2010) 191-200, 195.

<sup>80</sup> Council Negotiating Directives (Canada, India and Singapore), *supra* note 26, under "Standards of Treatment."

<sup>81</sup> Commission Communication, COM(2010) 343 final 4, *supra* note 18, 9.

<sup>82</sup> See e.g. the "shared understanding" on expropriation in Annex B US Model BIT 2004.

<sup>83</sup> It appears that such a closer definition is what the Parliament would like to see in future IIAs when it called for "protection against direct and indirect expropriation, giving a definition that establishes a clear and fair balance between public welfare objectives and private interests." Parliament Resolution, *supra* note 21, para. 19.

<sup>84</sup> Parliament Resolution, *supra* note 21, para. 24 ("Expresses its deep concern regarding the level of discretion of international arbitrators to make a broad interpretation of investor protection clauses, thereby leading to the

This reserved stance was indeed irritating for states and investors which had accepted that ISDS fulfilled a crucial function in effectively securing the substantive protections granted in IIAs.<sup>86</sup> With the coming of age of ISDS in the 1990s and the first decade of the 21<sup>st</sup> century it has become accepted that removing investment protection from the traditional paradigm of diplomatic protection has contributed to the de-politicization of investment disputes.<sup>87</sup>

Meanwhile, the initial reluctance of the EU institutions seems to have given way to a full endorsement of ISDS. In its 2010 Communication on investment, the Commission acknowledged the importance of ensuring the effective enforceability of investment protection standards through ISDS which formed “a key part of the inheritance that the Union receives from Member State BITs.”<sup>88</sup> And the Council in its Conclusions stressed “the need for an effective investor-to-state dispute settlement mechanism in the EU investment agreements.”<sup>89</sup>

Currently, the Commission appears determined to include ISDS and has even specifically addressed the issue of allocating responsibility (and in particular financial liability) between the Union and its Member States by proposing a regulation establishing a “framework for managing financial responsibility linked to investor-state dispute settlement tribunals”.<sup>90</sup> This proposal builds on and deepens the template adopted already in the mid-1990s when the EC joined the Energy Charter Treaty (ECT)<sup>91</sup> as a full participant. Prior to the ECT’s entry-into-force, the EC confirmed that it can become a respondent to individual claims raised by investors, and that the Community and its Member States concerned would determine the proper respondent within 30 days of receiving such a request among themselves.<sup>92</sup>

In addition to the difficulty of allocating responsibility, ISDS raises serious problems as regards available arbitration venues. Investor-state arbitration and conciliation under the

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ruling out of legitimate public regulations; calls on the Commission to produce clear definitions of investor protection standards in order to avoid such problems in the new investment agreements.”).

<sup>85</sup> See also *infra* text at note 153.

<sup>86</sup> See e.g. *Emilio Agustín Maffezini v. Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction, 25 January 2000, para. 54 (“[...] dispute settlement arrangements are inextricably related to the protection of foreign investors, as they are also related to the protection of rights of traders under treaties of commerce.”); *National Grid plc v. Argentina*, UNCITRAL, Decision on Jurisdiction, 20 June 2006, para. 49 (“[...] assurance of independent international arbitration is an important – perhaps the most important – element in investor protection.”).

<sup>87</sup> See already I. F.I. Shihata, “Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA”, 1 ICSID Review – FILJ (1986) 1. In fact, the latter concept is considered to be one of the major achievements of the ICSID Convention. See e.g. C. Schreuer/L. Malintoppi/A. Reinisch/A. Sinclair, *The ICSID Convention – A Commentary* (Cambridge University Press, 2<sup>nd</sup> ed. 2009) 416; C. Schreuer, “Investment Protection and International Relations”, in A. Reinisch/U. Kriebaum (eds.), *The Law of International Relations – Liber Amicorum Hanspeter Neuhold* (2007) 345-358, at 346, 347.

<sup>88</sup> Commission Communication, COM(2010) 343 final 4, *supra* note 18, 10. It also considered that ‘ISDS is such an established feature of investment agreements that its absence would in fact discourage investors and make a host economy less attractive than others’.

<sup>89</sup> Council Conclusions, 3041<sup>st</sup> Foreign Affairs Council Meeting, *supra* note 20, para. 18.

<sup>90</sup> Commission Proposal of 21 July 2012, COM (2012) 335, *supra* note 19. See also C. Brown and I. Naglis, “Dispute Settlement in Future EU Investment Agreements”, in M. Bungenberg, A. Reinisch and Ch. Tietje (eds.), *EU and Investment Agreements. Open Questions and Remaining Challenges* (Nomos – Hart Publishing, 2013) 17-36.

<sup>91</sup> Energy Charter Treaty, Annex 1 to the Final Act of the Conference on the European Energy Charter (Dec. 17, 1994), 34 I.L.M. 381 (1995).

<sup>92</sup> Statement by the European Communities to the Secretariat of the Energy Charter pursuant to Article 26(3)(b)(ii) of the Energy Charter Treaty, OJ 1998, L 69/115.

ICSID Convention<sup>93</sup> are available only to states and nationals of states parties to the Convention.<sup>94</sup> Access to the ICSID Convention is open to member states of the IBRD or to any other state which is a party to the ICJ Statute.<sup>95</sup> Thus, statehood is a clear requirement for adherence to the ICSID Convention which clearly prevents the EU in its current form from becoming a contracting party. Opening ICSID dispute settlement (conciliation and arbitration) to the EU would thus require a treaty revision which is theoretically possible,<sup>96</sup> practically, however, very unlikely to be achieved.<sup>97</sup> Nevertheless, the Commission stated its intention that it would explore this option.<sup>98</sup> In the medium term, it appears more realistic that the EU will adopt ISDS clauses providing for investment arbitration to be conducted under UNCITRAL<sup>99</sup> or other arbitration rules.<sup>100</sup>

Interestingly, the Commission has reacted to two specific issues frequently discussed in the investment arbitration community that have raised a certain degree of concern, the questions of sufficient transparency<sup>101</sup> and of potential inconsistencies of outcomes.<sup>102</sup> The Commission appears intent on addressing these problems by providing for a broad level of transparency in

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<sup>93</sup> Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), 18 March 1965, 575 UNTS 159.

<sup>94</sup> See Article 25(1) ICSID Convention.

<sup>95</sup> Article 67 ICSID Convention.

<sup>96</sup> See Articles 65 and 66 ICSID Convention.

<sup>97</sup> According to Article 66(1) ICSID Convention amendments must be accepted by all Contracting Parties. The practical difficulties of revising the ICSID Convention were discussed when the introduction of an appellate body was debated. See Possible Improvements of the Framework for ICSID Arbitration, ICSID Secretariat Discussion Paper (Oct. 26, 2004), available at <http://icsid.worldbank.org>. See also D. Gantz, "An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes: Prospects and Challenges", 39 Vanderbilt Journal of Transnational Law (2006) 39; B. Legum, "Options to Establish an Appellate Mechanism for Investment Disputes", in K. Sauvart and M. Chiswick-Patterson (eds.), Appeals Mechanism in International Investment Disputes (2008) 231-239; A. Qureshi, "An Appellate System in International Investment Arbitration?", in P. Muchlinski, F. Ortino and Ch. Schreuer (eds.), The Oxford Handbook of International Investment Law 1154 (2008); Ch. Tams, "An Appealing Option? The Debate about an ICSID Appellate Structure", in Ch. Tietje/G. Kraft/R. Sethe (eds.), Beiträge zum Transnationalen Wirtschaftsrecht, Heft 57, Juni 2006.

<sup>98</sup> Commission Communication, COM(2010) 343 final 4, *supra* note 18, 10 ("The Commission will explore with interested parties the possibility that the European Union seek to accede to the ICSID Convention (noting that this would require amendment of the ICSID Convention).").

<sup>99</sup> United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, U.N. GAOR, 31<sup>st</sup> Sess., suppl. no. 17, ch. V, sec. C, U.N. Doc. A/31/17 (Dec. 15, 1976), 15 I.L.M. 701 (1976), available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1976Arbitration\\_rules.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1976Arbitration_rules.html).

<sup>100</sup> It is not clear why the EP considers that next to ICSID also UNCITRAL arbitration would not be available to the EU. See Parliament Resolution, *supra* note 21, para. 33. The reason given by the Parliament that the EU is not a member of UNCITRAL is not convincing since UNCITRAL Arbitration Rules can be widely used by private, state and non-state entities, including international organizations.

<sup>101</sup> CITE LIT ##.

<sup>102</sup> See A. Afilalo, "Towards a Common Law of International Investment: How NAFTA Chapter 11 Panels should Solve their Legitimacy Crisis", 17 *Georgetown International Environmental Law Review* (2004) 51; S. Franck, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions", 73 *Fordham Law Review* (2005) 1521-##; C.N. Brower/M. Ottolenghi/P. Prows, "The Saga of CMS: *Res judicata*, Precedent and the Legitimacy of ICSID Arbitration", in: C. Binder/U. Kriebaum/A. Reinisch/S. Wittich (eds.) *International Investment Law for the 21<sup>st</sup> Century: Essays in Honour of Christoph Schreuer* (2009) 843-864; A. Reinisch, "The Role of Precedent in ICSID Arbitration", *Austrian Arbitration Yearbook* (2008) 495-##; L. Reed, "The De Facto Precedent Regime in Investment Arbitration: A Case for Proactive Case Management", 25 *ICSID Review* (2010) 95-##; A. Rigo Sureda, *Investment Treaty Arbitration: Judging Under Uncertainty* (2012).



its future IIAs<sup>103</sup> and by taking into consideration the use of quasi-permanent arbitrators and the creation of appellate mechanisms.<sup>104</sup> The Parliament endorsed these thoughts and added further ideas for improvement,<sup>105</sup> such as the institutionalisation of *amicus curiae* participation<sup>106</sup> and the more controversial enhancement of the role of domestic courts through requiring exhaustion of local remedies.<sup>107</sup>

## VI. Controversial Issues

As the preceding sections have shown an EU investment policy is gradually developing. However, there still remain many open issues some of which will be analysed in more detail in the following pages.

