

Where Should Europe’s Investment Path Lead?

Reflections on August Reinisch, “*Quo Vadis Europe?*”

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ABSTRACT

Relative to the past policies of its Member States, will the European Union’s new comprehensive international investment policy constitute a step forward, a step backward, or a perpetuation of the status quo? Professor Reinisch’s contribution to this volume opens a wide window on the current state of the debate. His cogent analysis suggests that, at present, all three possibilities remain live ones, although some basic contours of a likely trajectory are beginning to take shape. I use his musings as a springboard to investigate two questions which follow naturally from his. That is, in view of Professor Reinisch’s response to the question “where are you going, Europe?” I ask, first, where should European investment policy go next, and second, who should decide? These normative questions are pressing and require thoughtful answers developed through inter-institutional dialogue. If the new EU-wide investment policy is to succeed, their resolution must take precedence over the more mundane, technical matters that have consumed the bulk of scholarly attention so far.

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INTRODUCTION

European international investment policy stands at a crossroads. With the entry into force of the Lisbon Treaty,¹ foreign direct investment (FDI) now falls within the ambit of the Common Commercial Policy of the European Union.² In effect, this means that the negotiation and ratification of international investment treaties will in future be conducted by the various organs of the Union acting on an EU-wide level rather than by the individual Member States acting in their own capacity and on their own behalf. The Lisbon Treaty thus promises to bring about a much needed harmonization of the Member States' hitherto disparate approaches to protecting and promoting foreign direct investment flows across their sovereign borders.

Yet the crossroads at which the EU now finds itself is no simple Y-junction. Looking backward, its 27 Member States have not all come by the same road. Germany arrives off a veritable super-highway of investment treaty activism, with nearly 120 existing bilateral investment treaties in tow.³ Ireland, by contrast, seemingly drops out of the sky with none.⁴ The remaining 25 EU member countries approach from all manner of winding roads, each transporting varying numbers of investment treaties falling somewhere between these two extremes.⁵ All told, the European Union must, in the coming years, replace 1407 existing

¹ Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, signed 13 December 2007, entered into force 1 December 2009, Official Journal of the European Union, C 306/01 of 17 December 2007.

² See arts 206, 207(1), and 207(4), European Union, Consolidated version of The Treaty on the Functioning of the European Union, OJ C 115/47 of 9 May 2008 [hereinafter "Consolidated TFEU"]. The full texts of these articles are set forth in Professor Reinisch's contribution to the present volume (August Reinisch, *The EU on the Investment Path – Quo Vadis Europe? The Future of EU BITs and other Investment Agreements*, XX SANTA CLARA J. INT'L L. XX (2013) [hereinafter Reinisch – *Quo Vadis Europe?*]). Consolidated versions of all of the currently applicable EU treaties referenced in this comment may also be found in "Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union and the Charter of Fundamental Rights of the European Union, Council of the European Union," [hereinafter "Consolidated TEU," "Consolidated TFEU," and "EU Charter of Fundamental Rights," respectively] Doc. No. 6655/7/08 REV 7 (Brussels, 12 November 2012), available at: register.consilium.europa.eu/pdf/en/08/st06/st06655-re07.en08.pdf.

³ European Commission, Communication from the Commission to the European Parliament, The Council, the European Economic and Social Committee and the Committee of the Regions, Towards a comprehensive European international investment policy, Annex, 7 July 2010, COM(2010) 343 final 4 [hereinafter "Commission – Towards a Comprehensive EU Investment Policy"]; available at: http://trade.ec.europa.eu/doclib/docs/2010/july/tradoc_146307.pdf.

⁴ Id.

⁵ Id.

bilateral investment treaties (BITs) with consolidated EU-wide agreements.⁶

Looking forward, too, the crossroads at which the EU stands is not a typical fork in the road. At such a fork, one has the luxury of choosing among a small number of well-defined paths with the reasonable certainty that they will lead to known destinations. The EU, however, seeks to chart a path to the promised land of sustainable development and economic prosperity for all.⁷ It is generally agreed that this promised land lies somewhere beyond the wilderness of foreign investment policy.⁸ But from the current vantage point, numerous paths leading off in different directions through the wilderness are discernible – some more trodden⁹ and others less so.¹⁰ The EU must now choose among these paths or decide to blaze a new trail of its own. In making this choice, it must do its best to anticipate and prepare for the various kinds of natural hazards it is likely to encounter along the way.

⁶ Ahmad Ali Ghouri, *Resolving Incompatibilities of Bilateral Investment Treaties of the EU Member States with the EC Treaty: Individual and Collective Options*, 16(6) EUROPEAN L. J. 806, 817 (2010), table 6. This includes 1031 BITs concluded by Member States with non-EU states (extra-EU BITs) and 376 BITs concluded by EU Member States *inter se* (intra-EU BITs) but does *not* count the several hundred other agreements that have been signed by Member States but have not yet entered into force. For a list of all extra-EU BITs, including those signed but not yet in force, *see* List of the bilateral investment agreements referred to in Article 4(1) of Regulation (EU) No 1219/2012 of the European Parliament and of the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries, Official Journal of the European Union, 2013/C 131/02, at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2013:131:0002:0098:EN:PDF>

⁷ *See* Consolidated TEU, *supra* note 2, art. 3(3) (setting forth the Union's goals concerning sustainable development, full employment, environmental protection, scientific advancement, social inclusion, etc).

⁸ *See* Commission – Towards a Comprehensive EU Investment Policy, *supra* note 5 at p. 3 (“While the relationship between FDI and economic growth and welfare is a complex one, on balance, both inward and outward investment have a positive impact on growth and employment in and outside the EU, including in developing countries.”); Council of the EU, Conclusions on a comprehensive European international investment policy, 3041st Foreign Affairs Council Meeting, 25 October 2010 [hereinafter “Council – Conclusions on a Comprehensive EU Investment Policy”], at p. 1; available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/117328.pdf (“acknowledging the crucial role of foreign direct investment in fostering competitiveness, economic growth and productivity, strengthening trade relations between nations, contributing to sustainable development, job creation and enhanced consumer benefits”); and European Parliament resolution of 6 April 2011 on the future European international investment policy, (2010/2203 (INI)) [hereinafter “Parliament – Resolution on a Future EU Investment Policy”], para J.7; available at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2011-0141&language=EN> (“investment can have a positive impact on growth and jobs, not only in the EU but also in developing countries”).

⁹ Like the recent Canadian and US Model BIT paths.

¹⁰ *E.g.* the Gillard Government's announced policy of omitting investor-state dispute settlement from future Australian investment treaties.

In his piece *The EU on the Investment Path – Quo Vadis Europe?*, Professor Reinisch has done a remarkable job of providing a relief map to help would-be explorers of EU investment law and policy get the lay of the land. He explains in lucid terms what the Lisbon Treaty means and what it doesn't mean for the EU's investment policymaking competence moving forward. Anyone who knows anything about the complexity of EU law will immediately recognize that this expositional accomplishment is no small potatoes.

Professor Reinisch's article, however, goes well beyond the art of eloquent exposition to make several other notable contributions, two of which I will highlight here. The first is to shed light on how the inter-institutional power struggles being waged by the principal EU organs, namely, the European Commission, the European Parliament, the Council of the European Union (Council), and the Court of Justice of the European Union (CJEU), are shaping the future of EU international investment law and policy. By way of illustration, Professor Reinisch charts how these power struggles have brought about a situation in which the EU's new purported "exclusive competence"¹¹ over investment policymaking may actually amount to a mixed competence shared with the Member States.¹² He points out that, during the transitional period, Member States still retain important powers like the ability to conclude new BITs with countries with whom the EU is not actively pursuing negotiations.¹³ And even beyond the transitional period, the Member States (acting through the Council) will enjoy an effective veto over the Commission's EU-wide investment treaty negotiating initiatives, thanks to a special unanimity requirement included in the Lisbon Treaty.¹⁴

Professor Reinisch deserves credit for underlining these structural features of the new European regime. In doing so, he reminds the scholarly and policy-making communities that the EU's much-discussed new competence in this domain is not quite as exclusive and may not prove quite as unifying as some harmonization advocates might hope.

¹¹ Article 207 of the Consolidated TFEU, *supra* note 2, includes foreign direct investment within the areas covered by the Common Commercial Policy, and article 3(1) assigns exclusive competence over the CCP to the Union.

¹² Reinisch – *Quo Vadis Europe?*, *supra* note 2 at parts II & III, and noting at p. 8: "[t]he Council's compromise position appears to be its insistence on investment as an area of mixed competences between the Union and its members."

¹³ Albeit subject to an increased level of oversight by the Commission. For details, see Regulation (EU) No 1219/2012 of the European Parliament and of the Council of December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries, Official Journal of the European Union, L 351/40 (12 December 2012) [hereinafter "EU Regulation establishing transitional arrangements"], ch. III (Authorisation to amend or conclude a bilateral investment agreement), at: <http://eur-lex.europa.eu/Result.do?direct=yes&lang=en&where=EUROVOC:003462&whereihm=EUROVOC:bilateral%20agreement>.

¹⁴ Reinisch – *Quo Vadis Europe?*, *supra* note 2 at p. 1 (quoting the "special unanimity requirement" of article 207(4) of the Consolidated TFEU).

In a second key contribution, Professor Reinisch peeks under the bonnet of the EU's developing investment treaty negotiating agenda to provide an idea of where the new EU policy appears to be heading in practice.¹⁵ He does this by interweaving details from the Commission's various policy communications with revelations from the Council's leaked Negotiating Directives to the Commission.¹⁶ This discussion reveals that the Commission intends, at least for now, to pursue investment agreements which essentially hew to the model of the numerous 1980s and 1990s era investment treaties concluded by several influential Member States.¹⁷ Professor Reinisch notes that there seems to be no concrete plan in place as yet to address the many regulatory concerns which the European Parliament has raised about the suitability of these older model investment treaties within a 21st century international governance environment.¹⁸ In the final section of his article, he does an admirable job of highlighting this and other items one might expect to emerge as "controversial issues" over the coming years as the EU's future union-wide investment policy continues to take shape.¹⁹ He concludes – correctly, I suspect – that the final word on many of the most pressing open questions will likely come from the CJEU.

Overall, there is little I could add to Professor Reinisch's insightful analysis of his chosen topics. Instead, in my remarks, I wish to explore two questions which his analysis invites but does not address.²⁰ They are, to my mind, the elephants in the room. First, where *should* European investment policy go next (as distinguished from where *is* it going at present)? And second, who should decide? These are plainly normative questions and difficult ones at that. Rather than purporting to offer definitive answers – a task which would exceed the scope of my limited reflections by a wide margin – I will confine myself to suggesting what I

¹⁵ *Id.* at part IV.

¹⁶ This document, which concerns imminent or ongoing EU negotiations with Canada, India and Singapore, was obtained and leaked by NGOs. See Council Negotiating Directives (Canada, India and Singapore), 12 September 2011 [hereinafter Council – Negotiating Directives (Canada, India and Singapore)], available at: <http://www.bilaterals.org/spip.php?article20272&lang=en> and at <http://www.s2bnetwork.org/themes/eu-investment-policy/eu-documents/text-of-the-mandates.html>.

¹⁷ Reinisch – *Quo Vadis Europe?*, *supra* note 2 at part V.

¹⁸ Reinisch notes that the protection of sovereign regulatory space is an objective shared in principle by the Parliament, the Council, and the Commission. *Id.*, at pp. 30-31. However, he seems to take for granted that the EU's practice of including a general statement concerning the right to regulate in introductory chapter to its trade agreements will prove sufficient to protect Member States' regulatory space when faced with investor-state arbitration claims under investment treaties. This proposition seems dubious in the light of certain investment treaty arbitration decisions to the contrary. For a more extensive consideration of this topic, see Jan Kleinheisterkamp, *European Policy Space in International Investment Law*, 27(2) ICSID REV. 416-431 (2012).

¹⁹ Reinisch – *Quo Vadis Europe?*, *supra* note 2 at part VI.

²⁰ In this sense, I aim more to extend than to critique Professor Reinisch's argument.

consider to be some worthwhile cogitations in approaching each of the two questions raised.

The remainder of this comment proceeds as follows. Part I explores the “ought” question: where should European investment policy go next? I triangulate this query from the perspectives of empirics, policy, and practical implementation. After setting out some of the relevant considerations, Part II then asks the authority question: who should decide? I examine what the functional purposes and comparative strengths of the EU's four principal organs (Parliament, Council, Commission, and Court) suggest about the role each should play in shaping the future streamlined EU-wide investment policy. The final section concludes with a critical assessment of how much room the day-to-day exigencies of EU politics and bureaucracy leave for the kind of robust normative debate I propose. In my own circumspect but hopeful estimation, the answer is: enough.

I. WHERE SHOULD EU INVESTMENT POLICY GO NEXT?

Contemplating the future can be alternately exciting, terrifying, or both. But if it is to be something other than stultifying, it must be done in a manner which allows the contemplator to develop a reasonably well conceived plan for moving from point A to point B. This, of course, requires having at least a rough idea of where points A and B lie. As with most other public policy matters, figuring out “where to next?” in European international investment policy requires looking at the question from three different angles: past empirics, future goals, and practical implementation considerations. I take each in turn.

