# 13 Member States' Bilateral Investment Treaties (BITs): Lost in Transition?

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Abstract

*This article analyses the consequences of the shift of competence for Foreign Direct Investment (FDI) from the Member States to the European Union (EU). More specifically, the article focuses on the increasing interaction between European law and investment law, which is fuelled by the changes of the Treaty of Lisbon and in particular by the jurisprudence of the European Court of Justice (ECJ). In addition, attention is paid to the future Common European Investment Policy (CEIP) that is currently in the making. The author concludes that the continuing existence of Member States' Bilateral Investment Treaties (BITs) is seriously endangered and calls for a more realistic and sensible attitude of the European Parliament and the European Commission when developing the future CEIP.*

## 1 Introduction

In 2009 the European Court of Justice (ECJ) rendered – for the first time – three important judgments on the relationship between pre-accession Bilateral Investment Treaties (BITs) of EU Member States with third states and Community law.[1]

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1 ECJ, Case C-205/06, *Commission* v. *Austria*, [2009] ECR I-1301; ECJ Case C-249/06, *Commission* v. *Sweden*, [2009] ECR I-1335; ECJ, Case C-118/07, *Commission v. Finland*, [2009] ECR I-10889; *See further*: E. Denza, 'Bilateral Investment Treaties and EU rules on free transfer: Comment on Commission v. Austria, Commission v. Sweden and Commission v. Finland', 35 *European Law Review* (2010) pp. 263-274; N. Lavranos, 'European Court of Justice

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As will be discussed below in more detail, the thrust of these judgments is that even in the case of 'hypothetical incompatibilities' between the BITs and Community law, the BITs must be either brought into line with Community law or, if that proves impossible, be denounced. This approach not only illustrates that, according to the ECJ, Community law supersedes even prior international obligations of the EU Member States, but – even more importantly – underlines the desire of the ECJ to ensure that no international court or arbitral tribunal gets into the position of interpreting or applying Community law, thereby undermining the exclusive jurisdiction of the ECJ.[2]

Moreover, with the entering into force of the Lisbon Treaty on December 1, 2009, foreign direct investment (FDI) has been added to the exclusive external trade competence of the EU (Article 207 TFEU, former Article 133 EC).[3] Despite the fact that FDI is nowhere defined in the EU Treaties, the European Commission assumes that all the issues typically regulated in BITs (i.e. most-favoured-nation treatment (MFN), national treatment (NT), fair and equitable treatment (FET), dispute settlement procedures, compensation for expropriation) fall under this new exclusive competence of the EU. However, as will be discussed in more detail below, this view is certainly not shared by most, if not all EU Member States.

decision on the legal status of pre-accession bilateral investment treaties between European Union member states and third countries', 103 *American Journal of International Law* (2009) pp. 716-722; P. Koutrakos, 'Case C-205/06, Commission v. Austria and Case -294/06, Commission v. Sweden, judgments of the Court of 3 March 2009', 46 *Common Market Law Review* (2009) pp. 2059-276.

2 *See* on this point more generally: N. Lavranos, 'Protecting European Law from International Law', 15 *European Foreign Affairs Review* (2010) pp. 265-282.

3 Article 207 Treaty on the Functioning of the EU (TFEU) (ex Article 133 EC) reads as follows:

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

[...]

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

In the light of these recent developments in EU law, the European Commission has published a Communication[4] and a proposal for a Regulation[5] that is intended to address most of the unsettled issues. Irrespective of the final outcome, one thing is certain: the already complicated matrix of investment law and public international law will become even more complicated by the addition of Community law as new important factor.

The aim of this contribution is to analyze the new Common European Investment Policy (CEIP) that is currently in the making from the perspective of the Netherlands, which belongs to the leading EU Member States regarding inward and outward investments.[6]

The main argument that will be put forward is that the high standards of protection provided for by the existing Member States' BITs will – most probably – be lost in this transitional operation of transferring the FDI competence to the EU.

Accordingly, the following analysis will focus on the recent European law aspects, in particular on the ECJ's jurisprudence regarding BITs and the innovations introduced by the Lisbon Treaty. Some concluding observations will wrap up this contribution.[7]

## 2 Recent developments in European law vis-à-vis investment law

Until recently little attention was paid to the interaction between Community law and investment law.

The main reason for this is the existing congruency between the Treaty provisions on the freedom of capital movement and the right to freely transfer capital that is usually guaranteed by BITs. More specifically, the fact that Article 63 TFEU (former Article 56 EC) prohibits all restrictions on the movement of capital and payments between the EU Member States as well as between EU Member States

4 *See 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*, 7.7. 2010, COM (2010) 343 final ('Commission Communication on Investment'), <www.trade.ec.europa.eu/doclib/docs/2010/july/tradoc_146307.pdf> visited on 19 February 2012.

5 *See* Proposal for a Regulation of the European Parliament and the Council – establishing a transitional arrangements for bilateral investment agreements between Member States and third countries, 7.7.2010, COM(2010) 344 final, <www.trade.ec.europa.eu/doclib/docs/2010/july/tradoc_146308.pdf>, visited on 19 February 2012.

6 *See e.g.*, *UNCTAD World Investment report 2011*, <www.unctad-docs.org/files/UNCTAD-WIR2011-Full-en.pdf>, visited on 19 February 2012.

7 Since this contribution covers the pre- as well as post-Lisbon Treaty era, the terms 'Community law', 'European law' and 'EU law' are used interchangeably. This is also the case for the terms 'EC', 'Community' and 'EU'.

and third countries[8], provides a further basis for this congruency. Indeed, Article 63 TFEU aims to achieve the same as one of the essential purposes of a BIT, namely, to guarantee the free transfer of capital without restrictions and undue delay.[9] In addition, Community law, and in particular the functioning of the internal market is based on the fundamental notion of non-discrimination and the understanding that restrictions and exceptions to the free movement of capital should be limited as much as possible.[10] Accordingly, also investors of third states can equally profit from the free movement of capital within the EU but also vis-à-vis third states.

Moreover, in the absence of a specific EU competence for FDI or for the conclusion of BITs until the Lisbon Treaty entered into force on 1 December 2009, most EU Member States have over the past decades concluded approximately 1,200 BITs in order to promote and protect the investments of their investors.[11]

8 Article 63 TFEU reads as follows:
"1. Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.
2. Within the framework of the provisions set out in this Chapter, all restrictions on payments between Member States and between Member States and third countries shall be prohibited."

9 *See* for example the Dutch model text provision which reads as follows:
"Article 5
The Contracting Parties shall guarantee that payments relating to an investment may be transferred. The transfers shall be made in a freely convertible currency, without restriction or delay. Such transfers include in particular though not exclusively:
a) profits, interests, dividends and other current income;
b) funds necessary
(i) for the acquisition of raw or auxiliary materials, semi-fabricated or finished products,
or
(ii) to replace capital assets in order to safeguard the continuity of an investment;
c) additional funds necessary for the development of an investment;
d) funds in repayment of loans;
e) royalties or fees;
f) earnings of natural persons;
g) the proceeds of sale or liquidation of the investment;
h) payments arising under Article 7."

10 *See further:* C. Barnard, *The Substantive Law of the EU: The four freedoms*, 3rd ed. (Oxford University Press, Oxford, 2010) pp. 559 *et seq*.

11 Germany has concluded the most BITs of all EU Member States; according to E. Denza, *op cit.*, Germany has concluded 147, France 103, UK 102, the Netherlands 72 BITs. However, it should be noted that various calculations exist which differ slightly. For instance, according to my information the Netherlands has signed 98 BITs of which 91 are actually in force.

Accordingly, two legal regimes have existed – fairly independently – next to each other: one based on the network of BITs of the EU Member States concluded with third states and thus governed by public international law; the other established and governed by Community law provisions. This parallelism between international investment law and Community law has gradually been changing into an increasing interaction between both legal regimes due to recent judgments of the ECJ and the entering into force of the Lisbon Treaty.

However, it should be noted that this interaction is asymmetric in the sense that Community law claims supremacy over the BITs and the relevant public international law rules and principles.[12] Accordingly, the interaction between international investment law and Community law is marked by a struggle of supremacy between these two legal orders. This struggle on the hierarchy of norms is similar to the one that recently took place between UN law and Community law, and which the ECJ decided in *Kadi*[13] to be in favour of Community law.

The increasing influence of EU law on international investment law will be highlighted by discussing the following three aspects in more detail: (i) the ECJ's recent judgments on Member States' BITs, (ii) the new FDI competence of the EU and (iii) the specific situation of intra-EU BITs.

## **2.1** The BIT judgments of the ECJ

### **2.1.1** The capital transfer clause judgments

Since the terrorist attacks of 9/11 the need to control and, if necessary, restrict the free movement of capital has become an important tool in the 'war on terrorism', in particular, against the financing of terrorists and of their activities.[14] Thus, in the past decade the UN Security Council has adopted numerous Resolutions that freeze world-wide the financial assets of individuals and organizations that are suspected of sponsoring terrorism.[15] The EU has been both implementing these UN Security Council Resolutions as well as adopting its own autonomous freezing measures.[16] Indeed, in previous EC and EU Treaty revisions former Articles 301, 60 EC have been introduced to provide for a specific legal basis for the EU to adopt

12 *Supra* note 1.

