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The EU on the Investment Path – *Quo Vadis* Europe? The Future of EU BITs and other Investment Agreements

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I. Introduction

Without much public debate the Treaty of Lisbon¹ 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)² 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.³ Even then it was suggested that FDI should be added to the existing external trade powers, comprising trade in goods, services and intellectual property rights along the WTO-determined enlarged trade issues after the Uruguay Round.⁴ While the extension to investment issues received some vigorous

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1. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1 of 17 December 2007.
 2. Consolidated Version of The Treaty on the Functioning of the European Union art. 15, May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU].
 3. Treaty establishing a Constitution for Europe, Dec. 16, 2004, 2004 O.J. (C 310) 1.
 4. See TERENCE P. STEWART, *THE GATT URUGUAY ROUND* (1993); JOHN KRAUS, *THE GATT NEGOTIATIONS* (1994); ERNST-ULRICH PETERSMANN, *INTERNATIONAL AND EUROPEAN TRADE AND ENVIRONMENTAL LAW AFTER THE URUGUAY ROUND* (1996); ARTHUR DUNKEL, JAGDISH BHAGWATI

rejection by high-level state negotiators,⁵ 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.⁶

& MATHIAS HIRSCH, *THE URUGUAY ROUND AND BEYOND* (1998); WORLD TRADE ORGANIZATION, *GUIDE TO THE URUGUAY ROUND AGREEMENTS* (1998); GILBERT WINHAM, *AN INTERPRETATIVE HISTORY OF THE URUGUAY ROUND NEGOTIATION* (2005); ERNEST PREEG, *THE URUGUAY ROUND NEGOTIATIONS AND THE CREATION OF THE WTO* (2012).

5. See French, German, and other objections: MONSIEUR DE VILLEPIN, PROPOSITION D'AMENDEMENT À L'ARTICLE III-212, available at <http://european-convention.eu.int/docs/treaty/pdf/866/Art%20III%20212%20de%20Villepin%20FR.pdf>; JOSCHKA FISCHER, SUGGESTION FOR AMENDMENT OF ARTICLE 24, CONV 685/03, available at <http://european-convention.eu.int/Docs/Treaty/pdf/866/Art24Fischer.pdf>; DAVID HEATHCOAT-AMORY, SUGGESTION FOR AMENDMENT OF ARTICLE 24, available at <http://european-convention.eu.int/Docs/Treaty/pdf/866/Art24Heathcoat-Amory%20EN.pdf>.
6. Existing literature on the various aspects of the new EU investment powers is already vast. See, e.g., Tillmann R. Braun, *For a Complementary European Investment Protection*, EUR. Y.B. OF INT'L ECON. L. (SPECIAL ISSUE: INT'L INVESTMENT L. AND EU L.) 95 (2011); Colin Brown & Maria Alcover-Llubia, *The external investment policy of the European Union in the light of the entry into force of the Treaty of Lisbon*, YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY 3 (2012); Markus Burgstaller, *European Law and Investment Treaties*, 26 J. OF INT'L ARB. 181 (2009); Markus Burgstaller, *Vertical Allocation of Competences for Investment Treaties in the European Union*, in MULTILATERALISM AND REGIONALISM IN GLOBAL ECONOMIC GOVERNANCE: TRADE, INVESTMENT AND FINANCE 125-138 (Junji Nakagawa ed., 2011); Marc Bungenberg, Jörn Griebel & Steffen Hindelang eds., EUR. Y.B. OF INT'L ECON. L. (SPECIAL ISSUE: INT'L INVESTMENT L. AND EU L.) (2011); Marc Bungenberg, *The Division of Competences between the EU and Its Member States in the Area of Investment Politics*, EUR. Y.B. OF INT'L ECON. L. (SPECIAL ISSUE: INT'L INVESTMENT L. AND EU L.) 29 (2011); Marc Bungenberg, *Going Global? The EU Common Commercial Policy After Lisbon*, EUR. Y.B. OF INT'L ECON. L. 123 (2010); Marc Bungenberg, *Außenbeziehungen und Außenhandelspolitik*, EUR BEIHEFT 195 (2009); Marc Bungenberg, *The Politics of the European Union's Investment Treaty-Making*, in THE POLITICS OF INTERNATIONAL ECONOMIC LAW 133 (Tomer Broude, Marc L. Busch & Amelia Porges eds., 2011); N. Jansen Calamita, *The Making of Europe's International Investment Policy: Uncertain First Steps*, 39 LEGAL ISSUES OF ECON. INTEGRATION 301 (2012); Jan Ceyssens, *Towards a Common Foreign Investment Policy? – Foreign Investment in the European Constitution*, 32 LEGAL ISSUES OF ECON. INTEGRATION 259 (2005); Julien 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 ECON. L. 51 (2012); Anna De Luca, *New developments on the scope of the EU Common Commercial policy under the Lisbon Treaty: Investment liberalization vs. investment protection*, Y.B. ON INT'L INVESTMENT L. & POL'Y 165 (2012); ANGELOS DIMOPOULOS, *EU FOREIGN INVESTMENT LAW* (2011);

Angelos Dimopoulos, *The Common Commercial Policy after Lisbon: Establishing Parallelism between Internal and External Economic Relations?*, 4 CROATIAN Y.B. OF EUR. L. & POL'Y 101 (2008); Angelos Dimopoulos, *The Compatibility of Future EU Investment Agreements with EU Law*, 39 LEGAL ISSUES OF ECON. INTEGRATION 447 (2012); DIRK EHLERS, HANS-MICHAEL WOLFFGANG, & ULRICH JAN SCHRÖDER, *Bilaterale und regionale Handelsabkommen als Kernstück der "neuen" EG-Handelspolitik*, in RECHTSFRAGEN INTERNATIONALER INVESTITIONEN : TAGUNGSBAND ZUM 13, 211 (2009); Thomas Eilmansberger, *Bilateral Investment Treaties and EU Law*, 46 COMMON MARKET L. REV. 383 (2009); Adrian Emch, *News from Luxembourg – Is the New EU Investment Law Taking Shape?*, 9 J. OF WORLD INVESTMENT AND TRADE 497 (2008); Jörn Griebel, *Überlegungen zur Wahrnehmung der neuen EU-Kompetenz für ausländische Direktinvestitionen nach Inkrafttreten des Vertrags von Lissabon*, RECHT DER INTERNATIONALEN WIRTSCHAFT 469 (2009); Christoph Hermann, *Die Zukunft der mitgliedstaatlichen Investitionspolitik nach dem Vertrag von Lissabon*, 77 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 207 (2010); Steffen Hindelang & Niklas Maydell, *The EU's Common Investment Policy – Connecting the Dots*, EUR. Y.B. OF INT'L ECON. L. (SPECIAL ISSUE: INT'L INVESTMENT L. AND EU L.) 1 (2011); F. Hoffmeister & G. Ünüvar, *From BITS and Pieces towards European Investment Agreements*, in EU AND INVESTMENT AGREEMENTS: OPEN QUESTIONS AND REMAINING CHALLENGES 57 (Marc Bungenberg, August Reinisch & Christian Tietje eds., 2013); Sven Johannsen, *Die Kompetenz der Europäischen Union für ausländische Direktinvestitionen nach dem Vertrag von Lissabon*, 90 BEITRÄGE ZUM TRANSNATIONALEN WIRTSCHAFTSRECHT (2009); J. Karl, *The Competence for Foreign Direct Investment: New Powers for the European Union?*, 5 J. OF WORLD INVESTMENT AND TRADE 413 (2004); Marcus Klamert & Niklas Maydell, *Lost in Exclusivity: Implied Non-Exclusive External Competences in Community Law*, 13 EUR. FOREIGN AFF. REV. 493 (2008); Jan Kleinheisterkamp, *The Future of the BITS of European Member States after Lisbon*, 29 ASA BULL. 212 (2011); Markus Krajewski, *External Trade Law and the Constitution Treaty: Towards a Federal and More Democratic Common Commercial Policy?*, 42 COMMON MKT. L. REV. 91 (2005); Pieter Jan Kuijper, *Foreign Direct Investment: The First Test of the Lisbon Improvements in the Domain of Trade Polity*, 37 LEGAL ISSUES OF ECON. INTEGRATION 261 (2010); Lars Markert, *The Crucial Question of Future Investment Treaties: Balancing Investors' Rights and Regulatory Interests of Host States*, EUR. Y.B. OF INT'L ECON. L. (SPECIAL ISSUE: INT'L INVESTMENT L. AND EU L.) 145 (2011); Niklas Maydell, *The European Community's Minimum Platform on Investment or the Trojan Horse of Investment Competence*, in INTERNATIONAL INVESTMENT LAW IN CONTEXT 73 (August Reinisch & Christina Knahr eds., 2008); Carsten Nowak, *Legal Arrangements for the Promotion and Protection of Foreign Investments Within the Framework of the EU Association Policy and European Neighbourhood Policy*, EUR. Y.B. OF INT'L ECON. L. (SPECIAL ISSUE: INT'L INVESTMENT L. AND EU L.) 105 (2011); Federico Ortino & Piet Eeckhout, *Towards and EU Policy on Foreign Direct Investment*, in EU LAW AFTER LISBON 312 (Andrea Biondi et al. eds., 2011); August Reinisch, *The Division of Powers between the EU and its Member States "After Lisbon"*, EUR. Y.B. OF INT'L ECON. L. (SPECIAL ISSUE: INT'L INVESTMENT L. AND EU L.) 43 (2011); Mavluda Sattorova, *Return to the Local Remedies Rule in European BITS? Power (In)equalities, Dispute Settlement, and Change in Investment Treaty Law*, 39 LEGAL ISSUES OF ECON. INTEGRATION 223 (2012); Wenhua Shan, *Towards a Common European Community Policy on Investment Issues*, 2 J. OF WORLD INVESTMENT AND TRADE 603 (2001); Wenhua Shan & Sheng Zhang, *The Treaty of Lisbon: Half Way toward a Common Investment Policy*, 21 EUR. J. OF INT'L L. 1049 (2010); Jörg Philipp Terhechte, *Art. 351 TFEU, the Principle of Loyalty and the Future Role of the Member States' Bilateral Investment Treaties*, EUR. Y.B. OF INT'L ECON. L. (SPECIAL ISSUE: INT'L INVESTMENT L. AND EU L.) 79 (2011); Christian Tietje, *Die Außenwirtschaftsverfassung der EU nach dem Vertrag von Lissabon*, 83 BEITRÄGE ZUM TRANSNATIONALEN WIRTSCHAFTSRECHT (2009); Christian Tietje, *Bilaterale Investitionsschutzverträge zwischen EU-Mitgliedstaaten (Intra-EU-BITs) als Herausforderung im Mehrebenensystem des Rechts*, 104 BEITRÄGE ZUM TRANSNATIONALEN WIRTSCHAFTSRECHT (2011); Stephen Woolcock, *The potential impact of the Lisbon Treaty on EU External Trade policy*, 8 SIEPS – EUROPEAN POLICY ANALYSIS (2008).

