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# Recent Developments in the EU Investment Policy : Towards an Investment World Court?

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*The controversies that have surrounded the negotiation of both the Comprehensive Economic and Trade Agreement (CETA) and the Transatlantic Trade and Investment Partnership (TTIP) have underlined the difficulties arising out from the adoption of a truly common EU investment policy. Non-governmental organizations have called into question transparency and legitimacy of international investment arbitration during the negotiations. The article presents a reflection about current developments of the EU investment policy addressing, in particular, the criticisms towards the whole investor-to-State system and the EU's efforts in developing a "tailor-made" investment agreement and Investor-to-State Dispute resolution system. Along these lines, the article critically assesses the recently announced proposal for the establishment of an 'Investment Court System' put forward by the EU during the TTIP negotiations.*

Key Words : EU, Investment Policy, Investment Court System

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〈 Contents 〉



# Ⅰ. Introduction

The Treaty of Lisbon epitomized a significant change with the inclusion of FDI within the scope of the EU's common commercial policy. Nevertheless the effective incardination of this newly design policy in the realm of the common commercial policy (CCP) has not been a flawless process.[1] The difficulties arising out from the negotiation of new extra-EU international investment agreements, in particular, the Comprehensive Economic and Trade Agreement (CETA) and the TTIP have shown the obstacles in implementing such a common policy.

While there is a clear interest in having a coherent common investment policy since the EU as the largest source and destination of FDI in the world measured in terms of stocks and flows[2]; recent developments in the implementation have underlined the hindrances the newly-designed policy can encounter. Particularly, the negotiation of the transatlantic partnership (TTIP) between the EU member states and the United States has made evident a growing sense of division at the interior of member states and the European Union itself with a polarized public opinion. In terms of the institutional landscape, the Commission's unfettered powers in the implementation of the trade policy are confronted with a more active role of the European Parliament that claims to have its say in the process. In addition, there is also a strong criticism toward the current investor-to-State system that stems from the perceived lack of

1) TCE, Art III-315(4).
2) European Union, 〈http://ec.europa.eu/trade/policy/accessing-markets/investment/〉 (accessed 1 June 2015).

legitimacy and transparency of such dispute settlement system.

The discussion surrounding these freshly negotiated agreements that may serve as blueprint for future agreements exposes major weaknesses in the implementation of the newly-designed policy. This article argues that these cases unveil a sort of carrot and stick approach which is also reflected in the emerging and burgeoning literature. Along these lines, the article argues that in the context of the common commercial policy, different events act as positive incentives whereas others function and sanctions. The 'carrot' would be represented by the possibility to offer a reliable alternative and a predictable legal environment whereas the 'stick' is represented by the risk of being kept at the margins of the international system due to the obstacles that may arise in the access to international investment dispute settlement. Dispute resolution has turned to be the big stick. The main claim put forward is that the carrots and sticks in the EU should be adequately balanced at risk of delaying the establishment of an authentic common policy.

The article is structured in five sections. In the first section, the evolution and main aspects in the implementation of the EU investment policy are examined. In the second section the article further explores the different nuances in the content and dilemmas of the new EU policy. In section 3, the article analyses from a theoretical viewpoint how the implementation of the new policy will alter the landscape of international investment law. Finally, the article turns to study the articulation of the policy in light of the negotiations of new investment agreements, critically assessing the proposal for the establishment of an 'Investment Court System' as formulated by the EU Commission during the the TTIP negotiations.

## Ⅱ. STEP-BY-STEP: The Path towards An Investment Policy in The EU

Following the Treaty of Lisbon, the conclusion of International Investment Agreements (IIAs) fall into the exclusive competence of the EU, with the CCP including specific EU competences on investment protection.[3] An interesting feature of

3) The whole articulation merits a closer look that exceeds the length and purposes of this article. For a more detailed analysis of the EU common investment policy until 2011, see amongst others: A

the previous system was the interplay with other treaty provisions. In particular, those conferring the EU authority in the domains of free movement of capital and the freedom of establishment. Before the adoption of the Treaty of Lisbon reform there was a long-held debate whether or not foreign investment would be covered by the CCP on the basis of such provisions.

The former wording of Article 64 TFEU (ex-Article 57 TEC) already included the term 'direct investment', even if a specific reference to the adoption of norms on the part of the EU was not made.[4] Despite that, Article 57 vested the EC with normative power to regulate on the free movement of capital and, according to the principle of parallelism, to carry out negotiations in the external action. In this vein, the Court of Justice of the European Union (CJEU) in Opinion 2/92 affirmed that Article 57 had granted an external competence to the EU, leaving open the question about the precise scope of the EU's competence in EU law. In Opinion 1/94 the CJEU further consolidated this position.[5] In this Opinion, the CJEU clarified that the competence in the field of common commercial policy included only those aspects in the trade of services which are comparable to trade in goods, in particular, discussing the inclusion of issues related to the free movement of persons and their rights of establishment (both of which are essential aspects to successfully carry out an investment project). The CJEU concluded that in accordance with Article 3 of the Treaty of the EC the common commercial policy and the movement of people were considered as two different 'EU activities' and, consequently, the right of establishment could not be regarded as falling within the CCP. [6]

Subsequently, the Treaty of Nice (2001) broadened the CCP's scope, encompassing trade in services and commercial aspects of intellectual property. It must be noted that since then foreign investment by service providers, covered by the GATT, had been included within EU competence. Previously, the EU had negotiated agreements covering investment in services, such as on establishment of the GATS agreement. Before the Treaty of Lisbon and under the GATS provisions, the EU had competence

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Dimopoulos, EU Foreign Investment Law (OUP 2011) and MB Olmos Giupponi, Section 19, Law of the European Union Edited by David Vaughan CBE QC and Aidan Robertson QC (OUP 2015).

4) TCE, Art III-315(4).

5) The Opinion 2/92 dealt with the competence of the EU or one of its institutions to participate in the Third Revised Decision of the OECD on national treatment.

6) Opinion 1/94 *WTO* [1994] ECR I-5416, paras 45 and 46.

over some rules regarding market access and national treatment. Also, the EU had concluded agreements on other aspects of investment liberalization such as the GATT Trade Related Investment Measures agreement that prohibits investment performance requirements, such as local hiring and local joint venture.

In this previous scenario, member states concluded a myriad of BITs (1400 accounting for approximately half of the world's BITs), comprising 125 BITs with OECD countries.[7] These heterogeneous BITs contain different definitions of FDI with diverse provisions on investment protection.[8] In addition, there were various investment protection agreements negotiated by EU Member States in different fora, such as the Energy Charter Treaty, which establishes a multilateral framework for co-operations in the energy sector (including investment protection).[9] Although investment treaties are highly standardized since the 1960s most of them follow alike templates (Model BITs)[10], there are still many nuances in the BITs'[11] content that is mostly determined by the various models used by capital exporting nations such as the Germany (Model BIT 2008).[12] Overall, these BITs regulate basic protection standards without featuring other provisions such as environmental protection, labour standards,

7) European Commission, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions 'Towards a comprehensive European international investment policy' COM(2010)343 final (7 July 2010). UNCTAD, 'Global Value Chains: Investment and Trade for Development', World Investment Report 2013 (UNCTAD, 2013). '2009 World Investment Report of the United Nations Conference on Trade and Development' (UNCTAD, 2009) 32.

8) Nikos Lavranos, 'Bilateral Investment Treaty (BITS) and EU Law' (27 September 2010), ESIL Conference 2010, available at 〈http://ssrn.com/abstract=1683348〉 (accessed 1 July 2016).

9) The Energy Charter Treaty (ECT) entered into force on 16 April 1998. Its Member States are the countries of the enlarged EU, Central and Eastern Europe, the Russian Federation, Central Asia and the Caucasus, as well as Japan, Australia and Mongolia. As of 2014, 52 States have signed or acceded to the ECT. The Treaty remains open for accession by all countries committed to observance of its principles: 'The Energy Charter Treaty and Related Documents. A Legal Framework for International Energy Cooperation', available at 〈www.encharter.org/fileadmin/user_upload/document/EN.pdf〉 (accessed 1 July 2016).

10) Since the 1960s, there has been a trend to use 'model' BITs. MF Houde, 'Novel Features in Recent OECD Bilateral Investment Treaties' (OECD, 2008), available at 〈www.oecd.org/investment/internationalinvestmentagreements/40072428.pdf〉 (accessed 1 July 2016).

11) For further indications, see Lluis Paradell and Andrew Newcombe, *Law and Practice of Investment Treaties*, LawKluwer International, 2009. Chapter 1, 1-73.

12) Rudolf Dolzer and Christian Schreuer, *Principles of International Investment Law*, 2nd edn, Oxford University Press, 2012. The German Model BIT is available at 〈www.italaw.com/sites/default/files/archive/ita1025.pdf〉, and the US Model BIT is available at 〈www.italaw.com/sites/default/files/archive/ita1028.pdf〉 (accessed 1 July 2016).

human rights or corporate social responsibility.

At the same time, in order to reinforce its commercial presence, the EU was negotiating FTAs which comprised establishment for services and non-services sectors. Thus, the EU included investment protection provisions in FTAs or in separate agreements.

Thus, the investment policy is now integrated under the CCP umbrella, including the conclusion of international agreements. In the past, however, there has been a long-standing distinction between international trade agreements and international IAs. Whereas international trade agreements deal with trade in goods and services establishing different levels of liberalization, international IAs regard the investment protection in a specific country. In addition, trade agreements are usually regional or multilateral agreements, whereas IAs are mainly of bilateral nature. The consequences of the extension of the competence to FDI can also be appreciated in the context of the WTO and other international organizations (such as the OECD) in attempts to negotiate multilateral rules on investment.

So far, the inclusion of investment provisions in EU trade agreements have been progressively based on EU priorities. Now member states' priorities need also to be integrated.[13] In the case of the existing negotiations of free trade agreements, the EU has an interest in broadening the scope of negotiations to encompass investment protection, such the EU-Canada negotiations towards a Comprehensive Economic and Trade Agreement.16 Investment protection represents a relevant piece in the current negotiations with the US under the Transatlantic Trade and Investment Partnership, the comprehensive trade agreement presently being negotiated between the EU and the US.[14]

Although representing a substantial advancement for the EU global leadership, the emergence of a specialized EU investment policy as a new area of the common

13) European Commission, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, 'Towards a comprehensive European international investment policy' COM(2010)343 final (7 July 2010).

14) European Commission, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, 'Towards a comprehensive European international investment policy' COM(2010)343 final (7 July 2010). See also the House of Commons Report, 'The Transatlantic Trade and Investment Partnership – European Union Committee', Chapter 5: Summary of Conclusions and Recommendations, available at 〈www.publications.parliament.uk/pa/ld201314/ldselect/ldeucom/179/17908.htm〉 (accessed 1 June 2015).

commercial policy has proven to be extremely controversial leading to a sparkling scholarly discussion about the scope of the EU's competence in the subject matter.[15)]

What lies at the heart of the reform is the integration of investment protection and, consequently, investment dispute settlement in the scope of the CCP. This translates into a gradual assumption of powers on the part of the Union to guarantee the exercise of the current exclusive competence. Accordingly, member states are progressively reallocating the competence to negotiate, conclude, and implement investment protection agreements, which includes the possibility for the EU to re-negotiate previously signed international investment agreements. The laudable objective is to ensure consistency avoiding heterogeneity and uncertainty represented by a multitude of BITs signed by member states.

Clearly, the Treaty of Lisbon laid down the basic provisions granting the EU authority to develop an authentic community investment policy, removing all possible obstacles to FDI. Yet, the Treaty provided no straightforward guidance as to the precise scope of the legal powers in investment protection or the hierarchy and status of previously concluded BITs and trade agreements including investment chapters. As a result, there is a great margin for uncertainty that may result in a new doubtful allocation of competences.

Thus, there are still open questions regarding the conclusion and the implementation of the EU investment agreements. In order to provide with some headway regarding the future of the EU's Investment Treaties two regulations were passed to guarantee the legal certainty needs during the transitional period. The first regulation, Regulation (EU) No 1219/2012, aimed at making a smooth transference of FDI competence to the EU institutions, laying down arrangements for bilateral IAs between Member States and third countries. The second regulation, Regulation (EU) No 912/2014, is meant to tackle the thorny question of investor-to-State dispute settlement.[16)]

However, controversies are far from being solved as there is no clear-cut solution in terms of a transparent distribution of competences. Also the current wording brings

15) See amongst others, Thomas Eilmansberger, 'Bilateral investment treaties and EU law' (2009) 46 *CMLRev* 383-429; Jan Ceyssens, 'Towards a Common Foreign Investment Policy? – Foreign Investment in the European Constitution' (2005) 32 *Legal Issues of Economic Integration* 259-291.

16) Regulation (EU) No 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party.

about a considerable amount of uncertainty and raises several questions concerning the future EU's role in the field of FDI. For instance, it is unclear if the blurred limits of the EU's novel competence will include FDI protection in addition to investment liberalization. Moreover, the transfer of FDI competence from Member States to the EU institutions would make a considerable number of BITs incompatible with the TFEU leading to legal uncertainty for Member States and their external parties to the BITs.[17)]

Recent developments concerning the settlement of investment disputes in the EU pose different questions about the implementation of the modifications and goals foreseen in the new design of the EU trade and investment policy emerging after the Treaty of Lisbon. In order to tackle the crucial issues, the so-called 'Brussels Consensus' (considered as a starting point for the conformation of a common EU investment policy) defined the terms upon which member states and the EU agree identifying the key elements for the design of the EU investment policy.[18)] According to all three institutions, the EU's investment agreements should:

(1) provide a high level of protection for EU investors through standard clauses;
(2) respect the right to regulate in order to meet legitimate public policy objectives;
(3) increase legal certainty for both investors and host states;
(4) be consistent with broader principles and objectives of the Union's external action; and (5) include a state-of-the-art dispute settlement chapter with investor to-state procedures.[19)]

In the next section provides a brief account of the evolution of the EU investment policy explaining the various components contained within its scope.