13 ECJ, Joined cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation* v *Council and Commission,* [2008] ECR I-6351. *See generally:* N. Lavranos, 'UN Sanctions and Judicial Review, 76 *Nordic Journal of International Law (*2007) pp. 1-18; *idem*, 'Judicial Review of UN Sanctions by the ECJ', 78 *Nordic Journal of International Law* (2009) pp. 343-359.

14 *See e.g.,* V.D. Comras, *Flawed Diplomacy – The UN & The War on Terrorism* (Potomac Books, Washington, 2010).

15 UN SC sanctions, <www.un.org/sc/committees/>, visited on 19 February, 2012.

16 EU sanctions, <www.ec.europa.eu/external_relations/cfsp/sanctions/index_en.htm>, visited on 19 February, 2012.

freezing measures of which the EU has made ample use of. Similarly, the ECJ and the Court of First Instance (CFI) have built up a substantial jurisprudence on the validity of such freezing measures and the conditions for their application.[17]

Obviously, in order to ensure the effectiveness of the freezing measures it is important that they are implemented with immediate effect by all Member States. In this context, the European Commission started to look into the existing BITs of the EU Member States and identified the free transfer of capital clause[18] as a significant obstacle for the immediate implementation of such freezing measures.

If EU Member States were required to restrict the capital flow between them and third states with which they have concluded BITs in order to implement freezing measures imposed by the UN and/or EU, the EU Member States would violate their obligation under the BITs. Alternatively, if they would decide not implement the restriction on the free transfer of capital in order to honour their BIT obligation they would fail to fulfil their obligations under UN law and/or EU law.

The European Commission considered a lack of an explicit legal basis in the EU Member States' BITs that would allow the imposition of immediate freezing measures as being in conflict with the Community law obligations of the EU Member States – even if the Council has not taken any specific freezing measures. More specifically, the European Commission based its claim on former Article 307 EC [now Article 351 TFEU]. On the one hand, former Article 307(1) EC states that existing international obligations of a Member State prior to its accession to the EU shall not be affected by Community law. On the other hand, former Article 307(2) EC obliges EU Member States to eliminate any incompatibilities between their international and Community law obligations in favour of Community law.[19] The European Commission argued that the fact that Community law explicitly allows

17 *See* the most recent judgment of the General Court (formerly CFI) on freezing measures: Case T-85/09, *Kadi* v. *Commission and Council*, judgment of 30 September 2010, <www.curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en>, visited on 19 February 2012, which is now on appeal at the ECJ. The case is registered as C-584/10 P; *See generally:* M.Cremona, F. Francioni, S. Poli (eds), 'Challenging the EU Counter-terrorism measures through the courts', *EUI Working Papers*, AEL No. 2009/10, <www.cadmus.eui.eu/dspace/bitstream/1814/12879/3/AEL_2009_10.pdf>, visited on 19 February, 2012.

18 *See supra* note 9 for the text of the transfer clause in the Dutch model BIT.

19 *See* on the scope of Article 307 EC: J. Terhechte, 'Article 351 TFEU: The Principle of Loyalty and the Future Role of the Member States' Bilateral Investment Treaties', <www.papers.ssrn.com/sol3/papers.cfm?abstract_id=1638357>, visited on 19 February 2012; R. Schütze, 'EC Law and International Agreements of the Member States – An Ambivalent Relationship?', 9 *Cambridge Yearbook of European Legal Studies* (2007) pp. 387-440; Ch. Franklin, 'Flexibility v. Legal Certainty: Article 307 EC and Other Issues in the Aftermath of the Open Skies Cases', 10 *European Foreign Affairs Review* (2005) pp. 79-115; P. Manzini ,'The Priority of Pre-existing Treaties of EC Member States within the Framework of International Law', 12 *European Journal of International Law (*2001) pp. 781-792; J. Klabbers, 'Moribund on Fourth of July? The Court of Justice on Prior Agreements of the

the imposition of restrictions on capital transfer, while the BITs of the Member States do not, constitutes such an incompatibility and thus triggers the obligation of former Article 307(2) EC. According to established jurisprudence of the ECJ, the obligation to eliminate any incompatibility under former Article 307(2) EC entails renegotiating and modifying the pre-accession treaty, or if that fails denouncing that treaty.[20] Since the Member States had not taken sufficient action in this direction, the European Commission started infringement proceedings against Sweden, Austria and Finland, but remarkably not against all other Member States that have concluded many more similar BITs.[21]

Thus, for the first time the ECJ was asked to review the compatibility with former Article 307 EC of BITs concluded by these three EU Member States before their accession to the EU.

The ECJ started off its analysis by accepting that the transfer clauses contained in the BITs are, in principle, consistent with Community law.[22] Similarly, the ECJ acknowledged that in accordance with Article 307(1) EC pre-accession treaties entered into by the EU Member States remain, in principle, unaffected by their subsequent Community law obligations.[23] Nonetheless, the ECJ considered as inconsistent with EC law the lack of any provision in the BITs allowing the EU Mem-

Member States', 26 *European Law Review* (2001) pp. 187-197; *idem.*, *Treaty Conflict and the EU* (Cambridge University Press, Cambridge, 2009).

20 *See e.g.*: ECJ, Case 812/79, *Attorney-General* v. *Burgoa* [1980] ECR 2787; ECJ, Case C-84/98, *Commission* v. *Portugal* [2000] ECR I-5215; ECJ, Case C-62/98, *Commission* v. *Portugal* [2000] ECR I-5171; ECJ, Case C-307/99, *OFT Fruchthandelsgesellschaft* [2001] ECR I-3159; CFI, Case T-2/99, *T. Port* v. *Council* [2001] ECR II-2093; CFI, Case T-3/99, *Bananatrading* v. *Council* [2001] ECR II-2123; ECJ, Case C-203/03, *Commission* v. *Austria* [2005] ECR I-935; ECJ, Case C-216/01, *Budvar* [2003] ECR I-1361; ECJ, Case C-466, 467, 468, 469, 471, 472, 475 and 476/98, *Commission* v. *UK, Denmark, Sweden, Finland, Belgium, Luxemburg, Austria and Germany* (Open skies agreements) [2002] ECR I-9519. *See* N. Lavranos, 'Case-Note on Open Skies Agreements', 30 *Legal Issues of Economic Integration* (2003) pp. 81-91.

21 Originally, the Commission had also targeted Denmark, in particular because of its BITs with Indonesia, which supposedly also violated Article 307 EC. Meanwhile, Denmark terminated that treaty and negotiated a new one that was signed on 22 January 2007, so that the Commission dropped this case. *See* 'Free movement of capital: infringement procedures against Denmark, Austria, Finland and Sweden concerning Bilateral Investment Treaties with non-EU countries', *Europa Press Release RAPID database* (10 May, 2004) IP/04/618, <www.europa.eu/rapid/pressReleasesAction.do?reference=IP/04/618&format=HTML&aged=1&language=EN&guiLanguage=en>, visited on 19 February, 2012.

22 ECJ, Case C-205/06, *Commission* v. *Austria* [2009] ECR I-1301; ECJ, Case C-249/06, *Commission* v. *Sweden* [2009] ECR I-1335, paras. 26-27. The judgment against Finland was rendered half a year later and is registered as Case C-118/07, *Commission* v. *Finland* [2009] ECR I-10889.

23 *Ibid.*, paras. 33-34.

ber States concerned to immediately impose restrictions on the free transfer of capital.

The ECJ stressed that the EC law provisions empower the Council to take unilaterally restrictive measures against third states, which may include also states with which Austria, Sweden and Finland have concluded BITs.[24] More specifically, the ECJ emphasized that in order to be effective, such restrictive measures must be applied immediately by all EU Member States.[25] Further, the ECJ was not convinced that the various international law mechanisms put forward by Austria, Sweden and Finland, such as suspension, re-negotiation or denouncement of the BITs, would guarantee that restrictive measures adopted by the Community could be immediately and effectively implemented.[26] In other words, the ECJ was not persuaded that the EU Member States concerned would be able to fulfil their obligations under Article 307(2) EC. Accordingly, the ECJ concluded that the discrepancy between the BITs and the relevant EC law provisions regarding the possibility of imposing restrictions constitutes an incompatibility within the meaning of Article 307(2) EC, which must be eliminated by the EU Member States concerned.[27] The Court reached this conclusion despite the fact that the Council had not yet taken any freezing measures against the countries with which the three EU Member States have concluded BITs.

These judgments of the ECJ on the relationship between pre-accession BITs and subsequent Community law obligations are of fundamental importance because they have significant repercussions for the EU Member States, third states and the investments undertaken within the framework of these BITs.

First, the ECJ made it clear that EC law remains the 'supreme law of the land' for the EU Member States, which cannot be set aside by other international legal obligations even if predating their EC/EU accession. Hence, the ECJ has virtually eliminated the possibility for EU Member States to rely on Article 307(1) EC as a justification for refusing to fulfil conflicting EU law obligations.

Second, the development and application of the new 'hypothetical incompatibility' test is of particular significance because it expands the obligations of the EU Member States to eliminate perceived conflicts between their pre-accession treaties and Community law obligations at a stage when a conflict has not even materialized. Whereas the general obligation of eliminating conflicts between pre-accession treaties with subsequent EC law obligations can be accepted from the point of view of preserving the autonomy of the Community legal order and its uniform application, the imposition of the obligation to denounce pre-accession treaties even in case of hypothetical conflicts with Community law goes much

24 *Ibid.*, paras. 35-36.