On the one hand, it was argued 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.⁷ 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.⁸ Both limitations would lead to a situation of *de facto* shared control between the EU 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.⁹ 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.¹⁰ 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,¹¹ as well as ensuing trade negotiations with third countries that incorporated investment liberalization, but excluded post-establishment investment protection.¹² This limiting interpretation could also find support in the language of the

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7. See Bungenberg, *The Division of Competences between the EU and Its Member States in the Area of Investment Politics*, *supra* note 6, at 29.
 8. See the Lisbon Treaty judgment of the German Constitutional Court, *infra* note 130.
 9. See Ramses Wessel, *The EU as a Party to International Agreements: Shared Competences, Mixed Responsibilities*, in *LAW AND PRACTICE OF EU EXTERNAL RELATIONS: SALIENT FEATURES OF A CHANGING LANDSCAPE* 152 (Alan Dashwood & Marc Maresceau eds., 2008). See also *THE GENERAL LAW OF EC EXTERNAL RELATIONS* (Alan Dashwood & Christophe Hillion eds., 2000); *MIXED AGREEMENTS REVISITED: THE EU AND ITS MEMBER STATES IN THE WORLD* (Christophe Hillion & Panos Koutrakos eds., 2010).
 10. See Opinion 1/94, Competence of the Community to conclude international agreements concerning services and the protection of intellectual property, ECJ, ECR I-5267 (November 15, 1994) and the subsequent enlargements of the CCP by the Amsterdam and Nice Amendments to the EC Treaty. Cf. generally Piet Eeckhout, *EXTERNAL RELATIONS OF THE EUROPEAN UNION: LEGAL AND CONSTITUTIONAL FOUNDATIONS* (2004).
 11. Note by the General Secretariat: *Minimum Platform on Investment for EU FTAs*, 15375/06, (Nov.27, 2006) (unpublished); Based on Commission to the Council the European Union, 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," MD 381/06, (July 28, 2006). The content was considered confidential by the Council and never officially published. Requests for documents release by scholars were regularly denied. See N. Jansen Calamita, *The Making of Europe's International Investment Policy: Uncertain First Steps*, *supra* note 6, at 305 n.19. For details of the content of the Minimum Platform see, however, Niklas Maydell, *The European Community's Minimum Platform on Investment or the Trojan Horse of Investment Competence*, *supra* note 6.
 12. See Free Trade Agreement between the European Union and its Member States, of the one part,

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 the EU Commission vigorously adopts. 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-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.¹³ 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.¹⁴

A separate but related issue is the question of 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.¹⁵ While the Commission has clearly expressed this view,¹⁶ investment tribunals have generally upheld their jurisdiction based on the continued validity of so-called intra-EU-BITs.¹⁷

and the Republic of Korea, of the other part, May 14, 2011, art. 7(10), n.14, O.J. (L 127) 6, expressly stating that investment protection is not covered by the section on establishment.

13. See *infra* text accompanying note 97.

14. See *infra* text accompanying note 125.

15. See *infra* text accompanying note 179.

16. See EC Letter of January 13, 2006, quoted in *Eastern Sugar BV v. Czech Republic*, SCC Case No. 088/2004, Partial Award, at ¶ 19, (Arb. Inst. Of the Stockholm Chamber of Commerce 2007); European Commission Observations, July 7, 2010, quoted in *Eureko BV v. The Slovak Republic*, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, at ¶ 180 (Oct. 26, 2010).

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

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 that 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 was a Draft Regulation of the European Parliament and the Council establishing transitional arrangements for bilateral investment treaties between Member States and third countries (“grandfathering regulation”);¹⁸ the other a Communication outlining the future EU investment policy.¹⁹ 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.²⁰

As of December 2012, only the “grandfathering regulation” has been adopted.²¹ The long time required for its adoption may be explained by the contentious debate surrounding the modalities of the core authorization mechanism it contains. The underlying problem 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

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18. *Commission Proposal 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 final (July 7, 2010), [hereinafter Commission Proposal 2010], available at http://trade.ec.europa.eu/doclib/docs/2010/july/tradoc_146308.pdf.
 19. *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*, COM(2010) 343 final (July 7, 2010), [hereinafter 2010 Commission Communication], available at http://trade.ec.europa.eu/doclib/docs/2010/july/tradoc_146307.pdf.
 20. *Commission Proposal 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 final (July 21, 2012); available at http://trade.ec.europa.eu/doclib/docs/2012/june/tradoc_149567.pdf.
 21. Regulation No. 1219/2012 of the European Parliament and the Council of 12 December 2012 Establishing Transitional Arrangements for Bilateral Investment Treaties Between Member States and Third Countries, O.J. (L 351) 40.

enter into and be a partner to treaties with third countries addressing subject-matter 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.²² Such an authorization is now contained in the recently adopted grandfathering regulation. Already before its adoption, the Commission had informally signalled to its Member States that it would consent to their continued negotiation and conclusion of BITs with third states.

The initial Commission draft regulation intended to set out “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.”²³ Such authorization should have been 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.²⁴ However, the Proposal did not meet approval by the Member States because it included rather stringent Commission screening powers, in particular of existing BITs, but also concerning IIAs to be negotiated and concluded by Member States in the future.²⁵ Member States apparently feared the loss of control and had 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 regulation led to a weakening of the Commission’s screening powers in the finally adopted text, as reflected by the change of the regulation’s subject matter and scope. The latter no longer speaks of an authorization to maintain existing Member State BITs.²⁶ Also the Commission’s planned review powers concerning these BITs have been reduced to a mere “assessment” whether they may pose a “serious obstacle” to new EU IIAs.²⁷ One may wonder, however, whether the deletion of

22. TFEU, *supra* note 2, art. 2(1) (“When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.”). For the pre-Lisbon situation, *see* Case 41/76 *Donckerwolke v. Procureur de la République*, 1976 E.C.R. 1921. *See also* PAUL CRAIG, *THE LISBON TREATY: LAW, POLITICS AND TREATY REFORM* 259 (2010); PAUL CRAIG & GRAINNE DE BÚRCA, *EU LAW: TEXT, CASES AND MATERIALS* 79 (5th ed. 2011).

23. Commission Proposal 2010, *supra* note 18, art. 1.

24. *See* Commission Proposal 2010, *supra* note 18, arts. 5-6 with regard to Member State BITs in force.

25. *See* in particular, Commission Proposal 2010, *supra* note 18, arts. 5-6 as well as 11-12.

26. Regulation No. 1219/2012, *supra* note 21, art. 1 (“Without prejudice to the division of competences established by the TFEU, this Regulation addresses the status of the bilateral investment agreements of the Member States under Union law, and establishes the terms, conditions and procedures under which the Member States are authorised to amend or conclude bilateral investment agreements.”).

27. Regulation No. 1219/2012, *supra* note 21, art. 5 (“The Commission may assess the bilateral

an express “withdrawal of authorisation”²⁸ of existing BITs conflicting with EU law or overlapping with EU IIAs in the regulation implies a substantive change. Arguably, the principle of Union loyalty,²⁹ in particular in the strict interpretation given by the Court³⁰ will lead to similar results.

The “grandfathering regulation” does not provide much insight into the substance of a future EU investment policy. For this purpose, the Commission’s International Investment Policy Communication of July 2010 seems more useful. It received comments by the other EU institutions; most importantly among them were the Council Conclusions of 25 October 2010³¹ and the European Parliament’s resolution of 6 April 2011,³² adopting a report of its International Trade Committee of 22 March 2011.³³ On 5 July 2011, the Commission adopted a follow up to this resolution.³⁴ The Economic and Social Committee submitted its opinion on 13 July 2011.³⁵ However, this proposal has not led to the adoption of any formal legal instrument and, in particular, it does not provide a clear indication on the part of the EU how it intends to use its new investment power in order to structure future IIAs.³⁶ Thus, any assessments on the path the EU is likely to

investment agreements notified pursuant to Article 2, by evaluating whether one or more of their provisions constitute a serious obstacle to the negotiation or conclusion by the Union of bilateral investment agreements with third countries, with a view to the progressive replacement of the bilateral investment agreements notified pursuant to Article 2.”).