A. *A question of empirics*

In order to determine where the EU should move next with its international investment agreements, it is first necessary to take stock of what its Member States have achieved in the past through their respective investment policies and treaties. The principal documents released to-date by the Commission and the Council have evinced surprisingly little interest in this stock-taking exercise. The Commission, in its communiqué titled “Towards a comprehensive European international investment policy,” set out the number of extant BITs maintained by EU Member States.²¹ It failed, however, to analyze the concrete impact of any of these BITs on European investors, EU Member States, or the European investment environment as a whole. Instead, the Commission seems to have contented itself with two vague nods to a limited subset of the existing empirical literature on investment treaties. The first directs the reader without comment to “the extensive analytical work performed by

²¹ Commission – Towards a Comprehensive EU Investment Policy, *supra* note 5, at p. 4 (“the ‘BITs and pieces’ of investment policy”) and Annex (“Overview of the number of Bilateral Investment Treaties concluded by Member States”).

international organizations such as [the] OECD and UNCTAD.”²² The second references a single study in support of the assertion that:

[r]esearch confirms that substantive investment provisions in broad trade agreements impact trade and FDI flows more profoundly, or that the combination of substantive investment rules and provisions liberalising other parts of the economy jointly impact trade and investment more significantly.²³

The communiqué made no attempt to probe the possible policy-making significance of the “or” in this quote. Nor did it explain what the “extensive analytical work” by the OECD and UNCTAD actually reveals about the effectiveness of investment treaties. (It turns out some of it is quite critical on certain points.²⁴) Much less did the communiqué refer to the many academic studies which have so far found no conclusive evidence of a positive causal relationship between international investment treaties and investment flows to the states that sign them.²⁵

The Council’s statement in response to the Commission’s communiqué proved even less searching on the empirical front. It began with a sweeping acknowledgment of “the crucial role of foreign direct investment in fostering competitiveness, economic growth and productivity, strengthening trade relations between nations, contributing to sustainable development, job creation and enhanced consumer benefits”.²⁶ It made no attempt, however, to discover what is known about the precise role foreign direct investment plays in contributing to each of these noble goals. In particular, it nowhere examined the relationship between these

²² *Id.* at p. 4 (emphasis omitted).

²³ *Id.* at p. 5 (citing OECD (2006), Analysis of the economic impact of investment provision in regional trade agreements, OECD Trade Policy Working Paper No. 36, 11.07.2006).

²⁴ See e.g. UNCTAD, Investment Policy Framework for Sustainable Development (2012) (recommending a “new generation” of investment policies (p. 3) in part in reaction to what it describes on the publication website as “systemic flaws in the current system” (at: <http://unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20%28IIA%29/IIA-IPFSD.aspx>) (last visited 21 May 2013).

²⁵ For an overview, see Jason Webb Yackee, *Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence*, 51 VA. J. INT’L L. 397 (2011) (summarizing the existing literature as concluding that investment treaties do not produce increases in investment inflows, and finding additionally that investment treaties do not factor into the decision-making processes of company executives when deciding whether to undertake foreign investments nor of risk insurers when calculating premiums for political risk insurance policies). See also Jonathan Bonnitca, *The Economics of Investment Treaty Protection and the Evolving Empirical Research Agenda*, Working Paper, at: <http://ssrn.com/abstract=2138235> (suggesting future directions for empirical research that might shed light on important questions other than the relationship between investment treaties and investment flows).

²⁶ Council – Conclusions on a Comprehensive EU Investment Policy, *supra* note 8, para 1.

objectives and the decision to conclude EU-wide investment treaties which provide foreign investors with extensive substantive legal protections backed by international arbitration. Yet these fact-finding omissions did not deter the Council from authoritatively asserting that the EU's future investment policy "should not negatively affect investor protection and guarantees enjoyed under the existing [bilateral investment] agreements"²⁷ and should, in fact, "increase the current level of protection and legal security for the European investor abroad."²⁸

The European Parliament, for its part, did respond to the Commission's communiqué with a more evaluative approach. While it did not engage directly with any of the empirical studies mentioned above, it did begin its response with a series of stock-taking recitations in which it laid out some of the more problematic outcomes of states' past investment treaty practices.²⁹ It noted, for example, that while "inward investment can improve host countries' competitiveness, outward investment sometimes necessitates adjustment assistance for low-skilled workers."³⁰ It expressed concern that past BITs have "enabled some enterprises to file suits against their own countries."³¹ It also took issue with the way in which past investment treaties have been interpreted and applied in practice, stating:

a number of problems became clear because of the use of vague language in agreements being left open for interpretation, particularly concerning the possibility of conflict between private interests and the regulatory tasks of public authorities, for example in cases where the adoption of legitimate legislation led to a state being condemned by international arbitrators for a breach of the principle of "fair and equitable treatment".³²

The Parliament followed this critique with a mention of the fact that the US and Canada have changed their model BITs in response to such outcomes.³³

Of course, it is one thing to take note of existing problems and quite another to solve them.³⁴ Many of the European Parliament's concerns

²⁷ *Id.* at para 9.

²⁸ *Id.* at para 8 (emphasis added).

²⁹ Parliament – Resolution on a Future EU Investment Policy, *supra* note 8, paras A-J.

³⁰ *Id.* at para C.

³¹ *Id.* at para E.

³² *Id.* at para G. Unfortunately, the document does not cite to any specific investor-state awards which raised particular concerns for the European Parliament.

³³ *Id.* at para H.

³⁴ For example, Professor Reinisch rightly expresses skepticism about the Parliament's vague suggestion that the EU's future investment treaties should somehow distinguish between speculative investment and other forms of investment. (Reinisch – *Quo Vadis Europe?*, *supra* note 2, p. 29.) As risk-taking is inherent in all forms of investment

cannot properly be addressed without more systematic empirical analysis of the issues raised – which the Parliament’s Resolution decidedly lacks. But based as they are upon anecdotal observations, the Parliament’s calls upon the Commission to review its intended policy direction in certain areas enjoy at least some empirical basis. This stands in contrast to the Commission and Council documents to which it reacts.

It is therefore regrettable that the Commission initially responded to the Parliament’s calls for further analysis of key issues in a dismissive manner. Consider, for example, how the Commission went about taking “due note of the [Parliamentary] Resolution’s request for the establishment of clear definitions of investor protection standards, in order to prevent international arbitrators from broadly interpreting investor protection clauses.”³⁵ After pompously asserting that “[a]ll these standards have been defined and implemented by international tribunals and courts for many decades now – some even for centuries,”³⁶ the Commission went on to assure the Parliament that the Commission “remains at its disposition for further explanations as to the content of specific standards that may raise concerns or uncertainty for the Parliament.”³⁷ Such thinly veiled condescension seems unwarranted at best and intolerable at worst. Even a cursory perusal of the Parliamentary Resolution reveals that Parliament’s concerns over vague investment treaty terms stem not from a lack of understanding of the applicable international legal standards but rather from a detailed knowledge of the widely varying and sometimes irreconcilable ways in which those standards have actually been applied by tribunals in practice.³⁸

In fact, as the Commission well knows, there is a large and ever-growing literature on the relationship between vague treaty terms and inconsistent decision-making by international tribunals.³⁹ Scholars, arbitrators, NGOs, and intergovernmental organizations like UNCTAD have put forth no shortage of suggestions for how to address such inconsistency problems within international investment law.⁴⁰ It would be

activities, the Parliament would have to do a much better job of motivating its particular concerns before any informed decision concerning the EU’s future investment treaty definition of “investment” could be taken.

³⁵ European Commission, Followup to the European Parliament Resolution on the future European international investment policy, adopted by the Commission on 5 July 2011, pp. 4-5 [hereinafter “Commission – Follow up to the Parliament Resolution on the future European international investment policy”].

³⁶ *Id.*, at p. 4.

³⁷ *Id.*, at p. 5.

³⁸ Susan Frank, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 *FORDHAM L. REV.* 1521 (2005).

³⁹ On the flexibility of treaty interpretation more generally, see Gerald Fitzmaurice, *Vae Victis or Woe to the Negotiators! Your Treaty or Our “Interpretation” Of It?*, 65 *AM. J. INT’L L.* 358 (1971).

⁴⁰ Frank, *supra* note 38; Michael Waibel, *International Investment Law and Treaty Interpretation*, in *FROM CLINICAL ISOLATION TO SYSTEMIC INTEGRATION*, pp. 29-52,

very unfortunate indeed if the Commission, with the seeming encouragement of the Council,⁴¹ were to barrel ahead in forging a new EU-wide approach to international investment treaties that retains all of the known pathologies of the Member States' old ones without first engaging in at least some level of critical reflection.

In certain areas, systematic empirical evidence is available to guide future investment policy-making.⁴² In other areas, anecdotal evidence may have to suffice.⁴³ It seems incontrovertible, however, that evidence-free policymaking is likely to lead to suboptimal outcomes and should not be allowed to carry the day. Instead, Europeans have a reasonable right to expect that all of the EU's responsible organs will inform themselves of both the positive and negative consequences of states' past investment treaty-making practices before proceeding. Then, armed with this improved knowledge, these organs bear a collective and individual duty to adjust plans for a future EU-wide international investment policy in accordance with the EU's goals. This brings us to the second set of considerations relevant to the present "where next?" query. Namely, what exactly *are* the EU's goals for its future international investment policy?

B. A question of policy goals

Just as figuring out where along the investment path the EU presently stands requires EU institutions to engage in an empirical stock-taking exercise, figuring out where the EU should head next requires it to conduct a robust normative debate to clarify the end goals of a shared EU international investment policy. On one level this may seem like a simple task. There are, after all, several common themes that emerge from the relevant documents promulgated by the Parliament, Commission, and Council so far. In brief, these are:

- A commitment to creating a level playing field among investors from all EU Member States, both with respect to their intra-EU and extra-EU investment activities;⁴⁴

Hofmann, Rainer, Tams, C. Christian, eds. (Baden-Baden, 2011); UNCTAD, Investment Policy Framework for Sustainable Development, *supra* note 24; IISD Model International Agreement on Investment for Sustainable Development: Negotiators' Handbook, at: <http://www.iisd.org/investment/capacity/model.aspx>.

⁴¹ See Council – Negotiating Directives (Canada, India and Singapore), *supra* note 16, which instructs the Commission to essentially pursue investment treaties very much along the lines of the most investor-friendly of the Member States' 1990s era BITs.

⁴² Like the relationship between investment treaties and investment flows, discussed *supra* note 25 and accompanying text.

⁴³ Eg concerning the various ways in which investment arbitration tribunals have interpreted vague treaty standards in the past.

⁴⁴ There is, in this sense, a common goal of making the EU's future investment policy consistent with the most fundamental principle of the EU internal market: non-discrimination. Many commentators have argued that the existing intra-EU BITs violate this fundamental principle by affording preferential treatment within parts of the EU

- A desire to create jobs, stimulate growth, and encourage sustainable economic development;⁴⁵ and
- A concern for preserving the right of the EU and its Member States to regulate in the public interest.⁴⁶

It is difficult to take issue with any of these goals in the abstract; but as is often the case, the devil is in the details. Upon closer inspection, it becomes clear that the Council is most interested in opening new markets to EU investors and increasing the level of legal protection enjoyed by EU investors abroad.⁴⁷ The Parliament, by contrast, chiefly desires that the new EU investment policy have a “positive impact on growth and jobs not only in the EU but also in developing countries.”⁴⁸ To that end it calls on the Commission to “maintain asymmetry in the EU’s trading relations with developing countries”⁴⁹ – a goal that is clearly at odds with the Council’s objective of obtaining preferential market access and privileged protections for EU investors.

In another major clash of goals, the Parliament aggressively seeks to protect the “the right of parties to [any EU investment] agreement to regulate, inter alia, in the areas of protection of national security, the environment, public health, workers’ and consumers’ rights, industrial policy and cultural diversity.”⁵⁰ The Council, on the other hand, prioritizes the overarching objectives in the inverse manner. While stressing that the “European investment policy must continue to allow the EU and the Member States to adopt and enforce measures necessary to

internal market to some EU investors over others. *See e.g.* Commission Staff Working Document on the free movement of capital in the EU, SWD(2013) 146 Final, (Brussels, 15 May 2013), p.11(finding that “the Single Market for capital continues to be fragmented by existing Bilateral Investment Treaties (BITs) between certain Member States” and concluding that these BITs are contrary to EU law), at: http://ec.europa.eu/internal_market/capital/docs/reports/130415_market-monitoring-working-document_en.pdf.

⁴⁵ As called for under the Consolidated TEU, *supra* note 2, art. 3(3)

⁴⁶ *See, e.g.*, Parliament – Resolution on a Future EU Investment Policy, *supra* note 8, paras 23-26 (on protecting the right to regulate) and Commission – Follow up to the Parliament Resolution on the future European international investment policy, *supra* note 35, p. 5 (setting out the Commission’s stance on the right to regulate).

