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Promises and Pitfalls of the European Union Policy on Foreign Investment - How Will the New EU Competence on FDI Affect the Emerging Global Regime?

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PROMISES AND PITFALLS OF THE EUROPEAN UNION POLICY ON FOREIGN INVESTMENT—HOW WILL THE NEW EU COMPETENCE ON FDI AFFECT THE EMERGING GLOBAL REGIME?

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ABSTRACT

This article analyses constitutional changes and policy consequences concerning the transfer to the supranational level of an external competence in the field of investment resulting from the Treaty on the Functioning of the European Union (TFEU). It states that EU Member States lose their competence to conclude investment treaties and to analyse legal innovations at the EU level. The new comprehensive European investment policy may enable the EU to utilize its leverage to negotiate favourable terms with non-Member States and consistency in protection standards worldwide, leading to an even (as well as a superior) playing field for EU investors. This horizon, however, is darkened by technical, but important, issues of investment treaties implementation and the uncertain future of existing investment treaties signed by Member States. This article shows that these legal innovations offer a rich canvas against which international legal issues of 'systemic importance' are discussed, while policy lessons covering preferential trade policy and the next generation of investment treaties are explored. Legal issues and policy strategies will in turn impact the international regime for investment.

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I. INTRODUCTION

After a long and arduous process, all EU Member States ratified the Treaty of Lisbon (officially, the Treaty amending the Treaty on European Union and the Treaty establishing the European Community).[1] For the first time in its history, the EU acquired a wide legal competence for external economic matters; this is because the Treaty of Lisbon extends the scope of external trade policy on issues of investment. The implications of these essential innovations in EU international treaty-making powers, both on the international stage and in the EU bilateral relations, are significant. Of course, the Global Financial Crisis (2008–09) and the current EU sovereign debt crises have required governments to address the urgencies of short-term crisis management instead of long-term productive investment. However, the risk of recession shows the need for international investment in the EU which will continue to grow. For the EU itself and its trading partners, the extension of 'trade' policy to include investment does not only change the conditions of future negotiations but also has a systemic dimension.

This article elaborates the impact of the Treaty of Lisbon on the external actions of the EU, a major capital exporter in the world, and its 27 Member States. Even if some legal consequences can be identified and other issues remain unsolved, both are scrutinized in the broader context of their potential impact on the 'emerging global regime for investment'.[2] This article also addresses the resulting implications for third countries; this is necessary because the EU's new competence will play a role in the international investment regime for at least three major reasons:

- Firstly, the EU is the world's largest exporter of international investments, and the world's leading recipient of foreign direct investment (FDI). By 2010, the EU's outward FDI totaled US$ 3.88 trillion, down from US$ 9.15 trillion, while its inward FDI amounted to US$ 3.6 trillion, down from US$ 5.36 trillion.[3] Over the last three years, the EU accounted for approximately 30% of global FDI flows.[4] The flows of international investments in Europe reflect the EU's open policy with regard to the movement of capital and, thus, any regulatory innovation in the EU policy may systematically affect regional and global FDI flows.

[1] EU, Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, [2007] OJ C 306/1. I use, in the developments below, the new numbering of the Treaty on the Functioning of the European Union.

[2] See Jeswald W. Salacuse, 'The Emerging Global Regime for Investment', 51 Harvard International Law Journal 427 (2010), at 431.

[3] See the most recent data from the statistical office of the European Union ('Eurostat'), http://epp.eurostat.ec.europa.eu (visited 3 February 2012).

[4] See UNCTAD, *World Investment Report 2011 - Non-Equity Modes of International Production and Development*, New York and Geneva (UNCTAD/WIR/2011) 26 July 2011, at 101.

- Secondly, the new competence will broadly impact many ongoing preferential trade agreement[5] (PTA) negotiations which also contain investment chapters.[6] More specifically, it will greatly strengthen the negotiating power of the EU (more than if every single Member State negotiates on its own) and the EU can utilize its leverage to negotiate favourable liberalization terms with non-Member States and consistency in protection standards worldwide, leading to an even (as well as a superior) playing field for EU investors.
- Thirdly, because the EU Member States together account for almost half of the investment agreements currently in force around the world, the new EU competence will largely contribute to shaping the emerging global regime for investment by calling into question the futures of almost 1300 bilateral investment treaties (BITs) concluded by the 27 EU countries and third country partners.[7]

Whereas the idea of a European investment policy has frequently surfaced since the end of the 1990s, there is not an exhaustive analysis of such a transfer of competence and, above all, its consequences in terms of legal policy. This article provides a critical analysis of the new EU competence enshrined in the Treaty on the Functioning of the European Union (TFEU) but, even more so, of its likely ramifications on the different regional and global levels. In the first section, the dynamics of international investment law in the world and in the EU are discussed while the changes to EU external economic policy are analysed, focusing on the TFEU. The second section attempts to analyse the options for future EU investment policy whose features are partly presented in the EU Commission Communication. The third section contemplates the immediate challenges of implementation. The fourth section analyses the crucial stage of transition between the old national BIT system and the future EU agreements. In the concluding section, some policy issues are explored on the basis of the findings which confirm the emergence of the EU as a major actor on the international scene for the regulation of investment, but this section also points out some issues and concerns which must be addressed by EU policy-makers and related researchers, in order to obtain the full benefit of the new regime.

[5] As stated by Lester and Mercurio, many of the so-called FTAs favour certain countries in trade relations and are basically discriminatory rather than 'free trade'. The term PTA encompasses many different kinds of bilateral and regional trade agreements and underscores their common denominator, which is to establish preferences for the signatories over others in trade relations. See Simon Lester and Bryan Mercurio (eds), *Bilateral and Regional Trade Agreements – Commentary and Analysis* (Cambridge: Cambridge University Press, 2009) at 4–5.

[6] As of January 2012, the EU is engaged in PTA negotiations with India, Singapore, ASEAN, Canada, Colombia, Peru, Central America (Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, Panama) and Mercosur. See the European Commission's Directorate-General for Trade website, http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf (visited 3 February 2012).

[7] See UNCTAD, above n 4, at 100–01.

II. THE CHANGING HORIZONS OF EU INVESTMENT POLICY

The current European trends in investment treaty practices show that regulatory power, substantive agendas and the interests of various stakeholders are intrinsically intertwined, and that, together they form the EU jumble of investment regulations. In order to provide an overview of the current legal situations, the most important features of these practices will be briefly depicted in this section (Section II.A.). In addition, although some of the most relevant developments in international investment matters in the last decade have been witnessed in the EU (both within the EU or in EU external relations), the Treaty of Lisbon which gives a new competence to the EU will still push forward the new frontier of the Common Commercial Policy by giving birth to a new broad external economic policy at the supranational level (Section II.B.).

A. Recent European trends in investment treaty practices

Contemporary international regulation of FDI is one of the fastest-growing areas of international economic regulation. Although national laws and policies still constitute the most concrete and detailed part of the legal framework of FDI, the current system has become increasingly dependent upon international treaties. This 'treatification'[8] shows the significant recalibration of international investment law over the last few years. Professor Patrick Juilliard aptly synthesized this trend by stating that, in the evolution of the sources of law that govern foreign investments, there have been two *victimes* (losers): namely, internal law and customary international law; and two *vainqueurs* (winners): namely, BITs and the general principles of international law.[9] According to the United Nations Conference on Trade and Development (UNCTAD) studies and statistics, the network of international investment agreements (IIAs) has been expanding considerably over the last decade, amounting by the end of 2011 to almost 3000 BITs, whereas fewer than 400 BITs existed at the end of the 1990s.[10] From Figure 1, one can see that the EU countries have concluded numerous agreements and the total number of BITs concluded by EU members now represents almost half of existing BITs worldwide. Among them, Germany, the UK and France lead the group by concluding more than 100 BITs, and a selected group of countries (Portugal, Spain, Cyprus and the Czech Republic) has concluded in the last two years the greatest number of BITs, and this is reflected in the proportion of their BITs awaiting ratification.

[8] See Jeswald W. Salacuse, 'The Treatification of International Investment Law', 13 Law and Business Review of the Americas 155 (2007), at 155.

[9] Patrick Juillard, 'L'évolution des sources du droit des investissements', 250 Recueil des Cours de L'Académie de Droit International 1 (1994), at 208–09.

[10] UNCTAD, above n 4, at 100.

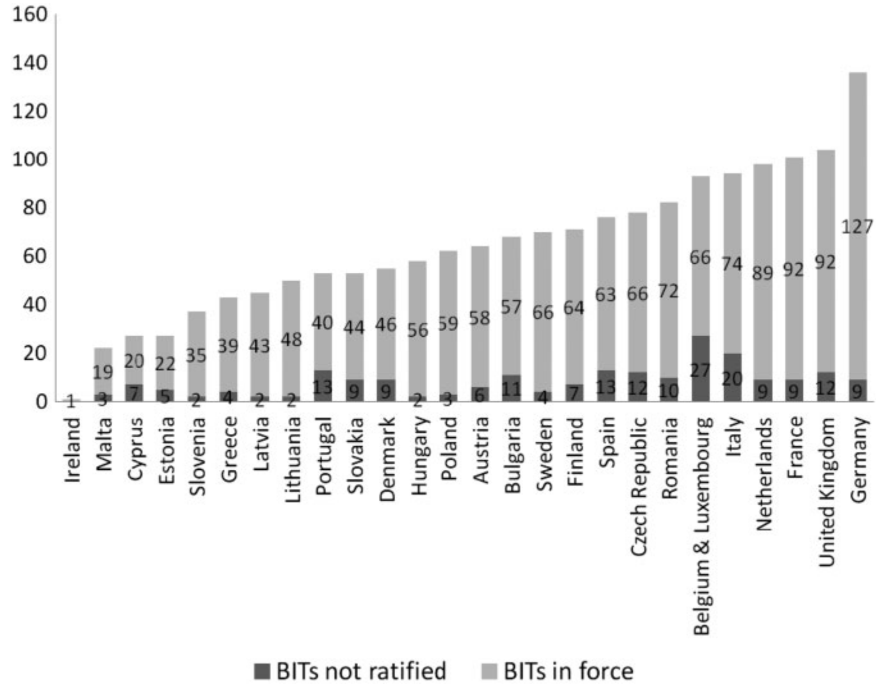

Figure 1. BITs concluded by EU Member States, as of January 2012. European Union Member States maintain a network of bilateral investment treaties between themselves. These Intra-EU BITs are included in the data. However, concerns have been expressed by the European Commission that these treaties have been superseded by European Community law. On this issue, see Eilmansberger Thomas, 'Bilateral Investment Treaties and EU Law', 46 Common Market Law Review 383 (2009), at 387. See also, Dimopoulos Angelos, 'The Validity and Applicability of International Investment Agreements between EU Member States under EU and International Law', 48 Common Market Law Review 63 (2011), at 64. *Source*: Compiled by the author on the basis of UNCTAD Database of Investment Agreements and national Ministries of Foreign Affairs public information.

