

NOTE

The Future Shape of EU Investment Agreements

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I. INTRODUCTION

The Treaty of Lisbon inserted foreign direct investment (FDI) into the existing framework of a broadened Common Commercial Policy (CCP).² Article 206 of the Treaty on the Functioning of the European Union (TFEU) now provides in a programmatic fashion:³

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

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

The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.

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

For the negotiation and conclusion of the agreements referred to in paragraph 3, the Council shall act by a qualified majority. For the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property, as well as foreign direct investment, the Council shall act unanimously where

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² Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, signed at Lisbon [2007] OJ C306/01.

³ Consolidated Version of The Treaty on the Functioning of the European Union [2008] OJ C115/47.

such agreements include provisions for which unanimity is required for the adoption of internal rules.

These provisions correspond largely to the proposals that were already discussed during the drafting of a Constitutional Treaty.⁴ Even then it was suggested that FDI should be added to the existing external trade powers, comprising trade in goods, services and intellectual property rights along the WTO-determined enlarged trade issues after the Uruguay Round. While the extension to investment issues received vigorous rejection by some high-level Member State negotiators,⁵ the matter did not appear to have attracted further attention during the subsequent negotiations. Moreover, when the question of the enlargement of the EU's external trade powers was revived during the Lisbon Treaty negotiations, investment seemed to have received no particular attention.

II. THE SCOPE OF THE NEW INVESTMENT POWERS OF THE EU UNDER AN ENLARGED CCP

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

⁴ Treaty establishing a Constitution for Europe [2004] OJ C310/1.

⁵ See French, German, and other objections: Proposition d'amendement à l'article III-212 déposée par Monsieur de Villepin, <<http://european-convention.eu.int/docs/treaty/pdf/866/Art%20III%20212%20de%20Villepin%20FR.pdf>> accessed 4 March 2013; Suggestion for amendment of Art 24 by Mr Joschka Fischer, CONV 685/03, <<http://european-convention.eu.int/Docs/Treaty/pdf/866/Art24Fischer.pdf>> accessed 4 March 2013; Suggestion for amendment of Art 24 by Mr David Heathcoat-Amory, <<http://european-convention.eu.int/Docs/Treaty/pdf/866/Art24Heathcoat-Amory%20EN.pdf>> accessed 4 March 2013.

⁶ Existing literature on the various aspects of the new EU investment powers is already vast. See Markus Burgstaller, 'European Law and Investment Treaties' (2009) 26 J Intl Arb 181; Marc Bungenberg, 'The Division of Competences between the EU and Its Member States in the Area of Investment Politics' in Marc Bungenberg et al. (eds), *European Yearbook of International Economic Law, Special Issue: International Investment Law and EU Law* (Springer 2011) 29; Marc Bungenberg, 'Going Global? The EU Common Commercial Policy After Lisbon' in Christoph Hermann and Jörg Philipp Terhechte (eds), *European Yearbook of International Economic Law* (Springer 2010) 123; N Jansen Calamita, 'The Making of Europe's International Investment Policy: Uncertain First Steps' (2012) 39 LIEI 301; Jan Ceysens, 'Towards a Common Foreign Investment Policy?—Foreign Investment in the European Constitution' (2005) 32 LIEI 259; Julien Chaisse, 'Promises and Pitfalls of the European Union Policy on Foreign Investment—How Will the New EU Competence on FDI Affect the Emerging Global Regime?' (2012) 15 J Intl Econ L 51; Anna De Luca, 'New Developments on the Scope of the EU Common Commercial Policy under the Lisbon Treaty: Investment Liberalization vs. Investment Protection' in Karl P Sauvant (ed), *Yearbook on International Investment Law & Policy* (Oxford University Press 2012) 165; Angelos Dimopoulos, *EU Foreign Investment Law* (Oxford University Press 2011); Angelos Dimopoulos, 'The Common Commercial Policy after Lisbon: Establishing Parallelism Between Internal and External Economic Relations?' 4 (2008) *Croat Ybk Eur L Poly* 101; Thomas Eilmansberger, 'Bilateral Investment Treaties and EU Law' (2009) 46 *CML Rev* 383; Steffen Hindelang and Niklas Maydell, 'The EU's Common Investment Policy—Connecting the Dots' in Marc Bungenberg et al (eds), *International Investment Law and EU Law* (Springer 2011) 1; Frank Hoffmeister and Günes Ünüvar, 'From BITS and Pieces Towards European Investment Agreements' in Marc Bungenberg, August Reinisch and Christian Tietje (eds), *EU and Investment Agreements. Open Questions and Remaining Challenges* (Nomos/Hart Publishing 2013) 57; J Karl, 'The Competence for Foreign Direct Investment: New Powers for the European Union?' (2004) 5 *J World Invest Trade* 413; Marcus Klamert and Niklas Maydell, 'Lost in Exclusivity: Implied Non-Exclusive External Competences in Community Law' (2008) 13 *EFA Rev* 493; Jan Kleinheisterkamp, 'The Future of the BITS of European Member States After Lisbon' (2011) 29 *ASA Bull* 212; Markus Krajewski, 'External Trade Law and the Constitution Treaty: Towards a Federal and More Democratic Common Commercial Policy?' (2005) 42 *CML Rev* 91; Pieter-Jan Kuijper, 'Foreign Direct Investment: The First Test of the Lisbon Improvements in the Domain of Trade Polity' (2010) 37 *LIEI* 261; Niklas Maydell, 'The European Community's Minimum Platform on Investment or the Trojan Horse of Investment Competence' in August Reinisch and Christina Knahr (eds), *International Investment Law in Context* (Eleven International Publishing 2008) 73; Federico Ortino and Piet Eeckhout, 'Towards and EU Policy on Foreign

be limited to aspects concerning the admission of investments and not extend to traditional investment protection once an investment was made. On the other hand, the express choice of the term 'FDI' was interpreted as limiting the EU's powers to FDI, excluding portfolio investments traditionally covered by modern investment treaties.⁷ Both limitations would lead to a situation of *de facto* shared control between the EU and its Member States, as they would require the conclusion of so-called mixed agreements to be negotiated and concluded by both the EU and its Member States.⁸ Thus, the question was anything but 'academic'.

This limiting interpretation of the new investment powers of the EU was supported by valid arguments. The EU's, and previously the European Community's (EC), CCP powers were traditionally aimed at reducing obstacles to international trade in order to pursue trade liberalization. Previous enlargements of the CCP in the field of services were interpreted restrictively by the European Court of Justice (ECJ), limiting the EC's power to the cross-border (trade equivalent) mode of supply in the language of the General Agreement on Trade in Services (GATS).⁹ And traditionally, the EC/EU acted in the field of investment only as regards liberalization and access/admission rules, as was evident in the so-called Minimum Platform on Investment,¹⁰ as well as ensuing trade negotiations with third countries that incorporated investment liberalization, but excluded post-establishment investment protection.¹¹ This limiting interpretation could also find support in the language of the Lisbon Treaty amendments, in particular Article 206 TFEU which speaks of the 'progressive abolition of restrictions on international trade and on foreign direct investment', suggesting that the CCP is primarily concerned with access/admission aspects. By comparison, Article 207(1) TFEU is more ambiguously worded. Its reference to the

Direct Investment' in Andrea Biondi et al (eds), *EU Law After Lisbon* (Oxford University Press 2011) 312; August Reinisch, 'The Division of Powers between the EU and Its Member States "after Lisbon"' in Marc Bungenberg et al (eds), *Eur Y Intl Econ L, Special Issue: International Investment Law and EU Law* (Springer 2011) 43; Mavluda Sattorova, 'Return to the Local Remedies Rule in European BITs? Power (In)equalities, Dispute Settlement, and Change in Investment Treaty Law' (2012) 39 *LIEI* 223; Wenhua Shan and Sheng Zhang, 'The Treaty of Lisbon: Half Way Toward a Common Investment Policy' (2010) 21 *EJIL* 1049; Christian Tietje, 'Die Außenwirtschaftsverfassung der EU nach dem Vertrag von Lissabon', (2009) 83 *Beiträge zum Transnationalen Wirtschaftsrecht*, <<http://telc.jura.uni-halle.de/de/forschungen-und-publikationen/beitr%C3%A4ge-transnationalen-wirtschaftsrecht>> accessed 9 April 2013; Stephen Woolcock, 'The Potential Impact of the Lisbon Treaty on EU External Trade policy' (2008) 83 *SIEPS—European Policy Analysis*, 8.

