
International Investment Law and the European Union: A Reply to Catharine Titi

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Abstract

Reasonable people might disagree whether the European Union (EU) is likely to make a significant and commendable contribution to international investment law. This article addresses two issues of relevance for this discussion. First, it considers the appropriateness of evaluating developments in international investment law in terms of balance between investor protection and the right to regulate. Second, the contribution of the recent EU practice is briefly examined, finding it less interesting and innovative than one might have expected.

1 Introduction

Reasonable people might disagree whether the European Union (EU) is likely to make a significant and commendable contribution to international investment law. Catharine Titi makes a powerful and in many ways persuasive argument in support of this likelihood.¹ This article will be limited to two issues where the materials put forward could also lend support to a different, if not necessarily better, reading. I will first consider the appropriateness of evaluating developments in international investment law through the analytical perspective of balance between the (originally excessive) investor protection and (the gradual recognition of) the right to regulate.² It will be suggested that the apparent consensus on the meaning of ‘balancing’ may sometimes obfuscate certain less obvious issues at play. Second, the contribution of the recent EU practice will be briefly examined,³ finding it less interesting and innovative than one might have expected.

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¹ Titi, ‘International Investment Law and the European Union: Towards a New Generation of International Investment Agreements’, in this volume at 639.

² See also C. Titi, *The Right to Regulate in International Investment Law* (2014).

³ See also Titi, ‘Le “droit de réguler” et les nouveaux accords de l’Union européenne sur l’investissement’, 39 *Journal du droit international* (2015) 64.

2 The Fog of Balancing

International investment law represents a balance between the competing interest of investors for protection from unfair treatment and the interest of the host state to exercise its regulatory powers.⁴ This is not an unusual proposition about international law. One could describe many regimes of international law as balancing competing interests of different kinds.⁵ However, taking an uncontroversial general description and loading it too heavily with legal or systemic significance may lead the inquiry into a bank of fog. One example of what I have in mind in relation to investment law is ‘depoliticization’: a concept that (at its best) means everything for everybody, with little independent analytical value,⁶ but may also be significantly misleading, suggesting with persuasive force that certain positive rules have (not) been created or that certain legal solutions would (not) fit the existing regime.⁷ Another example is ‘regulatory chill’: a perspective that takes complex inquiries about content of rules and compliance with rules and conflates them into a single question, presented from an entirely odd angle. In a similar vein, there are two reasons to be cautious about focusing on changes in treaty language to identify the (re)balancing of interests in investment law: first, it may miss or unduly simplify important elements in international investment law and, second, it may leave aside systemic assumptions that have to be taken into account if the balance is to be properly calibrated. This article will address these concerns in turn.

A What Is Being Balanced

I would not want to overstate my first concern. I am not suggesting that there is nothing of interest to be gained from an examination of changes in investment treaty practice.⁸ But there are four qualifications, none of them particularly original or controversial, that have to be made in order to argue that an examination of changes in treaty language can demonstrate changes in international law. The first qualification is a technical one. Identification of the meaning of treaty rules by reference to their textual expression may provide a glimpse of the ordinary meaning of terms, but it would fall short of the full inquiry mandated by principles of treaty interpretation expressed in the Vienna Convention on the Law of Treaties, namely calibrating ordinary meaning by context, object and purpose, and other available materials,

⁴ Lowe, ‘Regulation or Epropriation’, 55 *Current Legal Problems* (2002) 447, at 450.

⁵ E.g., on international humanitarian law, see Schmitt, ‘Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance’, 50 *Virginia Journal of International Law* (2010) 795; O’Connell, ‘Historical Development and Legal Basis’, in D. Fleck (ed), *The Handbook of International Humanitarian Law* (2013) 1, at 36–38; on law of the sea, see UNCLOS, *Chagos Marine Protected Area Arbitration (Mauritius v. UK)*, Annex VII Case, Award, 18 March 2015, at paras 219, 309.