17) According to the European Commission's estimations, extra EU BITs amount to more than 1200 agreements. For more detail, see 〈http://ec.europa.eu/trade/policy/accessing-markets/investment/〉 (accessed 1 July 2016).

18) See, generally, Angelos Dimopoulos, EU Foreign Investment Law (Oxford University Press 2011). See also the various articles published in the *Journal of World Investment & Trade* Volume 15, Special Issue: The Anatomy of the (Invisible) EU Model BIT, 2014

19) Frank Hoffmeister and Gabriela Alexandru, 'A First Glimpse of Light on the Emerging Invisible EU Model BIT' (2014) 15 *The Journal of World Investment* 379-401.

## Ⅲ. The Emerging EU Investment Policy: Defining its Scope

Evidently, the new EU investment policy is still 'under construction', as the ongoing negotiations demonstrate. Most of the controversy that surrounds the new common policy regards its scope, the allocation of competences and the sharp criticisms expressed by the civil society. Even if there is a previous practice in terms of inclusion of investment chapters in trade agreements, the new competence implies that the EU will conclude investment agreements on behalf of the member states. The previous FTAs concluded by the EU and its Member States including Investor-to-State (ISDS) dispute settlement clauses, contain two types of provisions: narrow ISDS clauses and broad ISDS clauses. The FTAs with South Africa and South Korea belong to the first category since they provide for *ad hoc* arbitration tribunals with jurisdiction over certain issues only (procurement contracts and telecommunications investment). In contrast, the Energy Charter Treaty (ECT) embodies the possibility to bring an investment claim before a wide range of institutionalised arbitration bodies, such as the International Centre for the Settlement of Investment Disputes (ICSID) and ICSID additional-facility tribunals (option not available for the EU since the facility does comprise international organisations), contemplating as well ad hoc arbitrations conducted under UNCITRAL rules and the arbitration tribunals of the Stockholm Chamber of Commerce (SCC). As another distinctive feature (that has also been echoed in the recent proposal for the creation of the investment court) these FTAs comprise alternative dispute resolution mechanisms, such as consultation and mediation, to take place before the ICSID Secretariat and before ad hoc consultation or mediation bodies.

The documents regarding the negotiation of CETA demonstrate that the EU has now followed a broader approach.[20] The CETA draft text contemplates that investors can bring their claims before ICSID tribunals, ICSID additional-facility tribunals, *ad hoc* arbitration tribunals which under UNCITRAL rules, and other *ad hoc* arbitration tribunals. Even if both, Energy Charter Treaty and CETA include the possibility to submit claims to the ICSID and ICSID additional-facility, since they are mixed

20) CETA. Section 3. Dispute settlement procedures. Available at http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pd (accessed 1 1 July 2016).

agreements signed by the EU and the Member States a foreign investor can only sue an EU Member State (and not the EU as such) before ICSID, under the ICSID Convention or following the process established by the additional-facility rules.

In determining the exact scope of the current FDI, it should be underlined that the EU investment policy only covers 'extra-EU' investment agreements. In contrast, 'intra-EU' investment agreements remain yet under the Member States' competence. These BITs have led to controversial legal issues and contradictory decisions by investment arbitral tribunals.[21)]

A question of paramount importance regards which investments are covered in the newly-designed investment policy. According to a broad definition provided by the *Max Planck Encyclopaedia of Public International Law*, a foreign investment consists in the 'transfer of funds or materials from one country (called capital-exporting country) to another country (called host country) in return for a direct or indirect participation in the earnings of that enterprise'.[22)] This definition comprises both 'foreign direct investment' as well as 'portfolio investment'.[23)]

Even though EU law sheds some light on the definitions of investment, it greatly remains a certain margin of interpretation. In EU law, for instance, Directive 88/361/EEC (also known as the 'capital directive') offers a starting point since it defines direct investments as:

'Investments of all kinds by natural persons or commercial, industrial or financial undertakings, and which serve to establish or to maintain lasting and direct links

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21) See in particular, *Eastern Sugar BV v The Czech Republic*, SCC No.008/2004, UNCITRAL (Partial Award of 27 March 2007). In this case, the arbitral tribunal held that that a BIT concluded by the Czech Republic before its accession to the EU had not automatically terminated upon accession. Therefore, the arbitral tribunal was not bound by the opinion of the European Commission, which considered the BIT superseded by EU law. Similarly, in a different case, *Eureko BV v The Slovak Republic*, PCA Case No 2008-13, UNCITRAL (Award on Jurisdiction, Arbitrability and Suspension of 26 October 2010), the arbitral tribunal hold that a BIT entered into by Slovakia prior to its accession to the EU was not terminated by accession). However, in the ICSID case *Electrabel SA v the Republic of Hungary*, Case No ARB/07/19 (Decision on Jurisdiction, Applicable Law and Liability of 30 November 2012), the ICSID tribunal held that Hungary had not breached the Energy Charter Treaty by terminating a power purchase agreement which was incompatible with EU law.

22) *Max Planck Encyclopaedia of Public International Law* (Oxford University Press 2011).

23) Rudolf Dolzer and Christian Schreuer *Principles of International Investment Law*, 2nd edn, Oxford University Press, 2012, 257 and 258; M Sornajarah, The International Law on Foreign Investment, 3edn, Cambridge University Press, 2010, 8.

between the person providing the capital and the entrepreneur to whom or the undertaking to which the capital is made available in order to carry on an economic activity'.[24]

In turn, the definition coined in international investment law by tribunals of the International Centre for Settlement of Investment Disputes through the different awards rendered is stricter. Thus, ICSID tribunals tend to identify the following integrating elements in the concept of investment: the project should have certain duration; there should be a certain regularity of profit and return; there is typically an element of risk for both sides; the commitment involved would have to be substantial; the operation should be significant for the host state's development.[25]

These criteria are similar to the threshold established by the ICSID arbitral tribunal in Salini (often referred to as the 'Salini test') under Article 25(1) of the Washington Convention.[26] According to this interpretation, an investment should involve:

(a) a certain duration;
(b) the assumption of risk;
(c) a substantial commitment on the part of the investor; and
(d) a contribution to the host's state development.

By looking at the different definitions as explained above and bearing in mind the central elements in the 'Salini test' (in particular the long-term commitment in the host country as well as the exercise of management control on the host company) it can be concluded that FDI in the sense of the CCP is not likely to embrace the protection of portfolio investments.[27] Certainly, portfolio investments specifically aim at short-term relationships and they are essentially oriented to profit-making.

The CJEU has described the notion of 'portfolio investment' as 'the acquisition of shares on the capital market solely with the intention of making a financial investment

24) The Directive is one of the main pieces of secondary legislation with impact on the free movement of capital
25) Catherine Yannaca-Small, 'Definition of Investor and Investment in International Investment Agreements', in *International Investment Law: Understanding Concepts and Tracking Innovations* (OECD 2008) 61.
26) *Salini Costruttori SpA and Italstrade SpA v Kingdom of Morocco*, ICSID Case No ARB/00/4, 2001.
27) M Sornarajah, T*he International Law on Foreign Investment*, 3rd edn, Cambridge University Press, 2010, 8.

without any intention to influence the management and control of the undertaking'.[28] It follows that portfolio investments hardly fit in the definition of the new CCP, then Member States would be still in charge of negotiating agreements guaranteeing their protection. This constitutes an area of potential future conflict between the EU and its Member States.

There are yet other uncertainties in the implementation of the EU investment policy, particularly due to the fact that in light of the current wording, the competence transferred appears to be wide-ranging. Article 206 TFEU only states that the 'Union shall contribute … to … the progressive abolition of restrictions on international trade and on foreign direct investment'.

But in a closer look, in a literal interpretation of the article, the new policy would not completely encompass all aspects of investment usually contained in a BIT. Accordingly, FDI in the sense of the CCP thus would solely cover certain types of investment and only partial aspects of the protection afforded in the current BITs. Therefore, the regulation of these other issues (and namely portfolio investments) will rest with the powers and competences of each Member State.

Likewise, BITs typically comprise both the pre-establishment phase (exclusion of performance requirements and right of admission) and provisions on the substantial protection to be granted to the foreign investor (different treatment standards). Once again, based on a restrictive interpretation of the wording of Article 206 TFEU, it can be concluded that the CCP explicitly sets out a competence on the pre-establishment phase of investment, henceforth not covering standards relating to the post-entry context.

With all these uncertainties around, the Commission has attempted to provide further guidance, putting forward the stepping stones for the future development of the investment policy.[29] The prospective template of the EU BIT has been ironically called the 'invisible or unwritten EU Model BIT' since it 'has not been put into a single

28) Joined Cases C-282/4, C-283/04 *Commission v Netherlands* [2006] ECR I-9141, para 19, Judgment of 26 September 2008.

29) European Commission, 'Proposal for a Regulation of the European Parliament and the Council establishing transitional arrangements for bilateral investment agreements between member states and third countries', July 2010. European Commission, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, 'Towards a Comprehensive European International Investment Strategy, COM (2010)343 final (7 July 2010). More information available at 〈http://trade.ec.europa.eu/doclib/docs/2010/july/tradoc_146307.pdf〉 accessed 1 July 2016.

written document (a model BIT), but has rather emerged in Brussels practice'.[30] This model should be construed based on the current clauses already included in the BITs. By analyzing the substantive protections already included in the texts of the recent EU's draft treaties such as those being negotiated with Canada, Singapore and the United States, one can get a 'sneak peak' on the direction the EU is taking in its treaty-making practice.[31]

It is plausible to envisage that different investment protection standards will be included in the future EU Model BIT, namely, the guarantee of non-discrimination, national treatment and the most-favoured-nation; the Fair and Equitable Treatment (FET) clause and the prohibition of unlawful expropriation of investment[32] as follows:

- National treatment and the most-favoured-nation (MFN) clause: The national treatment as a treaty-based standard provides for the non-discrimination between the foreign investor and the local investor conducting similar business.[33] The MFN clauses "link investment agreements by ensuring that the parties to one treaty provide treatment no less favourable than the treatment they provide under other treaties in areas covered by the clause".[34] As soon as the state in question confers a relevant benefit to a third party it is automatically extended to the beneficiary of the MFN clause.[35]
- Non-discrimination. This clause guarantees non-discrimination of foreign investors when compared to domestic and third-country investors.[36] This is a fundamental standard both in the EU and in international la

30) See the different contributions to the special issue of the Journal of World Investment & Trade 15 (2014). Marc Bungenberg and August Reinisch, 'The Anatomy of the (Invisible) EU Model BIT' (2014) 15 *The Journal of World Investment* 375, 380.

31) See draft investment chapter agreement with Singapore, available at 〈http://trade.ec.europa.eu/doclib/docs/2014/october/tradoc_152844.pdf〉 accessed 1 August 2016.

32) Bungenberg and Reinisch (n 31) 375-378.

33) See for instance, art 10 (3) and (7) ECT and 1102 NAFTA. See also, *Pope & Talbot v Canada* (NAFTA 2001).

34) OECD, 'Most-Favoured-Nation Treatment in International Investment Law', OECD Working Papers on International Investment, 2004/02 (OECD 2004) http://dx.doi.org/10.1787/518757021651 accessed 1 June 2016.

35) See, for instance, German 2008 Model BIT, art 3. NAFTA, art 1103.

36) Standard contained in many investment treaties, see for instance ECT, art 10.1.

w.[37] Most of the EU and Member States' legislation contains non-discriminatory provisions.

- Fair and Equitable Treatment (FET). This clause (complementary to non-discrimination) guarantees a basic level of protection to an investor regardless of the treatment granted to other investors. There is still uncertainty as to the specific content of the standard. The EU is trying to set out in particular what it is covered by the FET standard. FET 'has already become a rule of international law and is not determined by the laws of the host state'.[38] According to scholars, such as Dolzer and Schreurer, FET constitutes a customary law standard.[39]
- Free transfer of funds. This clause is already comprised in the TFEU. Article 63 TFEU (ex Article 56 TEC) expressly mentions the principle of the free movement of capital and payments is now expressly laid down in the TFEU. The Article states that all restrictions on the movement of capital between Member States and on payments between Member States and third countries are prohibited. It thus covers the free capital movements to and from third countries unless exceptional circumstances apply.[40]
- Expropriation: The prohibition of unlawful expropriation is a guarantee recognized in EU Member States' legislation and also in Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR).[41] Besides, the EU model BIT

37) In investment arbitration the prohibition of arbitrary or discriminatory measures is seen in close interrelation with the FET standard. Some tribunals have underlined the difference between the two standards. See, for instance, the definitions of discriminatory treatment put forward in the ELSI Case "Arbitrary", "wilful disregard of the due process of law" (ICJ, 1989); Siemens v Argentina, "despotic" "with not legitimate purposes" (ICSID 2007).

38) W Shan and S Zhang, 'The Treaty of Lisbon: Half way Towards a Common Investment Policy' (2010) 21 (4) *Eur J Int Law* 1049–1073, at 1063.