⁷ Lisbon Treaty judgment, German Constitutional Court, 2 BvE 2/08, 30 June 2009, para 379 ('The extension of the common commercial policy to "foreign direct investment" (Art 207.1 TFEU) confers exclusive competence on the European Union also in this area. Much, however, argues in favour of assuming that the term "foreign direct investment" only encompasses investment which serves to obtain a controlling interest in an enterprise The consequence of this would be that exclusive competence only exists for investment of this type whereas investment protection agreements that go beyond this would have to be concluded as mixed agreements.');

⁸ See Ramses A Wessel, 'The EU as a Party to International Agreements: Shared Competences, Mixed Responsibilities' in Alan Dashwood and Marc Maresceau (eds), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape* (Cambridge University Press 2008) 152. See also Christophe Hillion and Panos Koutrakos (eds), *Mixed Agreements Revisited* (Hart Publishing 2010).

⁹ See Opinion 1/94, Competence of the Community to conclude international agreements concerning services and the protection of intellectual property, ECJ, 15 November 1994, ECR I-5267, and the subsequent enlargements of the CCP by the Amsterdam and Nice Amendments to the EC Treaty. See in general Piet Eeckhout, *External Relations of the European Union* (2nd edn, Oxford University Press 2011).

¹⁰ Council of the EU, Minimum Platform on Investment, 15375/06, 27 November 2006 (unpublished). On the content of the Minimum Platform, see Maydell, 'The European Community's Minimum Platform' (n 6).

¹¹ See Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part [2011] OJ L127 6, Art 7(10) fn 14, expressly stating that investment protection is not covered by the section on establishment.

‘conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment’, can be read as supporting a limiting interpretation if one understands that ‘foreign direct investment’ is the other subject-matter ‘the commercial aspects of’ which may be addressed in CCP treaties. However, it is equally plausible to consider that ‘foreign direct investment’ is the third field of ‘trade agreements’ the EU may enter into, after those ‘relating to trade in goods and services’ and those relating to ‘the commercial aspects of intellectual property’.

Not surprisingly, it is this latter reading which is vigorously adopted by the Commission. The Commission considers that the EU’s investment power is not limited to the access/admission questions regarding investments. Rather, it comprises both the pre-establishment as well as the post-establishment phase and would thus allow the EU to conclude treaties containing the traditional substantive treatment obligations of international investment agreements (IIAs) and procedural guarantees in the form of State-to-State and investor-to-State dispute settlement (ISDS), albeit in the adapted version of allowing the EU (partly) to replace its Member States as respondent. The Commission equally rejects a narrow reading of its investment powers as powers limited to FDI. Though the wording, and thus the ‘ordinary meaning’, of the TFEU appears to be clear, the Commission in particular asserts that the EU’s investment power also includes an implied power concerning portfolio investments.¹²

A separate but related issue which will not be addressed here is the question of whether the new investment power of the EU implies that bilateral investment treaties (BITs) between Member States have become incompatible with EU Law and may have to be terminated.¹³ While the Commission has clearly expressed this view,¹⁴ investment tribunals have generally upheld their jurisdiction based on the continued validity of so-called intra-EU BITs.¹⁵

¹² In its 2010 Communication, the Commission first elaborates on the definition of FDI as an investment ‘which serves to establish lasting and direct links with the undertaking’ without taking a clear stance on portfolio investment: European Commission, Communication from the Commission to the European Parliament, The Council, the European Economic and Social Committee and the Committee of the Regions: Towards a Comprehensive European International Investment Policy, 7 July 2010, COM (2010) 343 final 4, 2–4 <http://trade.ec.europa.eu/doclib/docs/2010/july/tradoc_146307.pdf>. In a subsequent passage of the Communication, entitled ‘Looking beyond foreign direct investment’, the Commission suggests that ‘to the extent that international agreements on investment affect the scope of the common rules set by the Treaty’s Chapter on capitals and payments, the exclusive Union competence to conclude agreements in this area would be implied’ (ibid 8).

¹³ See Markus Burgstaller, ‘The Future of Bilateral Investment Treaties of EU Member States’ in Marc Bungenberg et al (eds), *Internationaler Investitionsschutz und Europarecht* (Nomos 2010) 113; Steffen Hindelang, ‘Member State BITs—There’s Still (Some) Life in the Old Dog Yet’ in Karl P Sauvant (ed), *Yearbook on International Investment Law and Policy 2010–2011* (Oxford University Press 2011) 217; August Reinisch, ‘Articles 30 and 59 of the Vienna Convention on the Law of Treaties in Action—The Decisions on Jurisdiction in the *Eastern Sugar* and *Eureko* Investment Arbitrations’ (2012) 39(2) LIEI 157; Christer Söderlund, ‘Intra-EU BIT Investment Protection and the EC Treaty’ (2007) 24 J Intl Arb 455; Christian Tietje, ‘Bilaterale Investitionsschutzverträge zwischen EU-Mitgliedstaaten (Intra-EU-BITs) als Herausforderung im Mehrebenensystem des Rechts’ (2011) 2 Kölner Schrift zum Wirtschaftsrecht 128; Hanno Wehland, ‘Intra-EU Investment Agreements and Arbitration: Is European Community Law an Obstacle?’ (2009) 58 Intl Comparative LQ 297.

¹⁴ See Commission Letter of 13 January 2006, quoted in *Eastern Sugar BV (Netherlands) v Czech Republic*, SCC Case No 088/2004, Partial Award (27 March 2007) para 119; European Commission Observations, 7 July 2010, quoted in *Eureko BV v The Slovak Republic*, UNCITRAL, PCA Case No 2008-13 Award on Jurisdiction, Arbitrability and Suspension (26 October 2010) para 180.

¹⁵ *Eastern Sugar v Czech Republic* (n 14); *Eureko BV v The Slovak Republic* (n 14); Jan Oostergetel and Theodora Laurentius v *The Slovak Republic*, UNCITRAL, Decision on Jurisdiction (30 April 2010); see also *Czech Republic v Eureko*, OLG Frankfurt, Case No 26 SchH 11/10, Order (10 May 2012).

III. THE START OF THE DEBATE ON FUTURE EU IIAs

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

In July 2010, two Commission documents were made public. One is a draft regulation establishing transitional arrangements for bilateral investment treaties between Member States and third countries;¹⁶ the other is a Communication outlining the future EU investment policy.¹⁷ This was followed by a Commission proposal in summer 2012 on a regulation addressing the issue of allocating financial responsibility between the EU and its Member States in case of investment arbitration.¹⁸ As of December 2012, only the regulation concerning transitional arrangements has been adopted.¹⁹

The Commission Communication received comments by the other EU institutions, most importantly among them were the Council Conclusions of 25 October 2010²⁰ and the European Parliament's resolution of 6 April 2011,²¹ adopting a report of its International Trade Committee of 22 March 2011.²² However, they have not yet been accompanied by a clear indication on the part of the EU as to how it intends to use its new investment power in order to structure future IIAs.²³ Thus, any assessments on the path the EU is likely to follow as regards IIAs must be based on inferences drawn from the scarce proposals available and some informally leaked documents from the negotiating process of comprehensive trade agreements with third States with which the Commission is currently engaged.