28. Commission Proposal 2010, *supra* note 18, art. 6.

29. See Consolidated Version of the Treaty on European Union art. 4(3)(2) and (3), March 30, 2010, 2010 O.J. (C 83) 13 [hereinafter TEU]. (“The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardise the attainment of the Union’s objectives.”).

30. *Cf.* Case C-205/06, Eur. Comm’n v. Austria, 2009, E.C.R. I-1301; Case C-249/06, Eur. Comm’n v. Kingdom of Sweden, 2009 E.C.R. I-1335; Case C-118/07, Eur. Comm’n v. Finland, 2009 E.C.R. I-10889. *See also infra* note 87.

31. Conclusions on a comprehensive European international investment policy, 3041st Foreign Affairs Council Meeting, 25 October 2010, *available at* http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/117328.pdf.

32. Resolution of 6 April 2011 on the future European international investment policy, EUR. PARL. DOC (2010/2203 (INI) [hereinafter Resolution on future European international investment policy], *available at* <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2011-0141&language=EN>.

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

34. *Follow up to the European Parliament Resolution on the future European international investment policy*, (5 July 2011), *available at* <http://www.europarl.europa.eu/oeil/spdoc.do?i=19829&j=0&l=en>.

35. *Opinion of the European Economic and Social Committee on the ‘Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions – Towards a comprehensive European international investment policy’*, 2011 O.J. (C 318) 150.

36. The Commission has expressly renounced the adoption of a Model BIT/IIA as used by most OECD members concluding investment treaties. *See* 2010 Commission Communication, *supra* note 19, at 6 (“[. . .] a one-size-fits-all model for investment agreements with 3rd countries would necessarily

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.

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.³⁷ Though reports about the

be neither feasible nor desirable.”).

37. On the negotiations with Canada see Céline Lévesque, *The Challenges of 'Marrying' Investment Liberalisation and Protection in the Canada-EU CETA*, in *EU AND INVESTMENT AGREEMENTS: OPEN QUESTIONS AND REMAINING CHALLENGES* 121 (Marc Bungenberg, et al. eds., 2013).

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 2011³⁸ 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.³⁹ In fact, avoidance of "NAFTA-contamination" was reportedly a specific wish of some Member State officials.⁴⁰ 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.⁴¹

Other negotiations announced in the Commission's 2010 Communication, such as those with China and potentially Russia,⁴² 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

38. EU Negotiating Mandates on Investment (2011, EU - Canada, India, Singapore FTA's), (Sept. 12, 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>.

39. See *infra* notes 173 and 174.

40. Luke E. Peterson, *EU member-states approve negotiating guidelines for India, Singapore and Canada investment protection talks; some European governments fear "NAFTA-contamination"*, INVESTMENT ARB. REP. (Sept. 23 2011), available at http://www.iareporter.com/articles/20110923_2.

41. See *infra* text accompanying note 96 and 97.

42. 2010 Commission Communication, *supra* note 19, at 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 Wenhua Shan and Sheng Zhang, *The Potential EU-China BIT: Issues and Implications*, in EU AND INVESTMENT AGREEMENTS: OPEN QUESTIONS AND REMAINING CHALLENGES 87 (Marc Bungenberg, et al. eds., 2013).

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.

In general, it seems that 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”⁴³ and Commission officials have asserted that the Commission would “go for the ‘gold standard’ of investment protection provisions,”⁴⁴ based on the existing practice of EU Member States.⁴⁵ This indicates the awareness of the need to go beyond a common lowest denominator when drafting future investment agreements.⁴⁶ While expecting that such a high level of investor protection will “increase Europe’s attractiveness as a destination for foreign investment,”⁴⁷ the 2010 Commission Communication⁴⁸ 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.”⁴⁹

43. 2011 EU Negotiating Mandates, *supra* note 38.

44. Hoffmeister and Ünüvar, *supra* note 6, at 70.

45. Also the 2010 Commission Communication repeatedly mentions member State BIT provisions “that should inspire the negotiation of investment agreements at the EU level,” *supra* note 19, at 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, 3041st Foreign Affairs Council Meeting, *supra* note 31, 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 32, para. 19.

46. 2011 EU Negotiating Mandates, *supra* note 38, 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.”

47. 2011 EU Negotiating Mandates, *supra* note 38.

48. In order to allow the EU to pursue public policy objectives, the 2010 Commission Communication, *supra* note 19, at 9, 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.”

49. 2011 EU Negotiating Mandates, *supra* note 38. As to the need to balance investor protection and the regulatory freedom of host states, *see infra* text accompanying note starting at note 165.

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,⁵⁰ even if this comes at the price of not being able to exercise an exclusive CCP competence.⁵¹ 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 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.”⁵² Commentators have equally stressed that the EU should strive for a “broad definition of investment with a non-exhaustive list.”⁵³ 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.”⁵⁴ In practice it would appear difficult to distinguish between “speculative” and “non-speculative” portfolio (or even direct) investment.⁵⁵

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.⁵⁶ The EU institutions have in general confirmed their intention to continue this policy of market access/liberalisation.⁵⁷

50. See *supra* note 13.

51. The 2011 EU Negotiating Mandates, *supra* note 38, 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* text at note 14.

52. 2011 EU Negotiating Mandates, *supra* note 38, (under “Scope”).

53. Hoffmeister and Ünüvar, *supra* note 6, at 71.

54. See 2011 Parliament Resolution, *supra* note 32, ¶ 11.

55. See in detail *infra* text accompanying notes 147 – 149.

56. 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, 2008 O.J. (L 289/1/4) 1, as well as Section C of Chapter 7 of 16 September 2010 on the signing, on behalf 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, art. 7.8, 2011 O.J. (L 127) 1, which provides for MFN treatment and specific market access commitments and national treatment in separate schedules. See also ANGELOS DIMOPOULOS, EU FOREIGN INVESTMENT LAW 52 (2011).

57. See 2010 Commission Communication, *supra* note 19, at 5 (“[. . .] our trade policy will seek to integrate investment liberalisation and investment protection”); Council Conclusions, 3041st

However, it is unclear whether the current market access approach will continue 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.⁵⁸

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, to compensation guarantees in case of expropriation and free transfer obligations.⁵⁹ In addition, they call for “rules concerning

Foreign Affairs Council Meeting, *supra* note 31, ¶ 6 (“The new EU international investment policy should increase the level of competitiveness of the Union and open new markets.”).

58. See e.g., North American Free Trade Agreement, U.S.-Can.-Mex., art. 1102(1), Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA] (“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.”); Canadian Model Foreign Investment Protection Agreement (FIPA), art. 3(1), 2004, reprinted in CHESTER BROWN (ED.), COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES 53 (2013) [hereinafter Canadian Model FIPA] (“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 a study for the EP Committee on International Trade, Stephen Woolcock & Jan Kleinheisterkamp, *The EU Approach to International Investment Policy after the Lisbon Treaty*, 31-87 (2010), <http://www.lse.ac.uk/collections/law/news/2010-11-03%20EU.pdf>.

59. Pursuant to the title “Standards of treatment” of the 2011 EU Negotiating Mandates, *supra* note 38:

[. . .] 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 2010 Commission Communication, *supra* note 19, at 8-9. See also the Council Conclusions, 3041st Foreign Affairs Council Meeting, *supra* note 31, ¶ 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

subrogation” which are typical in case an insurer compensates an investor and then needs to be able to raise claims against the host state.⁶⁰

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.”⁶¹ Indeed, umbrella clauses have been controversial in investment arbitration practice with respect to their practical effect.⁶² 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.”⁶³ 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 specific investments. But it does not convert the issue of the extent or content of such obligations into an issue of international law.”⁶⁴ It may be that the EU has not yet decided whether

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.”

60. See CHRISTOPH SCHREUER ET AL., *THE ICSID CONVENTION: A COMMENTARY*, 186-1286 (2d ed. 2009).
61. 2011 EU Negotiating Mandates, *supra* note 38, provide under “Standards of Treatment” (“f) other effective protection provisions, such as ‘umbrella clause?’”).
62. See Christoph Schreuer, *Travelling the BIT Route: Of Waiting Periods, Umbrella. Clauses and Forks in the Road*, 5 *THE J. OF WORLD INVESTMENT & TRADE* 231 (2004); Anthony Sinclair, *The Origins of the Umbrella Clause in the International Law of Investment Protection*, 20 *ARB. INT’L* 411 (2004); Thomas Wälde, *The “Umbrella” Clause on Investment Arbitration—A Comment on Original Intentions and Recent Cases*, 6 *THE J. OF WORLD INVESTMENT AND TRADE* 183 (2005); Stanimir 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 J. OF WORLD INVESTMENT AND TRADE* 555 (2004).
63. *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction, ¶ 163, (Aug. 6, 2003). 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, (Nov. 15, 2004); *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, ¶ 85 (April 27, 2006); *Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic*, ICSID Case No. ARB/03/13, Decision on Jurisdiction, ¶ 113 (July 27, 2006).
64. *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction, ¶ 128 (Jan. 29, 2004). See also *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, ¶ 53 (Oct. 12, 2005); *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 (May 29, 2009).

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.⁶⁵

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.⁶⁶

While the Commission has asserted that “non-discrimination should continue to be a key ingredient of EU investment negotiations,”⁶⁷ 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.⁶⁸

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* case⁶⁹ or not.⁷⁰ This indecision may result from the fact that investment jurisprudence is highly inconsistent, with tribunals disagreeing sharply whether an MFN clause should permit claimants to invoke more favourable procedural, maybe even jurisdictional,⁷¹ provisions in third country BITs or at least to overcome procedural obstacles, such as waiting periods,⁷² or whether it would not permit so.⁷³

65. 2010 Commission Communication, *supra* note 19, at 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.”).

