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MEMORANDUM*

TO: European Commission, Cabinet of the Trade Commissioner, Mr. Damien Levie

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DATE: June 2011 (Final)

RE: 'Gold Standards' for the International Investment Policy of the European Union after the Entry into Force of the Lisbon Treaty

* This memorandum is a research paper prepared on a *pro bono* basis by students at the Graduate Institute of International and Development Studies (IHEID) in Geneva. It is a pedagogical exercise to train students in the practice of international trade and investment law, not professional legal advice. As a result, this memorandum cannot in any way bind, or lead to, any form of liability or responsibility for its authors, the supervisors of the IHEID trade and investment law clinic or IHEID.

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List of Abbreviations

ACP	African, Caribbean, Pacific (group of States)
ASEAN	The Association of Southeast Asian Nations
BIT	Bilateral Investment Treaty
CARIFORUM	The Caribbean Forum
CCP	Common Commercial Policy
CECA	Comprehensive Economic Cooperation Agreement
CIC	Capital Issues Committee, Malaysian Ministry of Finance
ECJ	Court of Justice of the European Union
ECT	Energy Charter Treaty
EPA	Economic Partnership Agreement
EU	European Union
EUMS	European Union Member States
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
FIPA	Foreign Investment Protection Agreement
FSP	Full Security and Protection
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
ICSID	International Centre for the Settlement of Investment Disputes
IIA	International Investment Agreement
IGA	Intergovernmental Agreement (Agreement between the Belgo-Luxemburg Economic Union and Malaysia)
IMF	International Monetary Fund
MAI	Multilateral Agreement on Investment
MIGA	Multilateral Investment Guarantee Agency
MFN	Most-Favoured-Nation
NAFTA	North American Free Trade Agreement
NGO	Non-governmental Organisation
OECD	Organisation for Economic Cooperation and Development
PCA	Partnership and Cooperation Agreement
REIO	Regional Economic Integration Organization
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UNCTAD	United Nations Centre for Trade and Development
UNCITRAL	United Nations Commission on International Trade Law
UK	United Kingdom of Great Britain and Northern Ireland
US	United States of America
USSFTA	United States-Singapore Free Trade Agreement
WTO	World Trade Organisation

I. EXECUTIVE SUMMARY

This memorandum was prepared by students of the Investment Law Clinic at the Graduate Institute of International and Development Studies as a response to a request by the Private Office of the Trade Commissioner of the European Commission for research on what investment protection policy it could pursue. As such, we were asked to analyse the best practices for investment protection as provided for in international investment agreements, including but not limited to those concluded by EU Member States. In addition, we also consider the advantages and disadvantages of adopting a model BIT.

As foreign direct investment now falls within the exclusive competence of the EU through its Common Commercial Policy, it will have to consider the practical implications of this competence shift, such as the conclusion of international investment agreements. We recommend a European model BIT as the starting point and accordingly analyse the possible content in this memorandum.

Our analysis was guided by the EU's ambition to be a competitive player in the investment field and its intention to improve investment conditions both within the EU's territory and outside of it. While a BIT does not directly change the internal regulation of investments within a State, their value, as UNCTAD have highlighted, "…lies primarily in the contribution they can make to promote investment by helping to secure a welcoming and stable environment for foreign investment".[1] In addition, we were mindful throughout that good global governance, human rights, the rule of law and sustainable development all inspire the commercial policy of the EU. As such, the proposals suggested take these considerations as their premise and, in the authors' opinion, represent the "gold standards" in international investment law.

The particular methodology adopted was as follows. First, we identified the pertinent issues in international investment law around which there exists a debate as to the level of investor protection they provide. Second, we set out the options in each area, the various configurations of which have resulted in a variety of outcomes in practice.

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1 United Nations Conference on Trade and Development (UNCTAD), *Experiences with Bilateral and Regional Approaches to Multilateral Cooperation in the Area of Long-term Cross-Border Investment, Particularly Foreign Direct Investment*, Expert Meeting (Geneva, Switzerland: UNCTAD, May 8, 2002), 1.

Finally, we analysed the practice for each option and concluded upon the option that provided the highest level of investor protection. At the end of each section, we suggested a possible construction of the standard to be included on the basis of the foregoing analysis.

Every international investment agreement contains a definition of investment and investor, which are intended to define the scope of the agreement. If the EU wishes to increase the number of investors entitled to protection, it would be well advised to make the definition of investment as broad and open-ended as possible. A non-exhaustive list of investments provides the maximum protection to investors in this respect. The EU will have to decide, however, as to the reach of the term 'foreign direct investment' and particularly whether this extends to portfolio investments. As for protected investors, residency or siège social establishes the weakest link to a contracting party and, accordingly, increases the pool of beneficiaries that fall within the remit of the international investment agreement. In addition, the breadth of this pool may in principle encompass not-for-profit organisations if the EU should wish to include them. Finally, increasing the phases over which investors are protected can be achieved by making explicit provision for the pre-establishment phase in the international investment agreement.

The practice of including a provision on fair and equitable treatment in international investment agreements is widespread but its formulation varies, with the result that the standard actually applied by tribunals can differ significantly too. A reference to fair and equitable treatment should feature in the preamble of the international investment agreement—in addition to a standalone clause—as this serves to bolster and expand the application of the standard. The fair and equitable treatment clause should have added to it the notion of 'full protection and legal security' as tribunal practice reveals that doing so tends to broaden the protection available to investors. Crucially, fair and equitable treatment should appear as an autonomous standard and not be linked to the international minimum standard, which generally implicates a lower standard of treatment (as NAFTA jurisprudence indicates). In order to increase investor protection further still, a number of international investment agreements include additional obligations to the standard construction of the fair and equitable treatment clause.

National treatment guarantees that foreign nationals receive the same (or better) treatment as nationals of the area in which investment is made. In order to set the standard as high as possible, it is recommended that the comparison pool be made EU-wide. In addition, the standard should apply to both investors and investments, with this stipulation being made explicit in the relevant clause. Further still, it can also be made to extend to the pre-establishment phase of investment activity. Finally, exceptions to national treatment should be limited to fundamental EU concerns.

A freedom of transfer provision is essential in a liberalised capital transfer market. All EU Member State investment agreements should include a regional economic integration organisation clause, which suspends freedom of transfer and exempts the application of a provision that may be in conflict with regional law. However, its necessity in an EU investment agreement will depend upon whether the EU enters into a mixed or bilateral investment agreement with a third country. Furthermore, as with other standards, exceptions to freedom of transfer should not allow contracting parties to hide from their obligations that are owed to investors.

Expropriation is the most severe interference with property and its provision in international investment agreements is indispensable. In addition, the EU has made clear that it should be addressed in the context of a European investment agreement, and that indirect expropriation must also be provided for. As such, the provision for expropriation should reflect this, ensuring that investors have the right to compensation where their property is subject to interference by the measures of contracting parties. However, it is also important that the EU is able to regulate for legitimate public welfare purposes without being exposed to compensation claims. Therefore, the EU will have to decide upon the distinction between these situations and situations of compensable indirect expropriation, which must also serve a public purpose. As regards the assessment of compensation, an EU investment agreement should incorporate reference to variables such as the date, valuation method and interest rate pertinent to the expropriation, as these can alter the magnitude of compensation that the investor ultimately receives.

That an investor has recourse to an effective dispute settlement mechanism is essential to any practicable international investment agreement and, as such, we felt it necessary to address this issue in addition to the standard clauses outlined above. The

EU intends to provide for such a mechanism in an EU investment agreement. However, a number of challenges exist in the EU context. First, EU Member State national courts cannot review EU acts or legislation and are therefore not an appropriate forum for investor disputes with the EU. Second, recourse may be possible through the ECJ, provided the claim conforms to certain requirements, but uncertainty exists as to whether an international investment agreement would in practice be applied by the Court. Third, the amendment of existing investor-State dispute resolution mechanisms, such as ICSID, is both necessary and desirable if the EU is to be a party to proceedings. In addition to the foregoing dispute settlement options, a survey of fork-in-the-road clauses is provided and it is concluded that a number of models presently adopted by EU Member States could be followed.

Finally, a consideration of the form in which the abovementioned standards will ultimately manifest themselves is conducted in this memorandum. An EU model BIT provides for a consistent template from which the EU and EU Member States can draw upon in concluding international investment agreements with third states. It also ensures that EU interests will be addressed in these subsequent agreements. However, it does mean that EU Member States will have to relinquish some flexibility in the negotiation of future investment agreements and, hence, the advantages for EU Member States will have to be made clear. The key advantage for EU Member States is the increased bargaining power it gives them in concluding investment agreements with third states. There is also the added value of transparency, certainty and stability in the negotiation process. Given the increased number, needs and nature of actors in the negotiation and drafting of an EU [model] BIT, this also presents many challenges and will require complex as well as wide-ranging compromises. In general, however, it should make the EU a more attractive place to invest by incorporating gold standards in such a model BIT, from which investors will benefit through successive EU BITs. Practically speaking, the adoption of an EU [model] BIT allows for the (necessary) conclusion of mixed agreements to ensure maximum investor protection and should help to guard against forum shopping.

The memorandum concludes with an appraisal of what was intended to be achieved by the analysis of gold standards and the consideration of an EU model BIT. As such, it is recognised that certain areas that are related to the broader debate on EU

investment policy are beyond the scope of this particular memorandum. These are identified and it is recommended that further work be conducted in an effort to build upon what has been achieved here.

II. INTRODUCTION AND FACTUAL BACKGROUND

1. The EU entered the international investment law arena by virtue of Articles 3(1)(e), 206 and 207 of the CCP of the TFEU. As the "world's leading destination and source of investment",[2] the EU is likely to play a lead role for years to come, provided it achieves a cohesive, consistent and comprehensive international investment policy, making sure it is competitive at the international level.[3] The ambition to be a leader in this field is expressed in particular at Article 205 TFEU which, having reference to the principles and objectives laid out in Article 21 TEU, aims to link commercial policy with good global governance, human rights, the rule of law and sustainable development. The EU can and should become a role model in commercial matters and, in this way, shape the future world order.[4]

2. Arguably, while the investment system remains fragmented, the probability of achieving homogeneity, transparency and the recognition of legitimate development concerns is limited.[5] The goal therefore is to build upon the attractiveness of the EU as a location for investment by improving policy coherence, which should result in enhanced bargaining power as well as efficiency gains.[6] It should also be noted that both EU investors who make investments abroad and non-EU investors who invest in the EU will benefit from an EU model BIT that provides the strongest possible level of investment protection.

3. Article 3 TFEU[7] makes external commercial policy an exclusive competence of the EU. Its various actors–Commission, Parliament and Council—are presently

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[2] Council of the European Union, *Conclusions on a Comprehensive European International Investment Policy*, Conclusions (Luxembourg: Council of the European Union, October 25, 2010), 2, §6.
[3] Marc Bungenberg, "Going Global? The EU Common Commercial Policy after Lisbon," in *European Yearbook of International Economic Law 2010* (Berlin Heidelberg, Germany: Springer Verlag, 2010), 125.
[4] Christoph Vedder, "Ziele der Gemeinsamen Handelspolitik und Ziele des auswärtigen Handelns," in *Die Außenwirtschaftspolitik der Europäischen Union nach dem Verfassungsvertrag* (Baden-Baden: Nomos, 2006), 47.
[5] United Nations Conference on Trade and Development., *International Investment Rule-Making: Stocktaking, Challenges and the Way Forward*, UNCTAD Series on International Investment Policies for Development UNCTAD/ITE/IIT/2007/3 (New York, USA; Geneva, Switzerland: United Nations, 2008), 4-5.
[6] Carolinn Hjälmroth and Stefan Westerberg, *A Common Investment Policy for the EU*, Analysis: The Contribution of Trade to a New EU Growth Strategy (Stockholm, Sweden: National Board of Trade, 2009), 21-22, http://www.kommers.se/templates/Standard____4699.aspx.
[7] Article 3(1)(e): The Union shall have exclusive competence in the following areas: (…) common commercial policy. Article 3(2): The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is

involved in the design of a European international investment agreement, as laid out in Title V, Article 218. This is, however, without prejudice to the special provisions in Title II, Article 207(4), requiring the Council's unanimous action in "the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property, as well as foreign direct investment".

4. The Council identified the main pillars of future investment agreements to be concluded either exclusively by the EU or as shared, i.e. mixed, agreements in cooperation with Member States: It "stressed the need to ensure the inclusion in the substance of future negotiations of the fundamental standards of 'fair and equitable treatment', non-discrimination ('most-favoured-nation treatment' and 'national treatment'), 'full protection and security' treatment of investors and investments, protection against expropriation (including the right to prompt, adequate and effective compensation), free transfer of funds of capital and payments by investors, as well as other effective protection provisions (such as, where appropriate, the so-called "umbrella clauses") and dispute settlement mechanisms".[8]

5. In this memorandum, we aim to engage with the abovementioned elements where they represent the contentious issues in international investment law. In addition, we will consider aspects such as the 'pre-establishment phase' and the 'definition of investment and investor'. Accordingly, there are a number of standards typically found in investment agreements that fall outside the scope of this memorandum. Our intention is to consider those standards around which debate as to the level of investor protection exists. To this end, our methodology entails, first, identifying the issues within each element, then setting out the options, and finally analysing the practical implications of adopting a respective formulation. By way of conclusion, we select the option that provides the highest level of investor protection and provide an example of how this standard may be constructed in an investment instrument. In this way and in light of the timeliness of this work, we hope to make a contribution to the process of developing a future European investment policy.

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necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.

[8] Council of the European Union, *Conclusions on a Comprehensive European International Investment Policy*, 3, §14.

III. LEGAL ANALYSIS OF THE GOLD STANDARDS

1. DEFINITION OF 'INVESTMENT' AND 'INVESTOR'

OVERVIEW AND INTRODUCTION

- The definition of investment and investor define the scope of the IIA.
- A broad and open-ended definition of investment is strongly advised.
- The EU will have to decide upon the reach of FDI in its CCP, particularly whether this extends to portfolio investments.[9]
- A non-exhaustive list of investments maximises protection to investors.
- Residency or siège social establishes the weakest link to a territory and as such is controversial.
- The EU will have to decide whether to include not-for-profit organisations as protected investors.
- Extending IIA protection to the pre-establishment phase is likely to be attractive to investors because it extends the standards of treatment under the IIA to investors and in doing so encompasses the establishment, as well as expansion, management, conduct, operation, sale and acquisition of the investment.

