The European Journal of International Law Vol. 26 no. 3
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# International Investment Law and the European Union: Towards a New Generation of International Investment Agreements

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## Abstract

*For about half a century, the European investment treaty model has been associated with European Union (EU) member states' bilateral investment treaty practice, often referred to as their 'best practices'. Member state bilateral investment treaties, which are liberal instruments strongly protective of investor interests, have remained relatively unchanged over the years, in contrast with their North American counterparts, which have come to represent a new type of investment treaty, cognizant for the first time of the contracting parties' right to regulate. With the entry into force of the Treaty of Lisbon and the exercise of the EU's new competence over the conclusion of treaties covering foreign direct investment, Europe marks its distances with the old approach of the member states and appears eager to set its own 'model'. While broadly in harmony with the new generation of North American investment treaties, the nascent EU policy aims to improve international investment law in innovative ways, targeting both substantive and procedural protections, and leading to a yet newer generation of international investment treaties. The present article explores this new EU standard, which is set to change the face of international investment law as we know it.*

European Union (EU) member states have been among the world's most prolific treaty negotiators with close to half of all concluded bilateral investment treaties (BITs) engaging an EU member state as one of the contracting parties.[1] This intensive activity

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1 European Commission, Investment Protection and Investor-to-State Dispute Settlement in EU Agreements, Fact Sheet, November 2013, at 5. See further Bungenberg and Titi, 'The Evolution of EU Investment Law and the Future of EU-China Investment Relations', in W. Shan and J. Su (eds), *China and International Investment Law: Twenty Years of ICSID Membership* (2014); UN Commission on Trade and Development (UNCTAD), *World Investment Report 2012* (2012), at 85.

 doi:10.1093/ejil/chv040

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on the investment treaty negotiation front has gone hand in hand with the development of strong negotiating BIT models that have deeply marked today's international investment law, at least until the advent of the first new generation investment agreements on the other side of the Atlantic with the US and Canadian Model BITs of 2004.[2] In 2009, when the entry into force of the Treaty of Lisbon signalled the transfer of competence over the conclusion of agreements covering foreign direct investment from the member states to the Union,[3] some member states, such as Germany and the Netherlands, proved reluctant to let go of their tried-and-tested investment treaty models.[4] This insistence on the part of member states on the provisions of their own BIT templates found expression in the terms 'best practices'[5] and the 'gold standard'.[6] However, already in 2010, the European Commission explained that, although 'the principles and parameters [for the negotiations] will be *inspired* by "best practices" that Member States have developed', the Commission itself will establish the 'broad contours of the scope and standards the Union should be setting through international investment negotiations'.[7] In fact, relevant EU documents, including negotiating mandates,[8] statements of principles[9] and, notably, the preliminary treaty versions of the EU–Canada Comprehensive Economic and Trade Agreement (CETA) and the EU–Singapore Free Trade Agreement (FTA),[10] indicate that EU member state model BITs have only a marginal role to play in EU negotiations. The latter appear to follow the trajectory of new generation investment agreements[11] and thus mark a break

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2 Titi, 'The Arbitrator as a Lawmaker: Jurisgenerative Processes in Investment Arbitration', 14(5) *Journal of World Investment and Trade* (2013) 829, at 843ff.

3 Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community 2007, OJ C306, at 1; Treaty on the Functioning of the European Union, as adopted by the Treaty of Lisbon (TFEU) 2010, OJ C83/49, Arts 206–207.

4 E.g., see Lavranos, 'In Defence of Member States' BITs Gold Standard: The Regulation 1219/2012 Establishing a Transitional Regime for Existing Extra-EU BITs: A Member State's Perspective', 10(2) *Transnational Dispute Management* (2013).

5 See, e.g., European Parliament Resolution 2010/2203 of 6 April 2011, OJ 2012 C296 E, paras 9, 18, 19; European Commission, Towards a Comprehensive European International Investment Policy, Communication, COM(2010)343 final, 7 July 2010, at 9, 11.

6 Lavranos, *supra* note 4.

7 European Commission, *supra* note 5, at 11 (emphasis added).

8 E.g., the negotiating directives of 12 September 2011 authorizing the opening of negotiations on free trade agreements with Canada, India and Singapore. See European Union (EU) Council, 3109th General Affairs Council Meeting, Press Release, 12 September 2011, at 13. Another illustration is offered by the EU–US negotiations, see EU Council, Directives for the Negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America, Note, 17 June 2013, para. 23. The document has been leaked at www.bfmtv.com/economie/exclusif-dit-mandat-negociation-europe-etats-unis-540582.html (last visited June 2015).

9 E.g., European Commission, EU and US Adopt Blueprint for Open and Stable Investment Climates, Press Release, 10 April 2012. For another example of an internal document of the European Commission, see Titi, 'EU Investment Agreements and the Search for a New Balance: A Paradigm Shift from Laissez-faire Liberalism Toward Embedded Liberalism?', 86 *Columbia Foreign Direct Investment Perspectives* (2013).

10 EU–Canada Comprehensive Economic and Trade Agreement (CETA) (consolidated text of 26 September 2014), available at trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf (last visited June 2015). Draft EU–Singapore FTA Investment Chapter of October 2014, available at trade.ec.europa.eu/doclib/docs/2014/october/tradoc_152844.pdf (last visited June 2015).

11 Titi, *supra* note 2, at 843ff.

with member states' 'best practices'. More significantly, the international investment law policy elaborated by the EU encourages new formulations of old standards, substantive as well as procedural, responding in part to accusations articulated against the international system of investment protection and, ultimately, taking new generation investment agreements a step further. We are witnessing the decline of the old EU member state 'good practices' and the dawning of a new era, that of the EU's '*better* practices'.

The purpose of the present article is to explore this policy shift in Europe and the move towards this new generation of investment agreements. In order to do this, it will begin by considering developments within the EU with a bearing on the elaboration of its international investment policy, before examining the 'best practices' of the member states. In an ensuing step, the article will turn to the new EU policy. It will start by considering the absence of a concrete negotiating EU model BIT in order to better understand the formulation of the Union's negotiating objectives. Following this inquiry, it will query the new standard of the EU, looking in turn at its substantive and procedural aspects. A final section will conclude.

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## 1 Developments within the EU at the Heart of the Policy Shift

A little background history may be useful to highlight the confluence of reasons that have led to the formulation of a new investment policy in the EU. The entry into force of the Treaty of Lisbon in 2009 marked an important milestone in the elaboration of international investment treaty norms within (and without) the Union. By virtue of Article 207 of the Treaty on the Functioning of the European Union (TFEU), foreign direct investment has come under exclusive EU competence as part of the Union's common commercial policy.[12] Pursuant to Article 2(1) of the TFEU, in the area of its exclusive competence, 'only the Union may legislate and adopt legally binding acts, the member states being able to do so themselves only if so empowered by the Union or for the implementation of Union acts'.[13] This transfer of competence was born out of a wish to offer a robust basis for the Union's external economic action and in order to enhance its role in the elaboration of international investment norms.[14]

The addition of the three words 'foreign direct investment' in Article 207 of the TFEU triggered a fierce debate regarding the scope of the new competence, actively engaging EU institutions, national ministries (the old repositories of the investment treaty negotiating power) and academia. It raised, in particular, questions such as whether portfolio investments are also covered by the competence and the concomitant issue of whether

[12] TFEU, *supra* note 3.

[13] Indeed, EU member states are empowered to conclude investment agreements for a transitional period in accordance with the provisions of EU Regulation 1219/2012 of 12 December 2012, OJ 2012 L351/40, Art. 7ff; Bungenberg and Titi, *supra* note 1.

[14] Bungenberg and Hobe, 'The Relationship of International Investment Law and European Union Law', in M. Bungenberg *et al.* (eds), *International Investment Law: A Handbook* (2015) 1602; Bungenberg and Titi, *supra* note 1.

the new treaties will be concluded as mixed agreements.[15] Although it is beyond the purview of the present contribution to discuss the transfer of competence, it is worth noting that at least at some stage the European Commission perceived the latter as being comprehensive and exclusive,[16] an opinion that jarred with the one advocated by some member states.[17] It is possible that, despite any theoretical underpinnings to the contrary, the new competence could de facto prove to be exclusive and encompassing of all types and aspects of investment, with a final decision of the Court of Justice of the European Union giving its seal of approval to such an apportioning of competences. In any event, it will be interesting to monitor closely the conclusion of the first standalone BITs of the Union – such as the prospective BITs with China[18] and Myanmar[19] – as opposed to free trade agreements (FTAs), which may include policy aspects undisputedly not exclusive.