39) Rudolf Dolzer and Christian Schreuer, *Principles of International Investment Law*, 2nd edn, Oxford University Press, 2012, 123.

40) According to TFEU, Art 66 (ex EC Treaty, Art 59), temporary safeguard measures can be taken where, in exceptional circumstances, movements of capital to or from third countries cause, or threaten to cause, serious difficulties for the operation of economic and monetary union.

41) Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No 11 (20 March 1952–18 May 1954) as of its entry into force on 1 November 1998. According to the First Protocol to Article 1 of the ECHR:

would include protection against 'indirect expropriation'.[42] This is a question that arises sharp controversy in international investment law, particularly, if the host state's right to introduce regulations protecting the public interest in a non-discriminatory way prevails over the economic impact of those measures on the foreign investor. It is foreseen that future EU agreements will contain a detailed set of provisions in order to provide guidance to arbitrators to decide whether or not a specific government measure constitutes indirect expropriation.

- Guarantees relating to dispute resolution: The EU model BIT includes provisions for dealing with disputes between a State and investors from another State in line with the Regulation. Some of these treaties allow private investors to resort to international arbitration, after exhausting local remedies during a specific period of time.[43] Almost always, BITs offer a menu of international arbitral forums where ICSID is just one of the options.

In particular, the clauses relating to dispute resolution are of relevance for the analysis put forward in this article. Here there is part of the key question. So far, there are various avenues for the resolution of investment disputes. Under the ICSID system is available to investors if the State of the investor and the State to the dispute are both members of the World Bank (WB) or party to the International Court of Justice (ICJ) Statute. However, as mentioned before the ICSID convention excludes the

(1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

(2) The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties The Protocol is available at 〈http://conventions.coe.int/Treaty/en/Treaties/Html/009.htm〉 accessed 1 June 2016.

42) In a nutshell, direct expropriation is the compulsory taking of property that implies the transfer of the legal title of the seizure of property to the State. In contrast, indirect expropriation refers to the situation in which the investor formally remains legal owner, but it loses control over the investment. See M Sornarajah, *The International Law of Foreign Investment*, 3rd edn, Cambridge University Press, 2011, 364-367.

43) M Sornarajah, *The International Law of Foreign Investment*, 3rd edn, Cambridge University Press 2011, 364-367.

possibility that an international organisation would be party to it. The additional ICSID tool for the resolution of disputes, the ICSID additional-facility rules, allows ICSID to manage disputes even if the State of the investor or the State to the dispute is not a member State of the World Bank. Even if only the additional-facility rules are followed, they do not provide for the application to international organisations. Outside the ICSID system, there are other fora where the EU can be part of an international investment arbitration. Namely, the EU can be party in a proceeding before the Stockholm Chamber of Commerce (SCC) and before an ad hoc tribunal conducted under the rules of the United Nations Commission on International Trade Law (UNCITRAL). Additionally, the EU can be party before ad hoc tribunals conducted in accordance with both the international agreements that establish them and international law.[44)]

Dispute resolution has been placed as the main advantage in terms of investment protection, but has also worked as a sort of 'punishment'. The implementation of this new common policy has been characterised by the use of both reward and punishment to induce cooperation between member states and the EU. The carrot would be having a common approach, attracting more investment. In turn, the stick or the 'punishment' is represented by the lack of the resource to international settlement of disputes as a big sanction.

Another relevant question concerns the Commission's powers to scrutinize the current BITs. In particular, the extent to which powers can modify the current legal scenario, and according to what precise criteria the Commission will act to detect an inconsistency with EU law. Nonetheless, it seems evident that the Commission is vested with new powers over the investment provisions of the EU and its Member States, and this has reinforced its position in order to ensure that the present and future provisions will be adopted within the limits of EU law.[45)]

Precisely, Regulation (EU) No 912/2014 (previously alluded) envisages as its ultimate goal the formulation of a comprehensive EU investment policy. In this transitional

44) According to UNCTAD, in 2013 55% of the world's investor-state disputes were settled before ICSID tribunals, while ad hoc tribunals applying UNCITRAL rules represented 35%.; while the SCC dealt with only 5% of these disputes and the remaining 5% were settled by other ad hoc tribunals.

45) Kevin Kazimirek, 'The New EU Competence over Foreign Direct Investment and its Impact on the EU´s Role as a Global Player', *Oldenburger Studien zur Europäisierung und zur transnationalen Regulierung*, Ausgewählte Abschlussarbeiten, ST/2012/04.

period, bilateral IAs remain binding on Member States under public international law and will be progressively replaced by agreements concluded by the EU.[46] Certain requirements are imposed for the continuing existence of the previously signed BITs since they must be in conformity with the EU's investment policy. The Commission must grant an authorization in order to proceed and the 'Member State concerned shall notify the Commission of the conclusion and entry into force of the bilateral investment agreement, and of any subsequent changes to the status of that agreement '.[47] This regulation also authorizes Member States, under certain conditions, to amend or conclude individual BITs. The Member State in question is under the obligation to notify the Commission of its intentions in writing.[48] The Commission must grant an authorization in order to proceed.[49]

The Commission retains the power to assess if the negotiations are consistent with EU law and policies, and ensure that the negotiations do not overlap with negotiations already initiated by the Commission. As a result of these findings, the Commission may require a Member State to include or remove provisions from the draft BIT to ensure compatibility with EU law or investment policy. Where the Commission gives the authorization, the Member State in question may open negotiations for the new or revised BIT. The Commission must be kept informed of the progress made and may request to participate in the discussions between the Member State and the third country. The Commission's list includes over 1,200 BITs notified by all EU Member States except the Republic of Ireland. Subject to review by the Commission, these BITs will remain in force until the EU concludes replacement agreements with the respective third countries.

Consequently, three different scenarios are presented with regard to BITs signed with third countries (Extra-EU BITs).

Group I - Extra-EU BITs signed before 1 December 2009 or before Accession to the EU. Under Regulation (EU) No 1219/2012. Pursuant to the Regulation, on 8 May 2013, the Commission published a list of the BITs notified in the *Official Journal of the*

46) Member States should notify the Commission about the BITs that will continue in force. Ibid, arts 2 and 3.
47) Ibid, art 9(6).
48) Regulation (EU) No 1219/2012, art 8.
49) Ibid, art 9(6).

*European Union*, and will publish an updated list of such BITs every 12 months afterwards.[50] The Commission's list comprises over 1200 BITs notified by all EU Member States.[51] These BITs will remain in force until the EU concludes the respective replacement agreements with the respective third countries.

Group II- Extra-EU BITs signed between 1 December 2009 and 9 January 2013. In case a Member State has signed an extra-EU BIT after the entry into force of the Treaty of Lisbon, it must notify the Commission of any such BITs that it wishes to maintain in force or permit to enter into force by 8 February 2013.[52] If the authorization by the Commission is not granted, Member States must desist to take further steps towards the conclusion of such BITs and should 'withdraw or reverse' the steps already taken.

Group III- Extra-EU BITs signed or amended after 9 January 2013. If a Member State wants to commence negotiations to sign new BITs with third countries or to amend existing agreements after 9 January 2013, it needs to seek authorization by the Commission.

Finally, another source of controversies may be the possible contradictions between EU law and the content of BITs. That could be the case if a Member State does not comply with the Regulation's notification and authorization requirements. The question that may arise is if this lack of compliance has any effect under public international law on the relevant BIT.

Prior CJEU's case law on the compatibility of BITs concluded by Member States may constitute an invaluable precedent. In three previous cases dealing with Austria (Case C-205/06),[53] Sweden (Case C-249/06)[54] and Finland (Case C-118/07),[55] the CJEU

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50) [2013] OJ C131/2, 8 May 2013. Available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2013:131:0002:0098:EN:PDF accessed 1 June 2016. The Regulation established that the Commissi on would do so within three months of 8 February 2013, or by 8 May 2013.

51) The exception is the Republic of Ireland, since only BIT is with the Czech Republic and as such is not subject to Regulation (EU) No 1219/2912, which only relates to third countries.

52) For instance, the EU is currently planning to conclude BITs with Canada, India, and Singapore.

53) Case C-205/06 *Commission of the European Communities v Republic of Austria* [2009] ECR I-1301, Judgment of the Court (Grand Chamber), 3 March 2009. Investment agreements entered into by the Republic of Austria with the Republic of Korea, the Republic of Cape Verde, the People's Republic of China, Malaysia, the Russian Federation and the Republic of Turkey.

54) Case C-249/06 Commission of the European Communities v Kingdom of Sweden [2009] ECR I-1335, Judgment of the Court (Grand Chamber), 3 March 2009. Investment agreements entered into by the Kingdom of Sweden with the Argentine Republic, the Republic of Bolivia, the Republic of Côte d'Ivoire, the Arab Republic of Egypt, Hong Kong, the Republic of Indonesia, the People's Republic of China, the Republic of Madagascar, Malaysia, the Islamic Republic of Pakistan, the

upheld the Commission's position by ruling that the Member States in questions have failed to take appropriate steps required by Article 351 TFEU (ex-Article 307(2) EC) to remove incompatibilities of their pre-accession BITs provisions. In particular, the cases referred to the application of the so-called 'transfer clause' (on free transfers related to investment) with regard to restrictive measures the Council may take under the Treaty Articles on the free movement of capital pursuant to ex Articles 57(2), 59 and 60(1) EC.

The CJEU has already underlined that:

'Under the first paragraph of Article 307 EC, the rights and obligations arising from an agreement concluded before the date of accession of a Member State between it and a third country are not affected by the provisions of the Treaty. The purpose of that provision is to make it clear, in accordance with the principles of international law, that application of the Treaty is not to affect the duty of the Member State concerned to respect the rights of third countries under a prior agreement and to perform its obligations thereunder'.[56]

## Ⅳ. The New generation of eu bits and the DIFFICULT transition to A TRULY EUropean Investment policy

The conferral on the Union of exclusive competence in the realm of investment treaties as an area in which competence was previously non-exclusive and underdeveloped, have led to a complex scenario that raises a series of contentious questions. First of all, in a broader perspective it touches upon the question of the relations between EU law and international investment law. Second, it also concerns

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Republic of Peru, the Republic of Senegal, the Democratic Socialist Republic of Sri Lanka, the Republic of Tunisia, the Socialist Republic of Vietnam, the Republic of Yemen, and the former Socialist Federal Republic of Yugoslavia.

55) Case C-118/07 Commission of the European Communities v Republic of Finland [2009] ECR I-10889, Judgment of the Court (Second Chamber), 19 November 2009. Bilateral investment agreements concluded by the Republic of Finland with the Russian Federation, the Republic of Belarus, the People's Republic of China, Malaysia, the Democratic Socialist Republic of Sri Lanka, and the Republic of Uzbekistan.

56) Case C-205/06 *Commission of the European Communities v Republic of Austria* [2009] ECR I-1301, para 33.

the dimension of competence allocation. Third, the new policy implies a re-definition of inter-institutional balance in terms of the external powers. Fourth, there is the question of the external dimension and the inclusion of non-trade issues and the principles underpinning the external action. Last but not least, there is the issue of how this new competence will affect the EU's role in global governance.

## 1. The relations between EU law and international law, particularly, international investment law

First, when analyzing the implications of the EU investment policy there is a general question regarding the relations between EU law and international law, particularly, international investment law. In terms of content and clauses to be included, BITs are the main instruments to provide legal and economic framework to protect foreign investments.[57] Nevertheless, the automatic compliance with EU law should not be taken as granted.

There are several potential aspects for conflict with regard to the inclusion of specific clauses protecting investments. These conflicts can be solved via interpretation. Nevertheless, the Court of Justice of the European Union has rejected the possibility that international commercial arbitration tribunals may submit requests for preliminary questions so far.[58] Similarly, a traditional investment tribunal would not qualify in terms of article 267 TFEU to apply for a preliminary ruling. The clear position taken by the Court regarding the primacy of EU law and the exclusive, final, authoritative jurisdiction of the CJEU seems to almost exclude international arbitral tribunals. From a theoretical viewpoint as Lavranos highlights the CJEU and arbitral tribunals adopt the 'Solange' approach 'similar to the one which the European Court of Human Rights and the CJEU have been using to accommodate their co-existence as supreme courts within their respective legal systems'.[59] In an attempt to move forward, Schill has pointed out

57) Rudolf Dolzer and Christian Schreuer, *Principles of International Investment Law*, 2nd edn, Oxford University Press, 2012.

58) Stephan Schill, 'The Relation of the EU and Member States in Investor-State Arbitration', in L. Trakman, N. Ranieri (eds), *Regionalism in International Investment Law* (Oxford University Press 2013)1.

59) N Lavranos, 'EU Law and Investment Law: Two Worlds Apart?', Kluwer Arbitration Blog, 28 January 2015 http://kluwerarbitrationblog.com/blog/2015/01/28/eu-law-and-investment-law-two-worlds-apart/〉 accessed 1 June 2015.

that 'investment treaty tribunals, above all those established under the ICSID Convention, therefore replace domestic courts to a large extent'.[60]

Other obstacles may arise as the EU negotiates BITs with third countries, there is the possibility of parallel arbitrations under an EU BIT and a BIT concluded by a Member State. Also, remains to be determined the EU's status vis-à-vis the ICSID Convention. Furthermore, there is need for a further clarification of the EU's responsibility for the conduct of Member States (and their instrumentalities) under public international law. There is a potential clash between international investment law and other EU provisions, and interference with other policies like the competition policy. As seen with regard to the Micula case.[61] The Commission informed Romania that, after a careful examination of the information submitted, it had decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union (TFEU).[62] The Commission ultimately ordered the non-compliance with the ICSID award due to an incompatibility with EU law.