The precise scope of exclusive IIA powers after Lisbon remains unclear. Both the Union and its Member States – and apparently both the Commission and the Council – seem to pursue a broad approach towards future EU IIAs with regard to the inclusion of FDI as well as of provisions on expropriation and ISDS. They do so in a pragmatic way by proceeding on the basis of a mixed agreement without clearly determining their respective spheres of competences. However, that fact can only insufficiently veil the continuing divergences of opinions as to the true allocation of powers which also relates to the question of who is empowered to regulate questions concerning expropriation in future EU IIAs. Another highly contentious issue concerns the future of intra-EU-BITs, where some Member States and the EU seem to be on a collision course. But also in areas where there is less disagreement between the main actors questions remain open such the problem of the scope investments to be protected in future EU IIAs or the right balance between investment protection and regulatory freedom of the Member States and the EU. To another group of open issues belong problems rarely addressed in the official debate, such as whether the envisaged continuation of ISDS is compatible with the existing EU system of legal protection through the Court of Justice of the European Union (CJEU).<sup>108</sup>

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<sup>103</sup> Commission Communication, COM(2010) 343 final 4, *supra* note 18, 10 (“[T]he EU should ensure that investor-state dispute settlement is conducted in a transparent manner (including requests for arbitration, submissions, open hearings, *amicus curiae* briefs and publication of awards;”).

<sup>104</sup> Commission Communication, COM(2010) 343 final 4, *supra* note 18, 10 (“Consistency and predictability are key issues and the use of quasi-permanent arbitrators (as in the EU’s FTA practice) and/or appellate mechanisms, where there is a likelihood of many claims under a particular agreement, should be considered;”).

<sup>105</sup> Parliament Resolution, *supra* note 21, para. 31 (“Believes that changes must be made to the present dispute settlement regime, in order to include greater transparency, the opportunity for parties to appeal, the obligation to exhaust local judicial remedies where they are reliable enough to guarantee due process, the possibility to use *amicus curiae* briefs and the obligation to select one single place of investor-state arbitration.”).

<sup>106</sup> See Ch. Knahr and A. Reinisch, “Transparency versus Confidentiality in International Investment Arbitration – The Biwater Gauff Compromise”, 6 *The Law and Practice of International Courts and Tribunals* (2007) 97-118; A. Mourre, “Are *Amici Curiae* the proper response to the public’s concern on transparency in investment arbitration?”, 5 *The Law and Practice of International Courts and Tribunals* (2006) 257-##.

<sup>107</sup> See Ch. Schreuer, “Calvo’s Grandchildren: The Return of Local Remedies in Investment Arbitration”, 4 *The Law and Practice of International Courts and Tribunals* (2005) 1-##; U. Kriebaum, “Local Remedies and Standards for Protection”, in Ch. Binder, U. Kriebaum, A. Reinisch, S. Wittich (eds.), *International Investment Law for the 21<sup>st</sup> Century* (2009) 417-##.

<sup>108</sup> The Lisbon Treaty has restructured the judicial system of the European Union. The European Court of Justice (ECJ), now referred to as “Court of Justice”, has become part of the broader judicial architecture of the EU. Article 19 TEU states that “the Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts.” The General Court is the former Court of First Instance and the most important “specialised court” currently existing is the European Union Civil Service Tribunal.

### ***A. FDI or more – Does the EU’s new investment power encompass portfolio investment?***

Article 206 as well as 207 TFEU are fairly clear; they speak of “foreign direct investment” in circumscribing the new CCP power. In spite of this apparently limiting language, the EU Commission rejects a narrow reading of its investment powers and asserts that it also includes an implied power concerning portfolio investments. Most Member States and also the Council, representing Member States’ interests, prefer a more textual interpretation and have expressed their view that the EU’s powers are limited to FDI and do not include portfolio investments.

This question is a real and practical problem because modern BITs and IIAs usually cover both FDI and portfolio investments.<sup>109</sup> Thus, for the EU to enter the scene of investment treaty players it would be highly unorthodox if it wished to conclude agreements covering only FDI. In fact, the EU institutions have clearly expressed their view that future EU IIAs should broadly encompass both FDI and portfolio investment.<sup>110</sup> Therefore it is crucial to know whether the EU can conclude IIAs covering both FDI and portfolio investments itself or whether it needs the Member States. In the latter case, this would require the conclusion of so-called mixed agreements to be negotiated and concluded by both the EU and its Member States.<sup>111</sup> From a political perspective this is important since mixed agreements require separate ratification by the Member States. Today, this additional weight may appear not so crucial since the current rules of CCP treaty-making require unanimity in the Council in matters of FDI “where such agreements include provisions for which unanimity is required for the adoption of internal rules.”<sup>112</sup> However, the evolution of the EU’s gradual enlargement of the CCP has demonstrated a general shift from rule-making dominated by the Member States to centralized EC/EU legislation.<sup>113</sup> Similarly the current unanimity requirement for FDI matters in the Council may change in the future. In this situation, only a mixed competence would ensure sufficient bargaining power to the individual Member States.

The conflicting positions can be roughly summarized as follows: In its original Communication on an international investment policy, the Commission was not yet very clear on that point. It first elaborated on the definition of FDI as an investment “which serves to

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<sup>109</sup> See e.g. Article 1 US Model BIT 2004: ““investment” means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:

- (a) an enterprise;
- (b) shares, stock, and other forms of equity participation in an enterprise;
- (c) bonds, debentures, other debt instruments, and loans;
- (d) futures, options, and other derivatives;
- (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;
- (f) intellectual property rights;
- (g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law; and
- (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges.”

<sup>110</sup> See *supra* text starting at note 38.

<sup>111</sup> See R. Wessel, “The EU as a Party to International Agreements: Shared Competences, Mixed Responsibilities,” in A. Dashwood and M. Maresceau (eds.), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape* 152 (2008). See also A. Dashwood and C. Hillion (eds.), *The General Law of EC External Relations* (2000); C. Hillion and P. Koutrakos (eds.), *Mixed Agreements Revisited* (2010).

<sup>112</sup> Article 207(4) TFEU.

<sup>113</sup> Dimopoulos, *EU Foreign Investment Law*, *supra* note 6, 86 *et seq.*; ADD REF ##

establish lasting and direct links with the undertaking” without taking a clear stance on portfolio investment.<sup>114</sup> In a subsequent passage, entitled “Looking beyond foreign direct investment”, the Commission suggested that “to the extent that international agreements on investment affect the scope of the common rules set by the Treaty’s Chapter on capitals and payments, the exclusive Union competence to conclude agreements in this area would be implied.”<sup>115</sup> In its 2012 Financial Responsibility Regulation proposal the Commission is much more explicit in asserting that “the Union has exclusive competence to conclude agreements covering all matters relating to foreign investment, that is both foreign direct investment and portfolio investment.”<sup>116</sup> In addition to the express FDI power contained in Article 207 TFEU, the Commission clearly postulates an implied power relating to portfolio investment as well:

“The Union’s competence for portfolio investment stems, in the Commission’s view, from Article 63 TFEU. That article provides that the movement of capital between Member States of the Union and third countries is to be free of restrictions. Article 3(2) TFEU provides for the exclusive competence of the Union whenever rules included in an international agreement “may affect common rules or alter their scope”. In the Commission’s view, the Union must have exclusive competence also over matters of portfolio investment since the rules being envisaged, which would apply indistinctly to portfolio investment, may affect the common rules on capital movement set down in Article 63 of the Treaty.”<sup>117</sup>

Member States in general do not appear to share this view. A very explicit rejection can be found in the Lisbon Treaty judgment of the German Constitutional Court which argued as follows:

“The extension of the common commercial policy to “foreign direct investment” (Article 207.1 TFEU) confers exclusive competence on the European Union also in this area. 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 [...]. 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>118</sup>

The Member State opposition to the Commission’s far-reaching competence claims also found its way into the Council’s view. In its October 2012 Conclusions<sup>119</sup> commenting on the Commission’s plans, the Council is less explicit but clearly stressed that the scope of the EU’s exclusive CCP power related to FDI,<sup>120</sup> and admonished the Commission that the future broad investment policy covering all kinds of investment should be further elaborated “in full respect of the respective competences of the Union and its Member States as defined by the

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<sup>114</sup> Communication, COM(2010) 343 final 4, *supra* note 18, 2-4.

<sup>115</sup> *Ibid.*, 8.

<sup>116</sup> Commission Proposal of 21 July 2012, COM (2012) 335, *supra* note 19, 3.

<sup>117</sup> *Ibid.*

<sup>118</sup> Lisbon Treaty judgment, German Constitutional Court, 2 BvE 2/08, 30 June 2009, para. 379; available at [http://www.bundesverfassungsgericht.de/entscheidungen/es20090630\\_2bve000208en.html](http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html).

<sup>119</sup> Council Conclusions, 3041<sup>st</sup> Foreign Affairs Council Meeting, *supra* note 20.

<sup>120</sup> *Ibid.*, para. 2 (“RECOGNIZING the importance of foreign direct investment within the scope of the EU exclusive competence for the common commercial policy under Articles 3(1)(e) and 207 of the Treaty on the Functioning of the European Union;”).

Treaties.”<sup>121</sup> A more explicit Council position can be found in its negotiation directives to the Commission regarding Canada, India and Singapore in which it requests the Commission to aim at including “into the investment protection chapter of the agreement areas of mixed competence, such as portfolio investment, [...]”<sup>122</sup>

While these conflicting interpretations of the scope of the EU’s are easily comprehensible from the perspective of the respective EU organ’s institutional interests, the proper interpretation remains a difficult issue that has also received much academic attention.<sup>123</sup> The problem of the proper interpretation of the material scope of the EU’s investment power is exacerbated by the lack of any meaningful drafting history of the Lisbon Treaty (or for that matter of the identically worded Constitution Treaty).