Even before the entry into force of the Treaty of Lisbon, member states did not possess a comprehensive exclusive competence where foreign investment was concerned. The EU had an exclusive competence over the conclusion of treaties that covered the pre-establishment phase (market access),[20] which in practice invited EU involvement in the elaboration of international investment law norms.[21] During this time, the member state competence extended to the post-establishment phase – in other words, to the protection of investment already established in the host country.[22] In line with this division of competences in the pre-Lisbon era, and despite some rare exceptions that apparently did not attract any attention,[23] the

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[15] E.g., M. Bungenberg, J. Griebel and S. Hindelang (eds), *European Yearbook of International Economic Law 2011, Special Issue: International Investment Law and EU Law* (2011); Bungenberg, 'Going Global? The EU Common Commercial Policy after Lisbon', in C. Herrmann and J.P. Terchechte (eds), *European Yearbook of International Economic Law 2010* (2010) 123; Juillard, 'Investissement et droit communautaire: A propos des accords bilatéraux d'investissement conclus entre Etats membres et pays tiers', in J.-C. Masclet *et al.* (eds), *L'Union Européenne: Union de droit, union des droits, Mélanges en l'honneur du Professeur Philippe Manin* (2010) 445.

[16] European Commission, Proposal for a Regulation Establishing a Framework for Managing Financial Responsibility Linked to Investor-State Dispute Settlement Tribunals Established by International Agreements to Which the European Union Is Party, Doc. COM(2012)335 final, 2012/0163(COD), 21 June 2012, at 3; European Parliament Resolution 2013/2674(RSP) of 9 October 2013, not reported yet, recital H. See further European Commission, Public Consultation on Modalities for Investment Protection and ISDS in TTIP (Consultation Notice) 2014, available at trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152279.pdf (last visited June 2015), at 1. See also Joint Declaration Annexed to the European Parliament's Legislative Resolution of 16 April 2014 on the Proposal for a Regulation Establishing a Framework for Managing Financial Responsibility Linked to Investor-State Dispute Settlement Tribunals Established by International Agreements to Which the European Union Is Party, Doc. COM(2012)0335-C7-0155/2012-2012/0163 (2014)

[17] E.g., Lavranos, 'The Remaining Decisive Role of Member States in Negotiating and Concluding EU Investment Agreements', in M. Bungenberg, A. Reinisch and C. Tietje (eds), *EU and Investment Agreements* (2013) 165.

[18] Bungenberg and Titi, *supra* note 1.

[19] European Commission, EU and Myanmar/Burma to Negotiate an Investment Protection Agreement, Press Release, Doc. IP/14/285, 20 March 2014.

[20] Bungenberg and Titi, *supra* note 1.

[21] Juillard, *supra* note 15, at 445.

[22] Bungenberg and Hobe, *supra* note 14; Bungenberg and Titi, *supra* note 1.

[23] See, e.g., Finland's Model BIT (2002), Art. 3.

member states concentrated on the conclusion of treaties covering only post-establishment protections and not containing any provisions concerning market access.[24] At the same time, the EU engaged in the negotiation of FTAs covering market access and the pre-establishment phase, more generally.[25] Thus, while the member states 'focused on the promotion and protection of all forms of investment, the Commission elaborated a liberalisation agenda focused on market access for direct investment'.[26]

This 'liberalisation agenda' expressed in the Union's FTAs has, in the last decade, been based on the so-called 'EU Minimum Platform on Investment', an internal document that has purportedly served as a negotiating template for EU FTAs.[27] This model, which is the equivalent of a model BIT for trade negotiations, differs qualitatively from the approach adopted by EU member state BITs, in that it appears to be inspired by different principles and to take into account the parties' right to regulate.[28] A preliminary version of the platform[29] seems to indicate that the final document would contain not only general exceptions modelled after Article XX of the General Agreement on Tariffs and Trade (GATT)[30] but also articles targeting the avoidance of lowered environmental and social standards and laws concerning the protection and promotion of cultural diversity.[31]

Following its adoption, the EU Minimum Platform on Investment served as a basis for the negotiation of a number of FTAs, such as the 2008 EU–CARIFORUM Economic Partnership Agreement (EPA)[32] and the 2010 EU–South Korea FTA.[33] Indeed, these treaties contain provisions on the non-lowering of environmental, safety, and labour standards,[34] references to the fight against corruption and the International Labour

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[24] European Commission, *supra* note 5, at 5.

[25] *Ibid*., at 5. See Bungenberg and Hobe, *supra* note 14; Bungenberg and Titi, *supra* note 1.

[26] European Commission, *supra* note 5, at 11.

[27] EU Council, Minimum Platform on Investment, Doc. 15375/06, 27 November 2006. The platform has never been made publicly available, and requests for it have always been rejected. See, e.g., EU Council, Working Party on Information, Coreper/Council, Public Access to Documents, Doc. 6456/10, 15 March 2010, Annex; Draft Reply Adopted to Confirmatory Application No. 06/c/01/10 Made by E-mail on 11 January 2010, pursuant to Article 7(2) of Regulation (EC) No. 1049/2001, for Public Access to Document 15375/06, available at register.consilium.europa.eu/pdf/fr/10/st06/st06456.fr10.pdf (last visited June 2015). Some conclusions may also be drawn from a leaked document: European Commission, Note for the Attention of the 133 Committee, Minimum Platform on Investment for EU FTAs: Provisions on Establishment in Template for a Title on 'Establishment, Trade in Services and E-commerce', Doc. D(2006)9219, 28 July 2006, available at www.iisd.org/pdf/2006/itn_ecom.pdf (last visited June 2015).

[28] C. Titi, *The Right to Regulate in International Investment Law* (2014).

[29] European Commission, *supra* note 27.

[30] *Ibid*., at 7–8. General Agreement on Tariffs and Trade 1994, 55 UNTS 194.

[31] European Commission, *supra* note 27, at 11; see also 3 of the Explanatory Memorandum.

[32] Colin M. Brown, 'The European Union and Regional Trade Agreements: A Case Study of the EU-Korea FTA', in C. Herrmann and J.P. Terchechte (eds), *European Yearbook of International Economic Law 2011* (2011) 297, at 302. EU–CARIFORUM Economic Partnership Agreement (EU–CARIFORUM EPA), OJ 2008 L 289/I/3.

[33] Bungenberg and Hobe, *supra* note 13. EU–South Korea Free Trade Agreement (EU–South Korea FTA), OJ 2011 L 127/6.

[34] EU–CARIFORUM EPA, supra note 32, Art. 73; see also EU–South Korea FTA, *supra* note 33, Art. 1.1.

Organization,[35] general exceptions modelled after Article XX of the GATT[36] and security exceptions.[37] The EU–South Korea FTA appears to be the first EU document to explicitly refer to the right to regulate.[38]

It is noteworthy that if EU FTAs, covering market access, are deferent to the state's right to regulate, they operate in the field of liberalization and are therefore more intrusive than member states' BITs that only cover investment protection once such investment has been admitted into the host state. Likewise, if the elaboration of new generation international investment treaties allowing host states ampler policy space than their predecessors has taken first shape in North America,[39] both the USA and Canada offer market access through their investment agreements – in other words, these agreements are also more 'invasive' than EU member state BITs. These treaties also generally incorporate country-specific exceptions in the form of negative or positive lists defining clearly the scope of the national and most-favoured-nation treatment with respect to specific sectors or activities.[40]

In July 2012, the European Commission considered that the principles that inspired EU FTAs should also inspire the new EU investment policy. In an internal document on investment protection, the right to regulate, sustainable development and human rights, the Commission suggested that future EU investment agreements should safeguard states' right to regulate, in the same manner that EU FTAs do.[41] The EU's desire to extend the right to regulate to its investment treaties is not surprising. Most agreements for which negotiations are currently afoot are prospective FTAs with investment chapters. The EU would be unlikely to digress from its established FTA negotiating canons with the mere pretext that an investment chapter has now been added to the agreement. In theory, it would be possible for the investment chapter to stand 'apart' in the FTA, not forming a harmonious continuum with the rest of the treaty.

The possibility of such 'separateness' of the investment chapter was plainly underlined when, at the end of 2013, after the public announcement that the EU–Singapore FTA had been concluded, it transpired that what in fact had been concluded was an investment chapter-*free* FTA – in other words, the FTA minus the investment chapter.[42] However, even if an investment chapter stands 'separate' within a comprehensive FTA, the principles that guide the rest of the agreement may indirectly find application

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35 EU–CARIFORUM EPA, *supra* note 32, Art. 72; EU–South Korea FTA, *supra* note 33, Art. 13.4(3).

36 E.g. EU–CARIFORUM EPA, *supra* note 32, Art. 224; EU–South Korea FTA, *supra* note 33, Arts 2.15, 7.50, 8.3.

37 E.g. EU–CARIFORUM EPA, *supra* note 32, Art. 225; EU–South Korea FTA, *supra* note 33, Art. 15.9; see also Art. 2(7) of Annex 9.