66. *See supra* text accompanying note 58.

67. 2010 Commission Communication, *supra* note 19, at 8.

68. In regards to the different options to provide for market access, see *supra* text accompanying note 58.

69. Emilio Agustín Maffezini v. Spain, ICSID Case No. ARB/97/7, Decision on Jurisdiction (Jan. 25, 2000).

70. *See also* Stephen Fietta, *Most Favoured Nation Treatment and Dispute Resolution under Bilateral Investment Treaties: A Turning Point?*, 8 INT’L ARB. L. REV. 131 (2005); Emmanuel Gaillard, *Establishing Jurisdiction through a Most-Favored-Nation Clause*, 233 N.Y.L.J. 1, 3 (2005); Kai Hobér, *MFN Clauses and Dispute Resolution in Investment Treaties: Have we reached the end of the road?*, in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY 31 (Christina Binder et al. eds., 2009); August Reinisch, *How Narrow are Narrow Dispute Settlement Clauses in Investment Treaties?*, 2 J. INT’L DISP. SETTLEMENT 115 (2011).

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

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

73. In *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, Feb. 8, 2005, ¶ 223, the tribunal held that “an MFN provision in a basic treaty does

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-discrimination⁷⁴ or whether it would allow specifications to "like circumstances" as often found in North American IIAs^{75,76}. However, the Parliament's wish clearly suggests that such a specification should be adopted.⁷⁷

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."⁷⁸ 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,⁷⁹ or US BITs,⁸⁰ or qualifications of the full protection and security to include "legal protection", as found in some German BITs^{81,82}.

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

74. See, e.g. Agreement for the Promotion and Reciprocal Protection of Investments between the Republic of Austria and Ukraine art. 3(1), Nov. 8, 1996, 1995 U.N.T.S. 405 [hereinafter *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.").
75. See, e.g. Canadian Model FIPA, art. 3(1), 2004, *supra* text accompanying note 58.
76. It was asserted that the express mandate in the 2011 EU Negotiating Mandates that the non-discrimination standards of MFN and national treatment should be "unqualified" (see *supra* text accompanying note 59) implied that they should not include any reference to "like circumstances" as they can be found e.g. in U.S. and Canadian BITs as well as in NAFTA (See *supra* note 58). See also *Hoffmeister and Üzüvar*, *supra* note 6, at 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.
77. Resolution on future European international investment policy, *supra* note 32, 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'").
78. 2010 Commission Communication, *supra* note 19, at 8.
79. See NAFTA, *supra* note 58, art. 1105 ("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 Section B(1) of the Free Trade Commission's Clarifications Related to NAFTA Chapter 11, 1, 2 (July 31, 2001), <http://www.worldtradelaw.net/nafta/chap11interp.pdf>, this was held to be co-extensive, and thus limited, to the protection available under the international minimum standard ("Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the

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,⁸³ 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.”⁸⁴

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.”⁸⁵ Already the 2010 Commission Communication stated that “EU clauses ensuring the free transfer of funds of capital and

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.”)

80. Treaty Between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection Investment (U.S. Model BIT), art. 5, 2004 [hereinafter U.S. 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.”)
81. 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.”).
82. On the basis of such an express clause, the tribunal in *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, ¶ 303, (Feb. 6, 2007) 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 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.”
83. See *Mondev International Ltd. v. U.S.A.*, ICSID Case No. ARB(AF)/99/2, ICSID Additional Facility Award, ¶ 122, (Oct. 11, 2002); *United Parcel Service of America Inc. v. Government of Canada*, Award on Jurisdiction, ¶ 97 (Nov. 22, 2002); *ADF Group Inc. v. U.S.A.*, Case No. ARB(AF)/00/1, Award, ¶ 199, (Jan. 9, 2003); *The Loewen Group, Inc. v. U.S.A.*, ICSID Case No. ARB (AF)/98/3, Award, ¶ 125-127, (June 26, 2003.); *Waste Management, Inc. v. Mexico*, ICSID Case No. ARB(AF)/00/3, Award, ¶ 90-91 (April 30, 2004); *Methanex Corp. v. U.S.A.*, NAFTA/UNICTRAL, Part II, Ch. H, para. 23, Final Award of the Tribunal on Jurisdiction and Merits, (Aug. 3, 2005), See also the interpretation of the 2001 NAFTA Free Trade Commission, *supra* note 79.
84. Resolution on future European international investment policy, *supra* note 32, para. 19.
85. 2011 EU Negotiating Mandates, *supra* note 38, under “Standards of Treatment.”

payments by investors should be included.”⁸⁶ 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,⁸⁷ it is to be expected that future free transfer clauses will contain express exceptions allowing the EU legislator to adopt restrictive measures under Article 66⁸⁸ and 215 TFEU.⁸⁹ It has been suggested that such an exception could resemble the security exception of the EU-Korea FTA.⁹⁰

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,⁹¹ the Commission seems determined to include expropriation among the topics the EU has the competence to deal with. Again the

86. 2010 Commission Communication, *supra* note 19, at 9.

87. Case C-205/06, *European Commission v. Austria*, 2009 E.C.R. I-1301; Case C-249/06, *European Commission v. Kingdom of Sweden*, 2009 E.C.R. I-1335; Case C-118/07, *European Commission v. Finland*, 2009 E.C.R. I-10889. In these cases the European Court of Justice (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* Eileen Denza, *Bilateral Investment Treaties and EU rules on free transfer: Comment on Commission v Austria, Commission v Sweden and Commission v Finland*, 35 EUR. L. REV. 263 (2010); Nikos Lavranos, *New Developments in the Interaction between International Investment Law and EU Law*, 9 L. & PRAC. OF INT’L CTS. & TRIBUNALS 409 (2010); August Reinisch, *Introductory Note to European Court of Justice: Commission of the European Communities v. Austria and Sweden*, 48 I.L.M. 470 (2009).

88. TFEU, *supra* note 2, art. 66 (“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.”).

89. TFEU, *supra* note 2, art. 215(1) (“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.”).

90. *See Hoffmeister and Ünüvar, From BITS and Pieces towards European Investment Agreements, supra* note 6, at 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, 2011 O.J. (L 127) 6, which is in turn inspired by the General Agreement on Tariffs And Trade (GATT) Article XXI. *See* General Agreement on Tariffs and Trade, art. XXI, Oct. 30, 1947, 61 Stat. A-3, 55 U.N.T.S. 187 [hereinafter GATT].

91. *See, e.g.,* Christian Tietje, *Die Außenwirtschaftsverfassung der EU nach dem Vertrag von Lissabon*, 83 BEITRÄGE ZUM TRANSNATIONALEN WIRTSCHAFTSRECHT 16 (2009); T. R. Braun, *Für einen komplementären, europäischen Investitionsschutz, in* INTERNATIONALER INVESTITIONSSCHUTZ UND EUROPARECHT 191 (Marc Bungenberg, et al. eds., 2010).

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”⁹², 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.”⁹³ 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 BITs⁹⁴ remains to be seen.⁹⁵

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 concern⁹⁶ about the far-reaching implications of ISDS that might compromise the right to regulate.⁹⁷

This reserved stance was indeed irritating for states and investors who had accepted that ISDS fulfilled a crucial function in effectively securing the substantive protections granted in IIAs.⁹⁸ With the coming of age of ISDS in the 1990s and the first decade of the

92. 2011 EU Negotiating Mandates, *supra* note 38, under “Standards of Treatment.”

93. 2010 Commission Communication, *supra* note 19, at 9.

94. *See, e.g.*, the “shared understanding” on expropriation in Annex B of the U.S. Model BIT 2004. U.S. Model BIT 2004 annex B, 2004, <http://www.state.gov/documents/organization/117601.pdf>.

95. 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.” Resolution on future European international investment policy, *supra* note 32, para. 19.

96. Resolution on future European international investment policy, *supra* note 32, 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 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.”).

97. *See also infra* text at note 164.

98. *See, e.g.*, Emilio Agustín Maffezini v. Spain, ICSID Case No. ARB/97/7, Decision on Jurisdiction, ¶ 54 (Jan. 25, 2000), (“[. . .] 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.”); Gas Natural SDG SA v Argentina, ICSID Case No ARB/03/10, Decision on

21st 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.⁹⁹

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.”¹⁰⁰ And the Council in its Conclusions stressed “the need for an effective investor-to-state dispute settlement mechanism in the EU investment agreements.”¹⁰¹

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.”¹⁰² This proposal builds on and deepens the template adopted already in the mid-1990s when the EC joined the Energy Charter Treaty (ECT)¹⁰³ 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.¹⁰⁴

In addition to the difficulty of allocating responsibility, ISDS raises serious problems as regards available arbitration venues. Investor-state arbitration and conciliation under the ICSID Convention¹⁰⁵ are available only to states and nationals of states parties to the

Jurisdiction, ¶ 49 (June 17, 2005) (“[. . .] assurance of independent international arbitration is an important – perhaps the most important – element in investor protection.”).