6. Every IIA requires a definition of 'investment' and 'investor' in order to define the scope of the agreement. Therefore, the provision on the definition of investment and investor is not a standard of treatment as such, but rather clarifies the *type* of investment to be protected. 'Investment' and 'investor' are key terms that are "…fundamental to the institutions of investment arbitration".[10] Whereas an 'investor' is commonly defined as a 'natural or legal person', the definition of 'investment' can reflect the contracting parties' policies in the spectrum of assets included or excluded. While it may be easier to provide contracting parties with a negative list (as evidenced by NAFTA, Article 1139) or a broad definition with explanatory notes (US model BIT 2004, Article 1; USSFTA, Article 15(1); Draft MAI), the maximum protection

[9] FDI is an *economic* concept that cannot be extended to portfolio investment. Investment as a *legal* concept defining the scope of application of a BIT may also cover portfolio investment.
[10] Noah Rubins, "The Notion of 'Investment' in International Investment Arbitration," in *Arbitrating Foreign Investment Disputes*, ed. Norbert Horn and Stefan Kröll, vol. 19, Studies in Transnational Economic Law (The Hague, The Netherlands; Frederick, MD, USA: Kluwer Law International, 2004), 283.

possible can only be granted if the definition is as open as possible, thus allowing for its evolution over time. This does not imply, however, that the definition of investor needs to be broad also in order for the investor to be provided with the optimal treatment. By virtue of an open-ended definition of investment, the pool of investors to which the IIA extends is larger. Nevertheless, an inclusive definition is suggested for attaining the gold standard, as elaborated upon below.

OPTIONS

1. Broad Definition of Investment

7. A broad and open-ended definition is one of the major similarities between IIAs in general.[11] This type of definition simplifies the search for more precise terms covering those investments that the contracting parties intend to cover, given that employing the term 'every asset' may cover various forms of investment.[12] This is required if the BIT is to survive for many years, leaving room for evolution in the types of investment covered, and therefore constituting the gold standard.

8. A broad definition rather than a restrictive one is the general rule in EUMS BITs[13] and has been proposed by the European Commission also[14]. We did not come across a single EUMS BIT that did not define an investment as 'any/every kind of asset(s)'. However, at the heart of the discussion within the EU is whether a more restrictive understanding of the term 'investment' is required by Articles 206 and 207 TFEU, having reference to the EU's revised common commercial policy. It is as yet unclear whether portfolio investments fall within the exclusive competence of the

[11] United Nations Conference on Trade and Development (UNCTAD) and Karl Sauvant, *International Investment Agreements: Key Issues*, vol. 1 (New York: United Nations, 2004), 19; United Nations Conference on Trade and Development (UNCTAD), *Bilateral Investment Treaties 1996-2006: Trends in Investment Rule Making* (Geneva, Switzerland; New York, USA: United Nations Conference on Trade and Development, February 2007), 7.

[12] United Nations Conference on Trade and Development (UNCTAD), *Scope and Definition*, vol. II, UNCTAD Series on Issues in International Investment Agreements UNCTAD/ITE/IIT/11 (New York: United Nations, 1999), 18; United Nations Conference on Trade and Development (UNCTAD), *Bilateral Investment Treaties 1996-2006: Trends in Investment Rule Making*, 8.

[13] See Annex "List of EUMS IIAs Consulted".

[14] European Commission, *Towards a Comprehensive European International Investment Policy*, Communication (Brussels, Belgium: European Commission, July 7, 2010), http://eur-lex.europa.eu/Notice.do?mode=dbl&lang=en&ihmlang=en&lng1=en,de&lng2=bg,cs,da,de,el,en,es,et,fi,fr,hu,it,lt,lv,mt,nl,pl,pt,ro,sk,sl,sv,&val=519193:cs&page=.

EU.[15] If that is the case, future EU IIAs including portfolio investments may be concluded by the EU and a third State only. If not, future EU IIAs may have to be ratified by each MS individually.[16] This is purely speculative, and portfolio investments may fall under the exclusive competence of the EU by virtue of Article 63 TFEU.

9. Although the term 'FDI' is not defined, we do know that the purpose is "to establish or to maintain lasting and direct links"[17] between the investor and the entrepreneur in carrying out an economic activity. Moreover, the ECJ set the parameters in its *FII Group Litigation v Commissioners* judgment.[18] Accordingly, the decision for the EU will be whether the concept of investment is always to be limited having regard to the following variables:

1) Long-lasting commitment;

2) At least 10% company equity share;

3) Managerial control.

10. These elements are taken from definitions provided by the IMF[19] and the OECD[20]. They set the threshold for FDI and therefore effectively exclude portfolio investments (the latter including, for example, investment through the purchase of

[15] We did not find any sources that clarified the matter, unless the following vote taken on 13 April 2011 by the European Parliament can be considered to restrict the competence of the European Commission to investments limited to FDI: Carl Schlyter, *EP Decision of the Committee Responsible, First Reading/Single Reading: Bilateral Investment Agreements between Member States and Third Countries: Transitional Arrangements (Schlyter Report)* (Brussels, Belgium: European Parliament, May 10, 2011), http://www.europarl.europa.eu/oeil/file.jsp?id=5863842.: "Review of the agreements: the report limits the power of the Commission to review the existing bilateral investment agreements by Member States. The amended text provides that the Commission may review the agreements notified by the Member States assessing whether the agreements: conflict with the law of the Union other than the incompatibilities arising from the allocation of competences between the Union and its Member States on foreign direct investment, or; constitute a serious obstacle to the conclusion of future Union agreements with third countries relating to investment."

[16] For further discussion, see, for example: Bungenberg, "Going Global? The EU Common Commercial Policy after Lisbon," 135 et seq.

[17] "Council Directive 88/361/EEC for the Implementation of Article 67 of the Treaty," Database, *EUR Lex*, June 24, 1988, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31988L0361:EN:HTML.

[18] Judgment of 12 December 2006, *Test Claimants in the FII Group Litigation,* Case C-446, ECR I-11753.

[19] International Monetary Fund (IMF), *Balance of Payments and International Investment Position Manual*, 6th ed. (Washington D.C.: International Monetary Fund, 2009), 99.

[20] Organisation for Economic Corporation and Development (OECD), *OECD Benchmark Definition of Foreign Direct Investment*, 4th ed., OECD Benchmark Definition of Foreign Direct Investment (Paris, France: OECD Publishing, 2008), 234, www.sourceoecd.org/finance/9789264045736.

shares in a country's stock or bond market,[21] and are generally characterised by a limited degree of control and their short-term nature[22]). The intention, as articulated in the Arif Report,[23] is to prevent more volatile investments benefiting from extensive investment protection since they are more likely to destabilise the economy and constrain development policies.[24] In this context, Mr. Arif recommends: "It is of the opinion of the rapporteur that not all kinds of investments require the same high level of protection, and that for example short-term speculative investments do not deserve the same level of protection as long-lasting investments. The rapporteur therefore recommends that the scope of future European agreements is limited to FDI only". To which the European Parliament in its resolution adopting the Arif Report responds by "[a]sk[ing] the Commission to provide a clear definition of the investments to be protected, including both FDI and portfolio investment; considers, however, that speculative forms of investment, as defined by the Commission, shall not be protected".

11. There are numerous IIAs that exclude portfolio investments from the definition of investment,[25] or at least exclude those ordinary commercial transactions, loans and debt securities that are volatile, i.e. short-term and easily revocable, do not

[21] *Gruslin v Malaysia*, Award, ICSID Case No ARB/99/3; IIC 129 (2000), §25.5: "mere investments in shares in the stock market, which can be traded by anyone, and are not connected to the development of an approved project, are not protected." Notably, the Tribunal restricted this contention to the fact that a protected asset be approved in order to fall under the definition of investment in Article 1(3) IGA. The investor would have required approval under the proviso (i) rather than the CIC, whose approval had been obtained.

[22] For an example of a commonly accepted definition, see: United States of America, *Covering FDI and Portfolio Investment in a WTO Investment Agreement*, Communication (Geneva, Switzerland: World Trade Organization (WTO), Working Group on the Relationship between Trade and Investment, September 16, 2002), 1, http://docsonline.wto.org/GEN_highLightParent.asp?qu=&doc=D%3A%2FDDFDOCUMENTS%2FT%2FWT%2FWGTI%2FW142.DOC.HTM&curdoc=3&popTitle=WT%2FWGTI%2FW%2F142, §3.

[23] Kader Arif and Committee on International Trade, *Report on the Future European International Investment Policy* (Brussels: European Parliament, March 22, 2011), http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2011-0070+0+DOC+XML+V0//EN. Includes the result of the final vote of the Committee. Note that Mr. Said Kader Arif is a member of the Group of Progressive Alliance of Socialists and Democrats in the EP, and the spokesperson on international trade. The Report is of importance because it represents the policy adopted by the EP, calling on the Commission and the EUMS to take into account its restrictive content.

[24] Axelle Lemaire, "Le nouveau visage de l'arbitrage entre État et investisseur étranger: le chapitre 11 de l'ALENA," *Revue de l'Arbitrage* 2001, no. 1 (2001): 59, http://www.kluwerarbitration.com/print.aspx?ids=IPN22252.

[25] United Nations Conference on Trade and Development (UNCTAD), *Scope and Definition*, vol. II, UNCTAD Series on Issues in International Investment Agreements UNCTAD/ITE/IIT/11 (New York: United Nations, 1999), 26.

create the same benefits associated with foreign direct investment[26] and lack the essential factor of control.[27] Not including portfolio investments in the definition of an investment may not necessarily leave them unprotected. These investments are protected under domestic and international investment insurance schemes such as those outlined in MIGA.

12. Counter to the more restrictive definition, the European Commission suggests a broad definition that does not discriminate between investments, thus "…increas(ing) the current level of protection and legal security for European investors abroad".[28] If the aim is to increase competitiveness and to open new markets, a broad and open-ended definition that includes both FDI and portfolio investments may serve this goal better.[29] It is thus submitted that future investment agreements cover both FDI and portfolio investments but exclude speculation, i.e. purely speculative investments, such as hedge funds.

2. Non-exhaustive (Open) v Exhaustive (Closed) List

13. A non-exhaustive as opposed to an exhaustive list provides maximum protection to the investor because its broad categories allow for the inclusion of types of investments that may not have existed earlier. The following elements are taken from the various EUMS model BITs[30] that we consulted as well as the ECT:

> 1. Movable and immovable property, property rights/as well as any other rights *in rem*, such as servitudes, mortgages, liens, pledges, leases, usufruct

[26] United Nations Conference on Trade and Development (UNCTAD), *International Investment Agreements: Flexibility for Development*, UNCTAD Series on Issues in International Investment Agreements UNCTAD/ITE/IIT/18 (New York: United Nations, 2000), 72; United Nations Conference on Trade and Development (UNCTAD), *Scope and Definition*, II:27.
[27] Organisation for Economic Corporation and Development (OECD), *OECD Benchmark Definition of FDI*, 22, §29.
[28] Council of the European Union, *Conclusions on a Comprehensive European International Investment Policy*, 2.
[29] Notably, some developing countries such as South Korea and China may be opposed to including portfolio investments in the definition: Pierre Sauve, "Multilateral Rules on Investment: Is Forward Movement Possible?," *Journal of International Economic Law* 9, no. 2 (May 2006): 331-332, http://jiel.oxfordjournals.org/cgi/doi/10.1093/jiel/jgl011.
[30] See Annex for sources.

and similar rights: refers to both merchandise and land, as well as legal interests in property that do not result in full ownership.[31]

2. Interests in companies i.e. bonds, project bonds, loans, debt, and equity participation.

3. Claims to money used to create economic value and/or claims/rights to performance (pursuant to contract) having economic value.

4. Industrial and Intellectual Property: trademarks, trade secrets, patents, copyrights, potentially technical processes, goodwill and know-how, thus including both tangible property as well as a company's reputation.[32]

5. Rights conferred by law or contract: business concessions, including natural resource concessions: privileges or rights granted through special administrative or legislative action.[33]

6. Returns: defined separately. Accordingly, returns broadly include the amounts yielded by an investment (tautological) and can mean anything from profit to dividends/capital gains (returns from shares), interest/payments in kind (returns from debt), royalties (returns from intellectual property), and license fees/other fees (returns from contracts). This type of list by itself is linked to yet another investment and thus also non-exhaustive, adding to the broad concept of what constitutes an investment.

14. In short, all EUMS BITs surveyed contain a non-exhaustive list. The major question to be answered in respect of the definition of investment is whether the EU intends to exclude certain types. This will depend primarily on whether both FDI and portfolio investments are to be covered. If portfolio investments are excluded, 'interest in companies and consequently types of returns associated therewith (e.g. dividends/capital gains)' will have to be removed from the definition as well, unless the reference to returns in the 'freedom of transfer' provision is made in terms of 'returns associated with an investment'.

[31] See, for elaboration, United Nations Conference on Trade and Development (UNCTAD), *Scope and Definition*, II:19.
[32] Ibid., II:20-21.
[33] Ibid., II:19.

3. Definition of 'Investor'

15. There are three types of entities that can be included in the definition of an investor: natural persons (individuals) or legal persons (juridical entities) or secondary juridical entities without their own legal personality (e.g. office, agency, branch, subsidiary).[34] The link between the individual and the home State is either nationality (questions of dual-nationality are assessed either domestically or in the IIA) or residence or domicile. By virtue of Article 54 TFEU the nationality link between the legal entity and the State is either the place of incorporation, the place of central administration (siège social), the principal place of business, the national basis or ownership/control.[35]

16. In accordance with EU law, permanent residence is sufficient for a natural person to receive protection within or from the EU due to the fundamental freedom of movement of persons within the area.[36] Countries with a high level of inward immigration (e.g. Australia, Canada and the United States) also follow the approach of granting special legal status to permanent residents.[37] Likewise, legal persons incorporated in the EU benefit from the freedom of establishment. It is, however, still contested whether the nationality link established through the seat ('siège social') is sufficiently close, or alternatively leads to abusive use of investment protection offered by the EU to foreign investors. Incidentally, the European Parliament in endorsing the Arif Report calls on the Commission to assess whether the broad definition of investor has led to abusive practices.[38] The goal is to prevent claims for dispute settlement that are brought against an EUMS by an investor of that State's nationality. By contrast, the Council of the EU rejects the discrimination between

[34] Ibid., II:11; European Commission, "Branches: Legal Requirements in France," *Your Europe - Business*, July 2009, http://ec.europa.eu/youreurope/business/expanding-business/opening-branch/france/index_en.htm.
[35] United Nations Conference on Trade and Development (UNCTAD), *Scope and Definition*, II:35 and 37; United Nations Conference on Trade and Development (UNCTAD), *Bilateral Investment Treaties 1996-2006: Trends in Investment Rule Making*, 15.
[36] Notably, FTAs only cover nationals, not permanent residents.
[37] See, for elaboration, United Nations Conference on Trade and Development (UNCTAD), *Scope and Definition*, II:35.
[38] Arif and Committee on International Trade, *Report on the Future European International Investment Policy*. "Recalls that the standard EU Member State BIT uses a broad definition of 'foreign investor'; asks the Commission to assess where this has led to abusive practices; asks the Commission to provide a clear definition of a foreign investor based on this assessment and drawing on the latest OECD benchmark definition of FDI."

investors in order to increase the current level of protection.[39] Here, the intention is to include, for instance, those types of investors that do not require premises as such, but nevertheless need to incorporate in a country.