¹⁶ Commission Proposal of 7 July 2010 for a Regulation of the European Parliament and the Council establishing transitional arrangements for bilateral investment treaties between Member States and third countries, COM (2010) 344 <http://trade.ec.europa.eu/doclib/docs/2010/july/tradoc_146308.pdf> accessed 4 March 2013.

¹⁷ Commission Communication, COM (2010) 343 final 4 (n 12).

¹⁸ Commission Proposal of 21 July 2012 for a Regulation of the European Parliament and of the Council establishing a framework for managing financial responsibility linked to investor-State dispute settlement tribunals established by international agreements to which the European Union is party, COM (2012) 335 <http://trade.ec.europa.eu/doclib/docs/2012/june/tradoc_149567.pdf> accessed 4 March 2013.

¹⁹ Regulation No 1219/2012 of the European Parliament and the Council of 12 December 2012 establishing transitional arrangements for bilateral investment treaties between Member States and third countries [2012] OJ L351/40. It provides for an 'assessment' of 'the status of the [existing] bilateral investment agreements of the Member States under Union law, and establishes the terms, conditions and procedures under which the Member States are authorized to amend or conclude [future] bilateral investment agreements', art 1.

²⁰ Council of the EU, Conclusions on a comprehensive European international investment policy, 3041st Foreign Affairs Council Meeting, 25 October 2010 <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/117328.pdf> accessed 4 March 2013.

²¹ European Parliament resolution of 6 April 2011 on the future European international investment policy, (2010/2203 (INI)) <<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2011-0141&language=EN>> accessed 4 March 2013. See also European Commission, Follow up to the European Parliament Resolution on the future European international investment policy, adopted by the Commission on 5 July 2011.

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

²³ The Commission has expressly renounced the adoption of a Model BIT/IIA as used by most OECD members concluding investments treaties. See Commission Communication, COM (2010) 343 final 4 (n 12) 6 ('a one-size-fits-all model for investment agreements with 3rd countries would necessarily be neither feasible nor desirable').

At present, it is difficult to ascertain any clear directions from the three main EU players concerning future EU IIAs. Nevertheless, certain general positions have become apparent by now. While the Commission seems intent on asserting its broad new investment powers as a question of principle, it is struggling to provide content to its exercise. Gradually, this content takes shape and now seems to encompass, in addition to market access provisions, all traditional investment protection standards, including ISDS. The position of the Council reflects the diverse interests of the Member States, which it represents in their entirety, ranging from those States which would prefer to keep the *status quo ante* and thus their sole responsibility for the conclusion of investment protection treaties, to those which are content with the Lisbon shift of powers to the EU. The Council's compromise position appears to be its insistence on investment as an area of mixed competences between the Union and its members.

As regards the substance of the EU's future IIA policy, the Council seems to favour a traditional 'European' approach of strong investment protection including ISDS. The European Parliament equally has to find its new role after the Lisbon Treaty amendments of the CCP which gave it the right to be consulted during negotiations and requires its consent for treaty conclusions. While siding with the Commission in demanding broad investment powers for the EU, the Parliament seems to be developing its own position on the contents of future EU IIAs. In particular, it appears much more reluctant towards the traditional strong investor protection contained in many European BITs and has called for sufficient attention to be given to non-investment interests as well as the EU's right to regulate and pursue its policies without being hampered by concerns over investment claims. Thus, the Parliament's position on investment protection including ISDS is much more nuanced, if not reserved, than that of the two other main EU institutions.

IV. CURRENT EU NEGOTIATIONS ON IIAs OR INVESTMENT CHAPTERS IN FTAs

As for the use of the EU's new investment-treaty-making power, at the time of writing the Commission was engaged in negotiations with Canada, India and Singapore on comprehensive trade agreements which would include an investment chapter.²⁴ Though reports about the negotiating process are limited, some information can be gleaned from excerpts of the confidential Negotiating Directives issued by the Council which have been made public by non-governmental organizations.

For instance, the Council Negotiating Directives of 12 September 2011²⁵ concerning the negotiations with Canada, India and Singapore contain valuable information on the EU's official position with regard to a number of investment

²⁴ On the negotiations with Canada, see Céline Lévesque, 'The Challenges of "Marrying" Investment Liberalisation and Protection in the Canada-EU CETA' in Bungenberg et al (eds), *EU and Investment Agreements* (n 6) 121.

²⁵ Council Negotiating Directives (Canada, India and Singapore), 12 September 2011 <<http://www.bilaterals.org/spip.php?article20272&lang=en>> accessed 4 March 2013 as well as at <<http://www.s2bnetwork.org/themes/eu-investment-policy/eu-documents/text-of-the-mandates.html>> accessed 4 March 2013.

related issues. They comprise information confirming the Commission's position that the EU now has a comprehensive investment power by outlining that an investment chapter should include fair and equitable treatment (FET), full protection and security, national treatment and most-favoured-nation (MFN) treatment as well as guarantees against uncompensated expropriation and an umbrella clause. As regards the level of detail, the instructions appear to favour the traditional European approach by adhering to a rather concise treaty text, without clarifications limiting the scope of FET and indirect expropriation as they are known in US and Canadian BITs as well as in the North American Free Trade Agreement (NAFTA).²⁶ In fact, avoidance of 'NAFTA-contamination' was reportedly a specific wish of some Member State officials.²⁷ With regard to dispute settlement, the need for direct investor-State arbitration seems to be unquestioned, though the precise contours are still open given the difficulty of access to ICSID and ICSID Additional Facility dispute settlement, which appear to be the Commission's favourite venues.²⁸

Other negotiations announced in the Commission's 2010 Communication, such as those with China and potentially Russia,²⁹ have not yet materialized to an extent that would allow precise conclusions as to the emerging contours of future EU IIAs.

V. THE EMERGING CONTOURS OF FUTURE EU IIAs

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

It seems that by now the EU is determined to seek a high level of protection for its investors abroad. The Council has acknowledged this aim by calling for 'the highest possible level of legal protection and certainty for European investors in Canada/India/Singapore'³⁰ and Commission officials have asserted that the Commission would 'go for the "gold standard" of investment protection provisions',³¹ based on the existing practice of EU Member States.³² This indicates the awareness of the need to go beyond a common lowest denominator

²⁶ See below nn 39 and 40.

²⁷ Luke E Peterson, 'EU Member-States Approve Negotiating Guidelines for India, Singapore and Canada Investment Protection Talks; Some European Governments Fear "NAFTA-contamination"', *Investment Arbitration Reporter*, 23 September 2011 <http://www.iareporter.com/articles/20110923_2> accessed 4 March 2013.

²⁸ See below text at 80.

²⁹ The Commission Communication, COM (2010) 343 final 4 (n 12) 7, mentions both States as potential future negotiation partners, and considers to negotiate even a stand-alone investment agreement with China. As regards a potential agreement with China see also Wenhua Shan and Sheng Zhang, 'The Potential EU-China BIT: Issues and Implications' in M Bungenberg et al. (eds), *EU and Investment Agreements* (n 6) 87.

³⁰ Council Negotiating Directives (Canada, India and Singapore) (n 25).

³¹ Hoffmeister and Üntüvar (n 6) 70.