25 *Ibid.*, paras. 36-37.

26 *Ibid.*, paras. 38-40 and paras. 39-41.

27 *Ibid.*, para. 45.

too far.[28] In my view, the burden it imposes on the EU Member States and third states is disproportionate. This is particularly so because the ECJ failed to provide convincing arguments why Austria, Sweden and Finland would not be able to effectively suspend their BITs by invoking, for instance, the *clausula rebus sic stantibus* principle as enshrined in Article 62 of the Vienna Convention on the Law of Treaties (VCLT).[29] This generally accepted principle of public international law provides the possibility of suspending a treaty in case of unforeseen circumstances,[30] thereby enabling the EU Member States to fulfil their Community law obligations.

Moreover, while it is true that the imposition of restrictions on capital and payments once decided should be implemented immediately in order to retain their effectiveness, at the same time it cannot be denied that such decisions normally are prepared months before and need to pass many political and legislative hurdles at the UN, EU and national levels. This should give EU Member States sufficient time to start re-negotiating their BITs or at least inform the third state concerned that the BIT in question will be affected by upcoming Community legislation. In this way, the EC Member States would have sufficient time to find a practical solution by protecting the investments of their 'own' investors covered

28 The ECJ has continued to expand the concept 'hypothetical incompatibility' by two recent judgments: ECJ, Case C-45/07, *Commission* v. *Greece* (IMO) [2009] ECR I-701; ECJ, Case C-246/07, *Commission* v. *Sweden* (PFOS), [2010] ECR I-3317.

29 Article 62 VCLT reads as follows:

"Article 62 (Fundamental change of circumstances)

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:
   (*a*) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and
   (*b*) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.
2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:
   (*a*) if the treaty establishes a boundary; or
   (*b*) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.
3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty."

30 *See further* M. Shaw, *International Law* (Cambridge University Press, Cambridge, 2008) pp. 950-952; A. Vamvoukos, *Termination of Treaties in International Law: The Doctrine of Rebus Sic Stantibus and Desuetude* (Clarendon Press, Oxford, 1985); ICJ, *Fisheries Jurisdiction Case (Germany v. Iceland)*, Merits, 1973 ICJ Rep. 56 (2 February 1973), <www.icj-cij.org/docket/files/56/10713.pdf>, visited on 19 February 2012.

by the BITs concerned and respecting the legitimate interests of the third states and the investments of 'their' investors, while at the same time demonstrating their willingness to implement their Community law obligations.

Instead, the ECJ has opted for putting Community law first under any circumstances. Indeed, this is not surprising because it is in line with the ECJ's recent jurisprudence in *MOX Plant*[31] and *Kadi*[32] in which the Court rejected the idea that international law obligations could supersede or modify existing Community law obligations of the EU Member States.[33]

In addition and as mentioned above, BITs typically provide for the use of international arbitral tribunals for solving disputes between investors and host-states, but also between Contracting Parties of BITs.

While the ECJ has yet to pronounce its position on the relationship between international investor-host state arbitration and Community law,[34] the ECJ was very clear in its *MOX Plant* judgment that it does not accept that state-to-state international arbitral tribunals could find themselves in a position to interpret and apply Community law, thereby potentially undermining the uniformity and consistency of Community law as well as endangering the exclusive jurisdiction of the ECJ.[35]

It is for this reason that the ECJ has developed and applied the 'hypothetical incompatibility' concept in such an extensive manner. In other words, the ECJ is afraid that its exclusive jurisdiction as enshrined in former Article 292 EC [now Article 344 TFEU] to authoritatively interpret and apply Community law is progressively undermined by the ongoing proliferation of international courts and (arbitral) tribunals.[36]

This is also echoed in the sparse jurisprudence of the ECJ regarding commercial arbitration established under national law. In these cases, the ECJ ruled that national arbitral tribunals cannot be considered to be ordinary courts and tribu-

31 ECJ, Case C-459/03, *Commission* v. *Ireland* [2006] ECR I-4635.

32 *Supra* note 13.

33 *See further:* N. Lavranos, 'Revisiting Article 307 EC: The untouchable core of fundamental European Constitutional Law values', in P. Carrozza, F. Fontanelli, G. Martinico (eds.), *Shaping the rule of law through dialogue: international and supranational experiences* (Europa Law Publishing, Groningen, 2010) pp. 119-146.

34 *See* extensive analysis by N. Lavranos, 'Is an international investor-to-state arbitration system under the auspices of the ECJ possible?', <papers.ssrn.com/sol3/papers.cfm?abstract_id=1973491>, visited on 19 February 2012.

35 *See* on this point N. Lavranos, 'The MOX plant and IJzeren Rijn disputes: Which court is the supreme arbiter?', 19 *Leiden Journal of International Law* (2006) pp. 223-246.

36 *See* further: N. Lavranos, 'The ECJ's relationship with other international courts and tribunals', in K. Hagel-Sorensen, U. Haltern, H. Koch, J. Weiler (eds.), *Europe – The New Legal Realism – Essays in Honour of Hjalte Rasmussen*, (Djof Publishing, Copenhagen 2010), pp. 393-411.

nals in the sense of former Article 234 EC [now Article 267 TFEU] and thus cannot request preliminary rulings from the ECJ.[37] Moreover, the ECJ is concerned about the danger that arbitral awards that fail to reflect applicable Community law may run the risk of being annulled or not recognized and enforced by national courts of the Member States.[38]

More recently, in *Opinion 1/09* the ECJ once again limited the freedom of Member States to create an international court – in this case for patent disputes between private parties – outside the preliminary ruling system as established by the EU Treaties, i.e. outside the ultimate and final control of the ECJ.[39]

#### 2.1.2 *Commission* v. *Slovak Republic:* recognition of pre-accession BIT obligations

Besides the three capital transfer clause judgments just discussed, the ECJ recently rendered another judgment on the relationship between a pre-accession Member State BIT and EU law.

In this case,[40] the European Commission brought the Slovak Republic before the ECJ arguing that an exclusive right for transmission of energy into the Slovak electricity grid system granted to a Swiss company was in violation of EU law, which requires non-discriminatory access to all European companies. Consequently, the European Commission requested from the Slovak Republic that it terminates that contract with the Swiss company. The Slovak Republic refused to

37 *See e.g.,* ECJ, Case C-125/04, *Denuit & Cordenier* v. *Transorient* [2005] ECR I-923; ECJ, Case 102/81, *Nordsee Deutsche Hochseefischerei* [1982] ECR 1095, paras. 10-12.

38 ECJ, Case C-126/97, *Eco Swiss* v. *Benetton* [1999] ECR I-3055. *See also*: Court of The Hague, *Marketing Displays International Inc.* v. *VR,* 24 March 2005 regarding a case concerning the enforcement of three U.S. arbitral awards. The Court referred to *Eco Swiss* and found that it could annul an award if it conflicts with public policy. The Court concurred with the judgment of the President of the District Court of The Hague that the licensing agreement at issue was contrary to Article 81(1) EC (now 101 TFEU) and refused to enforce the arbitral award. *See also*: Cour d'Appel Paris, *Thales Air Defence B.V* v. *GIE Euromissiles, EADS France and EADS Deutschland GmbH*, 18 November 2004, which held that an arbitrator is not considered to have breached his/her *prima facie* duty to raise competition law issues *ex officio* if the competition law issues concerned were so intricate that they could not be readily detected by the arbitrator at the time of rendering the award in question. *See* G. Blanke, 'Defining the Limits of Scrutiny of Awards Based on Alleged Violations of European Competition Law: A Réplique to Denis Bensaude's Thales Air Defence BV v. GIE Euromissile', 23 *Journal of International Arbitration* (2006) pp. 249-258.

39 ECJ, Opinion 1/09, *Patent Court,* 8 March 2011,<www.curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en>, visited on 19 February 2012.

40 ECJ, Case C-264/09, *Commission* v. *Slovak Republic*, judgment of 15 September 2011, <www.curia.europa.eu/jcms/jcms/j_6/>, last visited 19 February 2012.

do so, arguing that the contract is protected under the Swiss-Slovak BIT that was concluded in 1990 and the European Energy Charter (ECT).[41] Accordingly, a termination of this contract would make the Slovak Republic liable to pay compensation for damages caused to the Swiss company.

Since the Swiss-Slovak BIT was concluded before the accession of the Slovak Republic to the EU, this BIT falls within the scope of former Article 307 EC [now Article 351 TFEU]. Hence, the question arose whether this BIT and the obligations flowing from it are immune from EU law obligations that arose after the accession of Slovak Republic to the EU, or whether the Slovak Republic is required to let EU law prevail, thereby being forced to violate its international law obligations and consequently pay damages.

The ECJ, following the Advocate General, decided in a straight and short judgment that:

> "51 In the light of the foregoing, the Court finds that the preferential access granted to ATEL may be regarded as an investment protected by the Investment Protection Agreement and that, *under the first paragraph of Article 307 EC, it cannot be affected by the provisions of the EC Treaty*.
>
> 52 In those circumstances, it must be held that, *even if it were to be assumed that the preferential access granted to ATEL were not compliant with Directive 2003/54*, that *preferential access is protected by the first paragraph of Article 307 EC*."[42] [emphasis added].