In terms of substance, EU Member States' practice allows us to identify the features of European BITs.[11] More specifically, the agreements tend to adopt the investment control model which materializes the 'European approach towards FDI regulation'. This can be seen from the model BITs of several EU countries. For example, the prototype BIT of the UK[12] adopts the investment control model, stating that each contracting party shall

[11] BITs are often negotiated on the basis of 'BITs model' developed by leading countries and promoted by them as templates for investment relations. A model BIT represents the set of norms which the relevant state holds out to be both reasonable and acceptable as a legal basis for protection of foreign investment in its own economy. For the texts of model BITs used by France, Germany, the UK, and the USA, see Rudolf Dolzer and Schreuer Christoph, *Principles of International Investment Law* (Oxford: Oxford University Press, 2008) at 360–429.

[12] See United Kingdom Foreign Office and Commonwealth – Treaty Section website, http://www.fco.gov.uk/en/publications-and-documents/treaties/ (visited 3 February 2012).

encourage and create favourable conditions for nationals or companies of the other contracting party to invest capital in its territory, and, subject to its right to exercise powers conferred by its laws, shall admit such capital. It also states that neither contracting party shall, in its territory, subject nationals or companies of the other contracting party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to its own nationals or companies or to any third state's nationals or companies.

By addressing the European approach to the entry or admission of FDI, this article means the approach of the Member States of the EU towards investors from outside the EU. The EU Member treaty approach is different from the approach combining the national treatment (NT) and the most-favoured-nation (MFN) treatment model adopted by some other countries (such as other significant capital exporters, like USA and Canada). Compared to the above-mentioned European approach, the US model BIT stipulates NT and MFN, whichever is more favourable to foreign investors from the States parties at the pre-entry (as well as the post-entry) stages of investment.[13]

B. The new frontier of the common commercial policy

In the past, the EU Member States showed great keenness to retain national control over foreign investment rather than see it move into EU competence.[14] *Inter alia*, this was showcased at the Nice Summit (2000), where EU Member States agreed to amend Article 133 of the Treaty of Rome (which governs the Union's common commercial policy) by extending EU competence to a number of 'new' areas. In a few sensitive sectors such as audio-visual services (e.g., *'l'exception culturelle'*)[15] and investment, EU Member States did not agree on handing over 'shared' or 'mixed'[16]

[13] The aim is to widen entry and establishment rights as far as possible, thereby enabling investors from States signatories to obtain the same rights of access as the most favoured third country investor.

[14] See generally, Julien Chaisse, 'Adapting the European Community Legal Structure to the International Trade' 17(6) European Business Law Review 1615 (2006) 35, at 1617.

[15] Which could be defined as an exemption for cultural goods and services developed towards the end of the Uruguay Round negotiations. In the context of economic institutions, Canada and the European Union (with France in the forefront) had 'written "*exception culturelle*" on their flags when they fought in 1993 against the inclusion of audiovisual media into the regime of the new WTO. Although the "cultural exception" doctrine proved to be a very effective public relations slogan, its precise meaning has not been clear. Proponents invoked it in order to argue that culture must not be subject to the laws of free trade. Opponents, however, suspected that the "cultural exception" doctrine was no more than disguised protectionism'. See Christoph B. Graber, 'The new UNESCO Convention on Cultural Diversity: a Counterbalance to the WTO', 9 Journal of International Economic Law 553 (2006), at 554.

[16] International negotiations over such issues require the direct participation of both EU and its Member State(s), and thus result in mixed agreements. Mixed competence issues have grown more prominent in recent years, largely as the result of 'new' international trade agendas, but

competence to the EC. With the ratification of the Treaty of Nice, investment was one of a few very sensitive issues that remain subject to the rules and procedures of inter-governmentalism, as opposed to the 'community approach'. For this reason, investment was covered by a plethora of BITs between individual EU Member States and third parties.[17] BITs were considered to be the single most important tool in investment relations between countries. But now, the Treaty of Lisbon extends the Common Commercial Policy to the second most important field of international economic relations, namely, FDI (Articles 206 and 207 TFEU). The Article 207 TFEU reads:

> 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.

In order to delimit the scope of the EU new competence, it is necessary to examine the categories of foreign investment, the relevant regulation covered in Article 207 TFEU and the nature of the EU competence. As for the implementation of such competence, the rules of decision-making imposing the qualified majority vote (QMV) as the principle, but subject to special circumstances under which decisions will need to be taken by unanimity of the Member States are discussed further.

Firstly, the new Article 207 TFEU includes expressly, and for the first time, 'foreign direct investment' under the Common Commercial Policy Title II of the TFEU without, however, providing a definition. As a result, the scope of the EU new competence to regulate foreign investment under the Treaty of Lisbon is neither clearly identified nor circumscribed by the Treaty. One can, however, notice that since 'foreign direct investment' is the concept chosen by the Treaty drafters, it cannot be treated as a synonym for a much broader concept of 'investment', which includes portfolio investments. FDI implies a controlling stake in a business,[18] and often connotes

also because of the EU's increased activism in international social accords, environmental treaties and consumer protection agreements. See Marcus Klamert and Niklas Maydell, 'Lost in Exclusivity: Implied Non-Exclusive External Competences in Community Law', 13 European Foreign Affairs Review 493(2008), at 493.

[17] Tomas Baert, 'The Euro-Mediterranean Agreements', in Gary Sampson and Stephen Woolcock (eds), *Regionalism, Multilateralism and Economic integration – The Recent Experience* (New York: United Nations University Press, 2003), at 116.

[18] FDI is achieved when foreign investors exert management control over another country's domestic companies by purchasing physical assets or a significant amount of stock. See Daniel R. Sieck, 'Confronting the Obsolescing Bargain: Transacting Around Political Risk

ownership of physical assets such as equipment, buildings and real estate, whereas portfolio investment[19] can be much more volatile, as an older EU Communication[20] indicates. Therefore, portfolio investments should not be part of the EU new exclusive competence enshrined in Article 207 TFEU.[21]

Secondly, the EU concept of FDI can be further defined by asking the following question: does Article 207 TFEU give competence to the supranational Institutions to take action in *all aspects of the regulation of foreign investment*? As a premise, the new Article 207 TFEU unifies rules on establishment in all sectors of foreign investment. This Article is placed under the Common Commercial Policy, which is based on principles of uniformity and liberalization. As a result, one can assume that the admission of foreign investment, both in goods and services, may fall within the scope of a given competence on the regulation of FDIs. Article 207 TFEU can be interpreted as granting powers with regard to all foreign persons that are already established. Such an interpretation does not depend on the necessity for foreign entities to meet the requirement of Article 54 TFEU.[22]

in Developing and Transitioning Economies Through Renewable Energy Foreign Direct Investment', 33 Suffolk Transnational Law Review 319 (2010), at 323.

19 For a distinction between foreign direct investment and passive portfolio investments not involving control, see Richard J. Hunter, 'Property Risks in International Business', 15 International Trade Law Journal 23 (2006), at 26.

20 In 2002, the EU Commission submitted to the WTO Working Group on the Relationship between Trade and Investment a report in which it contended that portfolio investment is not included in the notion of FDI: 'Portfolio investors, as a general rule do not expect to obtain additional benefits derived from the management control of the enterprise in which they invest. Their main concern is the appreciation of the value of their capital and the return that it can generate regardless of any long-term relationship consideration or control of the enterprise. This is the main rationale behind portfolio investment that makes it substantially different from FDI'. See WTO, Working Group on the Relationship between Trade and Investment, Communication of the European Union Commission, Definition of Investment, WT/WGTI/W/115, 16 April 2002, at 14.

21 To this extent, even if the EU concept of investment does not cover portfolio investment, the future definition of investment in EU treaties could explicitly include portfolio investment (as a national competence): such agreements would be mixed agreements. See below the discussion on the nature of the competence. See also, Jan Asmus Bischoff, 'Just a Little BIT of "Mixity"? The EU's Role in the Field of International Investment Protection Law', 48 Common Market Law Review 1537 (2011), at 1537.

22 To better understand the freedom of establishment (Articles 49–55 of the TFEU), Article 49 and Article 54 tend to be read together. According to Article 49 the 'restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited . . . Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54'. This second paragraph defines 'companies or firms' as 'companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making'. The right of establishment, therefore, is granted both to natural and legal persons. See Matthew W. Mauldin, 'The European Union, State-Sponsored Gambling, and Private Gambling Services: Time for Harmonization?', 36 Georgia Journal of International and Comparative Law 413 (2008), at 428–29.

Furthermore, the FDI competence may be anticipated to be comprehensive because it explicitly includes all standards of treatment of FDI (ranging from the MFN, NT, fair and equitable treatment, dispute settlement procedures to the rules on expropriation). Meanwhile, the FDI competence may cover the treatment of EU-controlled or EU-managed undertakings in third countries which do not fall straightforwardly within the scope of a Union competence on the ground of the principle of establishment.

Thirdly, beyond such competence transfer, the Treaty of Lisbon distinguishes three main categories of competences: the Union's *exclusive competences* in areas such as common trading policy,[23] where it legislates alone (Article 3 of the TFEU); *shared competences* between the Union and Member States (Article 4 of the TFEU), with the States exercising their competence if the Union does not exercise its own;[24] and *supporting competences* (Article 6 of the TFEU) where the Union can only provide support or co-ordination (excluding all aspects of harmonization) and, consequently, has no legislative power in those fields and may not interfere in the exercise of such competences reserved for the Member States.[25] As a result, the Treaty does not only bring FDI into the competence of the EU but also puts further pressure on Member States to renegotiate existing BITs because, according to the Treaty, Member States will no longer be able to negotiate such treaties on their own accord. As discussed above, it is safe to conclude that the EU now holds exclusive competence over FDI, which is interpreted to include the classical standards of investment protection. However, the absence of a definition of 'FDI' in the Treaty still leaves scope for disagreement. In fact, one can be sure that those Member States which are unhappy with the competence transfer and intend to retain their existing BITs will ask the CJEU to clarify this issue.[26] Some candidates to

[23] Other covered areas are: customs union; establishment of competition rules necessary for the functioning of the internal market; monetary policy for member states which use the Euro as legal tender; conservation of the biological resources of the sea as part of the common fisheries policy; and the conclusion of an international agreement when this is within the framework of one of the union's legislative acts or when it is necessary to help it exercise an internal competence or if there is a possibility of the common rules being affected or of their range being changed.