⁶ Paparinskis, ‘The Limits of Depoliticisation in Contemporary Investor-State Arbitration’, 3 *European Society of International Law Proceedings* (2010) 271.

⁷ ICSID, *Corn Products International, Inc. v. Mexico – Decision on Responsibility*, 15 January 2008, ICSID Case no. ARB/(AF)/04/1, separate opinion of Arbitrator Lowenfeld, 18 August 2009, at para. 1; UNCITRAL, *Ecuador v. US*, Expert Opinion of Professor Reisman, 24 April 2012, PCA Case no. 2012–5, at paras 24–25, 37, 54; expert opinion of Professor Tomuschat, 24 April 2012, at para. 32.

⁸ Alvarez, ‘The Evolving BIT’, in I.A. Laird and T.J. Weiler (eds), *Investment Treaty Arbitration and International Law* (2010) 1.

particularly by the background practice from other treaties and cases that informs the ordinariness or speciality of particular expressions.⁹

The second qualification is that any interpreter, whether operating in an arbitral or a less formalized setting, will have to examine a variety of different rules – on jurisdiction, admissibility, the scope and content of obligations, exceptions in primary rules and applicable secondary rules – to determine the existence of responsibility or the success of a particular claim. A rule-by-rule comparison may miss the overall systemic effect of individual changes – for example, the knock-on effect that changes to rules on jurisdiction, admissibility or exceptions will have on the manner of issues that substantive obligations address. The third qualification is that not all rules bearing upon the meaning of the treaty and substantive and procedural consequences of its breach will be set out in the treaty itself. Interpretation of investment treaties may require drawing upon customary law on the issue¹⁰ or taking into account rules of other regimes of international law such as international human rights law¹¹ or international health law.¹² Rules of state responsibility have sometimes been attributed interpretative significance¹³ and, of course, would apply as secondary rules.¹⁴ Tribunals may also be capable of drawing upon uncodified inherent powers to conduct proceedings.¹⁵

Finally, the common woe of negotiators, namely to be misunderstood by adjudicators and legal writers,¹⁶ is particularly likely in investment law. Jurisdictional clauses are broad, adjudicators decentralized and the application of rules to particular facts, rather than the more abstract exercise of interpretation, will often be of decisive importance in the formulation of treaty rules and their application in arbitral decisions.¹⁷ Overall, in many instances, the contentious issues will turn

⁹ Vienna Convention on the Law of Treaties, 1155 UNTS 331 (1969), Arts. 31–33, which reflect customary law, see recently *Maritime Dispute (Peru v. Chile)*, ICJ Reports (2014), available at www.icj-cij.org/docket/files/137/17930.pdf (last visited June 2015), at para. 57; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, ICJ Reports (2015), available at www.icj-cij.org/docket/files/118/18422.pdf (last visited June 2015), at para. 138; *Chagos*, *supra* note 5, at para. 501 (by implication).

¹⁰ UNCITRAL, *Saluka Investments BV (Czech Republic) v. Czech Republic – Partial Award*, 17 March 2006, at paras 254–262.

¹¹ ICSID, *Rompetrol Group v. Romania – Award*, 6 May 2013, ICSID Case no. ARB/06/3, at paras 168–172.

¹² ICSID, *Philip Morris Brand Sàrl (Switzerland) and others v. Uruguay – Procedural Order no. 3*, 17 February 2015, ICSID Case no. ARB/10/7, at paras 23–24.

¹³ ICSID, *Giovanni Alemanni and others v. Argentina – Decision on Jurisdiction and Admissibility*, 17 November 2014, ICSID Case no. ARB/07/8, at para. 316.

¹⁴ UNCITRAL, *Yukos Universal Limited (Isle of Man) v. Russia – Final Award*, 18 July 2014, PCA Case no. AA 227, at paras 1594–1606, 1650–1692, 1763–1769.

¹⁵ Brown, 'Inherent Powers in International Adjudication', in C. Romano *et al.* (eds), *The Oxford Handbook of International Adjudication* (2013) 828.