This judgment is of particular importance as it shows that there is a limit to the supremacy of EU law in the sense that previously assumed obligations under public international law, in this case under the Swiss-Slovak BIT, by the EU Member States are not always superseded by EU law obligations – even if the international law obligations are contrary to EU law. Indeed, this is a significant clarification and narrowing down of the sweeping statements made by the ECJ in the transfer of capital clause judgments discussed above.

More generally, the question arises whether this judgment is limited to pre-accession BITs, which would mean that only Member States that acceded to the EU more recently would benefit from this judgment, or whether it could be applied in analogy to all Member States' BITs that were in force before the entering into force of the Lisbon Treaty, i.e. before the transfer of competence on FDI to the EU.

In my view, and as will be explained below, the transfer of the FDI competence must be considered as fundamental and major change of the legal situation, which can be compared to the change of the legal obligations of a state when

41 The text of the Energy Charter Treaty is available at <www.encharter.org/index.php?id=7>, visited on 19 February 2012.

42 *Ibid.*

it joins the EU. In addition, limiting the application of this judgment to pre-accession BITs would establish a discrimination vis-à-vis the original Member States such as Germany, which signed the first ever BIT in 1959 and the following years. Therefore, in my view, this judgment and the underlying logic of it should be applied also to all Member States' BITs, including the BITs concluded between Member States and third states (so-called extra-EU BITs) that were in place before the entering into force of the Lisbon Treaty.

### 2.2 The new EU competence regarding FDI under the Lisbon Treaty

The second reason why European law increasingly interacts with international investment law is the entry force of the Lisbon Treaty on 1 December 2009. More specifically, Article 207 TFEU (former Article 133 EC) for the first time incorporates foreign direct investment (FDI) into the exclusive common commercial policy (CCP) competence of the European Union.[43]

Another innovation that has been introduced by the Lisbon Treaty, and which is important in the present context, is the expansion of the co-decision procedure regarding Article 207 TFEU. Prior to the Lisbon Treaty, the European Parliament (EP) had virtually no say in the CCP. Accordingly, the extension of the co-decision procedure (now called the "ordinary legislative procedure", Art. 294 TFEU) towards the CCP has significantly enhanced the power of the EP. Thus, the Lisbon Treaty has introduced substantial changes that raise a host of questions regarding the existing Member States' BITs and their future relationship vis-à-vis the new competence of the EU and the new powers of the EP.[44] However, the Lisbon Treaty fails to provide for any definition regarding the scope of FDI; nor does it contain any transitional period or provision that could guide this transfer of competence from the Member States to the EU. Therefore, the European Commission considered it necessary to propose a draft Regulation[45] for a transitional regime regarding the situation of existing Member States' BITs and a Communication[46] formulating the key elements of the future Common European Investment Policy (CEIP).[47]

43 *See supra* note 3 for the text of Article 207 TFEU (ex Article 133 EC).

44 *See generally:* A. Dimopoulos, *EU Foreign Investment Law* (Oxford University Press, Oxford, 2011); Ch. Herrmann, 'The Treaty of Lisbon Expands the EU's External Trade and Investment Powers, 14 *American Society of International Law Insight* (2010), <www.asil.org/files/insight100921pdf.pdf>, visited on 19 February, 2012.

45 *See supra* note 5.

46 *See supra* note 4.

47 *See generally:* J. Chaisse, 'Promises and pitfalls of the EU Policy on Foreign Investment – How will the new EU competence on FDI affect the emerging global regime?', 15 *Journal of International Economic Law* (2012), pp. 51-84; R. Leal-Arcas, 'The EU's Trade and Investment Policy after the Treaty of Lisbon', 11 *Journal of World Investment and Trade* (2010) pp. 463-514; Ch. Tietje,' EU-Investitionsschutz- und förderung zwischen

### 2.2.1 Draft EC Regulation

The proposed Regulation can be summarized as follows.

First, it should be noted that the scope of the proposed Regulation solely regulates the transitional regime for BITs between Member States and third states, also referred to as extra-EU BITs. Hence, this Regulation does not cover the situation of intra-EU BITs. This issue is discussed in more detail below.

Second, it is important to underline the fact that the Regulation acknowledges the continuing binding effect of Member States' BITs as matter of public international law, while stating that these BITs should be terminated if the European Commission finds them to be in conflict with the Union *aquis*. For this purpose the European Commission proposes a "conditional authorization" system. In essence, while the European Commission will authorize the maintenance of existing Member States' BITs, it will review them within 5 years after the entry into force of the Regulation. If the European Commission comes to the conclusion that one or more Member States' BIT(s) is/are not in conformity with EU law, the European Commission may withdraw the authorization of maintaining the BIT(s), which would oblige the Member State(s) in question to re-negotiate or terminate the BIT(s) in question.

In the view of most, if not all Member States, the proposed authorization regime severely restricts the investment policy of the Member States.[48] With this proposed Regulation the European Commission would in principle obtain the power to force Member States to terminate their BITs whenever the European Commission finds a conflict with the law of the Union. Or to use the words of a Member State representative: "with this Regulation the European Commission will have a permanent veto on Member States' BITs".[49]

Moreover, this proposed transitional regime is undermining the legal certainty of Member States' BITs, which in turn will cause doubts for investors who rely on the BITs when planning and executing their investments. Thus, it comes as no surprise that the Member States have been very critical regarding the proposed EC Regulation. Instead of the "authorization system" proposed by the European Commission, Member States have been propagating a "replacement system", that is, Member States' BITs need only to be terminated once the EU has concluded and ratified a BIT or FTA with an investment chapter with a particular country

Übergangsregelungen und umfassender europäischer Auslandsinvestitionspolitik', 21 *Europäische Zeitschrift für Wirtschaftsrecht* (2010) pp. 647-652.

48 *See* for an opposite view that supports the European Commission's approach: P.J. Kuijper, 'Foreign Direct Investment: The First Test of the Lisbon improvements in the domain of Trade Policy', 37 *Legal Issues of Economic Integration* (2010) pp. 261-272.

49 A remark made by a Member State representative during a meeting of the Trade Policy Committee.

that provides for at least the same level of protection.[50] Only such a "replacement system" will guarantee a smooth transition of competence from Member States to the EU, thereby ensuring legal certainty for all parties involved.

Indeed, at the end of May 2012, a compromise between the Council, EP and Commission has been reached. This compromise provides for the "replacement system" for all BITs that have been signed before 1.12.2009, i.e. before the entering into force of the Lisbon Treaty, while the "authorization system" is applicable for all post-Lisbon BITs, i.e. those that were signed or ratified by the Member States after 1.12.2009 and for all future BITs that Member States may wish to negotiate and conclude.

### 2.2.2 EC Communication on the future Common European Investment Policy (CEIP)

The scope of this Communication is to set out the main building blocks for a future EU investment policy.[51] From the outset it is interesting to note that the definition of FDI is limited to "investments in which investor acquires a lasting interest in and a degree of control over the undertaking he invests in, in the performance of an economic activity", thus 'portfolio investments' are apparently excluded. This definition is substantially more restrictive compared to the definition of investments typically used in Member States' BITs, which cover all types of investments including portfolio investments.[52]

Second, the EC recognizes that investment relations are a 'two-way street', i.e. in- and outward investments are equally important. This is an important acknowledgement of the recent changes in the global investment climate in that the EU Member States are not only exporting FDI into predominately developing countries, but increasingly become importers of FDI by attracting investments from new players such as Sovereign Wealth Funds controlled by China, the Gulf states and Russia. However, the Communication does not explain how the future EU investment policy would take into account this new development.[53]

The main aim of the European Commission is to provide a level playing field of the highest quality to all EU investors, in which non-discrimination should be

50 *See* Council Conclusion no. 9, adopted by the Council on 25 October 2010, <www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/117328.pdf>, visited on 19 February 2012.

51 *Supra note* 4.

52 Portfolio investments are indirect investments by investors whose only interest in a company's shares is as an investment, rather than holding a stake for management purposes. *See e.g.,* C. McLachlan, L. Shore, M. Weiniger, *International Investment Arbitration* (Oxford University Press, Oxford, 2007) p. 193.

53 *See further* F. Bassan, 'Host States and Sovereign Wealth Funds, between National security and International Law', 21 *European Business Law Review* (2010) pp. 165-201.

a key-element for future EU BITs. At the same time the European Commission argues that a one-size-fits-all model for BITs with third countries is neither feasible nor desirable.

Third, in terms of competence to conclude future EU BITs, the European Commission acknowledges that Articles 63-66 TFEU (free movement of capital provisions) do not contain an explicit competence for the EU to conclude BITs. However, according to the European Commission such a competence would nevertheless exist on the basis of "implied" competence on the basis of the ECJ's *AETR* jurisprudence.[54] Indeed, the European Commission is already negotiating investment chapters to be included in the already on-going FTA negotiations with Canada, India, and Singapore. Similarly, the European Commission has obtained from the Council negotiating mandates to include investment chapters in the "Deep and Comprehensive FTAs (DCFTAs) with Morocco, Egypt, Tunisia and Yemen.[55]

In this context it is interesting to note Article 6(1)(d) of the proposed Regulation for existing Member States' BITs, which allows the European Commission to withdraw an authorization for Member States' BITs, if

> "the Council has not taken a decision on the authorisation to open negotiations on an agreement which overlaps, in part or in full, with an agreement notified under Article 2, within one year of the submission of a recommendation by the Commission pursuant to Article 218(3) of the Treaty."