17. In relation to the above point of contention, the EU may need to assess how to deal with branches of establishments, i.e. a type of secondary establishment, in a way that grants the highest level of protection. The highest level of protection would be given to investors if the definition of the latter included branches, as is the case in, for example, NAFTA Article 1139, which explicitly refers to branches in its definition of 'enterprise' and 'enterprise of a Party', but is also true for several other IIAs including EUMS BITs by virtue of either explicit or implicit reference to:

i. Branches[40] or

ii. 'Legal persons not constituted under the law of the Contracting Party but controlled, directly or indirectly, by natural persons or legal persons as defined (i.e. having the nationality or constituted under the law of a Contracting Party)'[41] or

iii. 'Any juridical person established and having its seat outside the jurisdiction of one of the Contracting Parties and being controlled by an investor of the Contracting Party'[42] or

iv. 'Any juridical person and any commercial or other company or association with or without legal personality which is founded pursuant to the law of the [Contracting Party] or the law of a Member State of the European Union or the European Economic Area and is organized pursuant to the law of the [Contracting Party], registered in a public register in the [Contracting Party] or enjoys freedom of establishment as an agency or permanent establishment in the [Contracting Party] pursuant to Articles 49 and 54 TFEU.[43]

[39] Council of the European Union, *Conclusions on a Comprehensive European International Investment Policy*, 2.
[40] Austria model BIT, Canada FIPA model 2004, Chile-EU Agreement.
[41] Netherlands model BIT.
[42] Austria–Bulgaria BIT.
[43] General content taken from the Germany model BIT 2008.

18. In principle, in accordance with Article 49 TFEU a juridical entity has the right to open a branch in another EUMS, i.e. "a more independent entity that conducts business in its own name but still acts on behalf of the company".[44] Problems may arise by virtue of the possible distinctions made between subsidiaries and branches, where the inclusion of branches within the definition of investment is not entirely clear. Notably, this has never been an issue in international investment arbitration cases, and was discussed in only three cases under EU law,[45] thus clarifying the legal situation of branches within the EU considerably.

19. Another decision the EU will have to take is related to the profitability of an investor's activity. According to their BITs, EUMS differ in their understanding of whether an investor needs to engage in an economic or profitable activity. Some BITs, such as most German, Austrian and Finnish BITs, as well as the EU FTAs refer explicitly to legal entities 'whether directed at profit or not'. Similarly, the ASEAN Framework Agreement and some of the US BITs[46] include a reference to non-profit activities qualifying as investments.[47] The not-for-profit sector has in fact been acknowledged as "a major economic and social force, accounting for a significant share of national employment, and an even larger share of recent employment

[44] European Commission, "Branches," *Your Europe - Business*, April 2010, http://ec.europa.eu/youreurope/business/expanding-business/opening-branch/index_en.htm. As compared to a subsidiary, which, for future reference, is understood to be "an incorporated entity created in the host EU country, in accordance with one of the national business legal forms, whose capital is either fully owned by the mother company (a single member company recognised in all EU countries) or controlled by a company in collaboration with minority local partners (a joint subsidiary)" or as "a separate legal and corporate existence, not part of a larger entity but a separate entity of which at least 50 percent of its share capital is owned by a parent or holding company". The classification as either subsidiary becomes important with regard to three situations: funding, taxation of profits and remission of profits to foreign shareholders. Mark Northeast, "Outward Investment: The Branch v Subsidiary Decision," *Revenue Law Journal* 2, no. 1 (1991): 69-70, http://epublications.bond.edu.au/rlj/vol2/iss1/5.

[45] For elaborate descriptions of the sentences see for instance: Stephen Weatherill, *Cases and Materials on EU Law*, 9th ed. (Oxford, U.K.; New York, NY, USA: Oxford University Press, 2010), 439-445. Referencing Case C-212/97 *Centros Ltd v Erhervs-og Selskabhysstyrelsen* (1999) ECR I-1459, ECJ, §26-27; Case C-208/00 *Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC)* (2002) ECR I-9919, ECJ; Case C-167/01 *Kamer van Koophandel en Fabriekne voor Amsterdam v Inspire Art Ltd* (2003) ECR I-10155, ECJ.

[46] See, for instance: The President of the United States, "Investment Treaty with the Republic of Kazakhstan: Letter to the Senate of the United States," Letter, September 7, 1993. "The definition also covers charitable and non-profit entities, as well as entities that are owned or controlled by the state."

[47] In contrast to, for instance, the 1991 Netherlands-Czech and Slovak Federal Republic BIT. Sir Brownlie seems to suggest that an 'investment' is entered into for the very reason of obtaining a return, i.e. a profit-seeking activity would be at the heart of every international investment. Ian Brownlie, *CME Czech Republic BV v Czech Republic, Separate Opinion* (UNCITRAL 2003), §34.

growth".[48] Despite this contribution to the economy of the State and the fact that there are numerous examples of NGOs exposed to the threat of expropriation, discrimination and denial of the free transfer of funds as international investors,[49] their protection in IIAs has not yet been institutionalised for various reasons. These include, for example, their unclear status as an 'investor' or even as a company/business, as well as their 'investment' as such.[50] Given the proximity between the EU's CCP and its external policy, it will have to take a fundamental decision as to whether to include not-for-profit or even NGOs in the definition of investment and investor. The major advantage of including the latter would be the output mentioned above: their economic and social force, contributing to the economy indirectly. The major disadvantage is the classification of their investment that is to be protected: since an economic or social contribution to the development of a State in general can hardly be quantified with regard to the work of not-for-profit organisations and NGOs, the lack of profit may prevent tribunals from considering these organisations' output an 'investment'.

4. Pre-establishment Rights for the Investor

20. A debate that appears to be gaining more traction is that concerned with pre-establishment rights.[51] Extending IIA protection to the pre-establishment phase is likely to be attractive to investors because it extends the standards of protection to investors themselves rather than solely their investments. In this way the provision extends standards of treatment to investors in relation to the establishment, expansion, management, conduct, operation, sale and acquisition to the investment. The Canada

[48] Lester M. Salamon and Helmut K. Anheier, *Working Paper: The Non-Profit Sector: A New Global Force*, The Johns Hopkins Comparative Nonprofit Sector Project (Baltimore, MD, USA: Johns Hopkins Center for Civil Society Studies, 1996); Nick Gallus and Luke Eric Peterson, "International Investment Treaty Protection of NGOs," *Arbitration International* 22, no. 4 (2006): 530.
[49] Gallus and Peterson, "International Investment Treaty Protection of NGOs," 529.
[50] Nick Gallus and Luke Eric Peterson, "International Investment Treaty Protection of Not-For-Profit Organizations," *The International Journal of Not-for-Profit Law* 10, no. 1 (n.d.).
[51] Pre-establishment and pre-admission rights need to be distinguished. We emphasise the importance of pre-establishment rights as essential to the investor who seeks long-term investment in a host country that goes beyond carrying out a discrete business transaction requiring only a right of entry or presence by virtue of a (temporary) admission. By contrast, the right to establishment "entails not only a right to carry out business transactions in the host country but also the right to set up a permanent business presence there." United Nations Conference on Trade and Development (UNCTAD), *Admission and Establishment*, vol. II, UNCTAD Series on Issues in International Investment Agreements UNCTAD/ITE/IIT/10 (New York, USA: United Nations, 1999), 12.

Model BIT, US Model BIT and Chapter 11 of NAFTA "…confer rights *qua* 'investors' and thus create a limited sphere of investment treaty protection that is not dependent upon having an investment in the host state".[52] As such these provisions generally contain the following wording:

> [i]nvestor of a Party means a Party or state enterprise thereof, or a national or an enterprise of a Party, *that attempts to make*, *is making*, or has made an investment in that territory of the other Party.

21. The notion of an 'attempt to make' is unique to IIA language and does, at first glance at least, imply that activities undertaken by an investor prior to the actual establishment of the investment are covered by the IIA. Similar language can be detected in the GATS, which provides for establishment rights where market access commitments have been made, thus liberalising market access.[53] This is advantageous given that liberalised market access informs the European policy.[54]

22. One difficulty with the breach of a pre-establishment right is the calculation of a suitable remedy.[55] This could, perhaps, include the damages incurred by the investor where they have experienced discrimination in a tender process, for example. As such, damages could be calculated on the basis of the cost to the investor of submitting the bid for tender. This remedy is, in principle, justified by the substantial commitment that can be required by an investor even prior to the establishment of an investment in the host territory.[56]

23. A further challenge that this presents is the inevitable relinquishment of control over the admission of investments. As a general rule, positive rights of entry and establishment are not guaranteed to investors of another contracting party and the

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[52] Zachary Douglas, *The International Law of Investment Claims* (Cambridge, U.K.; New York, USA: Cambridge University Press, 2009), 138.
[53] United Nations Conference on Trade and Development (UNCTAD) and Karl Sauvant, *International Investment Agreements: Key Issues*, vol. 1 (New York: United Nations, 2004), 169.
[54] European Commission, *Global Europe: A Stronger Partnership to Deliver Market Access for European Exporters*, Communication (Brussels, Belgium: European Commission, April 18, 2007), 2.
[55] Douglas, *The International Law of Investment Claims*, 140.
[56] See, for example, International Federation of Consulting Engineers, *The Role of the Consulting Engineer in Projects* (Geneva, Switzerland, 1975). which provided an indication of pre-investment costs and accordingly a "substantial pre-investment analysis is usually required prior to an owner's decision to proceed with design and construction of a project".

host State therefore remains in control of those investments it chooses to admit.[57] As such, among EUMS IIAs, the more orthodox approach of promoting foreign investment—rather than concretely protecting the investor in the pre-establishment phase—is opted for. This can be seen, for example, in Article 2 of the UK Model BIT:

> Each Contracting Party shall encourage and create favourable conditions for national or companies of the other Contracting Party to invest capital in its territory, and, *subject to its right to exercise powers conferred by its laws*, shall admit such capital.

24. It is recommended that protection should go further in the European context and at least match that provided for in the US, Canada and NAFTA IIAs. It is submitted that the legitimate policy concerns of States, which may arise by virtue of such a liberalisation, could be dealt with through the general exceptions provision in the IIA. The extension of the IIA standards to the pre-establishment phase would likely just oblige the admitting State to ensure that it does not discriminate against or treat foreign investors unfairly in the admission stage.

25. Judicial pronouncement on this issue is sparse.[58] It suggests that, in certain circumstances, pre-establishment costs may be covered by an appropriately worded BIT (especially where the investment is subsequently established). However, it also highlights that there is a potential obstacle in respect of the threshold of investment required under the ICSID Convention.[59] If there is an agreement between the parties to consider pre-investment expenditures as a protected investment under ICSID, whether explicit or implied in the BIT, it has been suggested that jurisdiction could be established, however.[60]

26. The key advantage to inserting such a provision in an EU model BIT is that it is likely to be very attractive for foreign investors and fills a void in international

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[57] See United Nations Conference on Trade and Development (UNCTAD), *Admission and Establishment*, II:17-18.
[58] The primary case dealing with this issue is *Mihali v Sri Lanka*, ICSID Case No ARB/00/2, 15 March 2002.
[59] *Mihali v Sri Lanka*, ICSID Case No ARB/00/2, 15 March 2002, §50.
[60] Ben Hamida, "The Mihali v Sri Lanka Case: Some Thoughts Relating to the Status of Pre-Investment Expenditures," in *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (London, U.K.: Cameron May, 2004).

investment law that has yet to be addressed fully by tribunals or other IIAs in a satisfactory way.

PROPOSAL

27. In conclusion, the EU model BIT should include the following elements regarding protected investments and investors:

> For the purpose of this Agreement the term Investment(s) (…) means every kind of asset(s) (…) and shall include in particular but not exclusively:
>
> (a) …
>
> …
>
> Investor of a Party means a Party or State enterprise thereof, or a national or an enterprise of a Party, and a branch located in the territory of a Party and carrying out business activities there, whether or not for profit, and whether private or government-owned or controlled, *that attempts to make*, *is making*, or has made an investment in that territory of the other Party.[61]

2. FAIR AND EQUITABLE TREATMENT (FET)

OVERVIEW AND INTRODUCTION

- FET provision is widespread but its formulation varies.
- A reference to FET should feature in the preamble by way of bolstering the standard.
- Where 'full protection and legal security' is provided for, this is likely to broaden the protection to investors.
- FET as an autonomous standard generally means a higher standard than when it is linked to the international minimum standard.
- Additional obligations may be added to the standard FET construction.

[61] Sources: USA Model BIT 2004, Section A, Article 1, Definitions, Austria Model BIT.

28. As a concept, FET appears in almost every[62] EUMS model BIT. There is, however, variation in the formulation of its provision from one BIT to another. The construction of the FET standard varies in a number of fundamental ways but two broad distinctions may be made. The first concerns the standard construction of the FET clause while the second relates to additional obligations that can be seen in more recent IIAs. Within each of these broad distinctions, various peculiarities as to form can also be detected and will be discussed below.

OPTIONS

Construction of Standard

1. FET in the Preamble

29. A survey of IIAs reveals that some contain a reference to the standard in the preamble of the treaty, in addition to devoting a specific provision to the standard. This approach can be seen, for example, in the Dutch[63], Danish[64] and Swedish[65] model BITs, and generally conforms to the formulation below:

> Agreeing that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective

[62] Professor Dolzer affirms that this is due to its widespread use in investment litigation and also because the term is intrinsically related to other standards such as national treatment, indirect expropriation and the umbrella clause. See, Rudolf Dolzer, "Fair and Equitable Treatment: A Key Standard in Investment Treaties," *International Lawyer (ABA)* 39 (2005): 87.

[63] See Douglas, *The International Law of Investment Claims*, 617 Appendix 8. The model has been translated into practice. The term FET can be found in the preamble of Dutch BIT's signed with: Cambodia, 2003; Kuwait, 2001; Namibia, 2002; Uganda, 2000; China, 2001; Bulgaria, 1999; Honduras, 2001; Turkey, 1986; Korea. 2003; Belarus, 1995; Yugoslavia, 2002; Costa Rica, 1999; El Salvador, 1999; Ethiopia, 2003; Jordan, 2007.