¹⁶ Fitzmaurice, 'Vae Victis or Woe to the Negotiators! Your Treaty or Our "Interpretation" of It?', 65 *American Journal of International Law* (1971) 358.

¹⁷ EU–Canada Comprehensive Economic and Trade Agreement (CETA) 2014 (not yet finalized), see consolidated CETA text (published on 28 September 2014), available at www.trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf (last visited June 2015), Art. X.9(2), (4), Annex X.11(2); European Union (EU)–Singapore Free Trade Agreement (FTA) 2015 (not yet finalized), see authentic FTA text (as of May 2015), available at www.trade.ec.europa.eu/doclib/html/152844.htm (last visited June 2015), Art. 9.4(2), (5); www.trade.ec.europa.eu/doclib/docs/2015/june/tradoc_153575.pdf

on the usual lawyerly techniques of identification of applicable law, interpretation, solution of conflicts and application of law to the facts (more often than not, within or with an eye to formalized dispute settlement or in response to it), which may eventually strike – or undo – the balance.¹⁸ Careful *ex ante* attention to precise textual expression of particular clauses is, of course, an important element of this exercise. However, to focus on this exclusively runs the danger of missing something important, just as telling the story of European human rights law solely by comparing the language of the European Convention of Human Rights with its protocols would.

B What Is Not Being Balanced

My second broader concern relates to the conceptual aspects of the perspective of balancing. The strongest version of the criticism would be that balancing is not a free-standing and normatively neutral concept and cannot be unreflectively taken as a given and merely applied.¹⁹ The intermediate criticism would call for greater clarity for precisely what is meant by balancing.²⁰ I will not pursue these points in this article and assume that it is defensible to evaluate investment law from the perspective of balancing the interests of investors and states. I will merely draw attention to two perhaps slightly less obvious aspects of investment law that could have a bearing on such an inquiry.

The first relates to the scope of investment law: the all-important question of what the ‘investment’, which is protected by this regime of international law, is. The annulment committee in *Caratube v. Kazakhstan* recently noted that ‘[a] number of tribunals have reached the conclusion that the existence of an investment requires some inherent characteristics. ... it is commonly accepted that contribution and risk assumption form part of the core elements which characterize an investment’.²¹ Indeed, a number of important awards delineate the scope of the regime so as to exclude even significant

(last visited June 2015), Annex 9-A(2); *Saluka*, *supra* note 10, at paras 266–275, 310–456, 464–496; *Rompetrol*, *supra* note 11, at paras 270–280; *Yukos*, *supra* note 14, at paras 1575–1584; UNCITRAL, *British Caribbean Bank Limited (Turks & Caicos) v. Belize – Award*, 19 December 2014, PCA Case no. 2010–18, at paras 233–247, 279–284; ICSID, *Hochtief AG v. Argentina – Decision on Liability*, 29 December 2014, ICSID Case no. ARB/07/31, at paras 209–288; UNCITRAL, *Clayton and others v. Canada – Award on Jurisdiction and Liability*, 17 March 2015, PCA Case no. 2009-04, at paras 446–604.

¹⁸ Mills, ‘The Balancing (and Unbalancing?) of Interests in International Investment Law and Arbitration’, in Z. Douglas, J. Pauwelyn and J. Viñuales (eds), *The Foundations of International Investment Law* (2014) 437.

¹⁹ Cf. regarding compliance, Kingsbury, ‘The Concept of Compliance as a Function of Competing Conceptions of International Law’, 19 *Michigan Journal of International Law* (1998) 345.

²⁰ ‘Balancing’ may apply to interests (whether of particular disputing parties or genus of parties), rights, values, policies, interpretative materials, tensions between obligations, regimes or systems, balancing mandated by particular primary or secondary rules or balancing of evidence. See a recent inter-state award, in which ‘balance’ was used to describe interests underpinning particular rules (*Chagos*, *supra* note 5, at paras 219, 309); process of interpretation (*Chagos*, *supra* note 5, at para. 502); application of primary obligations to particular facts (*Chagos*, *supra* note 5, at paras 528, 531, 534–535, 540) and the system of dispute settlement (*Chagos*, *supra* note 5, at para. 45 [dissenting and concurring opinion of Judges Kateka and Wolfrum]).