38 EU–South Korea FTA, *supra* note 33, Art. 7.1(4); see also the preamble and Arts 13.3, 13.4.3, 13.5.2 and 13.7.

39 Titi, *supra* note 2, at 843ff.

40 Titi, *supra* note 28, at 129.

41 Titi, *supra* note 9.

42 E.g., Draft EU–Singapore Free Trade Agreement, version to be initialled in September 2013, available at trade.ec.europa.eu/doclib/docs/2013/september/tradoc_151772.pdf (last visited June 2015), ch. 17, n. 1: '[Negotiators' Note: Pending outcome of Investment Protection Chapter negotiations, new provisions may be added.]'

in the investment chapter, so much as forming part of the context of the chapter as in view of the principle of systemic integration.[43] It should also be noted that the new treaties, whether comprehensive FTAs or standalone BITs, will probably offer market access along with protection at the post-establishment phase, and, therefore, in light of the reasoning outlined earlier, being more 'intrusive', they are likely to safeguard more policy space for the host state than traditional member state BITs.

Further reasons, more directly linked to the transfer of competence, militate in favour of a policy that takes into account the host economy's right to regulate. Pursuant to Article 21 of the Treaty on European Union (TEU) and Article 205 of the TFEU, in the field of the common commercial policy, the EU has a 'constitutional obligation' to comply with the principles that guide its external action.[44] These principles include democracy, human rights,[45] sustainable development, the preservation and improvement of the environment,[46] sustainable management of natural global resources and the guiding principles of the Charter of the United Nations.[47] In this vein, the Council stressed that 'the new European international investment policy should be guided by the principles and objectives of the Union's external action, including the rule of law, human rights and sustainable development' and that it 'must continue to allow the EU and the member states to adopt and enforce measures necessary to pursue public policy objectives'.[48] New generation investment agreements are appropriate in order to guarantee a modicum of regulatory flexibility and ensure that such principles shall be observed without the menace of sizeable compensation awards hanging like the sword of Damocles over public policy-making.[49]

Like the Council, the Parliament has also expressed itself as being in favour of taking into account these standards in the EU's future investment policy. Envisioning the future EU investment policy, with its Resolution of 6 April 2011, it emphasized that investor protection 'must remain the first priority' of future EU investment agreements.[50] Yet, with the same breath, it levelled indirect criticism at the European Commission for focusing too strongly on investment protection when it 'should better address the right to protect the public capacity to regulate'.[51] Indeed, the Parliament considered the necessity of achieving a 'balance between investor protection and the

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[43] Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331, Art. 31 On the principle of systemic integration, see McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention', 54 *International and Comparative Law Quarterly* (2005) 279; C. McLachlan, L. Shore and M. Weiniger, *International Investment Arbitration: Substantive Principles* (2007), paras 7.69–7.70.

[44] Bungenberg, 'Preferential Trade and Investment Agreements and Regionalism', in Rainer Hofmann, Stephan Schill and Christian J. Tams (eds), *Preferential Trade and Investment Agreements: From Recalibration to Reintegration* (2013) 269, at 284. Treaty on European Union (TEU), OJ 2010 C 83/13.

[45] See also European Parliament Resolution 2009/2219(INI) of 25 November 2010, OJ 2012 C 99E.

[46] See also European Parliament Resolution 2010/2103(INI) of 25 November 2010, OJ 2012 C 99E.

[47] TEU, *supra* note 44, Art. 21.

[48] EU Council, Conclusions on a Comprehensive European International Investment Policy, 3041st Foreign Affairs Council Meeting, 25 October 2010, para. 17.

[49] Titi, *supra* note 28, at 73.

[50] European Parliament Resolution 2010/2203, *supra* note 5, para. 15.

[51] *Ibid.*, para. 6.

protection of the right to regulate'[52] and called on the Commission to include the right to regulate in all future investment agreements.[53]

The European Parliament's insistence on the principles of Article 21 of the TEU and on the right to regulate is not without significance. If the Commission negotiates the treaties in the new status quo, within the domain of the exclusive EU competence over the common commercial policy, [54] the Parliament has a decisive role that must not be ignored. With the entry into force of the Treaty of Lisbon,[55] the ordinary legislative procedure was introduced in the field of the common commercial policy.[56] As a corollary, according to Article 218(6) of the TFEU, agreements covering foreign direct investment can only be adopted after consent of the Parliament has been obtained.[57] The latter will also need to be regularly informed of the progress of the negotiations.[58] In other words, the Parliament has a veto power over the conclusion of EU investment agreements, and it seems to be conscious of its new role.[59]

Beyond these developments within the EU, it is important to recognize that the elaboration of the Union's investment policy is not cut off from other developments in international economic law. It is worth observing, for instance, that South Africa has terminated its BITs with the Belgium–Luxembourg Economic Union, Germany, the Netherlands, Spain and (also Switzerland).[60] It appears that the country has also given notice of termination of its BIT with France, and it is reportedly preparing to terminate other first-generation BITs concluded with EU member states. Indonesia has given notice of termination of its BIT with the Netherlands[61] and is said to be considering renegotiation of its investment treaties.[62] It is remarkable that Indonesia has never ratified its renegotiated BIT with Denmark.[63]

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52 *Ibid.*, para. 17.

53 *Ibid.*, paras 23–26, see further paras 27–30. See also European Parliament, Position of the European Parliament Adopted at First Reading on 16 April 2014 with a View to the Adoption of Regulation (EU) No…/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, Doc. P7_TC1-COD(2012)0163 (2014), recital 4: 'Union agreements should ensure that the Union's legislative powers and right to regulate are respected and safeguarded.'

54 TFEU, *supra* note 3, Art. 207(3).

55 Bungenberg, *supra* note 15, at 129–130.

56 TFEU, *supra* note 3, Art. 207(2).

57 *Ibid.*, Arts 218(6) and 207(1–2).

58 *Ibid.*, Art. 207(3); cf. Art. 218(10).

59 Bungenberg, *supra* note 15, at 129. See also European Parliament Resolution 2009/C 259 E/15 of 24 April 2008, OJ 2009 C259 E/83, para. 27; Bungenberg and Titi, *supra* note 1.

60 See Investment Policy Hub, available at investmentpolicyhub.unctad.org/IIA/CountryBits/195#iiaInnerMenu (last visited June 2015).

61 UNCTAD, *World Investment Report 2014* (2014), at 114.

62 Ewing-Chow and Losari, 'Indonesia Is Letting Its Bilateral Treaties Lapse So As to Renegotiate Better Ones', *Financial Times* (15 April 2014); Bland and Donnan, 'Indonesia to Terminate More Than 60 Bilateral Investment Treaties', *Financial Times* (26 March 2014).

63 Renegotiation was linked to infringement proceedings initiated in 2004 by the European Commission against Denmark relating to the absence of a regional economic integration organisation clause in its 1968 bilateral investment treaty (BIT) with Indonesia. The proceedings against Denmark were dropped when it terminated that BIT. See Titi, *supra* note 28, at 131ff.

However, beyond the denunciations of BITs, which may encourage a rethinking of the drafting of new international investment agreements (IIAs), the EU is negotiating its first IIAs with, among others, the USA[64] and Canada,[65] states that have pioneered the drafting of new generation investment agreements. Marking its distances from the investment treaty standards of its member states, the EU is turning to, and taking to a new level, the drafting of these new generation treaties. The analysis that ensues will focus on the shift from member state 'best practices' to this novel standard of the EU.

## 2 The 'Best Practices' of EU Member States

Until the entry into force of the Treaty of Lisbon, the conclusion of treaties covering foreign direct investment belonged to the exclusive competence of the member states. As a consequence, the latter concluded around 1,400 BITs,[66] a number that, as mentioned, amounts to half of the world's BITs.[67] In contrast with EU FTAs, which are generally cognizant of the state's right to regulate, EU member state BITs contain some of the last vestiges of international economic law's *laissez-faire* liberalism.[68] They are for the most short instruments,[69] one-sidedly focused on investment protection,[70] and do not incorporate exceptions relating to essential security,[71] human rights, the environment or other public interests.[72]

EU member state BITs have been largely based on the Draft Convention on Investments Abroad (better known as the Abs-Shawcross Draft Convention)[73]

[64] On the state of play of the negotiations of the Transatlantic Trade and Investment Partnership (TTIP), see ec.europa.eu/trade/policy/in-focus/ttip/ (last visited June 2015).

[65] On the CETA negotiations, *supra* note 10, available at ec.europa.eu/trade/policy/countries-and-regions/countries/canada/ (last visited June 2015).