[24] They include: internal market; social policy with regard to specific aspects defined in the treaty; economic, social and territorial cohesion; agriculture and fisheries, except for the conservation of the biological resources of the sea; environment; consumer protection; transport; transeuropean networks; energy; area of freedom, security and justice; joint security issues with regard to aspects of public health as defined in the Lisbon treaty; research, technological development and space; and development cooperation and humanitarian aid.

[25] Those fields are: protection and improvement of human healthcare; industry; culture; tourism; education, professional training, youth and sport; civil protection; and administrative cooperation.

[26] Sharing the same view, see Frederic Van Der Berghe, 'The EC's Common Commercial Policy Revisited: What Does Lisbon Add?', 4(9) Global Trade and Customs Journal 275 (2009), at 277.

this category might be identified as those EU states which have decided to conclude illegal BITs[27] with third countries since December 2009.[28] The final say will be the Court's in order to clearly delimit the scope of EU competence in the field of external relations,[29] as it did in relation to the Treaty Establishing the European Community in 1994. At that time, the EU Member States and the European Commission disagreed about the coverage of the commercial policy provisions of former Article 133 TEC in the areas of intellectual property and services. When the CJEU was consulted, it stated,[30] in Opinion 1/94, that only certain aspects of the two sectors could be considered as falling under former Article 133 TEC and, thereby, under the EC's exclusive competence.[31] To be fair, if the issue of the EU investment competence remains open from the theoretical point of view, there is no concern about the practical and policy perspectives. Or even if the CJEU would decide that EU investment agreements contain an element which relates to mixed competence, this would not impact much of the negotiation processes and the final outcomes, either. Because, as will be discussed below, the EU intends to develop broad encompassing trade and investment agreements which will include areas outside its exclusive competence, such as cultural cooperation[32] or criminal procedures in relation to

[27] In the same sense, Pieter-Jan Kuijper, 'Foreign Direct Investment: The First Test of the Lisbon Improvements in the Domain of Trade Policy', 37(4) Legal Issues of Economic Integration (2010), at 262.

[28] For instance, the Czech Republic did not refrain itself from concluding eight new BITs (with Albania, Kuwait, Lebanon, Montenegro, Morocco, Serbia, India and Kazakhstan). The same is true for Portugal, which concluded BITs with Senegal and Congo in 2010. These recent BITs are illegal not only since the entry into force of the Lisbon Treaty but also since the signature of the Treaty as indicated in Article 18 of the Vienna Convention on the Law of Treaties, which provides that Member States which have signed (here, the Lisbon Treaty) have the obligation to refrain from acts (such as concluding new BITs) which would defeat the object and purpose of that treaty prior to its entry into force. See Vienna Convention on the Law of Treaties, article 18, 23 May, 1969, U.N. Doc. A/Conf. 39/27 at 289 (1969), 1155 U.N.T.S. 331. For a commentary of this provision, Charme Joni S., 'The Interim Obligation of Article 18 of the Vienna Convention on the Law of Treaties: Making Sense of an Enigma', 25 George Washington Journal of International Law and Economics 71 (1992), at 74.

[29] 'Commission and Council fight each other to a stand-off and ultimately the matter will go to the Court, which will determine the scope of the words—"Foreign Direct Investment"—in Article 207 TFEU'. See Kuijper, above n 27, 261–72.

[30] The 'ECJ became considerably more circumspect in the first half of the 1990s, when it rejected an expansive interpretation of the common commercial policy and also became more restrictive in its interpretations of Opinion 1/76 and of the ERTA case in the domain of general external relations powers'. See Pieter Jan Kuijper, 'Fifty Years of EC/EU External Relations: Continuity and the Dialogue Between Judges and Member States as Constitutional Legislators', 31 Fordham International Law Journal 1571 (2008), at 1593.

[31] See ECJ, Opinion 1/94 *Community Competence to Conclude Certain International Agreements* (1994) ECR I-5276.

[32] Cultural cooperation elements have to be included in EU trade agreements as a consequence of the UNESCO Convention on Protection and Promotion of the Diversity of Cultural Expressions, which the EC and most of its Members States have ratified. The Convention foresees that countries have to promote cultural diversity and this should be also reflected in

intellectual property rights (IPR) violations.[33] A good illustration is the 2010 Preferential Trade Agreement (PTA) between the EU and South Korea; this is the first of the new generation of PTAs launched in 2007 as part of the 'Global Europe' initiative. This PTA includes a dedicated protocol on cultural cooperation which sets up a framework for engaging in policy dialogue on culture and audiovisual issues.[34] By this, even if the CJEU adopts a very broad interpretation of the new investment competence in the future, the negotiated trade and investment treaties are most likely to be mixed treaties. In addition to that, even if future EU agreements address only investment protection (i.e. no trade), they will largely be negotiated and signed as mixed agreements for two main reasons: (1) portfolio investment uses various indirect financial mechanisms and falls outside the Article 207 TFEU competence on FDI; and (2) as a result of Article 345 TFEU which states that the treaties shall in no way prejudice the rules governing Member States' systems of property ownership, some aspects of expropriation will remain within Member States' competence.[35]

Fourthly, the other limit lies in the decision-making rules because, instead of requiring a qualified majority, future investment agreements may be subject to unanimity. More specifically, TFEU Article 207(4) requires unanimous Council decisions on international agreements in certain fields,[36] such as trade in services, commercial aspects of intellectual property and FDI. These unanimity requirements, without doubt, have been carried over from EC Treaty Article 133(5)–(7), where unanimity is mandated for international agreements as long as internal EU action would require unanimity.

To sum up, the recent European trends in investment treaty practices have resulted in an incredibly complex set of obligations both for foreign investors and EU investors to deal with. As such, the Europe Union has constituted a key example of a lack of uniformity in international investment regulation, and

their international agreements and in the implementation of such international agreements. Without prejudice to the fact that UNESCO guidelines are being elaborated, the EU has drafted a model Protocol on Cultural Cooperation to be included in future trade agreements

33 It is not new, because, for instance, Article 61 of the 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) requires criminal procedures and penalties in cases of 'wilful trademark counterfeiting or copyright piracy on a commercial scale'. But, modern PTAs have developed this kind of TRIPs plus requirements and increase criminalization of certain violations. See Beatrice Lindstrom, 'Scaling Back TRIPs-Plus: An Analysis of Intellectual Property Provisions in Trade Agreements and Implications for Asia and the Pacific', 42 New York University Journal of International Law and Politics 917 (2010), at 942–46.

34 The protocol also seeks to encourage parties to cooperate in facilitating exchanges regarding cultural activities, notably in the area of performing arts, publications, protection of cultural heritage sites and historical monuments, as well as in the audiovisual sector. It also seeks to ensure a facilitated movement for artists and other cultural professionals and practitioners who are not service providers.

35 See below, Section III.A.2.

36 See Jean-Claude Piris, *The Lisbon Treaty: A Legal and Political Analysis* (London: Cambridge University Press, 2010) 284–86.

even a special case going beyond the fragmentation of international investment law and of public international law generally, as analysed by the International Law Commission.[37] This legal situation, however, will change to a large extent in the future because of the new EU competence. These treaty amendments make the disappearance of national investment policies and their transfer to the supranational level unavoidable. But, the EU is well aware that it is engaged in a global race for attracting FDIs and for protecting its own investments abroad. Considering that the WTO is not the best forum in the current state of affairs, progress is more likely to be made in bilateral venues. Meanwhile, the most important or most promising partners have been singled out by the EU Commission and will be the first tests for the new EU investment policy. The 'negotiation mandate' for EU–Canada/India/Singapore PTAs was approved by the General Affairs Council on 12 September 2011.[38] This confidential document confirms the trend that the EU will negotiate broad encompassing PTAs to replace narrow and conventional BITs.[39]

III. ENHANCING SUBSTANTIVE INVESTMENT TREATIES PROVISIONS

In sharp contrast with the more than 1200 existing BITs concluded by EU Members, the July 2010 Communication[40] mentions broader policy

[37] Fragmentation is caused by the fact that international law consists of diverse polycentric legal systems eclipsing the former Westphalian system of nation states. The post-war propensity towards accelerated cooperation has led to intensive inter-state treaty-making and the emergence of autonomous legal orders beyond the nation state model. See International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law.* Report of the Study Group of the International Law Commission Finalized by Martii Koskenniemi, 13 April 2006, UN Doc A/AC.4/L.682. Various factors are responsible for the increased fragmentation: the proliferation of international regulations, increasing political fragmentation (juxtaposed with growing regional and global interdependence in such areas as economics, the environment, energy, resources, health, and the proliferation of weapons of mass destruction), the emancipation of individuals from States, the specialization of international regulations. See Paul-Marie Dupuy, 'The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice', 31 New York University Journal of International Law & Policy (1999), at 791. See also, Thomas Cottier et al., 'Fragmentation and Coherence in International Trade Regulation: Analysis and Conceptual Foundations', in Thomas Cottier and Panagiotis Delimatsis (eds), *The Prospects of International Trade Regulation – From Fragmentation to Coherence* (London: Cambridge University Press, 2011), 791.

[38] The Commission will lead the negotiations according to this mandate given by the Council. The Council must approve the Commission's negotiating mandate before talks can begin. The European Parliament is fully informed at all stages of the negotiations and will have to give its consent to the outcome of the negotiations. The text of the negotiating mandates (for investment protection chapters) is available on the web through various NGO sources. See e.g. Bilaterals' website, http://www.bilaterals.org/spip.php?article20272&lang=en (visited 3 February 2012).

[39] The EU negotiating Mandate on investment involves some notable elements, including the first ever inclusion of an investor–state dispute mechanism for an EU-wide treaty.

[40] EU, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Towards a

objectives. It explicitly refers to the objectives of the overall European foreign policy (such as the promotion of the rule of law, human rights and sustainable development) and to the OECD Guidelines for multinationals.

Does the Commission ambitiously foresee that an EU model BIT will eventually be developed? The idea is tempting but it is probably not realistic. This is because the July 2010 Communication also states that 'a one-size-fits-all model for investment agreements with third countries would necessarily be neither feasible nor desirable'.[41] Very little is known about the extent to which model clauses have been used as a starting point in negotiations by EU Member States and to what extent they are reflected in the outcome.[42] The Commission mentions the specificity of each negotiating context, but it is imaginable that others can easily preclude the development of a template since, in practice, such a proposal will require the agreement of all EU institutions (i.e. the Commission, Council and Parliament). Nevertheless, even with such a model, there is no reason to believe that it will become an efficient tool for negotiations. A reasonable concern is that, for instance, Norway developed an ambitious BIT model (including environmental and labour standards) which was never accepted by third countries. Also, it is difficult to imagine that a model can meet the demands of developing, emerging and developed economies at the same time. Therefore, when the Commission leads future negotiations with third countries, it is very likely to be on a pragmatic basis and to tap into the experience and instruments existing between Member States and the third country in question. A model may gradually emerge from the practice, but the Commission does not seem to have any great interest in making such an EU model one of the priorities of its new investment policy.