³² Also the 2010 Commission Communication repeatedly mentions Member State BIT provisions 'that should inspire the negotiation of investment agreements at the EU level': Commission Communication, COM (2010) 343 final 4 (n 12) 8 (concerning umbrella clauses). Similarly, the Council considered that 'provisions of future EU investment agreements' should be fleshed out 'on the basis of the experience and the best practices of the Member States.' Council Conclusions, 3041st Foreign Affairs Council Meeting (n 20) para 15. Also the EP considered 'that future investment agreements concluded by the EU should be based on the best practices drawn from Member State experiences.' Parliament Resolution (n 21) para 19.

when drafting future investment agreements.³³ While expecting that such a high level of investor protection will ‘increase Europe’s attractiveness as a destination for foreign investment’,³⁴ the 2010 Commission Communication³⁵ as well as the Council Negotiating Directives also admonish the need to guarantee an appropriate regulatory space for the EU and its Member States by cautioning that an EU investment agreement ‘shall be without prejudice to the right of the EU and the Member States to adopt and enforce, in accordance with their respective competences, measures necessary to pursue legitimate public policy objectives such as social, environmental, security, public health and safety in a non-discriminatory manner’.³⁶ This language is reminiscent of the police powers doctrine,³⁷ as endorsed by some investment tribunals³⁸ and found in the explanatory provisions of US³⁹ and Canadian⁴⁰ Model BITs. It will leave considerable leeway for treaty negotiators to draft the respective treatment standards and possible exception clauses. These concerns were even reinforced by the European Parliament, which expressed its irritation with the regulatory chill of investment arbitration⁴¹ and specifically called upon the Commission ‘to include in all future agreements specific clauses laying down the right of parties to the agreement to regulate, inter alia, in the areas of protection of national security, the environment, public health, workers’ and consumers’ rights, industrial policy and cultural diversity’.⁴²

³³ The Council Negotiating Directives (Canada, India and Singapore) (n 25) expressly states that the provisions of the investment chapters to be negotiated ‘shall be built upon the Member States’ experience and best practise regarding their bilateral investment agreements’.

³⁴ The Council Negotiating Directives (Canada, India and Singapore) (n 25).

³⁵ In order to allow the EU to pursue public policy objectives, the Commission Communication, COM (2010) 343 final 4 (n 12) 8, recalls ‘that the Union’s trade and investment policy has to fit with the way the EU and its Member States regulate economic activity within the Union and across our borders. Investment agreements should be consistent with the other policies of the Union and its Member States, including policies on the protection of the environment, decent work, health and safety at work, consumer protection, cultural diversity, development policy and competition policy.’

³⁶ The Council Negotiating Directives (Canada, India and Singapore) (n 25).

³⁷ See Restatement (Third) of the Foreign Relations Law of the United States, s 712 Comment g, at 201 (‘action of the kind that is commonly accepted as within the police power of States.’).

³⁸ See eg *Técnicas Medioambientales Tecmed SA v United Mexican States*, ICSID Case No ARB(AF)/00/2, Award (29 May 2003) para 119 (‘The principle that the State’s exercise of its sovereign powers within the framework of its police power may cause economic damage to those subject to its powers as administrator without entitling them to any compensation whatsoever is undisputable.’); *Saluka Investments BV v The Czech Republic*, UNCITRAL, Partial Award (17 March 2006) para 262 (‘the principle that a State does not commit an expropriation and is thus not liable to pay compensation to a dispossessed alien investor when it adopts general regulations that are ‘commonly accepted as within the police power of States’ forms part of customary international law today.’.)

³⁹ See US Model BIT 2004, Annex B on Expropriation 4(b) (‘Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.’)

⁴⁰ See Canadian Model FIPA 2004, Annex B.13(1) on Expropriation (‘Except in rare circumstances, such as when a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation.’)

⁴¹ Parliament Resolution (n 21) para G (‘a number of problems became clear because of the use of vague language in agreements being left open for interpretation, particularly concerning the possibility of conflict between private interests and the regulatory tasks of public authorities, for example in cases where the adoption of legitimate legislation led to a State being condemned by international arbitrators for a breach of the principle of ‘fair and equitable treatment’).

⁴² Parliament Resolution (n 21) para 35.

A. *The Scope of Future EU IIAs*

With regard to the scope of future investment agreements, the EU plans to adhere to the concept of modern investment agreement practice to include both FDI and portfolio investments,⁴³ even if this comes at the price of not being able to exercise an exclusive CCP competence.⁴⁴ Indeed, investment agreements limited to FDI would be highly unusual and—because of the difficulty in distinguishing between FDI and portfolio investments in specific cases—might lead to protracted jurisdictional disputes not in the interest of investment protection. According to the Council Negotiating Directives with Canada, India and Singapore, the investment protection chapters of these agreements ‘shall cover a broad range of investors and their investments, intellectual property rights included, whether the investment is made before or after the entry into force of the agreement’.⁴⁵ Commentators have equally stressed that the EU should strive for a ‘broad definition of investment with a non-exhaustive list’.⁴⁶ This would imply that future EU IIAs are likely to contain a broad asset-based definition of ‘investment’ as currently contained in most EU Member State BITs. Uncertainty may stem from the fact that the European Parliament has expressly called for the exclusion of ‘speculative forms of investment’.⁴⁷ In practice it would appear difficult to distinguish between ‘speculative’ and ‘non-speculative’ portfolio (or even direct) investment.

B. *Admission/Access Provisions*

Past agreements of the EC/EU dealing with investments largely addressed questions of admission only and did so by adopting a GATS-inspired market access approach, that is, making specific commitments in specific areas.⁴⁸ The EU institutions have in general confirmed their intention to continue this policy of market access/liberalization.⁴⁹ However, it is unclear whether the current market access approach will be continued or whether the EU will adopt the North American practice of extending national treatment to the admission phase in order

⁴³ See (n 12).

⁴⁴ The Council Negotiating Directives (Canada, India and Singapore) (n 25) state that the Commission should aim at including ‘into the investment protection chapter of the agreement areas of mixed competence, such as portfolio investment . . .’ For a more expansive interpretation of the EU’s powers, see the Commission’s view (n 12).

⁴⁵ The Council Negotiating Directives (Canada, India and Singapore) (n 25) under ‘Scope’.

⁴⁶ Hoffmeister and Üntüvar (n 6) 71.

⁴⁷ See Parliament Resolution (n 21) para 11 (‘Asks the Commission to provide a clear definition of the investments to be protected, including both FDI and portfolio investment; considers, however, that speculative forms of investment, as defined by the Commission, shall not be protected; insists that where intellectual property rights are included in the scope of the investment agreement, including these agreements where draft mandates have already been proposed, the provisions should avoid negatively impacting the production of generic medicines and must respect the TRIPS exceptions for public health’).

⁴⁸ See eg the provisions on ‘commercial presence’ of Art 65ff. Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part [2008] OJ L289/I/4, 1, as well as Section C of Chapter 7 of the EU–Korea FTA, Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part [2011] OJ L127, 6, which provides for MFN treatment and specific market access commitments and national treatment in separate schedules.

⁴⁹ See Commission Communication, COM (2010) 343 final 4 (n 12) 5 (‘our trade policy will seek to integrate investment liberalisation and investment protection’); Council Conclusions, 3041st Foreign Affairs Council Meeting (n 20) para 6 (‘The new EU international investment policy should increase the level of competitiveness of the Union and open new markets’).

to secure market access as found in NAFTA as well as US and Canadian BITs.⁵⁰

C. Substantive Investment Protection

As regards substantive treatment of investments, it appears that future EU IIAs will include all the standards of treatment currently contained in EU Member State BITs. Again, the Council Negotiating Directives with Canada, India and Singapore are most instructive in this regard because they are most detailed. They contain basically all the treatment standards that can be found in modern BITs, from FET, full protection and security, national treatment and MFN, to compensation guarantees in case of expropriation and free transfer obligations.⁵¹ In addition, they call for ‘rules concerning subrogation’, which are typical in case an insurer compensates an investor and then needs to be able to raise claims against the host State.