⁴⁷ This is evident in the fact that the Council’s statement devotes 12 of its 19 paragraphs (paras 6-16, and 18) to advocating specific ways in which the Commission should aggressively pursue these two objectives while mentioning the need to preserve the right to regulate in furtherance of other public policy objectives only in non-committal terms in a single paragraph (para 17). *See* Council – Conclusions on a Comprehensive EU Investment Policy, *supra* note 8.

⁴⁸ Parliament – Resolution on a Future EU Investment Policy, *supra* note 8, at para J.7. *See also* para J.2 (seeking an investment policy which “promotes high-quality investments and makes a positive contribution to worldwide economic progress and sustainable development).

⁴⁹ *Id.* at para 21.

⁵⁰ *Id.* at para 25.

pursue public policy objectives”,⁵¹ it nevertheless insists that “the main focus... should continue to be effective and ambitious investment protection and market access.”⁵²

The Commission has made some effort to stake out a middle ground between these two extremes. Its main policy communication asserts that, while the future EU investment policy should be comprehensive and common, this does not entail a “one-size-fits-all model for investment agreements with 3rd countries.”⁵³ In this respect the Commission's position seems amenable to the Parliament's objective of continuing the EU's practice, in the trade realm, of extending special and differential treatment to developing countries. But by the same token, it appears to run counter to the spirit of the Council's first set of leaked negotiating directives to the Commission,⁵⁴ since these instruct the Commission to negotiate essentially identical investment agreements with Canada, India and Singapore – three countries which are clearly not at the same level of development.

On other points, the Commission's goals appear to be more closely aligned with the Council's. For example, it agrees with the Council's assessment that “the Union should follow the available best practices to ensure that no EU investor would be worse off [under any new EU investment treaty] than they would be under Member States' BITs.”⁵⁵ Still, there is a difference between the two positions in that the Commission's main objective is “to deliver better results as a Union than the results that have been or could have been obtained by Member States individually.”⁵⁶ The Commission thus seeks to be “*guided* by the best available standards”⁵⁷ previously developed by the Member States but evinces no intention to be *constrained* by them.⁵⁸ The distinction is subtle but important.

Overall, the question as to which policy goals the Commission will privilege over others remains an open one. As noted above, the Commission's initially dismissive response to the Parliament's Resolution seemed to intimate that its ultimate priorities lie closer to those of the Council than to those of the Parliament.⁵⁹ But recent moves suggest that

⁵¹ Council – Conclusions on a Comprehensive EU Investment Policy, *supra* note 8, para 17.

⁵² *Id.* at para 16.

⁵³ Commission – Towards a Comprehensive EU Investment Policy, *supra* note 2, p. 6.

⁵⁴ Council – Negotiating Directives (Canada, India and Singapore), *supra* note 16.

⁵⁵ *Id.* at p. 11. *Cf. also* Council – Conclusions on a Comprehensive EU Investment Policy, *supra* note 8, para 9.

⁵⁶ *Id.* at p. 6.

⁵⁷ *Id.* (emphasis added).

⁵⁸ Of course, even identifying which of the Member States' existing standards are the “best available” ones is problematic, given the considerable differences of opinion that exist across EU institutions and among Member States.

⁵⁹ *See infra* note 35 and accompanying text.

the Commission has yet to make up its mind on certain key objectives.⁶⁰ According to yet another leaked document, the Commission's proposed recommendation for a Council decision concerning the Commission's negotiating mandate in the upcoming Transatlantic Trade and Investment Partnership Agreement (TTIP) negotiations with the U.S. includes language designed to calm fears about "excessive lawsuits challenging national legislation."⁶¹ The draft includes a statement that an "[i]nvestor-to-state dispute settlement mechanism should contain safeguards against frivolous claims," and a specifies that "[t]he inclusion of investment protection and investor-to-state dispute settlement will depend on whether a satisfactory solution meeting EU interests... is achieved."⁶²

What are we then to make of the confusing range of objectives set forth by the Council, the Parliament, and the Commission? For one thing, as Professor Reinisch points out, it's not yet entirely clear where the EU is heading with its investment policy.⁶³ Given the dearth of evidentiary support in the articulation of all three institutions' sets of policy goals,⁶⁴ it's also not clear which positions deserve support over others. Most importantly, though, what the persistence of these significant disagreements and vacillations underscores is that the EU has much more work to do in hammering out what its common policy goals in the international investment domain *should* be moving forward.

At a minimum, a continued inter-institutional dialogue is called for – one that generates some mutually agreed means of either balancing or prioritizing among the three institutions' competing policy visions. Such a

⁶⁰ In addition to the developments described in this paragraph, *see also* the Commission's presentation, "EU Investment Policy, STATE OF PLAY," presented at a Civil Society Dialogue ad hoc meeting (Brussels, 15 April 2013), available at: http://trade.ec.europa.eu/doclib/docs/2013/april/tradoc_150853.pdf, which lists among the Commission's "main concerns" the following items (slide 11):

- Legitimate public measures (e.g. environment protection) challenged by investors as breaches of a broadly-defined FET or indirect expropriation
- Insufficient transparency and predictability of ISDS [investor-state dispute settlement]
- "Chilling effect" on the right to regulate or insufficient policy space for States.

⁶¹ Leaked Draft, "Presidency compromise proposal regarding the Commission's proposed Recommendation for a Council Decision authorising the opening of negotiations on a comprehensive trade and investment agreement, called the Transatlantic Trade and Investment Partnership, between the European Union and the United States of America (doc. 7396/13 RESTREINT UE/EU RESTRICTED)," EU Doc. No. DS 1353/1/13 REV 1 (Brussels, 21 May 2013) [hereinafter "Leaked Draft – EU TTIP Negotiating Mandate"], para 22, available at: http://www.s2bnetwork.org/fileadmin/dateien/downloads/21st_May_DS1353_13_REV1.pdf. For an early press report on the leaked draft, *see* Reuters, EXCLUSIVE – EU Wants to Exclude Utilities from US Trade Talks, by Ethan Bilby (21 May 2013) [hereinafter Reuters – Exclusive], at: <http://www.reuters.com/article/2013/05/21/eu-us-trade-idUSL6N0E20QA20130521>.

⁶² Leaked Draft – EU TTIP Negotiating Mandate, *id.* at para 21.

⁶³ Reinisch – *Quo Vadis Europe?*, *supra* note 2, at p. 39 (Conclusions).

⁶⁴ *See infra*, part I.A.

dialogue should ideally be allowed to run its course in advance of any further negotiations with third states. Otherwise, the Commission risks negotiating new investment agreements with third countries which either the Council or Parliament will veto⁶⁵ or which will be subject to challenge before the CJEU.⁶⁶ Neither outcome would do much to contribute to the confidence of investors in the stability and predictability of EU investment law – a fact which could make the EU's negotiating partners wary from the outset.

The better course would be to make a serious attempt to narrow the obvious goal gaps between the Parliament and the Council before continuing down the path of treaty negotiations with key trading partners. This would of course entail some delay in the conclusion of new comprehensive trade and investment agreements with Canada, India, and Singapore – a prospect which prominent EU multinational companies will not relish. Yet a delayed deal with these states may well be preferable to no deal, or worse yet, a bad deal. Conversely, a good deal could smooth the way for speedier negotiations in the much higher stakes and much more politically fraught Transatlantic Partnership and China-EU Investment Agreement talks that are to follow.⁶⁷ Either way, the bottom line is that the process of forging a minimal level of policy consensus has never been easy in any area of the EU's ever-expanding competence, yet it

⁶⁵ The Council has the power to do this under art. 207(4) of the Consolidated TFEU, which places investment on the list of agreements subject to a special unanimity requirement. *See supra*, note 14. The source of the Parliament's power of veto is not as easy to locate. Art. 218(6)(a) of the TFEU specifies the circumstances in which the Parliament's assent is required for international agreements. In particular, art. 218(6)(a)(v) requires Parliament's assent for "agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required." However, it does not appear that the other provisions of the TFEU specifically make investment treaties subject to either the "ordinary legislative procedure" or the "special legislative procedure where consent by the European Parliament is required." Even so, authoritative commentaries on the topic appear to accept that the Parliament now enjoys a veto power over future EU investment treaties, and the Commission and Council also appear to be proceeding on this basis. *See e.g.* Rudolf Mögele, 'AEUV Art. 218', in: Rudolf Streinz (ed), Beck'sche Kurz Kommentare, Band 57, EUV/AEUV, Vertrag über die Europäische Union und Verträge über die Arbeitsweise der Europäischen Union (2nd edition, Beck: München 2012) 2071-80, para 18 and n 40 (relying on past practice to conclude that all commercial agreements of the Union fall under the Parliamentary consent requirement of art. 218(6)(a)(v) TFEU; and ANGELOS DIMOPOULOS, EU FOREIGN INVESTMENT LAW (Oxford University Press, 2011), pp. 133-136 (reaching the same conclusion).

⁶⁶ This is possible under art. 218(11) of the Consolidated TFEU, *supra* note 14.

⁶⁷ Higher stakes because the TTIP deal would cover around "half of world economic output and a third of all trade" (Reuters – Exclusive, *supra* note 61), while investment flows between China and the EU are around \$20 billion annually and rising (*see* Commission proposes to open negotiations for an investment agreement with China, Europa Rapid Press Release, Reference: IP/13/458 (23 May 2013), at: http://europa.eu/rapid/press-release_IP-13-458_en.htm). The negotiations are more politically fraught because each requires a deal between two of the world's three largest economies and most politically powerful negotiating blocks.

has always proven essential to the forward march of European harmonization. There is no reason to expect international investment policy to be the exception.

C. *A question of implementation*

Shifting the focus to challenges of implementation brings in yet another set of factors which counsel in favor of slowing the train a bit. As should be evident from the preceding discussions, without an empirically grounded understanding of what the Member States' investment policies have accomplished in the past and a deliberatively generated minimum consensus on what a new EU policy should achieve in the future, any attempt to implement anything at all on a Union-wide level becomes an exercise in shooting in the dark. This is aptly illustrated by the ongoing debate over how legal responsibility and financial liability for investor-state arbitration claims should be divided between the EU and the affected Member State(s) in instances where such claims arise under future EU investment treaties. The Commission transmitted its proposed regulation on this topic to the Council and the Parliament in June of 2012.⁶⁸

Without getting into the particulars of the Commission's proposal,⁶⁹ it would seem difficult to conceive of a sensible means of apportioning important rights of legal defense and significant financial liabilities among potential respondents without first knowing precisely what types of investor-state claims will be countenanced and what level of financial liability they may entail. The attempt puts the proverbial cart before the horse.

This point has not been lost on the European Parliament. In May of 2013, the Parliament adopted several amendments to the Commission's proposed responsibility sharing regulation.⁷⁰ Notable among these was a

⁶⁸ European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing a framework for managing financial responsibility linked to investor-state dispute settlement tribunals established by international agreements to which the European Union is party, COM(2012) 335 final (Brussels, 21 June 2012) [hereinafter "Commission Proposal – Financial Responsibility"], available at: http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&lg=EN&type_doc=COMfinal&an_doc=2012&nu_doc=335.

⁶⁹ Not surprisingly, the proposal would grant the Commission extremely broad authority to dictate the legal defense to be mounted in any arbitration proceedings and to determine what portion of any ultimate liability finding should fall upon the fisc of the Member State concerned. *See id.*

⁷⁰ Draft European Parliament Legislative Resolution, on the proposal for a regulation of the European Parliament and of the Council establishing a framework for managing financial responsibility linked to investor-state dispute settlement tribunals established by international agreements to which the European Union is party, European Parliament Doc. No. A7-0124/2013 (26 March 2013) (Plenary sitting) [hereinafter "Draft European Parliament Legislative Resolution – Managing Financial Responsibility in ISDS"]. A side-by-side comparison of the Commission's proposed regulation and the Parliament's amendments is available at: <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2013-0124&language=EN&mode=XML>. Note that this website contains the Parliamentary

revised opening recital paragraph which states that not all future EU investment agreements should necessarily provide for investor-state arbitration.⁷¹ Rather, the inclusion of investor-state dispute settlement provisions, in the Parliament's assertion, "should be a conscious and informed policy choice that requires political and economic justification" and "should be decided for each International Investment Agreement in the light of the particular circumstances."⁷² The Parliament went on to insert into the proposed regulation two entirely new paragraphs designed to ensure that future EU investment agreements will:

- a) "afford foreign investors the same high but no higher level of protection" than that which is afforded to European investors under "Union law and the general principles common to the laws of the Member States";⁷³
- b) safeguard and not unduly constrain the Union's legislative powers;⁷⁴ and
- c) be consistent with the CJEU's rulings on the limited international liability of the Union for its legislative acts.⁷⁵

What is striking about these amendments is that they have nothing to do with the technicalities of dividing up legal and financial responsibilities between the EU and the Member States. In point of fact, the Parliament expressed only minor quibbles with the Commission's proposed approach

documents relating to the plenary session of 26 March 2013 (Ordinary legislative procedure: first reading). The proposed amendments it lists were, however, formally adopted by the Parliament in a Plenary sitting on 23 May 2013 (Ordinary legislative procedure: second reading).