[64] Denmark Model BIT. Available at http://www.unctad.org/sections/dite/iia/docs/Compendium//en/199%20volume%207.pdf Accessed 21/03/2011. The model has translated into practice. The term FET can be found in the preamble of Danish BIT's signed with: India, 1995; Tanzania, 1996; Venezuela, 1994; Tunisia, 1996; Uganda, 2001; Zimbabwe, 1996; Pakistan, 1996; Philippines, 1997; Russian Federation, 1994; Albania, 1995; Algeria, 1999; Croatia, 2000; Egypt, 1997; Korea, 1996; Mongolia 1995; Mozambique, 2002; Belarus, 2004; Poland 1989; Slovenia, 1999; China, 2002.

[65] Swedish model BIT. Available at http://www.unctadxi.org/templates/DocSearch.aspx?id=780 Accessed 21/03/2011. The model has translated into practice. The term FET can be found in the preamble of Swedish BIT's signed with: Slovenia, 1999; Russian Federation, 1995; Mexico, 2000; Poland, 1989; China, 2002.

utilisation of economic resources.[66]

30. The advantage of this approach is that it does tend to bolster the nature of FET. As such, some tribunals have fleshed out the notion of FET by reference to the preamble of the treaty.[67] In the course of interpretation, taking into account the ordinary meaning and purpose of a treaty, where FET is mentioned in the preamble it can be said with some certainty that a tribunal is likely to offer a broader interpretation of FET.[68]

2. Linking FET to FPS

2A. *Reference to FPS*

31. A number of IIAs include a reference to FPS, either considering it part of FET[69] or as a separate standard.[70] In the latter case, it can be that FET is accorded a broader level of protection. However, it is important to keep in mind that some tribunals have not given any additional meaning to the separation of FET and FPS.[71] Conversely, other tribunals, in recognising the interrelationship between FET and FPS, have granted further protection based on full protection and security.[72] It is thus advisable to include such a reference.

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[66] Preamble, US – Ecuador BIT.

[67] For example, the tribunal in *Occidental v Ecuador* directly tied the FET provision of the BIT to Preamble, which refers to FET. As such, the Tribunal reasoned that "…fair and equitable treatment is desirable in order to maintain a stable framework for investment and maximum utilization of economic resources…". Crucially, reading the standard in conjunction with this part of the preamble, the Tribunal concluded that "[t]he stability of the legal and business framework is thus an essential element of FET", *Occidental v. Ecuador*, Award, 1 July 2004, 12 ICSID Reports 59, §183.

[68] See *Tecmed v Mexico* for an example of a broad interpretation of the FET standard where there is a reference to FET in the preamble of a BIT. *Técnicas Medioambientales Tecmed SA v Mexico*, Award, ARB(AF)/00/2, IIC 247 (2003), 10 ICSID Report 130, §155-156.

[69] See, for example, the Argentine-France BIT, Article 5.1: "Investments made by investors of the Contracting party shall be fully and completely protected and safeguarded in the territory and maritime zone of the other Contracting Party, in accordance with the principle of just and equitable treatment mentioned in article 3 of this Agreement".

[70] Denmark-Bosnia BIT 2004, Article 2.2: "Investments of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party." Most BITs will follow this form with small variations. See for instance: Finland-Belarus, 2006; Germany-Egypt, 2005; Greece-India, 2007; Netherlands-Cambodia, 2006; Spain-Colombia, 2007.

2B. *Inclusion of 'legal security' in the FPS clause*

32. There has been some debate regarding the scope of FPS. In particular, this concerns whether it has evolved beyond the physical protection of investments and investors. Some tribunals have recognised that the principle has evolved beyond the "physical safety of persons and installations", but only in exceptional circumstances does it "[include] the adverse effects of the amendments of the law or administrative actions on the investment".[73] However, German BITs usually include the qualification 'legal security' to the standard, and as such give a higher level of protection.[74] This has been significant for tribunals interpreting the provision, who have found that where 'legal security' is added by the contracting parties, the provision can extend beyond physical protection of assets. Accordingly, tribunals may consider a violation of the standard to have occurred when the investor see the law not being applied in a consistent manner.[75] Therefore, it is prudent to include the qualification 'legal security' to provide certainty that tribunals will not give a narrower interpretation to FET by excluding the protection of legal security, hence assuring a higher level of protection to investors.

3. Link to International Minimum Standard or Autonomous Standard

33. There are the two main possibilities in respect of the standard accorded to FET. The first approach among IIAs is to equate the FET standard with the international minimum standard. An alternative approach is to have the FET standard as an autonomous (higher) standard.

34. As for the former, the FET provision usually contains an indirect or direct reference to the international minimum standard. As such, the French model BIT contains an indirect reference by stipulating, "traitement juste et équitable conformément aux principes du Droit International". France has expressed views that

[71] *Occidental Exploration and Production Company v. Ecuador* (LCIA Administered Case No. UN 3467) Award, 1 July 2004, §187.
[72] *Azurix Corp v. Argentina*, Award, ICSID Case No ARB/01/12, IIC 24 (2006), §407.
[73] *PSEG Global Inc and Konya Ilgin Elektrik Üretim ve Ticaret Ltd Širketi v Turkey*, Award and Annex, ICSID Case No ARB/02/5; IIC 198 (2007), §257-258.
[74] See, for example, Germany-Argentine BIT.

FET refers to a standard higher than the Minimum Standard, although it is important to be mindful that the French model BIT drafting has generated some debate concerning its linkage with the international minimum standard. Some tribunals have considered that the wording provided in the clause "principles of international law" cannot be read as a reference to the international minimum standard.[76] The US model BIT, on the other hand, directly correlates FET with the international minimum standard. To this end, it attempts to elaborate upon the characteristics of this minimum standard by stating that, "fair and equitable treatment includes the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world".

35. Some other agreements phrase the standard differently, inferring that the customary international law minimum standard would be the least admissible treatment, but that FET would provide a higher level of protection, however. In this respect, the German Model BIT reads "[e]ach Party shall at all times accord to covered investments fair and equitable treatment and full protection and security, and shall in no case accord treatment less favourable than that required by international law".[77]

36. As a rule of thumb, the tribunals that have considered FET as equivalent to the minimum standard of international law have given a narrower interpretation of FET.[78] While there have been some anomalies in the NAFTA context,[79] following the FTC[80] notes of interpretation on FET, tribunal decisions have generally been consistent and consider it as part of the international minimum standard. Nevertheless,

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[75] *Siemens AG v Argentina*, Award and Separate Opinion, ICSID Case No ARB/02/8; IIC 227 (2007), §303.

[76] See for example *Total SA v Argentina*, Decision on Liability, ICSID Case No ARB/04/1; IIC 484 (2010), §25). On the other hand, Arbitrator Nikken in a separate opinion in the *Suez* case affirmed that the most reasonable interpretation of FET under the French provision is equivalent to the current international minimum standard and not the qualification provided in the *Neer* case of 1926. (See *Suez and ors v Argentina*, Decision on Liability, ICSID Case No ARB/03/17; IIC 442 (2010), Separate Opinion of Arbitrator Pedro Nikken, §18.

[77] Similar drafting can also be found in the Greece model BIT.

[78] For example*, Genin v. Estonia*, Award, 25 June 2001, 17 ICSID Review- FIJL (2002) 395, §367.

[79] In the *SD Myers* and *Pope & Talbot* cases, the Tribunals did not directly correlate a breach of the international minimum standard to a breach of FET. See *SD Myers v. Canada*, First Partial Award, 13 November 2000, 40 ILM (2001) 1408, §264, and *Pope and Talbot v. Canada*, Award, 10 April 2001, 7 ICSID Reports 102, §111.

this is to say nothing of the varied conceptions of the minimum standard that have emerged from tribunal practice.[81]

37. When considered as related to the international minimum standard a number of benchmarks may be identified. This should be compared and contrasted below with the autonomous construction of the FET standard. If FET is considered as the minimum standard of customary international law, two broad approaches are evident. The first one is as established in the *Neer* case.[82] This standard requires for its violation an act or measure that "amount[s] to an outrage, bad faith, wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency".[83] Alternatively, in the *ELSI* case, the violation of FET would stem from an arbitrary act that is considered "…a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety". [84]

38. Another possible benchmark when FET is considered equal to the international minimum standard of customary international law is to place the burden of proof on the investor to show that the standard has evolved from the lowest benchmark described above in the *Neer* case. One tribunal has inquired whether "the Claimant [has] proven that the standard has evolved. If it has evolved, what evidence has Claimant provided to the Tribunal to determine its current scope?"[85] This decision

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[80] FTC stands for NAFTA Free Trade Commission that is composed of representatives from member States and is capable of issuing binding interpretations under Article 1131(2).

[81] In the *Glamis* case, the Tribunal established that the international minimum standard ought to be considered to be the same one as in the 1926 *Neer* case. Therefore, according to the Tribunal to "violate the international law minimum standard (…) an act must be sufficiently egregious and shocking – a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons- so as to fall below accepted international standards.". *Glamis Gold Ltd v United States*, Award, Ad hoc—UNCITRAL Arbitration Rules. June 8, 2009. IIC 380 (2009). §616.

[82] *LFH Neer and Pauline Neer (USA) v United Mexican States* (1926) RIAA 60.

[83] *LFH Neer and Pauline Neer (USA) v United Mexican States* (1926) RIAA 60, p. 61-62.

[84] *Elettronica Sicula S.P.A.(ELSI)* [1989] I.C.J.Rep, §128.

[85] *Glamis Gold Ltd v United States*, Award, Ad hoc—UNCITRAL Arbitration Rules. June 8, 2009. IIC 380 (2009). §600. As professor Kaufmman-Kohler suggests there is no consensus about the status of substantive law in international arbitration. One may consider that the judge knows the law, thus *iura novit curia* applies, or one may assess that law is a fact and needs to be proven by the parties. See: Gabrielle Kaufmann-Kohler, "Globalization of Arbitral Procedure," *Vanderbilt Journal of Transnational Law* 36 (2003): 1313-1333.Nevertheless, most of this discussion applies to considerations of the status of foreign law in arbitration. In *Glamis* the tribunal was dealing with international customary law which might lead to a stronger consideration that iura novit curia applies as stated by the ICJ in the *Fisheries jurisdiction*, I.C.J. Reports 1974, p. 9, §17; p. 181, §18 and also in *Case Concerning Military and Paramilitary Activities (Nicaragua/United States of America)*, Merits, 27 June 1986 I.C.J. Reports 1986, 14.

is noteworthy as the EU should be mindful that proving customary international law has evolved may be difficult since there is no general understanding about the scope of FET. Hence, an increased level of protection in such a clause would demonstrate an intention to avoid this high burden and make it clear to investors that the EU wishes to ensure optimal FET for the investor.

39. In contrast, an alternative approach is to avoid any reference to the international minimum standard. Where tribunals have interpreted this type of provision, they will frequently provide a threshold of protection that goes beyond the minimum customary rules. The actual level of protection accorded by the tribunal then depends upon the wording used in the provision.[86] Given this, the content of the standard can vary quite substantially between IIAs.[87] Nevertheless, a few common elements may be detected from the judicial practice.

40. Certain key elements that are associated with an autonomous FET standard can include, for example, arbitrary and discriminatory action, the failure to provide transparency, stability, due process, procedural propriety or the failure to act according to contractual obligations.[88] Comparing the scope of these elements with those that have been found to be part of the international minimum standard, it is evident that having an autonomous standard provides better protection for the investor.[89] EUMS BITs usually do not link FET directly to the international minimum standard. Broadly speaking, some explicitly refer to the content of FET, indicating

[86] As such, in *Tecmed v Mexico,* the Tribunal took "…into account the text of Article 4(1) of the Agreement…". In this Case, the Tribunal found a violation of FET due to the Mexican Government's arbitrariness in revoking a previously granted permit. The standard of compliance is much higher than the one set in the *Glamis* case, given that the Tribunal stated, "…[t]he foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor…"[86]

[87] In the *MTD* case, for example, the Tribunal refers to positive obligations such as "to promote, to create, to stimulate" as an indication that more protection was sought when the agreement was signed. *MTD v. Chile*, Award, 25 May 2004, 12 ICSID Reports 6, §110-112.

[88] Organisation for Economic Co-operation and Development (OECD), *Fair and Equitable Treatment Standard in International Investment Law*, Working Paper, Working Papers on International Investment (Paris, France: Organisation for Economic Co-operation and Development (OECD), September 2004), 26-39.

[89] For example in *Tecmed v Mexico*, where the Tribunal read the FET standard in the BIT as a higher standard than the international minimum standard (§154 - 156). Similarly, *MTD* follows *Tecmed* in giving a higher level of protection than the one provided in the international customary minimum standard.

that it should be dealt with as an autonomous standard,[90] while others simply refer to FET without further elaboration, leaving the standard open to interpretation.[91] There are also, it should be noted, some variations and exceptions to these broad traditions of EUMS BITs.[92]

Additional Obligations

4. Conditions for Investment

41. Some IIAs impose obligations on contracting parties in addition to the standard FET obligation. The Energy Charter Treaty is a case in point. As such, Article 10 provides not only the limitations on discriminatory behaviour provided for in some EUMS BITs, but also includes the obligation to encourage stable, equitable, favourable and transparent conditions for investors of another contracting party.

42. Alternatively, some agreements such as the UK, Dutch, Greek and Swedish model BITs, provide more precision in respect of FET provision. Article III of the Netherlands BIT, for example, stipulates that

> 1. Each Contracting Party shall ensure fair and equitable treatment of the investments of nationals of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those nationals. Each Contracting Party shall accord to such investments full physical security and protection (…)

43. Similarly, in the Sweden–Kazakhstan BIT, Article 2(6) provides that

> [e]ach Party shall ensure that its laws, regulations, administrative practices and procedures of general application, and adjudicatory decisions, that

[90] Austria–Malta 2002; Portugal – Bosnia Herzegovina 2002; Portugal-Libya 2003; Italy-Lithuania 1994; Italy–Angola 1997; Germany model BIT 2008; Italian model BIT; Netherlands model BIT; UK model BIT; Denmark model BIT; Greece model BIT; Sweden model BIT.
[91] Czech Republic-Malta BIT 2003; Portugal–China BIT 2005; Hungary–Uzbekistan BIT 2002; Hungary–Serbia BIT 2001; Belgo-Luxembourg Model BIT; Finland Model BIT.
[92] See for instance French example analyzed above. A few other BITs do not include any reference to FET: Bulgaria—Austria BIT 1997; Portugal–Algeria BIT 2004 (includes non-discriminatory, arbitrary measures but no mention of FET).

pertain or affect investments covered by this Agreement are promptly published or otherwise made publicly known.

44. These examples illustrate the types of additional obligations that can be added to the traditional FET standard. Self-evidently, the inclusion of such additional obligations adds to investor protection and has the effect of bolstering the FET standard.