[66] European Commission, *supra* note 1, at 4.

[67] Bungenberg and Titi, *supra* note 1. See also UNCTAD, *World Investment Report 2013* (2013), at 10.

[68] Titi, *supra* note 9.

[69] E.g., compare the French and German Model BITs of 2006 and 2009 respectively with the Canadian (2004 and 2012 version) and US Model BITs (2004 and 2012). See also Titi, *supra* note 2, at 832.

[70] Titi, *supra* note 9; see also Titi, *supra* note 28, at 21; Juillard, 'The Law of International Investment: Can the Imbalance Be Redressed?', in K.P. Sauvant (ed.), *Yearbook on International Investment Law and Policy 2008–2009* (2009) 275, at 280; Juillard, *Bilateral Investment Treaties in the Context of Investment Law*, OECD Investment Compact Regional Roundtable on Bilateral Investment Treaties for the Protection and Promotion of Foreign Investment in South East Europe, 28–29 May 2001, available at www.oecd.org/investment/internationalinvestmentagreements/1894794.pdf (last visited June 2015), at 6.

[71] Some treaties exceptionally contain exceptions relating to the protection of public order or public order and security, see Belgium–Luxembourg Economic Union (BLEU) Model BIT (2002), Art. 2(3); German Model BIT (2009), Art. 3(2); German Model BIT (2009).

[72] E.g., French, German and Dutch Model BITs.

[73] See A. von Walter, 'Balancing Investors' and Host States' Rights: What Alternatives for Treaty-makers?' in M. Bungenberg, J. Griebel and S. Hindelang (eds), *European Yearbook of International Economic Law 2011, Special Issue: International Investment Law and EU Law* (2011), at 141. Draft Convention on Investments Abroad, 1959. The Draft Convention was published in 1960, 9 *Journal of Public Law* (now *Emory Law Journal*) 116.

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and the 1967 OECD Draft Convention on the Protection of Foreign Property.[74] Despite occasional treaty conclusions between developed partners outside Europe (for example, the North American Free Trade Agreement (NAFTA) and the Australia–US FTA),[75] EU member states have continued to negotiate investment treaties with the developing world.[76] The principal *raison d'être* of these treaties has been to ensure the protection of European investors in their ventures in developing countries[77] and the highest levels of investment protection and minimal state rights have been sought. Indeed, this preoccupation with investor protection has been so strong that some early BITs were concluded on a non-reciprocal basis.[78] The 1972 BIT between France and Tunisia testifies to this approach, its preamble declaring the parties' desire to encourage 'the development of French investments in Tunisia'.[79] Generally, the investment promotion and protection elements of EU member state treaties seem to have been of relevance to different parties: through them EU member states have protected their investors abroad, and their developing partners have encouraged investment inflows in their territories.[80]

As a consequence, investors protected under EU member state BITs have initiated a large number of investment arbitrations against third countries. It is remarkable that in 2012 EU investors were at the basis of 60 percent of new disputes.[81] At the same time, because of minimal exposure to investment arbitration *qua* respondents[82] – the first significant cases against EU member states have been initiated very

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[74] Although this convention never entered into force, it exercised a considerable influence on Organisation for Economic Co-operation and Development (OECD) members' model BITs in the years following its negotiation. See Carreau, 'Investissements', in *Répertoire de droit international* (2013) 1, at 141, paras 30–31; Juillard, 'L'évolution des sources du droit des investissements', 250 *Recueil des cours de l'Académie de droit international de La Haye* (1994) 9, para. 167. Draft Convention on the Protection of Foreign Property 1967, OECD. The draft convention is available at http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=242&InstrumentPID=237&Lang=en&Book= (last visited June 2015).

[75] North American Free Trade Agreement 1992, 32 ILM 289 (1993). United States–Australia Free Trade Agreement (Australia–US FTA) 2004, H.R. 4759 (108th).

[76] See Investment Policy Hub, available at investmentpolicyhub.unctad.org/IIA (last visited June 2015). North American Free Trade Agreement 1992, 32 ILM 289, 605 (1993). Australia–US FTA, *supra* note 75.

[77] Titi, *supra* note 2, at 845; Titi, *supra* note 28, at 21; Juillard, *supra* note 70, at 280; Newcombe, 'Sustainable Development and Investment Treaty Law', 8 *Journal of World Investment and Trade* (2007), at 363. Cf. S. Robert-Cuendet, *Droits de l'investisseur étranger et protection de l'environnement* (2010), at 484.

[78] Banifatemi and A. von Walter, 'France', in C. Brown (ed.), *Commentaries on Selected Model Investment Treaties* (2013) 245, at 247–251.

[79] Convention entre le Gouvernement de la République française et le Gouvernement de la République tunisienne sur la protection des investissements 1972, 848 UNTS 144, Registration no. I-12147 Preamble (author's translation).

[80] Titi, *supra* note 28, at 21; Titi, *supra* note 2, at 845.

[81] Compare with 7.7 per cent of investment arbitrations initiated by US investors. European Commission, *supra* note 1, at 5, 10. See also UNCTAD, 'Recent Developments in Investor-State Dispute Settlement, Updated for the Multilateral Dialogue on Investment', 1 *IIA Issues Note* (2013) 1, at 4.

[82] UNCTAD, *supra* note 81, at 29–30; Titi, *supra* note 2, at 845.

recently[83] – the latter have not been confronted with interpretations that harmed state interests and, therefore, with the need to amend a system that, ultimately, has been perfectly suited to serve their interests.[84]

EU member state BITs have by no means been identical among them or even largely similar. However, collectively, they have come to represent the so-called European model, which, in the transfer of the competence lexicon, became broadly known as the 'good'[85] or 'best practices'[86] of the member states or the 'gold standard'.[87] So, in 2010, the European Commission noted that the EU 'should follow the available best practices to ensure that no EU investor would be worse off than they [*sic*] would be under Member States' BITs'.[88] This statement creates the impression that the proposed member states' best practices relate to the highest level of protection for investors, a task partly incompatible with the conclusion of the balanced treaties that jar with unlimited investor protection.[89] In comparable fashion, the European Parliament has stressed that future EU investment agreements should be based on the best practices of the member states.[90] Analogous phrases were employed in the negotiating directives for the treaties to be concluded with Canada, India, Singapore and the USA.[91] For instance, according to the EU–US High Level Working Group on Jobs and Growth, the Transatlantic Trade and Investment Partnership (TTIP), which was negotiated between the EU and the USA, 'should include investment liberalization and protection provisions based on the highest levels of liberalization and highest standards of protection that both sides have negotiated to date',[92] a statement later rehearsed in the negotiating directive for the same agreement.[93]

The terms 'high' or 'the highest' levels of investment protection, with which EU member state best practices have ostensibly become synonymous, is a fast conclusion

83 E.g., the first claim against France (ICSID, *Erbil Serter v. France*, ICSID Case no. ARB/13/22) was initiated in September 2013, the first claim against Belgium (ICSID, *Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) Company of China, Limited v. Belgium*, ICSID Case no. ARB/12/29) in September 2012, the first case against Greece (ICSID, *Poštová banka, a.s. and ISTROKAPITAL SE v. Greece*, ICSID Case no. ARB/13/8) in May 2013 (the award was delivered on 9 April 2015) and the first case against Cyprus (ICSID, *Marfin Investment Group Holdings S.A., Alexandros Bakatselos et al. v. Cyprus*, ICSID Case no. ARB/13/27) in September 2013. Another recent 'first' is *Austrian Airlines v. Austria* (UNCITRAL, Final Award, 9 October 2009). To these must be added a number of cases currently pending against notably Spain and the Czech Republic concerning renewable energy projects.

84 Titi, *supra* note 2, at 845.

85 E.g., European Parliament Resolution 2010/2203, *supra* note 5, paras 9, 18, 19; European Parliament Resolution 2013/2674(RSP), *supra* note 16, para. 17.

86 E.g., European Commission, *supra* note 5, at 8, 11; EU Council, *supra* note 48, para. 15.

87 Lavranos, *supra* note 4; Hoffmeister and Ünüvar, 'From BITS and Pieces towards European Investment Agreements', in Marc Bungenberg, August Reinisch and Christian Tietje (eds), *EU and Investment Agreements* (2013) 57, at 70.

88 European Commission, *supra* note 5, at 11.

89 See also Bungenberg and Titi, *supra* note 1.

90 European Parliament Resolution 2010/2203, *supra* note 5, para. 19.

91 Transatlantic Partnership Negotiating Directive, 17 June 2013, para. 23, available at data.consilium.europa.eu/doc/document/ST-11103-2013-DCL-1/en/pdf (last visited June 2015).