⁷¹ See *id.*, Amendment 3, Proposal for a new regulation, Recital 2, which reads: "[i]n the cases where it is justifiable, future investment protection agreements concluded by the Union can include an investor-to-state dispute settlement mechanism..." (emphasis in original). The Parliament justified this amendment on the grounds that:

...it is not a necessity to include ISDS provisions in future EU investment agreements and that their inclusion should be a conscious and informed policy choice that requires political and economic justification. Even if there is a general policy choice in favour, the question whether to include ISDS should be decided for each International Investment Agreement in the light of the particular circumstances.

(Emphasis in original.)

⁷² *Id.* at "Justification."

⁷³ *Id.* at Amendment 4, Proposal for a regulation, Recital 3(a) (new) (emphasis omitted).

⁷⁴ *Id.*, at Amendment 5, Proposal for a regulation, Recital 3(b) (new).

⁷⁵ *Id.* (citing *FIAMM and Fedon v. Council and Commission*, [2008] ECR I-6513 and noting, in its "Justification," that "[u]nless framed restrictively, EU investment treaties [could] thus allow arbitral tribunals to hold the Union liable to foreign investors for legislative acts where EU investors would have no claim under EU law" (emphasis in original).

on that front.⁷⁶ The Parliament instead devoted the bulk of its energies to resurrecting what it evidently regards as a prematurely stifled policy debate.⁷⁷ This move is quite understandable under the circumstances, and one can only hope that the Commission and the Council will sit up and take notice.

Of course, to highlight the Parliament's ongoing hesitations is not to minimize the important preparatory work the Commission has already done. There are numerous difficult implementation questions that must be worked out in order to allow the EU to move forward with adopting a comprehensive Union-wide investment policy. What will become of the Member States' existing BITs? How much involvement will the Member States have in negotiations over the new BITs that are slated to replace their old ones?⁷⁸ How will the EU deal with the fact that the ICSID Convention welcomes only states, and not supranational organizations, as contracting parties?⁷⁹ Even outside the ICSID context, how will legal and financial responsibility be handled when future investor-state arbitration claims arise? The Commission itself has taken the lead in identifying these and many other complex challenges. It deserves credit for deploying its formidable technical expertise to begin sorting through them, and I have no doubt that its efforts will eventually succeed.

The larger point, however, is that since responsibility for European investment policymaking has shifted with the Lisbon Treaty, the implementation process must morph along with it. This requires stepping back to discern which technical problems can be addressed in advance of achieving an inter-institutional consensus on policy goals and which ones cannot. It makes little sense to propose a technical regulation which, in effect, implements the policy vision of one institution when it is known in advance that a second institution with a conflicting policy vision must also provide its assent before the regulation can be adopted. On the other hand, asking the Commission to sit on its hands while the Parliament and the Council battle it out hardly seems ideal either. In the next part, I therefore consider what role each of the four major EU institutions can and should productively play in the process of creating and refining the Union's new comprehensive international investment policy.

⁷⁶ See, e.g., *id.*, at Amendment 6, recital 4; Amendment 7, recital 6; Amendment 9, recital 8; Amendment 10, recital 10, etc. (all proposing only minor changes to the Commission's text).

⁷⁷ *Id.*, at Amendments 3-5, 8, 19, 24, 27, 28, 30, 32, 34, 35, 43 (all proposing major additions or changes to the Commission's text).

⁷⁸ See Reinisch – *Quo Vadis Europe?*, *supra* note 2, at **part II** (discussing the idea of EU investment treaties as “mixed agreements” to be negotiated jointly by the Commission and the Member States).

⁷⁹ The EU's recent experience with negotiating the accession of the Union to the European Convention on Human Rights can no doubt provide lessons on how to approach this problem. See PAUL GRAGL, *THE ACCESSION OF THE EUROPEAN UNION TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (Hart Publishing 2013).

II. WHO SHOULD DECIDE? FOUR VOICES, ONE EUROPE

Deciding who should do what in a policymaking context is not only a question of legal competence but also of comparative advantage. Each of the institutions that play a major part in shaping Europe's future international investment policy brings different institutional strengths and weaknesses to the table. These strengths and weaknesses should serve as signposts for working out how the new EU policy takes shape in practice. In discussing them, I will follow a traditional legal ordering schema, moving from legislative to executive to judicial functions in sequence.

A. *Community-wide democratic vetting in the European Parliament*

The European Parliament was singled out to be one of the clear winners under the Lisbon Treaty's amendments to the Union's institutional operating structure.⁸⁰ Indeed, it is worth recalling that a major driver of the successive rounds of EU treaty reform over the past two decades has been a push to reduce the EU's much bemoaned democratic deficit.⁸¹ This makes it felicitous that the outcome of the Lisbon Treaty, insofar as it concerns foreign investment policy, is not only that the EU has acquired the competence to craft an integrated EU-wide policy on behalf of its Member States but also that the European Parliament now plays a significant role in shaping the new policy.

As noted above, the enactment of the Lisbon Treaty brought foreign direct investment within the scope of the EU's Common Commercial

⁸⁰ Among other things, the Lisbon Treaty augmented the Parliament's powers by bringing more than 40 new fields under the co-decision procedure by which the Parliament and the Council now jointly exercise decision-making authority. The Treaty also gives Parliament the final say on the EU budget. As explained by European Parliament President Jerzy Buzek:

The Treaty gives a huge boost to the powers of the European Parliament. The rise in legislative powers for the European Parliament represents almost a doubling in power. One key area of increased power is the Common Agricultural Policy. MEPs for the first time will decide on agricultural expenditure hitherto almost exclusively controlled by national agricultural ministries. Agricultural spending counts for almost 40% of the EU budget. MEPs will also have an equal say with ministers on the way the EU's structural funds are shaped and spent. Our European Parliament committees are responsible for nearly 100 percent of EU legislation, having great power in their hands.

Statement by EP President Jerzy Buzek on the Lisbon Treaty (2009), available at: http://www.europarl.europa.eu/pdf/lisbon_treaty/statement_ep_president_EN.pdf.

⁸¹ For an overview, see Giandomenico Majone, *Europe's "Democratic Deficit": The Question of Standards*, 4(1) EUROPEAN L.J. 5-28 (1998); Andrew Moravcsik, *In Defence of the "Democratic Deficit": Reassessing the Legitimacy of the European Union*, 40(4) J. OF COMMON MARKET STUDIES 603-34 (2002); Andreas Føllesdal & Simon Hix, *Why There is a Democratic Deficit in the EU: A Response to Majone & Moravcsik*, 44(3) J. OF COMMON MARKET STUDIES 533-62 (2006); and Youri Devuyst, *The European Union's institutional balance after the Treaty of Lisbon: "community method" and "democratic deficit" reassessed*, 39(2) GEORGETOWN J. INT'L L. 247-325 (2008).

Policy (CCP), which is subject to the so-called “ordinary legislative procedure.”⁸² The legal import of this change is that the Parliament and the Council must henceforth act jointly in adopting the EU’s future investment treaties and also in enacting the internal regulatory framework which will govern their implementation within the Union.⁸³ Viewed from the perspective of comparative institutional strengths, it becomes evident that the Parliament and the Council have different roles to play in exercising this shared competence.

Members of the European Parliament are directly elected by citizens within EU Member States.⁸⁴ Their principal task is to represent the interests of their constituencies in the enactment of EU-wide legislation.⁸⁵ In the realm of investment, the European Parliament functions as a democratic deliberative body which ensures that the various policy concerns voiced by its diffuse constituencies in respect of Member States’ past investment policies are addressed in any new EU-wide policy. So far, the Parliament appears to be taking its expanded representative responsibilities in this area quite seriously. This much is evident from the above discussion of the Parliament’s recent amendments to the Commission’s proposed regulation on managing the financial responsibility of the Union and the Member States under future EU investment treaties.

Given that the Parliament’s very purpose is to protect the interests of EU citizens, it is puzzling that some commentators within the investment arbitration community appear to view the Parliament’s active efforts to shape the new EU investment policy as somehow inappropriate or obstructionist.⁸⁶ One can only hope that this sentiment will wane with time as the relevant actors become more accustomed to Parliamentary involvement in this area of the EU’s external relations.⁸⁷

⁸² *Supra* note 11.

⁸³ For the legal basis of the Parliament’s powers, *see* the explanation *supra*, note 65 (discussing the combined impact of arts 207(1), 207(2), 207(4), and 218(6)(a)(v) on the legal competence of the Parliament and the Council, respectively, in the area of foreign direct investment).

⁸⁴ Art. 14(3) Consolidated TEU and art. 223(1) Consolidated TFEU, both *supra* note 2,

⁸⁵ The Parliament thus serves a function similar to that of the House of Representatives in the U.S. domestic lawmaking context.

⁸⁶ OGEMID subscribers will recall that the above-discussed Parliamentary amendments to the Commission’s proposed financial responsibility regulation (*see* discussion in part I.C., *infra*) were greeted with scathing criticism by many members of the OGEMID community. For those who are not familiar with it, OGEMID is the principle electronic listserv followed by the community of investment arbitration practitioners and scholars. Since OGEMID operates under the Chatham House Rule, I cannot quote any of the specific comments here.

⁸⁷ To the extent that the objection is that Parliament is insufficiently informed about the relevant issues, the better approach would be to take direct action to educate Parliamentarians and thereby do away with any knowledge deficit. For an example of such productive engagement, *see* Jan Kleinheisterkamp, *Managing financial responsibility for investor claims under EU investment agreements: Comments on the Commission proposal for a Regulation – COM(2012) 335 final* and Professor Tietje’s

In my own view, the Parliament's strong push for a re-evaluation of some of the international investment regime's central articles of faith should be welcomed with open arms. Whether or not one agrees with any of its specific reform proposals, the Parliament's refusal to rubber stamp and simply transpose onto the EU level the past bilateral investment treaty practices of certain influential Member States has generated positive results. It has opened up space for a genuine and much needed dialogue about the goals of international investment policy and a critical appraisal of the successes and failures of past efforts. The Parliament's cautious approach thus deserves praise rather than condemnation. But approbation considerations aside, what seems unarguable is that the European Parliament understands both its powers and its duties in the new EU investment policy-making arena. EU citizens may take heart in observing that the Parliament so far appears committed to doing its job.

B. Member State checks and balances at the Council of the European Union

Turning then to the Council, can the same generally positive assessment be made of its efforts to-date, in light of its institutional strengths? As explained on its website, "[t]he Council is the EU institution where the Member States' government representatives sit, i.e. the ministers of each Member State with responsibility for a given area."⁸⁸ The Council's remit includes the authority to adopt "legislative acts (Regulations, Directives, etc.), in many cases [including international investment policy] in 'co-decision' with the European Parliament."⁸⁹ The EU treaties establish the number of votes each Member State can cast within the Council.⁹⁰ They also determine the circumstances in which the Council may act by simple majority as opposed to when it must act by qualified majority or unanimity.⁹¹ When it comes to adopting an EU-wide international investment policy, the unanimity requirement applies.⁹²

study on the draft Regulation [hereinafter "Kleinheisterkamp – Comments on Managing Financial Responsibility"] available at: <http://ssrn.com/abstract=2222580>.

⁸⁸ Website of the Council of the European Union, at: <http://www.consilium.europa.eu/council?lang=en>. Note that the Council of the European Union is designated in short form in the EU treaties as "the Council." There is also a separate body called "the European Council" which the treaties always refer to by its full name. This latter body is comprised of the Member States' sitting heads of state and is responsible for setting the general policy direction of the Union. Unlike the Council, however, it does not exercise any direct legislative authority.

⁸⁹ *Id.*

⁹⁰ Loosely speaking, the formula allocates more votes to Member States with larger populations, but the correspondence is not straightforward. The economic and political prominence of certain Member States and their historical role within the Union are also taken into account. Hence Italy and Germany each receive 29 votes (even though Germany's population exceeds Italy's by 22 million), but Spain (whose population lags that of Italy by less than 13 million) receives only 27 votes.

⁹¹ The basic functions of the Council are set forth in article 16 of the Treaty on European Union (TEU), while the manner in which the Council goes about fulfilling its functions is

Unlike Members of the European Parliament, Council Members are not directly elected by citizens but are instead appointed to the Council by the governments of their respective home states.⁹³ Their democratic mandate is thus a couple of steps further removed from the electorate than is the case with the European Parliament.⁹⁴ The Council does, nevertheless, enjoy two comparative institutional advantages over the Parliament when it comes to international investment policy-making.

The first is subject matter-specific diplomatic expertise at the intergovernmental level. Members of the European Parliament are legislative generalists. Their mandate is to forge a pan-European regulatory consensus that will prove acceptable to their constituents on matters ranging from immigration to agricultural policy. The Council, by contrast, sits in “configurations” organized by subject matter.⁹⁵ Council decisions concerning international investment policy are led by executive branch officials from the Member States who sit together within the Foreign Affairs Configuration, and specifically, by high level officials sitting within the Trade Policy Committee (Services and Investment).⁹⁶ These officials bring to the Committee a considerable level of collective diplomatic expertise in negotiating matters involving international investment law and policy.⁹⁷ As a result, they may be better placed than

specified in articles 237 to 243 of the Treaty on the Functioning of the European Union (TFEU). Article 3 of Protocol 36 (on Transitional Provisions) specifies the current voting rights allocations exercised by the Member States within the Council. This number ranges from 3 votes on the low end (Malta) to 29 on the high end (Germany, France, Italy, and UK). To access all of the relevant texts, *see* Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union and the Charter of Fundamental Rights of the European Union, Council of the European Union, Doc. No. 6655/7/08 REV 7 (Brussels, 12 December 2012), at: <http://consilium.europa.eu/documents/treaty-of-lisbon?lang=en>.