A limiting interpretation is clearly supported by the wording of the TFEU. The ordinary meaning of “foreign direct investment”, as used in Articles 206 and 207 TFEU, comprises investment to the exclusion of portfolio investment. While the precise distinction and delimitation between FDI and portfolio may be difficult, a number of internationally used reference points have been made available by the OECD,<sup>124</sup> the IMF,<sup>125</sup> and also the EU has adopted secondary legislation on point.<sup>126</sup>

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<sup>121</sup> *Ibid.*, para. 7 (“ACKNOWLEDGING the importance of a comprehensive approach to shaping the future EU international investment policy that does not discriminate between different types of investors and their investments, SUPPORTS the definition of a broad scope for the new EU policy in this field as suggested by the Commission, to be further elaborated in full respect of the respective competences of the Union and its Member States as defined by the Treaties;”). See also the final para. 19 of the Council conclusions (“LOOKS forward to the Commission developing further initiatives as well as to working with the Commission and the European Parliament, through good cooperation and in full respect of the attribution of competences defined by the Treaties, to set up a comprehensive European international investment policy.”).

<sup>122</sup> Council Negotiating Directives (Canada, India and Singapore), *supra* note 26.

<sup>123</sup> See the debate in M. Bungenberg, J. Griebel & S. Hindelang (eds.), *European Yearbook of International Economic Law, Special Issue: International Investment Law and EU Law* (2011); M. Bungenberg, A. Reinisch and Ch. Tietje (eds.), *EU and Investment Agreements. Open Questions and Remaining Challenges* (2013); as well as M. Burgstaller, “Vertical Allocation of Competences for Investment Treaties in the European Union”, in J. Nakagawa (ed.), *Multilateralism and Regionalism in Global Economic Governance – Trade, Investment and Finance* (2011) 125-138; M. Bungenberg, “Going Global? The EU Common Commercial Policy After Lisbon”, in C. Hermann and J.P. Terhechte (eds.), *European Yearbook of International Economic Law* (2010) 123-151; A. Dimopoulos, *EU Foreign Investment Law* (2011); A. Dimopoulos, “The Common Commercial Policy after Lisbon: Establishing Parallelism between Internal and External Economic Relations?” *Croatian Yearbook of European Law and Policy* 4 (2008) 101-131; Th. Eilmansberger, “Bilateral Investment Treaties and EU Law”, 46 *Common Market Law Review* (2009) 383-429; Ch. Hermann, “Die Zukunft der mitgliedstaatlichen Investitionspolitik nach dem Vertrag von Lissabon”, 77 *Europäische Zeitschrift für Wirtschaftsrecht* (2010) 207-212; M. Krajewski, “External Trade Law and the Constitution Treaty: Towards a Federal and More Democratic Common Commercial Policy?”, 42 *Common Market Law Review* (2005) 91-127; P. J. Kujper, “Foreign Direct Investment: The First Test of the Lisbon Improvements in the Domain of Trade Polity”, 37 *Legal Issues of Economic Integration* (2010) 261; F. Ortino and P. Eeckhout, “Towards and EU Policy on Foreign Direct Investment”, in A. Biondi et al. (eds.), *EU Law After Lisbon* (2011) 312; W. Shan and S. Zhang, “The Treaty of Lisbon: Half Way toward a Common Investment Policy”, 21 *European Journal of International Law* (2010) 1049; Ch. Tietje, “Die Außenwirtschaftsverfassung der EU nach dem Vertrag von Lissabon”, *Beiträge zum Transnationalen Wirtschaftsrecht* No. 83 (2009). See also the references in note 6.

<sup>124</sup> OECD Benchmark Definition of Foreign Direct Investment, 4<sup>th</sup> edition, April 2008, para. 11, available at <http://www.oecd.org/dataoecd/26/50/40193734.pdf>. (“11. Direct investment is a category of cross-border investment made by a resident in one economy (the *direct investor*) with the objective of establishing a lasting interest in an enterprise (the *direct investment enterprise*) that is resident in an economy other than that of the direct investor. The motivation of the direct investor is a strategic long-term relationship with the direct investment enterprise to ensure a significant degree of influence by the direct investor in the management of the direct investment enterprise. The “lasting interest” is evidenced when the direct investor owns at least 10% of the

*Prima facie*, the Commission position is certainly more difficult to defend. Why should the new CCP power encompass portfolio investment when only FDI is explicitly mentioned? Indeed, recognizing this textual obstacle the Commission suggests seeking an implied competence and considers that such an implied external power results from the express internal power of the EU to regulate the free movement of capital pursuant to Article 64 TFEU.<sup>127</sup> However, a closer look at the established EU doctrine of implied powers shows that the expansive interpretation given by the ECJ<sup>128</sup> and codified in the TFEU<sup>129</sup> is likely to be continued by the CJEU. In the field of investment this would make it probable that, if called to rule on such issue, the Court would consider also portfolio investment that can be regulated on the basis of Article 63<sup>130</sup> and 64 TFEU to be covered by the EU's implied external powers.

The question is likely to remain a theoretical problem since in practice the Council will not consent to a broad investment agreement suggested by the Commission without Member

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voting power of the direct investment enterprise. Direct investment may also allow the direct investor to gain access to the economy of the direct investment enterprise which it might otherwise be unable to do. The objectives of direct investment are different from those of portfolio investment whereby investors do not generally expect to influence the management of the enterprise.”).

<sup>125</sup> International Monetary Fund, *Balance of Payments Manual*, 5<sup>th</sup> edition, 1993, para. 362, available at <http://www.imf.org/external/np/sta/bop/BOPman.pdf>. (“362. Reflecting the difference noted previously, a direct investment enterprise is defined in this *Manual* as an incorporated or unincorporated enterprise in which a direct investor, who is resident in another economy, owns 10 percent or more of the ordinary shares or voting power (for an incorporated enterprise) or the equivalent (for an unincorporated enterprise). Direct investment enterprises comprise those entities that are subsidiaries (a nonresident investor owns more than 50 percent), associates (an investor own 50 percent or less) and branches (wholly or jointly owned unincorporated enterprises) either directly or indirectly owned by the direct investor. [...]”).

<sup>126</sup> Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (1988) OJ L 178/5 (“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.”).

<sup>127</sup> Article 64(2) TFEU (“Whilst endeavouring to achieve the objective of free movement of capital between Member States and third countries to the greatest extent possible and without prejudice to the other Chapters of the Treaties, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt the measures on the movement of capital to or from third countries involving direct investment – including investment in real estate – establishment, the provision of financial services or the admission of securities to capital markets.”).

<sup>128</sup> See the so-called *ERTA Case*, Case 22/70 *Commission v. Council* [1971] ECR 263 in which the ECJ affirmed the implied powers doctrine by stating that the authority to enter into international agreements “arises not only from an express conferment by the Treaty but may equally flow implicitly from other provisions of the Treaty, from the act of accession and from measures adopted within the framework of those provisions, by the Community institutions.”; see also Opinion 2/91, *ILO Convention No. 170* [1993] ECR I-1061 (“Authority to enter into international commitments may not only arise from an express attribution by the Treaty, but may also flow implicitly from its provisions [...] whenever Community law created for the institutions of the Community powers within its internal system for the purpose of attaining a specific objective, the Community had authority to enter into the international commitments necessary for the attainment of that objective even in the absence of an express provision in that connection.”)

<sup>129</sup> Article 216(1) TFEU (“The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union’s policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.”)

<sup>130</sup> Article 64(2) TFEU (“Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.”).

States participation. Thus, the intended broad scope of investment protection<sup>131</sup> will require close cooperation between the Commission and the Member States.

### ***B. Should future EU IIAs protect all forms of investments?***

Independent from the question of the allocation of treaty-making power for FDI “plus/minus portfolio investment” is the policy question whether future EU or mixed agreements covering investment should broadly cover all forms of investment or be more selective. This question is linked to a debate often addressed by critics of the current investment protection system who wish to differentiate between “useful”, “genuine”, “legitimate” investment that should be attracted by special host state protection and unwelcome forms of investment. This debate is related to the development impact discussion which led many capital importing countries to adopt admission requirements in order to screen useful investments and to disallow unwelcome investments.<sup>132</sup> A similar effect was intended by so-called performance requirements; however, due to the fact that most IIAs and in particular trade treaties consider performance requirements to be distortive of competition they are generally less and less used.<sup>133</sup>

Today, such concerns have been taken up by the EU Parliament which has espoused calls for limiting investment protection to “non-speculative” investments. However, uncertainty stems from the fact that the Parliament has expressly called for the exclusion of “speculative forms of investment”.<sup>134</sup> In practice, it would appear difficult to distinguish between “speculative” and “non-speculative” portfolio (or even direct) investment. Neither the Parliament nor any other EU institution has offered any precise definition of “non-speculative” investments that should enjoy future IIA protection, though Parliament specifically requested Commission to provide a clear definition of what kind of the investments should be protected.<sup>135</sup> In its reaction, the Commission pointed towards the difficulty of such a distinction and stressed that “speculative” investment should not be equated with portfolio investment.<sup>136</sup> It also suggested that speculative forms of investment would not be protected by future investment agreements because such agreements regularly do not protect “ordinary commercial transactions” and by extension not “short term investments”.<sup>137</sup>

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<sup>131</sup> See Communication, COM(2010) 343 final 4, *supra* note 18, 2-4; see also The Council Negotiating Directives (Canada, India and Singapore), *supra* note 26, under “Scope”.

<sup>132</sup> CITE LIT ##.

<sup>133</sup> CITE LIT ##.