92 Final Report of the EU-US High Level Working Group on Jobs and Growth, 11 February 2013, available at trade.ec.europa.eu/doclib/docs/2013/february/tradoc_150519.pdf (last visited June 2015), at 3.

93 Transatlantic Partnership Negotiating Directive, *supra* note 91, paras 15, 22.

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that may not reflect a more complex reality on the ground. As an illustration, the European Commission specified that the enounced levels of protection in the TTIP correspond to 'the highest levels of liberalisation and investment protection that both sides have negotiated to date in other *trade* deals'.[94] This is not astonishing, given that until the Treaty of Lisbon the EU did not have the competence to conclude agreements covering investment protection at the post-establishment stage but was limited to market access provisions. As noted earlier, EU free trade agreements have been more favourable to the state's right to regulate and public interest objectives than their member state investment treaty counterparts. In the same vein, if the 2012 Statement of the European Union and the United States on Shared Principles for International Investment reaffirmed the parties' attachment to principles relating to international investments such as a 'strong protection for investors' and 'effective dispute settlement procedures',[95] this was not to be achieved by refusing the state's right to regulate. According to the statement, 'governments can fully implement these principles while still preserving the authority to adopt and maintain measures necessary to regulate in the public interest to pursue certain public policies'.[96] The statement also stressed that 'governments should not seek to attract foreign investment by weakening or failing to apply such measures'.[97] On occasion, EU institutions have stressed that the proposed provisions, such as security exceptions, are compatible with EU member state best practices.[98] In all probability, the mention of best practices in EU documents is no more than a means of member state 'appeasement'.

If official EU documents expressly cite EU member state best practices, the new policy that is being sketched bears little in common with the traditional BITs of the member states. As noted, the European Commission, already in 2010, while citing member state 'best practices' that ought to 'inspire' 'the principles and parameters' for EU negotiations, emphasized that it is the Commission itself that determines the 'scope and standards' of future EU investment agreements.[99] In other words, the role of member state best practices is relegated to (merely) offering 'inspiration' for new agreements. The TTIP's public consultation document clearly specified that the Union wishes to 'rely on past treaty practice *with a proven track record*'.[100]

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[94] European Commission, 'European Union and United States to Launch Negotiations for a Transatlantic Trade and Investment Partnership (Memo)', 13 February 2013 (emphasis added). See also Transatlantic Partnership Negotiating Directive, *supra* note 91, para. 15.

[95] Statement of the European Union and the United States on Shared Principles for International Investment, 10 April 2012, available at trade.ec.europa.eu/doclib/docs/2012/april/tradoc_149331.pdf (last visited June 2015).

[96] Statement of the European Union and the United States, *supra* note 95. See also European Commission, *supra* note 9.

[97] Statement of the European Union and the United States, *supra* note 95.

[98] E.g., this is the case of the earlier-mentioned European Commission document on investment protection, the right to regulate, sustainable development and human rights.

[99] European Commission, *supra* note 5, at 11.

[100] European Commission, Public Consultation on Modalities for Investment Protection and ISDS in TTIP, Consultation Document (2014), available at trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152280.pdf (last visited June 2015) (emphasis added).

In a recent document of the European Parliament on the negotiations between the EU and China, the discrepancy between EU objectives and member state practices is likewise obvious. The Parliament remarks that the EU–China treaty 'should be based on the best practices drawn from Member State experiences' and then goes on to explain the standards that these treaties must contain.[101] The elaboration of some of these is quite dissimilar to the *acquis* of member state best practices. Probably, the most obvious example is the formulation of the fair and equitable treatment standard, whose content is made explicit for the first time.[102]

Furthermore, while in 2010, the European Commission cited the best practices 'that member states have *developed*',[103] in the Parliament resolutions of 6 April 2011 and 9 October 2013 the tone changes.[104] The new phrase is somewhat ambivalent, in that, *stricto sensu*, there is no longer a question of EU member state best practices but, rather, of best practices drawn (by the EU) from the latters' experience. The elusive legal meaning attached to the new phrasing is underlined by the possibility that the new treaties shall adopt only the best practices drawn from the experiences of the member states.

As a closing remark, it may be added that, exceptionally, some EU documents rehearse 'no-higher-than-domestic-standards' statements, and so they further digress from EU member state 'best practices'. In April 2014, the Parliament noted that 'Union agreements should afford foreign investors the same high level of protection as Union law and the general principles common to the laws of the member states grant to investors from within the Union, but not a higher level of protection'.[105] Although it is difficult to appreciate the significance of such statements at this stage, all elements seem to indicate that EU member state model provisions only have an accessory role to play in EU investment negotiations.

## 3 The 'Invisibility' of the EU Model BIT

However, before querying this new standard of the EU, it is important to address the question of whether there is one single standard and to consider why, if there is a single standard, it remains at this stage 'invisible'.[106] Transaction costs involved in investment treaty negotiation, as when treaties in arbitration are invoked, plead in favour of the development of model BITs,[107] and so the use of these treaty templates is

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[101] European Parliament Resolution 2013/2674(RSP), *supra* note 15, para. 17; European Parliament Resolution 2010/2203, *supra* note 5, paras 9, 18, 19.

[102] European Parliament Resolution 2013/2674(RSP), *supra* note 15, para. 17; European Parliament Resolution 2010/2203, *supra* note 5, paras 9, 18, 19.

[103] European Commission, *supra* note 5, at 11 (emphasis added).

[104] See European Parliament Resolution 2010/2203, *supra* note 5, para. 19; European Parliament Resolution 2013/2674(RSP), *supra* note 16, para. 17.

[105] Position of the European Parliament, *supra* note 53, recital 4.

[106] The term is borrowed from the International Conference on the (Invisible) EU Model BIT, which was organized in November 2013 by M. Bungenberg and A. Reinisch at the University of Vienna.

[107] Hamamoto and Nottage, 'Japan', in Brown, *supra* note 78, 347, at 390.

widespread among industrialized economies, in particular. But despite an early suggestion in 2006 that '[a] new, ambitious model EU investment agreement should be developed in close coordination with Member States',[108] the EU's nascent investment policy is being designed in the absence of a model agreement comparable to the model BITs of the member states.

In 2010, the European Commission took a position against the adoption of an EU model investment agreement. It explained that adopting a 'one-size-fits-all model' would be 'neither feasible nor desirable' and that the Union would need to take into account the particularities of each negotiation, including the interests of its stakeholders and the level of development of its partners.[109] The divergence between concluded member state BITs was noted by both the Commission and the Parliament,[110] and the latter, in particular, called on the Commission 'to reconcile these divergences to provide a strong EU template for investment agreements'.[111] However, the Parliament specified that this template or model[112] 'would also be adjustable according to the level of development of the partner country'.[113]

This 'divergence' among concluded member state BITs is an element that must not be ignored, as it constitutes itself an argument against the hasty adoption of an EU model investment treaty. Suffice it to recall the lengthy and painstaking efforts to reach agreement at the EU member state level before the adoption of the first negotiating directives in September 2011,[114] in order to appreciate the difficulties involved in any attempt to find a common concrete solution to the drafting of a model BIT.

Insisting on the need to draft an EU model investment agreement in this early phase of the exercise of the EU's competence may also seem precipitated for another reason. The elaboration and adoption of model investment agreements generally succeeds the conclusion of the first BITs. A few examples amply illustrate this point. If Germany adopted its first model BIT about one year after the conclusion of its BIT with Pakistan,[115] the Netherlands did so more than a decade after its first BIT[116] and Austria more than 20 years later.[117] France had not made public a model BIT until 2006,[118]

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[108] European Commission, Commission Staff Working Document on Annex to the Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, Global Europe: Competing in the World, Doc. SEC(2006) 1230, 4 October 2006, at 18.

[109] European Commission, *supra* note 5, at 6.

[110] *Ibid.*; European Parliament Resolution 2010/2203, *supra* note 5, para. 9.

[111] European Parliament Resolution 2010/2203, *supra* note 5, para. 9.

[112] The French, equally authentic, version of the Resolution talks of the template as a '*modèle*'.

[113] European Parliament Resolution 2010/2203, *supra* note 5, para. 9.

[114] Titi, *supra* note 28, at 142.

[115] Dolzer and Kim, 'Germany', in Brown, *supra* note 78, 289, at 295.

[116] Schrijver and Prislan, 'The Netherlands', in Brown, *supra* note 78, 535, at 542, 544.

[117] Reinisch, 'Austria', in Brown, *supra* note 78, 16, at 17. The first Austrian BIT was concluded with Romania in 1976. It is now replaced by a 1996 BIT. *Ibid.*

[118] Banifatemi and von Walter, *supra* note 78, at 245.