This provision is commonly referred to as the 'blackmail' provision as the European Commission seems to suggest that if the Council, i.e. the Member States, fail to give the European Commission a certain negotiation mandate for an FTA or stand-alone EU BIT, then the Commission could "punish" Member States for their failure to act by withdrawing its authorization for existing Member States' BITs. It should be emphasized that the EU Treaties do not provide for any legal basis that would allow the European Commission to limit the Council's power regarding negotiating mandates. Accordingly, this kind of provision violates the distribution of competences between the Council and European Commission and, thus for this and other reasons is totally unacceptable to Member States. Indeed, in the May 2012 compromise of the Regulation, the blackmail provision was dropped.

Fourth, and as acknowledged by the European Commission in its Communication on the future European investment policy, the future EU BITs will be largely based on Member States' BITs experience.[56] They will also need to include minimum

54 ECJ, Case 22/70 *AETR* [1971] ECR 263. *See generally* P. Eeckhout, *EU External Relations Law* (Oxford University Press, Oxford, 2011) pp. 149 *et seq*.

55 *See* the results of the Foreign Affairs Council (Trade) held on 14 December 2011, <www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/126937.pdf>, visited on 19 February 2012.

56 *Supra* note 4.

standards for fair compensation and proportionality, which in turn requires also the inclusion of effective dispute settlement options. However, currently, the most commonly used dispute settlement structures are not entirely suited for the EU.

Of course, the EU can use the UNCITRAL rules as well as the Additional Facility rules of the International Centre for the Settlement of Investment Disputes (ICSID). Nonetheless, the European Commission considers it a disadvantage that the EU cannot currently become party to the (ICSID).[57] Therefore, the European Commission is working towards accession of the EU to ICSID, which will be difficult to achieve in the near future.[58] In the meantime, the European Commission refers to the dispute settlement procedures of the Energy Charter Treaty (ECT) as a source of inspiration, which has also been ratified by the EU. The ECT provides for three possible avenues for investor-state arbitration: ICSID, a sole arbitrator or an ad hoc arbitration tribunal established under the rules of UNCITRAL or an application to the Arbitration Institute of the Stockholm Chamber of Commerce (SCC). However, also the Energy Charter is not without problems for disputes involving EU Member States. Indeed, the European Commission has argued that Energy Charter disputes involving the EU and/or Member States should not be resolved by international arbitration but instead by Community law courts or domestic courts of the Member States that are obliged to apply Community law and have the possibility to request preliminary rulings from the ECJ, which is not the case for international arbitral tribunals.[59]

Generally, the European Commission wants to arrive at state-of-the art dispute settlement procedures that focus on better transparency and consistency and predictability of decisions. In particular, the European Commission is considering some sort of appeal system and pre-fixed list of arbitrators, without, however, further fleshing out its ideas.

Finally, regarding international responsibility, the European Commission proposes that it should be the respondent in all cases against the EU and Member States. Currently, discussions are ongoing on how this complex question can be solved. In June 2012 the European Commission presented a draft proposal on this issue (COM(2012) 335 final).

In short, the Communication is formulated in very general and broad terms. The Communication implies that EU competence is fully exclusive and extends to all aspects typically regulated in BITs. In this context, the Communication concludes that the EU should exclusively represent the EU and its Member States internationally with regard to all FDI-issues, including BITs. However, many issues

57 The ICSID rules are available at <www.icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=Rules_Home>, visited on 19 February 2012.

58 *Supra* note 4.

59 *See* discussion at *supra* note 37. *See also* P. Cameron, *International Energy Investment Law* (Oxford University Press, Oxford, 2010) p. 164.

remain untouched in the Communication and therefore need to be expanded, for example, regarding the definition of investor, investments, expropriation regime, dispute settlement procedures, the role of the ECJ vis-à-vis international arbitrators, to name but a few.[60] Also, it remains highly questionable whether the FDI competence of the EU actually encompasses all aspects typically regulated by BITs. This view is shared by the vast majority of Member States. The point has been explicitly raised by the German Constitutional Court in its *Lisbon Treaty* judgment in which it noted:

> "379. The extension of the common commercial policy to 'foreign direct investment' (Article 207.1 TFEU) confers exclusive competence on the European Union also in this area. Much, however, argues in favour of assuming that the term 'foreign direct investment' only encompasses investment which serves to obtain a controlling interest in an enterprise (see Tietje, *Die Außenwirtschaftsverfassung der EU nach dem Vertrag von Lissabon*, 2009, p. 15-16). The consequence of this would be that exclusive competence only exists for investment of this type whereas investment protection agreements that go beyond this would have to be concluded as *mixed agreements*."[61] [emphasis added].

### 2.2.3 The influence of the European Parliament on future Common European Investment Policy (CEIP)

As mentioned above, the Lisbon Treaty not only expanded the competence of the EU by including FDI, and thus arguably BITs, but has also introduces the EP as a new important factor that will shape the future CEIP.

While it is yet too early to predict how the EP will use its new powers in the area of the CCP, the first (draft) reports by the Committee of International Trade (INTA) of the EP indicate that the EP has very different views compared to those of the Council. Regarding the transitional regime proposed by the EC, the draft report[62] written by Mr Carl Schlyter (Sweden, Green Party) was particularly distressing as he proposed a sunset clause of 8 years, which would mean that all Member States' BITs would have to be terminated within 8 years. It goes without saying that this is unrealistic. Fortunately, he was narrowly outvoted by the other INTA members, so that the INTA committee[63] and subsequently the whole EP adopted

60 *See* also Council Conclusions of 25 October 2010, *supra* note 50.

61 German Federal Constitutional Court, *Lisbon Treaty*, judgment of 30.6.2009, <www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html>, visited on 19 February 2012.

62 *See* <www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-452.807+01+DOC+PDF+V0//EN&language=EN>, visited on 19 February 2012.

63 *See* <www.europarl.europa.eu/en/pressroom/content/20110411IPR17422/html/Bilateral-investment-less-Commission-authority-easier-EU-level-agreements>, visited on 19

a more realistic position regarding the proposed transitional regime.[64] Nonetheless, the position of the EP is significantly different from that of the Council. After several rounds of informal negotiations between the EP, European Commission and Council, the so-called trilogues,[65] a compromise solution has been found in May 2012.

Regarding the future CEIP, INTA member Mr Arif (France, Socialist Party) presented his report, which was subsequently adopted by the EP. The thrust of it is very clear by emphasizing more transparency, and advocating the inclusion of social and environmental elements in future EU FTA/BITs.[66] Indeed, the EP is calling for a "new balance" in the EU's investment policy that would limit the position of the investor and increase the room for so-called "policy space" for the host state.

Finally, one should also not forget the NGOs, which have already started their campaign against the existing situation of Member States' BITs, while at the same time pushing the EU to use this opportunity to develop a new, more balanced investment policy.[67]

### 2.3 Intra-EU BITs

The third aspect of the new relationship between EU law and investment law concerns the specific issue of intra-EU BITs, i.e., BITs between EU Member States that were concluded before one of the Contracting Party joined the EU as was the case with most former Central and Eastern European countries. Essentially, three problems have been identified by the European Commission with regard to intra-EU BITs:

- the alleged discrimination between EU investors that enjoy the benefits of an existing BIT and investors whose Member States have not concluded a BIT with a certain state;
- intra-EU BITs supposedly form an obstacle to the internal capital market regulated by EU law;

February 2012.

64 *See* <www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0141+0+DOC+XML+V0//EN>, visited on 19 February 2012.

65 *See* on the nature of the so-called trilogues: P. Craig, 'Institutions, Power and Institutional Balance', in P. Craig and G. de Búrca (eds.), *The Evolution of EU Law* (Oxford University Press, Oxford, 2011) p. 58.

66 *See* <www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2011-0141&language=EN>, visited on 19 February 2012.

67 *See, e.g.*, 'Reclaiming public interest in Europe's international investment policy Civil society statement on the future of Europe's international investment policy', issued by numerous NGOs, July 2010, available at <www.tni.org/sites/www.tni.org/files/download/eu_investment_reader.pdf", visited on 19 February 2012. *See* also the website of the Seattle to Brussels network, <www.s2bnetwork.org/>.

- intra-EU BITs carry the possibility that international arbitral tribunals potentially interpret and apply BIT provisions that are similar to EU law, and thus de facto interpret and apply EU law thereby intruding upon the exclusive jurisdiction of the ECJ

The problem of intra-EU BITs is further exacerbated by the fact that several Central and Eastern European Member States have been facing numerous disputes brought under the auspices of intra-EU BITs. These Member States have been arguing that with their accession to the EU in 2004 and 2007 respectively, the intra-EU BITs have been automatically terminated or have been superseded by the supremacy of EU law and thus have become inapplicable. If that would indeed be the case, investors would be unable to rely on intra-EU BITs any longer and international arbitral tribunals would be prevented from exercising their jurisdiction over intra-EU BITs disputes.

Regarding the discriminatory effect, the argument goes as follows: suppose an Irish investor invests in Poland, while Ireland does not have a BIT with Poland and suppose a Dutch investor invests in Poland under the Dutch-Polish BIT, the Irish investor is discriminated by the fact that he cannot enjoy the benefits of a BIT. These benefits concern first of all access to international arbitration, next to access to domestic courts and potentially European courts, and second specific rights in terms of compensation for expropriation, which is still not properly regulated at the European level.