²¹ ICSID, *Caratube International Oil Company v. Kazakhstan – Decision on the Annulment Application*, 21 February 2014, ICSID Case no. ARB/08/12, at para. 235.

economic activities if they are of insufficient economic contribution or duration or are subject to no other risk than a purely commercial risk.²² There may be scope for reasonable disagreement on whether this approach is reflective of *jurisprudence constante* in arbitrations conducted by the International Centre for Settlement of Investment Disputes or investment arbitration more generally.²³ However, this disagreement is irrelevant for evaluating EU practice, which explicitly delineates the scope of protection and consent to arbitration by incorporating the ‘characteristics of an investment’ into the *chapeau* of the definition of ‘investment’.²⁴ Investments of insufficient duration, contribution and risk will not be ‘investments’ that fall under the protective ambit of the EU treaties.

The second observation relates to teleology and structure. The story told by most investment treaties in their preambles weaves together three strands: importance of legal protection provided, its relationship with the flows of capital and the overall effect on the host state’s development.²⁵ I would not want to overstate my point. There are differences in emphasis and formulation, and there are other strands present. Reciprocity appears explicitly through the deepening of economic relations and implicitly through home states’ interest in the protection of their nationals. Indeed, reasonable people disagree on whether the teleology makes sense, whether it will deliver on its promises and whether it is worthwhile overall.²⁶ Still, the *lex lata* does seem to view the existence of protection under international law as being closely interlinked with the investor’s decision to make or retain an investment. Consequently, in a structural sense, investment protection treaties (or, at least, parts of them) may be better conceived of as pledges made by host states to influence or reward investors’ decisions.²⁷ Taking these points together, investment treaties (are intended to) nudge, or be nudged, by particular decisions that inject investments so deeply into the legal and economic system of the host state as to necessarily subject them to significant risks going beyond the merely commercial. This dynamic has to be taken into account when evaluating the balance struck, and an otherwise impeccable analysis of what treaties say may miss something important if it does not.²⁸

²² ICSID, *KT Asia v. Kazakhstan – Award*, 17 October 2013, ICSID Case no. ARB/09/8, at paras. 188–223; ICSID, *Nova Scotia Incorporated (Canada) v. Venezuela – Award*, 30 April 2014, ICSID Case no. ARB(AF)/11/1, at paras 90–97, 105–113; ICSID, *Poštová Banka, AS and Istrokapital SE v. Greece – Award*, 9 April 2015, ICSID Case no. ARB/13/8, at paras 360–371.

²³ Legum, ‘Of Definitions and Disregard: An Editorial’, 30 *ICSID Review* (2015) 281.

²⁴ CETA, *supra* note 17, Art. X.3; EU–Singapore FTA, *supra* note 17, Art. 9.1.

²⁵ Texts of the most recent treaties provided by UN Conference on Trade and Development illustrate my point, available at www.investmentpolicyhub.unctad.org/IIA/MostRecentTreaties (last visited June 2015).

²⁶ Poulsen, Bonnitcha and Yackee, *Transatlantic Investment Treaty Protection* (12 March 2015); Baetens, *Transatlantic Investment Treaty Protection: A Response to Poulsen, Bonnitcha and Yackee* (12 March 2015), available at www.ceps.eu/publications (last visited June 2015).

²⁷ Cf. Brimlayer, ‘From “Contract” to “Pledge”: The Structure of International Human Rights Agreements’, 77 *British Yearbook of International Law* (2006) 163.