## 2. The relations between the EU and the Member States

From the outset, the current framework represents a development in terms of the allocation of competences since the hitherto failed attempts to include matters touching upon foreign investment as a part of the common commercial policy have been overcome, vesting the EU with strengthened powers. Different questions relating to the substitution of the current BITs for 'EU BITs' have, nevertheless, been left open, like the definition of the content of the EU exclusive competence as to the inclusion of both investment protection and liberalization.

To make matters even more complex, there is a considerable dispersion of norms relating to various aspects of the investment policy. While Article 207 TFEU preponderantly regards the EU's action on the international level, the various measures adopted regarding FDI may have effects on other economic sectors falling within other

60) Schill (n 59) 397

61) Commission advised Romania not to comply with ICSID ruling because it could be understood as a "state aid". European Commission Bruxelles, 01.10.2014 C (2014) 6848. State aid SA.38517 (2014/C) (ex 2014/NN).

62) Implementation of Arbitral award Micula v Romania of 11 December 2013.

Treaty provisions also implicitly included in the scope of the CCP. This is the case of art 63 TFEU (ex Article 56 TEC) which even if it does not refer to the conclusion of international agreements, it does explicitly mention capital movements to and from third countries. In its case-law, the CJEU has established that the principle of free movement of capital has direct effect, therefore, directly confers rights on individuals who can rely on them before national courts.[63] Furthermore, Articles 64-66 TFEU (ex-Article 57-59 TEC) regulate on specific rules regarding limitations on capital movements to and from third countries.

Another highly controversial issue concerns financial responsibility[64] in the event of arbitral awards rendered against the EU.[65] The Commission has been working on proposals to address the financial bearing responsibility on the part of Member State s.[66] Currently, the Regulation of the European Parliament and Council tackles those issues as examined in detail below.[67]

In order to find a balanced approached, the previous experience of cooperation on investment issues at multilateral level may come in handy. An example of this is the cooperation articulated in the context of the United Nations Commission on International Trade Law (UNCITRAL)[68], in which the EU and the Member States have actively taken part in the adoption of new rules on transparency in Treaty-based investor-State Arbitration applicable beyond the EU's own IAs.[69]

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63) Eg, Case C-101/05 *Skatteverket v A* (2007) para 21.

64) Freja Baetens, Gerard Kreijen & Andrea Varga, 'Determining International Responsibility Under the New Extra-EU Investment Agreements: What Foreign Investors in the EU Should Know' (2014) 47 (5) *Vanderbilt Journal of Transnational Law*, 1203.

65) Jan Kleinheisterkamp, 'Financial responsibility in European international investment policy', (2014) 63 (02) *International and Comparative Law Quarterly* 449-476.

66) European Commission, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, 'Towards a comprehensive European international investment policy' COM(2010)343 final (7 July 2010).

67) European Commission, 'Fact sheet. Investment Protection and Investor to State Dispute Settlement i n EU agreements. November 2013', available at 〈http://trade.ec.europa.eu/doclib/docs/2013/novemb er/tradoc_151916.pdf〉 (accessed 1 June 2016).

68) MB Olmos Giupponi and HL Yu, 'The Pandora Box Effects under the UNCITRAL Transparency Rules' *Journal of Business Law* 2016.

69) The UNCITRAL Rules on Transparency came into effect on 1 April 2014, and comprise a set of procedural rules that provide for transparency and accessibility to the public of treaty-based investor -State arbitration. UNCITRAL, 'Rules on Transparency in Treaty-based Investor-State Arbitration', available at 〈www.uncitral.org/uncitral/uncitral_texts/arbitration/2014Transparency.html〉 accessed 1 June 2016.

## 3. The inter-institutional balance

Overall, after the adoption of the Treaty of Lisbon the EU's position in the field of commercial policy has been strengthened with the inclusion of a broader scope of the EU CCP; the extension of the qualified majority voting procedure in the Council; an increased engagement of the European Parliament in the legislative process, and by allocating fields of shared competences within the EU's exclusive competences, being subject to the Council's unanimous voting system.

Under the general rules applicable to the negotiation and conclusion of agreements in the CCP, whenever an agreement is negotiated at the WTO, the Commission needs the formal authorization of both the Council and Parliament in order to sign the agreement on behalf of the EU. In addition to that, since the Treaty of Lisbon has been in force any agreement, whether in the form of an EU BIT or an investment chapter in future FTAs, needs the consent (or assent) of the European Parliament. This requirement could lead to delays. It is likely that reaching common positions on investment will need considerable time, and may require flexibility in the short to medium term. In this regard, previous experience can prove to be crucial. Over the past decade, the EU has been developing a common platform on investment and had already concluded a number of FTAs with investment chapters. Various examples can be mentioned here, for instance, the EU-CARIFORUM EPA signed in 2008 comprises a chapter on liberalization of investment based on a positive listing of coverage, protection for current payments and capital movements related to FDI, and some provisions on investor's commitments.[70]

This process should be applied to the external action as a whole. In the cases in which the agreement relates exclusively or primarily to common foreign and security policy, this would clearly be the High Representative of the EU for Foreign Affairs and Security Policy (HR). However, trade is not included in the wording. Article 218(1) indicates that the procedures laid down in the article are without prejudice to the

70) The CARIFORUM-EU Economic Partnership Agreement, or EP is a new partnership which CARIFORUM —a group of 15 Caribbean countries—and the EU signed in 2008. The CARIFORUM group includes Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Dominican Republic, Grenada, Guyana, Haiti, Jamaica, St Lucia, St Vincent and the Grenadines, St Kitts and Nevis, Suriname, Trinidad and Tobago.

specific provisions laid down in Article 207. This Article regulates on external trade and states that the Commission will negotiate. Consequently, one must expect that the Commission will continue to be the EU's negotiator on the substance of trade. Also, from an organizational viewpoint, the Commission's staff specializing in trade issues remain in DG Trade and were not transferred to the European External Action Service (EEAS).

Therefore, the design of the trade and investment policy ultimately relies on the institutional support and technical expertise of the DG Trade. One may wonder what would be the role the HR plays in defining the balance between trade and other objectives. At the time of writing, it is probably too early to assess its impact. In any case, it will be developed by the relationships between the HR, the EEAS, the Commission, and the Council. It appears that, as Woolcock argues, it is likely that for the moment the previous and long-established decision-making procedures including close co-operation between the Commission and Member States in the Trade Policy Committee, with growing involvement of the INTA Committee, will continue to shape the substance of EU trade policy.[71)]

## 4. Principles of the external action and non-trade/investment issues

As for the future BITs that will afford investment protection, several limitations must be noticed in line with the new EU investment policy guidelines. Only investors with substantial business operations will be able to benefit from the protection of the agreement (thus excluding 'shell corporations'). Measures taken for legitimate public purposes such as environment protection would be admitted when consistent with the investment agreements.

Also, it is envisaged the inclusion of non-trade objectives in the realm of labour, health and environmental standards. Up to now, the EU has included general commitments in FTAs regarding non-trade issues as follows: to respect and promote labour principles and rights in accordance with international standards and rules (in

71) See Stephen Woolcock, 'European Union trade policy', in T*he New Palgrave Dictionary of Economics Online*, Palgrave Macmillan, 2011, 8.

particular, those of the International Labour Organization (ILO)); to uphold and improve the level of environmental protection; to promote sustainable development and Corporate Social Responsibility practices, such as those embodied in the OECD's Guidelines for Multilateral Enterprises.[72]

In addition, the European Commission's Communications 'Trade, Growth and World Affairs: Trade Policy as a Core Component of the EU's 2020 Strategy' (adopted in November 2010)[73] and 'Trade, Growth and Development: Tailoring trade and investment policy for those countries most in need' (launched in January 2012) have stressed the need for coherence of the external dimension of the trade and investment policy when it comes to non-trade issues.

Therefore, the EU is faced with the significant challenge of achieving an approach that respects the balance between investment protection while safeguarding other rights and other non-commercial interests, such as the protection of the environment. This approach needs to provide an adequate margin of manoeuvre for the EU in order to guarantee that the protection granted to EU investors will not be worse in comparison to that granted under BITs concluded by Member States. Despite the clear intentions of the Commission, this balance is not easy to accomplish, particularly, taking into account the resistance expressed by the EU civil society against some aspects of the EU's investment rules.

In sum, the development of a comprehensive approach to non-trade issues should result in a better articulated policy. Ultimately, the design of the investment policy will determine the influence the EU will exert in the global investment law landscape.

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72) European Commission, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, 'Towards a comprehensive European international investment policy' COM(2010)343 final (7 July 2010).

73) European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on 'Trade, Growth and World Affairs – Trade Policy as a core component of the EU's 2020 strategy' COM(2010)612 final.

# Ⅴ. Carrots and Sticks in The Implementation of The EU Investment Policy

Behind the establishment of a common EU investment policy there is the long-held idea that the big carrot or advantage in doing so is the demonstration that the EU 'can do better' than the Member States acting alone. At the same time, certain disadvantages as punishment for 'doing nothing' are presented as the 'big stick'. This approach is reflected in the European Commission's Strategy in the field in the following terms: '(i) the current arrangements –those which receive the strongest criticism- will stay in place and the potential for future abuse will continue: standards of treatment will remain vague and ISDS will not be as transparent; (ii) The EU is a major player in the global scene: we cannot hide behind our finger by not taking a stance on a debate which is likely to change investment protection rules worldwide ; (iii) There is a pragmatic need to protect EU investments abroad; (iv) There is an imperative drive to do so without undermining the capacity of States to regulate'.[74)]

Against this backdrop, the main controversial question concerns dispute resolution since there are claims that the new EU investment agreements may lead to an increase in the litigation against Member States. Having a closer look at the UNCTAD statistics for the period 2008-2012[75)] of the 214 cases registered worldwide, EU investors accounted for 53 per cent of them (113 cases), with investors from the Netherlands, Germany, and the UK as the main actors.[76)] There is a clear increase in EU investors' resource to ISDS in the total of recent initiations. In 2012, of the total of cases initiated EU investors were responsible for 60 per cent of all initiations, while US investors accounted for 7.7 per cent.[77)] Therefore, the ICSID statistics indicate that investors from the EU are highly active as claimants in ICSID proceedings.

Arbitrations have been initiated most frequently by claimants from the European

74) R Schlegelmilch, Investor-State Dispute Settlement (ISDS) provisions in the EU's international invest ment agreements 9. Part I: Statement From The EC- The European Commission's Strategy In The F ield Of International Investment Protection, available at http://www.europarl.europa.eu/RegData/etud es/STUD/2014/534979/EXPO_STU(2014)534979_EN.pdf

75) UNCTAD, 'World Investment Report 2013 (UNCTAD, 2013) xxi. In 2012, 58 new known Investor-to-State dispute settlement (ISDS) cases were initiated.

76) Ibid.

77) Ibid.

Union (299 cases, or 53 percent or all known disputes) and the United States (127 cases, or 22 percent).28 Among the EU Member States, claimants most frequently come from the Netherlands (61 cases), the United Kingdom (43), Germany (39), France (31), Italy (26) and Spain (25). Apart from countries in the European Union and the United States, only Canada, with 32 cases, counts as a home State with a significant number of investment claims.[78)]

In terms of legal standing, as anticipated in the previous section the main difficulty that arises is that whereas all the Member States are parties to the ICSID Convention, the EU is not a party to the Convention.[79)] In other words, the EU cannot be part of arbitration before the ICSID since only States that are members of the World Bank or party to the Statute of the International Court of Justice (ICJ) can be parties to the ICSID Convention (1966). The EU does not fulfil the requirement of statehood for adherence to the ICSID Convention.[80)] This represents a Gordian knot, since there is the need to articulate coordination regarding the ongoing and future disputes. The Regulation (EU) No 912/2014 provides some rules to answer the crucial question of who would be the respondent in case of claims against the EU in procedures for settlement of disputes that may lead to the payment of compensation. The general rule as set out in the regulation is that 'the Union will in principle be responsible for defending any claims alleging a violation of rules included in an agreement which fall within the Union's exclusive competence, irrespective of whether the treatment at issue is afforded by the Union itself or by a Member State'.[81)]

It should be emphasized that international responsibility for breaching the standards of treatment subject to dispute settlement follows the division of competences between the Union and the Member States. As a consequence, the Union will in principle be responsible for defending any claims alleging a violation of rules included in an agreement which fall within the Union's exclusive competence, irrespective of whether

78) ISDR 2014.

79) ICSID was established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States ('ICSID Convention') adopted by the IBRD's Executive Directors on 18 March 1965; it entered into force on 14 October 1966. C Schreuer et al., *The ICSID Convention: A Commentary* (Cambridge University Press 2013). Max Planck Encyclopaedia of Public International Law, Oxford University Press, May 2013.

80) See COM (2010)343.