The real priorities in the new EU investment policy, however, consist of two crucial features. Firstly, setting improved standards of investment protection (III.A.) will provide innovations in rule-making and may rejuvenate the international investment regime by giving more precise definitions or creating new rights and obligations. Secondly, treaty practice shows that two basic models are negotiated as BITs. The first is based on an 'admission clause', meaning that the admission of foreign investment is subject to the domestic laws of the host country. The second model of BIT, albeit less frequent, confers on foreign investors a right of establishment (hereinafter called the 'right of establishment' model), even though not in an absolute manner. The EU investment policy will innovate as it may give preference

comprehensive European international investment policy, COM(2010) 343 final, Brussels, 7 July 2010.

[41] EU, above n 40, at 6.

[42] Both in North America and the EU, it is not very clear whether Member States will always approach the other parties with the same proposal (i.e. the same protection standard).

to the second model and change the paradigm of EU approach towards investment liberalization (III.B.).

A. Setting improved standards of investment protection

The July 2010 Communication states that the EU's 'future action in this field should be inspired and guided by the best available standards, so as to offer a level playing field of a high quality to all EU investors'.[43] An important challenge of setting standards of investment protection relates to the substantive rules[44] which the EU would seek to introduce in trade and investment agreements. Standards give substance to the 'treatment'[45] which the investor is subject to and as requested by the EU Parliament in its April 2011 resolution—these standards should be better defined in future treaties.[46] Investment standards establish the substantive protection accorded to those investors and/or investments and typically include 'fair and equitable treatment', 'full protection and security', expropriation conditions and the non-discrimination standards. But, their treatment standards may vary from one BIT to another. More noteworthily, tribunals are left with a too large scope for the interpretation of these norms, which does not satisfy basic needs of legal predictability.

Although it is difficult to analyse each common provision in all BITs, it is relevant to focus on the most important legal obligations that the parties to a BIT accept. Considering, firstly, that these obligations cover the voluntary limitation of the States' regulatory powers *vis-à-vis* private parties in the interest of promoting direct investments and are illustrated by the protection against expropriation without compensation takes effect and by the protection through standards that control the regulatory behaviour of the host state and, secondly, that the protection against expropriation and the fair and equitable treatment are the two principles identified by Behrens as rules of

[43] EU, above n 40, at 6.

[44] Salacuse, above n 2, at 445–48. See also, Todd J. Grierson-Weiler and Ian A. Laird, 'Standards of Treatment', in Peter Muchlinski (ed), *The Oxford Handbook of International Investment Law* (Oxford: Oxord University Press, 2008), 259–304.

[45] In the ICSID case of Suez, *Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v The Argentine Republic*, the tribunal defined 'treatment' as follows: 'The word "treatment" is not defined in the treaty text. However, the ordinary meaning of that term within the context of investment includes the rights and privileges granted and the obligations and burdens imposed by a Contracting State on investments made by investors covered by the treaty'. ICSID, *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v Argentine Republic* (2006) Case No. ARB/O3/19.

[46] See European Parliament resolution of 6 April 2011 on the future European international investment policy (2010/2203(INI)) at 24: The EP 'calls on the Commission to produce clear definitions of investor protection standards in order to avoid such problems in the new investment agreements'.

constitutional values for the international regime for investment,[47] these two core elements of investment protection will now be analysed in greater detail.

1. Redefining the fair and equitable treatment

An investor's investment decision is not made on the basis of the legal situation in a given host state at the time of the investment alone, but also on the expectation that he will be treated, in the future, fairly and equitably. The fair and equitable treatment seeks to address this situation and is closely related to the concept of investors' legitimate expectations and has repeatedly raised questions before arbitrators such as: to what extent may an investor legitimately rely on the stability of the legal and factual conditions under which he made the investment? And what sort of changes in the host state must the investor anticipate? In addition to the above questions, one can easily observe that the meaning of the 'fair and equitable treatment' standard may not necessarily be the same in all the treaties where it appears. And the 'ordinary meaning' of the 'fair and equitable treatment' (FET) standard is usually defined by terms of almost equal vagueness. In *MTD Equity v Chile*, the tribunal stated that 'in their ordinary meaning, the terms "fair" and "equitable"... mean "just", "even handed", "unbiased", "legitimate" '.[48] Similarly, probably no one can say more ambiguously than the tribunal did in *S.D. Myers*. In this case, the tribunal affirmed that an infringement of the FET standard requires 'treatment in such an unjust or arbitrary manner that the treatment rises to a level that is unacceptable from an international perspective'.[49] In substance, the FET is sometimes understood to be an independent standard that embodies the concept of the rule of law (minimum standard of treatment). Meanwhile, as some commentators try to dock FET to customary international law and its minimum standard of treatment that has developed in the arbitral practice (beyond the minimum standard of treatment), others again see it as an independent self-contained treaty standard.[50]

These variations are well reflected in the EU countries' treaty practice. Some EU countries' BITs do take into account the full range of international law sources, including general principles, modern treaties and other conventional obligations and, hence, give FET an extended scope of application. However, some other EU countries' BITs regard FET as a mere minimum

[47] See Peter Behrens, 'Towards the Constitutionalization of International Investment Protection', 45 Archiv des Völkerrechts 153 (2007), at 459.

[48] ICSID, *MTD Equity v Chile* (2004) Case No. ARB/01/07, para 105.

[49] See PCA, *Saluka Investment BV (Netherlands) v Czech Republic* (2006) Partial Award, at para 297. For more information on fair and equitable treatment in foreign direct investment, see, Ioana Tudor, *The Fair and Equitable Treatment Standard in International Foreign Investment Law* (Oxford: Oxford University Press, 2008), 300.

[50] For an extensive analysis of arbitrators approaches, see Tudor, above n 49.

standard of treatment. As a result, the EU will have to face two challenges which are interrelated. The first will be to proceed to a kind of harmonization in its relations with third countries. For example, if there are currently significant variations in the way that the FET is defined with China, the EU will have to convince China that it is appropriate to shift to a single definition since it will benefit all investors. Secondly, the substantive immediate issue will be to decide what the most suitable definition of the FET in EU treaties is. This issue particularly challenges the EU because neither its domestic systems nor EU law includes an obligation as broad or comprehensive as the FET obligation in BITs.

The proper interpretation may be influenced by the specific wording of a particular treaty, its context, negotiating history or other indications of the parties' intent. Because the tribunals do not engage only in investor–state dispute resolution but are also involved in norm elaboration and even norm creation which usually raises controversies, would the EU decide to fine-tune the situations covered by such a standard? If so, it does not mean that the EU could promise foreign investors the treatment that is less than fair and less than equitable in its treaties; instead, it could clearly state, for instance, whether transparency (which has been interpreted as being covered by the FET) is covered and how. In short, the EU could take a cautious approach by including the minimum standard of treatment under customary international law (and perhaps elaborating the types of conduct that would result in its breach) hence reducing the risk of broad interpretation by arbitral tribunals.

2. Redefining the indirect expropriation

The fundamental protection against expropriation raises similar questions. If traditional international investment protection law was formerly aimed at direct expropriations (towards the taking of a foreign investor's assets), indirect expropriations (i.e. deprivations) have become a part of international investment protection rules and are, in practice, an importance cause of treaty violations. Although there are significant discrepancies in the EU countries' practices (some national BITs will cover both direct and indirect expropriations while some others will not address indirect expropriation), it is still not a matter of national investment policies; this is because some EU countries (such as the UK, France and Germany) do not always cover indirect expropriation in their BITs. In this case, the future choice will become very important because if indirect expropriation is later covered by a treaty, it means that the BIT will grant a protection to foreign investors who may be faced with the serious investment climate changes which none of them could have reasonably anticipated.

Not only is there no clear definition of indirect expropriation, but, in recent years, a growing number of important tribunal decisions have not been able to draw the line between the concepts of indirect expropriation and of governmental regulatory measures not requiring compensation. Now, this line still very much depends on the factual situation and circumstances of each case and it thus renders litigation in this field very unpredictable.[51] Even so, the most recent generation of USA and Canada's investment treaties, which frequently include investment chapters of PTAs, have introduced specific language and established criteria. These are important innovations because they can help arbitrators to determine the reality of an indirect expropriation requiring compensation. Moreover, the Dominican Republic–Central America Free Trade Agreement (DR–CAFTA) goes even further and makes an effort to bring clarity to the test of 'indirect expropriation' that should be a source of inspiration for the EU Commission. More specifically, the recent DR–CAFTA innovates and clarifies the traditional standard with the addition of three material parameters by: (1) expressly conflating the concepts of 'indirect expropriation' and 'measures tantamount to expropriation'; (2) supplementing the expropriation provision with an annex specifically devoted to enumerating the indirect expropriation criteria; and (3) explicitly permitting non-discriminatory government regulation.[52]

Considering that the issue of expropriation is at the very heart of investment protection, the transfer of investment powers to the EU raises even more specific issues. While it follows from Article 345 TFEU that the Treaty does not affect a Member State's right to decide whether a given asset should be in public or private ownership, the Court's case law shows that this does not have the effect of exempting expropriation measures from the fundamental rules of the Treaty,[53] including those on freedom of establishment and free movement of capital. Accordingly, expropriation measures in the EU should be non- discriminatory and proportionate in order to attain their legitimate objective (e.g., by providing for adequate compensation). Hence, the EU should include precise clauses covering this issue into its own future investment or trade agreements.

[51] One must also note that there are some variations in the way that some arbitral tribunals have distinguished legitimate non-compensable regulations having an effect on the economic value of foreign investments from indirect expropriation requiring compensation. Examination reveals that, in broad terms, they have identified the following criteria which look very similar to the ones laid out in the recent agreements: (i) the degree of interference with the property right, (ii) the character of governmental measures, i.e. the purpose and the context of the governmental behaviour, and (iii) the interference of the measure with reasonable and investment-backed expectations. See Anne Van Aaken, 'International Investment Law between Commitment and Flexibility: a Contract Theory Analysis,' 12 Journal of International Economic Law 507 (2009), at 510–12.