²⁸ As Vaughan Lowe puts it, ‘it makes no sense to criticize a BIT for being an unbalanced instrument favouring investors at the expense of host States, if one looks only at the provisions of the BIT. ... to criticize a BIT on the ground that it only gives rights to investors is like criticizing a screwdriver for only being useful for attaching screws.’ Lowe, ‘Book Review of *Commentaries on Selected Model Investment Treaties* / edited by Chester Brown. ISBN 978-0-10-964519-0, £180.00’, 30 *ICSID Review* (2015) 275, at 276.

3 Brave New Europe

In the investment treaty practice of post-2000 (investment law, as it were, after arbitration), states participating in the system have adopted two approaches: first, they have remained perfectly happy to continue in the usual manner (for example, the traditional home states in Western Europe)²⁹ and, second, they have finessed the sources and content of obligations, added layers of substantive and procedural exceptions and advanced transparency (Canada and the USA).³⁰ The first few months of 2015 have delivered two new approaches: India has reshaped the teleology of investment law around the right to regulate, setting out *prima facie* narrow substantive and procedural guarantees, interlinked with investors' obligations,³¹ and Brazil has departed from the investor–state paradigm by concluding treaties that provide for inter-state dispute settlement only.³² Considered against this background, does the EU practice provide an innovative and coherent contribution worthy of its own separate chapter in the story of the development of investment law?

A New Europe

Catharine Titi's highly competent discussion of the developments in EU practice leads her to conclude that 'it is probable that we stand at the threshold of an even newer generation of international investment treaties, and one set to change the face of international investment law as we know it'.³³ That may very well be so, but glimpses of the aesthetically enhanced future have been rather well disguised so far, and the existing practice shows a somewhat uneasy mixture of things new and old. Three examples taken from the section on substantive obligations should illustrate my point.

First, the definition of expropriation in EU treaties follows the USA-Canada approach (which, in its own turn, borrows from a 1978 US Supreme Court judgment).³⁴ Why is this so? Would it not make more sense for the EU to search for inspiration closer to home than Washington, DC, in the 1970s? It could have drawn upon European human rights law,³⁵

²⁹ 2003 Italy Model Bilateral Investment Treaty (BIT); 2004 Netherlands Model BIT; 2006 France Model BIT; 2008 Germany Model BIT; 2008 UK Model BIT. Treaties and model treaties referred to in this and the following footnote are available at www.investmentpolicyhub.unctad.org/IIA (last visited June 2015).

³⁰ Dominican Republic–Central America Free Trade Agreement 2004, available at www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text (last visited June 2015); 2004 Canada Model BIT; 2004 US Model BIT; 2012 US Model BIT. The 2007 Norway's attempt at a model BIT could provide a European counterpart.

³¹ 2015 India Model BIT, available at www.finmin.nic.in/the_ministry/dept_eco_affairs/icsection/Indian%20Model%20Text%20BIPA.asp (last visited June 2015).

³² 2015 Brazil–Mozambique BIT, available at www.itamaraty.gov.br/index.php?option=com_content&view=article&id=8511&catid=42&Itemid=280&lang=pt-BR (last visited June 2015); 2015 Brazil–Angola BIT, available at www.itamaraty.gov.br/index.php?option=com_content&view=article&id=8520:acordo-brasil-angola-de-cooperacao-e-facilitacao-de-investimentos-acfi-luanda-1-de-abril-de-2015&catid=42&lang=pt-BR&Itemid=280 (last visited June 2015).

³³ Titi, *supra* note 1, at 661.

³⁴ *Penn Central Transportation Company and others v. New York City* 438 US 104, at 123–128 (1978); 2012 US Model BIT, Annex B; CETA, *supra* note 17, Annex X.11(2); EU–Singapore FTA, *supra* note 17, Annex 9-A(2).