Korea not until 2001[119] and Colombia adopted a model BIT around 10 years after the conclusion of its treaties with Mexico and Venezuela in 1994.[120]

Changes to model BITs have often been incorporated in concluded agreements before an official revision of the model. For instance, this is the case of the US policy shift regarding the drafting of the essential security interests exception as self-judging, already in the 1999 US–Bahrain BIT.[121] It is also noteworthy that provisions repeatedly found in a country's investment treaties may be considered to constitute a de facto model.[122] Finally, the non-adoption of a model BIT, although rare in practice, is not unique to the EU. Australia has never adopted a negotiating model investment agreement, although it must also be noted that the country does not play a primordial role in BIT negotiations.[123] The same reason may explain why another state, Japan, has likewise not adopted a model BIT.[124] Yet, it is notable that Switzerland, a prolific treaty negotiator, has never had a model BIT.[125]

Irrespective of these considerations, it appears that the decision of the EU not to proceed with the adoption of a model BIT so far results, among others, from its intention to accord more ample policy space to developing countries as compared to developed economies.[126] This would imply that investment treaties concluded between the EU and developed economies would be more liberal and would afford narrower regulatory flexibility to host states. However, the veracity of this statement is not self-evident.[127] As will be discussed later in this article, the CETA with Canada and the TTIP negotiations with the USA aim to allow the state its regulatory flexibility, and they do so in a definitely novel fashion for Europe. It is also remarkable that the quest for ampler policy space was launched by these same negotiating partners of the EU in the mid-2000s,[128] and it was expressed and reiterated in later treaties and (versions) of their model BITs.[129]

Having followed a consistent approach with respect to regulatory flexibility in the last decade, it would be surprising if these two states abandoned their 'new' models when negotiating with the EU. It is also questionable from the point of view of the Union whether it is advisable to offer greater regulatory flexibility to developing

[119] Shin, 'Republic of Korea', in Brown, *supra* note 78, 393, at 397–398.

[120] Rivas, 'Colombia', in Brown, *supra* note 78, 183, at 191, 193. However, contrast the approach of the United Kingdom, which prepared its Model BIT in 1972 well in time before the conclusion of its first BIT with Egypt in 1975. Brown and Sheppard, 'United Kingdom', in Brown, *supra* note 78, 697, at 703–704.

[121] US–Bahrain BIT 1999, US Senate Treaty, Doc. 106–25, Art. 14(1).

[122] Ho, 'Singapore', in Brown, *supra* note 78, at 628.

[123] According to UNCTAD, Australia has at this moment 22 BITs in force – that is, less than one-fifth of German BITs and less than one-fourth of BITs concluded by Belgium, France, the Netherlands or the United Kingdom. See Investment Policy Hub, available at http://investmentpolicyhub.unctad.org/ (last visited June 2015).

[124] Hamamoto and Nottage, *supra* note 107, at 352.

[125] Schmid, 'Switzerland', in Brown, *supra* note 78, 651, at 658.

[126] E.g., European Commission, *supra* note 5, at 6; European Parliament Resolution 2010/2203, *supra* note 5, paras 2, 6, 7, 26, 39.

[127] E.g., European Commission, *supra* note 9; Transatlantic Partnership Negotiating Directive, *supra* note 91.

[128] See Canadian and US Model BITs (2004).

[129] E.g., US Model BIT (2012).

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economies, where it intends to protect its investors, and narrower flexibility to developed economies, whose investors are likely to become actively involved in disputes against the EU and its member states. At the same time, it is possible that the first concluded investment treaties of the Union will set an involuntary standard that may be emulated – but also amended – in subsequent negotiations.[130]

## 4 The New Standard of the EU

Despite the uncertainty surrounding the exercise of the new competence and the final shape of EU investment agreements, the EU is formulating an investment policy that goes beyond the new generation of investment agreements, and it is the novelty of this approach that underlines the advent of a new standard. Given the EU's weight in investment negotiations, there is a real opportunity for it 'to set a new agenda for investment protection and investor state [*sic*] dispute settlement provisions'.[131] The Union wishes to improve its investment agreements in a twofold approach that targets substantive and procedural standards. The analysis that follows will explore the two in turn.

### A *Substantive Standards*

With its new investment policy, the EU wishes to achieve a 'better balance' between the state's right to regulate and investment protection and to elaborate 'clearer and better standards'.[132] The two objectives are entwined, and the Commission considers that investment protections must be clearly defined and leave no room for 'interpretative ambiguity', particularly where the 'state's right to regulate for public policy objectives' is involved.[133] The Commission emphasizes, in particular, the right of the states to pursue legitimate public policy objectives and explains that this 'principle' of EU FTAs will apply to the investment protection provisions of the EU agreements.[134]

According to the directives that authorized the investment negotiations with Canada, India and Singapore, each agreement should be 'without prejudice to the right of the EU and the Member States to adopt and enforce … measures necessary to pursue legitimate public policy objectives such as social, environmental, security, public health and safety in a non-discriminatory manner. The agreement shall respect the policies of the EU and its Member States for the promotion and protection of cultural diversity'.[135] Similar statements were made in the TTIP negotiating

[130] Titi, 'Full Protection and Security, Arbitrary or Discriminatory Treatment and the Invisible EU Model BIT', in M. Bungenberg and A. Reinisch (eds), *The Anatomy of the (Invisible) EU Model BIT: Journal of World Investment and Trade* (2014), at 540.

[131] European Commission, *supra* note 1, at 3.

[132] *Ibid.*, at 3; European Commission, *supra* note 100.

[133] European Commission, *supra* note 1, at 6. See also European Parliament Resolution 2013/2674(RSP), *supra* note 15, para. 41.

[134] European Commission, *supra* note 1, at 7

[135] Negotiating directives of 12 September 2011 authorizing the opening of negotiations on free trade agreements with Canada, India and Singapore, *supra* note 8.

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directive.[136] Accordingly, the consolidated text of the CETA incorporates Article XX of the GATT[137] and includes, *inter alia*, carve-outs for the audio-visual sector,[138] exceptions for national security,[139] prudential[140] and safeguard measures and balance of payment problems.[141]

In attempting, among others, to safeguard a 'balance' between investment protections and the host economy's right to regulate, the Commission stresses the need to draft treaty standards in a 'detailed and precise manner'.[142] Apart from innovative preamble language,[143] which is unusual not only in EU member state BITs but also in the Canadian Model BIT,[144] the new EU approach targets investment law's two most important standards, fair and equitable treatment and expropriation. As far as indirect expropriation is concerned, the EU introduces provisions similar to those found in Annex B of the US and Canadian BITs.[145] Like these models, the CETA explicitly rejects the sole effect doctrine[146] and enjoins the tribunal to consider the 'reasonable' expectations of investors.[147] However, unlike its predecessors, it introduces a requirement to take into account the 'character' of the measure and, notably, its 'object, context and intent', and, significantly, it incorporates an element of proportionality. According to the CETA's annex on expropriation:

> except in the rare circumstance where the impact of the measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations.[148]

Such a provision is absent from the BITs concluded by EU member states,[149] and, if it exists in the US and Canadian Model BITs, the CETA's formulation is new. According to the European Commission, this new provision aims, *inter alia*, to ensure that investors shall not be compensated 'just because their profits have been reduced through the

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[136] Transatlantic Partnership Negotiating Directive, *supra* note 91, paras 8, 23.
[137] CETA, *supra* note 10, Exceptions Chapter, Art. X.02.
[138] *Ibid.*, Investment Chapter, Art. X.1(3); Subsidies Chapter, Art. X.7; see also Preamble.
[139] *Ibid.*, Exceptions Chapter, Art. X.05. But cf. Art. X.02(2) of the same chapter.
[140] *Ibid.*, Financial Services Chapter, Art. 15; see also Art. 20 and Annex XX.
[141] *Ibid.*, Exceptions Chapter, Art. X.03 and X.04.
[142] European Commission, *supra* note 1, at 7.
[143] The Preamble establishes, among others, that 'the provisions of this Agreement preserve the [parties'] right to regulate [... and their] flexibility to achieve legitimate policy objectives ... [S]tates have the right to preserve, develop and implement their cultural policies, and to support their cultural industries ... , including through the use of regulatory measures and financial support'.
[144] An exception that confirms the rule is the Austrian Model BIT (2011).
[145] CETA, *supra* note 10, Investment Chapter, Annex X.11.
[146] '[T]he sole fact that a measure or series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred'. *Ibid.*, Annex X.11, para. 2.
[147] *Ibid.*, Annex X.11, para. 2.
[148] An earlier draft text proposed by the EU expressly invoked proportionality, see *Ibid.*, Annex on Expropriation, 7 February 2013.
[149] E.g., see the Model BITs of France (2006), Germany (2009), the Netherlands (2004) and the United Kingdom (2008).