45. In drafting the FET provision we should also be mindful that the European Parliament considers that future investment agreements concluded by the EU should be based on the best practices drawn from EUMS experiences in respect of FET, defined on the basis of the level of treatment established by international customary law.[93] This will have to be clarified by the EU since it does not appear to be conducive with the highest level of protection available in international investment law. Defining with reference to international customary law will lead to a lesser protection, as is indicated by the foregoing analysis, than if FET is incorporated as an autonomous standard.

PROPOSAL

46. In light of the analysis on FET, the following provision is recommended:

> 1. Each party shall at all times accord to covered investments, investors and returns, fair and equitable treatment and full protection and legal security, and shall in no case accord treatment less favourable than that required by international law.[94]
>
> 2. In accordance with the provisions of this Treaty each Contracting Party shall create stable, equitable, favourable and transparent conditions for investors of other Contracting Parties to make investments in its area. Both Contracting Parties shall ensure, *de jure* and *de facto* that the management,

[93] Arif and Committee on International Trade, *Report on the Future European International Investment Policy*, §19.
[94] Greek Model BIT, Article 3(2). The proposal, however, changed the phrase from "investments and returns of investors" to "investments, investors and returns" in order to provide the highest level of protection.

maintenance, use, transformation, enjoyment or assignment of the investments effected in their territory by investors of the other Contracting Party, as well as by companies and enterprises in which these investments have been effected, shall in no way be the object of arbitrary or discriminatory measures.[95]

3. Each Contracting Party shall create and maintain in its territory a legal framework capable of guaranteeing to investors the continuity of legal treatment.[96]

3. NATIONAL TREATMENT

OVERVIEW AND INTRODUCTION

- National treatment guarantees that foreign nationals receive the same or better treatment as nationals of the area in which investment is made.
- Making the comparison pool EU-wide offers the maximum level of protection for third country nationals.
- National treatment should apply to both 'investors' and 'investments'.
- National treatment should ideally extend to the pre-establishment phase.
- Exceptions should be limited to explicitly stated EU concerns.

47. National treatment provides a set of conditions to avoid the possibility of preferential treatment being given to nationals from the host State to the detriment of foreign investors or investments. A number of variables pertain to the application of national treatment, however, and these will be analysed presently.

[95] Sources: First sentence - Energy Charter Treaty, Article 10(1). Second sentence - Italian model BIT. See also Italy—Jordan 2001 BIT, Article 2 (3) and Italy—Angola BIT 2002, Article 2(3)
[96] Italian model BIT. See also Italy—Jordan BIT 2001, Article 2(4) and Italy–Angola BIT 2002, Article 2(4).

OPTIONS

1. Make the Comparison Pool EU-wide

48. Determination of the basis of comparison remains a controversial issue. Even in IIAs that explicitly refer to investors or investments in 'like circumstances', tribunals have yet to determine a consistent approach as to what ought to be the comparator, i.e. who is in a 'like circumstance'. Tribunal practice remains unpredictable as to what ought to be considered a likeness test, regardless of whether the agreement includes an explicit reference to "in like circumstances" or not. In some cases tribunals have taken into account the same business or economic sector.[97] Moreover, another uncertainty about how the likeness test would be applied by a tribunal in respect of an EU BIT exists given the presence of a further variable which would feature in its analysis, namely whether simply nationals of the EUMS concerned or nationals of all EUMS should be considered in like circumstances.

49. Given the varied interpretation, the breadth accorded to 'in like circumstances' can vary substantially.[98] This is potentially a point of discussion both where this

[97] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press, 2008), 180-181.

[98] *Pope & Talbot Inc v Canada*, Award on the Merits of Phase 2, Ad hoc—UNCITRAL Arbitration Rules, IIC 193 (2001), §78. In this case the Tribunal affirmed that a first test would consider if the comparators are in the same business or economic sector. However, a second step would be to analyse if there is "a reasonable nexus to rational government policies".
Feldman Karpa v Mexico, Award and Separate Opinion, ICSID Case No ARB(AF)/99/1, IIC 157 (2002), (2003) 18 ICSID Rev—FILJ 488, (2003) 42 ILM 625, §172. In this case the Tribunal considered that "in like circumstances" should be interpreted as "those in the business of purchasing Mexican cigarettes for export" (same-business-approach).
Occidental Exploration and Production Company v Ecuador, Award, LCIA Case No UN 3467, IIC 202 (2004), §173. In this case the Tribunal considered that a broader interpretation of "in like circumstances" was necessary and it should not be done "addressing exclusively the sector in which that particular activity is undertaken".
SD Myers v Canada, First Partial Award and Separate Opinion, Ad hoc—UNCITRAL Arbitration Rules, IIC 249 (2000), §250. The Tribunal decided that the legal framework i.e. the NAFTA, precipitates an examination of whether a non-national complainant is in the same sector, 'sector' referring to wide connotations such as 'economic or business sector'.
Methanex v USA, Final Award on Jurisdiction and Merits, Ad hoc—UNCITRAL Arbitration Rules; IIC 167 (2005), §14. The Tribunal looked at domestic investment identical in every respect except nationality of ownership (i.e. domestic methanol producers).
United Parcel Service of America Inc v Canada, Award and separate opinion, Ad hoc—UNCITRAL Arbitration Rules, IIC 306 (2007), §180. The Tribunal held that treatment granted to UPS in like circumstances would have entailed the assumption by UPS of the benefits and responsibilities assumed by Canada Post, i.e. delivering to individuals across the entire country, which UPS had no intention to do. UPS and Canada Post were held to be in like circumstances under the PAP program, under which UPS was not discriminated against.
Parkerings-Compagniet AS v Republic of Lithuania, ICISD Case No. ARB/05/8 (2007), Award, §371. The three conditions for Parkerings to be in like circumstances with and discriminated against in

phrase is explicit in an IIA and where it is not. At first blush, it would seem that excluding this 'qualifier' implies a broader pool of comparators.[99] However, some tribunals may apply a narrower judicial construction where it does not appear in the IIA. Therefore it would be prudent to include a qualifier which would indicate to a tribunal how the 'in like circumstances' test should be applied. As such, it is suggested that terminology similar to, for example, 'if the activity raises common public concerns' would better protect investors.[100] Adopting this formulation has been commended by leading scholars given that "…it focus[es] not on the indicia of the investments' likeness, but rather on the absence of any legitimate reason to distinguish between the foreign and domestic investments in the specific circumstances…".[101] Tribunals in their consideration of discrete industry sectors have applied this approach.[102] However, there appears no apparent reason for why this qualifier cannot be applied to the entire economy.

50. As previously mentioned, one issue that arises with the competence of the EU to be a signatory to IIAs is how to delimit national treatment. This is important notwithstanding that the EU internal market is a non-discriminatory environment already. Where individual States sign IIAs, the comparison is always between the nationals. However, in light of the new competence, if a foreign company investing in

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comparison to Pinus Proprius as identified by the Tribunal were: (i) Pinus' status as foreign investors (ii) same economic and business sector (iii) different treatment unless justified by governmental measures. Accordingly, (i) Pinus was Dutch-owned (ii) Pinus and Parkerings competed for the same project (iii) different treatment justified by virtue of the extent of Parkerings' project into the UNECSO-protected old town.

[99] This is dispensable in an EU context but UNCTAD argues that the inclusion of 'in like circumstances' has provided greater guidance and has made "…it clear that providing different treatment to foreign investments and investors, which in fact are not in the same circumstances as domestic investments or investors, would not violate the national treatment standard". United Nations Conference on Trade and Development (UNCTAD), *Bilateral Investment Treaties 1996-2006: Trends in Investment Rule Making* (Geneva, Switzerland; New York, USA: United Nations Conference on Trade and Development, February 2007), 36.

[100] Avoiding a direct reference to "in like circumstances" and including a reference to same public policy concerns could induce the same kind of interpretation provided by the Tribunal in *Occidental* which provides a higher level of protection for investors. Therein the Tribunal compared two very different activities—flowers and oil production—to determine whether there was any legitimate reason for distinguishing the VAT regulation in these two sectors. *Occidental Exploration and Production Company v Ecuador*, Award, LCIA Case No UN 3467, IIC 202 (2004), §173.

[101] Nicholas DiMascio and Joost Pauwelyn, "Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?," *The American Journal of International Law* 102, no. 1 (January 2008): 85.

[102] *SD Myers Inc v Canada*, First Partial Award and Separate Opinion, Ad hoc—UNCITRAL Arbitration Rules, IIC 249 (2000), §248. In this case the tribunal considered that "in like circumstances must also take into account circumstances that would justify governmental regulations that treat them

an EUMS brings a claim against the EU, what/who should be the comparator?[103] Should it be the most favourable treatment given by any EUMS, or should it be limited to the treatment given by the EUMS in which the investment was made?[104] This is a decision that will have to be taken by the EU. The decision ought to be made because although there exist the fundamental freedoms, EUMS still may have different non-discriminatory practices in the same business sectors that amount to more favourable treatment being accorded to one investor than another. This is possible since an EU law allows for discriminatory behaviour within one EUMS if it is in the public interest and everyone within that territory is treated alike. For instance, it is possible to envisage a scenario in which an EUMS imposes a justifiable regulation,[105] i.e. applied to all persons or undertakings operating within the territory of the State in which the service is provided.[106] Hence, a violation of NT could be found if the comparator were to be EU-wide and the tribunal were to consider national treatment not simply in the territory of a single EUMS but rather the entire EU territory. In this scenario, two EUMS have been generally obligated to implement the regulation but, nonetheless, one EUMS may decide not to impose a measure on a specific sector due to its unique public interest concerns. This could open the door for foreign investor claims against the EU or EUMS whereby an investor compares their situation in the adopting EUMS with that in the non-adopting EUMS.

51. Without a qualification of "in like circumstances" the issue is even more confused if the tribunal rejects the comparator "in the same business sector". For instance, a tribunal may compare flowers, mining and seafood to oil companies based

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differently in order to protect the public interest". It also meant same sector as the national investor, then it added that sector included "the concepts of economic sector and business sector".

[103] See: Armand De Mestral, "Is a Model EU BIT Possible—Or Even Desirable?," *Columbia FDI Perspectives*, no. 21, Vale Columbia Center on Sustainable International Investment (March 24, 2010), http://www.vcc.columbia.edu/content/model-eu-bit-possible-or-even-desirable.

[104] This discussion is unique to that surrounding a possible future BIT signed by the EU because the investment regime, although having strong connecting factors with the trade regime, remains a field with different concerns and mechanics. Whereas in trade the concerns revolve around state-state practice from a macro-market perspective, the investment regime deals with private action for compensatory damages.

[105] 'Justified' as by virtue of the requirements laid out originally in the Cassis de Dijon case (Case 205/84, *Commission v Germany*, [1986] ECR 3755, ECJ) and followed by an extensive amount of case law. For further reference, see, for instance: Stephen Weatherill, *Cases and Materials on EU Law*, 9th ed. (Oxford, U.K.; New York, NY, USA: Oxford University Press, 2010), 436.

[106] Case 205/84, *Commission v Germany*, [1986] ECR 3755, ECJ, §27.

on a provision that includes the reference "in like circumstances".[107] Under this approach, a violation of NT could be found from a comparison of different measures and regulations across different sectors of all EUMS. Therefore, it is recommended to create a new likeness test that makes the reference to the comparator more explicit.

52. In this sense, the highest level of protection, security and liberalisation to foreign investors in the EU would be given by the comparison of all EUMS. This approach may also give the necessary bargaining leverage against developing countries that have recently started to have significant FDI outflows, but are still reluctant to sign investment agreements, such as Brazil.[108] This clause would guarantee an optimal level of protection to foreign investors in the EU. On the other hand, EUMS may be reluctant to accept a clause drafted in these terms given that it is likely to impinge significantly on their national policies. Moreover, this approach may lead to an increase in claims as foreign investors realise differences in the regulatory and administrative regimes across EUMS. Nevertheless, this could be remedied through the insertion of a comprehensive exceptions policy in which EUMS could avoid granting national treatment in sensitive sectors.[109]

2. Explicit Reference to Investors or Investments

53. An analysis of BIT practice reveals that the national treatment standard is occasionally drafted to cover investments[110] or investors[111] or "investments and

[107] *Occidental Exploration and Production Company v Ecuador*, Award, LCIA Case No UN 3467, IIC 202 (2004)

[108] This does not necessarily mean that Brazil would automatically sign a BIT with the EU because of the EU pool wide comparison. As Kleinheisterkamp shows the Brazilian reluctance is a political issue that revolves mostly around the Brazilian parliament hesitation to accept international arbitration. The example here aims at illustrating a possible increase in the bargaining power since this would accrue foreign investors interests in signing BIT's which may lead to political pressure resulting in the signature of a BIT. Jan Kleinheisterkamp, "O Brasil e as disputas com investidores estrangeiros/Brazil and the disputes with foreign investors," in *Comércio internacional e desenvolvimento: uma perspectiva Brasileira*, ed. Roberto Di Sena Júnior and Mônica Teresa Costa Sousa Cherem (São Paulo, Brazil: Editora Saraiva, 2004), 173 et seq.

[109] This exceptions policy, however, would need to be applied systematically. Otherwise, the MFN clause could open the door for a claim even though the exception is included in the BIT. For a development of this argument please see the MFN analysis below.

[110] Netherlands Model BIT; Sweden Model BIT; Bulgaria–Netherlands 1999; Belgium-Luxembourg–Algeria BIT 1991.

[111] Belgo-Luxembourg model BIT; French model BIT; France- Bahrain 2005; France – Argentina 1993

investors",[112] while others include reference to "investments, investors and returns".[113] Some States opt to give it a narrower scope by only applying the standard to investments.[114] UNCTAD warns of the danger of a provision that does not refer to both investments and investors since "State measures may affect one or both categories, individually or jointly. There may be measures affecting the investment but not the investor, affecting the investor but not the investment, or affecting both".[115] In order to avoid any interpretation that might exclude investment or investors, some IIAs have a separate provision for investments and investors respectively.[116] NAFTA includes two similarly drafted provisions, one related to investors and the other to investments, in order to make it clear that it applies to both.[117] Alternatively, the UK model BIT sets out one provision for investments or returns[118] and another for nationals or companies.[119] The German model BIT does not include a reference to investments, granting national treatment only to investors. However, it does make reference to activities in connection with investments that should not receive treatment to be deemed less favourable.[120] In the further alternative, the Netherlands model BIT only refers to investments.[121] An EU model clause that is concerned with providing the highest level of protection to investors should specifically extend national treatment to both 'investors and investments'.