The argument of the European Commission is that this difference in treatment is unacceptable under EU law and thus must be eliminated by terminating or not applying intra-EU BITs. Accordingly, the European Commission has been pushing for the denouncement of all intra-EU BITs.[68] Indeed, it has been reported that Denmark has terminated its BIT with the Czech Republic.[69]

Of course, one could and indeed should argue the other way around: the extra benefits enjoyed by investors that fall under an intra-EU BIT should be extended to all European investors by taking appropriate legislative measures at the European level, rather than eliminating existing rights. In other words, instead of low-

68 *See further* A. Dimopoulos, 'The validity and applicability of international investment agreements between EU Member States under EU and international law', 48 *Common Market Law Review* (2011) pp. 63-93; H. Wehland, 'Intra-EU Investment agreements and arbitration: Is EC law an obstacle?', 58 *International Comparative Law Quarterly* (2009) pp. 297-320; Th. Eilmansberger, 'Bilateral Investment Treaties and EU law', 46 *Common Market Law Review* (2009) pp. 383-429; M. Burgstaller, 'European Law and Investment Treaties', 26 *Journal of International Arbitration* (2009) pp. 181-216; Ch. Söderlund, 'Intra-EU BIT investment protection and EC Treaty', 24 *Journal of International Arbitration* (2007) pp. 455-468.

69 *See* IAReporter 17 July 2009, available at <www.iareporter.com/articles/20090719_2>, last visited 19 February 2012.

ering the protection standards for all European investors, the EU should expand the highest existing protection standard to all European investors. After all, the EU has not obtained exclusive FDI competence from the Member States for the purpose of lowering the standards of protection for investors.

Regarding the anomaly of international agreements between EU Member States, it is understandable that the European Commission is pleading for their phase-out. However, that could only be done if in the meantime those additional rights which intra-EU BITs offer, i.e. the right to compensation in case of expropriation and access to international arbitration, are maintained by adopting European legislative measures. This would require the creation of a specialized European Investment Tribunal and uniform rights and procedures for expropriation and compensation within the EU.

With regard to the endangering of the exclusive jurisdiction of the ECJ, it is obvious that intra-EU BITs have created the real possibility that international arbitral tribunals may end up interpreting and applying Community law, in particular the free movement of capital provisions of Article 63 TFEU *et seq*. Considering the importance the ECJ attaches on the uniform and consistent interpretation and application of EU law, it is clear that the ECJ is reluctant to accept the possibility that other international courts and tribunals, which are unable to request preliminary rulings, are in position to challenge its exclusive jurisdiction. Again, this was recently underlined by the ECJ in its *Opinion 1/09*.[70] Equally, the European Commission as the guardian of the Treaties is strongly defending the ECJ's exclusive jurisdiction. Thus, the creation of a specialized European Investment Tribunal or a stand-alone European investment court analogous to the EFTA court, which is required to follow the ECJ jurisprudence closely, should be considered.[71]

70 *Supra* note 39.

71 The obligation of the EFTA court to follow ECJ jurisprudence can be summarized as follows:

> "It is evident that for the EEA Agreement to work, coordination between the EFTA Court and the ECJ had to be guaranteed. To this end, article 106 of the EEA Agreement establishes an exchange of information system between the two courts. Whenever the EEA Agreement and EC laws are identical, the former will be interpreted according to the jurisprudence of the ECJ/CFI prior to the signing of the EFTA Agreement, without prejudice to later jurisprudence. Under article 3.2 of the ESA/Court Agreement, the EFTA Court shall pay due account to the principles laid down by the relevant rulings by the [ECJ] given after the day of signature of the EEA Agreement and which concern the interpretation of that Agreement or of such rules of the [treaty] in so far they are identical. Moreover, in order to achieve as uniform an interpretation of the EEA Agreement as possible, the agreement establishes additional procedures. According to article 105 of the EEA Agreement, the EFTA Joint Committee shall keep under constant review the development of the case law of the Court of Justice of the European Communities and the EFTA Court. If the EEA Joint Committee is not able to settle the divergence in jurisprudence between the two courts, the contracting parties may agree to request the ECJ

Meanwhile, the legal status of intra-EU BITs has also been dealt with by international investment arbitral tribunals. For example, in the *Eastern Sugar* case adjudicated in 2007, the Czech Republic argued that with its accession to the EU in 2004, the previously concluded BIT with Netherlands had been terminated or superseded by Community law.[72] In the *Eastern Sugar* proceedings the opinion of the European Commission was quoted in the awards as follows. On the one hand, the European Commission claimed that:

> "Based on ECJ jurisprudence [former] Article 307 EC is not applicable once all parties of an agreement have become Member States. Consequently, such agreements cannot prevail over Community law.
>
> For facts occurring after accession, the BIT is not applicable to matters falling under Community competence. Only certain residual matters, such as diplomatic representation, expropriation and eventually investment promotion, would appear to remain in question.
>
> Therefore, where EC Treaty or secondary legislation are in conflict with some of these BITs' provisions – or should the EU adopt such rules in the future – Community law will automatically prevail over the non-conforming BIT provisions.
>
> [...]
>
> The Commission therefore takes the view that intra-EU BITs should be terminated in so far as the matters under the agreements fall under Community competence."[73]

to give ruling on the interpretation of the relevant rules. Protocol 48 to the EEA Agreement stipulates that decisions taken by the EEA Joint Committee under Articles 105 and 111 may not affect the case-law of the Court of Justice of the European Communities. Finally, to foster homogeneity, all EEA contracting parties can be represented in cases before the EFTA Court, and the ECJ/CFI. According to the Statute of the EFTA Court, the Community and the European Commission are represented before the EFTA Court by an agent appointed for each case. They are entitled to submit statements or written observation to the Court. Similarly, according to the EC Statute, the EFTA States and the EFTA Surveillance Authority are represented before the ECJ, and when a national court in EC Member States requests a preliminary ruling from that court, the EFTA states shall be notified and allowed to submit statements of case or written observations to the Court. Furthermore, in light of the homogeneity between EEA law and EU law, and when the ECJ/CFI are addressing EU law of importance for the EEA Agreement, the EFTA Surveillance Authority submits written and/or oral observations.", <www.pict-pcti.org/courts/EFTA.html>, visited on 19 February 2012.

72 *Eastern Sugar B.V.* v. *The Czech Republic,* SCC No. 008/2004, *partial award* (UNCITRAL) (March 27, 2007) (Netherlands/Czech Republic BIT), available at <ita.law.uvic.ca/documents/EasternSugar.pdf>, last visited 19 February 2012.

73 *Ibid.*, pp. 24-25.

On the other hand, the European Commission admitted with regard to existing intra-EU BITs that:

> "However, the effective prevalence of the EU *aquis* does not entail, at the same time, the automatic termination of the concerned BITs, or, necessarily, the non-application of all their provisions.
>
> Without prejudice to the primacy of Community law, to terminate these agreements, Member States would have to strictly follow the relevant procedure provided for this in regard in the agreements themselves. Such termination cannot have a retroactive effect."[74]

The arbitral tribunal found the explanation of the European Commission to be "ambiguous" and not persuasive with regard to the arguments of the Czech Republic. Accordingly, the arbitral tribunal proceeded in deciding the dispute on the basis of the BIT.

Interestingly, in another currently on-going dispute between the Dutch company *Eureko* against the Slovak Republic, the Slovak Republic raised the same argument as in *Eastern Sugar*.[75] In this dispute, the PCA/UNCITRAL arbitral tribunal has invited the European Commission and the Netherlands to submit their views on the legal validity of the BIT between the Netherlands and the Slovak Republic.[76] While the European Commission apparently supports the Slovak Republic by arguing that the BIT is in conflict with Community law and therefore is not applicable any longer, the Netherlands strongly rejects this view arguing that Community law cannot affect the legal status of intra-EU BITs. Moreover, referring to the observation of the European Commission in *Eastern Sugar*, the Netherlands argues that the BIT remains fully legally valid until it has been terminated in accordance with the requirements of the BIT itself.[77]

In October 2010 the arbitral tribunal issued its decision concerning its jurisdiction by rejecting the arguments put forward by the Slovak Republic and the EC by siding with Eureko and the Netherlands. The arbitral tribunal ruled that the BIT is

74 *Ibid.*, pp. 25-26.

75 *See* for details on the *Eureko* dispute: 'Arbitrators selected in Billion dollar UNCITRAL claim against Slovak Republic', *IAReporter*, <www.iareporter.com/articles/20091124_11>, visited on 19 February 2012.

76 *See* 'Arbitrators ask European Commission to weigh in on intra-EU BIT validity as states continue to plead that such treaties lapsed upon EU entry', *IAReporter* of 27 June 2010, <www.iareporter.com/articles/20100701_1>, visited on 19 February 2012.