99. See also Ibrahim F.I. Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA*, 1 ICSID Review Foreign Investment L.J. (1986). In fact, the latter concept is considered to be one of the major achievements of the ICSID Convention. See, e.g., CHRISTOPH SCHREUER ET AL., *THE ICSID CONVENTION: A COMMENTARY* 416 (2009); Christoph Schreuer, *Investment Protection and International Relations*, in *THE LAW OF INTERNATIONAL RELATIONS: LIBER AMICORUM HANSPETER NEUHOLD* 345, 346-347 (August Reinisch & Ursula Kriebaum eds., 2007).
100. 2010 Commission Communication, *supra* note 19, at 9. 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.”
101. Council Conclusions, 3041st Foreign Affairs Council Meeting, *supra* note 31, para. 18.
102. Commission Proposal 2012, *supra* note 20. See also Colin Brown & Ilmārs Naglis, *Dispute Settlement in Future EU Investment Agreements*, in *EU AND INVESTMENT AGREEMENTS: OPEN QUESTIONS AND REMAINING CHALLENGES* 17 (Marc Bungenberg, et al. eds., 2013).
103. 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).
104. Statement by the European Communities to the Secretariat of the Energy Charter pursuant to Article 26(3)(b)(ii) of the Energy Charter Treaty, 1998 O.J. (L 69/115).
105. Convention on the Settlement of Investment Disputes between States and Nationals of Other

Convention.¹⁰⁶ 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.¹⁰⁷ 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,¹⁰⁸ practically, however, very unlikely to be achieved.¹⁰⁹ Nevertheless, the Commission stated its intention that it would explore this option.¹¹⁰ In the medium term, it appears more realistic that the EU will adopt ISDS clauses providing for investment arbitration to be conducted under UNCITRAL¹¹¹ or other arbitration rules.¹¹²

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 transparency¹¹³ and of potential inconsistencies of outcomes.¹¹⁴

States, March 18, 1965, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

106. See ICSID Convention, *supra* note 105, art. 25(1).
107. ICSID Convention, *supra* note 105, art. 67.
108. See ICSID Convention, *supra* note 105, arts. 65 & 66.
109. According to ICSID Convention art. 66(1), 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. ICSID Convention, *supra* note 105, art. 66(1). See *Possible Improvements of the Framework for ICSID Arbitration*, ICSID Secretariat Discussion Paper (Oct. 26, 2004), available at <http://icsid.worldbank.org>. See also David Gantz, *An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes: Prospects and Challenges*, 39 VANDERBILT J. OF TRANSNAT'L L. (2006); Barton Legum, *Options to Establish an Appellate Mechanism for Investment Disputes*, in APPEALS MECHANISM IN INTERNATIONAL INVESTMENT DISPUTES 231 (Karl Sauvant ed., 2008); Asif Qureshi, *An Appellate System in International Investment Arbitration?*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 1154 (Peter Muchlinski, et al eds. 2008); Christian Tams, *An Appealing Option? The Debate about an ICSID Appellate Structure*, in BEITRÄGE ZUM TRANSNATIONALEN WIRTSCHAFTSRECHT, Heft 57 (Ch. Tietje et al. eds., 2006).
110. 2010 Commission Communication, *supra* note 19, at 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).”).
111. United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, U.N. GAOR, 31st Sess., Supp. No. 17, Ch. V, Sec. C, U.N. Doc. A/31/17 (Dec. 15, 1976), available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1976Arbitration_rules.html.
112. It is not clear why the EP considers that next to ICSID also UNCITRAL arbitration would not be available to the EU. See Resolution on future European international investment policy, *supra* note 32, 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.
113. See on transparency in general V.V. Veeder, *The Transparency of International Arbitration: Process and Substance*, in PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION 89 (Loukas K. Mistelis & Julian Lew eds., 2006); Howard Mann, *Transparency and Consistency in International Investment Law: Can the Problem be fixed by Tinkering?* in APPEALS MECHANISM IN INTERNATIONAL INVESTMENT DISPUTES 213 (Karl Sauvant ed., 2008); Julie A. Maupin, *Transparency in International Investment Law: The Good, the Bad, and the Murky*, in TRANSPARENCY IN INTERNATIONAL LAW (Andrea Bianchi & Anne Peters eds., forthcoming Dec.

The Commission appears intent on addressing these problems by providing for a broad level of transparency in its future IIAs¹¹⁵ and by taking into consideration the use of quasi-permanent arbitrators and the creation of appellate mechanisms.¹¹⁶ The Parliament endorsed these thoughts and added further ideas for improvement,¹¹⁷ such as the institutionalisation of *amicus curiae* participation¹¹⁸ and the more controversial enhancement of the role of domestic courts through requiring exhaustion of local remedies.¹¹⁹

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 –

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- 2013).
114. See Ari Afilalo, *Towards a Common Law of International Investment: How NAFTA Chapter 11 Panels should Solve their Legitimacy Crisis*, 17 GEO. INT'L ENVTL. L. REV. 51 (2004); Susan Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521 (2005); Charles Brower, Michael Ottolenghi, & Peter Prows Ottolenghi, *The Saga of CMS: Res judicata, Precedent and the Legitimacy of ICSID Arbitration*, in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 843 (Christina Binder, et al eds. 2009); August Reinisch, *The Role of Precedent in ICSID Arbitration*, 2008 AUSTRIAN ARB. Y.B. 495; Lucy Reed, *The De Facto Precedent Regime in Investment Arbitration: A Case for Proactive Case Management*, 25 ICSID REVIEW 95 (2010); Andres Rigo Sureda, INVESTMENT TREATY ARBITRATION: JUDGING UNDER UNCERTAINTY (2012).
 115. 2010 Commission Communication, *supra* note 19, at 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;”).
 116. 2010 Commission Communication, *supra* note 19, at 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;”).
 117. Resolution on future European international investment policy, *supra* note 32, 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.”).
 118. See Christina Knahr & August Reinisch, *Transparency versus Confidentiality in International Investment Arbitration – The Biwater Gauff Compromise*, 6 THE L. AND PRAC. OF INT’L CTS AND TRIBUNALS 97 (2007); Alexis Mourre, *Are Amici Curiae the proper response to the public’s concern on transparency in investment arbitration?*, 5 THE L. AND PRAC. OF INT’L CTS AND TRIBUNALS 257 (2006).
 119. See Christoph Schreuer, *Calvo’s Grandchildren: The Return of Local Remedies in Investment Arbitration*, 4 THE L. AND PRAC. OF INT’L CTS AND TRIBUNALS 1 (2005); Ursula Kriebaum, *Local Remedies and Standards for Protection*, in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY 417 (Christina Binder, et al eds., 2009).

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 as 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).¹²⁰

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.¹²¹ Thus, for the EU to enter the scene of

120. 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. TEU Article 19 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. TEU, *supra* note 29, art. 19.

121. See, e.g., U.S. Model BIT 2004, *supra* note 94, art. 1:
 “[I]nvestment” 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;

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.¹²² 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.¹²³ 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.”¹²⁴ 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.¹²⁵ 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 establish lasting and direct links with the undertaking” without taking a clear stance on portfolio investment.¹²⁶ 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

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- (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.

122. See *supra* text accompanying note starting at note 49.

123. See Ramses Wessel, *The EU as a Party to International Agreements: Shared Competences, Mixed Responsibilities*, in *LAW AND PRACTICE OF EU EXTERNAL RELATIONS: SALIENT FEATURES OF A CHANGING LANDSCAPE* 152 (Alan Dashwood & Marc Maresceau eds., 2008). See also Alan Dashwood & Christophe Hillion (eds.), *THE GENERAL LAW OF EC EXTERNAL RELATIONS* (2000); *MIXED AGREEMENTS REVISITED: THE EU AND ITS MEMBER STATES IN THE WORLD* (Christophe Hillion & Panos Koutrakos eds., 2010).

124. TFEU, *supra* note 2, art. 207(4).

125. DIMOPOULOS, *EU FOREIGN INVESTMENT LAW*, *supra* note 6, at 86; PIET ECKHOUT, *EXTERNAL RELATIONS OF THE EUROPEAN UNION. LEGAL CONSTITUTIONAL FOUNDATIONS* 9-16 (2004); PAUL CRAIG & GRAINNE DE BÚRCA, *EU LAW: TEXT, CASES AND MATERIALS* 319-322 (5th ed. 2011); PANOS KOUTRAKOS, *EU INTERNATIONAL RELATIONS LAW (MODERN STUDIES IN EUROPEAN LAW)* 11-75 (2006).

126. 2010 Communication, *supra* note 19, at 2-4.

Treaty's Chapter on capitals and payments, the exclusive Union competence to conclude agreements in this area would be implied."¹²⁷ 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."¹²⁸ 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."¹²⁹

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."¹³⁰

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 Conclusions¹³¹ commenting on the Commission's plans, the Council is less explicit, but it clearly stressed that the scope of the EU's exclusive CCP power related to FDI,¹³² and admonished the Commission that the future broad investment policy covering all kinds of investment

127. 2010 Communication, *supra* note 19, at 8.

128. Commission Proposal 2012, *supra* note 20, at 3.

129. Commission Proposal 2012, *supra* note 20, at 3.

130. Lisbon Treaty judgment, German Constitutional Court, 2 BvE 2/08, (June 30 2009), para. 379, available at http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html.

131. Council Conclusions, 3041st Foreign Affairs Council Meeting, *supra* note 31.

132. Council Conclusions, 3041st Foreign Affairs Council Meeting, *supra* note 31, 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;").

should be further elaborated “in full respect of the respective competences of the Union and its Member States as defined by the Treaties.”¹³³ 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, [...]”¹³⁴

While these conflicting interpretations of the scope of the EU’s powers 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.¹³⁵ 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,

133. Council Conclusions, 3041st Foreign Affairs Council Meeting, *supra* note 31, 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* Council Conclusions, 3041st Foreign Affairs Council Meeting, *supra* note 31, 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.”).