(i) Umbrella clauses

The version of the leaked Negotiating Directives is a bit more ambiguous concerning umbrella clauses since they are mentioned with question marks under other effective investment protection provisions.⁵² Indeed, umbrella clauses have been controversial in investment arbitration practice as regards their practical effect.⁵³ Some tribunals follow the approach of *SGS v Pakistan* which rejected the

⁵⁰ See eg North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States, and the Government of the United States of America (NAFTA) (17 December 1992) (1993) 32 ILM 289, Art 1102(1) (‘Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments’); Canadian Model FIPA 2004, Art 3(1) (‘Each Party shall accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory’).

⁵¹ Pursuant to the title ‘Standards of treatment’ of the Council Negotiating Directives (Canada, India and Singapore) (n 25):

the negotiations shall aim to include in particular but not exclusively the following standards of treatment and rules:

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

Except for subrogation provisions, all these standards can also be found in the Commission Communication, COM (2010) 343 final 4 (n 12) 8–9. See also the Council Conclusions, 3041st Foreign Affairs Council Meeting (n 20) para 14, according to which the Council:

STRESSES the need to ensure the inclusion in the substance of future negotiations of the fundamental standards of ‘fair and equitable treatment’, non-discrimination (‘most-favored-nation treatment’ and ‘national treatment’), ‘full protection and security’ treatment of investors and investments, protection against expropriation (including the right to prompt, adequate and effective compensation), free transfer of funds of capital and payments by investors, as well as other effective protection provisions (such as, where appropriate, the so-called ‘umbrella clauses’) and dispute settlement mechanisms and CONSIDERS that these principles should be the main pillars of future EU investment agreements.

⁵² The Council Negotiating Directives (Canada, India and Singapore) (n 25) provide under ‘Standards of Treatment’ (‘(f) other effective protection provisions, such as ‘umbrella clause?’’).

⁵³ See Christoph Schreuer, ‘Travelling the BIT Route: Of Waiting Periods, Umbrella. Clauses and Forks in the Road’ (2004) 5 J World Invest Trade 231; Anthony Sinclair, ‘The Origins of the Umbrella Clause in the International

view that ‘breaches of a contract . . . concluded with a State (widely considered to be a matter of municipal rather than international law) are automatically “elevated” to the level of breaches of international law’.⁵⁴ Other tribunals adhere to the traditional view endorsed by *SGS v Philippines* that an umbrella clause ‘makes it a breach of the BIT for the host State to fail to observe binding commitments, including contractual commitments, which it has assumed with regard to specific investments. But it does not convert the issue of the extent or content of such obligations into an issue of international law’.⁵⁵ It may be that the EU has not yet decided whether it would endorse the potentially far-reaching implications of an umbrella clause, though the 2010 Commission Communication suggests that umbrella clauses are regarded as valuable tools for the protection of contractual rights of investors.⁵⁶

(ii) *Non-discrimination standards*

With regard to the main substantive standards it appears that the EU is determined to follow the path of traditional short formulations found in most EU Member State BITs, though it is difficult to judge this from the available documents alone. The wording of the Council Negotiating Directives with Canada, India and Singapore may be viewed as mere headings.⁵⁷

While the Commission has asserted that ‘non-discrimination should continue to be a key ingredient of EU investment negotiations’,⁵⁸ it remains unclear whether future national treatment and MFN clauses should be limited to the post-establishment phase or extend to the admission phase, thus de facto allowing for market access.⁵⁹

On the basis of present EU documents it is also not clear whether the institutions have formed an opinion on whether a MFN clause should encompass dispute settlement as in the *Maffezini* case⁶⁰ or not.⁶¹

Law of Investment Protection’ (2004) 20 *Arb Int* 411; Thomas Wälde, ‘The “Umbrella” Clause on Investment Arbitration—A Comment on Original Intentions and Recent Cases’ (2005) 6 *J World Invest Trade* 183; Stanimir A Alexandrov, ‘Breaches of Contract and Breaches of Treaty—The Jurisdiction of Treaty-based Arbitration Tribunals to Decide Breach of Contract Claims in *SGS v Pakistan* and *SGS v Philippines*’ (2004) 5 *J World Invest Trade* 555.

⁵⁴ *SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan*, ICSID Case No ARB/01/13, Decision on Jurisdiction, para 172 (6 August 2003). See also *Salini Costruttori SpA and Italstrade SpA v Hashemite Kingdom of Jordan*, ICSID Case No ARB/02/13, Decision on Jurisdiction (15 November 2004); *El Paso Energy International Company v Argentine Republic*, ICSID Case No ARB/03/15, Decision on Jurisdiction, para 85 (27 April 2006); *Pan American Energy LLC and BP Argentina Exploration Company v Argentine Republic*, ICSID Case No ARB/03/13, Decision on Jurisdiction, para 113 (27 July 2006).

⁵⁵ *SGS Société Générale de Surveillance SA v Republic of the Philippines*, ICSID Case No ARB/02/6, Decision on Jurisdiction, para 128 (29 January 2004). See also *Noble Ventures, Inc v Romania*, ICSID Case No ARB/01/11, Award, para 53 (12 October 2005); *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC BV v Republic of Paraguay*, ICSID Case No ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction (29 May 2009).

⁵⁶ Commission Communication, COM (2010) 343 final 4 (n 12) 8 (‘They have been traditionally used in Member States BITs and are an important element among others that should inspire the negotiation of investment agreements at the EU level.’).

⁵⁷ See above n 51.

⁵⁸ Commission Communication, COM (2010) 343 final 4 (n 12) 8.

⁵⁹ As regards the different option to provide for market access, see above text at n 48.

⁶⁰ *Emilio Agustín Maffezini v Spain*, ICSID Case No ARB/97/7, Decision on Jurisdiction (25 January 2000).

⁶¹ See also Zachary Douglas, ‘The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails’ (2011) 2 *JIDS* 97; Stephen Pietta, ‘Most Favoured Nation Treatment and Dispute Resolution under Bilateral Investment Treaties: A Turning Point?’ (2005) 8 *Intl Arb L Rev* 131–8; Emmanuel Gaillard, ‘Establishing Jurisdiction Through a Most-Favoured-Nation Clause’ (2005) 233 *NYLJ* 1, 3; Kaj I Hobér, ‘MFN Clauses and Dispute Resolution in Investment Treaties: Have We Reached the End of the Road?’ in Christina Binder et al. (eds), *International Investment Law for the 21st Century* (Oxford University Press 2009) 31; August Reinisch, ‘How Narrow are Narrow

Finally, with regard to the Council's directives suggesting that the Commission should negotiate 'unqualified' national treatment and MFN provisions, it may be unclear whether this implies that such clauses should follow the traditional 'European' approach of merely providing for non-discrimination⁶² or whether it would allow specifications to 'like circumstances' as often found in North American IIAs.⁶³ However, the Parliament's wish clearly suggests that such a specification should be adopted.⁶⁴

(iii) *Fair and equitable treatment as well as full protection and security*

Concerning FET and full protection and security, the EU seems determined to continue the traditional IIA policy of its Member States to adopt short provisions. Already the 2010 Commission Communication qualified these standards as 'an important element among others that should inspire the negotiation of investment agreements at the EU level'.⁶⁵ Indeed, there are good arguments in favour of the straightforward versions of FET omitting any references to the 'international minimum standard', as found in NAFTA,⁶⁶ or US BITs⁶⁷ or qualifications of the full protection and security to include 'legal protection', as found in some German BITs.⁶⁸

Dispute Settlement Clauses in Investment Treaties?' (2011) 2 JIDS 115; Stephan W Schill, 'Allocating Adjudicatory Authority: Most-Favored-Nation Clauses as a Basis of Jurisdiction: A Reply to Zachary Douglas' (2011) 2 JIDS 353.

⁶² See eg Austria-Ukraine BIT, Art 3(1) ('Each Contracting Party shall accord to investors of the other Contracting Party and their investments treatment no less favourable than that which it accords to its own investors and their investments or to investors in third States and their investments').