81) Regulation 912/2014, preamble (3) and art 1.

the treatment at issue is afforded by the Union itself or by a Member State.[82] Once a dispute resolution procedure has been initiated, either by or against a Member State, the Member State in question and the Commission should co-operate in the conduct of the proceedings. This may entail the participation of the Commission in the proceedings.[83] In turn, Member States should ensure compliance with the Regulation, to avoid further legal uncertainty. In general, foreign investors should also review whether any extra-EU BITs on which they rely have been duly notified and, to the extent necessary, authorized by the Commission.[84]

According to the new EU approach to investment, it is necessary to ensure effective enforcement of investment rules, taking into consideration latest developments, for example in dealing with parallel claims, consistency (roster, binding interpretations), costs, transparency, amicus submissions.[85] To reinforce these ideas, the three main EU institutions have endorsed the use of the investor-to-State Dispute Settlement even if the stance on the issue may vary. [86]

Progressively the European Commission has been in favour of including ISDS in future IIAs under its new competence.[87] The Commission has played a significant role in improving the way in which the current investment disputes settlement system that are meant to be implemented in future years.[88] In the realm of the investment policy, amongst other issues, the Commission has been seeking to: '(a) Prevent investors from bringing multiple or 'frivolous claims' (the investor who loses the case will be obliged pay all litigation costs including those of the state); (b) Make the arbitration system more transparent: make documents available to the public, give access to hearings and allow interested parties (e.g. non-governmental organizations) to make submission; (c) Deal with conflicts of interests and consistency of arbitral awards (e.g. the introduction

82) ICSID Convention, art 13(b) and (c).
83) ICSID Convention, art 13(b)-(c).
84) ibid.
85) European Commission, 'Investment Protection and Investor to State Dispute Settlement in EU agree ments. November 2013', available at 〈http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151916.pdf〉 (accessed 1 June 2016).
86) August Reinisch, 'The Future Shape of EU Investment Agreements', (2013) 28 (1) *ICSID Review*.
87) European Commission, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, Towards a comprehensive European international investment policy (COM(2010)343).
88) Ibid.

of a binding code of conduct for arbitrators); (d) Introduce safeguards for the parties to the disputes which would allow states to maintain control over how the investment provisions are being interpreted.'[89]

Moreover, the European Commission has been active in submitting amicus curiae briefs in arbitration proceedings, although it has not always been successful. In 2014 the European Commission sought to intervene as a third-party under article 37 of ICSID Arbitration Rules in an ICSID proceeding under the BIT between Spain and Guatemala, citing its new competence for extra-EU investment obligations, based on the 'systemic interest' in the interpretation of investment agreements concluded by EU Member States. However, the European Commission's application was rejected since it did not meet the criteria set out in the ICSID rules for two main reasons: it was not submitted in the format contemplated under the ICSID rules and it was sent after the final hearings, being extemporaneous.[90]

In contrast, the European Parliament, has expressed since the beginning its reluctance towards the dispute settlement method based on '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', recommending that 'in addition to state-to-state dispute settlement procedures, investor-state procedures must also be applicable in order to secure comprehensive investment protection'.[91] The criticisms put forward by the Parliament were focused on an allegedly lack of both transparency (bearing in mind the commercial arbitration focus on confidentiality) and lack of consistency of arbitral awards, emerging from the decentralised feature of international arbitration.

The proposal that came from European Parliament contemplates the inclusion of 'the opportunity of parties to appeal'.[92] The European Parliament took also the view that ISDS should only be included in future EU-IIAs where it is justifiable, for instance in case of "an agreement with a third country that does not have a properly-functioning judicial system, where the rule of law is doubtful".[93] To address these concerns the

89) ibid. The text in italics is ours.

90) Investment Arbitration Reporter (IAreporter.com), European Commission's DG Trade tries to intervene for first time in an extra-EU BIT case to offer "systemic" views, but ill-timed application is rejected, July 9, 2014.

91) European Parliament Resolution of 6 April 2011 on the Future European Investment Policy (2010/2203(INI).

92) Ibid.

Commission has been discussing the establishment of "appellate mechanisms" for a review of arbitral awards should be considered alongside with or as an alternative to "quasi-permanent arbitrators".[94] Finally, in July 2015 the Parliament adopted a resolution backing the transatlantic trade deal, but rejecting the US demand for an extra-judicial arbitration mechanism.[95]

After having examined the legal framework for the new competence, it is worth scrutinizing the implementation of this novel competence. In this respect, there are two open frontlines: the internal dimension intra-EU BITs (not covered by the common policy but that falls into the internal market rules) and the external dimension that comprises the new EU investment policy.

## 1. Intra-EU investment disputes and investment protection treaties between EU member states

As previously stated, the new EU investment policy excludes the investment protection treaties between member states, these are mainly: the Energy Charter Treaty (to which all Member States are party) and Bilateral Investment Treaties (BITs). The EU already negotiated on behalf the Member States the International Energy Charter, which final text was adopted in The Hague in May 2015.

In an overview of the cases registered with ICSID up to March 2014 involving EU Member States. The ICSID statistics present 54% (some 260 cases) involved a claimant that was from an EU Member State; and 12% (55 cases) involved a respondent State that was a member of the EU. Of the 55 cases involving an EU Member State as respondent, 71% (31 cases) invoked intra-EU BITs (and so involved a claimant and respondent from within the EU). In these 55 cases, Hungary (11 cases) and Romania (9 cases) were the EU Member States most frequently represented as respondents.[96]

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93) R Cafari Panico, 'Recent Developments in EU Investment Agreements'. Transnational Notes, July 14, 2014, available at 〈http://blogs.law.nyu.edu/transnational/2014/07/recent-developments-in-eu-investment-agreements/〉 accessed 1 June 2016.

94) See COM (2010)343.

95) A Robert, "European Parliament backs TTIP, rejects ISDS", EuroActiv, 13 Jul 2015, available at http://www.euractiv.com/sections/global-europe/european-parliament-backs-ttip-rejects-isds-316142.

96) The ICSID statistics indicate that, as of 1 March 2014, 463 cases had been registered under the ICSID Convention and Additional Facility (AF) Rules.

At first glance, EU Member States seem to be much more likely to be party to an 'intra-EU' claim, i.e. claims by EU investors against EU Member States, than to a claim filed by an investor from outside of the EU. Indeed, 2012 saw an increase in the number of treaty-based investment disputes, with at least eight new intra-EU investment disputes, and overall number of such claims of 59. Of the eight new claims, two were brought pursuant to the Energy Charter Treaty and the other six pursuant to provisions of intra-EU bilateral investment treaties.[97]

Most of these new disputes are related to the energy sector, but not exclusively. Probably, the most high-profile case concerns Germany, the so-called 'Vatenfall II cas e'[98] that has arisen out from Germany's decision to phase out nuclear energy. It is expected that this scenario will change dramatically as the EU Commission has called on the Member States to terminate the intra-EU BITs. The rationale behind is that EU investors are already and sufficiently protected by the internal market rules.[99]

## 2. The negotiation of the new investment agreements: What are the lessons to be learned so far?

Various replacement agreements are already being negotiated, among them, two comprehensive international investment agreements: the CETA[100] and TTIP. On 15 June 2013, Member States granted the European Commission a mandate to negotiate a Transatlantic Trade and Investment Partnership (TTIP) with the US, including a chapter on investment.[101] The EU hoped to complete TTIP talks and conclude it by the end

97) Hungary was the 'most recurrent' respondent, having to cope with three new intra-EU claims.

98) Background to the new dispute Vattenfall v Germany (II) The Vattenfall I Dispute Case (2009–2011) Regarding Environmental Regulations Applying to the Coal-Fired Power Plant Hamburg-Moorburg. The case was settled. See 〈http://www.spiegel.de/international/germany/berlin-referendum-on-buying-electricity-grid-from-vattenfall-fails-a-931609.html〉 accessed 1 June 2015.

99) For a detailed analysis on the issue, see: A De Luca, The legal framework for foreign investments in the EU: the destiny of member states' BITs, and future European agreements on the protection of foreign investment, in Leon Trakman, Nicola Ranieri (eds), *Regionalism in International Investment Law*, Oxford University Press, 2013,120-161.

100) CETA Technical Summary of Final Negotiated Outcomes: Canada-EU Comprehensive Economic and Trade Agreement (18 October 2013). Available at http://www.italaw.com/sites/default/files/archive/ceta-final-negotiated-outcomes.pdf

101) European Commission, The Transatlantic Trade Investment Parthnership, available at http://ec.europa.eu/trade/policy/in-focus/ttip/ accessed 30 October 2015.

of 2014, but negotiations have been delayed. TTIP belongs to the category of the 'megaregional agreements' (UNCTAD).[102] During the negotiations, several controversial issues were raised:

- Dispute resolution and legitimacy of arbitral tribunals

Investment treaty-based arbitration has come under scrutiny in the public eye, adding yet another layer of complexity.[103] This trend responds to the long-held belief that investment protection agreements are meant to be a tool for the safeguard of investors' rights in developing countries characterized by a weak compliance with the rule of law. Thus, the questioning of the Investor-to-State Dispute Settlement (ISDS) relates to the idea that arbitral tribunals are not legitimate.[104]

The (reasonable or not) fear that the inclusion of ISDS may open the possibility for several other cases to be filed has dominated the consultation on the TTIP with the civil society.[105] The question is, that outside the relation developed-developing countries, the current investment dispute settlement system would not be fit-for-purpose in order to solve controversies amongst equally developed countries. Another key element under discussion is the episodic nature of international investment tribunals. In sum, what is in the spotlight is the nature of investor-to-State dispute resolution system which would imply giving away sovereignty. Civil society groups have eagerly discussed the ISDS. Some EU member states have also contended that investors in the EU are sufficiently protected by resorting to the national courts.

However, no detailed mention of these debates is found in the framework of the discussions within the INTA Committee.[106] For instance, it was not addressed during the vote on 28 May 2015 in the INTA Committee regarding the question whether or

102) World Economic Forum, 'Mega-regional Trade Agreements Game-Changers or Costly Distractions for the World Trading System?'http://www3.weforum.org/docs/GAC/2014/WEF_GAC_TradeFDI_MegaRegionalTradeAgreements_Report_2014.pdf accessed 30 December 2015.

103) M Waibel, A Kaushal, K-H Chung and C Balchin (eds), *The backlash against investment arbitration: Perceptions and reality*, Kluwer Law International, 2010.

104) Jan Kleinheisterkamp, 'Who is afraid of investor-state arbitration?: or comparative law?', Policy briefing papers, 4/2014. LSE Law.

105) Marco Bronckers, 'Schizophrenia in the EU about International Law', 21 Jan. 2015, Leiden Blog 〈http://leidenlawblog.nl/articles/schizophrenia-in-the-eu-about-international-law〉 accessed 1 June 2016.

106) Nikos Lavranos, 'Countering Anti-ISDS Propaganda with Facts: An Uphill Battle', Kluwer Arbitration blog, 8 June 2015.

not to include ISDS in TTIP. On that occasion, the majority of the Committee members accepted that a renovated form of ISDS, namely, in the shape of the creation of a permanent investment court, should be included in TTIP.[107)]

- European 'public interest' and negotiations of new BITs

In view of these different clauses that may be included in the EU Model BIT various alarms were already raised by both Member States and third states. First, the adoption legitimate public measures by the host State (e.g. environment protection) may be challenged by investors as a breach of a broadly-defined Fair and Equitable Treatment clause or as amounting to indirect expropriation. Second, there are criticisms that highlight the insufficient transparency and predictability of the Investor-State Dispute Settlement (ISDS). Third, there is the question of how to address the so-called the right to regulate of the state and the margin of manoeuvre to introduce changes in the legal framework and its impact on investment protection.[108)] An additional complication would be represented by the fact that Member States may not consider the new model BIT as providing a competitive advantage for their investors.

One of the held perceptions is that companies will get exemptions from government regulations and legislation, undermining democracy and development. This is related to the question of how BITs work in practice and if they are truly signed in the best interest of the public. That links up to the issue of the parliamentary participation in the conclusion and adoption of investment treaties, in particular, taking into consideration the European Parliament recommendations of on the negotiations for the Transatlantic Trade and Investment Partnership, that while embracing the agreement, despise the dispute resolution mechanism.

- The role of the civil society in the negotiations of new Investment Agreements

During the negotiation of the TTIP, it has been long argued by civil society organizations in the EU that private investors (e.g. US companies) may challenge

107) D Vincentini, 'MEPs give passing vote to TTIP', EuroActiv, 29 May 201. The non-binding resolution was passed on Thursday (28 May) with 28 votes, 13 against and no abstentions. Available at http://www.euractiv.com/sections/trade-society/meps-give-only-passing-vote-ttip-314959 accessed 1 October 2015).

108) Catherine Titi, *The Right to Regulate in International Investment Law* (Nomos, 2014).

government regulations of the other party to the treaty (e.g., EU or Member State measures). Furthermore, it was made evident the potential request of financial compensation for those regulations that are found to infringe certain treaty principles. Both circumstances were taken as 'unsettling news' by civil society organizations.

However, the TTIP is not the only treaty in which the ISDS mechanism has been included. Other comprehensive bilateral trade agreements negotiated between the EU and third countries comprise this type of mechanism, such as the agreement with Canada, and the agreement between the EU and Singapore. Whereas it is likely that ISDS may also be included in other bilateral agreements currently being negotiated by the EU, for instance, the treaty with Japan.

In order to provide an institutional channel for participation, the mechanism articulated by the EU has taken the form of consultations. For instance, the EU opened a consultation on Investor-State Dispute Settlement ('ISDS') in the framework of the TTIP between the EU and the United States organized by the European Commission between 27 March and 13 July 2014, which results were finally published by the European Commission on 13 January 2015.[109] The question that arises with regard to the current negotiations is how civil society concerns are addressed at EU level and the role the civil society will play in this new machinery. The question has been apparently answered by the proposal on the creation of an investment court system as discussed in the next section.