⁹² Art. 207(4) Consolidated TFEU, *supra* note 2.

⁹³ Art 16(2) Consolidated TEU, *supra* note 2

⁹⁴ Of course, national governments are directly elected by citizens in all EU Member States, and it is these governments which appoint their executive branch Ministers to serve on the Council. The individual Council Members in this sense enjoy a certain degree of democratic legitimacy as representatives of their countries’ elected governments. The democratic legitimacy of the Council as a whole is nevertheless limited by the fact that its members are not directly elected to represent their countries in a generalized EU-wide legislative role but are rather appointed to ministerial posts in their home states and then seconded to the Council for specific purposes.

⁹⁵ Art. 16(6) Consolidated TEU and art. 236 Consolidated TFEU, both *supra* note 2.

⁹⁶ Information about the Council’s Committee Structure may typically be found on the website of the Presidency of the Council, which rotates to a different Member State every six months. At the time of this writing, the Council presidency was held by Ireland. The relevant website explaining the Council’s committee structure for January through June of 2013 was thus accessible at: <http://eu2013.ie/ireland-and-the-presidency/abouttheeu/theeuexplained/councilworkingparties/>.

⁹⁷ The Parliament also develops substantial subject-matter expertise through its committee structure. In the investment realm, the Committee on International Trade (known as INTA) is the dominant player. Nevertheless, the expertise advantage I highlight here is diplomatic. Consistent with their legislative function, most members of INTA will take a legislative/regulatory view of international investment law (the

many Parliamentarians to set realistic policy boundaries within which the Commission stands a good chance of concluding successful treaty negotiations with other countries in practice.

The Council's second institutional strength in this realm is its unique ability to safeguard the interests of individual Member States against any potential "tyranny of the majority." While Parliamentary decisions concerning EU investment policy are taken by a simple majority, the TFEU imposes the special unanimity requirement upon all Council decisions taken within this area. Stronger, larger, and more historically influential states within the EU are thereby prohibited – at least in theory – from riding roughshod over the wishes of weaker, smaller, or newer Member States.

In light of these two institutional strengths, it seems pertinent to ask how the Council might go about capitalizing on its comparative advantages in its role as co-legislator overseeing the development of the EU's future comprehensive international investment policy.

With respect to the latter strength, the equalizing effect of the Council's special unanimity requirement has important implications given the Member States' differential experiences with their past investment treaty practices. The Member States which, prior to the passage of the Lisbon Treaty, entered into the largest numbers of bilateral investment treaties were: Germany, the United Kingdom, France, the Netherlands, Belgium/Luxembourg, and Italy.⁹⁸ This list contains all of the founding members of the European Coal and Steel Community (ECSC).⁹⁹ It also includes all of the EU's present day economic powerhouse states save Spain. Yet the list has almost no overlap with the list of EU countries that have faced serious investor-state arbitration claims under BITs. Germany and Belgium are only now facing their first colorable investor-state claims,¹⁰⁰ while the other founding countries have yet to face any.¹⁰¹

advantages of which I highlighted in the previous section). In contrast, many of the executive branch ministers who serve on the Council's Trade Policy Committee (Services and Investment) have participated in inter-governmental negotiations over international investment agreements on behalf of their home countries and/or have been involved in responding to investor-state legal claims lodged under such agreements. This imbues them with an inevitably different, though ideally complementary, viewpoint.

⁹⁸ Commission – Towards a Comprehensive EU Investment Policy, *supra* note 5 at p. 12 (Annex).

⁹⁹ The ECSC was established in 1951 by the Treaty of Paris, to which West Germany, France, the Netherlands, Belgium, Luxembourg, and Italy were party. See Treaty Establishing the European Coal and Steel Community, 18 April 1951, 261 *U.N.T.S.* 140, entered into force 23 July 1952. Expired 23 July 2002.

¹⁰⁰ See *Vattenfall AB v. Federal Republic of Germany*, ICSID Case No. ARB/12/12 (award pending); *Vattenfall Launches Second Claim Against Germany*, *GLOB. ARB. REV. NEWS* (June 25, 2012), available at www.globalarbitrationreview.com/news/article/30634/vattenfall-launches-second-claim-against-germany/; and Alyx Barker, *Belgium Faces ICSID Claim from Chinese Investors*, *GLOB. ARB. REV.* (Sep. 24, 2012).

By contrast, the Czech Republic, Poland, Slovakia, Hungary, Romania, Lithuania, Bulgaria, Estonia, Latvia, and Slovenia have all had to respond to multiple claims by foreign investors, some of which have led to large damages awards against them.¹⁰² One might expect these very different experiences with investor-state dispute settlement to lead Member States to adopt different positions within the Council when it comes to the EU's future international investment policy.

For example, there is good reason to suppose that the Czech Republic, which has already faced 20 investor-state arbitration claims, might want the Council to be a bit more specific in its policy communications than simply stating that the EU's new policy should "continue to allow the EU and the Member States to adopt and enforce measures necessary to pursue public policy objectives."¹⁰³ Such a general statement sheds little light on the most pressing challenge that the Commission will face when negotiating with other countries. That is, *how*, precisely, should public policy prerogatives be better protected in future EU agreements with third states? In light of its wealth of experience responding to investor-state claims triggered by public policy measures, Czech officials might be thought to have developed strong views on the matter. Moreover, given its effective right of veto over Council decisions in this area, one might expect to see the Czech Republic's representatives flex their muscles a bit more here than in other matters. The same goes for the other Member States that have accrued experience in responding to investor-state claims.

Yet surprisingly, there appears to have been little concerted debate surrounding this or other controversial issues within the Council so far. To the contrary, nothing in the Council's conclusions on the Commission's original investment policy proposal,¹⁰⁴ or in its first set of leaked negotiating directives to the Commission,¹⁰⁵ evinces any kind of dissension within the Council's ranks. Council Members instead seem to have united around a common mission of securing "effective and ambitious investment protection and market access"¹⁰⁶ for EU investors.¹⁰⁷ The intriguing question is, why?

¹⁰¹ According to UNTAD, claims have also been lodged against the UK, France, Italy, and Spain. However, it is doubtful whether any of these claims was even remotely colorable, as there is no publicly available information to suggest that any of them ever reached the stage of the constitution of an actual arbitral tribunal. See UNCTAD, *Recent Developments in Investor-State Dispute Settlement (ISDS)*, IIA Issues Note, No. 1 (May 2013), Annex 2 ("Known Investment treaty claims, by respondents").

¹⁰² *Id.*

¹⁰³ Council – Conclusions on a Comprehensive EU Investment Policy, *supra* note 8, para 17.

¹⁰⁴ *Id.*

¹⁰⁵ Council – Negotiating Directives (Canada, India and Singapore), *supra* note 16.

¹⁰⁶ Council – Conclusions on a Comprehensive EU Investment Policy, *supra* note 8, para 16. See also Council – Negotiating Directives (Canada, India and Singapore), *supra* note 16 (instructing the Commission to aim to include eight specific investor protection standards, backed by investor-state arbitration).

One answer may be that the Council simply trusts the Commission to hammer out the details in an appropriate manner. This explanation could dovetail with the first of the Council's two comparative institutional strengths. That is, perhaps, in light of their diplomatic expertise, the Council Members think it better not to hamstring the Commission in advance with too detailed a policy agenda or too constrictive a negotiating mandate. But if preserving the Commission's negotiating flexibility is truly the goal, the Council is pursuing its aim rather selectively. After all, it did instruct the Commission to make eight specific, BIT-derived investor protection standards – backed by investor-state dispute settlement mechanisms – “the main pillars of future EU investment agreements”.¹⁰⁸

A second possible explanation is less generous but perhaps more probable. It is often the case that an institution's relative strengths also entail relative weaknesses. Here, the Trade Policy Committee's specialized knowledge could act as a double-edged sword. It could encourage myopic decision-making processes that pursue investor protection goals to the exclusion of competing policy considerations. This potential institutional weakness is structurally mitigated within the Council by the fact that all final decisions are vetted and adopted by the Committee of Permanent Representatives.¹⁰⁹ Unlike the Trade Policy Committee, this Committee is comprised of the Member States' permanent ambassadors to the EU, who are accountable not to their respective countries' trade ministers but to their heads of government.

In practice, however, the degree to which final Council decisions prioritize trade and investment issues versus competing policy concerns may depend upon the level of influence exerted upon each Member State's home government by the pro-trade and pro-investment lobbies relative to other powerful lobbies, such as workers' unions, human rights advocates, environmental organizations, and the like. If public choice theorists are correct in suggesting that significant power differentials exist across the two types of lobbies,¹¹⁰ this could help explain why the Council has so far

¹⁰⁷ In respect of the Leaked Draft – EU TTIP Negotiating Mandate, *supra* note 61, it is noteworthy that all of the language providing greater protection for public policy regulations enacted by the EU and its Member States was proposed by the Commission, not by the Council's Trade Policy Committee. As of this writing, it appears that the Presidency of the Council has not recommended that this language be struck from the Council's final negotiating directives to the Commission, but it remains to be seen what the full Council will make of the proposed draft when it meets to consider the matter.

¹⁰⁸ Council – Conclusions on a Comprehensive EU Investment Policy, *supra* note 8, at para 14.

¹⁰⁹ This Committee is known as COREPER II. A basic description of the Committee and its functions may be found at: <http://europa.eu/newsroom/calendar/event/291099/coreper-ii>.

¹¹⁰ Some classic works include: Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98(3) QUARTERLY JOURNAL OF ECONOMICS 371-400 (1983); Anne O. Krueger, *The Political Economy of the Rent-Seeking Society*, 64(3) AMERICAN ECONOMIC REVIEW 291-303 (1974); James M. Buchanan, *The Domain of Constitutional Economics*, 1(1) CONSTITUTIONAL POLITICAL ECONOMY 1-18 (1990);

placed a strong emphasis on pushing detailed investor protection standards while generating only vague nods in the direction of preserving governmental regulatory space.¹¹¹

The EU investment policy saga could yet hold a surprising twist in store for its followers at the Council level, though. This is because lobby-based power dynamics often generate unconventional outcomes in institutional environments requiring unanimous decision-making.¹¹² While fans of the Council's current policy direction must maintain the support of 27 Member States in order to continue the present inertia, opponents need only convince a single Member State to shift course in some material way in order to force a Council-wide re-alignment.¹¹³ The situation calls to mind the experience of the OECD Multilateral Agreement on Investment.¹¹⁴ In the mid-1990s, its eventual adoption seemed all but assured by the overwhelming support of the business community and the strong commitment of the negotiating governments. But in the end, the entire agreement unraveled after a successful civil society campaign convinced France to withdraw its support.¹¹⁵

What this analysis suggests is that it is still too early to conclude that the Council will remain steadfast on its present course in forging the EU's comprehensive international investment policy. Potential veto threats emanating from the European Parliament and perhaps, in future, from within the Council itself may well force the Council to make some concessions. But there is no reason why the Council need await the materialization of such threats before acting.

Jagdish N. Bhagwati, *Directly Unproductive, Profit-Seeking (DUP) Activities*, 90(5) JOURNAL OF POLITICAL ECONOMY 988-1002 (1982).

¹¹¹ An ancillary to this explanation is that stronger states may be able to put various kinds of pressure on weaker states to go along with a particular policy. Thus, to the extent that a lobby can successfully get the governments of the stronger states on board with its preferred policies, it may not have to lobby the weaker governments directly.

¹¹² This has been the source of much debate within the WTO, with commentators fearing that the Doha Development Round of negotiations may never reach a conclusion if the WTO's "single undertaking" principle and its consensus-based decision-making norm are retained. See, e.g. Joost Pauwelyn, *New Trade Politics for the 21st Century*, 11 J. OF INT'L ECONOMIC L. 559 (2008); and Richard Baldwin, *21st Century Regionalism: Filling the Gap between 21st Century Trade and 20th Century Trade Rules*, CEPR Policy Insights No. 56, May 2011, available at: <http://www.cepr.org/pubs/policyinsights/PolicyInsight56.pdf>.

¹¹³ Indeed, I would be surprised if savvy civil society organizations weren't either already making or preparing to make concerted efforts to influence the voting patterns of one or two Member State governments within the Council. In light of all of the public reporting on investor-state arbitration claims, identifying which Member States are particularly vulnerable to civil society lobbying efforts and which officials within those governments are most likely to lend a sympathetic ear is not a difficult task.

¹¹⁴ The OECD maintains a website repository of the documentation related to the negotiations at: <http://www.oecd.org/daf/mai/index.htm>.