⁶³ See eg Canadian Model FIPA 2004, Art 3(1) text at n 50. It was asserted that the express mandate in the Council Negotiating Directives (Canada, India and Singapore) that the non-discrimination standards of MFN and national treatment should be 'unqualified' (see above n 51) implied that they should not include any reference to 'like circumstances' as they can be found, for example, in US and Canadian BITs as well as in NAFTA (see above n 50). See Hoffmeister and Ünüvar (n 6) 71. However, it may also be that the intention merely was to clarify that the Council did not wish to have any conditional MFN or national treatment contained in the future investment chapters under negotiation.

⁶⁴ Parliament Resolution (n 21) para 19 ('non-discrimination (national treatment and most favoured nation), with a more precise wording in the definition mentioning that foreign and national investors must operate "in like circumstances"').

⁶⁵ Commission Communication, COM (2010) 343 final 4 (n 12) 8.

⁶⁶ Art 1105 NAFTA ('Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security'). In NAFTA Free Trade Commission, Clarifications Related to NAFTA Chapter 11 (2001) this was held to be co-extensive, and thus limited, to the protection available under the international minimum standard ('1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party. 2. The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.').

⁶⁷ Art 5 US Model BIT 2004:

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

⁶⁸ Art 4 (1) Germany-Argentina BIT ('Investments by nationals or companies of either Contracting Party shall enjoy full legal protection and full legal security in the territory of the other Contracting Party.'). On the basis of such an express clause, the Tribunal in *Siemens AG v Argentine Republic*, ICSID Case No ARB/02/08, Award (6 February 2007) para 303 held that:

the obligation to provide full protection and security is wider than 'physical' protection and security. It is difficult to understand how the physical security of an intangible asset would be achieved. In the instant case, 'security' is qualified by 'legal'. In its ordinary meaning, 'legal security' has been defined as 'the quality of the legal system which implies certainty in its norms and, consequently, their foreseeable application.

References to the ‘international minimum standard’ in FET clauses have been regarded as limitations to the customary international law standard, in particular by NAFTA tribunals,⁶⁹ which considerably lower the level of investor protection and, conversely, increase the regulatory discretion of host States. This latter consequence may have inspired the Parliament to call for the inclusion of FET clauses ‘defined on the basis of the level of treatment established by international customary law’.⁷⁰

(iv) *Transfer clauses*

The Council Negotiating Directives with Canada, India and Singapore may again be relied upon to presume that future EU IIAs will routinely include guarantees on the ‘free transfer of funds of capital and payments by investors’.⁷¹ Already the 2010 Commission Communication stated that ‘EU clauses ensuring the free transfer of funds of capital and payments by investors should be included’.⁷² Given the Commission’s rigorous approach to defend the EU’s capacity to impose limits on such free transfer obligations for political reasons at any time,⁷³ it is to be expected that future free transfer clauses will contain express exceptions allowing the EU legislator to adopt restrictive measures under Article 66 and 215 TFEU. It has been suggested that such exceptions could resemble the security exception of the EU–Korea FTA.⁷⁴

(v) *Expropriation*

The question whether the EU has the power to adopt expropriation clauses in future IIAs has been controversial since the time the enlargement of the CCP was negotiated. While many commentators and apparently also EU Member States have referred to the exclusion of issues of property ownership from the scope of the TFEU and thus of the EU’s external investment power,⁷⁵ the Commission seems determined to include expropriation under its competence. The absence of any clear EU template makes it difficult to infer the precise scope and content of a

⁶⁹ See *Mondev International Ltd v United States of America*, ICSID Case No ARB(AF)/99/2, ICSID Additional Facility Award (11 October 2002) para 122; *United Parcel Service of America Inc v Government of Canada*, UNCITRAL, Decision on Jurisdiction (22 November 2002) para 97; *ADF Group Inc v United States of America*, ICSID Case No ARB(AF)/00/1, ICSID Additional Facility Award (9 January 2003) para 199; *The Loewen Group, Inc and Raymond L Loewen v United States of America*, ICSID Case No ARB (AF)/98/3, Award (26 June 2003) paras 125–7; *Waste Management, Inc v United Mexican States*, ICSID Case No ARB(AF)/00/3, Award (30 April 2004) paras 90–1; *Methanex Corporation v United States of America*, UNCITRAL (NAFTA), Final Award, Part II, Ch H (3 August 2005) para 23. See also the interpretation of the 2001 NAFTA Free Commission (n 66).

⁷⁰ Parliament Resolution (n 21) para 19.

⁷¹ Council Negotiating Directives (Canada, India and Singapore) (n 25) under ‘Standards of Treatment’.

⁷² Commission Communication, COM (2010) 343 final 4 (n 12).

⁷³ Case C-205/06, *Commission of the European Communities v Republic of Austria*, ECJ, 3 March 2009, ECR I-1301; Case C-249/06, *Commission of the European Communities v Kingdom of Sweden*, ECJ, 3 March 2009, ECR I-1335 Case C-118/07, *Commission of the European Communities v Republic of Finland*, ECJ, 19 November 2009, ECR I-10889. In these cases the ECJ found that even the mere possibility of a potential obstruction of the EU’s regulatory power to adopt transfer restrictions by capital transfer clauses in Member State BITs was sufficient to lead to an incompatibility with EU law. See also Eileen Denza, ‘Bilateral Investment Treaties and EU Rules on Free Transfer: Comment on Commission v Austria, Commission v Sweden and Commission v Finland’ (2010) 35 ELRev 263; Nikos Lavranos, ‘New Developments in the Interaction between International Investment Law and EU Law’ (2010) 9 LPIC 409; August Reinisch, ‘European Court of Justice: *Commission of the European Communities v. Austria and Sweden* (March 3, 2009) Introductory Note’ (2009) 48 ILM 470.

⁷⁴ See Hoffmeister and Ünüvar (n 6) 73, referring to Art 15.9 of the EU–Korea FTA, Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part [2011] OJ L127/6, which is in turn inspired by the Art XXI GATT.

⁷⁵ See eg Tietje, ‘Die Außenwirtschaftsverfassung der EU nach dem Vertrag von Lissabon’ (n 6); Tillmann Rudolf Braun, ‘Für einen komplementären, europäischen Investitionsschutz’ in Bungenberg et al (n 13) 195.

potential EU expropriation clause. However, the pieces found in different documents may be put together to form a discernible mosaic. While the Council Negotiating Directives with Canada, India and Singapore speak of ‘protection against direct and indirect expropriation, including the right to prompt, adequate and effective compensation’,⁷⁶ the 2010 Commission Communication admonishes that the ‘Union should include precise clauses covering this issue [ie that expropriation measures should be non-discriminatory and proportionate to attain their legitimate objective] into its own future investment or trade agreements’.⁷⁷ It would thus appear that any future expropriation clauses are likely to closely resemble the clauses found in existing EU Member State BITs. Whether it will also contain an attempt to more closely define the notion of indirect expropriation, as can be found in some more recent North American BITs⁷⁸ remains to be seen.⁷⁹

VI. THE PLACE OF INVESTOR–STATE DISPUTE SETTLEMENT IN THE EU’S INVESTMENT ARCHITECTURE

In the initial phase of the discussion of a new EU external investment policy, EU institutions appeared to be reluctant to accept investor–State dispute settlement. While the Commission was silent for a considerable period of time, it eventually came forward with a positive assessment. Still, the Parliament in particular voiced concern⁸⁰ about the far-reaching implications of ISDS that might compromise the right to regulate.⁸¹

This reserved stance was irritating for States and investors, who had recognized that ISDS fulfilled a crucial function in effectively securing the substantive protections granted in IIAs.⁸² With the coming of age of ISDS in the 1990s and the first decade of the 21st century it has become accepted that removing investment protection from the traditional paradigm of diplomatic protection has contributed to the de-politicization of investment disputes.⁸³

⁷⁶ Council Negotiating Directives (Canada, India and Singapore) (n 25) under ‘Standards of Treatment’.