<sup>134</sup> See Parliament Resolution, *supra* note 21, para. 11 (“Asks the Commission to provide a clear definition of the investments to be protected, including both FDI and portfolio investment; considers, however, that speculative forms of investment, as defined by the Commission, shall not be protected; insists that where intellectual property rights are included in the scope of the investment agreement, including these agreements where draft mandates have already been proposed, the provisions should avoid negatively impacting the production of generic medicines and must respect the TRIPS exceptions for public health;”).

<sup>135</sup> *Ibid.*

<sup>136</sup> European Commission, Follow up to the European Parliament Resolution on the future European international investment policy, adopted by the Commission on 5 July 2011, *supra* note 23, 3 (“Speculation has never been regarded as being synonymous to portfolio investment.”).

<sup>137</sup> *Ibid.*, 2 *et seq.* (“[T]here would appear to be a misunderstanding that speculative forms of investment would necessarily fall within the scope of protection of any future agreement, or that such investments are currently protected under existing BITs. The *raison d'être* of the special protection and guarantees included in BITs is founded on the nature of the investment transaction as one which is clearly different from ordinary commercial transactions, implying the contribution and commitment within the host state of substantial resources for the longer term. BITs distinguish between investment and ordinary commercial transactions for the purposes of

It is true that investment tribunals, both ICSID and non-ICSID panels, have developed techniques to distinguish between “investments” and “ordinary commercial transactions” with the effect that the latter would not fall under the protection of investment tribunals. Through the precise limitation may be difficult, tribunals have consistently held that purely commercial transactions such as sales contracts or the acquisition of “receivables” from a private company do not qualify as investments.<sup>138</sup>

However, “ordinary commercial transactions” often are far from speculative “transactions”, but rather relate to the payment for goods or services. Thus, the lack of protection for “ordinary commercial transactions” does not imply that “short term investments” or even “speculative” investments would be automatically excluded as a result of the established jurisprudence of investment tribunals to exclude “ordinary commercial transactions” from the notion of “investments”.

In the practice of investment protection, similar concerns about “unwelcome” investments have been addressed in different ways. One approach of distinguishing between welcome and unwelcome types of investment can be found in the discussion of an implied “investment” notion under the ICSID Convention which clearly goes beyond the mere differentiation between “investments” and “ordinary commercial transactions”.<sup>139</sup> ICSID jurisprudence has developed a test concerning the jurisdictional requirement of an “investment” pursuant to Article 25 ICSID Convention and given different weight, in particular, to the notion of a contribution to the host state development.<sup>140</sup> Since the *Salini* case, a certain contribution to the host state development figures prominently in ICSID case-law next to a certain duration, risk participation and a certain total value contribution when it comes to define the unwritten jurisdictional requirement of an “investment”.<sup>141</sup>

Similar to the non-written contribution to the host state development element, the non-speculative character of an investment could be regarded as a jurisdictional requirement in future EU IIAs – one that may even be expressly laid down in such treaties. An explicit inscription of such a requirement would certainly avoid problems along the line of the long-standing ICSID controversy whether the “contribution”-requirement is an intended part of the 25 notion of investments.<sup>142</sup>

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protecting *established* investors within the host state. [...] As far as the Commission is aware, up to now no tribunal has ever decided upon a dispute arising out of a short term investment in the capital market of the host state.”).

<sup>138</sup> See, e.g., *Global Trading Resources Corp. and Globex International, Inc. v. Ukraine*, ICSID Case No. ARB/09/11, Award (Dec. 1, 2010), para. 56 (“[P]urchase and sale contracts entered into by the Claimants were pure commercial transactions and therefore cannot qualify as an investment for the purposes of Article 25 of the Convention.”); *Alps Finance v. Slovak Republic*, UNCITRAL, Award, 5 March 2011, considering that a “mere one-off sale transaction” would not qualify as an investment.

<sup>139</sup> See *supra* text at note 136.

<sup>140</sup> See C. Schreuer, L. Malintoppi, A. Reinisch, A. Sinclair, *The ICSID Convention: A Commentary* (2<sup>nd</sup> ed., 2009) 128 *et seq.*

<sup>141</sup> See *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, para. 52 (“The doctrine generally considers that investment infers: contributions, a certain duration of performance of the contract and a participation in the risks of the transaction [...]. In reading the Convention’s preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition.”).

<sup>142</sup> While the annulment committee in *Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, (Nov. 1, 2006), as well as the sole arbitrator in *Malaysian Historical Salvors, SDN, BHD v. Malaysia*, ICSID Case No. ARB/05/10, Award on Jurisdiction (May 17, 2007), regarded the lack of “contribution” crucial for denying jurisdiction, the tribunal in

However, as with the opaque notion of the “contribution” to the host state development, there remains the problem of the proper identification of non-speculative investments. ICSID cases that have relied on the need to demonstrate a contribution to the host state development have often taken rather subjective concepts when deciding that the services of a law firm or the salvaging operations for historical ships do not contribute to such development.<sup>143</sup> While the underlying rationale may have been a crude preference for green-field FDI, there is no clear explanation why the provision of legal services or the development of aqua-touristic sites or museums should not contribute to the development of host states.

Another technique to address concerns about “illegitimate” investments is the limitation of investment protection to investment “in accordance with the law of the host state.”<sup>144</sup> A number of IIAs expressly contain such clauses and various investment tribunals have held that they lacked jurisdiction over claims concerning investments not made “in accordance with the law of the host state.”<sup>145</sup> For instance, already in 2005, an ICSID tribunal in *Salini v. Morocco*<sup>146</sup> had found that such a BIT clause excluded from its protection investments made illegally and in 2006, the tribunals in *Inceysa v. El Salvador*<sup>147</sup> and *Fraport v. Philippines*<sup>148</sup> reiterated this view and denied their jurisdiction on the basis of such clauses because the investors had fraudulently and thus illegally procured their investment. However, such cases have introduced a considerable level of uncertainty since they have not yet been able to draw a clear line what degree of “illegality” is required to deprive investors of investment protection.<sup>149</sup> A further complication stems from recent ICSID cases that have incorporated

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*Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010, para. 111, rejected the requirement of a “contribution to the host States development.” (“[...] while the preamble refers to the “need for international cooperation for economic development,” it would be excessive to attribute to this reference a meaning and function that is not obviously apparent from its wording. In the Tribunal’s opinion, while the economic development of a host State is one of the proclaimed objectives of the ICSID Convention, this objective is not in and of itself an independent criterion for the definition of an investment.”).

<sup>143</sup> See *Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, (Nov. 1, 2006), and *Malaysian Historical Salvors, SDN, BHD v. Malaysia*, ICSID Case No. ARB/05/10, Award on Jurisdiction (May 17, 2007).

<sup>144</sup> See A. Carlevaris, “The Conformity of Investments with the Law of the Host State and the Jurisdiction of International Tribunals”, 9 *The Journal of World Investment and Trade* (2008) 35-##; Ch. Knahr, “Investments “in accordance with host state law””, in: A. Reinisch/Ch. Knahr (eds.), *International Investment Law in Context* (2008) 27-42.

<sup>145</sup> See e.g. Article 10 Germany-Ghana BIT (1995), signed 24 February 1995, entered into force 23 November 1998 (“This Treaty shall also apply to investments made prior to its entry into force by nationals or companies of either Contracting Party in the territory of the other Contracting Party consistent with the latter’s legislation.”) In case based on this BIT, the tribunal held that the investment must have been in accordance with host state law at the *initiation* of an investment, i.e. when it is “made”; otherwise it would lack jurisdiction. See *Gustav F W Hamster GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award (June 18, 2010), para. 127.

<sup>146</sup> *Salini Construttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, para. 46.

<sup>147</sup> *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006, para. 190.

<sup>148</sup> *Fraport AG Frankfurt Airport Services Worldwide v. Philippines*, ICSID Case No. ARB/03/25, Award, 16 August 2007. See, however, the annulment decision ##.

<sup>149</sup> See, however, *Desert Line Projects LLC v. Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008, para. 106, in which the tribunal suggested that only material violations should have the effect of depriving investors of the protection by an investment tribunal. (“As far as concerns the issue of the certificate, the threshold inquiry is whether Article 1(1) corresponds to mere formalism or to some material objective. The Arbitral Tribunal has no hesitation in opting for the second alternative. A purely formal requirement would by definition advance no real interest of either signatory State; to the contrary, it would constitute an artificial trap



the “in accordance with the law of the host state”-requirement into the general notion of “investment”<sup>150</sup> pursuant to Article 25 ICSID Convention.<sup>151</sup>

Similarly, practical problems are likely to arise should the EU adopt such plans to carve out “speculative” investments from the broad and all-encompassing investment definition. The uncertainty surrounding the proper notion of “investment” was clearly damaging for ICSID and may in the long run deter investors from using ICSID, relying on UNCITRAL<sup>152</sup> or other investment arbitration rules instead which do not have such a requirement. In a similar way, uncertainty about the exact scope of protected investment could be damaging for future EU IIAs because it might insert a considerable degree of unpredictability as to the jurisdictional threshold to be overcome in order to hear a dispute on the merits.

### *C. The integration of broader, non-economic concerns into future EU IIAs*

The emergence of effective investment protection since the late 1990s primarily through the availability of effective ISDS has led to a growing uneasiness among many host states, including some EU Member States, fearing that too effective investment protection may become too costly and ultimately deter from adopting legitimate policy measures.<sup>153</sup> This true or perceived danger of a so-called regulatory chill<sup>154</sup> has led to outright denunciation of the current system<sup>155</sup> and (even in OECD countries) to attempts to moderate investment protection by balancing investor concerns with governmental interests.<sup>156</sup>

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depriving investors of the very protection the BIT was intended to provide. [...]”). See also A. Reinisch, “From Novel Personal Jurisdiction Issues to Considerable Substance on Fair and Equitable Treatment—ICSID Arbitration in 2008”, in: *The Global Community. Yearbook of International Law and Jurisprudence 2009* (2010) 749-770.