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[112] US model BIT 2004; Austria model BIT; Canada FIPA model 2004; Denmark model BIT; German model BIT 2008; Italian model BIT; NAFTA; Austria – Bosnia Herzegovina 2002; Germany – Afghanistan 2005; Belgium Luxembourg – Albania 1999; Bulgaria –Slovakia 2005; Finland-Ethiopia 2006; Greece – Jordan 2005;

[113] Finland model BIT; Greece model BIT; UK model BIT; Greece-Azerbaijan 2004; Greece – India 2007;

[114] Netherlands-Ethiopia BIT, 2006, Article III (2): "Each Contracting Party shall accord to such investments treatment which in any case shall not be less favourable than that accorded either to investment of its own nationals or to investments of nationals of any third State, whichever is more favourable to the national concerned."

[115] United Nations Conference on Trade and Development (UNCTAD), *Most-Favored-Nation Treatment*, vol. 3, UNCTAD Series on Issues in International Investment Agreements UNCTAD/ITE/IIT/10 (New York, USA; Geneva, Switzerland: United Nations, 1999), 43.

[116] US model BIT, 2004, Article III (1) and (2): "1. Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory. 2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments." See also NAFTA, Article 1102.

[117] NAFTA Chapter 11, Article 1102 (1) and (2).

[118] UK Model BIT, Article 3 (1).

[119] UK Model BIT, Article 3 (2).

[120] German Model BIT, 2005, Article 3 (2).

[121] Netherlands Model BIT, Article 3 (2).

3. Extension of National Treatment to the Pre-admission Phase

54. The debate around the phases of investment establishment to which national treatment extends speaks to guarantees that a State may provide for investor access to its national market. Usually in BIT practice the State remains completely free to determine which investors may access its market given that most BITs do not provide for any specific obligation on the State to grant establishment rights to the investor. Thus, the "host retains full discretion to discriminate against or among foreign investors with respect to the establishment of investments within its territories".[122]

55. Nevertheless, there is a recent trend in BIT practice—mostly in US practice, but also recently evident in Canadian practice[123]—providing that national treatment shall also apply to the "establishment, acquisition and expansion" of the investment.[124] This type of clause imposes an obligation on the host State, precluding it from discriminating in the pre-admission phase. Although a sharp distinction between the pre- and post-entry phase may be often difficult to draw, pre-admission usually refers to "restrictions or prohibitions on investing in certain sectors of the economy, local inputs requirements, export requirements, use of local labour, or local ownership requirements".[125] NAFTA also provides protection to the pre-entry phase. It is noteworthy that in both aforementioned provisions there is a qualification to the national treatment provision in the third paragraph stating that NT also applies with respect to a State or province, so local authorities will not be able to avoid the application of NT.

56. Generally speaking, none of the EUMS BITs include pre-establishment protection. The clauses in these BITs usually limit the standard scope of application to the "management, operation, maintenance, use, enjoyment, sale and liquidation of an investment".[126] This approach has been analysed and characterised as the "investment

[122] See: Kenneth J. Vandevelde, "Investment Liberalization and Economic Development: The Role of Bilateral Investment Treaties," *Columbia Journal of Transnational Law* 36 (1998): 511.
[123] Canada - Peru BIT, 2006. See also Japan-Korea 2002 BIT.
[124] US model BIT 2004. Article 3.
[125] Michael R. Reading, "The Bilateral Investment Treaty in ASEAN: A Comparative Analysis," *Duke Law Journal* 42, no. 3 (December 1992): 699, http://www.jstor.org/stable/1372842.
[126] Austria Model BIT, Article 3 (3). See also model BITs of UK, Belgo-Luxembourg, Denmark and Greece. Nevertheless, The Finland Model BIT has a clause drafted similarly to the US Model BIT. In the MFN clause the BIT includes the words 'establishment' and 'acquisition'. However, as regards national treatment, it includes only acquisition.

control approach".[127] This less liberal approach is usually provided by the wording: "each Contracting Party shall promote in its territory investments by investors of the other Contracting Party and shall, in accordance with its laws and regulations, admit such investments".[128] In this sense the promotion of investment remains dependent upon the laws and regulations of the State, which is free to discriminate against potential investors.

57. Any EU model clause should concern itself with the scope of the national treatment standard in this way. On the one hand, adopting a more liberal approach and deciding to include pre-establishment rights is in line with the main objective of the European Commission regarding the shift of competence post-TFEU, namely the liberalisation of investments.[129] Moreover, it will provide greater investment access for European investors and also guarantee a level playing field in the competition with North American investors. Nevertheless, the EU must be mindful of the drawbacks. First, since it is not presently the practice of EUMS, the inclusion of such a clause could involve political compromise and extensive negotiations. It has also been shown that Asian countries have been very reluctant to sign BITs with similar clauses. In fact, arguably the national treatment standard pertaining to pre-entry rights was the cause for the termination of treaty negotiations between Malaysia, Singapore and Indonesia.[130] In principle, if the EU is serious about improving access to investors abroad, it should extend protection to the pre-establishment stage.[131] Nonetheless, the inclusion of exceptions will be necessary in order to make this more attractive among EUMS and with third States.

4. Exceptions

58. It is frequently the case that States will negotiate for different exceptions depending on their national interests in specific sectors or in relation to international economic or taxation agreements. It should be stated at the outset that in order to keep

[127] See United Nations Conference on Trade and Development (UNCTAD) and Sauvant, *International Investment Agreements: Key Issues*, 1:143.
[128] Finland–Guatemala BIT, 2005, Article 2.
[129] European Commission, *Towards a Comprehensive European International Investment Policy*, 5.
[130] Reading, "The Bilateral Investment Treaty in ASEAN: A Comparative Analysis," 700.
[131] It is interesting to note that, by virtue of Article 10 ECT, post-establishment protection is obligatory while pre-establishment protection is hortatory.

the exceptions as narrow as possible for maximum investor protection, the exceptions should be limited to those concerns that the EU explicitly furthers under Title V Chapter I, Article 21 TEU such as national security, human rights, and sustainable economic, social and environmental development.[132]

59. The use of exceptions enables host countries to exclude certain types of enterprises, activities or industries from the operation of national treatment. These may consist of either general, subject-specific or country-specific exceptions. In the alternative, however, exceptions could be structured on the basis of a GATS type 'opt-in' or 'positive list' approach or the NAFTA type 'opt-out' or 'negative list' approach.[133] The former may be preferable where gradual liberalisation is sought. By contrast, the 'opt-out' approach may have certain disadvantages. This approach may curtail the ability of a host country to distinguish between domestic and foreign investments, as it may be difficult to identify with precision all the industries and activities to which national treatment should not apply.

60. Different IIAs have a diverse range of exceptions since States have strong policy interests in certain areas aiming to protect certain national industries. For instance, the US has stipulated sector exceptions to the national treatment standard.[134] It is also the case that regional economic integration arrangements with other countries are usually protected, as is demonstrated by the frequent use of REIO clauses among EUMS.

61. Another common exception to national treatment that can be seen in various model BITs is the exclusion of taxation matters. The Finnish model BIT states that the provisions of the BIT shall not apply to any "agreement for the avoidance of double

[132] It is important to distinguish that the exceptions dealt with in this part of the memorandum are directly related to MFN and national treatment. Some exceptions such as security and environmental exceptions will be dealt with under the general exceptions heading (please see relevant section below).

[133] This is also the practice of US BITs in which "exceptions to national and most favoured nation treatment in the sectors must be explicitly stated in the annex to the treaty." Philippe Gugler and Vladimir Tomsik, *The North American and European Approaches in the International Investment Agreements*, Working Paper (Berne, Switzerland: NCCR Trade Regulation, 2006), 15, www.unifr.ch/pes/assets/files/cinqu.pdf.

[134] United States–Argentina BIT, 1994. Protocol: "2. With reference to Article II, paragraph 1, the United States reserves the right to make or maintain limited exceptions to national treatment in the following sectors: air transportation; ocean and coastal shipping; banking; insurance; energy and power production; custom house brokers; ownership and operation of broadcast or common carrier radio and television stations; ownership of real property; ownership of shares in the Communications Satellite Corporation; the provision of common carrier telephone and telegraph services; the provision of submarine cable services; use of land and natural resources".

taxation or other international agreement relating wholly or mainly to taxation".[135] This exception is particularly important and widespread because tax agreements are extensively used as a tool to attract foreign investors. Hence, it is "one of the most important means by which host states intervene in the economy to shape cross-border investment flows".[136]

62. These exceptions are sometimes drafted in the same article that prescribes national and most-favoured-nation treatment, combining the two standards and exceptions.[137] Other model BITs follow a different approach and separate the exceptions from the two standards, indicating a wider scope of application for the exceptions.[138]

63. The German model BIT in Article 3(2) also includes a list of possible acts that may, in particular, be deemed to constitute treatment less favourable.[139] The formula clearly does not limit the scope of application and it is drafted as *numerus apertus*.

PROPOSAL[140]

> 1. Each Party shall accord to investors of the other Party treatment no less favourable than that it accords to its investors with respect to the establishment,

[135] Finland model BIT, Article IV. Similar provisions can be found in the Germany model BIT 2005; UK model BIT, which includes wider exceptions as regards national security, public security, public order and it allows for safeguard measures related to exchange or monetary policy in exceptional circumstances; Belgo-Luxembourg model BIT; Denmark model BIT, Greece model BIT, Sweden model BIT and France Model BIT.

[136] Vandevelde, "Investment Liberalization and Economic Development: The Role of Bilateral Investment Treaties," 514. The author also mentions that a survey conducted in the 1990's revealed that out of 103 countries, only four did not offer some kind of tax incentive. See United Nations Conference on Trade and Development (UNCTAD), *Transnational Corporations and Competitiveness*, World Investment Report (New York, USA; Geneva, Switzerland: United Nations Conference on Trade and Development (UNCTAD), August 1995), 291.

[137] See, for example, Sweden, France and Greece model BITs.

[138] In this sense the UK Model BIT reads: The provisions of this Agreement relative to the grant of treatment not less favourable than that accorded to the nationals or companies of either Contracting Party or of any third State shall not be construed so as to preclude the adoption or enforcement by a Contracting Party of measures which are necessary to protect national security, public security or public order, nor shall these provisions be construed to oblige one Contracting Party to extend to the nationals or companies of the other the benefit of any treatment, preference or privilege resulting from…"

[139] The provision mentions different treatment relating to public procurement, sale of products at home and abroad and other measures of similar effect.

[140] A new drafting needs to be created of the NT provision in order to tackle the issue of qualifying 'in like circumstance' properly. Note that the purpose of this exercise is merely to show the evolution of the concept, which is speculative but nevertheless further elaborated upon in paragraphs 48-52.

acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.[141]

2. Each Party shall accord to covered investments, including returns, treatment no less favourable than that it accords to investments or returns in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.[142]

3. The provisions of this Agreement relative to the grant of treatment not less favourable than that accorded to the investors of either Contracting Party or of any third State shall not be construed so as to oblige one Contracting Party to extend to investors, investments, including returns, of the other party the benefit of any treatment, preference or privilege by virtue[143] of any existing or future agreement resulting from

(a) any existing or future customs, economic or monetary union, a common market to which either of the Contracting Parties is or may become a party, and includes the benefit of any treatment, preference or privilege resulting from obligations arising out of an international agreement or reciprocity arrangement of that customs, economic or monetary union.[144]

(b) any international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly to taxation;[145]

(c) article (MFN treatment clause) shall not apply to treatment accorded under all treaties whether bilateral or multilateral, in force or signed before the date into force of this Agreement dealing with any benefits granted by customs, economic or monetary union that any of the contracting parties are members.[146]

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[141] Adaptation form NAFTA, Article 1102 adding obligations and reference to "nationals or companies".

[142] Adaptation from NAFTA including reference to returns, as found in Finland model BIT, Greece model BIT, UK model BIT. Greece-Azerbaijan BIT 2004, Greece–India BIT 2007.

[143] Adaptation from UK model BIT, Article 7. The part of the provision that deals with exceptions related to national security, public security or public policy are addressed under the general exceptions heading below.

[144] Adaptation from UK model BIT, Article 7. Exclusion of reference to "free trade area or similar international agreement".

[145] UK model BIT, Article 7.

[146] The possibility of drafting a clause in these terms is to avoid the double derivation issue developed below on the MFN policy options. Source: Adaptation from: United Nations Conference on Trade and Development (UNCTAD), *MFN*, 3:108. (Option 1: limiting the scope of application of MFN treatment in post-establishment)

4. MOST-FAVOURED-NATION TREATMENT

OVERVIEW AND INTRODUCTION

- MFN provision has a multilateralising effect on the investment framework.
- MFN provision should extend to procedural matters.
- Exceptions to the MFN clause may be needed to prevent free riders.
- This can be achieved through an appropriately drafted REIO clause.

64. The aim of the MFN provision is to guarantee that investments and/or investors from the contracting parties to a treaty do not receive less favourable treatment than that provided to those of third countries. In practice, MFN provision brings all the agreements signed by a given country up to the highest level of protection having regard to that provided by third countries. In this way, including an MFN provision has a multilateralising effect on the investment framework.

65. Model BITs from EUMS are usually drafted in such a way as to provide generally for the application of MFN. For instance, Article 3(2) of the Dutch model BIT reads

> …more particularly, each Contracting Party shall accord to such investments treatment which in any case shall not be less favourable than that accorded either to investments of its own nationals or to investments of nationals of any third State, whichever is more favourable to the national concerned.[147]

66. In the alternative, other BITs have the clause drafted in such a way as to explicitly extend to all parts of the agreement. The Belgo-Luxembourg model BIT provides for this type of clause at Article 4(1), for example

> In all matters relating to the treatment of investments the investors of each Contracting Party shall enjoy national treatment and most-favoured-nation treatment in the territory of the other Party.

67. Adopting a different approach again, the UK model BIT includes the MFN clause in general terms but adds a specific provision to clearly demarcate the scope of

[147] Similar drafting can be found in the Germany model BIT 2005, Austria; Denmark; Finland; Greece; Sweden and France.

application of the clause. To this end, Article 3(3) states, "[f]or the avoidance of doubt it is confirmed that the treatment provided for in paragraphs (1) and (2) above shall apply to the provisions of Articles 1 to 12 of this Agreement".

1. Asymmetrical Clauses[148]

68. The question as to whether developing countries should be granted preferential treatment to ensure that they are given the best possible opportunity to develop further pervades many aspects of international economic law. For example, in the WTO system, this is achieved through the General System of Preferences approach. Another way to further this goal may be by the insertion of asymmetric clauses in IIAs. As such, developing countries are offered preferential treatment in contrast to developed countries. An example of this is provided in the EPA between the CARIFORUM States and the EC (and its EUMS). It provides at Article 70 that:

> 2. When a Party or a Signatory CARIFORUM State concludes a regional economic integration agreement creating an internal market or requiring the parties thereto to significantly approximate their legislation with a view to removing non-discriminatory obstacles to commercial presence and to trade in services, the treatment that such Party or Signatory CARIFORUM State grants to commercial presences and investors of third countries in sectors subject to the internal market or to the significant approximation of legislation is not covered by the [MFN] provision.