## Ⅵ. The Creation of The 'Investment Court System'

The establishment of an ad-hoc arbitration tribunal was envisaged as an alternative solution since the beginning of the discussions concerning the articulation of a common investment policy. Thus, the announcement regarding the creation of an 'investment court system' did not came as a surprise. Already on 5 May 2015, the Commission issued its Concept Paper proposing the reform of the ISDS system, moving away from the current system of Investment Treaty arbitration.[110] The concept paper

109) The report on the outcomes of the consultation, released on 13 January 2015, is available at 〈http://trade.ec.europa.eu/consultations/index.cfm?consul_id=179〉 accessed 1 June 2016.

110) Concept Paper. Investment in TTIP and beyond – the path for reform. Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court, available at

suggested the creation of one court adjudicating disputes under multiple agreements and between different trading parties.

On 8 July 2015 the European Parliament approved a resolution proposing the replacement of investor-State arbitration provisions in the TTIP based on the EU Commission's proposal including a dispute resolution system before 'independent professional judges in public hearings'.

On September, 16 the EU unveiled the proposal for the establishment of an Investment Protection and the Investment Court System in the Transatlantic Trade and Investment Partnership (draft chapter on Investments).[111] This proposal further develops the ideas featured in the European Commission's Concept paper 'Investment in TTIP and beyond – the path for reform. Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court'.[112] The draft details the proposals for the investment chapter in Transatlantic Trade and Investment Partnership treaty between the EU and the US. The chapter sets forth detailed investment protection provisions and the establishment of an International Investment Court to resolve disputes under the TTIP. Furthermore, the draft text comprises dispute settlement provisions in another section on Trade in Services, Investment and E-Commerce.

The draft condenses the view expressed by stakeholders in the public consultation on investment in TTIP and, at the same time, reflects the positions taken by the Council and the European Parliament, namely, the Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America adopted by the Council on the 17 June 2013, and the Resolution of 8 July 2015 of the European Parliament containing recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership.[113]

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〈http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF〉 accessed 1 June 2016.

111) European Commission, "Text of the proposal on Investment Protection and Resolution of Investment Disputes and Investment Court System in TTIP" Chapter II- Investment, available at 〈http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf〉 accessed 1 October 2015.

112) European Commission, Blog post by Trade Commissioner Cecilia Malmström 'Proposing an Investment Court System', 16 September 2015, available at 〈https://ec.europa.eu/commission/2014-2019/malmstrom/blog/proposing-investment-court-system_en〉 accessed 1 October 2015.

113) Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America adopted by the Council on the 17 June 2013.

It is worth highlighting that, at the moment, this proposal is merely an internal document of the European Union and does not constitute a formal proposal to the United States in the framework of the TTIP negotiations. The document will serve as the basis for the consultation to be organized by the Commission with the EU's Member States in the Council. The Commission will also discuss the proposal with the European Parliament before presenting a formal text proposal to the United States.

What is relevant, is that the EU will attempt to open negotiations with other States for setting up a permanent International Investment Court. The final goal is that over time this International Investment Court would substitute all investment dispute resolution mechanisms provided in EU agreements, EU Member States agreements with third countries and in trade and investment treaties concluded between third countries. In the EU's view, the creation of a world investment court "would further increase the efficiency, consistency and legitimacy of the international investment dispute resolution system".[114] The proposal can also be regarded as an attempt to accommodate Investor-state arbitration under TTIP, resolving investment disputes within an (autonomous) EU legal order.

The EU announced with fanfare the approval of a 'proposal for a new and transparent system for resolving disputes between investors and states' … 'intended to ensure that all actors can have full trust in the system' which 'enshrines governments' right to regulate and ensures transparency and accountability'.[115] That was also the shared perception of First Vice-President Frans Timmermans who considered the proposal for a 'new Investment Court System' as 'groundbreaking' a 'new, modernized system of investment courts, subject to democratic principles and public scrutiny' (…) 'the new Investment Court System will be composed of fully qualified judges, proceedings will be transparent, and cases will be decided on the basis of clear rules. In addition, the Court will be subject to review by a new Appeal Tribunal. With this new system, we protect the governments' right to regulate, and ensure that investment disputes will be adjudicated in full accordance with the rule of law'.[116] Along the

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Resolution of 8 July 2015 containing the European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership.

114) European Commission, "Commission proposes new Investment Court System for TTIP and other EU trade and investment negotiations", Brussels, 16 September 2015, available at 〈http://europa.eu/rapid/press-release_IP-15-5651_en.htm〉 accessed 1 October 2015.

115) Ibid.

same lines, Trade Commissioner Cecilia Malmström, presented the proposal as a significant achievement criticizing the 'old system' as suffering from a fundamental lack of trust. Malmström emphasized the need to have a trustworthy international investment court. In the Commissioner's view, since 'EU investors are the most frequent users of the existing model, which individual EU countries have developed over time' the EU 'must take the responsibility to reform and modernise it *taking* the global lead on the path to reform.'[117]

The whole idea of the EU taking the lead on the issue of progressing towards the establishment of a world investment court sounds ambitious, in particular, considering the tremendous endeavour that it would imply. Overall, the implementation of the proposal innovation will move ISDS closer to the structure of a permanent court.

At the first glance, the draft chapter appears as an improved and revised version of the ICSID system, combining some elements of the WTO system (i.e. the establishment of an appeal court) and crystallizing investment arbitration case-law. As an innovative feature, the proposal attempts to boost mediation. Another innovation is the inclusion of 'ethics provisions' and a Code of Conduct for Members of the Tribunal, the Appeal Tribunal and Mediators in Annex II. Clearly, the EU has tried to tackle all the various pitfalls pointed out during the consultations with the civil society.

In addition, the draft has built upon the recent comprehensive free trade agreements negotiated with Canada (CETA) and Singapore, which already introduce fundamental changes to the present investment dispute resolution system with provisions regulating on:

- Transparency: all documents should be posted on-line, all hearings will be open to the public;
- The prohibition of forum shopping;
- A strict code of conduct for arbitrators, including concrete steps on how to manage them
- The early dismissal of unfounded claims,
- The avoidance frivolous and unfounded claims.

116) Ibid.

117) The text in italics is ours.

In order to grasp a detailed idea of the proposal's content, it is worth having a look into the different provisions.

## 1. Investments covered

The draft contains specific definitions indicating what are the investments covered under the protection. As a significant change, in Annex II there is a specific reference to public debt and sovereign debt restructuring.[118] This is a matter subject to a considerable debate under the ICSID system with several cases arising from the Argentine sovereign debt restructuring and we are, now, witnessing the submission of those cases emerging from the Eurozone bailout.[119] The text attempts to clarify ex ante the potential conflicts that may arise in the following terms:

1. No claim that a restructuring of debt issued by a Party breaches an obligation under Section 2 [Investment Protection] may be submitted to, or if already submitted continue in, arbitration under Section 3 [Resolution of Investment Disputes and Investment Court System] if the restructuring is a negotiated restructuring at the time of submission, or becomes a negotiated restructuring after such submission.

2. Notwithstanding [Article 6 Submission of a Claim, Section on Resolution of Investment Disputes and Investment Court System], and subject to paragraph 1 of this Annex, an investor of another Party may not submit a claim under Section 3 [Resolution of Investment Disputes and Investment Court System] that a restructuring of debt issued by a Party breaches Articles X [National Treatment] or X [Most-Favoured Nation] of Section 1 [Liberalisation of Investments] or an obligation under Section 2 [Investment Protection], unless 270 days have elapsed from the date of receipt by the respondent of the written request for consultations pursuant to [Article 4 Consultations].

3. For the purposes of this Annex, 'negotiated restructuring' means the restructuring or rescheduling of debt instruments issued by a Party that has been effected through (i) a modification or amendment of such debt instruments, as provided for under their terms and governing law, or (ii) a debt exchange or other similar process in which the holders of no less than 66% of the aggregate principal amount of the outstanding debt

118) Annex II. Public debt.

119) MBelen Olmos Giupponi, 'ICSID Tribunals and Sovereign Debt Restructuring (SDR): Mapping the further implications of the Alemanni Decision' (2015) 30 (3) *ICSID Review* 506-524.

under such debt instruments subject to restructuring, excluding debt held by that Party or by entities owned or controlled by it, have consented to such debt exchange or other process. For greater certainty, debt issued by a Party means debt issued by any administrative level of a Party including with respect to the European Union a government of or in a European Member State or its sub-federal level.'[120]

## 2. Standards of treatment

The draft refers to the investors of a Party in respect of a covered investment as regards any treatment that may affect the operation of such investment.[121] The chapter provides for the classical guarantees or standard of treatments recognised under international investment law, such as:

- No expropriation without compensation;
- Freedom to transfer funds relating to an investment[122];
- The guarantee of fair and equitable treatment and physical security;
- The commitment that governments will respect their own written (and legally binding) contractual obligations towards an investor[123];
- Compensation for losses in certain circumstances linked to war or armed conflict.[124]

An appreciable difference with the current IIAs, is that the standards of protection have been clearly defined, like in the case of '*fair and equitable treatment*' which comprises a closed list of government's behaviour that investors are protected from (such as denial of justice, targeted discrimination on manifestly wrongful grounds such as gender, race or religious beliefs or on the grounds of harassment). The substantive basis for the resort to the Investment Court System by a foreign investor is the breach of any of these guarantees.

120) Ibid.
121) Draft Chapter. Art 3. Treatment of Investors and of covered investments.
122) Draft Chapter. Art 6. Transfer.
123) Draft Chapter. Art 7. Observance of written commitments; Art 8. Subrogation; Art 9. Denial of benefits.
124) Draft Chapter. Arts X [National Treatment] or X [Most-Favoured Nation] of Section 1 [Liberalisation of Investments]

## 3. Investment protection, regulatory measures and expropriation

In order to address one of the main causes of concern arising from investment treaty jurisprudence, Article 2 regulates on investment and regulatory measures/objectives, containing the right of a state to regulate 'through measures necessary to achieve legitimate policy objectives'. This statement should be read jointly with different categories of objectives which may be considered legitimate, such as the protection of public health, safety, environment or public morals. Other provisions are included to bring 'greater certainty' which have already been criticized:

'First, that the protections given in the TTIP do not constitute a commitment by a Party that it will not change the legal or regulatory framework, including where it impacts on an investor's expectation of profits. Second, that, in the absence of a specific legal or contractual commitment, a Party's decision not to issue, renew or maintain a subsidy (which the Commission flags would include state aid) will not breach investment protections. And third, that the investment protections offered do not prevent a Party from discontinuing a subsidy or requesting its reimbursement, or as requiring that Party to compensate an investor therefor, where so ordered by a "competent authority" (which under Annex III includes the Commission and Member State Courts when applying EU law on state aid)'.[125]

The draft includes a provision on compensation for losses[126] and the prohibition of expropriation without compensation.[127] A detailed annex has been added that clarifies what constitutes indirect expropriation, clarifying that expropriation may be direct or indirect and setting out the factors for determining an indirect expropriation. Significantly, again, the draft confirms that, unless manifestly excessive, non-discriminatory measures introduced by a Party to protect legitimate public welfare objectives do not constitute indirect expropriations.[128]

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125) A Cannon, C Leathley and V Naish, 'European Commission publishes draft investment chapter for t he TTIP, including investment protection provisions and the establishment of an International Inves tment Court' (PIL Notes) (18 Sept 2015), available at 〈http://hsfnotes.com/publicinternationallaw/201 5/09/18/european-commission-publishes-draft-investment-chapter-for-the-ttip-including-investment-protect ion-provisions-and-the-establishment-of-an-international-investment-court/〉accessed 1 October 2015.

126) Draft Chapter. Art 4.

127) Draft Chapter. Art 5. Expropriation.

128) Draft Chapter. Annex I. Expropriation.

## 4. Resolution of Investment Disputes

The draft chapter applies to a dispute between, on the one hand, a claimant of one Party and, on the other hand, the other Party concerning treatment alleged to breach [investment protection provisions, i.e. the investment protection section and the national treatment and the most-favoured nation treatment provisions concerning post-establishment], which breach allegedly causes loss or damage to the claimant or its locally established company.[129)]

The draft also defines as 'claimant' an investor of a Party 'which seeks to submit or has submitted a claim pursuant to this section, either (a) acting on its own behalf; or (b) acting on behalf of a locally established company which it owns or controls. The locally established company shall be treated as a national of another Contracting State for the purposes of Article 25 (2) (b) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 (ICSID-Convention)'.[130)]

## 5. Transparency provisions

The draft contains several references to the UNCITRAL Rules on transparency in Treaty-based Investor-State Arbitration adopted in 2014 under the auspices of the EU. 1. The 'UNCITRAL Transparency Rules' shall apply to disputes under this Section, with the following additional obligations. 2. The request for consultations under Article 4, the request for a determination and the notice of determination under Article 5, the agreement to mediate under Article 3, the notice of challenge and the decision on challenge under Article 11 the request for consolidation under Article 27 and all document submitted to and issued by the Appeal Tribunal shall be included in the list of documents referred to in Article 3(1) of the UNCITRAL Transparency Rules. 3. Exhibits shall be included in the list of documents mentioned in Article 3(2) of the UNCITRAL Transparency Rules. Notwithstanding Article 2 of the UNCITRAL Transparency Rules, the European Union or the United States as the case may be shall

129) Draft Chapter. Section 3 - Resolution of Investment Disputes and Investment Court System. Sub-Section 1: Scope And Definitions. Art 1. Scope and Definitions.