<sup>150</sup> See *supra* text at note 140.

<sup>151</sup> In *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award (April 15, 2009), para. 114, the tribunal suggested to take into account, in addition to the *Salini* criteria “assets invested in accordance with the laws of the host State” as well as “assets invested *bona fide*.” This view was confirmed by the tribunal in *Gustav F W Hamster GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award (June 18, 2010), para. 123.

<sup>152</sup> See *White Industries Australia Limited v. India*, UNCITRAL, Final Award, 30 November 2011, para. ## (“The present case, however, is not subject to the ICSID Convention. Consequently, the so-called *Salini Test* and [...] are simply not applicable here.”). One must be aware, however, that there are recent UNCITRAL cases like *Alps Finance v. Slovak Republic*, UNCITRAL, Award, 5 March 2011, which have expressly required the *Salini* criteria in order to qualify an investment as protected investment held that a “mere one-off sale transaction” would not qualify as an investment.

<sup>153</sup> See G. Van Harten, *Investment Treaty Arbitration and Public Law* (2007). For a more nuanced view, see the contributions in M. Waibel et al. (eds.), *The Backlash Against Investment Arbitration: Perceptions and Reality* (2010).

<sup>154</sup> See St. Woolcock, “The EU Approach to International Investment Policy after the Lisbon Treaty”, Study for the EP Committee on International Trade 2010, 46.

<sup>155</sup> In 2007, Bolivia was the first State to denounce the ICSID Convention, followed by Ecuador in 2009 and, most recently, by Venezuela in January 2012. The ICSID Convention regulates the withdrawal of States Parties in Articles 71 and 72. See Ch. Schreuer, “Denunciation of the ICSID Convention and Consent to Arbitration”, in M. Waibel et al. (eds.), *The Backlash against Investment Arbitration: Perceptions and Reality* 353-368 (2010); O. M. Garibaldi, “On the Denunciation of the ICSID Convention”, in Ch. Binder, U. Kriebaum, A. Reinisch, S. Wittich (eds.), *International Investment Law for the 21<sup>st</sup> Century* 251 (2009); K. Rastegar, “Denouncing ICSID”, in *Ibid.*, 278.

<sup>156</sup> Cf. the attempts of the US and Canada to draft more balanced expropriation provisions in their 2004 Model BITs; see *supra* notes **Error! Bookmark not defined.** and **Error! Bookmark not defined.**. See also the Norwegian Draft Model BIT 2007, available at [http://www.pca-cpa.org/showpage.asp?pag\\_id=1391](http://www.pca-cpa.org/showpage.asp?pag_id=1391), which included an express provision on the “right to regulate” (Draft Article [12]: “Nothing in this Agreement shall be

These anxieties have also been picked up by the EU institutions. In its 2010 Communication, the Commission stated with regard to the potential breadth of indirect expropriation that “[a] clear formulation of the balance between the different interests at stake, such as the protection of investors against unlawful expropriation or the right of each Party to regulate in the public interest, needs to be ensured.”<sup>157</sup> It further stated that “Investment agreements should be consistent with the other policies of the Union and its Member States, including policies on the protection of the environment, decent work, health and safety at work, consumer protection, cultural diversity, development policy and competition policy.”<sup>158</sup> These concerns are shared in principle by the Council, admonishing in its Negotiating Directives with Canada, India, and Singapore the need to guarantee an appropriate regulatory space for the EU and its Member States by cautioning that an EU investment agreement “shall be without prejudice to the right of the EU and the Member States to adopt and enforce, in accordance with their respective competences, measures necessary to pursue legitimate public policy objectives such as social, environmental, security, public health and safety in a non-discriminatory manner.”<sup>159</sup>

Such language is reminiscent of the police powers doctrine,<sup>160</sup> as endorsed by some investment tribunals<sup>161</sup> and found in the explanatory parts of US<sup>162</sup> and Canadian<sup>163</sup> Model BITs. It will leave considerable leeway for treaty negotiators to draft the respective treatment standards and possible exception clauses. These concerns were even reinforced by the European Parliament which expressed its irritation with the regulatory chill of investment arbitration<sup>164</sup> and specifically called upon the Commission “to include in all future agreements specific clauses laying down the right of parties to the agreement to regulate, inter alia, in the

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construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Agreement that it considers appropriate to ensure that investment activity is undertaken in a manner sensitive to health, safety or environmental concerns.”)

<sup>157</sup> Commission Communication, COM(2010) 343 final 4, *supra* note 18, 9.

<sup>158</sup> *Ibid.*

<sup>159</sup> The Council Negotiating Directives (Canada, India and Singapore), *supra* note 26.

<sup>160</sup> See Restatement (Third) of the Foreign Relations Law of the United States, § 712 Comment g, at 201 (“[...] action of the kind that is commonly accepted as within the police power of states.”).

<sup>161</sup> See, e.g., *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ARB(AF)/00/2, Award, 29 May 2003, para. 119 (“The principle that the State’s exercise of its sovereign powers within the framework of its police power may cause economic damage to those subject to its powers as administrator without entitling them to any compensation whatsoever is undisputable.”); *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL Partial Award, 17 March 2006, para. 262 (“[...] the principle that a State does not commit an expropriation and is thus not liable to pay compensation to a dispossessed alien investor when it adopts general regulations that are “commonly accepted as within the police power of States” forms part of customary international law today.”)

<sup>162</sup> See Annex B on Expropriation 4(b) US Model BIT 2004 (“Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.”)

<sup>163</sup> See Annex B.13(1) on Expropriation Canadian Model FIPA 2004 (“Except in rare circumstances, such as when a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation.”)

<sup>164</sup> Parliament Resolution, *supra* note 21, para. G (“[...] a number of problems became clear because of the use of vague language in agreements being left open for interpretation, particularly concerning the possibility of conflict between private interests and the regulatory tasks of public authorities, for example in cases where the adoption of legitimate legislation led to a state being condemned by international arbitrators for a breach of the principle of ‘fair and equitable treatment.’”).

areas of protection of national security, the environment, public health, workers' and consumers' rights, industrial policy and cultural diversity.”<sup>165</sup> In its response, the Commission pointed to the EU's practice to include a general right to regulate in its FTAs and that it intends to continue this practice in its negotiations.<sup>166</sup>

While finding the proper balance between investment and non-investment interests will indeed be one of the core issues for future EU IIAs,<sup>167</sup> it is questionable whether the incorporation of standard clauses preserving the contracting states' right to regulate which accomplish that goal. At present there is not yet sufficient practice to determine how investment tribunals would interpret such general clauses in order to assess whether the intended effect can be achieved.

#### ***D. Consequences of the shift of treaty-making powers for existing Member State BITs with third parties***

With the intensifying discussion over the content of future EU IIAs, the initial debate about the future of existing Member State BITs “after Lisbon” has receded.<sup>168</sup> Nevertheless, what was clearly recognized as a crucial issue of legal certainty early on remains an important and still unsolved problem. The problem's core is easy to describe. If and to the extent that the EU has acquired an exclusive competence over investment matters, such shift of powers leads to a corresponding loss of powers on the part of the Member States.

As a consequence, existing Member State BITs become “unconstitutional” under EU law. Of course, this does not automatically affect their validity under international law but from the perspective of EU law the exclusive CCP power implies that only the EU can lawfully enter into and be a partner to treaties with third countries addressing subject-matters covered by the CCP.

Since this “loss” of Member State powers took effect with the entry-into-force of the Lisbon Treaty on 1 December 2009, a quick pragmatic solution had to be found. In fact, EU law permits the Union to authorize the Member States to act in fields of its own exclusive powers.<sup>169</sup> Such a re-transfer of powers was envisaged early on in the July 2010 Commission proposal for a so-called grandfathering regulation<sup>170</sup> which would authorize Member State BITs through a grant back of competences. Reportedly, the Commission had already

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<sup>165</sup> Parliament Resolution, *supra* note 21, para. 35.

<sup>166</sup> European Commission, Follow up to the European Parliament Resolution on the future European international investment policy, adopted by the Commission on 5 July 2011, *supra* note 23, 5 (“[T]he inclusion [...] of specific clauses laying down the right [...] to regulate (*inter alia*, in the areas of protection of national security, the environment, public health, workers' and consumers' rights, industrial policy and cultural diversity) is largely consistent with the current practice of the EU, which includes a similar statement in the general part of all its Free Trade Agreements (FTAs) in order to cover not only investment, but all other disciplines as well. To the extent that investment protection Chapters will be part of a FTA, this general affirmation will also apply to them, and will be replicated in any investment protection agreement.”)

<sup>167</sup> See L. Markert, “The Crucial Question of Future Investment Treaties: Balancing Investors' Rights and Regulatory Interests of Host States”, in M. Bungenberg, J. Griebel & S. Hindelang (eds.), *European Yearbook of International Economic Law, Special Issue: International Investment Law and EU Law* (2011) 145-171; J. Kleinheisterkamp, “European Policy Space in International Investment Law”, *ICSID Review – FILJ* (## forthcoming ##) ##.

<sup>168</sup> CITE relevant LIT ## [partly from note 6].

<sup>169</sup> CITE LIT ##.

<sup>170</sup> Commission Proposal “grandfathering regulation”, COM (2010) 344, *supra* note 17.

informally signalled to its Member States that it would consent to their continued negotiation and conclusion of BITs with third states.<sup>171</sup>

The Draft Regulation of the European Parliament and the Council establishing transitional arrangements for bilateral investment treaties between Member States and third countries<sup>172</sup> which was made public by the Commission in summer 2010 basically lays down “the terms, conditions and the procedure under which Member States are authorised to maintain in force, amend or conclude bilateral agreements with third countries relating to investment.”<sup>173</sup> Such authorization should be given as a matter of course with regard to duly notified Member State BITs as long as they do not conflict with EU law, overlap with EU treaties or obstruct the EU’s investment policy.<sup>174</sup>

However, the Proposal did not meet unanimous approval by the Member States because it included rather stringent Commission screening powers of existing BITs as well IIAs to be negotiated and concluded by Member States in the future.<sup>175</sup> Member States apparently fear the loss of control and have a sense of being more and more at the mercy of the Commission with regard to their investment policies.