134. 2011 EU Negotiating Mandates, *supra* note 38.

135. *See* the debate in: EUROPEAN YEARBOOK OF INTERNATIONAL ECONOMIC LAW, SPECIAL ISSUE: INTERNATIONAL INVESTMENT LAW AND EU LAW (Marc Bungenberg, et al eds., 2011); EU AND INVESTMENT AGREEMENTS. OPEN QUESTIONS AND REMAINING CHALLENGES (Marc Bungenberg, et al eds., 2013); as well as Markus Burgstaller, *Vertical Allocation of Competences for Investment Treaties in the European Union*, in MULTILATERALISM AND REGIONALISM IN GLOBAL ECONOMIC GOVERNANCE – TRADE, INVESTMENT AND FINANCE 125 (Junji Nakagawa ed., 2011); Marc Bungenberg, *Going Global? The EU Common Commercial Policy After Lisbon*, EUR. Y.B. INT’L ECON. L. 123 (2010); ANGELOS DIMOPOULOS, EU FOREIGN INVESTMENT LAW (2011); Angelos Dimopoulos, *The Common Commercial Policy after Lisbon: Establishing Parallelism between Internal and External Economic Relations?* 4 CROATIAN Y.B. OF EUR. L. AND POL’Y 101 (2008); Thomas Eilmansberger, *Bilateral Investment Treaties and EU Law*, 46 COMMON MKT. L. REV. 383 (2009); Ch. Hermann, *Die Zukunft der mitgliedstaatlichen Investitionspolitik nach dem Vertrag von Lissabon*, 77 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 207 (2010); Markus Krajewski, *External Trade Law and the Constitution Treaty: Towards a Federal and More Democratic Common Commercial Policy?*, 42 COMMON MKT. L. REV. 91 (2005); Pieter Jan Kuijper, *Foreign Direct Investment: The First Test of the Lisbon Improvements in the Domain of Trade Policy*, 37 LEGAL ISSUES OF ECON. INTEGRATION 261 (2010); Federico Ortino & Piet Eeckhout, *Towards and EU Policy on Foreign Direct Investment*, in EU LAW AFTER LISBON 312 (Andrea Biondi et al. eds., 2011); Wenhua Shan and Sheng Zhang, *The Treaty of Lisbon: Half Way toward a Common Investment Policy*, 21 EUR. J. OF INT’L L. 1049 (2010); Christian Tietje, *Die Außenwirtschaftsverfassung der EU nach dem Vertrag von Lissabon*, 83 BEITRÄGE ZUM TRANSNATIONALEN WIRTSCHAFTSRECHT (2009). *See also* the references in note 6.

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,¹³⁶ the IMF,¹³⁷ and also the EU has adopted secondary legislation on point.¹³⁸

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.¹³⁹ A closer look at the established EU doctrine of implied powers shows that the expansive interpretation given by the ECJ¹⁴⁰ and codified in the TFEU¹⁴¹

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136. BENCHMARK DEFINITION OF FOREIGN DIRECT INVESTMENT para. 11 (OECD., 4th ed. 2010), 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 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.”).
137. BALANCE OF PAYMENTS MANUAL para. 362 (International Monetary Fund ed., 5th edition 1993), 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. [. . .].”).
138. Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty, 1988 O.J. (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.”).
139. TFEU, *supra* note 2, art. 64(2) (“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.”).
140. See the so-called ERTA Case, Case 22/70 Commission of the European Communities v. Council of the European Communities, 1971 E.C.R. 263, in which the ECJ affirmed the implied powers doctrine by stating that the authority to enter into international agreements “arises not only from

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 63¹⁴² 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 States participation. Thus, the intended broad scope of investment protection¹⁴³ 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” investments 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.¹⁴⁴ A

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, Convention No. 170 of the International Labour Organization, 1993 E.C.R. 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.”).

141. TFEU, *supra* note 2, art. 216(1) (“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.”).
142. TFEU, *supra* note 2, art. 63(1) (“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.”).
143. *See* 2010 Commission Communication, *supra* note 19, at 2-4; *see also* 2011 EU Negotiating Mandates, *supra* note 38 (under “Scope”).
144. The economic dimension of territorial sovereignty entails the right of each government to decide whether to admit foreign investments or not and, consequently, to adopt policy measures. In general, there are some concerns against a full liberalization of national economies such as weak domestic industries being eliminated or social problems caused by a rapid change of the economy. In order to encounter these issues, there are various regulatory approaches in existing treaties. Typical treaty models of admission contain, e.g., “performance requirements”, according to which the host state imposes obligations on the investor to conduct his business in a certain manner

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.¹⁴⁵

Today, such concerns have been taken up by the EU Parliament through 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.”¹⁴⁶ 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 the Parliament specifically requested that the Commission provide a clear definition of what kind of investments should be protected.¹⁴⁷ 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.¹⁴⁸ It also suggested that speculative forms of investment would not be protected by future investment agreements because

such as the obligation to use local materials, the duty to export a certain amount of product or the requirement to hire a certain number of locals. On the admission of FDIs in detail, *see* THOMAS POLAN, *LEGAL ADMISSION OF FDI* (2006). Other treaties require that the investment is made “in accordance with the laws” to the host state, which implies that investments violating domestic law, i.e. the rules on admission and establishment, as well as other domestic rules such as provisions relating to corruption, are not covered by the treaty. *See infra* note 155.

145. Developed countries are rather skeptical about the effectiveness of performance requirements, as they constitute interventionist strategies of the past. However, the decline of BITs featuring performance requirements in both developed and developing countries has happened for various reasons. First of all, international obligations, for example the WTO TRIMs Agreement, obliged governments to phase out certain types of performance requirements. Secondly, many countries had to change their investment policy due to their accession to trade regimes that involve the harmonization of trade and investment policies across Member States, such as the EU or NAFTA. Thirdly, there has undoubtedly been a competition for FDI inflows which has led to many countries liberalizing their FDI policy; *see* UNCTAD, *FOREIGN DIRECT INVESTMENT AND PERFORMANCE REQUIREMENTS: NEW EVIDENCE FROM SELECTED COUNTRIES*, 18-20 (2003). The use of performance requirement clauses has prominently been prohibited by BITs concluded by the US (*see, e.g.*, Article 8 of both the 2004 and 2012 U.S. Model BITs . U.S. Model BIT 2004, *supra* note 94, art. 8. U.S. Model BIT 2012 art. 8, 2012, <http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>) or, on a North-American level, by way of NAFTA, *supra* note 58, art. 1106.
146. *See* Resolution on future European international investment policy, *supra* note 32, 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;”).
147. Resolution on future European international investment policy, *supra* note 32, para. 11.
148. *Follow up to the European Parliament Resolution on the future European international investment policy*, *supra* note 34, at 3 (“Speculation has never been regarded as being synonymous to portfolio investment.”).

such agreements regularly do not protect “ordinary commercial transactions” and by extension not “short term investments.”¹⁴⁹

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. Though 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.¹⁵⁰

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”.¹⁵¹ 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.¹⁵² Since the *Salini* case, a certain contribution to the host state

149. *Follow up to the European Parliament Resolution on the future European international investment policy*, *supra* note 34, at 2:

“[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 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.”

150. *See, e.g.*, *Global Trading Resources Corp. and Globex International, Inc. v. Ukraine*, ICSID Case No. ARB/09/11, Award, ¶ 56 (Dec. 1, 2010) (“[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, (March 5, 2011), considering that a “mere one-off sale transaction” would not qualify as an investment.

151. *See supra* text accompanying note 147.

152. *See* CHRISTOPH SCHREUER, ET AL., *THE ICSID CONVENTION: A COMMENTARY* 128 (2nd ed. 2009).

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.”¹⁵³

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 this “contribution” requirement is an intended part of the Article 25 notion of investment.¹⁵⁴

However, as with the opaque notion of the “contribution” to the host state development, there remains the problem of 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.¹⁵⁵ 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.”¹⁵⁶ A number of IIAs expressly contain such clauses and various investment

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153. See *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 52 (July 23, 2001) (“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.”).
154. 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 *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, ¶ 111 (July 14, 2010), 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.”).
155. 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).
156. See *Andrea Carlevaris, The Conformity of Investments with the Law of the Host State and the Jurisdiction of International Tribunals*, 9 J. OF WORLD INVESTMENT & TRADE 35 (2008); Christina Knahr, *Investments “in accordance with host state law”*, in INTERNATIONAL INVESTMENT LAW IN CONTEXT 27 (August Reinisch & Christina Knahr eds., 2008); Ursula Kriebaum, *Illegal*

tribunals have held that they lacked jurisdiction over claims concerning investments not made “in accordance with the law of the host state.”¹⁵⁷ For instance, already in 2001, the ICSID tribunal in *Salini v. Morocco*¹⁵⁸ had found that such a BIT clause excluded from its protection illegal investments and in 2006, the tribunals in *Inceysa v. El Salvador*¹⁵⁹ and *Fraport v. Philippines*¹⁶⁰ 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 fail to draw a clear line as to what degree of “illegality” is required to deprive investors of investment protection.¹⁶¹ A further complication stems from recent ICSID cases that have incorporated the “in accordance with the law of the host state” requirement into the general notion of “investment”¹⁶² pursuant to Article 25 ICSID Convention.¹⁶³

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

Investments, 2010 AUSTRIAN Y.B. ON INT'L ARB. 307; Stephan Schill, *Illegal Investments in Investment Treaty Arbitration*, 11 LAW & PRAC. OF INT'L CTS & TRIBUNALS 281 (2012).