130) Draft Chapter. Investor of a party is defined in art 1 of Chapter X (General Provisions)

make publicly available in a timely manner prior to the constitution of the division, relevant documents pursuant to paragraph 2, subject to the redaction of confidential or protected information. Such documents may be made publicly available by communication to the repository referred to in the UNCITRAL Transparency Rules. 5. A disputing party may disclose to other persons in connection with proceedings, including witnesses and experts, such unredacted documents as it considers necessary in the course of proceedings under this Section. However, the disputing party shall ensure that those persons protect the confidential or protected information in those documents'.[131]

## 6. Alternative Dispute Resolution and Consultations

The chapter provides for various alternative dispute resolution methods. It contemplates the amicable resolution in the following terms 'any dispute should, as far as possible, be settled amicably through negotiations or mediation and, where possible, before the submission of a request for consultations pursuant to Article 3. Such settlement may be agreed at any time, including after proceedings under this Section have been commenced. 2. A mutually agreed solution between the disputing parties shall be notified to the non-disputing Party within 15 days of the mutually agreed solution being agreed. The [..] Committee shall keep under surveillance the implementation of such mutually agreed solutions and the Party to the mutually agreed solution shall regularly report to the [..] Committee on the implementation of such solution'.[132] Provisions for mediation regulates that possibility together with draft procedural rules.[133]

The draft regulates in detail the Consultations, 'where a dispute cannot be resolved as provided for under Article 2, a claimant of a Party alleging a breach of the provisions referred to in Article 1(1) may submit a request for consultations to the other Party. Unless the disputing parties agree to a longer period, consultations shall be held within 60 days of the submission of the request for consultations under paragraph 5. 4. Unless the disputing parties agree otherwise, the place of consultation

131) Draft Chapter. Art 18. Transparency.
132) Draft Chapter. Sub-Section 2. Alternative Dispute Resolution and Consultations. Article 2. Amicable Resolution.
133) Draft Chapter. Art 3. Mediation.

shall be: (a) Washington DC where the consultations concern treatment afforded by the United States; (b) Brussels where the consultations concern treatment afforded by the European Union; or (c) the capital of the Member State of the European Union concerned, where the consultations concern treatment afforded exclusively by that Member State'.[134]

If the dispute cannot be settled within six months of the submission of the request for consultations, the claimant may submit a claim to the Tribunal established pursuant to Article 9.[135] The draft foresees that a claim may be submitted to the Tribunal under one of the following sets of rules on dispute settlement: (a) the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 (ICSID); (b) the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 (ICSID) in accordance with the Rules on the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre, where the conditions for proceedings pursuant to paragraph (a) do not apply; (c) the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL); or, (d) any other rules agreed by the disputing parties at the request of the claimant.

The draft chapter precludes the possibility of mass claims as it provides that 'claims submitted in the name of a class composed of a number of unidentified claimants, or submitted by a representative intending to conduct the proceedings in the interests of a number of identified or unidentified claimants that delegate all decisions relating to the proceedings on their behalf, shall not be admissible.'[136]

The draft regulates in detail the consent to submit a claim, stipulating that consent under paragraph 1 and the submission of a claim under this Section shall be deemed to satisfy the requirements of: (a) Article 25 of the ICSID Convention and the ICSID Additional Facility Rules for written consent of the disputing parties; and, (b) Article II of the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards for an "agreement in writing". 3. The claimant is deemed to give consent in accordance with the procedures provided for in this Section at the time of submitting a claim pursuant to Article 6.[137]

134) Draft Chapter. Art 4. Consultations.
135) Draft Chapter. Art 6. Submission of a claim.
136) Draft Chapter. Art 6.5.

## 7. Third party funding

Taking into consideration recent investment arbitration treaties concerning third party funding, Article 8 of the draft text contains relevant regulations in the matter. The draft defines 'Third Party funding' means any funding provided by a natural or legal person who is not a party to the dispute but who enters into an agreement with a disputing party in order to finance part or all of the cost of the proceedings in return for a remuneration dependent on the outcome of the dispute or in the form of a donation or grant.[138] In addition, the draft features the obligation of a disputing party using third party funding to disclose to the other disputing party and tribunal of that funding at the time the claim is submitted, or, if the funding agreement is entered into at a later date, without delay as soon as the agreement is concluded, as follows: 'Where there is a third party funding, the disputing party benefiting from it shall notify to the other disputing party and to the Tribunal, or where the division of the Tribunal is not established, to the President of the Tribunal, the name and address of the third party funder. Such notification shall be made at the time of submission of a claim, or, where the financing agreement is concluded or the donation or grant is made after the submission of a claim, without delay as soon as the agreement is concluded or the donation or grant is made'.[139]

## 8. The Investment Court System

The proposed system comprises a First-Instance Tribunal and appellate Tribunal. The Tribunal of First Instance is established to hear claims submitted pursuant to Article 6. The judges of the Investment and Appeal Tribunals would be required to have high technical and legal qualifications, including having demonstrated expertise in public international law, being subject to strict ethical rules under Article 11 and a Code of Conduct under Annex II. It is desirable that they have expertise in particular, in international investment law, international trade law and the resolution of disputes arising under international investment or international trade agreements.

137) Draft Chapter. Art 7. Consent.
138) Draft Chapter. Art 8.
139) Ibid.

The draft chapter attempts to guarantee impartiality by requiring in Article 5 of Annex that judges 'shall not be influenced by self-interest, outside pressure, political considerations, public clamour, loyalty to a Party or disputing party, or fear of criticism'. They would be precluded from taking on work as counsel on any investment disputes under the TTIP or any other agreement.

As for the appointment of the fifteen Judges to the Tribunal, five of the Judges shall be nationals of a Member State of the European Union, five shall be nationals of the United States and five shall be nationals of third countries.

The Judges shall be appointed for a six-year term, renewable once. However, the terms of seven of the fifteen persons appointed immediately after the entry into force of the Agreement, to be determined by lot, shall extend to nine years. Within 90 days of the submission of a claim pursuant to Article 6, the President of the Tribunal shall appoint the Judges composing the division of the Tribunal hearing the case on a rotation basis, ensuring that the composition of the divisions is random and unpredictable, while giving equal opportunity to all Judges to serve.9. Notwithstanding paragraph 6, the disputing parties may decide to by a sole Judge who is a national of a third country, to be selected by the President of the Tribunal.

An appeal tribunal is envisaged to hear the appeals against the awards rendered by the first instance tribunal. The Appeal Tribunal has been modelled following the WTO Appellate body. The permanent Appeal Tribunal would be comprised of six members, each appointed for a six-year term, with two EU and two US nationals, and two nationals of third countries. The Appeal Tribunal would have a President and Vice-President would be selected only from the nationals of third countries. Although each tribunal would need an EU, US and third country national, the President of the Tribunal would appoint the Judges composing the division of the Tribunal hearing the case on a rotation basis, ensuring that the composition of the divisions is random and unpredictable. The draft set strict time limits for the parties to appeal an award (90 days from issuance). The appeal proceedings should not to exceed 180 days from notification of appeal to decision. Detailed provisions on fees are contained already in the draft chapter. In the Commission's view, the Appeal Tribunal should ensure that there 'could be no doubt as to the legal correctness of the decisions of tribunals'.[140]

140) European Commission - Fact Sheet, Reading Guide,

Even if this ensuring correctness of judges constitutes the main reason behind the structure of the new tribunal, the draft raises various questions in this regard. The draft underlined the fact that each Tribunal should be comprise of a national of the EU, US and a third country shows a clear interest on assuring impartiality. To reinforce this idea, the draft provides that allocation to a Tribunal will be 'random'. Two comments are in order. First, the number of Tribunal members may be sufficient to ensure a 'random' choice, for the Appeal Tribunal to be constituted it needs to comprise 6 individuals of different nationalities (US, EU member states and third state). Second, the chair will always be drawn from the two third country members, who will also be the President and Vice-President of the Tribunal, rotating the two roles every two years. Overall, the design of the tribunal of appeal allocates a great deal of responsibility in the hands of this third-State individuals, who have the potential to determine the orientation of the jurisprudence that would result from the TTIP dispute resolution process.[141)]

What the draft transpires is the Commission's concerns regarding impartiality and conflicts of interest, leading to the inclusion of the Code of Conduct in Annex II; the Article 5 of Annex II (relating to independence and impartiality of arbitrators); specific provisions on fees, ethics and other miscellaneous points such as the emphasis on confidentiality.[142)] However, some initial difficulties are already present. For instance, it remains to be seen if there are enough potential candidates taking into consideration the high technical and legal requirements the judges should fulfil. Also, in view of these requirements, there is potential for the judges' appointments to be more easily challenged.

There is a reference to what may constitute in the future a multilateral investment court the ambitious undertaking that the Commission aims at achieving in the long run. In line with this goal, article 12, regulating on multilateral dispute settlement mechanisms provides that 'upon the entry into force between the Parties of an international agreement providing for a multilateral investment tribunal and/or a

141) A Cannon, Ch Leathley and V Naish, 'European Commission publishes draft investment chapter for the TTIP, including investment protection provisions and the establishment of an International Investment Court' (PIL Notes) (18 Sept 2015), available at http://hsfnotes.com/publicinternationallaw/2015/09/18/european-commission-publishes-draft-investment-chapter-for-the-ttip-including-investment-protection-provisions-and-the-establishment-of-an-international-investment-court/(accessed 1 October 2015).

142) Draft Chapter. Art 11. Ethics.

multilateral appellate mechanism applicable to disputes under this Agreement, the relevant parts of this section shall cease to apply. The Committee may adopt a decision specifying any necessary transitional arrangements'.[143]

## 9. Procedural aspects

The Tribunal shall determine whether the treatment subject to the claim is inconsistent with any of the provisions referred to in Article 1(1) alleged by the claimant. In making its determination, the Tribunal shall apply the provisions of this Agreement and other rules of international law applicable between the Parties. It shall interpret this Agreement in accordance with customary rules of interpretation of public international law, as codified in the Vienna Convention on the Law of Treaties. 3. For greater certainty, pursuant to paragraph 1, the domestic law of the Parties shall not be part of the applicable law. Where the Tribunal is required to ascertain the meaning of a provision of the domestic law of one of the Parties as a matter of fact, it shall follow the prevailing interpretation of that provision made by the courts or authorities of that Party. 4. For greater certainty, the meaning given to the relevant domestic law made by the Tribunal shall not be binding upon the courts or the authorities of either Party. The Tribunal shall not have jurisdiction to determine the legality of a measure, alleged to constitute a breach of this Agreement, under the domestic law of the disputing Party.[144]

According to Article 16, the respondent may 'no later than 30 days after the constitution of the division of the Tribunal pursuant to Article 9(4), and in any event before the first session of the division of the Tribunal, or 30 days after the respondent became aware of the facts on which the objection is based, file an objection that a claim is manifestly without legal merit'. [145]

The draft intends to avoid parallel proceedings, stipulating that 'the Tribunal shall dismiss a claim by a claimant who has submitted a claim to a domestic court or tribunal concerning the same treatment as that alleged to be inconsistent with the provisions referred to in Article 1(1) unless: (a) the claimant withdraws such claim

143) Draft Chapter. Art 12.
144) Draft Chapter. Art 13. Applicable law and rules of interpretation
145) Draft Chapter. Art 16.Preliminary Objections.

before a final judgment, award or decision has been delivered; or (b) a final judgment, award or decision has been delivered on such claim by the domestic court or tribunal .'[146] In sum, the draft contains a 'fork in the road' clause, investors choose between ISDS or litigation before domestic courts at an early stage.

As other relevant aspects the draft contains provisions aimed at preventing frivolous claims. The draft contains an 'anti-circumvention clause', in light of which, 'For greater certainty, the Tribunal shall decline jurisdiction where the dispute had arisen, or was foreseeable on the basis of a high degree of probability, at the time when the claimant acquired ownership or control of the investment subject to the dispute and the Tribunal determines, on the basis of the facts of the case, that the claimant has acquired ownership or control of the investment for the main purpose of submitting the claim under this Section. The possibility to decline jurisdiction in such circumstances is without prejudice to other jurisdictional objections which could be entertained by the Tribunal'.[147] In turn, Article 17 provides that '1. Without prejudice to the Tribunal's authority to address other objections as a preliminary question or to a respondent's right to raise any such objections at any appropriate time, the Tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim, or any part thereof, submitted under this section is not a claim for which an award in favour of the claimant may be made under Article 6, even if the facts alleged were assumed to be true. The Tribunal may also consider any relevant facts not in dispute'.[148]

As an innovation, the draft contemplates the right of the tribunal to order interim measures of protection, in the following terms: 'The Tribunal may order an interim measure of protection to preserve the rights of a disputing party or to ensure that the Tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the Tribunal's jurisdiction. The Tribunal may not order the seizure of assets nor may it prevent the application of the treatment alleged to constitute a breach'.[149]

146) Draft Chapter. Art 14.Other claims.
147) Draft Chapter. Art 15. Anti-circumvention clause:
148) Draft Chapter. Art 17. Claims unfounded as a matter of law.
149) Draft Chapter. Art 19. Interim decisions.