³⁵ Cf. 2007 Norway Model BIT, Art. 6.

which is itself of an equally respectable vintage,³⁶ and elaborated in quite a few international judgments dealing with (issues comparable to) investment protection.³⁷ Second, the definition of most-favoured-nation treatment in the EU–Canada Comprehensive Economic and Trade Agreement (CETA) explains that substantive obligations in other treaties are not ‘treatment’, unless particular measures are adopted pursuant to them.³⁸ Why? The proposition that obligations in other treaties do constitute ‘treatment’ seems to be reflective of consensus in investment arbitration.³⁹ What is the reason for such a sharp departure from a generally accepted reading of the clause, which is seemingly expressed in the form of an interpretation of the ordinary meaning rather than an exception?

Third, the definition of fair and equitable treatment has been supplemented by an explanation of what conduct can constitute its breach.⁴⁰ The idea of elaborating fair and equitable treatment in this manner is an interesting one (even if the pedigree and implications of some elements may be more obvious than others).⁴¹ However, the effort to ensure greater predictability may be undercut by significant differences already present within the EU practice: ‘targeted discrimination’ in the CETA but not in the draft EU–Singapore Free Trade Agreement (FTA);⁴² a rule on contractual breaches in the FTA but not in the CETA; and ‘legitimate expectations’ expressed as part of the obligation in the FTA but only something to be taken into account in application in the CETA. Overall, EU practice is not without innovative ideas, but it could benefit from closer attention to both the fine print and overall consistency.

B *Brave Europe*

Thinking about the EU from behind a veil of ignorance, one could imagine a number of possible innovative futures for its investment law (some of which may be more likely than

³⁶ CJEU, *Hauer v. Land Rheinland-Pfalz*, Case 44/79, Judgment of 13 December 1979, at paras 17–30; ECtHR, *Sporrong and Lönnroth v. Sweden*, Appl. nos 7151/75 and 7152/75, Judgment of 23 September 1982. All CJEU and ECtHR decisions are available online at respectively www.curia.europa.eu/juris/recherche.jsf?language=en and www.hudoc.echr.coe.int/ (last visited June 2015).

³⁷ See just in the Grand Chamber of the European Court of Human Rights (ECtHR) in the last three years: ECtHR, *Kotov v. Russia*, Appl. no. 54522/00, Judgment of 3 April 2012; ECtHR, *Centro Europa 7 SRL and Di Stefano v. Italy*, Appl. no. 38433/09, Judgment of 7 June 2012; ECtHR, *Vistiņš and Perepjolkins v. Latvia*, Appl. no. 71243/01, Judgment of 25 October 2012; ECtHR, *Ališić and others v. Bosnia and Herzegovina and others*, Appl. no. 60642/08, Judgment of 16 July 2014. The USA–Canada definition appears to have been applied in one case so far, ICSID, *Railroad Development Corporation (RDC) v. Guatemala – Award*, 29 June 2012, ICSID Case no. ARB/07/23, at paras 79–152.

³⁸ CETA, *supra* note 17, Art. X.7(4).

³⁹ UNCITRAL, *White Industries v. India*, Final Award, 30 November 2011, at para. 11.2. Most states do not even raise this particular point. See ICSID, *MTD Equity Sdn. Bhd. and other v. Chile – Decision on Annulment*, 21 March 2007, ICSID Case no. ARB/01/7, at para. 64; ICSID, *Rumeli Telekom and other v. Kazakhstan – Award*, 29 July 2008, ICSID Case no. ARB/05/16, at para. 575; ICSID, *EDF International SA and others v. Argentina – Award*, 11 June 2012, ICSID Case no. ARB/03/23, at paras 921–937; ICSID, *Arif v. Moldova – Award*, 8 April 2013, ICSID Case no. ARB/11/23, at para. 396; ICSID, *Apotex Holdings Inc. and other v. US – Award*, 25 August 2014, ICSID Case no. ARB(AF)/12/1, at paras 9.66–71; UNCITRAL, *Hesham Talaat M. Al-Warraq v. Indonesia*, Final Award, 15 December 2014, at paras 540–555.

⁴⁰ CETA, *supra* note 17, Art. X.9(2), (4); EU–Singapore FTA, *supra* note 17, Art. 9.4(2), (5).