⁷⁷ Commission Communication, COM (2010) 343 final 4 (n 12) 9.

⁷⁸ See eg the ‘shared understanding’ on expropriation in US Model BIT 2004, Annex B.

⁷⁹ It appears that such a closer definition is what the Parliament would like to see in future IIAs when it called for ‘protection against direct and indirect expropriation, giving a definition that establishes a clear and fair balance between public welfare objectives and private interests’. Parliament Resolution (n 21) para 19.

⁸⁰ Parliament Resolution (n 21) para 24 (‘Expresses its deep concern regarding the level of discretion of international arbitrators to make a broad interpretation of investor protection clauses, thereby leading to the ruling out of legitimate public regulations; calls on the Commission to produce clear definitions of investor protection standards in order to avoid such problems in the new investment agreements’).

⁸¹ See also below text at n 103.

⁸² See eg *Emilio Agustín Maffezini v Kingdom of Spain*, ICSID Case No ARB/97/7, Decision on Jurisdiction, para 54 (25 January 2000) (‘dispute settlement arrangements are inextricably related to the protection of foreign investors, as they are also related to the protection of rights of traders under treaties of commerce.’); *National Grid plc v The Argentine Republic*, UNCITRAL, Decision on Jurisdiction, para 49 (20 June 2006) (‘assurance of independent international arbitration is an important—perhaps the most important—element in investor protection.’).

⁸³ See already Ibrahim FI Shihata, ‘Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA’ (1986) 1 ICSID Rev—FILJ 1. In fact, the latter concept is considered to be one of the major achievements of the ICSID Convention. See eg Christoph Schreuer et al., *The ICSID Convention—A Commentary* (2nd edn, Cambridge University Press 2009) 416; Christoph Schreuer, ‘Investment Protection and International Relations’ in August Reinisch and Ursula Kriebaum (eds), *The Law of International Relations—Liber Amicorum Hanspeter Neuhold* (Eleven International Publishing 2007) 345, 346, 347.

However, the initial reluctance of the EU institutions seems to have given way to a full endorsement of ISDS. In its 2010 Communication on investment, the Commission acknowledged the importance of ensuring the effective enforceability of investment protection standards through ISDS which formed ‘a key part of the inheritance that the Union receives from Member State BITs’.⁸⁴ And the Council stressed in its Conclusions ‘the need for an effective investor-to-State dispute settlement mechanism in the EU investment agreements’.⁸⁵

Currently, the Commission appears determined to include ISDS and has even specifically addressed the issue of allocating responsibility (and in particular financial liability) between the Union and its Member States by proposing a regulation establishing a ‘framework for managing financial responsibility linked to investor-State dispute settlement tribunals’.⁸⁶ This proposal builds on and deepens the template adopted already in the mid-1990s when the European Community joined the Energy Charter Treaty (ECT)⁸⁷ as a full participant. Prior to the ECT’s entry-into-force, the European Community confirmed that it can become a respondent to individual claims raised by investors, and that the Community and its Member States concerned would determine the proper respondent within 30 days of receiving such a request among themselves.⁸⁸

In addition to the difficulty of allocating responsibility, ISDS raises serious problems as regards available arbitration venues. Investor-State arbitration and conciliation under the ICSID Convention⁸⁹ are available only to States and nationals of States party to the Convention.⁹⁰ The ICSID Convention is open to Member States of the IBRD or to any other State which is a party to the International Court of Justice (ICJ) Statute.⁹¹ Thus, Statehood is a clear requirement for adherence to the ICSID Convention, which clearly prevents the EU in its current form from becoming a contracting party. Opening ICSID dispute settlement (conciliation and arbitration) to the EU would thus require a treaty revision which is theoretically possible,⁹² but practically very unlikely to be achieved.⁹³ Nevertheless, the Commission stated its intention to explore this

⁸⁴ Commission Communication, COM (2010) 343 final 4 (n 12) 10. It also considered that ‘ISDS is such an established feature of investment agreements that its absence would in fact discourage investors and make a host economy less attractive than others’.

⁸⁵ Council Conclusions, 3041st Foreign Affairs Council Meeting (n 20) para 18.

⁸⁶ Commission Proposal of 21 July 2012, COM (2012) (n 18) 335. See also C Brown and I Naglis, ‘Dispute Settlement in Future EU Investment Agreements’ in Bungenberg et al., *EU and Investment Agreements* (n 6) 17.

⁸⁷ Energy Charter Treaty, Annex 1 to the Final Act of the Conference on the European Energy Charter (17 December 1994) (1995) 34 ILM 381.

⁸⁸ Statement by the European Communities to the Secretariat of the Energy Charter pursuant to Art 26(3)(b)(ii) of the Energy Charter Treaty [1998] OJ L69/115.

⁸⁹ Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) (‘ICSID Convention’).

⁹⁰ See ICSID Convention, Art 25(1).

⁹¹ ICSID Convention, Art 67.

⁹² See ICSID Convention, Arts 65 and 66.

⁹³ According to Art 66(1) ICSID Convention amendments must be accepted by all Contracting Parties. The practical difficulties of revising the ICSID Convention were discussed when the introduction of an appellate body was debated. See Possible Improvements of the Framework for ICSID Arbitration, ICSID Secretariat Discussion Paper (26 October 2004) <<http://icsid.worldbank.org>> accessed 4 March 2013. See also David A Gantz, ‘An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes: Prospects and Challenges’ (2006) 39 Vand J Transnatl L 39; B Legum, ‘Options to Establish an Appellate Mechanism for Investment Disputes’ in Karl P Sauvant and Michael Chiswick-Patterson (eds), *Appeals Mechanism in International Investment Disputes* (Oxford University Press 2008) 231–9; A Qureshi, ‘An Appellate System in International Investment Arbitration?’ in Peter Muchlinski et al. (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press 2008) 1154; Christian J Tams, ‘An Appealing Option? The Debate about an ICSID Appellate Structure’ in Christian Tietje et al

option.⁹⁴ In the medium term, it appears more realistic that the EU will adopt ISDS clauses providing for investment arbitration to be conducted under UNCITRAL⁹⁵ or other arbitration rules.⁹⁶

Interestingly, the Commission has reacted to two specific issues frequently discussed in the investment arbitration community that have raised a certain degree of concern, namely, the questions of sufficient transparency and of potential inconsistencies of outcomes. The Commission appears intent on addressing these problems by providing for a broad level of transparency in future IIAs⁹⁷ and by taking into consideration the use of quasi-permanent arbitrators and the creation of appellate mechanisms.⁹⁸ The Parliament endorsed these thoughts and added further ideas for improvement,⁹⁹ such as the institutionalization of *amicus curiae* participation and the more controversial enhancement of the role of domestic courts through requiring exhaustion of local remedies.¹⁰⁰

An issue that has not received much attention by the EU institutions is the question of the compatibility of ISDS with the system of legal protection guaranteed by the ECJ of the EU.¹⁰¹ Concern has been voiced that the ECJ may regard any ‘competing’ dispute settlement institution as an ‘unconstitutional’ threat to the autonomy of EU law and its own exclusive power to interpret it.¹⁰²

(eds), *Beiträge zum Transnationalen Wirtschaftsrecht, Heft 57* (2006), <<http://telc.jura.uni-halle.de/de/forschungen-und-publikationen/beitr%C3%A4ge-transnationalen-wirtschaftsrecht>> accessed 9 April 2013.

⁹⁴ Commission Communication, COM (2010) 343 final 4 (n 12) 10 (‘The Commission will explore with interested parties the possibility that the European Union seek to accede to the ICSID Convention (noting that this would require amendment of the ICSID Convention)’).