This Member State reluctance towards the draft grandfathering regulation may be one of the reasons why it has remained only a proposal since summer 2010. As of December 2012, the draft proposal still has not yet been adopted. However, this is not only a timing problem but also one of defective legal certainty. As long as there is no explicit legal basis existing Member State BITs are no longer in conformity with EU law. Although the Commission is currently unlikely to institute legal proceedings against Member States, the fact that it did pursue such a course of action with regard to comparatively minor EU law inconsistencies in the cases concerning the transfer provisions of Austrian, Finish and Swedish BITs<sup>176</sup> has alerted Member States that legal action is not excluded.

### ***E. The impact on intra-EU-BITs***

An issue related to the question of the effect of the transfer of IIA powers on existing Member State BITs with third countries is the question whether the new investment competence of the EU implies that BITs concluded among Member States, so-called intra-EU-BITs, have become incompatible with EU law and whether such potential incompatibility implies their automatic termination or requires that they be terminated by the Member States.<sup>177</sup>

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<sup>171</sup> CITE ## .

<sup>172</sup> Commission Proposal of 7 July 2010 for a Regulation of the European Parliament and the Council establishing transitional arrangements for bilateral investment treaties between Member States and third countries, COM(2010) 344; available at [http://trade.ec.europa.eu/doclib/docs/2010/july/tradoc\\_146308.pdf](http://trade.ec.europa.eu/doclib/docs/2010/july/tradoc_146308.pdf).

<sup>173</sup> Article 1 Commission Proposal “grandfathering regulation”, COM (2010) 344, *supra* note 17.

<sup>174</sup> See Articles 5 and 6 Commission Proposal “grandfathering regulation”, COM (2010) 344, *supra* note 17, with regard to Member State BITs in force.

<sup>175</sup> See in particular, Articles 5 and 6 as well as 11 and 12 of the draft regulation, Commission Proposal “grandfathering regulation”, COM (2010) 344, *supra* note 17.

<sup>176</sup> See *supra* text at note 75.

<sup>177</sup> See L. Aroulai and W. Ben Hamida, “La Protection des Investissements par le Droit Primaire – Droit Conventionnel des Investissements et Droit Primaire Communautaire: Étude compare des régimes et des approches”, in: Catherine Kessedjian & Charles Leben (eds.), *Le droit européen et l’investissement* (2009) 69-95; M. Burgstaller, “The Future of Bilateral Investment Treaties of EU Member States”, in: M. Bungenberg/J. Griebel/S. Hindelang (eds.), *Internationaler Investitionsschutz und Europarecht* (2010) 113-138; S. Hindelang, “Member State BITs-There’s Still (Some) Life in the Old Dog Yet”, Karl Savant (ed.), *Yearbook Int’l Investment Law & Policy* 2010/2011 (Oxford University Press, 2011) 217; M. Potesta, “Bilateral Investment

In the course of a number of investment arbitrations, some Member States (in their role as respondents) have in fact asserted that the incompatibility between intra-EU-BITs and EU law would lead to the formers' automatic termination.<sup>178</sup> The Commission has been slightly more cautious by asserting that such incompatibility would not lead to an automatic termination, but rather require the Member States to terminate their intra-EU-BITs.<sup>179</sup>

Investment tribunals have generally rejected the claim that intra-EU-BITs and EU law would be incompatible as matter of treaty law. As a result they have usually upheld their jurisdiction based on the continued validity of intra-EU-BITs. The *Eastern Sugar* tribunal rejected the argument that the alleged incompatibility would have led to an automatic treaty termination pursuant to Article 59 Vienna Convention on the Law of Treaties (VCLT),<sup>180</sup> holding that the Czech Republic/Netherlands BIT and EU law did "not cover the same precise subject-matter."<sup>181</sup> Similarly, the tribunal in *Eureko v. Slovakia*<sup>182</sup> dismissed the "intra-EU jurisdictional objection", holding that the BIT provisions have "not been displaced by EU law" as a result of Article 59 VCLT,<sup>183</sup> nor have they been "disapplied by EU law" as a result of Article 30 VCLT.<sup>184</sup>

The issue may of course be largely a question of perspective. From an EU law perspective, the incompatibility may stem, for instance, from the fact that intra-EU-BITs grant nationals of specific EU Member States procedural rights like ISDS that would not be available to other EU nationals and thus lead to discrimination.<sup>185</sup> Under accepted EU principles like supremacy/primacy it would clearly follow that any inconsistency between EU law and national law must lead to a "disapplication" of national law.<sup>186</sup> In the opinion of the

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Treaties and the European Union recent Developments in Arbitration and before the ECJ", 8 *The Law and Practice of International Courts and Tribunals* (2009) 225-245; A. Reinisch, "Articles 30 and 59 of the Vienna Convention on the Law of Treaties in Action – The Decisions on Jurisdiction in the *Eastern Sugar* and *Eureko* Investment Arbitrations", 39(2) *Legal Issues of Economic Integration* (2012) 157-177; Ch. Söderlund, "Intra-EU BIT Investment Protection and the EC Treaty", 24 *Journal of International Arbitration* (2007) 455-468; Ch. Tietje, "Bilaterale Investitionsschutzverträge zwischen EU-Mitgliedstaaten (Intra-EU-BITs) als Herausforderung im Mehrebenensystem des Rechts", 2 *Kölner Schriften zum Wirtschaftsrecht* (2011) 128-135; R. Volterra, "Le Point de Vue des États Tiers", in: Catherine Kessedjian & Charles Leben (eds.), *Le droit européen et l'investissement* (2009) 41-49; H. Wehland, "Intra-EU Investment Agreements and Arbitration: Is European Community Law an Obstacle?", 58 *International and Comparative Law Quarterly* (2009), 297-320; M. Wierzbowski/A. Gubrynowicz, "Conflict of Norms Stemming from Intra-EU BITs and EU Legal Obligations: Some Remarks on Possible Solutions", in: C. Binder/U. Kriebaum/A. Reinisch/S. Wittich (eds.), *International Investment Law for the 21<sup>st</sup> Century. Essays in Honour of Christoph Schreuer* (2009) 544-560.

<sup>178</sup> See e.g. the position of the Czech Republic summarized in *Eastern Sugar v. Czech Republic, Eastern Sugar BV v. Czech Republic*, 27 March 2007, SCC Case No 088/2004, Partial Award, para. 97.

<sup>179</sup> See EC Letter of January 13, 2006, quoted in *Eastern Sugar v. Czech Republic, Eastern Sugar BV v. Czech Republic*, 27 March 2007, SCC Case No 088/2004, Partial Award, para. 119; European Commission Observations, 7 July 2010, quoted in *Eureko BV v. The Slovak Republic*, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, para. 180.

<sup>180</sup> Vienna Convention on the Law of Treaties, 1155 UNTS 331.

<sup>181</sup> *Eastern Sugar v. Czech Republic, Eastern Sugar BV v. Czech Republic*, 27 March 2007, SCC Case No 088/2004, Partial Award, para. 160.

<sup>182</sup> *Eureko BV v. The Slovak Republic*, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010.

<sup>183</sup> *Ibid.*, para. 265.

<sup>184</sup> *Ibid.*, para. 277.

<sup>185</sup> *Ibid.*, para. 183, quoting the European Commission Observations, 7 July 2010.

<sup>186</sup> The doctrine of "supremacy" or "primacy" of EC/EU law was developed by the ECJ in the *Van Gend* Case, insisting that Community law stands for an autonomous legal order which required not only direct effect but also that – in case of conflict between a directly applicable Community law norm and a norm of the national legal order – the Community law norm would have to be applied. See Case 26/62 *Van Gend en Loos v. Nederlandse*

Commission this overriding effect also applies vis-à-vis treaties concluded by Member States.<sup>187</sup>

From the perspective of international law, any potential incompatibility between intra-EU-BITs and EU law must be assessed on the basis of treaty law rules concerning successive treaty obligations. Thus, investment tribunals have assessed such incompatibility arguments on the basis of the rules on successive treaties codified in Articles 30<sup>188</sup> and 59<sup>189</sup> VCLT.<sup>190</sup> On this basis, the fact that intra-EU-BITs may provide investors with different or more rights than EU law does not necessarily mean that these two systems are incompatible.<sup>191</sup> Even the fact that procedural rights like access to ISDS may be discriminatorily available only to some EU nationals as a result of an intra-EU-BIT does not imply that the two treaties are incompatible.<sup>192</sup>

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*Administratie der Belastingen* [1963] ECR 1 (“[...] the integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity.”).

<sup>187</sup> European Commission Observations, 7 July 2010, quoted in *Eureko BV v. The Slovak Republic*, para. 180 (“[A]s a result of the supremacy of EU law vis-à-vis pre-accession treaties between Member States, conflicts between BIT provisions and EU law cannot be resolved by interpreting and applying the relevant EU law provisions in the light of the BIT. Only the inverse approach is possible, namely interpretation of the BIT norms in the light of EU law. The foregoing has implications as regards the ability of private parties (investors) to rely on provisions of an intra-EU BIT that are in conflict with EU law. Under EU law, a private party cannot rely on provisions in an international agreement to justify a possible breach of EU law. This includes resort to judicial settlement mechanisms that conflict with the EU judicial system. Furthermore, in the EU legal system, national legislation of an EU Member State that is incompatible with EU law does not become ‘invalid’; it merely cannot be applied where it conflicts with EU law. The same applies in the Commission’s view, to existing intra-EU BITs that contain provisions that are incompatible with EU law: neither the BIT as such nor the conflicting provisions become ‘invalid’; but they cannot be applied where they conflict with EU law.”).