⁴¹ Paparinskis, ‘Introduction to the Paperback Edition’, in M. Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (2014) xliii, at lii–lv.

⁴² EU–Singapore FTA, *supra* note 17.

others in legal, political and policy terms). The EU could nudge investment protection law towards a ‘Uruguay moment’, centralizing and institutionalizing its dispute settlement, in some ways similarly to multilateral trade. At the other end of the spectrum, it could move towards (for lack of a better word) a ‘Campbellian moment’, entirely or substantially dismantling mixed adjudication to return to the traditional inter-state regime.⁴³ Or a generalist international lawyer’s perspective could be adopted, taking a step back to reflect upon the function that international law and dispute settlement could be expected to fulfil within this legal regime.⁴⁴ Such an examination could possibly lead to modest conclusions about the role of this manner of adjudication, suggesting instead a focus on greater involvement of the contracting parties (for example, the internalization of investment law in bureaucratic decision making and inter-party consultations, a lack of agreement by the parties as a precondition to claims, an expectation of non-disputing parties’ submissions and a broad approach to permissibility of inter-party arbitration). And there are smaller tweaks that could have significant systemic importance – for example, elaborating the meaning of particular terms or concepts in a manner that non-parties could adopt or take into account in some legally relevant form.⁴⁵ When the veil of ignorance is dropped, there is little that one could point to in the existing EU practice that could have such an impact as the US practice has had or the recent Indian and Brazilian practice may have.

It is right that the EU has moved beyond the models of the traditional home states of Western Europe. However, the more important point may be that the *sui generis* elements of the European constitutional and political order have not yet translated into qualitatively new contributions to international investment policy.⁴⁶ Indeed, the lack of major surprises may be the most surprising aspect of the story so far. Whatever new faces may be lurking around the corner,⁴⁷ the black letter of the existing EU practice is an update of the US practice of the last decade, better on some points than others – not that there is anything wrong with that.

⁴³ See SADC, *Mike Campbell (Ltd) and Others v. Zimbabwe*, Case 2/2007, [2008] SADCT 2, which led to the dismantlement of the individual-state aspects of the Southern African Development Community (SADC) Tribunal. De Wet, ‘The Rise and Fall of the Tribunal of the Southern African Development Community: Implications for Dispute Settlement in Southern Africa’, 28 *ICSID Review* (2013) 45.

⁴⁴ H. Lauterpacht, *The Function of Law in the International Community* (2011); Lowe, ‘The Function of Litigation in International Society’, 61 *International and Comparative Law Quarterly* (2012) 209; G. Hernández, *The International Court of Justice and the Judicial Function* (2014); Paparinskis, *For or Against International Arbitration: A Perspective of International Law of Dispute Settlement* (9 June 2015), available at www.ejiltalk.org/for-or-against-international-arbitration-a-perspective-of-international-law-of-dispute-settlement/ (last visited June 2015).

⁴⁵ 2015 Mauritius Convention on Transparency, available at www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention.html (last visited June 2015); Lowe, *supra* note 44, at 216–219.

⁴⁶ Rules on apportionment of financial responsibility between the EU and its member states may be an exception, in any event related more to secondary rules of responsibility and (tertiary) rules of dispute settlement than primary rules of investment protection. Dimopoulos, ‘The Involvement of the EU in Investor-State Dispute Settlement: A Question of Responsibilities’, 51 *Common Market Law Review* (2014) 1671.

⁴⁷ European Commission, Concept Paper: Investment in TTIP and Beyond: The Path for Reform, 5 May 2015, available at www.trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF (last visited June 2015); European Parliament, Resolution Containing Recommendations to the European Commission on the Negotiations for the Transatlantic Trade and Investment Partnership, 8 July 2015, Resolution no. 2014/2228(INI), at xiii–xv. European Commission, Commission draft text TTIP – investment, 16 September 2015, available at www.trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf (last visited September 2015).