[52] For a discussion, see Rachel D. Edsall, 'Indirect Expropriation under NAFTA and DR-CAFTA: Potential Inconsistencies in the Treatment of State Public', 86 Boston University Law Review 931 (2006), at 953–61.

[53] See EU, European Commission, Proposal for Regulation of the European Parliament and of the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries, COM(2010)344 final, Brussels, 7 July 2010, at 8

Taking inspiration from the North American Free Trade Agreement (NAFTA) and CAFTA efforts to clarify the concept of indirect expropriation and considering the legal need for the EU to insert proportionality test, this article concretely suggests the following definition: 'Except in rare circumstances, non-discriminatory regulatory actions by a Party that are proportionately designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations'. By adopting such a definition, the EU would not only set a high standard of protection covering both direct and indirect expropriations, but it could give clear indication to the arbitrators in order to avoid excessively broad interpretation and, hence, legal insecurity.

Beyond the constitutional guarantees against expropriation and FET, the EU effort to better define essential concepts could be pursued with some other classical BITs provisions: for instance, Germany and France do not make the same use of an 'umbrella clause'.[54] And, as a matter of fact, under contemporary interpretation, an 'umbrella clause' in an investment treaty has far-reaching ramifications. The 'umbrella clause' may be invoked to elevate a contract breach by a State to an international wrongdoing, regardless of the nature of the contract or the specific provision breached. As a major consequence, an 'umbrella clause' vests the treaty tribunal with subject matter jurisdiction for the contract claim.[55] However, for this to happen, the wording of the investment treaty must be sufficiently specific as demonstrated in *Salini v Jordan*.[56] This would have to be clarified by EU negotiators in light of the possibility for foreign investors to bypass normal procedures existing in the national legal orders, especially in the least developed EU countries. Finally, the EU could believe that it is legitimate to treat state-controlled entities (i.e. SOE or sovereign funds) as a different class of investors, seeing as how there are suspicions of non-commercial motivations behind, for instance, Russian or Chinese outward foreign direct investment (OFDI).[57]

[54] States that are parties to an investment treaty may commit themselves to honor contractual undertakings *vis-à-vis* nationals of the other state. This kind of commitment is called an 'umbrella clause' because it

provides a general 'umbrella' for violations of contractual commitments (e.g. stabilization clauses) to become a breach of the investment treaty, not only a breach of the investment contract (ICSID, *CMS Gas Transmission Co. v Argentina* (2007) Case No.ARB/01/8.

[55] An 'umbrella clause is usually seen as transforming municipal law obligations into obligations directly cognizable in international law'. See ICSID, *Noble Ventures v Romania* (2005) Case No. ARB/01/11.

[56] ICSID, *Salini Costruttori S.p.A. v Jordan* (2004) Case No. ARB/02/13. Because it reinforces the legal value of a stabilization clause, an 'umbrella clause' may further tighten the constraints on regulation which stem from those clauses. These issues are discussed in detail by Sinclair. See Anthony C. Sinclair, 'The Origins of the Umbrella Clause in the International Law of Investment Protection', 20 Arbitration International 411 (2004), at 411.

[57] Despite increasing inclination towards market liberalization and privatization observed over the last decade, the role of the States has in this period of time arguably grown in importance on some particular aspects of investment. Notably, investments from emerging economies

It is what could be addressed in BITs with basic requirements on governance, transparency of ownership and legal structure, disclosure of the investment strategy, limits on state subsidies and credit or it could require state-owned firms to operate on a commercial basis when they buy and sell goods and services.[58] Here, the article would particularly address the case of China because if the Chinese Yuan appreciates, acquiring foreign assets will become easier for China and this will boost even more Chinese foreign investments than before. At that time, one can imagine that the bargaining power may be in favour of the PRC and, thus, it will be more difficult to develop new rules in BITs with it.

B. Changing the policy paradigm of EU FDI liberalization approach

As stated by the Commission in its July 2010 Communication, 'a comprehensive common international investment policy needs to better address investor needs from the planning to the profit stage or from the pre- to the post-admission stage. Thus, our trade policy will seek to integrate investment liberalisation and investment protection'.[59] The most important change which will benefit EU investors might be the shift from post-establishment to pre- and post-establishment rights granted to foreign investors which represent the two main approaches to the admission of foreign investment that can be recognised in the BITs. 'Entry' provisions have a significant effect on the host state's control over foreign investment because it erodes the control that the host state can exert on the FDI.

Without stating so in an explicit manner, it seems to be implied in the EU Commission Communication that the Commission wishes to proceed towards a major change: EU IIAs should no longer be based on an admission clause but, instead, they should adopt the US model granting pre-establishment rights to foreign investors. Such an assumption is strongly reinforced by the EU approach in WTO and PTAs negotiations. As a matter of fact, EU PTAs with developing countries now include a right of establishment both in the services and the non-services sectors as in the case of the 2008

increased, a large proportion of which was executed by SOEs and Sovereign Wealth Funds (SWFs). This trend was further reinforced in 2010/2011 by the fact that despite the fears and turbulences that spread all over the world in the wake of the global economic and financial crisis, SWFs have blatantly retained their influence. See especially, Julien Chaisse et al. 'Emerging Sovereign Wealth Funds in the Making - Assessing the Economic Feasibility and Regulatory Strategies' 45(4) 837 Journal of World Trade (2011), at 840.

58 These are, for instance, some of the key aspects that the US wants to include in the currently negotiated invetsment chapter of the Trans-Pacific Partnership Agreement. See Julien Chaisse, 'Foreign Direct Investment in the TPP – Innovations in Rule-Making?' in Chin Leng Lim, Deborah Elms and Patrick Low (eds), *The Trans-Pacific Partnership (TPP) Trade Agreement* (London: Cambridge University Press, forthcoming 2012).

59 EU, above n 40, at 5.

CARIFORUM[60] Economic Partnership Agreement.[61] The EU's approaches to investment with developing countries, therefore, have both sets of provisions–rights of entry/establishment, i.e., market access, and post-establishment protection which stands in sharp contrast to the European BIT 'admission clause' model. In this respect, the market access commitments in the recent EU PTAs must be interpreted as filling a gap by opening up third country economies to EU investment in the same manner of a US BIT. However, the law applicable to EU investment is made of two layers: once markets are opened by the PTA, the post-establishment protections available to European investors in European BITs will apply.

European BITs, i.e., most of the BITs concluded by the 27 EU member countries, do not grant investors 'right to establish' investment since investment treaties mainly concern the treatment of foreign investment after its entry into the territory of the host state. As a result, such a clause does 'in practice significantly restrict the ability of a foreign investor to establish or acquire investment'.[62] Usually the wording of BITs is such that the parties should encourage investment or perhaps that they should encourage liberalizing their investment regimes. In this kind of agreement, admission clauses are best-effort clauses only, encouraging admission. And these clauses are often qualified by provisions such as 'subject to each party's laws' and so on. BITs of this kind usually do not grant investors the same conditions that the national companies have for their investments–they do not grant national treatment as far as the entry is concerned. The parties of these BITs can usually maintain most of the existing limitations or controls on the admission such as, for instance, exclusion of some sectors from FDI, screening procedures, maximum equity conditions, etc. Simply put, most BITs operate in the conditions that UNCTAD classifies as 'an investment control approach'. This approach does not offer any automatic right of admission or establishment to foreign investment. Therefore, governments have a wide range of discretion in this area.

Whereas most existing BITs and, notably, all European BITs can be classified as having the 'investment control' character, a rather prominent exception to this usual form is BITs of the United States. The US BITs represent a combined NT/MFN approach with regard to not only the post-entry stage but also the pre-entry stage. The goal of such an approach

[60] The member states of CARIFORUM are Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, the Dominican Republic, Grenada, Guyana, Haiti, Jamaica, St. Kitts and Nevis, Saint Lucia, St. Vincent and the Grenadines, Suriname and Trinidad and Tobago.

[61] See Pierre Sauvé and Natasha Ward, 'Services and investment in the EC-CARIFORUM Economic Partnership Agreement: Innovation in rule-design and implications for Africa', in Gerrit Faber and Jan Orbie (eds), *Beyond Market Access for Economic Development: EU-Africa Relations in Transition* (London: Routledge, 2009), 137–72.

[62] Steven J. Jarreau, 'Anatomy of a BIT: The United States - Honduras Bilateral Investment Treaty', 35 University of Miami Inter-American Law Review 429 (2004), at 445.

is to reduce the host state's control over FDI. The NT/MFN approach is a more liberal and, in a way, a more audacious approach than the 'investment control' because, under this regime, the parties must be able to stipulate specific exceptions to the agreement at the moment the treaty comes into force or for only a short time afterwards. This is also called a top-down approach or a negative-list approach; this is because the list contains items where the agreement does not apply rather than where it does apply.

The US BITs, in line with the current prototype of the US BIT, do not distinguish between the pre-establishment and the post-establishment stage of an investment. This is practical because, in many cases, the distinction between these two stages is far from clear-cut. This is all the more true if a very broad definition of investment is used, which is the case of the US. In fact, the MFN treatment is rather usual in IIAs even with respect to the entry of FDI. It ensures a level playing-field among foreign investors–foreign investors from one country cannot be more favoured than investors from another country. However, this does not affect whether the host country will liberalize the sector for foreign investors at all. It is NT applied also at the pre-establishment stage that prevents the host country from discriminating between foreign and domestic investors. The NT, however, does not prevent the host country from prohibiting private investment in certain sectors altogether.

Nowadays, it is widely recognized that there might exist situations in which it is not possible to accord identical treatment to foreign investors in some sectors because of the special nature of these sectors, e.g., financial services, insurance services, and so on. The treatment accorded in these sectors, therefore, is 'equivalent' treatment. This means that differences can exist in the treatment accorded but it must hold that the overall competitive opportunities of foreign-owned or foreign-controlled enterprises in the market are to be maintained. This softening of the NT will be elaborated in greater detail within NAFTA later. In general, it can be said that the NT/MFN standards in the US BITs are intended to cover situations of both *de facto* and *de jure* discrimination.

In its July 2010 Communication, the Commission also points out that the existing European BITs relate to the treatment of investors 'post-entry' or 'post-admission' only, which is perfectly true. This implies that Member States' BITs provide no specific binding commitments regarding the conditions of entry, neither from third countries regarding outward investment by companies of the Member States, nor vice versa. But the European Commission observes that '[g]radually, the European Union has started filling the gap of "entry" or "admission" through both multilateral and bilateral agreements at EU level covering investment market access and investment liberalisation'[63] and illustrates this in a footnote, because, at the multilateral

[63] EU, above n 40, at 5.

level, GATS provides for a framework for undertaking commitments on the supply of services through a commercial presence (defined as 'mode 3' in GATS Article I). And, at the bilateral level, the EU has also concluded its 2010 negotiations with South Korea on a PTA, which includes provisions on market access for investors and establishments.