<sup>188</sup> Article 30 VCLT (“1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs. 2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail. 3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty. [...]”).

<sup>189</sup> Article 59(1) VCLT (“A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject matter and: (a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or (b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.”).

<sup>190</sup> See in detail A. Reinisch, “Articles 30 and 59 of the Vienna Convention on the Law of Treaties in Action – The Decisions on Jurisdiction in the *Eastern Sugar* and *Eureko* Investment Arbitrations”, 39(2) *Legal Issues of Economic Integration* (2012) 157-177.

<sup>191</sup> *Eureko BV v. The Slovak Republic*, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, para. 263 (“Nor can it be said that the provisions of the BIT are incompatible with EU law. The rights to fair and equitable treatment, to full protection and security, and to protection against expropriation at least, extend beyond the protections afforded by EU law; and there is no reason why those rights should not be fulfilled and upheld in addition to the rights protected by EU law.”).

<sup>192</sup> *Eastern Sugar v. Czech Republic*, para. 170 (“If the EU Treaty gives more rights than does the BIT, then all EU Parties, including the Netherlands and Dutch investors, may claim those rights. If the BIT gives rights to the Netherlands and to Dutch investors that it does not give to other EU countries and investors, it will be for those other countries and investors to claim their *equal rights*. But the fact that these rights are unequal does not make them incompatible.”).

In spite of, or maybe because of, the predominantly positive attitude of investment tribunals towards the continued validity of intra-EU-BITs, the Commission continues to pressure EU Member States to terminate them.<sup>193</sup>

### ***F. Compatibility of ISDS with the system of legal protection by the Court of Justice of the EU***

Also the debate concerning ISDS has shifted quite remarkably. While at first it seemed uncertain whether the EU institutions would espouse the concept of ISDS as such or rather go for the *Calvo*-inspired, Australia-US BIT approach to abandon it outright and to rely exclusively on domestic courts,<sup>194</sup> the gradual endorsement of ISDS by the Commission and the Council and, subsequently though less enthusiastically, also by the Parliament led to questions concerning the necessary adaptations to account for the fact that the EU is not a state, but rather a highly integrated supranational organization. In particular more technical issues concerning the potential accessibility of ICSID have been raised and remain unresolved hitherto.<sup>195</sup>

An issue that has received much less attention by the EU institutions is the question of the general compatibility of ISDS with the system of legal protection guaranteed by the CJEU.<sup>196</sup> Concern has been voiced that the Court of Justice may regard any “competing” dispute settlement institution as an “unconstitutional” threat to the autonomy of EU law and its own exclusive power to interpret it.<sup>197</sup>

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<sup>193</sup> CITE LIT ##.

<sup>194</sup> The Australia-United States FTA (2005) totally abolishes investor-state arbitration. While this has been a feature in North-North BITs, the Australian Government has announced that it would generally abstain from including ISDS provisions in future BITs. See Australian Government, DEP’T OF FOREIGN AFF. & TRADE, Gillard Government Trade Policy Statement: Trading Our Way to More Jobs and Prosperity 14 (12 April 2011), available at <http://www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobs-and-prosperity.html>. See also L. Nottage, “The Rise and Possible Fall of Investor-State Arbitration in Asia: A Skeptic’s View of Australia’s “Gillard Government Trade Policy Statement””, 8(5) *Transnational Dispute Management* (2011); L. E. Trakman, “Investor State Arbitration or Local Courts: Will Australia Set a New Trend?”, 46 *Journal of World Trade* (2012) 83; W. S. Dodge, “Investor-State Dispute Settlement between Developed Countries: Reflection on the Australia-United States Free Trade Agreement”, 39 *Vanderbilt Journal of Transnational Law* (2006) ##.

<sup>195</sup> See *supra* text at note 93.

<sup>196</sup> See M. Burgstaller, “Investor-State Arbitration in EU International Investment Agreements with Third States”, 39 *Legal Issues of Economic Integration* (2012) 207-221; M. Burgstaller, “Les Aspects procéduraux de l’Arbitrage – Qui est partie? Le rôle de la Commission Européenne?”, in: Catherine Kessedjian & Charles Leben (eds.), *Le droit européen et l’investissement* (2009) 123-140; J. Dutheil de la Rochère, “Quel rôle pour la Cour de Justice?”, in: Catherine Kessedjian (ed.), *Le droit européen et l’arbitrage d’investissement/European Law and Investment Arbitration* (2011) 37-45; St. Hindelang, “Der primärrechtliche Rahmen einer EU-Investitionsschutzpolitik: Zulässigkeit und Grenzen von Investor-Staat-Schiedsverfahren aufgrund künftiger EU Abkommen”, in M. Bungenberg and Ch. Herrmann (eds.), *Die Gemeinsame Handelspolitik der Europäischen Union „nach Lissabon“* (2011) 157; St. Hindelang, “Circumventing Primacy of EU Law and the CJEU’s Judicial Monopoly by Resorting to Dispute Resolution Mechanisms Provided for in Inter-se Treaties? The Case of Intra-EU Investment Arbitration”, 39 *Legal Issues of Economic Integration* (2012) 179-206; Nikos Lavranos, “Designing an International Investor-to-State Arbitration System after Opinion 1/09”, in Marc Bungenberg and Christoph Herrmann (eds.), *CCP after Lisbon, Special Issue to the EYIEL 2013* (forthcoming) ##; M. Parish, “International Courts and the European Legal Order”, 23 *European Journal of International Law* (2012) 141; St. Schill, “Luxembourg Limits: Conditions for Investor-State Dispute Settlement under Future EU Investment Agreements”, in M. Bungenberg, A. Reinisch and Ch. Tietje (eds.), *EU and Investment Agreements. Open Questions and Remaining Challenges* (2013) 37-56.

<sup>197</sup> Pursuant to Article 19(1)(2) TEU, the Court has to “ensure that in the interpretation and application of the Treaties the law is observed.”

These concerns stem from a line of ECJ cases that have vigilantly safeguarded the spheres of exclusive jurisdiction enjoyed by the Court as the sole authentic interpreter of Community, now Union law. The judicial autonomy claim is based on the EU's constituent treaty which provides not only for various forms of exclusive competence of the CJEU, but also for an explicit prohibition for the Member States to have their EU law related disputes settled by any other court or tribunal.<sup>198</sup>

This latter prohibition played an important role in the so-called *MOX Plant* case<sup>199</sup> in which the Commission successfully brought infringement proceedings against Ireland because the latter had instituted arbitral proceedings against the UK under the UN Law of the Sea Convention.<sup>200</sup> In the view of the ECJ, the law of the sea issues raised in that arbitration came within the scope of Community competence and were thus part of a dispute concerning the interpretation or application of Community law.<sup>201</sup>

Since both the *MOX Plant* case as well as Article 344 TFEU expressly refer to inter-state disputes it is unlikely that investor-state arbitration would be regarded incompatible with this form of exclusivity.<sup>202</sup> However, from a broader perspective it cannot be excluded that the CJEU might find fault in a system of ISDS regularly provided for in future EU IIAs where such investor-state arbitration tribunals may deal with questions of EU law. This could be the case if the Court followed an interpretation given to the nature of investment arbitration as the procedural option for private parties to enforce the international law claims of their home states.<sup>203</sup> In order to understand the background of such a possible curb on ISDS by the CJEU it is important to appreciate the Court's past case-law and position vis-à-vis its potential judicial competitors.

The first clear manifestation of such a defensive stance can be found in the Court's Advisory Opinion on the European Economic Area (EEA) Agreement<sup>204</sup> which intended to set up a parallel system of judicial protection covering both the EC and EFTA states joined in the EEA enterprise. While the ECJ found that the Community's treaty-making power in the field of an enlarged free trade agreement comprised also the power to agree on binding dispute settlement,<sup>205</sup> it considerably limited this position by holding that such a dispute settlement institution would be prevented from ruling on issues concerning the allocation of competences

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<sup>198</sup> Article 344 TFEU ("Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.").

<sup>199</sup> Case C-459/03, *Commission v. Ireland (Mox Plant)*, 30 May 2006, ECR 2006, I-4635.

<sup>200</sup> *Ireland v. United Kingdom ("MOX Plant Case")*, PCA arbitration case ##, available at [http://www.pca-cpa.org/showpage.asp?pag\\_id=1148](http://www.pca-cpa.org/showpage.asp?pag_id=1148).

<sup>201</sup> Case C-459/03, *Commission v. Ireland (Mox Plant)*, 30 May 2006, ECR 2006, I-4635, paras. 125 *et seq.*

<sup>202</sup> In the *Eureko* case, *Eureko BV v. The Slovak Republic*, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, para. 276, an investment tribunal rejected such an assertion by the respondent state holding that the *MOX Plant* ruling was "concerned with disputes between the BIT Contracting Parties, the ruling is not applicable to disputes under Article 8, which are not disputes between Contracting Parties but investor-state disputes."

<sup>203</sup> See, in general, Z. Douglas, "The Hybrid Foundations of Investment Treaty Arbitration", 74 *BYBIL* (2003) 151. See also Hindelang, "Circumventing Primacy of EU Law", *supra* note 196, 200, arguing that such a position could lead to an incompatibility of ISDS and Article 344 TFEU.