⁹⁵ United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, UN GAOR, 31st Sess, suppl no 17, ch V, sec C, UN Doc A/31/17 (15 December 1976) (1976) 15 ILM 701 <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1976Arbitration_rules.html> accessed 4 March 2013.

⁹⁶ It is not clear why the EP considers that next to ICSID also UNCITRAL arbitration would not be available to the EU. See Parliament Resolution (n 21) para 33. The reason given by the Parliament that the EU is not a member of UNCITRAL is not convincing since UNCITRAL Arbitration Rules can be widely used by private, State and non-State entities, including international organizations.

⁹⁷ Commission Communication, COM (2010) 343 final 4 (n 12) 10 (‘[T]he EU should ensure that investor-State dispute settlement is conducted in a transparent manner (including requests for arbitration, submissions, open hearings, *amicus curiae* briefs and publication of awards)’).

⁹⁸ Commission Communication, COM (2010) 343 final 4 (n 12) 10 (‘Consistency and predictability are key issues and the use of quasi-permanent arbitrators (as in the EU’s FTA practice) and/or appellate mechanisms, where there is a likelihood of many claims under a particular agreement, should be considered’).

⁹⁹ Parliament Resolution (n 21) para 31 (‘Believes that changes must be made to the present dispute settlement regime, in order to include greater transparency, the opportunity for parties to appeal, the obligation to exhaust local judicial remedies where they are reliable enough to guarantee due process, the possibility to use *amicus curiae* briefs and the obligation to select one single place of investor-State arbitration’).

¹⁰⁰ See Christoph Schreuer, ‘Calvo’s Grandchildren: The Return of Local Remedies in Investment Arbitration’ (2005) 4 LPICT (2005) 1; U Kriebaum, ‘Local Remedies and Standards for Protection’ in Binder et al (n 61) 417.

¹⁰¹ See Markus Burgstaller, ‘Investor-State Arbitration in EU International Investment Agreements with Third States’ (2012) 39 LIBE 207; Jacqueline Duthéil de la Rochère, ‘Quel rôle pour la Cour de Justice?’ in Catherine Kessedjian (ed), *Le droit européen et l’arbitrage d’investissement/European Law and Investment Arbitration* (Pantheon-Assas 2011) 37; Steffen Hindelang, ‘Der primärrechtliche Rahmen einer EU-Investitionsschutzpolitik: Zulässigkeit und Grenzen von Investor-Staat-Schiedsverfahren aufgrund künftiger EU Abkommen’ in Marc Bungenberg and Christoph Herrmann (eds), *Die Gemeinsame Handelspolitik der Europäischen Union ‘nach Lissabon’* (Nomos 2011) 157; Matthew Parish, ‘International Courts and the European Legal Order’ (2012) 23 EJIL 141; Stephan W Schill, ‘Luxembourg Limits: Conditions for Investor-State Dispute Settlement under Future EU Investment Agreements’ in Bungenberg et al. (eds), *EU and Investment Agreements* (n 6) 37.

¹⁰² Cf Case C-459/03, *Commission v Ireland (Max Plant)*, [2006] ECR I-4635, paras 122ff; Opinion 1/09, *European and Community Patents Courts*, CJEU, 8 March 2011 (not yet published).

VII. THE INTEGRATION OF BROADER, NON-ECONOMIC CONCERNS INTO FUTURE EU IIAs

The emergence of effective investment protection since the late 1990s primarily through the availability of effective ISDS has led to a growing uneasiness among many host States, including some EU Member States, fearing that investment protection that is too effective may become too costly and ultimately deter the adoption of legitimate policy measures.¹⁰³ This true or perceived danger of a so-called regulatory chill¹⁰⁴ has led to outright denunciation of the current system¹⁰⁵ and (even in OECD countries) to attempts to moderate investment protection by balancing investor concerns with governmental interests.¹⁰⁶

These anxieties have also been picked up by the EU institutions. In its 2010 Communication, the Commission stated with regard to the potential breadth of indirect expropriation that '[a] clear formulation of the balance between the different interests at stake, such as the protection of investors against unlawful expropriation or the right of each Party to regulate in the public interest, needs to be ensured'.¹⁰⁷ It further stated that 'Investment agreements should be consistent with the other policies of the Union and its Member States, including policies on the protection of the environment, decent work, health and safety at work, consumer protection, cultural diversity, development policy and competition policy'.¹⁰⁸ Indeed finding the proper balance between investment and non-investment interests will be one of the core issues for future EU IIAs.¹⁰⁹

VIII. AN ASSESSMENT OF POLICY INITIATIVES

After initial concerns about the EU's investment policy to be carried out by the Commission, which were fuelled by the latter's reluctance to take clear positions on a wide range of crucial issues, it now appears that, three years after the entry-into-force of the Lisbon Treaty, some contours of future EU IIAs are beginning to emerge, seemingly also still recognizable as 'European'. EU Investment agreements are likely to be concluded as mixed agreements and it is

¹⁰³ See Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press 2007). For a more nuanced view, see the contributions in Michael Waibel et al (eds), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Kluwer Law International 2010).

¹⁰⁴ See Stephen Woolcock, 'The EU Approach to International Investment Policy after the Lisbon Treaty', *Study for the EP Committee on International Trade* (2010) 46, <<http://www.europarl.europa.eu/committees/en/studiesdownload.html?language=Document=EN&file=33990>> accessed 9 April 2013.

¹⁰⁵ In 2007, Bolivia was the first State to denounce the ICSID Convention, followed by Ecuador in 2009 and, most recently, by Venezuela in January 2012. The ICSID Convention regulates the withdrawal of States Parties in Arts 71 and 72. See Christoph Schreuer, 'Denunciation of the ICSID Convention and Consent to Arbitration' in Michael Waibel et al. (eds), *The Backlash against Investment Arbitration: Perceptions and Reality* (Kluwer Law International 2010) 353; Oscar M Garibaldi, 'On the Denunciation of the ICSID Convention' in Binder et al (n 61) 251; Keyvan Rastegar, 'Denouncing ICSID' in Binder (n 61) 278.

¹⁰⁶ Cf the attempts of the United States and Canada to draft more balanced expropriation provisions in their 2004 Model BITs; see above nn 39 and 40. See also the Norwegian Draft Model BIT 2007, <http://www.pca-cpa.org/showpage.asp?pag_id=1391> accessed 4 March 2013, which included an express provision on the 'right to regulate' (Draft Art [12]: 'Nothing in this Agreement shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Agreement that it considers appropriate to ensure that investment activity is undertaken in a manner sensitive to health, safety or environmental concerns').

¹⁰⁷ Commission Communication, COM (2010) 343 final 4 (n 12).

¹⁰⁸ *ibid.*

¹⁰⁹ See Lars Markert, 'The Crucial Question of Future Investment Treaties: Balancing Investors' Rights and Regulatory Interests of Host States' in Bungenberg et al. (eds), *European Yearbook of International Economic Law, Special Issue: International Investment Law and EU Law* (Springer 2011) 145; Jan Kleinheisterkamp, 'European Policy Space in International Investment Law' (2012) 27 ICSID Rev—FILJ 416.

to be expected that future EU IIAs will largely resemble the typical BITs concluded by the Member States in the past, though there may be a few additions, particularly in ensuring sufficient regulatory space for host States and addressing some recent concerns surrounding ISDS. It is thus possible that future EU IIAs will contain language aiming at integrating broader, non-economic concerns into their investment protection purpose in order to find a balance between investors' and host States' interests. It is also likely that such future agreements will contain some limitations on the usually available investment dispute settlement options, some of which result from the peculiar nature of the EU as a non-State actor, and others from its political will to make ISDS more transparent and its outcomes less inconsistent.