Whereas most of the BITs have followed, in their language and in the legal standards, a draft convention elaborated under the OECD auspices, the US BITs represented one major exception and already applied the national treatment and MFN treatment, in the early 1990s, to the admission and establishment of investment. The model treaty of the US concerning the encouragement and reciprocal protection of investment uses a very broad definition of investment. All kinds of investment—tangible or intangible, all kinds of equity participation, bonds, pledges, rights and so on—are covered by the treaty. In its Article II, the treaty explicitly stipulates the national and MFN treatment also with respect to (among other things) 'establishment, acquisition, and expansion'. The model treaty,[64] therefore, adopts the combined NT/MFN model for the admission of FDI. Exceptions to NT and MFN in the sectors must be explicitly stated in the annex to the treaty.[65]

The EU has an opportunity to enhance substantive investment treaties provisions because very few innovations have occurred in treaty-drafting since the 1960s. The new EU power, amongst the first rank in the world as a capital exporter and a capital importer, gives the EU a great bargaining power. Meanwhile, there is also a demand from many to clarify the scope of certain standards which are subject to diverging arbitration awards. These possible innovations will depend very much on each bilateral negotiation. It seems however that the shift from a post-establishment to a pre- *and* post-establishment model is a non-conditional one. This illustrates the race in which the EU is engaged with the US and Japan, but it also demonstrates

[64] The model treaty explicitly prohibits local content requirements as well as other performance requirements (e.g., transfer of technology) as conditions for the establishment, acquisition, expansion, and so on. Similar requirements can be applied but only because of conditions for the receipt or continued receipt of an advantage, i.e. as conditions for receiving subsidies or incentives. The NT and MFN treatment can be denied under certain circumstances to a company, which is owned or controlled by nationals of a third country. Importantly, the obligations of the treaty 'shall apply to the political subdivisions of the parties' so that the obligations do not hold only on the central or federal level, but on lower levels as well. Otherwise, NT, as regards the establishment of investment, could be disturbed by measures taken by local authorities.

[65] The model treaty contains a model annex from the US. In the sectors mentioned in the annex, USA 'may adopt or maintain exceptions to the obligation to accord national treatment'. The content of the model annex is similar to the content of Annex I and II to NAFTA, which will be analysed in more details below. In fact, the model annex explicitly refers to NAFTA: exceptions to national treatment can be adopted or maintained with respect to measures pursuant to Article 1108 of NAFTA–Reservations and Exceptions. In some sectors, not only exceptions from national treatment but also those from MFN treatment can be adopted–e.g., banking, insurance, securities and other financial services, air and maritime transport and so on.

the major shift from national policies oriented towards protection to the supranational investment policy combining both protection and liberalization. Another feature could complement the new system with the setting up of an EU-wide investment guarantee agency. Most governments provide investment guarantees and political risk insurance designed to meet the needs of international investors. There is, for now, no EU investment guarantee agency which could assist EU investors. At the national level, such agencies do exist but their role will become blurred when the EU starts to negotiate its own agreements.

IV. EXPLORING THE IMPLEMENTATION CHALLENGES

Having negotiated BITs and PTAs with an enhanced protection of FDI, be they BITs or PTAs, the EU investment agreements will now have to be implemented. The majority of BITs offer investors direct recourse to international arbitration against the country concerned when their rights under the treaty have been violated. Investment treaty arbitration is the process by which neutral arbitrators settle disputes concerning bilateral treaty agreements between sovereign states and foreign investors. States can bring claims against private investors arising out of interpretation or application disputes; likewise, investors can bring, and have brought, a significant number of claims against the states arising out of treaty violations in the recent years. Should an international agreement provision be violated by the EU itself or the Member States, the EU must be able to access an arbitration forum that raises two different, but interrelated, issues. Firstly, in terms of investment commitments enforcement (Section IV.A.); secondly, in the hypothesis that an EU member is brought before international arbitration, who will assume international responsibility–whether the Member State or the EU, or both (Section IV.B.)?

A. The Uncertain investment commitments enforcement

The issue of investment commitments enforcement is underscored and partly clarified by the EU Commission communication, which declares that 'the future EU agreements including investment protection should include investor-state dispute settlement'.[66] By this, the EU clearly affirms its will to adhere to the existing efficient system of investor–state dispute settlement. This is not surprising as, apart from the recent Australia–USA agreement[67] which only allows State to State arbitration, most PTAs grant a right to

[66] EU, above n 53, at 10.

[67] The main explanation to this unusual case is that Australians fear to face numerous claims from US investors, who would be more familiar with this kind of dispute in reason of their practice of NAFTA rules. See Andrew Mitchell and Tania Voon, 'Australia – United States Free Trade Agreement', in Simon Lester and Bryan Mercurio (eds), *Bilateral and Regional Trade Agreements: Case Studies* (Cambridge: Cambridge University Press, 2009), at 27–29.

investors to make a claim against the host State. In order to ensure proper respect and conformity with investment rules regarding protected foreign investments, investment treaties provide various dispute resolution mechanisms—'one of the most important of which is international investor-state arbitration which entitles an injured investor to sue the host government for damages because of a violation of treaty standards and rights'.[68]

On the basis of these treaty provisions, any disputes between a state and a foreign investor can be settled by international arbitration. That solution which enables the investor to access an international tribunal is the alternative to the domestic courts of the host state which would have to settle the case, if BITs did not exist. The host government's consent to the jurisdiction of an international arbitration tribunal is granted *ex ante* in the form of an open offer in either the investment treaty or in its national law.

In the last few years, investment disputes brought before international arbitrators have multiplied and have raised attention by reason of the significant compensations that host states have had to pay in some instances.[69] According to the UNCTAD, the number of cases launched now exceeds 360, with 46 already decided in favour of investors, yielding cumulative awards in excess of US$3 billion. These disputes have been essentially filed with the International Center for Settlement of Investment Disputes (ICSID)[70] (or the ICSID Additional Facility), which deals with the largest number of disputes.[71] Investment disputes may also be settled under the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL), the Stockholm Chamber of Commerce (SCC), the Paris-based International Chamber of Commerce (ICC), and *ad-hoc* arbitration. As for the involvement of the EU in international investment treaty arbitration, there is already a model for it because the EU is a party to the Energy Charter Treaty (ECT) in its own right (as well as through the individual Member State parties) even though no energy investor has yet chosen to bring a claim against the EU under that Treaty.

68 Salacuse, above n 2, at 446.

69 One notable example is the case of *CME Czech Republic B.V. v The Czech Republic*, an UNCITRAL arbitration under the Netherlands–Czech Republic BIT, which resulted in an award and payment of US$355 million to an injured investor, one of the largest awards ever made in an arbitration proceeding. See UNCITRAL, *CME Czech Republic B.V. v The Czech Republic* Final award (2003).

70 List of Concluded Cases, International Centre for Settlement of Investment Disputes, http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=List Concluded (visited 3 February 2012).

71 See Christoph Schreuer, 'Travelling the BIT Route: of Waiting Periods, Umbrella Clauses and Forks in the Road', 5 Journal of World Investment & Trade 231 (2004), pointing out that most BITs refer to ICSID. More than 140 states are parties to the ICSID Convention. International Centre for Settlement of Investment Disputes, List of Contracting States and Other Signatories of the Convention, ICSID/3 (4 November 2007), http://icsid.worldbank.org (follow 'List of Contracting States' hyperlink) (visited 3 February 2012).

Recent experience shows that it is essential for investors to maintain a maximum free choice to choose the arbitration *fora* which suit their case best. Therefore, all options that are currently available (i.e. ICSID, UNCITRAL, SCC, ICC, and *ad-hoc* arbitration) should be included in a future EU investment treaty. Also, the following two issues, even though not addressed by the Commission, should also be embodied, considering their importance to the EU policy on FDI.

- The first, of a technical nature, concerns the necessary ratification of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention), which is the most frequently-used forum for solving investment disputes. This Convention is open to signature and ratification by states which are members of the World Bank or party to the Statute of the International Court of Justice. Since the EU qualifies under neither, it is at present not legally possible for the EU to bring a dispute before this arbitration forum[72] without amending the ICSID Convention itself.[73]
- Secondly, international investment disputes involving governments typically will raise political issues rather than pure economic problems. The framework of international law dealing purely with relations between States and based mainly on diplomacy and war is, since its origin, at the heart of States' sovereignty.[74] The new competence raises the issue of the capacity of the EU to fully endorse the responsibility of legal decisions, which may have political consequences.[75] Even if one cannot oppose such a trend and its unavoidable evolution, this article would still underscore the fact that such transfer of a competence in the field of investment has significant political implications.[76]

[72] See Marc Bungenberg, 'Going Global? The EU Common Commercial Policy After Lisbon', 1 European Yearbook of International Economic Law 123 (2010), at 149.

[73] Albeit not impossible, this amendment may be difficult to make as some EU Member States (such as Poland) have not signed the ICSID Convention.

[74] Brian White, 'Diplomacy', in John Baylis, Patricia Owens, and Steve Smith (eds), *The Globalization of World Politics: An Introduction to International Relations* (Oxford: Oxford University Press, 2004), at 390.

[75] The Commission's technical capacity was questionned by the Parliament in its April 2011 resolution: 'calls on the Commission to invest in terms of its personnel and its material resources in the negotiation and conclusion of EU investment agreements'. See European Parliament resolution of 6 April 2011 on the future European international investment policy (2010/2203(INI)) at 16.

[76] The new invesment power can only reinforce the point made in 2006 by Meunier and Nicolaidis according to whom:

> In recent history, some countries (like Japan) have enjoyed tremendous trade power, which they never succeeded in translating into actual political power. Other countries have enjoyed political power in world affairs without being trade heavyweights. Many in the EU want to see it become a global power through the back door, by leveraging its (substantial) trade power instead of its (lightweight) military power. We argued that,

In any event, a foreign investor may be unwilling to bring a claim, were it to face the combined strength of the EU, rather than its individual Member State, as respondent. This has certainly been the experience, to date, under the ECT. Nevertheless, the EU is aiming for a modern investment dispute settlement mechanism. For this, such a mechanism should seek to improve transparency to an extent which can be found in the WTO. One can imagine a tribunal made up of quasi-permanent arbitrators combined with public hearings and favour the acceptance of *amicus curiae* briefs. It may also be the right time for the EU to encourage the amicable settlement of disputes.[77] After all, the main goals of IIAs should be to promote FDI flows[78] and not to develop the international arbitration industry. Therefore, future EU agreements should provide the possibility of consultations between the investor and the host state before the formal dispute settlement proceedings are brought out.