<sup>204</sup> CITE source ##

<sup>205</sup> Opinion 1/91, *Economic Area Agreement I*, 14 December 1991, ECR 1991, I-6079, para. 40 ("An international agreement providing for such a system of courts is in principle compatible with Community law. The Community's competence in the field of international relations and its capacity to conclude international agreements necessarily entails the power to submit to the decisions of a court which is created or designated by such an agreement as regards the interpretation and application of its provisions.").



between the EC and its Member States<sup>206</sup> which fell under the exclusive jurisdiction of the Court.<sup>207</sup> This attitude was confirmed by the Court's Opinion on the establishment of a European Common Aviation Area (ECAA) which equally stressed the need for an autonomous EC legal order which would prevent an international dispute settlement mechanism from rendering binding interpretations of EC law.<sup>208</sup>

More recently, in its Opinion on the *European and Community Patents Courts*<sup>209</sup> the Court of Justice reiterated its reserved position towards "foreign judges" who might rule on EU law. With regard to the envisaged patent courts that would have had exclusive jurisdiction to decide patent cases, the Court of Justice cautioned that such a system would deprive it of the possibility to make preliminary rulings on requests from Member State courts and would thus threaten the uniform interpretation and application of EU law guaranteed by the Court.<sup>210</sup> In other words, the Court of Justice appears to give increasing weight to its own role as the guardian of the true interpretation of EU law whether in direct actions or indirectly through the system of preliminary references. That role is regarded threatened by "foreign" courts which do not submit to the CJEU's ultimate interpretive power.

The implications for ISDS are uncertain. However, it cannot be excluded that the CJEU would consider investor-state arbitration incompatible with such a far-reaching interpretation of its own interpretive prerogatives. The question appears to turn on the degree to which investor-state arbitration tribunals are likely to interpret and apply EU law in the future. One such crucial area is the question of the attribution of acts or omissions causing harm to foreign investors that is relevant not only for the question who is likely to be a respondent in ISDS proceedings, but also for the ultimate responsibility. To decide such questions an investment tribunal would clearly "have to rule on the respective competences of the [Union] and the Member States as regards the matters governed by the provisions of the agreement."<sup>211</sup> It

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<sup>206</sup> *Ibid.*, para. 34 ("[...] when a dispute relating to the interpretation or application of one or more provisions of the agreement is brought before it, the EEA Court may be called upon to interpret the expression 'Contracting Party', within the meaning of Article 2(c) of the agreement, in order to determine whether, for the purposes of the provision at issue, the expression 'Contracting Party' means the Community, the Community and the Member States, or simply the Member States. Consequently, the EEA Court will have to rule on the respective competences of the Community and the Member States as regards the matters governed by the provisions of the agreement.").

<sup>207</sup> *Ibid.*, para. 35 ("[...] the jurisdiction conferred on the EEA Court under [the EEA Agreement] is likely adversely to affect the allocation of responsibilities defined in the [EC] Treaties and, hence, the autonomy of the Community legal order, respect for which must be assured by the Court of Justice [...]").

<sup>208</sup> Opinion 1/00, *European Common Aviation Area*, 18 April 2002, ECR 2002, I-3498, paras. 12-13 ("[...] the autonomy of the Community legal order [...] requires that the procedures for ensuring uniform interpretation of the rules of the ECAA Agreement and for resolving disputes will not have the effect of binding the Community and its institutions, in the exercise of their internal powers, to a particular interpretation of the rules of Community law referred to in that agreement.").

<sup>209</sup> Opinion 1/09, *European and Community Patents Courts*, CJEU, 8 March 2011, ECR 2011 (not yet reported).

<sup>210</sup> *Ibid.*, para. 89 ("[T]he envisaged agreement, by conferring on an international court which is outside the institutional and judicial framework of the European Union an exclusive jurisdiction to hear a significant number of actions brought by individuals in the field of the Community patent and to interpret and apply European Union law in that field, would deprive courts of Member States of their powers in relation to the interpretation and application of European Union law and the Court of its powers to reply, by preliminary ruling, to questions referred by those courts and, consequently, would alter the essential character of the powers which the Treaties confer in the institutions of the European Union and on the Member States and which are indispensable to the preservation of the very nature of European Union law.").

<sup>211</sup> Opinion 1/91, *Economic Area Agreement I*, 14 December 1991, ECR 1991, I-6079, para. 34, see *supra* note 206.

seems that a mechanism like the one adopted for the determination of the roles in investment arbitration for purposes of the ECT<sup>212</sup> would sufficiently safeguard the required autonomy of the EU institutions. Where such issues concerning the internal distribution of competences are insulated from the determination by ISDS, the autonomy would seem to be guaranteed. Much more problematic appear cases where investor-state arbitral tribunals may be called upon to directly apply EU law in the course of assessing the claims of an investor. That is particularly likely if future EU IIAs contain applicable law clauses<sup>213</sup> which would not be limited to the treaty standards and possibly customary international law,<sup>214</sup> but rather encompass the law of the host state.<sup>215</sup> In such a situation investment tribunals may have to rule on EU law which could be regarded as an infringement of the exclusive power of the CJEU to interpret EU law. One possibility to remedy such a potential incompatibility of ISDS with EU law is hinted to in the *European and Community Patents Courts* Opinion where the CJEU seemed to suggest that it was the non-availability of the preliminary reference proceeding by the planned patent courts which caused the incompatibility.<sup>216</sup> One could thus presume that as long as the envisaged dispute settlement mechanism offered a possibility to allow preliminary references it should be viewed as compatible with the CJEU's claim to have the final word on the interpretation of EU law. Apart from the question whether the EU's future IIA partners would agree to such a possibility, a practical problem seems to stem from another line of CJEU jurisprudence. In the past, the Court has consistently given a rather narrow interpretation to the notion of a "tribunal" which according to Article 267 TFEU is entitled to request a preliminary ruling.<sup>217</sup> According to the CJEU's case-law, such bodies must exercise public authority on behalf of Member States and possess independent judicial tasks.<sup>218</sup> Since the *Nordsee* case,<sup>219</sup> the Court has held that commercial arbitration tribunals are a form of private and not state dispute settlement and thus do not qualify as "tribunals" entitled to request preliminary rulings. While it is not excluded to view mixed investor-state arbitration as different from purely private arbitration, it may still be difficult to see the required link to a

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<sup>212</sup> Statement by the European Communities to the Secretariat of the Energy Charter pursuant to Article 26(3)(b)(ii) of the Energy Charter Treaty, OJ 1998, L 69/115. See *supra* text at note 92.

<sup>213</sup> E. Gaillard/Y. Banifatemi, "The Meaning of "and" in Article 42(1), Second Sentence, of the Washington Convention: The Role of International Law in the ICSID Choice of Law Process", 18 ICSID Review—Foreign Investment Law Journal (2003) 375; A. R. Parra, "Applicable Substantive Law in ICSID Arbitrations Initiated under Investment Treaties", 16 ICSID Review—Foreign Investment Law Journal (2001) 20; G. Sacerdoti, "Investment Arbitration Under ICSID and UNCITRAL Rules: Prerequisites, Applicable Law, Review of Awards", 19 ICSID Review—Foreign Investment Law Journal (2004) 1.

<sup>214</sup> See e.g. Article 1131(1) NAFTA ("A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.").

<sup>215</sup> See e.g. Article 10(7) Argentina/Netherlands BIT, 20 October 1992 ("The arbitration tribunal addressed in accordance with paragraph (5) of this Article shall decide on the basis of the law of the Contracting Party which is a party to the dispute (including its rules on the conflict of law), the provisions of the present Agreement, special Agreements concluded in relation to the investment concerned as well as such rules of international law as may be applicable.").

<sup>216</sup> See *supra* note 210.

<sup>217</sup> According to Article 267(2) TFEU (ex-Article 234(2) TEC) "any court or tribunal of a Member State" may request a preliminary ruling.

<sup>218</sup> In Case 246/80 *Broekmeulen v. Huisarts Registratie Commissie* [1981] ECR 2311, the Dutch Appeals Committee for General Medicine was recognised as a 'tribunal' because it operated with the consent and cooperation of public authorities, used adversarial procedures and delivered final decisions. In addition to these characteristics, general establishment by law, permanency, compulsory jurisdiction, *inter partes* procedure, independence and applying rules of law, are seen as criteria to be evaluated when determining whether a decision-making body qualifies as a 'court or tribunal' enabled to ask for a preliminary ruling.

<sup>219</sup> Case 102/81 *Nordsee Deutsche Hochseefischerei* [1982] ECR 1095.

Member State,<sup>220</sup> though it has been suggested that one could regard treaty-based arbitration as arbitration being based on national law.<sup>221</sup> Thus, any suggestions to remedy the uncertain situation by “upgrading”<sup>222</sup> investor-state tribunals to “tribunals” entitled to make preliminary references in order to make the system of ISDS compatible with EU law remain fraught with difficulties.

## VII. Conclusions

After initial concerns about the EU’s investment policy to be carried out by the Commission, which were fuelled by the latter’s reluctance to take clear positions on a wide range of crucial issues, it now appears that, three years after the entry-into-force of the Lisbon Treaty, some contours of future EU IIAs are beginning to emerge, seemingly also still recognizable as “European”. It is to be expected that future EU IIAs will largely resemble the typical BITs concluded by its Member States, though there may be a few additions in particular in the field of ensuring sufficient regulatory space for host states and addressing some recent concerns surrounding ISDS.

However, there still remain a number of open questions: Will the EU alone be competent to conclude IIAs covering both FDI and portfolio investment? Is it possible and is it in the interest of the EU to protect only certain kinds of investment? What will happen to existing BITs and other IIAs concluded by the Member States with third parties; what with intra-EU-BITs? Will the CJEU accept a system of ISDS that may have implications on the interpretation and application of EU law? While many of these questions will have to be addressed in the current effort to shape a future EU investment policy it is likely that the final word will come from the CJEU ... and that maybe only in a few years.

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<sup>220</sup> Article 267(2) TFEU speaks of “any court or tribunal of a Member State.”

<sup>221</sup> See, e.g., Hindelang, “Circumventing Primacy of EU Law”, *supra* note 196, 179, at 202.

<sup>222</sup> One may also view that as a “downgrading” since international tribunals would thereby be equated to courts or tribunals of Member States.