77 Interestingly, in the course of bilateral consultations between the Slovak Republic and the Netherlands, the Slovak Republic has officially confirmed that the BIT between both countries has not been terminated and thus is legally valid under public international law. At the same time, however, the Slovak Republic has indicated its wish to start discussions on how to deal with the future status of intra-EU BITs.

fully valid and that it thus has jurisdiction to decide the case.[78] With regard to the issue of EU law, the arbitral tribunal stated:

> "283. The fact that, at the merits stage, the Tribunal might have to consider and apply provisions of EU law does not deprive the Tribunal of jurisdiction. The Tribunal can consider and apply EU law, if required, both as a matter of international law and as a matter of German law. This jurisdictional objection therefore is rejected."[79]

The tribunal's award on the merits is expected in 2012. Meanwhile, the Slovak Republic has requested the annulment of this award before a court in Frankfurt, which is the seat of the arbitration. The Frankfurt court rejected all claims by the Slowak Republic.[80] Therefore, it is expected that the Slovak Republic will appeal against that judgment before the highest German Civil Court, hoping that preliminary questions are asked to the ECJ.

Similarly, a Czech national court, which was called upon to annul the arbitral award in the *Binder v. Czech Republic* case came to the same conclusion.[81]

Besides, a new intra-EU BIT dispute has arisen again against the Slovak Republic, *European American Investment Bank AG (Austria) v. Slovak Republic*[82], which also raises the issue of compatibility of intra-EU BITs with EU law.

Meanwhile in the current discussion between the European Commission and the Member States, the European Commission has intensified the pressure on the Member States by giving them two options: either termination of all intra-EU BITs or being sued before the ECJ.[83] It remains to be seen whether, and if so, under which conditions the Member States will bow to the pressure of the European Commission.

78 *Eureko* v. *Slovak Republic*, PCA Award on Jurisdiction (No. 2008-13), 26 October 2010, available at <www.pca-cpa.org/upload/files/E-SR%20Award%20on%20Jurisdiction,%20Arbitrability%20and%20Suspension.pdf>, visited on 19 February 2012.

79 *Ibid*.

80 See for the press release of the German court of 10 May 2012 (in German) <http://www.olg-frankfurt.justiz.hessen.de/irj/OLG_Frankfurt_am_Main_Internet?rid=HMdJ_15/OLG_Frankfurt_am_Main_Internet/nav/d44/d4471596-ad85-e21d-0648-71e2389e4818,e808e04a-9437-31f0-12f3-12b417c0cf46,,,11111111-2222-3333-4444-100000005004%26_ic_uCon_zentral=e808e04a-9437-31f0-12f3-12b417c0cf46%26overview=true.htm&uid=d4471596-ad85-e21d-0648-71e2389e4818>, visited on 25 May 2012.

81 On file with the author.

82 *See* <www.pca-cpa.org/showpage.asp?pag_id=1373>, visited on 19 February 2012.

83 *See* 'EC asks Member States to signal by year's end whether they will terminate their intra EU-investment treaties; spectre of legal action looms', *IAReporter*, 20 October 2010, <www.iareporter.com/articles/20101023_10>, visited on 19 February 2012.

Another alternative, of course, would be that the European Commission considers a uniform European solution in the form of a regulation, which would contain the main elements of the intra-EU BITs and import them into the European legal order, thereby making the intra-EU BITs superfluous. In particular, access to arbitration, uniform standards such as NT, MFN and FET as well as minimum standards for the compensation of damages in case of expropriation would have to be regulated by such regulation.

### 2.4 The future investment chapters in EU FTAs

Meanwhile, it should be noted that the attention of the European institutions and the Member States has already turned towards the future. As mentioned above, the Council – at the request of the European Commission – has adopted negotiation mandates for the European Commission to negotiate an investment chapter that is to be included in the ongoing FTA negotiations with Canada, India and Singapore.[84] These FTA negotiations started before the Lisbon Treaty entered into force, which means that an investment chapter was not included in the original negotiation mandates of the European Commission. However, since it was considered efficient to add an investment chapter to those FTAs, the European Commission requested from the Council a modification of the original negotiation mandates by including an investment chapter.

The mandates of the Council clearly request the European Commission to negotiate an investment chapter that is based on the best practices of the existing Member States' BITs.[85] This means that, among other elements, national treatment (NT), most favoured nation treatment (MFN), fair and equitable treatment (FET), a broad asset-based definition of investments and investor-to-state dispute settlement arbitration systems must be included. The Council also made clear that these FTAs will have to be concluded as mixed agreements. Of course, it remains to be seen whether the European Commission will indeed be able to meet these conditions by the Council.

Indeed, there are a number of issues that have already emerged as being highly problematic.

The first, more general issue, concerns the negotiations with Canada in which the EU is confronted with the NAFTA model that Canada is demanding to be followed for the FTA with the EU.

84 *See* General Affairs Council Conclusions of 12 September 2011, <www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/EN/genaff/124579.pdf>, visited on 19 February 2012.

85 *See* for the text of the mandates, which were apparently leaked <www.s2bnetwork.org/themes/eu-investment-policy/eu-documents/text-of-the-mandates.html>, visited on 19 February 2012.

The second issue that needs to be further fleshed out relates to the questions regarding of who is going to represent the EU and/or Member States in claims of Canadian, Indian or Singaporean investors against the EU/Member States and who is going to pay any awards against the EU/Member States.

In addition and as mentioned above, the Council also approved mandates for the European Commission to negotiate investment chapters to be included in the DCFTAs with Morocco, Egypt, Tunisia and Yemen.[86]

### 2.4.1 The NAFTA "contamination" of the Common European Investment Policy (CEIP)

The selection of Canada as one of the first countries to conclude a FTA with an investment chapter is not an obvious one. Indeed, Canada being an OECD member with a well developed legal system based on the rule of law, most EU Member States did not see the need to sign a BIT with Canada in the past decades. In fact, Canada signed BITs mainly with Central and Eastern European countries after Communism fell when these countries entered a difficult transitional period. However, even more problematic is the fact that Canada's BITs and FTAs are based on the NAFTA model, which is distinctly different compared to the BIT model of the EU Member States. While it is not possible to analyze these differences in detail here, it suffices to point to several important aspects.

Firstly, NAFTA does not use the fair and equitable treatment (FET) standard of EU Member States' BITs but rather the "minimum standard of customary international law" (Article 1105 NAFTA). This change was made by the NAFTA contracting parties after the first NAFTA arbitral tribunals interpreted the level of protection in a way that was not according to the taste of the NAFTA contracting parties. Consequently, they issued an interpretative note in which they modified the NAFTA text by making the minimum standard of customary international law the standard of protection that is to be accorded to investors.[87]

The question immediately arises what standard will be eventually agreed upon by the EU and Canada to be used in their FTA. Clearly, as the Council has emphasized repeatedly, Member States are not inclined to accept a standard that is lower than the best practice of the EU Member States' BITs.

Secondly, NAFTA also differs widely from the EU Member States' BITs concerning the range of exceptions and policy space. In particular, the NAFTA jurispru-

86 *Supra* note 50.

87 *See* for a detailed analysis: J. Stone, 'Arbitrariness, the Fair and Equitable Treatment Standard, and the International Law of Investment', 25 *Leiden Journal of International Law* (2012) pp. 77-107; T. Yalkin, 'The International Minimum Standard and Investment Law: The Proof is in the Pudding', *European Journal of International Law – EJIL-Talk analysis*, 3 August 2009, <www.ejiltalk.org/international-minimum-standard/>, visited on 19 February 2012.

dence has accepted that certain measures do not amount to indirect expropriation.[88] In contrast, while EU Member States' BITs also contain the usual public policy exceptions, compensation must usually be paid, also in case of indirect expropriation. The huge room of manoeuvre of the so-called "policy space" or "regulatory space" offered by NAFTA is seen by the European Parliament and many NGOs as a very attractive feature that should be adopted by the EU and incorporated in its FTAs. The idea is that EU and Member States authorities would obtain more space to impose legislation that otherwise would not be compatible with the FET standard. While this may be attractive from the point of view of legislator, it is of course less attractive for European investors that are investing in Canada and thus may face indirect expropriation measures without being compensated.

So, again the question arises to what extent the EU will copy the NAFTA "policy space" model.

Thirdly, another element worth mentioning is the differences regarding dispute settlement. NAFTA provides for extensive third party intervention by non-disputing parties, i.e. in a case between a Mexican investor against the US, all other NAFTA contracting parties can intervene in the proceedings. Moreover, amicus briefs submissions are standard in NAFTA proceedings and the transparency requirements are considerably higher compared to EU Member States' BITs. Again, it seems that the EP and the European Commission view these NAFTA elements as being worthy of incorporation into EU FTAs.

Of course, one may wonder whether it is indeed preferable for an efficient and effective dispute resolution to allow all 27 Member States, the EP, the European Commission and NGOs to intervene in every dispute.

In short, there is a clear risk of NAFTA "contamination" of the future Common European Investment Policy (CEIP).[89] If these NAFTA elements are indeed introduced, this may offer more policy space for EU and Member States authorities to enact legislation that could negatively affect investors, but this comes with the high price of a considerably lower standard of protection for investors. On top of that, it is fair to expect an intensified politicization of investment disputes and increased involvement of third parties, which in turn will lead to even more polarisation between investors and host states. Clearly, this is not conducive for increasing FDI, which is so badly needed in these times of economic and financial crisis.

88 *See further* R. Edsall, 'Indirect expropriation under NAFTA and DR-CAFTA: Potential inconsistencies in the treatment of state public welfare regulations', 86 *Boston University Law Review* (2006) pp. 931-962.

89 *See also* L. Peterson, 'Some in EU want to slow trade talks with Canada-Fears Canada will take NAFTA route balancing government and business rights', *Embassy*, 5 October 2011, <www.embassymag.ca/page/view/peterson-10-05-2011>, visited on 19 February 2012.