157. See, e.g., Treaty between the Federal Republic of Germany and the Republic of Ghana for the encouragement and reciprocal protection of investments art. 10 (Feb. 24, 1995), German Federal Law Gazette II 1997/48 at 2055, [hereinafter Germany-Ghana BIT] (“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 a 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 Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, ¶ 127 (June 18, 2010).
158. *Salini Construttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 46 (July 23, 2001).
159. *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, ¶ 190 (Aug. 2 2006).
160. *Fraport AG Frankfurt Airport Services Worldwide v. Philippines*, ICSID Case No. ARB/03/25, Award (Aug. 16, 2007). See, however, the annulment decision of December 23, 2010.
161. See, however, *Desert Line Projects LLC v. Yemen*, ICSID Case No. ARB/05/17, Award, ¶ 106 (Feb. 6, 2008), 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 depriving investors of the very protection the BIT was intended to provide. [. . .]”). See also August 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, 749 (2010).
162. See *supra* text at note 151.
163. In *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, ¶ 114 (April 15, 2009), 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 Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, ¶ 123 (June 18, 2010).

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 UNCITRAL¹⁶⁴ 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.¹⁶⁵ This true or perceived danger of a so-called regulatory chill¹⁶⁶ has led to outright denunciation of the current system¹⁶⁷ and (even in OECD countries) attempts to moderate investment protection by balancing investor concerns with governmental interests.¹⁶⁸

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164. See *White Industries Australia Limited v. India*, UNCITRAL, Final Award, ¶ 7.4.9 (Nov. 30, 2011), (“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, (March 5, 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.
165. See GUS VAN HARTEN, *INVESTMENT TREATY ARBITRATION AND PUBLIC LAW* (2007). For a more nuanced view, see the contributions in *THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY* (Michael Waibel et al. eds., 2010).
166. See STEPHEN WOOLCOCK, *THE EU APPROACH TO INTERNATIONAL INVESTMENT POLICY AFTER THE LISBON TREATY*, Study for the EP Committee on International Trade 46 (2010).
167. 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 Christoph Schreuer, *Denunciation of the ICSID Convention and Consent to Arbitration*, in *THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY* 353 (Michael Waibel et al. eds., 2010); Oscar M. Garibaldi, *On the Denunciation of the ICSID Convention*, in *INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER* 251 (Christina Binder, et al. eds., 2009); Keyvan Rastegar, *Denouncing ICSID*, in *INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER* 278 (Christina Binder, et al. eds., 2009).
168. Cf. the attempts of the US and Canada to draft more balanced expropriation provisions in their 2004 Model BITs. Canadian Model FIPA, *supra* note 58 and US Model BIT 2004, *supra* note 94. See *infra* notes 174 and 175. See also the Norwegian Draft Model BIT, 2007, available at 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 construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this

EU institutions have also picked up these anxieties. 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.”¹⁶⁹ 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.”¹⁷⁰ 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.”¹⁷¹

Such language is reminiscent of the police powers doctrine,¹⁷² as endorsed by some investment tribunals¹⁷³ and found in the explanatory parts of US¹⁷⁴ and Canadian¹⁷⁵ Model BITs. It will leave considerable leeway for treaty negotiators to draft the

Agreement that it considers appropriate to ensure that investment activity is undertaken in a manner sensitive to health, safety or environmental concerns.”).

169. 2010 Commission Communication, *supra* note 19, at 9.

170. 2010 Commission Communication, *supra* note 19, at 9.

171. 2011 EU Negotiating Mandates, *supra* note 38.

172. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 712 cmt. g, at 201 (“[. . .] action of the kind that is commonly accepted as within the police power of states.”).

173. See, e.g., *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ARB(AF)/00/2, Award, ¶ 119 (May 29, 2003), (“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, ¶ 262 (March 17, 2006) (“[. . .] 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.”)

174. See Annex B on Expropriation 4(b) in U.S. Model BIT 2004, *supra* note 94, annex b (“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.”).

175. See Annex B.13(1) on Expropriation in Canadian Model FIPA, *supra* note 58, annex b.13(1) (“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.”)

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 arbitration¹⁷⁶ 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 areas of protection of national security, the environment, public health, workers’ and consumers’ rights, industrial policy and cultural diversity.”¹⁷⁷ In its response, the Commission pointed to the EU’s practice to include a general right to regulate in its FTAs and that it intended to continue this practice in its negotiations.¹⁷⁸

While finding the proper balance between investment and non-investment interests will indeed be one of the core issues for future EU IIAs,¹⁷⁹ it is questionable whether the incorporation of standard clauses preserving the contracting states’ right to regulate will 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. 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.¹⁸⁰

176. Resolution on future European international investment policy, *supra* note 32, 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.’”).

177. Resolution on future European international investment policy, *supra* note 32, para. 25.

178. *Follow up to the European Parliament Resolution on the future European international investment policy*, *supra* note 34, at 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.”).

179. See Lars Markert, *The Crucial Question of Future Investment Treaties: Balancing Investors’ Rights and Regulatory Interests of Host States*, EUR. Y.B. INT’L ECON. L., SPECIAL ISSUE: INT’L INVESTMENT LAW AND EU LAW 145 (2011); Jan Kleinheisterkamp, *European Policy Space in International Investment Law*, 27 ICSID REVIEW FOREIGN INVESTMENT L. J. 416 (2012).

180. See L. Aroulai & W. Ben Hamida, *La Protection des Investissements par le Droit Primaire – Droit*

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.¹⁸¹ 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.¹⁸²

Investment tribunals have generally rejected the claim that intra-EU-BITs 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),¹⁸³ holding that the Czech Republic/Netherlands BIT and EU law did "not cover the same precise subject-matter."¹⁸⁴ Similarly, the tribunal in *Eureko v.*

Conventionnel des Investissements et Droit Primaire Communautaire: Étude compare des régimes et des approches, LE DROIT EUROPÉEN ET L'INVESTISSEMENT 69 (2009); Markus Burgstaller, *The Future of Bilateral Investment Treaties of EU Member States*, in INTERNATIONALER INVESTITIONSSCHUTZ UND EUROPARECHT 113 (Marc Bungenberg, et al. eds., 2010); Steffan Hindelang, *Member State BITs-There's Still (Some) Life in the Old Dog Yet*, Y.B. INT'L INVESTMENT L. & POL'Y 2010/2011 217 (2011); Michele Potesta, *Bilateral Investment Treaties and the European Union recent Developments in Arbitration and before the ECJ*, 8 THE LAW AND PRAC. OF INT'L CTS & TRIBUNALS 225 (2009); August 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 ECON. INTEGRATION 157 (2012); Christer Söderlund, *Intra-EU BIT Investment Protection and the EC Treaty*, 24 J. INT'L ARB. 455 (2007); Christian Tietje, *Bilaterale Investitionsschutzverträge zwischen EU-Mitgliedstaaten (Intra-EU-BITs) als Herausforderung im Mehrebenensystem des Rechts*, 2 KÖLNER SCHRIFTEN ZUM WIRTSCHAFTSRECHT 128 (2011); Robert Volterra, *Le Point de Vue des États Tiers*, in LE DROIT EUROPÉEN ET L'INVESTISSEMENT 41 (Catherine Kessedjian & Charles Leben eds., 2009); Hanno Wehland, *Intra-EU Investment Agreements and Arbitration: Is European Community Law an Obstacle?*, 58 INT'L & COMP. L.Q. 297 (2009); Marek Wierzbowski & Aleksander Gubrynowicz, *Conflict of Norms Stemming from Intra-EU BITs and EU Legal Obligations: Some Remarks on Possible Solutions*, in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 544 (Christina Binder, et al. eds., 2009).

181. See, e.g., the position of the Czech Republic summarized in *Eastern Sugar v. Czech Republic*, SCC Case No 088/2004, Partial Award, ¶ 97 (March 27, 2007).

182. See EC Letter of January 13, 2006, quoted in *Eastern Sugar v. Czech Republic*, SCC Case No 088/2004, Partial Award, ¶ 19 (March 27, 2007); European Commission Observations, July 7, 2010, (cited in *Eureko BV v. The Slovak Republic*, Award on Jurisdiction, Arbitrability and Suspension, ¶ 180 (Oct. 26, 2010)).

183. Vienna Convention on the Law of Treaties art. 59(1), 1155 U.N.T.S. 331 [hereinafter 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.")

184. *Eastern Sugar v. Czech Republic*, *Eastern Sugar BV v. Czech Republic*, SCC Case No 088/2004, Partial Award, ¶ 160, (March 27, 2007).

*Slovakia*¹⁸⁵ 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,¹⁸⁶ nor have they been “disapplied by EU law” as a result of Article 30 VCLT.¹⁸⁷

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.¹⁸⁸ Under accepted EU principles like supremacy and primacy, it would clearly follow that any inconsistency between EU law and national law must lead to a “disapplication” of national law.¹⁸⁹ In the opinion of the Commission this overriding effect also applies vis-à-vis treaties concluded by Member States.¹⁹⁰

185. *Eureko BV v. The Slovak Republic, Award on Jurisdiction, Arbitrability and Suspension* (Oct. 26 2010).

186. *Id.* ¶ 265.

187. *Id.* ¶ 277. VCLT, *supra* note 183, art. 30:

“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. [. . .].”

188. *Eureko BV v. The Slovak Republic*, ¶ 183, quoting the European Commission Observations, July 7, 2010.

189. 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 Administratie der Belastingen*, 1963 E.C.R. 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.”).