69. The EU may decide to grant asymmetrical provisions to developing States in an effort to take into account their needs.[149] Such special treatment for a contracting party may allow it to open up fewer sectors, to liberalise fewer types of transactions, to "protect the right to regulate" and to "allow additional possibilities for promoting

[148] This has parallels with the traditional distinction between conditional and unconditional MFN clauses. The idea behind the conditional MFN clause was that it would ultimately lead to lower tariffs. Conditional MFN clauses were ultimately abandoned, because it was too complicated and economically inefficient. Rather, States adopted unconditional MFN clauses, which avoid with these problems. In granting the highest form of investor protection, negotiating parties are strongly advised to adopt the unconditional approach.

[149] It is likely that the EU would seek to take account of developing countries' needs in investment agreements having regard especially to Title III, Chapter I Articles 208 and 209 TFEU.

its development".[150] Indeed, the degree to which such flexible treatment may be granted depends solely on the economic conditions in the respective developing State. Accordingly, at an UNCTAD Expert Meeting, a delegate from Burkina Faso's Ministry of Trade and Finance pointed out that the broad principles of investment protection and promotion provided under Lomé (I) do *not* contain the development policies of the ACP countries. By contrast, the improved investment environment created by Lomé "had contributed to attracting foreign investment in *all* sectors"[151] as opposed to a limited number thereof. Therefore, this casts some doubt over the intended effect of providing asymmetrical clauses. As such, the EU will have to decide whether following a similar approach in an IIA is worthwhile. It is important to bear in mind that this type of asymmetric clause would need to be adapted from the trade regime to the investment regime. However, the concern that the intended effect of this type of clause may not be achieved would be common to both regimes.

70. Currently, to our knowledge, there is no consistent practice from any State of including specific clauses addressed to guarantee development to an underdeveloped party to the agreement. During the discussions under the Doha Development Agenda, the Working Group on Trade and Investment (WGTI) looked into the possibility of inserting development clauses in a multilateral investment agreement. The discussions did not reach a common approach to development clauses.[152] Nevertheless, the EU may have an interest in the inclusion of such a clause in the light of Article 21, 2(d)[153] of the TEU Title V, Chapter 1. Suggestions on development clauses were provided by the Chinese Taipei[154] Permanent Mission, which argued for the differentiation of pre-

[150] United Nations Conference on Trade and Development (UNCTAD), *Report of the Expert Meeting on International Investment Agreements: Concepts allowing for a Certain Flexibility in the Interest of Promoting Growth and Development* (Geneva, Switzerland: UNCTAD, May 6, 1999), 8.
[151] Ibid., 6.
[152] In this sense Sauvé affirms: "no comfort was given to developing countries fear that a WTO agreement in this area would continue the trend of most existing international investment agreements, whose focus is primarily on the liberalization and protection of investment without providing operationally compelling provisions on development issues." Pierre Sauve, "Multilateral Rules on Investment: Is Forward Movement Possible?," *Journal of International Economic Law* 9, no. 2 (May 2006): 336, http://jiel.oxfordjournals.org/cgi/doi/10.1093/jiel/jgl011.
[153] The Union's external action should pursue common policies in order to "foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty;"
[154] Groupe de Travail des Liens entre Commerce et Investissement, WTO, *Communication du territoire douanier distinct de Taiwan, Penghu, Kinmen et Matsu*, Communication (Geneva, Switzerland: World Trade Organization (WTO), July 1, 2002), http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/W126-f.pdf. On the relationship between trade, investment and development see also: Working Group on the Relationship between Trade and Investment, *Communication form*

entry requirements, more flexibility to NT than MFN since discriminatory measures guaranteeing better treatment to nationals may promote development, and the Mission also argued for a relaxation of procedural obligations such as onerous legislative requirements and the publication of regulations, given the burden these can place on developing countries. Although the possibility exists to include these types of provisions, it should be borne in mind that their intended effect is not always achieved. Allowing further protection to national industry could lead to economic inefficiency, which would support inefficient and uncompetitive firms rather than actually promoting development.

2. Scope of Application

2A. Substantive v Procedural Provisions

71. The main issue that arises out of tribunal practice in respect of MFN is the scope of application of the MFN clause. The debate is focused around the possibility of MFN clauses extending beyond substantive procedures to apply also to procedural matters. At the extreme of this debate, it has been queried whether jurisdiction could be established through a third treaty dispute settlement provision by virtue of an MFN clause.[155]

72. While some tribunals have warned of the danger of extending the MFN clause too far,[156] other tribunals have been asked by claimants to give a broader scope of applicability to procedural matters, including access to dispute settlement mechanisms and a broader consent to arbitration.[157]

India - Relationship between Trade, Investment and Development., Communication (Geneva, Switzerland: World Trade Organization (WTO), April 13, 1999), http://commerce.nic.in/trade/international_trade_papers_nextDetail.asp?id=112.

[155] Emmanuel Gaillard, "Establishing Jurisdiction Through a Most-Favored-Nation Clause," *The New York Law Journal* 233, no. 105 (June 2, 2005).

[156] Despite the fact that *Maffezini v Spain* was the first case to extend the applicability of the MFN clause to procedural issues the Tribunal tried to avoid giving an across the board application, highlighting the fact that there are some provisions that are required by public policy, and extending MFN to them would create "disruptive treaty–shopping that would play havoc with the policy objectives of underlying specific treaty provisions." *Maffezini v Spain*, Decision on Objections to Jurisdiction, ICSID Case No ARB/97/7, IIC 85 (2000), §63.

[157] *Plama Consortium Limited v Bulgaria*, Decision on Jurisdiction, ICSID Case No ARB/03/24, IIC 189 (2005), §99. In this case, the BIT in question gave jurisdiction to a Tribunal only to determine the

73. Much will depend on the wording of the MFN clause, and if the EU seeks to achieve the highest level of protection for investors making investments in the area, they would be well-advised to adopt a formulation analogous to that provided in the UK model BIT which, for the avoidance of doubt, expressly extends its MFN provision to the dispute settlement clause of the BIT.[158] The extension of protection to procedural issues follows the premise of this memorandum, which is focused on providing the highest level of protection to investors. Therefore, the memorandum does not discuss in detail the current practice of the EU or if this current practice may be reproduced in an EU model BIT. It should be borne in mind that a few FTAs, such as CAFTA, have expressly included notes to preclude the interpretation given in *Maffezini*.[159] Moreover, tribunals have interpreted differently the possibilities of extension to procedural issues. Hence, it is suggested that the provision should include specific references to the scope of the standard, including but not limited to the extension of MFN: to pre-investment stage[160]; to the waiting requirement[161]; to be used as a basis for jurisdiction[162]; as a means of according a better treatment[163].[164]

74. Another possibility of addressing the inclusion of procedural matters is an approach taken by the Belgo-Luxembourg model BIT, which has a provision stating that "[i]n all matters relating to the treatment of investments the investors of each Contracting Party shall enjoy national treatment and most-favoured-nation treatment in the territory of the other Party".[165] Although this approach may generate more doubt regarding the extension to procedural matters, it has the merit of allowing

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amount of compensation in an expropriation. The Claimants tried to argue that the Bulgarian general consent in other BITs to ICSID fora constituted a better treatment, therefore MFN should apply.

[158] United Kingdom-Angola BIT, 2000; United Kingdom-Bosnia and Herzegovina BIT, 2002; United Kingdom-Albania BIT, 1994; United Kingdom-Barbados BIT, 1993; United Kingdom-Belarus BIT, 1994; United Kingdom-Côte D'Ivoire BIT 1995; United Kingdom-Cuba BIT, 1995; United Kingdom-El Salvador BIT, 1999; United Kingdom-Estonia BIT, 1994.

[159] Ruth Teitelbaum, "Who's Afraid of Maffezini? Recent Developments in the Interpretation of Most Favored Nation Clauses," *J. Int'l Arb.* 22 (2005): 229.

[160] *Técnicas Medioambientales Tecmed SA v Mexico*, Award, ARB(AF)/00/2; IIC 247 (2003); 10 ICSID Rep 130, § 69.

[161] *Siemens AG v Argentina*, Decision on Jurisdiction, ICSID Case No ARB/02/8, IIC 226 (2004), § 79 et seq.

[162] *Plama Consortium Limited v Bulgaria*, Decision on Jurisdiction, ICSID Case No ARB/03/24, IIC 189 (2005), § 193 et seq.

[163] *MTD Equity Sdn Bhd and MTD Chile SA v Chile*, Award, ICSID Case No ARB/01/7; IIC 174 (2004), § 104, and *ADF Group Inc v United States*, Award, ICSID Case No ARB(AF)/00/1; IIC 2 (2003), § 196 et seq.

[164] G. Egli, "Don't Get Bit: Addressing ICSID's Inconsistent Application of Most-Favored-Nation Clauses to Dispute Resolution Provisions," *Pepp. L. Rev.* 34 (2006): 1045.

[165] Belgium Luxembourg Model BIT; Spain-Argentina 1991.

tribunals to interpret the application of MFN clauses more broadly than the more common clause, which simply states: "Each Contracting Party shall accord (…) MFN and national treatment".[166]

2B. Extension to the Pre-establishment Stage?

75. Furthermore, a model BIT that seeks further liberalisation should include a pre-establishment protection provision.[167] This option would be similar in nature to that elaborated upon under the national treatment section above.

2C. Explicit Reference to Investment and Investor

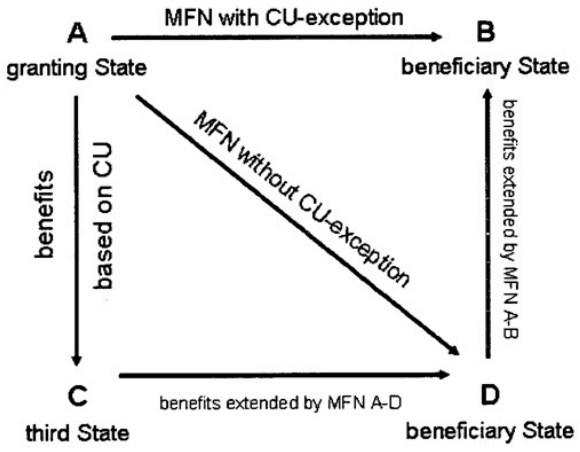
76. The MFN clause should also include an explicit reference to the protection of investments and investors to provide for the highest level of protection as outlined in the national treatment section above.

3. Double-Derivation Avoidance

77. It should be borne in mind that an MFN clause is likely to affect other agreements such as those pertaining to REIOs. In this respect, a State could potentially be obliged to extend the same benefits to third countries that exist within a REIO. In this way, exceptions to the principle may be needed.[168] However, where these are included it is important that the exceptions appear throughout the BIT. This is because, as one author has pointed out, "[o]therwise MFN clauses might allow investors to circumvent such exceptions and rely on more favourable treatment in third-country BITs, even though the basic treaty contains an explicit exception for MFN treatment in this respect".[169] Although EUMS all include REIO clauses in their

[166] Austria Model BIT; German Model BIT 2008; Netherlands Model BIT; Denmark Model BIT; Finland Model BIT; Greece Model BIT; Sweden Model BIT; France Model BIT; NAFTA; Canada FIPA Model 2004; Cyprus–Czech Republic BIT, 2001; Spain-Albania BIT, 2003; Belgium-Croatia BIT, 2001.
[167] United Nations Conference on Trade and Development (UNCTAD), *MFN*, 3:42.
[168] Article VII, Germany-USA FCN, available at http://usa.usembassy.de/etexts/friendtreaty4555.html.
[169] Stephan W. Schill, "Multilateralizing Investment Treaties through Most-Favored-Nation Clauses," *Berkeley Journal of International Law* 27 (2009): 525.

BITs, this may still be an issue with regard to related previous agreements such as the Friendship, Commerce and Navigation Agreement between Germany and the US.[170] The same author has highlighted the possibility of circumvention of exceptions to MFN clauses as illustrated in the diagram below: [171]



CU= CUSTOMS UNION

Figure 1: Stephan W. Schill, "Multilateralizing Investment Treaties through Most-Favored-Nation Clauses," *Berkeley Journal of International Law* 27 (2009), 496.

78. Here, the general exception (A-B BIT) prevails over the A-D BIT, since the MFN has the general exception. However, benefits granted to another State (A-C BIT) that would be considered part of the exception might be extended to B through a double derivation (benefits extended to D and then to B).

79. One of the most fundamental guiding principles of the EU policy is non-discrimination.[172] Given this, it seems that it would desire the highest level of protection through MFN clauses.[173] Nevertheless, the exceptions need to be carefully drafted in order to secure their effective application and avoid the potential for

[170] Ibid., 526-528. Schill provides a practical example of extending benefits usually covered by the REIO clause to other countries through the Treaty of Friendship, Commerce and Navigation ("FCN") between Germany and the United States. In this case US corporations headquartered in Germany were recognized as being governed by US law because other EU member states can transfer their headquarters to Germany without having to adapt to German local laws. The aforementioned FCN does not have a customs union exception, hence opening the door to foreign investors from other States to claim the same benefit granted to US investors through the MFN clause in the FCN by the double derivation.

[171] Ibid., 525.

[172] European Commission, *Towards a Comprehensive European International Investment Policy*, 8.

[173] See European Commission, *Concept Paper on Non-Discrimination*, Communication (Geneva, Switzerland: World Trade Organization (WTO), June 26, 2002), 4. In this document the Working Group concludes favourably upon "a general MFN obligation (including possible exceptions) for foreign investments across the board on all sectors".

circumvention by double derivation, particularly having regard to already existent EUMS BITs. If MFN clauses from previously concluded BITs could be invoked against the EU, it may lead to a loophole through which third States could enjoy the benefits of the REIO without bearing any of its costs.

80. On the other hand, simply repeating REIO clauses, which include exceptions to FTAs, may be counter-productive to the policy goals of the EU. As the EC submitted in a note for the attention of the 133 Committee concerning the new EU investment policy: "…the classical [REIO] clause needs to be adjusted to avoid a carve-out from the scope of MFN treatment of any FTA, which would be counter-productive".[174]

81. In this sense, the EU should attempt to exclude from future BITs—through REIO clauses—issues that are only applicable to EUMS. On the other hand, the EU will want to ensure that liberalisation and investment access is granted. The first justification for the inclusion of an REIO clause concerns the right of establishment. It was suggested above to include pre-entry rights with exceptions in order to guarantee greater market access. Nevertheless, within the EU, EUMS already have full rights of entry and establishment under Article 49 TFEU. It would be hard to find the political support to grant these rights to non-EUMS States without the same benefit being reciprocated, which would happen without an REIO clause.