## 10. Third Party and Non- Disputing Party Intervention

Keeping up with the terminology of the UNCITRAL rules, the draft features several provisions on the participation of non-disputing Party to the Agreement and third parties. As for the participation of non-disputing parties, the draft foresees that '1. The respondent shall, within 30 days after receipt or promptly after any dispute concerning confidential or protected information has been resolved, deliver to the non-disputing Party: (a) a request for consultations referred to in Article 4, a notice requesting a determination referred to in Article 5, a claim referred to in Article 6 and any other documents that are appended to such documents; (b) on request: a. pleadings, memorials, briefs, requests and other submissions made to the Tribunal by a disputing party; b. written submissions made to the Tribunal by a third person; c. minutes or transcripts of hearings of the Tribunal, where available; and d. orders, awards and decisions of the Tribunal. (c) on request and at the cost of the non-disputing Party, all or part of the evidence that has been tendered to the Tribunal'.[150] Under the same article, the non-disputing Party has the right to attend a hearing held during the proceedings. Ultimately, the Tribunal 'shall accept or, after consultation with the disputes parties, may invite written or oral submissions on issues relating to the interpretation of this Agreement from the non-disputing Party. The Tribunal shall ensure that the disputing parties are given a reasonable opportunity to present their observations on any submission by the non-disputing Party'.[151]

As for the intervention by third parties, 'the Tribunal shall permit any natural or legal person which can establish a direct and present interest in the result of the dispute (the intervener) to intervene as a third party'. [152] This intervention is limited to 'supporting, in whole or in part, the award sought by one of the disputing parties' and 'must be lodged within 90 days of the publication of submission of the claim pursuant to Article 6. The Tribunal shall rule on the application within 90 days, after giving the

150) Draft Chapter. Art 22. The non-disputing Party to the Agreement

151) Draft Chapter. Art 22.3.

152) Draft Chapter. Art 23. Intervention by third parties. There are certain limitation as to the persons who can intervene, namely, ". For greater certainty, the fact that a natural or legal person is a creditor of the claimant shall not be considered as sufficient in itself to establish that it has a direct and present interest in result of the dispute".

disputing parties an opportunity to submit their observations'.[153] Once the application to intervene is granted, the intervener shall receive a copy of every procedural document served on the disputing parties, save, where applicable, confidential documents. The intervener may submit a statement in intervention within a time period set by the Tribunal after the communication of the procedural documents. The disputing parties shall have an opportunity to reply to the statement in intervention. The intervener shall be permitted to attend the hearings held under this Chapter and to make an oral statement. In the event of an appeal, a natural or legal person who has intervened before the Tribunal shall be entitled to intervene before the Appeal Tribunal.

The draft includes also the possibility for the Tribunal to accept amicus curiae briefs from third parties. And to order expert reports in the following terms: 'at the request of a disputing party or, after consulting the disputing parties, on its own initiative, may appoint one or more experts to report to it in writing on any factual issue concerning environmental, health, safety, or other matters raised by a disputing party in a proceeding'.[154]

In a better version of the rules instituted under the ICSID Convention, the draft incorporates rules on the

consolidation of claims, providing that '1. In the event that two or more claims submitted under this Section have a question of law or fact in common and arise out of the same events and circumstances, the respondent may submit to the President of the Tribunal a request for the consolidated consideration of all such claims or part of them. The request shall stipulate: (a) the names and addresses of the disputing parties to the claims sought to be consolidated; (b) the scope of the consolidation sought; and (c) the grounds for the request. The respondent shall also deliver the request to each claimant in a claim which the respondent seeks to consolidate. 2. In the event that all disputing parties to the claims sought to be consolidated agree on the consolidated consideration of the claims, the disputing parties shall submit a joint request to the President of the Tribunal pursuant to paragraph 1. The President of the Tribunal shall, after receipt of such joint request, constitute a new division (the "consolidating

153) Draft Chapter. Art 23.2.
154) Draft Chapter. Art 24. Expert Reports.

division") of the Tribunal pursuant to Article 9 which shall have jurisdiction over all or part of the claims which are subject to the joint consolidation request. 3. In the event that the disputing parties referred to in paragraph 2 have not reached an agreement on consolidation within thirty days of the receipt of the request for consolidation referred to in paragraph 1 by the last claimant to receive it, the President of the Tribunal shall constitute a consolidating division of the Tribunal pursuant to Article 9. The consolidating division shall assume jurisdiction over all or part of the claims, if, after considering the views of the disputing parties, it decides that to do so would best serve the interest of fair and efficient resolution of the claims, including the interest of consistency of awards. 4. The consolidated consideration of the claims shall be submitted to the consolidating division of the Tribunal under application of the dispute settlement rules chosen by agreement of the claimants from the list contained in Article 6. 5. If the claimants have not agreed upon the dispute settlement rules within 30 days after the date of receipt of the request for consolidated consideration by the last claimant to receive it, the consolidated consideration of the claims shall be submitted to the consolidating division of the Tribunal under application of the UNCITRAL arbitration rules'.[155]

## 11. Types of Awards

The draft regulates on various types of awards that could be rendered by the tribunals, such as interim, provisional and final awards. In particular, it should be noted the possibility for the tribunal to render Provisional Awards: '1. Where the Tribunal concludes that the treatment in dispute is inconsistent with the provisions referred to in Article 1(1) alleged by the claimant, the Tribunal may, on the basis of a request from the claimant, and after hearing the disputing parties, award only: (a) monetary damages and any applicable interest; (b) restitution of property, in which case the award shall provide that the respondent may pay monetary damages representing the fair market value of the property at the time immediately before the expropriation or impending expropriation became known, whichever is earlier, and any applicable interest in lieu of restitution, determined in a manner consistent with

155) Draft Chapter. Art 27. Consolidation.

Article 2.5 of Section 2 of Chapter II (Expropriation) (…) 5. The Tribunal shall issue a provisional award within 18 months of the date of submission of the claim. If that deadline cannot be respected, the Tribunal shall adopt a decision to that effect, which will specify the reasons for such delay. A provisional award shall become final if 90 days have elapsed after it has been issued and neither disputing party has appealed the award to the Appeal Tribunal. 6. Either disputing party may appeal the provisional award, pursuant to Article 29'. In such an event, if the Appeal Tribunal modifies or reverses the provisional award of the Tribunal then the Tribunal shall, after hearing the disputing parties if appropriate, revise its provisional award to reflect the findings and conclusions of the Appeal Tribunal. The provisional award will become final 90 days after its issuance. The Tribunal shall be bound by the findings made by the Appeal Tribunal. The Tribunal shall seek to issue its revised award within 90 days of receiving the report of the Appeal Tribunal.[156)]

## 12. Appeal

As mentioned before, the draft contemplates the appeal of the awards in the following terms 'Either disputing party may appeal before the Appeal Tribunal a provisional award, within 90 days of its issuance. The grounds for appeal are: (a) that the Tribunal has erred in the interpretation or application of the applicable law; (b) that the Tribunal has manifestly erred in the appreciation of the facts, including the appreciation of relevant domestic law; or, (c) those provided for in Article 52 of the ICSID Convention, in so far as they are not covered by (a) and (b). 2. If the Appeal Tribunal rejects the appeal, the provisional award shall become final. If the appeal is well founded, the Appeal Tribunal shall modify or reverse the legal findings and conclusions in the provisional award in whole or part. The Appeal Tribunal may also dismiss the appeal on an expedited basis where it is clear that the appeal is manifestly unfounded, in which case the provisional award shall become final. Its decision shall specify precisely how it has modified or reversed the relevant findings and conclusions of the Tribunal. 3. As a general rule, the appeal proceedings shall not exceed 180 days from the date a party to the dispute formally notifies its decision to appeal to the

156) Draft Chapter. Art 28. Provisional Award.

date the Appeal Tribunal issues its decision. When the Appeal Tribunal considers that it cannot issue its decision within 180 days, it shall inform the disputing parties in writing of the reasons for the delay together with an estimate of the period within which it will issue its decision. In no case should the proceedings exceed 270 days '.[157] Again, to avoid frivolous claims the draft provides that 'a disputing party lodging an appeal shall provide security for the costs of appeal and for the amount provided for in the provisional award'.[158]

## 13. Enforcement of Awards

The draft expressly addresses the enforcement of awards stipulating that 'Final awards issued pursuant to this Chapter by the Tribunal or the Appeal Tribunal shall be binding between the disputing parties and shall not be subject to appeal, review, set aside, annulment or any other remedy. 2. Each Party shall recognize an award rendered pursuant to this Agreement as binding enforce the pecuniary obligation within its territory as if it were a final judgement of a court in that Party. 3. Execution of the award shall be governed by the laws concerning the execution of judgments in force where such execution is sought.

4. For greater certainty, Article X (Rights and obligations of natural or juridical persons under this Agreement, Chapter X) shall not prevent the recognition, execution and enforcement of awards rendered pursuant to this Section.'[159]

## 14. A critical appraisal of the proposed court system

One may ask if these attempts of the EU in laying the stepping stones for a 'might-be' future word investment court are realistic. Evidently, the draft published presents as advantageous vis-à-vis the current system. However, the road ahead can turn out to be an uphill struggle if the deeper implications of the creation of such a system are not

157) Draft Chapter. Art 29. 5. The provisions of Arts 18 [Transparency], 19 [Interim decisions], 20 [Discontinuance], 21 [The non-disputing party to the proceeding] shall apply mutatis mutandis in respect of the appeal procedure.

158) Draft Chapter. Art 29.

159) Draft Chapter. Art 30.

taken into consideration. The laudable objective of setting up a world investment court which guarantees the balance between the interests at stake in the investment arbitration process may encounter sooner rather than later, certain obstacles. The coordination and costs of establishing a world investment court would be substantial. A priori there are some initial questions for the debate.

- Coordination and costs: Taking into account the scope and increasing number of BITs, it seems a tremendous task to 'scan' all the instruments in force in order to coordinate the dispute settlement provisions. It is estimated that there are currently more than 3000 bilateral investment treaties in force, most of them provide for ad hoc arbitration of disputes between investors and States. According to the UNCTAD over 40 investment treaty arbitrations were initiated in 2014 and a new investment treaty was signed every other week that year. It would take time to replace all these scattered ISDS for a world investment court. One may also point out that there is reluctance on the part of certain states towards the mechanisms for ISDS think, for instance, of some Latin American states.[160] Presently, it seems highly unlikely to reach a global consensus on a world investment court. Furthermore, the costs of these comprehensive reform could be enormous, aspect that should not be overlooked considering that, precisely, one of the main criticisms raised by developing states towards the current system are the funding.
- Institutional aspects: In addition, a crucial technical aspect in the creation of a world investment court is whether it has to be created within the framework of a multilateral organization, such as the ICSID, or if this investment arbitration court would be established as a self-standing body. The Commission paper affirms that 'work has already begun on how to start this process, in particular on aspects such as architecture, organisation, costs and participation of other

160) Belen Olmos Giupponi, 'The Protection of Foreign Direct Investment in Latin America: Where Do We Stand on International Arbitration?' (2015) 32 *Journal of International Arbitration* 113-142.

partners' (sic) without providing further details.

- Jurisdictional issues: In the event such a court is established, the exercise of jurisdiction would go through a transition period. At the beginning, this investment court would be unlikely able to settle a majority of ISDS disputes. The reform would not operate overnight and international arbitration of ISDS disputes will not fade away from the investment arbitration landscape for a considerable long period. This criticism does not deny the significance that the establishment of a world investment court may have. It would bring a new possibility for the resolution of ISDS disputes adding to the present alternatives of arbitration and submission to the jurisdiction of local courts.
- Avoiding further fragmentation in international investment law: In terms of o the relationship between this proposed form of dispute resolution and the existing body of international investment law and European law, the draft brings also food for thought. Namely, it provides for the enforcement of Final Awards issued by the Tribunals within the EU and US, however, it does not address the status of such Awards under the ICSID Convention (a highly problematic question as such) or, indeed, under the 1958 New York Convention. When it comes to the relationship with EU law, it is uncertain how the Commission envisions that the creation of these Investment Tribunals will be made compatible with the CJEU's jurisdiction.

In sum, with its announced desire to create a world investment court, the EU Commission has taken a significant and potentially far-reaching step towards the establishment of a multilateral body to resolve ISDS disputes in the future. Nevertheless, the legal and practical challenges of establishing a world investment court should not be underestimated and the likelihood that it could materialize in mid-short term may yet remain fairly low.

# Ⅶ. Conclusions

To conclude, in order to avoid lengthy disruptions and make the transition to the establishment of a fully-fledged EU model investment smooth, the EU must strengthen its capacities, inter-institutional balance and vertical cooperation. However, up to a certain extent, progress will depend on the current negotiations regarding new investment agreements and the possible pressure from third countries that expect the replacement of multiple BITs with single EU Member States by a possibly more beneficial EU-wide BIT.

The draft chapter issued under the TTIP negotiations seeks to avoid the different challenges arose to the 'investment protection test', including relevant substantive provisions. The proposal for the creation of an investment court is presented as the final piece of the jigsaw. It represents a compromise that tests the EU's capacity to build consensus among different interests. Notwithstanding, the unsolved question is if another sub system will be given rise in an already fragmented international investment law landscape in which the autonomy and the primacy of the EU legal order is also involved.

Certainly, as the various investment arbitration cases show, the influence of the EU institutions becomes ever extensive, encompassing different aspects ranging from submitting amicus curie files to preventing the payment of the award.

What is at stake is the EU' role in the international investment regime. The failure to adopt a coherent common investment policy consistent with the principles and objectives as set out in the treaties may undermine EU's role as a global actor.

The idea of a completely 'flawless' EU investment policy constitutes almost a utopia. There is no one-size-fits-all model. It requires more than a crafty lawyer to engineering a completely functional and operative EU legal system in terms of investment policy. It remains to be seen if the new proposed model for an investment court takes root modifying not only the EU legal scenario but also the whole ISDS and international investment treaty law.