B. The EU international responsibility

The recent experience of EU Member States under national BITs shows that they have been subject to numerous claims by foreign investors (See Figure 2). As of January 2012, 64 cases have been brought before various arbitral tribunals against EU Member States, which means that one-fifth of all publicly available investment disputes have involved EU Member States' BITs violations.

As can be seen from Figure 3, most of these treaty arbitrations against EU Member States were directed against countries that acceded to the EU at the 2004 enlargement. The Czech Republic, Poland, Romania, Hungary, Slovakia and Estonia represent more than 75% of all treaty arbitrations against EU Member States; this is the result both of their attractiveness for FDI and the relative fragility of their domestic legal systems.

Because the EU will now conclude investment treaties with third countries, this implies that market access and protection will be granted as rights to the foreign investors. These rights may be violated at the EU level or

increasingly, the EU does exploit its formidable trade power to pursue non-trade objectives through conditionality or fostering regional trade blocs in its own image.

See Sophie Meunier and Kalypso Nicolaidis, 'The European Union as a Conflicted Trade Power, 13(6) Journal of European Public Policy 906 (2006), at 922.

77 See Nikos Lavranos, 'New Developments in the Interaction between International Investment Law and EU Law', 9 The Law and Practice of International Courts and Tribunals (2010), at 436. For a proposal on what such a dispute prevention approahc could be, see Roberto Echandi, 'Investor-State Dispute Prevention: A Conceptual Framework', World Trade Institute NCCR Trade Working Paper No 2011/46 (at 39), http://www.nccr-trade.org/publication, at 409 (visited 3 February 2012).

78 See Julien Chaisse and Christian Bellak, 'Do Bilateral Investment Treaties Promote Foreign Direct Investment? Preliminary Reflections on a New Methodology' 3(4) Transnational Corporations Review 3 (2011), at 9–10 (visited 3 February 2012).

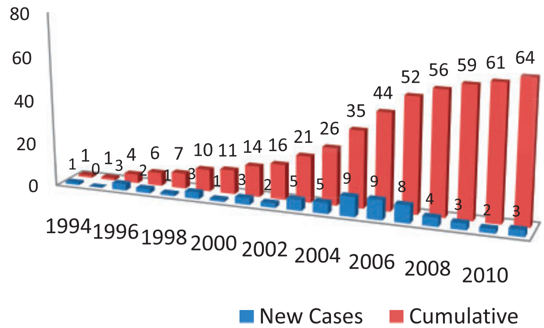

Figure 2. Number of treaty-based investor–state dispute settlement cases (concluded and pending) against EU Member States (1994–2011). *Source*: UNCTAD Database of treaty-based investor–state dispute settlement cases and Kluwer Arbitration Database (Wolters Kluwer), as of January 2012.

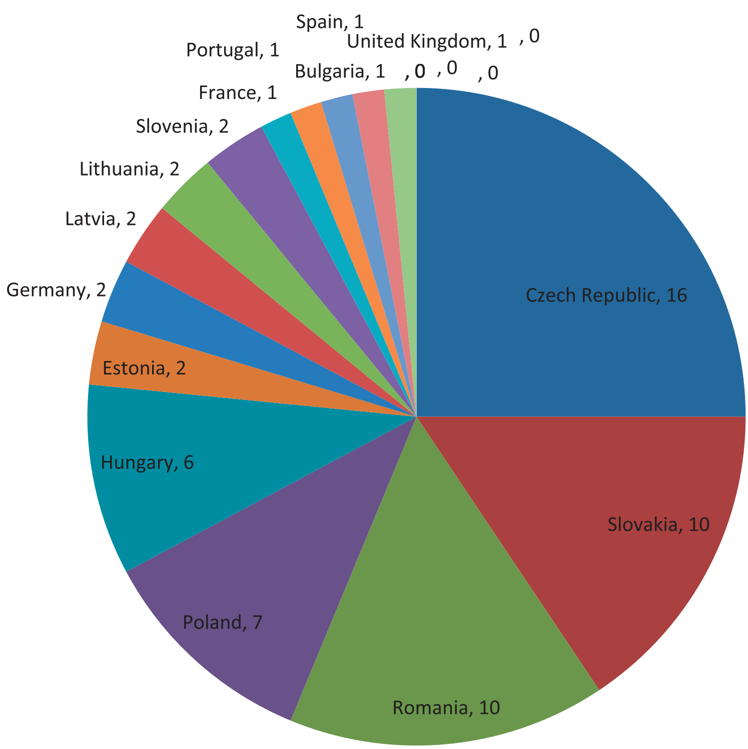

Figure 3. Detailed known international arbitration cases against EU Member States. *Sources*: UNCTAD Database of treaty-based investor–state dispute settlement cases and Kluwer Arbitration Database (Wolters Kluwer), as of January 2012.

national level and, perhaps, even more frequently than at the time of national BITs; this is because most of the partners singled out by the Commission in the July 2010 Communication are becoming capital exporters and are likely to become regular investors in the common market. Some questions have consequently arisen: if an EU member is brought before international arbitration, who will assume international responsibility[79]–this Member State, or the EU, or both? If it be the EU, what would the legal status of the Member State be? Could it intervene, for example, as a third party or *amicus curiae* in any such proceedings?

In order to answer these questions, one has to focus on the key issue of the nature of the EU's external competence, which is the decisive factor in the allocation of international responsibility. When the agreement is a pure EU agreement concluded on the basis of the EU exclusive competence, there is no doubt that the EU will be responsible to third countries for the performance of the agreement. However, the answer will be different if the agreement is mixed in nature. As discussed above, this may happen in the future because the EU intends to develop broad encompassing trade and investment agreements which will include areas outside its exclusive competence, such as cultural cooperation and criminal procedures in relation to IPR violations. More precisely, since most of the negotiated trade and investment treaties are very likely to be mixed treaties, it will raise the issue of responsibility to third countries in case of the non-performance of such a treaty.

About this issue, the EU Commission 2010 Communication does address the international responsibility between the EU and the Member States: the EU, represented by the Commission, 'will defend all actions of EU institutions. Given the exclusive external competence, the Commission takes the view that the European Union will also be the sole defendant regarding any measure taken by a Member State which affects investments by third country nationals or companies falling within the scope of the agreement concerned'.[80] The Commission's answer is straightforward, and this is not surprising because the WTO litigation experience over the last 20 years has provided some certainty.[81] The Community and Member States have always been regarded as jointly and severally responsible in international law for the whole mixed agreement, as we were reminded by the Court of Justice in the 1994 *EDF* case.[82] Advocate General Tesauro in the *Hermes*

[79] The international responsibility is defined as with reference to the consequences under international law of internationally wrongful acts. See extensively, Frank Hoffmeister, 'Litigating against the European Union and its Member States - Who Responds Under The ILC's Draft Articles on International Responsibility of International Organizations?', 21(3) European Journal of International Law 723 (2010), at 724.

[80] EU, above n 40, at 10.

[81] There is no doubt that the Union is responsible for acts done by its institutions or bodies. See extensively, Hoffmeister, above n 79, at 730.

[82] The Court said that the Lomé Convention 'was concluded, according to its preamble and Article 1, by the Community and its Member States of the one part and the ACP States of the other part. It established an essentially bilateral ACP-EEC cooperation. In those circumstances, in the absence of derogations expressly laid down in the Convention, the Community and its Member States as partners of the ACP States are jointly liable to those latter States for the fulfilment of every obligation arising from the commitments undertaken, including those

case, while accepting that 'on the Community side' a mixed agreement such as the WTO/TRIPS requires a separation of competences, argued that this division is a purely internal matter.[83] And since, in practice within the WTO and prior to the treaty of Nice, TRIPS cases were brought against either the EC alone or the EC and individual Member States together, the EC has tended to assume lead responsibility for all WTO disputes but would consult Member States through the ex-Article 133 Committee.[84]

The EU responsibility as a purely legal mechanism raises other issues. International treaties have been signed in which parties consent to the jurisdiction of international tribunals and commit themselves to enforcing the subsequent decisions of those tribunals. The problem lies in the implementation of this responsibility if the EU (or the Member State) loses a case against a foreign investor. In this case, the investor will be entitled to comprehensive compensation in the instance of a breach. The most common remedy in investment arbitration is indeed compensation. There is, however, no rule to anticipate who would be liable for payment of any award made against the EU for the actions of a Member State. This situation, which is very likely to occur, must be taken into account. One might suggest that EU internal mechanisms could be set up, by way of EU regulation, under which the EU could obtain reimbursement for damages paid by reason of the Member State's breach of investment treaties (e.g. expropriation by a region or a municipality). In its relations with third countries, the EU would, thus, be responsible to third countries and would be able to promptly compensate foreign investors, both under mixed and EU agreements. The

relating to financial assistance'. See ECJ, Case C-316/91 *European Parliament v Council (EDF)* (1994) ECR I-0625, at para 29.

83 As underscored by the Advocate General Tesauro

> This is how matters stand on the Community side but it must not be forgotten that both the Community and the Member States signed all the WTO agreements and are therefore contracting parties *vis-à-vis* contracting non-Member States. And while it is true that the approval of those agreements on behalf of the Community is restricted to 'matters within its competence,' it is also true that the Final Act and the WTO Agreement contain no provisions on competence and the Community and its Member States are cited as original members of equal standing. In these circumstances, it should be recognised that the Member States and the Community constitute, *vis-à-vis* contracting non-member States, a single contracting party or at least contracting parties bearing equal responsibility in the event of failure to implement the agreement. This clearly means that, in that event, the division of competence is a purely internal matter.

See ECJ, Case C-53/96 (Opinion of AG Tesauro) *Hermes International v FHT Marketing* (1998) ECR I-3603 at para 14.

84 In the WTO, the EU is not only represented by the EU Commission but also, where appropriate, by the Council Chair. See Eva Steinberger, 'The WTO Treaty as a Mixed Agreement: Problems with the EC's and the EC Member States' Membership of the WTO', 17(4) European Journal of International Law 837 (2006), at 858.

specific case of a mixed-agreement violation by a Member State and the necessary compensation could remain a purely internal question.

The EU international responsibility under future investment treaties is not subject to any doubt. It has proved to be very effective within the WTO framework. This article, however, identifies that there is no clear mechanism to address compensation, and this calls for further reform in order to provide legal security for FDI. Besides, the July 2010 communication does not address the challenges of implementation which appears even less attractive than the horizons of new negotiations and the perspectives of new conquests. This issue is extremely crucial for foreign investors since they want the certainty of being able to file a claim against the EU. But it is at present not feasible, so this issue will have to be addressed by the EU before concluding its first investment pacts.