effects of regulations enacted for a public policy objective'.[150] This statement makes reference to the crucial dilemma of how to draw the line between an indirect expropriation and a non-compensable regulation taken in the public interest.[151] As it will be recalled, the presence of a public interest is, in any case, required for the lawfulness of even an indirect expropriation.[152] At the same time, this statement reiterates the rejection of the sole effect doctrine and aligns the EU position with the police powers doctrine.[153]

The second standard that the EU wishes to specify in its investment agreements is fair and equitable treatment. This approach has already been adopted in the treaty with Singapore and with Canada.[154] The latter two agreements contain a novel provision that enumerates in quasi-exhaustive manner[155] the measures that are incompatible with fair and equitable treatment. Accordingly, the fair and equitable treatment clause is violated, *inter alia*, where a measure or a series of measures constitutes denial of justice in criminal, civil or administrative proceedings, a fundamental breach of due process, including a fundamental breach of transparency in judicial and administrative proceedings, manifest arbitrariness, targeted discrimination on manifestly wrongful grounds or abusive treatment of investors, including coercion, duress and harassment.[156] It is noteworthy that in the current version of the CETA, one of the most essential notions of fair and equitable treatment, namely the protection of the investor's legitimate expectations, does not figure among the list of its constituents. On the contrary, the frustration of the investor's legitimate expectations stands alone in a separate paragraph as an element that a tribunal 'may' take into account 'when applying the above fair and equitable treatment'.[157] Legitimate expectations may be born where a party has made 'a specific representation to an investor to induce a covered investment'.[158] The European Commission explains that the purpose of this provision is to ensure that the fair and equitable treatment standard does not amount to a 'stabilisation obligation'.[159]

It is hoped that this formulation will be refined in future EU investment agreements. A final aspect of the fair and equitable guarantee of this article must be noted – one

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[150] European Commission, *supra* note 1, at 8; EU, Investment Protection Does Not Give Multinationals Unlimited Rights to Challenge Any Legislation, Memorandum, 20 December 2013, available at trade.ec.europa.eu/doclib/press/index.cfm?id=1008 (last visited June 2015).

[151] Lowe, 'Regulation or Expropriation?', 55(1) *Current Legal Problems* (2002) 447, at 447; Robert-Cuendet, *supra* note 77.

[152] Robert-Cuendet, *supra* note 77, at 196ff, 270–271.

[153] On these, see Titi, *supra* note 28.

[154] Draft EU–Singapore FTA, *supra* note 42, Art. 9.4; and CETA, *supra* note 10, Investment Chapter, Art. X.9.

[155] An ambiguity in Draft EU–Singapore FTA, *supra* note 42, para. 2, may open the door to further elements that may be accepted as forming part of the content of the standard.

[156] *Ibid.*, para. 2.

[157] CETA, *supra* note 10, Investment Chapter, Art. X.9(4).

[158] *Ibid.*

[159] European Commission, *supra* note 100. On stabilization, see Weil, 'Les clauses de stabilisation ou d'intangibilité insérées dans les accords de développement économique', in *Mélanges offerts à Charles Rousseau – La communauté internationale* (1974); P.D. Cameron, *International Energy Investment Law* (2010), at 68–83; Titi, 'Les clauses de stabilisation dans les contrats d'investissement: une entrave au pouvoir normatif de l'Etat d'accueil?' 141(2) *Journal du droit international* (2014) 541.

that is in conformity with the practice of the member states – namely, the new EU treaties abandon the traditional approach of new generation North American investment agreements, which tether fair and equitable treatment to the minimum standard of treatment and, therefore, establish the former as a standard independent of the latter.[160]

Apart from the new formulations of these standards, the recently negotiated treaties explain that the full protection and security standard relates only to 'physical security'.[161] The CETA further reveals a specification to the effect that the most-favoured-nation treatment 'does not include investor-to-state dispute settlement procedures provided for in other international investment treaties and other trade agreements'. Substantive obligations in such other agreements do not constitute 'treatment', and, therefore, they 'cannot give rise to a breach of this article, absent measures adopted by a Party'.[162] Although a provision concerning the exclusion of the application of the most-favoured-nation treatment from a treaty's investor–state dispute settlement (ISDS) provisions has started to be included in new generation agreements,[163] it does not figure in the US, Canadian or EU member state model BITs nor, in fact, in any 'influential' model BITs.

## B *ISDS*

The elaboration of the new EU investment policy is not limited to a reformulation of substantive standards of investment protection. At this stage of the investment negotiation process, many issues remain unclear with respect to ISDS (topics such as the interpretive autonomy of the EU and the question of which dispute settlement mechanisms will be included in future EU agreements). Although it is beyond the purpose of the present analysis to explore these issues and difficulties, attention will be drawn to some discordant voices in the approval of ISDS, redolent of, or sympathetic

[160] CETA, *supra* note 10, Investment Chapter, Art. X.9; Draft EU–Singapore FTA, *supra* note 42, Art. 9.4.

[161] CETA, *supra* note 10, Investment Chapter, Art. X.9(5); Draft EU–Singapore FTA, *supra* note 42, Art. 9.4(4).

[162] CETA, *supra* note 10, Investment Chapter, Art. X.7(4).

[163] E.g., Colombian Model BIT (2007), Art. IV(2); Agreement between the Belgium-Luxembourg Economic Union and the Republic of Colombia on the Reciprocal Promotion and Protection of Investments, signed in Brussels, 4 February 2009, ratification suspended, Art. V(3); Colombia–Japan BIT (2011), Art. 3(1) ('Note'); Bilateral Agreement for the Promotion and Protection of Investments between the Government of the United Kingdom of Great Britain and Northern Ireland and the Republic of Colombia, signed in London, 19 May 2009, not in force), Art. III(2); Canada–Peru Free Trade Agreement, signed in Lima, 29 May 2008, entered into force 1 August 2009, available at www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/peru-perou/peru-toc-perou-tdm.aspx?lang=eng (last visited 15 July 2015), Annex 804.1; Japan–Switzerland Economic Partnership Agreement, Reg. I-47102 (2009) 2642 UNTS 3, Art. 88(2); Framework Agreement on Comprehensive Economic Cooperation between the Association of South East Asian Nations and the People's Republic of China, signed in Bangkok, 15 August 2009, entered into force 1 January 2010, Art. 5(4); ASEAN Comprehensive Investment Agreement, signed in Cha-am, adopted 26 February 2009, entered into force 29 March 2012, Art. 6, n. 4; China–Peru Free Trade Agreement, signed in Beijing, 28 April 2009, entered into force 1 March 2010, Art. 131, n. 13; European Free Trade Association–Hong Kong Free Trade Agreement, signed in Schaan, 21 June 2011, entered into force 1 October and 1 November 2012, Art. 4.1, n. 16.

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to, the previous Australian government's views in this respect,[164] before focusing on aspects of procedural standards that the EU wishes to include in its new investment agreements.

### 1 *New Scepticism* vis-à-vis *Investor–State Dispute Settlement?*

New EU agreements, including, notably, those negotiated with industrialized economies, are expected to embrace ISDS provisions. This expectation, however, should not lead one to consider the inclusion of ISDS a foregone conclusion, given that critiques of it may have affected attitudes *vis-à-vis* the dispute settlement mechanism. The EU institutions involved in the formulation of the EU's investment policy have clearly indicated that EU investment agreements must provide an effective ISDS system.[165] The Commission has expressed the view that the absence of provision for investment arbitration – the latter being 'such an established feature of investment agreements' – would discourage investors and lower the attractiveness of an economy as an investment destination.[166] The need for ISDS was likewise discussed by the Council[167] and the European Parliament.[168]

However, the Parliament has also emphasized that including ISDS in the EU-negotiated agreements 'is not a necessity' but, rather, should be perceived as 'a conscious and informed policy choice that requires political and economic justification' and that 'the question whether to include ISDS should be decided for each International Investment Agreement in the light of the particular circumstances'.[169] This line echoes the view that EU investment agreements should not be based on the earlier-mentioned 'one-size-fits-all model'. In a different document, the European Parliament's view that EU investment agreements must provide protection that is no greater than that afforded by EU law equally raises questions.[170] In the intra-EU BIT debate, ISDS has been discussed as an element introducing discrimination between EU investors.[171] Paradoxically, this statement is included in the Parliament's position relating to the adoption of the regulation

[164] Australia, Department of Foreign Affairs and Trade, *Gillard Government Trade Policy Statement: Trading Our Way to More Jobs and Prosperity*, April 2011, at 14. However, the new Australian government appears to have abandoned this policy, as testified by the Free Trade Agreement between Australia and the Republic of Korea, signed 8 April 2014, entered into force 12 December 2014, Chapter 11, Arts 11.15ff, s. B, which does include investor–state dispute settlement. See further Australia, Department of Foreign Affairs and Trade, *Frequently Asked Questions on Investor-State Dispute Settlement*, available at www.dfat.gov.au/fta/isds-faq.html (last visited June 2015).