¹¹⁵ For a brief history of the episode, see Katia Tieleman, *The Failure of the Multilateral Agreement on Investment (MAI) and the Absence of a Global Public Policy Network*, Working Paper, UN Vision Project on Global Public Policy Networks (2005), at: http://www.gppi.net/fileadmin/gppi/Tieleman_MAI_GPP_Network.pdf

Instead, when crafting its next round of policy statements and negotiating directives for the Commission, the Council can and should take concrete steps to explicitly address the major criticisms that have been leveled against some of the Member States' past investment treaty practices. These criticisms are well-known.¹¹⁶ It is therefore reasonable to expect the Council to engage with them at the same level of specificity as in its pronouncements concerning investor protection standards. In doing so, the Council can put to good use the considerable diplomatic expertise of its Trade Policy Committee and the numerous investor-state dispute resolution experiences of some of its Member States. This, in turn, promises to generate more feasible ways of making necessary adjustments to the EU's future investment treaty-making practices than might otherwise emerge from Parliamentary proposals alone.

Let us hope that the Council will rise to the challenge. If it does, the EU's new comprehensive international investment policy stands a good chance of outperforming the past policies of the individual Member States – which was, after all, the main reason behind the decision to transfer competency over investment policy to the EU in the first place. At a more fundamental level, the international investment arena affords the Member States a critical opportunity to contribute, through the Council, to the maturation of the European Union. By fully embracing its new post-Lisbon Treaty role as co-legislator with the Parliament, the Council can reaffirm its commitment not only to European cooperation, but to European democracy.

C. *Executive coordination through the European Commission*

Moving next to the European Commission, what light can its comparative institutional strengths shed on the role it ought to play in the forging of the new EU comprehensive investment policy? First, a few words about the structure of the Commission are in order. The Commission is comprised at its highest level by 27 Commissioners who are appointed (one by each Member State) to sit in the College of Commissioners. At the outset of his or her term, the President of the Commission¹¹⁷ assigns specific portfolios to each Commissioner. These portfolios reflect the areas in which the EU is competent to act on behalf of the Member States. The individual Commissioners then take responsibility for directing the Commission's

¹¹⁶ For a comprehensive discussion of the various critiques and some proposed solutions, see UNCTAD, *International Investment Agreements: Key Issues*, vols. I-III (UNCTAD/ITE/IIT/2004/10) (01 Dec 2004, 17 May 2005, and 30 June 2005, respectively), all available at: <http://unctad.org/en/pages/publications/Intl-Investment-Agreements---Issue-Series-I.aspx>. See also *THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY*, (Michael Waibel, ed. 2010).

¹¹⁷ The President is nominated by the European Council (that is, the heads of all of the Member State governments) acting by a qualified majority. He or she must then be formally elected to office by the European Parliament acting by an absolute majority. Each President serves a five-year term, and may be re-elected to a second term. For details, see art 17(7) Consolidated TEU, *supra* note 2.

activities in particular subject matter areas such as trade, agriculture, and energy.¹¹⁸

Like members of the Council, the Commissioners are initially nominated by their home governments. Unlike the Council, however, the Commission serves a fixed five-year term so that its composition does not fluctuate along with national election results in each Member State.¹¹⁹ The fixed term helps to secure the Commissioners in their mandate to serve the Union as a whole rather than the interests of their home states. In addition, the makeup of the entire Commission – including the portfolio assignments made by the President – must be approved by the European Parliament before it can take office.¹²⁰ The Commission's Director-General of Trade (who now oversees investment policy as well) is therefore vetted by the Parliament's Committee on International Trade before being voted into office by a majority of the full Parliament.¹²¹ The democratic imprimatur which the Commission receives from the Parliamentary confirmation process is important, since the Commission exercises extensive powers under the EU treaties.

In terms of its functions within the investment domain in particular, the Commission enjoys the exclusive right to initiate EU legislation regulating cross-border investments.¹²² This power is best understood as quasi-legislative in that the Commission cannot actually adopt any legislation on its own – such power being reserved to the Parliament and the Council as co-legislators.¹²³ The Commission's other investment-related powers are executive in nature. It is tasked with negotiating investment treaties with third states,¹²⁴ implementing and overseeing the enforcement of the Union's investment regulations and treaty

¹¹⁸ A list of the Commission's Departments (Directorates-General) and Services may be found at: http://ec.europa.eu/about/ds_en.htm.

¹¹⁹ Also unlike Council members, Commissioners are appointed to act on behalf of the Union rather than on behalf of their home states. They are therefore required to be "completely independent" and may "neither seek nor take instructions from any Government or other institution, body, office or entity." Art 17(3) Consolidated TEU, *supra* note 2.

¹²⁰ The Parliament also has the power to dissolve the Commission through an extraordinary vote on a motion of censure. *Id.*, at art 17(8).

¹²¹ The Parliament must vote on the proposed Commission as a whole and may not reject individual Commissioners (*see id.*, art 17(7), para 3). However, in practice, when there are strong objections to a particular candidate, the President will either reshuffle the proposed portfolio assignments or ask the relevant Member State to nominate a different Commissioner in place of the objectionable one. This ensures that Parliamentary approval of the entire Commission is not held up over a single candidate.

¹²² Indeed, the Commission has exclusive authority to propose legislation in most areas of the EU's competence. This power, known as the right of initiative, emanates from art. 17(2), Consolidated TEU, *supra* note 2.

¹²³ See the discussion *infra*, parts II.A & B.

¹²⁴ Upon authorization from the Council. *See* Consolidated TFEU, *supra* note 2, art 218(1)-(4).

obligations,¹²⁵ and defending the Union in any legal disputes brought against it in consequence of such regulations and treaty obligations.¹²⁶

These structural features, duties, and powers suggest a couple of comparative institutional strengths upon which the Commission can draw in developing the EU's new comprehensive international investment policy. First, the Commission possesses an unparalleled level of technical expertise when it comes to negotiating and implementing pan-European economic treaties – principally trade agreements.¹²⁷ It has likewise accumulated a wealth of experience in defending against state-to-state claims before the WTO.¹²⁸ While international investment law and policy present distinctive challenges that are absent from the trade context (the possibility of investor-state claims being paramount among them), the Commission's extensive experience with the latter nonetheless gives it significant insight into the former.

Second, the Commission has been building up its investment expertise for some years through its direct involvement in several areas of investment policymaking. In particular, it has:

- spoken for the EU in its status as a party to the Energy Charter Treaty;¹²⁹
- successfully¹³⁰ and unsuccessfully¹³¹ challenged portions of certain Member States' BITs before the CJEU;
- submitted amicus curiae briefs to arbitration tribunals presiding over BIT-based investor-state claims against Member States;¹³²
- represented the EU in investment-related negotiations within the WTO;¹³³ and

¹²⁵ Consolidated TEU, *supra* note 2, art 17(1).

¹²⁶ The details of this role are still being worked out. *See infra*, notes 68-77 and accompanying text.

¹²⁷ *See* European Commission, Memo, *The EU's Free Trade Agreements, Where Are We?* (Brussels, 18 June 2013), at: http://ec.europa.eu/trade/policy/countries-and-regions/agreements/#_europe (listing 28 trade agreements already in place, plus more than a dozen ongoing and two upcoming sets of negotiations).

¹²⁸ A listing of all WTO cases in which the EC has acted as complainant, respondent, or third party may be found at: <http://trade.ec.europa.eu/wtodispute/search.cfm?code=1>.

¹²⁹ Note that this treaty contains investor protection standards similar to most BITs and permits investors to file arbitration claims against parties who violate those standards. *See* Energy Charter Treaty (signed 17 December 1994, entered into force 16 April 1998), 2080 U.N.T.S. 100, 34 I.L.M. 360 [hereinafter ECT].

¹³⁰ Case C-205/06, *European Commission v. Austria*, ECJ, 3 March 2009, ECR I-1301; Case C-249/06, *European Commission v. Kingdom of Sweden*, ECJ, 3 March 2009, ECR I-1335; Case C-118/07, *European Commission v. Finland*, ECJ, 19 November 2009, ECR I-10889.

¹³¹ Case C-264/09, *Commission v. Slovak Republic*, ECJ, 15 September 2011.

¹³² The Commission has not made its amicus submissions publicly available, but media outlets have reported on several of them. *See, e.g.* Luke Eric Peterson, *European Commission Seeks to Intervene as Amicus Curiae in ICSID Arbitrations to Argue that Long-term Power Purchase Agreements Between Hungary and Foreign Investors are Contrary to European Community Law*, INV. ARB. REP., Sept. 17, 2008, at 14.

- participated as an observer in the investment policymaking and standard-setting activities of several other intergovernmental bodies.¹³⁴

This broad exposure, in combination with its deep expertise in the trade realm, makes the Commission better placed than any other EU institution to engineer the smooth functional integration of the EU's future trade and investment policies. The Commission's new competence to negotiate both types of treaties arrives not a moment too soon. While most international investment issues still remain outside the formal ambit of the WTO, there is an undeniable and accelerating worldwide trend toward concluding integrated regional trade and investment agreements.¹³⁵

The Commission's nearly two decades of experience with trade negotiations gives it a clear informational advantage in this environment. Thanks to its familiarity with the policy preferences and negotiating strategies of its trading partners, the Commission is in a better position than either the Council or the Parliament to assess how investment and trade provisions can and cannot (and should and should not) be linked within the next-generation of hybrid agreements. It also knows more about what the EU's negotiating partners are and are not likely to accept in terms of trade-offs *between* investment and trade concessions. Now that the EU is able to put both topics on the table simultaneously, the Commission can play a productive role in anticipating and proposing concrete ways in which each might best be played off against the other.

Beyond just contributing its technocratic expertise at the level of negotiations and implementation, however, the Commission has a vital role to play in shaping the normative orientation of the EU's comprehensive international investment policy. Thanks to its legislative right of initiative, the Commission enjoys a first-mover advantage in setting the terms of the policy debate. It has already thrice made use of

¹³³ Such as discussions surrounding the Trade Related Investment Measures (TRIMS) agreement.

¹³⁴ For example, the Commission represents the EU as an observer before investment-related bodies such as the United Nations Commission on International Trade Law (UNCITRAL) (which recently adopted new transparency requirements for future investor-state arbitrations conducted under the revised UNCITRAL rules) and the United Nations Conference on Trade and Development (UNCTAD) (which analyzes the investment law and policy practices of its members and makes recommendations for "best practices").

¹³⁵ The trend began in the 1990s with the conclusion of the North American Free Trade Agreement (NAFTA) – a model which has since been replicated across several other regional trading blocs. Its newest manifestations may be seen in the negotiations toward the Trans-Pacific Partnership Agreement (TPPA) (*see* current status of the negotiations at: <http://www.ustr.gov/tpp>) and the Transatlantic Trade and Investment Partnership Agreement (TTIP) (*see* announcement of impending negotiations at: <http://www.ustr.gov/about-us/press-office/fact-sheets/2013/february/US-EU-TTIP>). As noted above (*supra* note 16), the EU is meanwhile working to conclude comprehensive trade and investment agreements with Canada, India, and Singapore.

this advantage: first, in communicating to the Parliament and the Council a proposed framework for the new EU investment policy;¹³⁶ second, in its proposed regulation on transitional arrangements for Member States' BITs with third states (since adopted);¹³⁷ and third, in its proposed regulation on managing financial responsibility linked to investor-state dispute settlement.¹³⁸

The first mover advantage gives the Commission a unique opportunity to lead, rather than follow, by contributing innovative ideas to the policy discussion. The Commission is nevertheless constrained in pressing this advantage by its position as middleman between the Council and the Parliament.¹³⁹ Unfortunately, the above discussion of the Parliament's strong pushback against the Commission's proposed financial responsibility regulation suggests that the Commission has not always been sufficiently mindful of this go-between role. The Commission's lackluster policy framework document likewise evinced a distinct lack of creativity in applying its mind to the coordination task.¹⁴⁰

Moving forward, the Commission should devote less of its immediate attention to promulgating technical regulations and a great deal more to pondering what kinds of new investment regulations and investment treaty provisions actually stand a good chance of finding favor with both the Council and the Parliament. There is no way of getting around this central challenge. If any progress is to be made, it falls to the Commission to close the distance between the two institutions' competing policy visions. This can only be done if the Commission proves willing to go out on a limb and propose innovative ways of responding to the Parliament's major regulatory concerns while also satisfying the Council's aggressive investor protection objectives.

Before moving on to the final section, it is worth pausing to consider why the Commission has not yet proven more proactive on the innovation front. One might have expected a greater show of problem-solving initiative, given the Commission's vast treaty negotiating expertise and its unenviable institutional positioning between the Council's Scylla and the Parliament's Charybdis. One explanation may lie in the Commission's desire to avoid what has lately become known as "NAFTA contagion." This refers to the U.S. and Canadian-led phenomenon of concluding ever more detailed investment treaties which – while considerably longer and more difficult to negotiate than their predecessors – do little to clarify the actual content of states' obligations toward foreign investors.¹⁴¹

¹³⁶ See discussion *supra* note 21 and accompanying text.

¹³⁷ EU Regulation establishing transitional arrangements, *supra* note 13.

¹³⁸ Discussed *infra*, note 68 and accompanying text.