V. MAPPING THE TRANSITION PHASE

There are, indeed, many legal and practical issues to be resolved in the near future. Of course, the provisions of the national BITs shall continue in effect for a certain period of time (usually between 10 and 20 years) after the date of termination.[85] But, the key challenge is to manage the transition (which fundamentally consists of replacing a set of agreements by a single one) while, at the same time, ensuring that European Union investors will not be out of investment protection. To this extent, two options seem available, not only for the EU and its Member States, but also for third countries.

The first option consists of a progressive replacement of selected existing BITs with a country by a new agreement negotiated with the same partner country.[86] In this hypothesis, a future EU investment agreement with a specific country will only replace—in the meaning of the Vienna Convention—the existing Member States' BITs with the country in question if the BIT

[85] For example, Article 16.2 Denmark–Tanzania (1999): '[t]he provisions of the Agreement shall remain in force for a further period of 15 years from the date of termination'; and Article 15 Italy–Tanzania: '[t]he provisions of the Agreement shall continue in effect for 20 years after the date of termination'.

[86] A slightly different approach which would consist of keeping the existing BITs with a partner and complementing them by an EU negotiated pre-establishment focused agreement can be mentioned, but is not a reasonable option. The legal regime applicable to a foreign country and the EU would consist of a variable set of BITs which do not grant the same rights. Even if the MFN clause could level the playing field, the resulting regime would still depend on the scope of the MFN obligation itself, which is like any other substantial provision of the treaty not only limited by the overall coverage of the agreement but by the wording introduced in the clause itself. Several aspects are relevant in this regard. First, whether the obligation applies to investments already established in the country, or whether it also applies to the ability of the investor to claim access to the host country. Second, whether the language allows the comparison between the treatment of investors from different countries. Finally, whether issues pertaining to investor-State dispute settlement procedures are covered by the MFN principle. See Luigi Crema, 'Disappearance and new sightings of restrictive interpretation(s)', 21 European Journal of International Law 681 (2010), at 693.

concluded by an EU Member has equivalent scope and provides for at least an equivalent treatment as the Member States' BITs. As a matter of fact, provisions and aspects in Member States' BITs, which are not covered by an EU IIA cannot be considered *automatically* eliminated by the later-in-time EU investment agreement. Otherwise, such an outcome would be inconsistent with the stated objective of preserving the highest existing level of protection for EU investors. One can imagine such an option in a broad PTA which would be negotiated with a third partner. The PTA investment chapter would include a provision stipulating the termination of existing BITs when the new PTA comes into force. As to the 'old' BITs between EU Members and the third party, they could be listed in a subsequent provision. Of course, such an option requires the agreement of the third party and suggests that the transition period cannot be a short one. Albeit not impossible, it may place a burden on the EU and neutralize the advantage of the new competence at least when the EU is the *demandeur* in the negotiations. But, in the opposite case, if the third country is an important capital exporter seeking access to the EU market, such an option may be very easy to implement.

The second option promoted by the EU Commission is announced in the Proposal for Regulation establishing 'transitional arrangements for bilateral investment agreements between Member States and third countries'.[87] Its objective is to provide legal certainty to both EU and foreign investors operating under the terms of these agreements.[88] The proposal, albeit rather 'poorly and incoherently drafted',[89] for the regulation contains the following key features which, in effect, significantly restrict Members policies:

- It requires Member States to notify the EU Commission of all BITs that they wish to maintain or begin to negotiate. It shows that the Commission wants to be able to assess whether existing BITs would conflict with EU law.
- It sets out transitional arrangements for Member States with existing BITs. These arrangements leave all BITs in force between Member States and third countries unchanged. An exception exists to oblige Member States to renegotiate where incompatibilities with EU legislation exist.[90] In substance, this provision establishes a framework for renegotiation, if BITs need to be amended.

[87] EU, above n 53.

[88] In this sense, Nikos Lavranos, 'New Developments in the Interaction between International Investment Law and EU Law', 9 The Law and Practice of International Courts and Tribunals 425 (2010), at 438.

[89] Jan Asmus Bischoff, 'Just a Little BIT of "Mixity"? The EU's Role in the Field of International Investment Protection Law', 48 Common Market Law Review 1527 (2011), at 1559.

[90] Nikos Lavranos, 'Members States' BITs: Lost in Transition?', Working Paper (2011) 13–14, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1935625 (visited 3 February 2012).

- It allows Member States to continue negotiating BITs for the time being, even though this is to be regarded as an 'exceptional transitional measure'.
- Finally, in case a claim is brought against Member States, the Commission must be notified without delay and the States will have to cooperate. One can imagine that the Commission will then decide whether it will involve itself in the investment dispute.

The Draft Regulation is intended to maintain the status quo through the introduction of transitional arrangements for BITs between Member States and third countries, involving authorization to maintain BITs in force and, indeed, to amend or to conclude new BITs, via a so-called 'empowerment mechanism'; this involves the re-delegation of powers to Member States to negotiate BITs, subject to monitoring by the Commission and ensuring compliance with EU law.[91]

New in appearance, this draft regulation is similar to another Commission proposal, made in 2005, proposing that Member States, planning to negotiate agreements with third countries in the field of trade in services (other than transport), observe a standstill obligation for a certain period of time in which the Commission might decide to propose a recommendation to the Council to negotiate such an agreement as a Community agreement. [92] In a context of parallelism between this EC competence and a right for Member States to maintain and to conclude agreements, the Commission considered that it was important to keep under constant surveillance all existing agreements concluded by Member States with third countries in the field of services other than those concerned with transport.[93]

The 2010 Regulation Proposal establishing 'transitional arrangements for bilateral investment agreements between Member States and third countries' will not enter into force before spring 2012. Latest developments indicate that on 10 May 2011, the EP adopted a position at first reading on the proposed Regulation.[94] The position adopted by the EP suggested amendments generally aimed at weakening the Commission's power to review

[91] cf. the Austria and Finland cases, etc. On this issue, see Eilmansberger Thomas, 'Bilateral Investment Treaties and EU Law', 46 Common Market Law Review 383 (2009), at 387.

[92] See EU, European Commission, Proposal for a Council Regulation on the negotiation of agreements on trade in services other than transport, COM/2005/0326 final, Brussels, 20 May 2005.

[93] It was also essential that the Commission should be informed about any planned negotiation of new services agreements. But, one must note that this 2005 draft Regulation never came into force.

[94] Council of the European Union, Proposal for a Regulation of the European Parliament and of the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries—Outcome of the European Parliament's first reading, Interinstitutional File: 2010/0197 (COD), Brussels, 23 May 2011.

existing BITs and to withdraw authorization from them.[95] Because the regulation must be adopted under the co-decision procedure,[96] it is now the responsibility of the Council of the EU to see whether it agrees with the amended version submitted by the EP.[97]

VI. CONCLUSION

This article addresses the future trends of the investment regime against the background of the Treaty of Lisbon coming into force. As the constitutional history of federal States demonstrates, a distribution of competences is a highly complex and political exercise, where there is a temporary balance of the power between those who intend to increase competences of the *centre* and those who take care of the integrity of competences of the *periphery*. That is precisely what can be observed in this very specific field on international investment. Future developments should clarify the hypothesis depicted above but it seems already clear that significant changes will be progressive, but not dramatic: a few points can be anticipated.

EU external action is experiencing a new important development because the Treaty of Lisbon establishes, for the first time, an express competence over foreign investment by including it in the scope of the Common Commercial Policy. Bringing trade and investment matters into the same hands contributes to ensuring the development of a strong, coherent and efficient external economic policy for the EU. Fundamentally, it puts to an end the *unnatural* distinction of trade and investment policies as it has been the case in the EU since 1968. It is an important development not only for EU integration but also for EU investors because the key concern for the European Commission is discrimination among EU investors. The new competence simultaneously contributes to reducing fragmentation of international investment regulation by first reducing the number of existing international instruments and, thus, ensuring a better homogeneity of the contents of these rules.

Increasing coordination of external economic relations within the EU may soon expand the BITs scope and lead to the emergence of EU IIAs and broad-encompassing PTAs with other countries. This would arguably constitute an important step towards more coherence, because, firstly, EU countries are amongst the most active negotiators of BITs and the number of

[95] The amendment to Article 5 suggested by the EP indicates that the Commission 'shall notify the Member State of any reason that could constitute a cause for withdrawal of the authorisation provided for in Article 3'. See Council of the European Union, above n 94, at Amendment No. 19.

[96] The co-decision procedure is based on the principle of parity and means that neither institution (European Parliament or Council) may adopt legislation without the other's assent.

[97] Council of the European Union (Foreign Affairs / Trade), 3086th Council meeting, Press Release No. Presse-129, Brussels, 13 May 2011, at 9.

such agreements may, thus, diminish internationally, and, secondly, a European model may also arguably have an important signalling effect and it will not be overlooked internationally.

This will happen because the future EU IIAs with the broad scope are an advantage, not only to EU investors but also to foreign investors. The future BITs entered into by the EU may provide a more consistent approach, effectively extending the national treatment provision to a single standard of treatment for foreign investors anywhere in Europe. Moreover, future EU investment treaties aim to create a stable investment climate for foreign investors in EU-member countries that are less developed since the need for investment protection provisions in countries such as the UK and France are relatively low. However, more protection can only make foreign investors more confident. Meanwhile, it may attract foreign investors to seek new opportunities in some other Eastern EU Member States, which joined in 2004, but still have to improve their own legal systems (such as Romania, Bulgaria, Hungary and, soon, Croatia or Montenegro). Furthermore, the Commission can negotiate by arguing that entering into a BIT with the EU prevents obstacles to the free movement of capital because investors will be protected throughout the EU without worrying about channelling their investments by taking account of particular pockets of protection.

Finally, at the global level, the emergence of the EU as major player on the international scene may also represent an element in favour of the revival of a multilateral agreement on investment which is a project that can only resurface in the coming years.[98] The EU may be tempted to start the investment negotiations with a view to pre-empt policy-making in investment rules at the multilateral level. It is, however, beyond the scope of this article to analyse the possible effect of the EU competence in this multilateral framework.

[98] As pointed out by Jeswald W. Salacuse, 'the very existence of the international investment regime indicates that a multilateral international organization is not a necessary condition for the creation of a regime. On the other hand, the absence of such an organization with its associated resources, knowledge and structures may impede the future development of the regime and reduce its ability to withstand challenges'. See Salacuse, above n 2, at 468.