### 2.4.2 Representation and financial apportionment

In the context of finalizing the FTA negotiations on investment chapter between the EU and Canada, India and Singapore, another very important issue has emerged, which needs to be regulated. This issue concerns the representation in disputes that are instituted against the EU and/or Member States on the basis of these FTAs and the financial responsibility and apportionment between the EU and/or Member States in case the EU and/or Member States have to pay an award to an investor. In other words, the question is who is going to represent the EU and/or Member States in such disputes and who is going to pay the award?

Assuming that the future EU FTAs with Canada, India and Singapore will be mixed, this implies that both the EU and the Member States are legally bound by the whole FTA and are thus bound by all rights and obligations that flow from those FTAs. Moreover, considering the fact that in most cases it is not immediately apparent whether the EU and/or the Member States is responsible for the act that has caused the damage to the investor, this makes it necessary that the investor is able to bring its claim against both the EU and the Member State concerned. Stated differently, in most cases one cannot reasonably expect from an investor to make a choice of directing its claim against the EU or the Member State in question, since this carries the risk that the claim will be judged as inadmissible simply because it was directed against the wrong respondent.

In order to avoid such uncertainties and to ensure effective dispute settlement resolution between investors and the EU/Member States, this issue must be regulated in the FTAs. Several solutions are possible.

The first solution, based on the WTO practice of the EU and its Member States and inspired by the solution used in the Energy Charter Treaty (ECT), is that it would be primarily the EU alone that would be defendant in all cases – regardless whether the disputed act falls within the competence of the EU or the Member State concerned. Although, formally speaking the EU and the Member States would determine among themselves who would be the respondent in ECT disputes.[90] Nonetheless, for practicality reasons the European Commission argues that in principle the EU should be respondent in all cases. Similarly, the European Commission argues that it should be the EU which would pay upfront the award and would then enter into negotiations with the Member State concerned as to the exact apportionment of the award between the EU and the Member State. If no agreement is reached, the financial apportionment would eventually have to be decided by the ECJ.[91]

90 *See* the statement of the European Community in Annex ID to the ECT, <www.encharter.org/fileadmin/user_upload/document/Annex_ID.pdf>, visited on 19 February 2012.

91 *See* 'Unpublished Discussion paper gives overview of European Commission Trade department's recent thinking on foreign investment dispute settlement', *IA Reporter*, 9 June 2011, <www.iareporter.com/articles/20110609_5>, visited on 19 February 2012.

The advantage of this solution, which seems to be the preferred one by the European Commission, is that the European Commission remains in control – both at the stage of proceedings and at the stage of implementing and executing the award. It also has the beauty of simplicity and clarity towards the investor, who would not have to worry about the difficulties of correctly delineating the competence between the EU and the Member State and identifying the right respondent. This is also reflected in the proposal by the European Commission (COM(2012) 335 fin).

The disadvantage of this solution from the perspective of the Member State concerned is, however, immediately apparent. The Member State, which in most cases committed or omitted the disputed act, will not be able to explain and defend its position before the arbitral tribunal. Instead, the Member State will have to fully rely on the European Commission's willingness and ability to defend the Member State's action. Generally, that is what one should expect on the basis of the principle of sincere cooperation and mutual trust between the European Commission and the Member State. But what about the situation when the European Commission considers the committed or omitted act of the Member State concerned to be in violation of EU law and/or FTA obligations? In other words, can and will the European Commission defend a Member State against a claim of an investor even though the European Commission actually agrees with the investor? Moreover, would it not in most cases be more advantageous for an investor to bring a claim primarily against the Member State concerned? One advantage would be that the investor could bring arbitration proceedings under the ICSID Convention, which currently is not available for the EU.[92] One advantage of the ICSID Convention is that in case of delay or refusal to execute an award, the investor could seize assets of a Member State more easily than assets of the EU, which in principle enjoys immunity.

For these reasons, the second option seems to be much more appropriate. This option is inspired by the "co-respondent mechanism" that is currently developed by the EU and Council of Europe institutions as part of the EU accession to the European Convention of Human Rights (ECHR).[93] In short and simplified terms, the "co-respondent mechanism" would introduce a system of "shared responsi-

92 The EU – even though not being party to ICSID – could of course use the ICSID Additional Facility rules, which are very similar or could incorporate the most relevant rules into the FTAs. Nonetheless, the Annulment procedure under ICSID would presumably not be possible to use.

93 *See* for a detailed explanation of the "co-respondent mechanism": *Report to the Committee of Ministers on the elaboration of the legal instruments for the accession of the European Union to the ECHR*, CDDH (2011) 009, 14 October 2011, <www.coe.int/t/dghl/standardsetting/hrpolicy/cddh-ue/CDDH-UE_MeetingReports/CDDH_2011_009_en.pdf>, visited on 19 February 2012; *See also* J.-P. Jaqué, 'The accession of the EU to the ECHR', 48 *Common Market Law Review* (2011) pp. 995-1023, in particular 1014 *et seq.*; T. Lock, 'Walk-

bility", which would enable the EU or the Member State concerned to join the proceedings as a "co-respondent" next to the (other) addressee of the claim. Accordingly, whenever, a claim is brought against either the EU or a Member State in which the compatibility of the FTA obligations with EU law, the EU or the Member State concerned could join the proceedings as "co-respondent".

The advantages of this solution are immediately apparent. In the first place, the Member State concerned is able to fully participate in the proceedings and defend its action or inaction, thereby preserving its legal interests. In the second place, having participated directly in the proceedings, the Member State concerned if it lost the case will be less inclined to enter into protracted negotiations or even legal proceedings before the ECJ in order to determine the financial apportionment regarding the payment of the award. In the third place, the investor does not have to worry about the unclear position of the EU vis-à-vis ICSID because it can rely for the execution of the award on the Member State concerned.

In short, the "co-respondent mechanism" offers a superior solution by providing a more appropriate balance between the legitimate interest of the European Commission to play a leading role in disputes against the EU and the legitimate interest of the Member State concerned to defend itself and to fully participate in the proceedings, which most likely will concern an act or omission by that Member State rather than an act of the EU.

In sum, it appears that the specific characteristics of the EU still requires the relevant parties to deal with several complex issues that moreover will have to be acceptable to Canada, India and Singapore.

## 3 Concluding observations

The preceding analysis has shown that one thing is certain: international investment law will never be the same. The "communitarization" of international investment law instigated by the Lisbon Treaty and actively pushed forward by the ECJ has already profoundly affected the legal situation of the Member States' BITs and of European investors.

Firstly, and foremost, the continuing existence of Member States' extra-EU BITs is in serious danger by the Regulation of the European Commission and the anti-BIT attitude of the EP. With the transfer clause judgments in its hands, the European Commission can already now challenge the validity and applicability of existing Member States' BITs. Accordingly, practically all 1,200 Member States' BITs are on the verge of being eliminated, whenever the European Commission considers it fit to take action against the Member States.

ing on a tightrope: The draft ECHR accession agreement and the autonomy of the EU legal order', 48 *Common Market Law Review* (2011) pp. 1025-1054, in particular 1038 *et seq*.

Secondly, and even more uncertain is the position of the intra-EU BITs. The European Commission is using all possible means to force Member States to terminate them, without so far indicating what should come in their place. The fact that new disputes persistently pop up against Member States on the basis of intra-EU BITs proves the fact that there is clearly a gap in EU law, which intra-EU BITs continue to fill. In other words, intra-EU BITs are still needed and therefore cannot simply be terminated, without anything comparable in their place.

Thirdly, the first EU FTAs with Canada, India and Singapore will be of utmost importance because they will have a precedent function. Therefore, the EU and the Member States need to get it right. However, there is a clear danger of NAFTA "contamination" and of significantly moving away from the best practice of the Member States' BITs.

Fourthly, the Common European Investment Policy (CEIP) will have to be developed with great care. The European Commission has consistently stated that it will be "an evolution rather than a revolution". However, it seems that the EP prefers to use its powers for a revolution and for a re-balancing of the CEIP. While the approach of the EP may be laudable and commendable, one must not lose sight of the fact that BITs are there to promote and protect investors and their investments – not less, but certainly not more. Radical calls for termination of existing BITs and rebalancing of current Member States' practice, which have served European investors so well in the past 50 years, naturally scare investors off and out of Europe. In times of tremendous economic and financial crisis, with high rates of unemployment in Europe, the EU clearly needs more rather than less investment in order to combat the crisis.

Finally, the rather unproductive and useless battles between the European Commission, EP and Council as to the precise delimitation of the FDI and BITs competences should be put behind them. Since such delineations are long and protracted exercises that ultimately will be determined by the ECJ on a case-by-case basis, all players involved should accept mixity as a rule.[94] This is even more so, since mixity has been the rule in the CPP for many decades and there is no reason to believe that in the case of FDI this should be any different.[95]

In conclusion, it is to be hoped that "sense and sensibility" will prevail in the EP, European Commission and Council so that Member States' BITs are not lost in transition.

94 *See in particular*, J.A. Bischoff, 'Just a little *BIT* of "mixity"? The EU's role in the field of international investment protection law', 48 *Common Market Law Review* (2011) pp. 1527-1570.

95 *See* for a detailed analysis on the practice of the CCP: R. Leal-Arcas, *Theory and Practice of EC External Trade Law and Policy* (Cameron May, London, 2008).