¹³⁹ As art 17(1) of the Consolidated TEU, *supra* note 2 puts it, one of the Commission's principal functions is to "exercise coordinating, executive, and management functions."

¹⁴⁰ See discussion *supra* note 21 and accompanying text.

¹⁴¹ For allusions to this phenomenon, see e.g. Jan Kleinheisterkamp – *Comments on Managing Financial Responsibility*, *supra* note 87, para 38 (criticizing the Commission for distancing itself from the NAFTA practice of tying the FET standard to customary

To the extent that the much criticized North American solutions are indeed inspiring the Commission's reticence, one can but sympathize.¹⁴² What is less apparent, however, is why the Commission should regard itself as limited by the previous innovations of others. The U.S. and Canada may be somewhat trapped on their present trajectories by mechanisms like path dependency, vested interests, the impact of MFN clauses included in past treaties, and other constraints. But the Commission has a one-time opportunity to sweep aside the past and chart an entirely new path for European international investment law and policy. It would be a shame to see it waste the rare gift of a blank slate by needlessly limiting itself to coloring within some imaginary North American lines. Hopefully, the Commission's Members will instead recognize that a renewed round of policy innovation is both possible and called for, and that the Commission is in the prime position to drive it.¹⁴³

D. Safeguarding of EU law by the Court of Justice of the European Union

Last but not least, it is necessary to consider what role the Court of Justice of the European Union (CJEU)¹⁴⁴ might play in the evolving EU international investment policy story. Professor Reinisch has suggested that the CJEU will have the final word on some of the most controversial questions surrounding the scope and functioning of the new policy.¹⁴⁵ In particular, he predicts that the Court will at some point be called upon to decide:

- whether the EU is competent to conclude investment treaties with third states covering both foreign direct investment and portfolio investment (or whether such treaties must instead be concluded as

international law but without providing a workable alternative way to clarify the content of the standard); and "Opinion of the European Economic and Social Committee on the 'Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions — Towards a comprehensive European international investment policy,'" COM(2010) 343 (2011/C 318/25), Rapporteur: Mr Jonathan PEEL, C318/150 OFFICIAL JOURNAL OF THE EUROPEAN UNION (29 Oct. 2011), para 4.4.1 (stressing that the EU "should build on its own strengths rather than imitate NAFTA").

¹⁴² For a catalogue of some of the criticisms of the U.S. Model BIT program and an analysis of differences between the 2004 and 2012 Models, see Mark Kantor, *The New U.S. Model BIT: If Both Sides Are Angry With You, You Must Be Doing Something Right*, 5(2) NEW YORK DISPUTE RESOLUTION LAWYER (Fall 2012), reprinted in TRANSNAT'L DISP. MGMT., ISSN: 1875-4120 (November 2012). For criticisms from the opposing viewpoint see, Stephen Schwebel, *The United States 2004 Model Bilateral Investment Treaty: an Exercise in the Regressive Development of International Law*, 3(2) TRANSNAT'L DISP. MGMT. (April 2006).

¹⁴³ This is not to suggest that the Commission must entirely reinvent the wheel when it comes to determining the wording of its future international investment agreements; only that it need not limit itself to adopting the refinements recently pioneered by the United States and Canada, which may or may not be suitable to the EU's purposes.

¹⁴⁴ Previously known as the European Court of Justice (ECJ).

¹⁴⁵ Reinisch – *Quo Vadis Europe?*, *supra* note 2, at p. 39.

“mixed agreements” by the EU and its Member States acting jointly);

- what will happen to the existing intra-EU BITs; and
- whether the CJEU will accept a system of treaty-based investor-state dispute settlement that grants party-appointed arbitrators a role in interpreting and applying certain aspects of EU law.¹⁴⁶

I do not disagree with Professor Reinisch's identification of these three issues as the most likely to capture the Court's attention. But passing them through the prism of comparative institutional strengths can again shed a bit of differently colored light upon each issue.

As is well known, the CJEU is the judicial body tasked with “ensur[ing] that in the interpretation and application of the [EU] Treaties the law is observed.”¹⁴⁷ Its judges and advocates-general are “appointed by common accord of the governments of the Member States” for a renewable term of six years.¹⁴⁸ They must be “persons whose independence is beyond doubt and who possess the ability required for appointment to high judicial office.”¹⁴⁹ The Court's jurisdiction extends to a wide array of matters, from policing the separation of powers boundaries between the Member States and the Union¹⁵⁰ to hearing complaints by private persons against actions taken by EU institutions.¹⁵¹

When it comes to the EU's future comprehensive international investment policy, a number of possible Court challenge scenarios might arise. Beginning with the first of the three above-identified issues – the question of exclusive EU competency versus “mixed” EU-Member State competency to conclude new investment treaties with third states – the Court indeed has jurisdiction to decide the issue.¹⁵² The EU treaties

¹⁴⁶ *Id.*

¹⁴⁷ Consolidated TEU, *supra* note 5, art. 19(1) (which sets out the general structure and jurisdiction of the Court).

¹⁴⁸ Consolidated TFEU, *supra* note 5, art. 254.

¹⁴⁹ *Id.* See also *id.*, at arts 251-257 (describing the composition of the General Court and of the Court of Justice, the appointment process for judges and advocates general, the eligibility requirements for both positions, and the respective jurisdictional competencies of the General Court and Court of Justice).

¹⁵⁰ Consolidated TFEU, *supra* note 5, at art. 263 (allowing Member States, the Commission, the Parliament, and the Council to bring actions for annulment against any EU organ “on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers”).

¹⁵¹ See *id.*, at arts. 263 and 265 (allowing “any natural or legal person”, under certain conditions, to bring an action before the Court).

¹⁵² For purposes of the present analysis, I do not distinguish between actions over which the General Court has original jurisdiction and the Court of Justice only appellate jurisdiction, on the one hand, and actions over which the Court of Justice has original jurisdiction, on the other. In any event, the treaties confer upon the Court of Justice the right to give the final word on all of the matters discussed here. I therefore refer to the CJEU's jurisdiction as shorthand for the cumulative (and in some cases sequential) jurisdiction of both courts.

permit it to do so upon application by one or more Member States and/or upon application by any of the principal EU institutions involved: Parliament, Council, and Commission.¹⁵³

If the matter does end up before the CJEU, the Court's past decisions suggest that it may prove more sympathetic to the Commission's exclusive competence claim than to the mixed competence position asserted by some Member States.¹⁵⁴ The Court's observers have long noted its tendency to side with Community institutions in their attempts to exercise the broadest plausible interpretation of their enumerated Treaty powers over the Member States. Moreover, the CJEU has demonstrated its eagerness to step in and clarify competence issues at the earliest available opportunity.¹⁵⁵ Under its existing jurisprudence, the Court could resolve the investment treaty-making competence question in advance of any actual attempt by the Union to formally adopt an EU-wide investment treaty with a third state.¹⁵⁶ It could even do so in advance of any attempt by the Commission to so much as open negotiations toward a given treaty.¹⁵⁷

From a pragmatic standpoint, however, it is not obvious that this particular competence question is best resolved by the Court. One of the most enduring criticisms that the Court has faced is that it has improperly ascribed to itself the role of "an engine for the building of the autonomous Community legal order".¹⁵⁸ Without any democratic mandate, critics

¹⁵³ An *ex ante* challenge could be brought under 218(6)(b)(11) and an *ex post* challenge under art. 263 of the Consolidated TFEU, *supra* note 5.

¹⁵⁴ I note that the Council has so far hedged on this point, which probably indicates that not all of the Member States are in agreement. See e.g. Council – Conclusions on a Comprehensive EU Investment Policy, *supra* note 8, para 7 (stating that the Council "SUPPORTs the definition of a broad scope for the new EU policy in this field as suggested by the Commission, to be further elaborated in full respect of the respective competences of the Union and its Member States as defined by the Treaties").

¹⁵⁵ See, e.g. [1992] 1 C.M.L.R. at 715 (where the Court asserted its duty to "forestall [rather than rectify after-the-fact] complications which would result from legal disputes concerning the compatibility with the Treaty of international agreements binding upon the Community").

¹⁵⁶ See Consolidated TFEU, *supra* note 2, at art. 218(6)(b)(11) ("A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised").

¹⁵⁷ See *Re the Accession of the Community to the European Human Rights Convention* (Opinion 2/94), [1996] E.C.R. I-1784, para 6, [1996] C.M.L.R. 265, 287 ("where a question of competence has to be decided, it is in the interests of the Community Institutions and of the States concerned, including non-member countries, to have that question clarified from the outset of negotiation and even before the main points of the agreement are negotiated").

¹⁵⁸ Judge Fernand Schockweiler, *La Cour de justice des Communautés européennes dépasse-t-elle les limites de ses attributions?*, 18 JOURNAL DES TRIBUNAUX, DROIT EUROPÉEN 73 (1995). Most scholars agree that the Court chiefly pursues this goal by employing a teleological method of interpretation. See, e.g. Nial Fennelly, *Legal*

charge, it has pushed the development of the European Union in directions never fathomed or assented to by the Member States and their citizens. This criticism featured heavily in debates over the EU's democratic deficit in the decade leading up to the adoption of the Lisbon Treaty.¹⁵⁹ It was partly in response to this that the Lisbon Treaty enhanced the legislative powers of the Parliament and placed greater cooperation burdens upon the Parliament and the Council acting in tandem.¹⁶⁰

Arguably, then, by making international investment policy subject to the legislative co-decision procedure, the Member States have signaled their preference for working out their substantive disagreements through a process of inter-institutional dialogue in which both the EU institutions and the Member States (acting through the Council) have an equal say. In any event, it is unclear what might be gained by referring a dispute over exclusive versus mixed competence in investment treaty matters to the CJEU. Even if the Court were to come down on the side of the EU's exclusive competence, the Council's special unanimity requirement would nevertheless force the Commission to negotiate investment treaties which each and every Member State would be individually willing to ratify. As a practical matter, the best way to do this is to facilitate the active involvement of the Member States' respective investment treaty negotiators in at least the first few sets of EU-level negotiations. This suggests that the competence question may be more academic than real.

The question as to what will become of existing intra-EU BITs raises some similar considerations. If the matter is dealt with through inter-institutional dialogue, the co-decision procedure (in combination with the special unanimity requirement) will again ensure that the eventual solution meets with the satisfaction of all parties concerned.¹⁶¹ There would be no need for any involvement by the Court. But what if ensuing events instead lead to a showdown between the Commission – which regards intra-EU BITs as unlawful under the Treaties – and the Member States that refuse to terminate their intra-EU BITs?¹⁶² It is under this scenario that the CJEU has a pivotal role to play.

Interpretation at the European Court of Justice, 20(3) *FORDHAM J. INT'L L.* 656-79 (1997) and references cited therein.

¹⁵⁹ See references cited *supra*, note 81.

¹⁶⁰ See *supra* note 80.

¹⁶¹ Indeed, this is precisely what happened in the case of the recently adopted regulation governing transitional arrangements for Member States' extra-EU BITs (EU Regulation establishing transitional arrangements, *supra* note 13).

¹⁶² In a May 2013 appearance before Parliament, European Commissioner Karel de Gucht (DG Trade) stated:

The Commission agrees that bilateral and investment treaties (BITS) between EU Member States do not comply with EU law. [...] All the Member States except one have such intra-EU BITS in force. Commission officials have therefore initiated informal discussions with them with a view to reaching agreement on the joint termination of all these agreements within an agreed time frame.

When it comes to intra-EU BITs, there can be little doubt that they violate the fundamental principles of the Common Market. By granting either greater substantive legal protections¹⁶³ or greater access to legal remedies¹⁶⁴ to investors from some EU states than to investors from others, intra-EU BITs contravene the EU's prohibition against discrimination among EU citizens on the basis of nationality.¹⁶⁵

The fact that intra-EU BITs exist at all appears to be an artifact of historical oversight. Their existence was never mentioned in the successive rounds of accession treaties concluded between the Community and the newly acceding Member States. They continue in force today only because the accession treaties neglected to explicitly terminate them.¹⁶⁶ And so far, investment arbitration tribunals have found the terms of the accession treaties insufficiently definite to conclude that they impliedly terminated the intra-EU BITs as a matter of international law.¹⁶⁷

Several Member States have already agreed bilaterally to terminate their agreements, and the Commission has encouraged them to proceed with doing so. However, in those cases where Member States are not willing to terminate agreements, the Commission is ready to play its role as a guardian of the Treaties so as to ensure compliance with EU law.

Comments of European Commissioner Karel de Gucht, (DG Trade) (22 May 2013), European Parliament, Plenary Session from 20.05.2013 to 23.05.2013, Debate on "Financial responsibility linked to investor-state dispute settlement tribunals established by international agreements to which the EU is a party," transcript available at:

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20130522+ITEM-019+DOC+XML+V0//EN&language=EN>.

¹⁶³ Where a BIT's investment protection standards are higher than those afforded by national and EU law.

¹⁶⁴ Since investors, under a BIT, can enforce their rights either through the national courts or through international arbitration – the latter being in many cases a more effective means of obtaining compensation than the former.