190. European Commission Observations, July 7, 2010 (*cited in* *Eureko BV v. The Slovak Republic*, ¶ 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.”

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 and 59 VCLT.¹⁹¹ 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.¹⁹² 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.¹⁹³

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.¹⁹⁴

E. 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,¹⁹⁵ the gradual endorsement of ISDS

191. See in detail August 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 ECON. INTEGRATION 157 (2012).

192. *Eureko BV v. The Slovak Republic*, Award on Jurisdiction, Arbitrability and Suspension, ¶ 263 (Oct. 26, 2010) (“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.”).

193. *Eastern Sugar v. Czech Republic*, ¶ 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.”).

194. See, e.g., Report by Luke Peterson, http://www.iareporter.com/articles/20101023_10 (available by subscription or purchase), according to which the EU Commission informed the Member States that certain intra-EU-BITs must be terminated. On an earlier occasion, the Commission explicitly stated in its submission in *Eureko BV v. The Slovak Republic*, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, ¶ 182 (Oct. 26, 2010), that “[e]ventually, all intra-EU BITs will have to be terminated.”

195. 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, DEPARTMENT OF FOREIGN AFFAIRS AND TRADE, GILLARD GOVERNMENT TRADE POLICY STATEMENT: TRADING OUR WAY TO MORE JOBS AND PROSPERITY 1, 14 (2011), <http://pdf.aigroup.asn.au/trade/Gillard%20Trade%20Policy%20Statement.pdf>. See also L. Nottage,

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.¹⁹⁶

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.¹⁹⁷ 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.¹⁹⁸

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 in Article 344 TFEU 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.¹⁹⁹

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 DISP. MGMT. (2011); Leon E. Trakman, *Investor State Arbitration or Local Courts: Will Australia Set a New Trend?*, 46 J. WORLD TRADE 83 (2012); William S. Dodge, *Investor-State Dispute Settlement between Developed Countries: Reflection on the Australia-United States Free Trade Agreement*, 39 VAND. J. TRANSNAT’L L. 1 (2006) 1-37.

196. See *supra* text accompanying note 105.

197. See M. Burgstaller, *Investor-State Arbitration in EU International Investment Agreements with Third States*, 39 LEGAL ISSUES OF ECONOMIC INTEGRATION 207 (2012); Markus Burgstaller, *Les Aspects procéduraux de l’Arbitrage – Qui est partie? Le rôle de la Commission Européenne?*, in LE DROIT EUROPÉEN ET L’INVESTISSEMENT 123 (Catherine Kessedjian & Charles Leben eds., 2009); Jacqueline Dutheil de la Rochère, *Quel rôle pour la Cour de Justice?*, in LE DROIT EUROPÉEN ET L’ARBITRAGE D’INVESTISSEMENT/EUROPEAN LAW AND INVESTMENT ARBITRATION 37 (Catherine Kessedjian ed., 2011); Steffan Hindelang, *Der primärrechtliche Rahmen einer EU-Investitionsschutzpolitik: Zulässigkeit und Grenzen von Investor-Staat-Schiedsverfahren aufgrund künftiger EU Abkommen*, in DIE GEMEINSAME HANDELSPOLITIK DER EUROPÄISCHEN UNION NACH LISSABON” 157 (Marc Bungenberg & Christoph Herrmann eds., 2011); Steffan 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 ECON. INTEGRATION 179 (2012); Nikolaos Lavranos, *Designing an International Investor-to-State Arbitration System after Opinion 1/09*, in COMMON COMMERCIAL POLICY AFTER LISBON, SPECIAL ISSUE TO THE EUROPEAN YEARBOOK OF INTERNATIONAL ECONOMIC LAW 199 (Marc Bungenberg & Christoph Herrmann eds., 2013); Matthew Parish, *International Courts and the European Legal Order*, 23 EUR. J. OF INT’L L. 141 (2012) 141; Stephan Schill, *Luxembourg Limits: Conditions for Investor-State Dispute Settlement under Future EU Investment Agreements*, in EU AND INVESTMENT AGREEMENTS: OPEN QUESTIONS AND REMAINING CHALLENGES 37 (Marc Bungenberg, et al. eds., 2013).

198. Pursuant to TEU, *supra* note 29, art. 19(1), the Court has to “ensure that in the interpretation and application of the Treaties the law is observed.”

199. TFEU, *supra* note 2, art. 344 (“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

This latter prohibition played an important role in the so-called *MOX Plant* case²⁰⁰ 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.²⁰¹ 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.²⁰²

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.²⁰³ 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.²⁰⁴ 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 this defensive stance can be found in the Court's Advisory Opinion on the European Economic Area (EEA) Agreement²⁰⁵ which intended to set up a parallel system of judicial protection covering both the then 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,²⁰⁶ it considerably limited this position by holding that such a dispute settlement institution would be prevented from ruling on issues

for therein.”).

200. Case C-459/03, *Commission v. Ireland (Mox Plant)*, 2006 E.C.R. I-4635.

201. *Ireland v. United Kingdom (“MOX Plant Case”)*, UNCLOS Annex VII Arbitral Tribunal, available at http://www.pca-cpa.org/showpage.asp?pag_id=1148.

202. Case C-459/03, *Commission v. Ireland (Mox Plant)*, 2006 E.C.R. I-4635, ¶¶ 125 - 184.

203. In the *Eureka* case, 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.” *Eureka BV v. The Slovak Republic*, *supra* note 185, ¶ 276.

204. See generally Zachary Douglas, *The Hybrid Foundations of Investment Treaty Arbitration*, 74 BRIT. Y.B. INT'L L. 151 (2003). See also Steffen Hindelang, *Circumventing Primacy of EU Law*, *supra* note 197, at 200, arguing that such a position could lead to an incompatibility of ISDS with TFEU, *supra* note 2, art. 344.

205. Agreement on the European Economic Area (EEA), 1994 O.J. (L 1) 3.

206. Opinion 1/91, *Economic Area Agreement I*, 1991 E.C.R. I-6079, ¶ 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.”).

concerning the allocation of competences between the EC and its Member States²⁰⁷ which fell under its own exclusive jurisdiction.²⁰⁸ This attitude was confirmed by the Court's Opinion on the establishment of a European Common Aviation Area (ECAA) equally stressing the need for an autonomous EC legal order that would prevent an international dispute settlement mechanism from rendering binding interpretations of EC law.²⁰⁹

More recently, in its Opinion on the *European and Community Patents Courts*²¹⁰ 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.²¹¹ 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 that do not submit to the CJEU's ultimate interpretive power.

The implications for ISDS are uncertain. It cannot be excluded that the CJEU would consider investor-state arbitration incompatible with such a far-reaching interpretation

207. *Id.* ¶ 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.")

208. *Id.* ¶ 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 [. . .].")

209. Opinion 1/00, European Common Aviation Area, 2002 E.C.R. I-3498, ¶¶ 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.")

210. Opinion 1/09, European and Community Patents Courts, CJEU, 2011 E.C.R. I-01137.

211. *Id.* ¶ 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.

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. In order 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.”²¹²

It seems that a mechanism like the one adopted for the determination of the roles in investment arbitration for purposes of the ECT²¹³ 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 clauses²¹⁴ that would not be limited to the treaty standards and possibly customary international law,²¹⁵ but rather encompass the law of the host state.²¹⁶ In such a situation investment tribunals may have to rule on EU law; this 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.²¹⁷

212. Opinion 1/91, Economic Area Agreement I, 1991 E.C.R. I-6079, ¶ 34, *see supra*, note 206.

213. Statement by the European Communities to the Secretariat (1998). *supra* text accompanying note 104.

214. Emmanuel Gaillard & Yas 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 REV.—FOREIGN INVESTMENT L.J. 375 (2003); Antonio R. Parra, *Applicable Substantive Law in ICSID Arbitrations Initiated under Investment Treaties*, 16 ICSID REV.—FOREIGN INVESTMENT L. J. 30 (2001); Giorgio Sacerdoti, *Investment Arbitration Under ICSID and UNCITRAL Rules: Prerequisites, Applicable Law, Review of Awards*, 19 ICSID REV.—FOREIGN INVESTMENT L. J. 1 (2004).

215. *See, e.g.*, NAFTA, *supra* note 58, art. 1131(1) (“A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.”).

216. *See, e.g.*, Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of the Netherlands and the Argentine Republic, art. 10(7), Oct. 20, 1992, 2233 U.N.T.S. 168 (“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.”).

217. *See supra* note 210.

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. But 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.²¹⁸ According to the CJEU's case law, such bodies must exercise public authority on behalf of Member States and possess independent judicial tasks.²¹⁹

Since the *Nordsee* case,²²⁰ 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 Member State,²²¹ though it has been suggested that one could regard treaty-based arbitration as arbitration being based on national law.²²² Thus, any suggestions to remedy the uncertain situation by "upgrading"²²³ 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.

218. According to TFEU, *supra* note 2, art. 267(2) (ex-Article 234(2) TEC) "any court or tribunal of a Member State" may request a preliminary ruling.

219. In Case 246/80, *Broekmeulen v. Huisarts Registratie Commissie*, 1981 E.C.R. 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.

220. Case 102/81, *Nordsee Deutsche Hochseefischerei*, 1982 E.C.R. 1095.

221. TFEU, *supra* note 2, art. 267(2) speaks of "any court or tribunal of a Member State."

222. *See, e.g., Hindelang, Circumventing Primacy of EU Law, supra* note 180, at 202.

223. One may also view that as a "downgrading" since international tribunals would thereby be equated to courts or tribunals of Member States.

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 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.