[165] European Commission, *supra* note 5, at 9–10; EU Council, *supra* note 48, para. 18; European Parliament Resolution 2010/2203, *supra* note 5, paras 31–35.

[166] European Commission, *supra* note 5, at 10.

[167] EU Council, *supra* note 48, recital 18; see also 14.

[168] European Parliament Resolution 2010/2203, *supra* note 5, paras 31–35.

[169] European Parliament, Report on the Proposal for a Regulation Establishing a Framework for Managing Financial Responsibility Linked to Investor-State Dispute Settlement Tribunals Established by International Agreements to Which the European Union Is Party, Doc. COM(2012)0335–C70155/2012–2012/0163(COD), 26 March 2013, Amendment 2, Justification.

[170] Position of the European Parliament, *supra* note 53, recital 4.

[171] E.g., Eilmansberger, 'Bilateral Investment Treaties and EU Law', 46 *Canadian Modern Language Review* (2009), at 402ff.

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relating to the apportioning of financial responsibility 'linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party'.[172] Antipathy towards ISDS in the context of the EU negotiations with industrialized economies has more recently been expressed by Germany,[173] which traditionally has included dispute settlement provisions in its investment treaties with developing countries. It is remarkable that Germany did not raise any concerns about ISDS at the time that the relevant negotiating mandates were given to the Commission.[174]

### *2 Procedural Standards in the EU's 'Model'*

At this stage, there is no concrete indication that these preoccupations will prevail, and the European Commission has already expressed its wish to improve the modalities of the functioning of the ISDS system. The Commission focuses on 'building a modern, transparent and efficient ISDS system'.[175] First of all, the Commission considers that improvement of ISDS is not conceivable without transparency.[176] Having participated in the United Nations Commission on International Trade Law's (UNCITRAL) elaboration of the new transparency rules,[177] the EU has been a strong advocate for transparency in arbitral proceedings. Following from the EU's initiative,[178] the UNCITRAL Transparency Rules[179] were introduced in the CETA.[180] It is notable of course that the concern with transparency was first prominent in the NAFTA context. With its 2001 Notes of Interpretation of Certain Chapter 11 Provisions, the NAFTA Free Trade Commission highlighted the absence of a general duty of confidentiality imposed on the disputing parties,[181] and in its joint statement on a 'Decade of Achievement' in July 2004, it welcomed the fact that Mexico had 'joined Canada and the United States in supporting open hearings for investor-state disputes'.[182] All NAFTA awards are

[172] Position of the European Parliament, *supra* note 53, recital 4.

[173] Donnan and Wagstyl, 'Transatlantic Trade Talks Hit German Snag', *Financial Times* (14 March 2014).

[174] See also *ibid*.

[175] European Commission, Consultation Notice, *supra* note 16, at 3.

[176] On transparency, see Ortino, 'Transparency of Investment Awards: External and Internal Dimensions', in J. Nakagawa (ed.), *Transparency in International Trade and Investment Dispute Settlement* (2013), at 119–158; Titi, 'International Investment Law and Good Governance', in M. Bungenberg *et al.* (eds), *International Investment Law: A Handbook* (2015) 1768; Menétrey, 'La transparence dans l'arbitrage d'investissement', 1 *Revue de l'Arbitrage* (2012) 33; A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties* (2009).

[177] European Commission, *supra* note 1, at 8.

[178] Draft EU–Canada Free Trade Agreement Investor-to-State Dispute Settlement Text, 1 February 2013, Art. 11, after discussions on 28–30 January 2013.

[179] UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, 2014, New York: United Nations. The Rules are available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency.html (last visited June 2015).

[180] CETA, *supra* note 10, Investment Chapter, Art. X-33.

[181] NAFTA Free Trade Commission Notes of Interpretation of Certain Chapter 11 Provisions, 31 July 2001, available at www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp (last visited June 2015).

[182] NAFTA Free Trade Commission, Joint Statement on 'Decade of Achievement', 16 July 2004, available at www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/JS-SanAntonio.aspx?lang=eng (last visited June 2015).

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public.[183] Express provisions on transparency figure in the US and Canadian Model BITs and in treaties concluded on their basis.[184] The US Model BIT of 2012 has broken ground in 'transparency and public participation, [as] it requires consultations on improving transparency practices … and commits the Parties to consider including transparency and public participation provisions in a possible future appellate mechanism for' ISDS.[185] However, transparency remains new in the EU context, and the incorporation of the UNCITRAL rules on transparency is still novel, given that the latter were only adopted in 2014.[186]

The Commission further wishes to prevent investors from engaging in multiple or frivolous claims, in order to both ensure that investors may not 'win twice' and in order to discourage 'long shot' claims, especially given that even where a respondent state has won a case it may be liable to pay its arbitration costs.[187] The EU further aims to incentivize investors to launch their claims in local courts or resort to amicable settlements or other alternative dispute resolution methods.[188] More concretely, the CETA introduces procedural requirements for the submission of claims to arbitration[189] and regulates the situation where claims are brought concurrently under the investment agreement and another international agreement.[190] Possibly inspired by a 2006 amendment to the International Centre for Settlement of Investment Disputes' (ICSID) Arbitration Rules, the same treaty contains provisions on the rejection of claims that are manifestly without legal merit[191] and those 'unfounded as a matter of law'.[192]

Another notable EU suggestion concerns the introduction of a code of conduct for arbitrators, including specific provisions to address conflicts of interest.[193] EU investment agreements may leave outside the scope of the arbitration clause measures adopted 'in times of crisis in order to protect consumers or to maintain the stability and integrity of the financial system'.[194] Other proposals include binding guidance by the parties on the interpretation of a treaty provision and the introduction of an

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[183] Ortino, *supra* note 176, at 124.

[184] E.g., US Model BIT (2012), Art. 29; Canadian Model BIT (2012), Arts 31–32; US–Chile FTA (2003) H.R. 2738 (108th), Art. 10.20; Central America-Dominican Republic-United States Free Trade Agreement, signed in Washington DC, 5 August 2004, entered into force on different dates in 2006, 2007 and 2009), Art. 10.21.

[185] Caplan and Sharpe, 'United States', in Brown, *supra* note 78, at 757.

[186] Another recent treaty to refer to the UNCITRAL Transparency Rules is the Colombia–France BIT 2014 (Acuerdo entre el gobierno de la República de Colombia y el gobierno de la República francesa sobre el fomento y protección recíprocos de inversiones) (treaty not in force), Art. 15.

[187] European Commission, *supra* note 1, at 8; European Commission, *supra* note 100.

[188] European Commission, *supra* note 100.

[189] CETA, *supra* note 10, Investment Chapter, Art. X.21.

[190] *Ibid.*, Art. X.23.

[191] *Ibid.*, Art. X.29.

[192] *Ibid.*, Art. X.30. Also European Commission, *supra* note 100.

[193] CETA, *supra* note 10, Dispute Settlement Chapter, Annex I. See also European Commission, *supra* note 1, at 8–9; European Commission, Consultation Notice, *supra* note 16, at 3–4. European Commission, *supra* note 100; European Parliament Resolution 2013/2674(RSP), *supra* note 15, para. 42.

[194] European Commission, *supra* note 100.

appeals mechanism in order to increase consistency in ISDS.[195] While some treaties, such as the US Model BIT, envisage the possibility of a future appellate system, the Commission expects the TTIP to create such a mechanism.[196]

## 5 Conclusion

International investment law is an evolving vibrant field, and nowhere is this more evident than in the exercise of the EU's new competence over foreign direct investment. Despite adding a layer of complexity to investment negotiations, the new state of affairs creates the opportunity for the EU not only to influence the drafting of investment treaty standards but also to improve international investment law in unprecedented ways. Breaking free from the old-fashioned 'European' approach of the member states, the Union has designed its own investment negotiating 'model', establishing a new standard. This standard is in harmony with the new generation of investment agreements, first born in North America. The elaboration of an actual EU model agreement – whether adopted in black-and-white form or emerging as a de facto template – is still to come. However, it is probable that we stand at the threshold of an even newer generation of international investment treaties and one that is set to change the face of international investment law as we know it.

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[195] European Commission, *supra* note 1, at 8–9; European Commission, Consultation Notice, *supra* note 16, at 3–4; European Commission, *supra* note 100. See also European Parliament Resolution 2013/2674(RSP), *supra* note 15, para. 42.

[196] European Commission, *supra* note 100.