¹⁶⁵ This is prohibited under Consolidated TFEU, *supra* note 2, art. 18. In a 2012 decision, the Frankfurt Court of Appeals (reviewing an arbitration award issued under an intra-EU BIT) found that intra-EU BITs may well violate article 18 of the TFEU, since they allow some EU investors by not others to initiate arbitration proceedings against certain Member States. The Court nevertheless upheld the arbitration award. It opined that the proper remedy to the nationality based discrimination problem would be to require the Member States to offer the option of investor-state arbitration to *all* EU investors, even in the absence of an applicable BIT. (See *Eureka v. Slovakia*, case no. 26 SchH 11/10, Frankfurt Court of Appeals, available (in German) at: www.italaw.com). The court's decision is curious, since it is not clear whence the suggested authority to force Member States to grant this expanded consent to investor-state arbitration derives. There is no provision of the EU treaties which purports to grant either the EU or the Member States' courts the power to order Member States to consent to investor-state arbitration with all EU investors.

¹⁶⁶ It is to be hoped that the EU will rectify this error in future accession treaties.

¹⁶⁷ The relevant legal provisions governing the implicit termination of international treaties are articles 30(2) and 59 of the Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331. Examples of cases in which arbitral tribunals have assumed jurisdiction

The reason why the matter has not yet reached the CJEU is probably because the Commission does not wish to antagonize the powerful Member States that have balked at the idea of voluntarily terminating their intra-EU BITs at a time when the Commission needs their support in order to forge a new comprehensive EU *external* investment policy.¹⁶⁸

Still, intra-EU BITs cannot forever remain in legal limbo. Either the Commission¹⁶⁹ or an unhappy Member State¹⁷⁰ will eventually find an opportune moment to challenge them, and when this happens, the Court will almost certainly force the recalcitrant Member States' hands. The only question is whether it will be worth the judicial showdown to reach this inevitable result. From the perspective of "old Europe" investors who are invested in "new Europe" countries, the answer may be yes. The delayed legal fight is worth it to them if it buys a few more years of privileged legal protection in the meantime. This is especially true when it comes to investments in Member States whose domestic court systems are considered sub-par by contemporary standards.¹⁷¹ But from the perspectives of the rule of law, free and fair competition, and the broader ideals of the European project, the answer must be no. A drag-the-feet strategy only perpetuates nationality-based discrimination among EU investors. In so doing, it also places the Member States that maintain intra-EU BITs in perpetual violation of their duty of cooperation under the EU Treaties.¹⁷²

The CJEU can put to an end to this anomalous situation with the stroke of its pen. As the authoritative interpreter of the EU Treaties, the Court possesses the exclusive ability to issue final and binding pronouncements on questions of EU law and to order all who are subject to its jurisdiction to comply with that law.¹⁷³ It can, in other words, order the Member States to either terminate their existing intra-EU BITs or amend them so as to remove their discriminatory provisions and impacts.

over investor-state disputes under intra-EU BITs include: *Eastern Sugar v. Czech Republic*, Partial Award, 27 March 2007; *Eureko v. Slovakia*, Award on Jurisdiction, 26 October 2010; *Eureko v. Poland*, Partial Award, 19 August 2005; and *Ioan Micula and others v. Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction of 24 September 2008.

¹⁶⁸ It is nevertheless surprising that none of the EU-Member States that have faced multiple claims under intra-EU BITs has sought to bring the matter before the Court. This could in principle be done via an infringement action lodged by one Member State against another under art. 259 of the Consolidated TFEU, *supra* note 2.

¹⁶⁹ Under art. 258 of the Consolidated TFEU, *id.*

¹⁷⁰ Perhaps one, like Ireland, whose investors do not enjoy the benefits of any intra-EU BITs.

¹⁷¹ Particularly as they will enjoy all the benefits of the extended privilege without incurring any of the costs of the eventual legal battle.

¹⁷² It may also open some of the "old Europe" countries up to unwanted surprises in the form of investor-state disputes in the interim – a very real prospect which few of them appear to be taking seriously.

¹⁷³ Consolidated TEU, *supra* note 2, art. 19(1).

A comparative institutional analysis suggests that the Court should do precisely this if and when the intra-EU BITs problem comes before it. Two principal considerations support this conclusion. First, there is no other body that can end these ongoing violations of EU law after political persuasion and compromise have failed. The violations could continue indefinitely if the Court were to stay its hand – hardly an appealing outcome. Second, unlike in the case of the exclusive versus mixed competence question, there is no democratic deficit problem to be concerned with here. Recall that the task of identifying what role the Court should play in deciding the investment treaty-making competence question is not really a matter of ascertaining the Court's jurisdiction; the potential value-add of a CJEU decision on that point is undermined by the fact that the EU Treaties give the Member States the right to veto the adoption of new EU-wide investment laws and policies in any event.¹⁷⁴ By contrast, in resolving the intra-EU BITs quandary, the Court would merely be exercising its power to order the Member States to comply with EU Treaty obligations to which they have *already* consented. Thus, no comparable political consent problem arises.

Third and finally, what role should the CJEU play in determining whether the EU's future investment treaties may properly include a system of investor-state dispute settlement that grants party-appointed arbitrators a role in interpreting and applying some aspects of EU law? Here I will limit myself to two blunt observations. The CJEU, much like domestic constitutional and supreme courts the world over, is a zealous guardian of its own jurisdiction.¹⁷⁵ And although countless scholars and judges have criticized the Court for overreaching on numerous occasions,¹⁷⁶ the Member States have yet to adopt any EU treaty amendment which scales back its powers.

It therefore seems safe to conclude, as the European Parliament has done,¹⁷⁷ that the EU's future international investment treaties must find a way to ensure that EU law – *as articulated by the CJEU* – is fully respected and applied within the context of future investor-state arbitration proceedings involving EU parties. Failing this, investment arbitration risks meeting with the same fate as every other legal arrangement that has ever attempted to free itself of the Court's control over the development of EU law¹⁷⁸ and/or eschew the application of what the Court regards as

¹⁷⁴ See the discussion *infra*, pp. 31-32.

¹⁷⁵ See the excellent discussion in Reinisch – *Quo Vadis Europe?*, *supra* note 2, pp. 34-38 (part E).

¹⁷⁶ For a chronology of the major accusations of judicial activism by the Court, see Henri de Waele, *The Role of the European Court of Justice in the Integration Process: A Contemporary and Normative Assessment*, 6(1) HANSE L. REV. 1- 26 (2010).

¹⁷⁷ See Draft European Parliament Legislative Resolution – Managing Financial Responsibility for ISDS, *supra* notes 70-75 and accompanying text.

¹⁷⁸ The Court has been aggressive on this front through its preliminary rulings jurisprudence under art. 267 of the Consolidated TFEU, *supra* note 2.

mandatory EU law.¹⁷⁹ To wit – it can expect to receive a big, fat legally-binding pronouncement of “not a chance”.

There is also a yet starker possibility that could arise in respect of investment treaty disputes brought against the Union (as opposed to against an individual Member State). The CJEU might be tempted to declare *itself* the appropriate body to hear such claims under article 268 of the TFEU, which gives the Court jurisdiction “in disputes relating to compensation for damage” involving the non-contractual liability of the Union.¹⁸⁰ Such an outcome would throw into disarray the current plans for developing a shared responsibility regulation governing the respective legal and financial liabilities of the Union and the Member States in connection with investor-state arbitration proceedings. More than that, it could altogether preclude the EU and the Member States from consenting to resolve future treaty-based investment disputes before any other forum but the CJEU.

For these reasons, if the EU's political organs wish to include investor-state arbitration provisions in at least some of the EU's future investment treaties, the wisest course would be for the Commission, Council, and Parliament to take great pains to word those treaties in such a way as to ensure that no question of a conflict between the EU's external investment treaties and its internal law ever comes before the Court. This will no doubt require developing some creative new textual provisions. Simply adopting the innovations introduced by other countries in their recent model BITs will not suffice to address the unique problems that arise in the EU context. But difficult though the drafting challenge may be, the eventual costs of neglecting it probably outweigh the up-front costs of undertaking it. The CJEU's comparative institutional advantage is its ability to have the final word on all matters of EU law. It should be expected – in both the prescriptive and normative senses of the word – to play to its strengths.

¹⁷⁹ The paradigmatic case known to arbitration practitioners is *Eco Swiss China Time Ltd v. Benetton Int'l NV*, [1999] E.C.R. I-30555 (E.C.J.) (finding an arbitration award defective due to the arbitral tribunal's failure to consider and apply EC competition law, even though neither party had raised that point before the original tribunal).

¹⁸⁰ Such a possibility would obviously depend upon whether the CJEU would regard investment treaty obligations as a form of contractual liability or as a form of non-contractual liability. In the former case, the treaty's dispute resolution provisions would presumptively apply. Any incompatibility between those provisions and EU law would, as discussed above, most likely result in the invalidation of the non-conforming provisions of the investment treaty. It is only in the latter case (treaty liability not regarded as a form of contractual liability) that article 268 of the Consolidated TFEU, *supra* note 2, arguably provides the Court with jurisdiction to decide the claim itself. Note that art. 268 refers to art. 340, which states: “[i]n the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.” An EU-wide investment treaty could potentially be viewed as a statement of the relevant “general principles common to the laws of the Member States” which the Court should apply.

CONCLUSION

The passage of the Lisbon Treaty announced the dawn of a new era for the European Union. It is to be an era in which democratic participation is deepened, the autonomous rights of the Member States are safeguarded with renewed diligence, and uniform respect for the rule of European law is demanded equally of Member States, old and new. Each of these objectives is embedded in the institutional arrangements by which the EU must now forge its comprehensive Union-wide international investment policy. The question as to where European investment policy will go in the future must therefore be answered with full awareness of and due respect for the comparative institutional strengths and weaknesses of the EU's Parliament, Council, Commission, and Court.

The Parliament is best suited to conduct a thorough democratic vetting of proposed EU investment policies, regulations, and treaties. Its democratic mandate equips it to insist that all new EU investment laws adequately address the concerns raised by EU citizens before attaining the requisite parliamentary assent. When it comes to safeguarding the interests of particular Member States, on the other hand, the Council takes the pole position. It is for the Council to ensure that the collective wisdom of the Member States' past experiences with bilateral investment treaties and investor-state arbitration claims is reflected in the negotiating mandates it provides to the Commission and in the investment-related regulations and treaties it adopts in co-decision with the Parliament.

For its part, the Commission serves two demanding masters. Fortunately, its first mover advantage gives it the flexibility to suggest innovative approaches to closing the gap between the investment policy objectives of the Parliament and those of the Council. Thanks to its extensive experience negotiating trade agreements on behalf of the Union, the Commission is well placed to propose feasible means of accomplishing this difficult Parliament/Council coordination task.

Finally, the Court of Justice of the European Union plays the always-important role of judicial backstop. With its power to resolve competence disputes between the Member States and the EU organs, to decide the ultimate fate of intra-EU BITs, and to order the alteration of any new external EU investment treaties that do not comply with internal EU law, the Court's potential involvement looms large in the background. Let us hope that this will motivate the relevant actors to work out reasonable solutions on their own. But if not, it is comforting to know that the Court can be called upon to resolve contested legal issues as necessary.

Assuming each of the four major EU institutions embraces its new investment-related powers in a manner that displays due regard for the comparative institutional advantages of its counterparts, Europe's comprehensive international investment policy will emerge through a process of productive inter-institutional dialogue. The signs so far are

encouraging.¹⁸¹ While the Council, Parliament, and Commission started off advancing disparate and seemingly irreconcilable policy objectives, their recent communications have demonstrated a much greater willingness to compromise. This trend is likely to gain further momentum, in my estimation. The structural checks and balances which the Lisbon Treaty imposes upon each institution's competencies in the investment arena effectively prohibit any one institution from moving forward without getting the others on board.

But as this healthy inter-institutional cooperation gathers steam, European decision-makers should take care not to let momentum overwhelm introspection. The Lisbon Treaty has given them a one-time opportunity to infuse an old international legal regime with a new set of democratic ideals. Only by seizing the chance to reflect critically upon what its Member States' individual investment policies have achieved separately in the past can Europe think creatively about what its common investment policy should achieve collectively in the future. If it does so, the Lisbon Treaty may one day be regarded as the dawn not only of a more democratic European Union, but of a more democratic international investment law system.

¹⁸¹ As this article went to print, press reports indicated that the Council had approved a negotiating mandate for the Commission's TTIP talks with the U.S. which takes a much more cautious approach to investor-state dispute settlement than the Council had taken in its prior communications. According to one such report:

a US demand to talk about the terms of protection for each other's investments – was settled early on, with a decision to allow talks. However, a majority of states, a diplomat from an EU member state said, are extremely wary at the prospect of the advent of US-style corporate litigation [aka aggressive investor-state arbitration claims]. The EU would, he said, need a big trade-off before they would be willing to harmonise investment-protection law.

European Voice, "Traumatic birth for EU-US trade talks," by Andrew Gardner (14 June 2013), available at: <http://www.europeanvoice.com/article/2013/june/traumatic-birth-for-eu-us-trade-talks/77548.aspx>.