82. Moreover, this would render the exceptions to MFN and NT irrelevant, creating a sensitive political situation for EUMS who may want secure the exclusion of foreign investors from certain fundamental sectors. The inclusion of pre-establishment rights as such is a sensitive issue because it could involve the relinquishment of the States' discretion to freely discriminate between the kind of investors they allow into their jurisdiction. Furthermore, developing countries might show some resistance to an unqualified expansion of pre-establishment rights. In this sense, an Indian communication on the modalities for pre-establishment commitments based on a GATS-type positive list approach revealed their opposition and affirmed, *inter alia*: "developing countries need to retain the ability to screen and channel FDI

[174] European Commission DG Trade, *Upgrading the EU Investment Policy*, Issues Paper (Brussels: European Commission, May 31, 2006), 2.

in tune with their domestic interests and priorities".[175]

83. There are also legal concepts within the Community framework that should not be extended to non-Members. For instance, the EU legal system may extend rights to individuals from EUMS through directives that may even lead to a right of compensation. Granting these same rights to non-European investors would create a "severe imbalance of contractual obligations" (…). "The principles of precedence of European Union Law, its direct applicability and the above-mentioned obligation to pay compensation are unique features of the European Union. As these concepts have their origin and justification exclusively in the European Community Treaty, they cannot be unilaterally applied to non-European Union Member States"[176]. Hence, the inclusion of an REIO clause is recommended, but it should not allow discretionary discrimination by the EU towards non-EUMS.

4. What exceptions are to be included?

84. It is suggested that a similar approach to that suggested under the national treatment section above is followed in this respect.

PROPOSAL

> 1. Each Party shall accord to investors of the other Party treatment no less favourable than that it accords to nationals or companies of any third-State with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.[177]
>
> 2. Each Party shall accord to covered investments, including returns, treatment no less favourable than that it accords to investments or returns in its territory of

[175] Working Group on the Relationship between Trade and Investment, *Communication from India - Views on Modalities for Pre-establishment Commitments Based on a GATS-Type Positive List Approach*, Communication (Geneva, Switzerland: World Trade Organization (WTO), October 7, 2002), 3, http://commerce.nic.in/trade/international_trade_papers_nextDetail.asp?id=108.
[176] Joachim Karl, "Multilateral Investment Agreements and Regional Economic Integration" (1999): 19.
[177] Adaptation from NAFTA Article 1103, adding obligations and reference to "nationals or companies".

any third-State with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.[178]

3. For the avoidance of doubt it is confirmed that the treatment provided in paragraphs (1) and (2) above shall apply to all matters of this agreement (to the provisions of articles X to Y of this Agreement).[179]

5. EXPROPRIATION

OVERVIEW AND INTRODUCTION

- Expropriation is the most severe form of interference with property and is an indispensable provision in an IIA.
- The definition of expropriation must include indirect expropriation.
- It is important that IIA parties be free to regulate in the public interest but this exception should not allow the avoidance of a legitimate claim for indirect expropriation.
- An EU model BIT should refer to variables such as the date, valuation method and interest rate pertinent to the expropriation.

85. Expropriation, being as it is "… the most severe form of interference with property", is an indispensable consideration of any investment agreement.[180] The European Parliament has also recommended its provision in all future agreements concluded by the EU.[181] In this respect, the Parliament stipulated that any definition should protect against direct and indirect expropriation, and "…that establishes a clear and fair balance between public welfare objectives and private interests, and allowing for adequate compensation in accordance with the damages occurred in the event of

[178] Adaptation from NAFTA including reference to returns as found in Finland Model BIT; Greece Model BIT; UK Model BIT; Greece-Azerbaijan BIT, 2004; Greece–India BIT, 2007.
[179] UK Model BIT.
[180] Dolzer and Schreuer, *Principles of International Investment Law*, 89.
[181] Arif and Committee on International Trade, *Report on the Future European International Investment Policy*, §19.

illegitimate expropriation".[182] With this is mind the proceeding options address these concerns as well as other topical issues pertaining to expropriation.

86. It is highlighted at this point that the type of instrument the EU ultimately opts for will have a bearing on the construction of the expropriation provision, given the debate as to the extent of competence of the EU and the need to ensure that actions of EUMS are covered.[183]

OPTIONS

1. Police Powers

87. A distinction has been made between expropriation in the public interest (compensable) and regulation for general welfare objectives (non-compensable). However, this distinction is not in itself clear-cut and furthermore is becoming increasing blurred as a result of BIT wording and tribunal practice, which increasingly seek to characterise situations of the former as those of the latter. One of the most illustrative provisions in this respect is the Annex to the US model BIT. In Article 6(1) of the BIT, it is provided that "[n]either party may expropriate or nationalise a covered investment either directly or indirectly through measures equivalent to expropriation or nationalisation …". This is elaborated upon, however, by Annex B which describes in respect of expropriation that:

> (a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors: (i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred; (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expropriations; and (iii) the character of the government action.

[182] Ibid., §19.

> (b) Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriation.

88. The Annex refers, accordingly, not only to the economic impact of measures, which would otherwise constitute indirect expropriation, but also to the type of measures that may be characterised as other than indirect expropriation to ensure that legitimate public interest objectives are preserved. The latter, it is suggested, is difficult to distinguish from compensable expropriation, which also can include measures taken in the public interest. As such, the demarcation between expropriation and regulation is imprecise, leaving the investor somewhat unclear as to whether they have a claim. It is accordingly not advisable to follow the US model BIT in this way.

89. This debate on the remit of the State's freedom to regulate for the purposes of general welfare is evident in the *dicta* of arbitral tribunals also. It has been noted in tribunal practice that

> governments must be free to act in the broader public interest through protection of the environment, new or modified tax regimes, the granting or withdrawal of government subsidies, reductions or increases in tariff levels, imposition of zoning restrictions and the like. Reasonable governmental regulation of this type cannot be achieved if any business that is adversely affected may seek compensation.[184]

90. The scope for this exception is potentially very broad, especially in light of the non-exhaustive list referred to in the above paragraph.[185]

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[183] See Patricia Nacimiento, "Who's A Respondent In Light of Art. 207 of the Lisbon Treaty?," *Kluwer Law International Latest News*, n.d., http://kluwer.practicesource.com/blog/2010/who%e2%80%99s-a-respondent-in-light-of-art-207-of-the-lisbon-treaty-2/.

[184] *Feldman v Mexico*, Award, 16 December 2002, 18 ICSID Review-FILJ (2003) 488, §103. Similarly, the tribunal in *SD Myers v Canada* held that regulatory conduct is unlikely to be characterised as expropriatory under Article 1110 of NAFTA: *SD Myers v Canada*, First Partial Award, 13 November 2000, 40 ILM (2001) 1408, §281.

[185] The approach has been criticised in *Azurix v Argentina*: "[a]ccording to it, the BIT would require that investments not be expropriated except for a public purpose and that there be compensation if such expropriation takes place and, at the time, regulatory measures that may be tantamount to expropriation would not give rise to a claim for compensation if taken for a public purpose". *Azurix v Argentina*, Award, 14 July 2006, ICSID Reports 107, §311.

91. Including such phrases as 'reasonable' regulatory measures in BIT language could operate as a fig leaf behind which States can hide from their obligation to pay compensation, even if a measure is in the public interest. On the other hand, a balance must be struck to ensure a State can still be free to apply certain measures, in a non-discriminatory manner, so that it may further its policies, without being exposed to claims for compensation.[186]

92. In light of its obligations at the international level, as well as its own policy objectives, it will be necessary for the EU to take, in particular, environmental measures without being exposed to claims of expropriation.[187] As has been expressed in a Communication from the Commission to the Council, the EU's investment policy

> "[…] has to fit with the way the EU and its Member States regulate economic activity within the Union and across [their] borders. Investment agreements should be consistent with the other policies of the Union and its Member States, including policies on the protection of the environment […] Investment policy will continue to allow the Union, and the Member States to adopt and enforce measures necessary to pursue public policy objectives".[188]

93. However, given the abovementioned considerations, it is necessary to ensure that this is made clear, either in the provision on expropriation or through a general exceptions provision. Similarly, it is in the interest of the EU to promote certain human rights and, should this implicate expropriation in some way, the EU ought to be able to excuse it as being within the remit of its police powers. Once again, the intention that an IIA should reflect human rights concerns has been addressed in a Communication from the Commission to the Council, which provides that

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[186] As such, a tribunal will need to take into consideration a whole host of factors in its determination of expropriatory measures and measures taken in the public interest. Indeed, this was the approach taken by the Tribunal in *LG&E v Argentina*, reasoning that it was required to balance "the degree of the measure's interference with the right of ownership and the power of the State to adopt its policies". *LG&E v Argentina*, Decision on Liability, 3 October 2006, 46 ILM (2007) 36, §189.

[187] For example, it is a party to a number of international treaties on the environment and climate change, including the two United Nations climate treaties, the UN Framework Convention on Climate Change (UNFCCC) 1992 and the Kyoto Protocol. The latter requires the 15 countries that were EU members at the time to reduce their collective emissions in the 2008-2012 period by 8% to below 1990 level. Emissions monitoring and projections show that the EU is well on track to meet this target. Regulatory space for environmental policy objectives such as this would ensure that it is not left exposed to investment treaty claims as a result of its attempt to meet international treaty obligations on the environment.

[188] European Commission, *Towards a Comprehensive European International Investment Policy*, 5.

> "[a] common investment policy should also be guided by the principles and objectives of the Union's external action more generally, including the promotion of the rule of law, human rights and sustainable development In this respect, the OECD Guidelines for Multinational Enterprises, which are currently being updated, are an important instrument to help balance the rights and responsibilities of investors".[189]

The need to ensure that the investment policy of the EU reflects the founding principles of the EU is brought into sharp focus through Article 6 TEU and Article 205 TFEU. In particular, the former stipulates in paragraph 2 that "[t]he Union shall respect fundamental rights, as guaranteed by the European Convention on the Protection of Human Rights and Fundamental Freedoms […] and as they result from the constitutional traditions common to the Member States, as general principles of Community law".

94. To these ends, it is submitted that similar appropriate wording for such provision may be that found in the US model BIT, under its Annex B as outlined above. However, rather than an illustrative list as it provides, we recommend an exhaustive list to ensure that these carve-outs are not abused. As such, non-discriminatory regulatory actions taken by a Party that are intended to protect legitimate public welfare objectives, including the environment in particular, could be excluded from the remit of indirect expropriation. Similarly, measures for the protection of human rights could be addressed in such a provision.

95. In addition, it is important to be mindful that the competence of the EU in some matters may be an issue.[190] As such, it may be necessary to ensure that the EU has the competence to nationalise in the public interest if it needs to. This will require a consideration of the type of agreement that EU enters into, for example, a mixed agreement.

[189] Ibid., 9.
[190] *See*, for example, André von Walter, "Balancing Investors' and Host States' Rights: What Alternatives for Treaty-makers?," in *International Investment Law and EU Law* (Berlin Heidelberg, Germany: Springer Verlag, 2011), 141.

2. Determination of Compensation

96. Aside from characterising the forms of expropriation under an investment treaty, other elements which are of interest to an investor include the method of valuing the property concerned, the date upon which this valuation takes place and the *post hoc* interest rate to be applied. Accordingly, the ensuing analysis will consider each of these variables and draw conclusions as to the optimal provisions for the investor.

97. The date for determining when expropriation took place is critical for the valuation of the expropriated investment. It is usually the time immediately before the expropriation became public knowledge. This is the case in the UK model BIT, the Bulgaria-Austria BIT, the Czech Republic-Bulgaria BIT and the newly signed but not yet in force Canada-Romania BIT, amongst many others. The wording is generally as straight forward as with the UK-Vietnam BIT, that the requisite date for determining compensation is "…immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier". Alternatively, some treaties provide that any change in value, which results from the expropriation, shall not be included in the analysis of the fair market value. This is the case, for example, in Article 5(2) of the Austria-Azerbaijan BIT.

98. It should be noted that where a treaty provides that the compensation is to be determined as of the date of the expropriation, a tribunal will have no discretion to apply customary international law standards which may otherwise prevail in the case of an illegal expropriation.[191] An expropriation could be considered as illegal if it is simply indirect in nature, as these are the types of expropriation in which compensation is never paid. As such the magnitude of compensation is likely to vary for the investor. As damages can be significantly higher in cases of an illegal investment, it may even be in the investor's interest for the expropriation to be characterised as illegal. This is a consideration that one should be mindful of in drafting provisions related to the date of compensation.

99. As for the value of the investment, BITs refer to a number of methods by which to calculate this. For example, the Bulgaria-Austria BIT refers to the 'actual

value' whereas the Czech Republic-Bulgaria BIT notes that the 'market value' is the appropriate valuation to adopt. The choice between these two approaches could lead to a difference in valuation for the investor since the 'market value' appears to suggest a more objective valuation than 'actual value'. In practice, however, it is likely that a tribunal in interpreting these terms would simply adopt one of the traditional approaches—discounted cash flow method, book value or replacement value—and the terminological distinction would result in no actual difference.

100. Similarly, there are explicit differences made in interest rate calculation across various BITs. In the UK model BIT, interest is to be calculated at the 'normal commercial rate'. Setting a threshold on this rate, the Bulgaria-Austria BIT stipulates that this commercial interest rate should be "…no less than the prevailing LIBOR rate of interest". An alternative, if only slightly more specific wording, is used in the Czech Republic-Bulgaria BIT which provides that it is the "interest rate applicable in the territory" that is to be applied. These qualifications are advisable to guide the tribunal in applying a desired interest rate. Setting a lower threshold, such as by reference to the LIBOR rate, ensures that the investor receives a fair rate of interest.

PROPOSAL

101. Given the above considerations, the following is suggested as a draft provision on expropriation:

> 1. Investments of investors of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation, in the territory of the other Contracting Party, except by due process of law, for a public interest, on a non-discriminatory basis and against preliminary and adequate compensation.[192]
>
> 2. Such compensation shall amount to the actual value of the expropriated investment and shall be determined and computed in accordance with internationally recognised principles of valuation on the basis of the fair

[191] Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Austin TX, USA: Wolters Kluwer Law & Business, 2009), 394.
[192] Source: Bulgaria-Austria BIT (1997).

market value of the expropriated investment at the time the impending expropriation became publicly known, whichever is the earlier (hereafter referred to as the valuation date). Such compensation shall be calculated in a freely convertible currency to be chosen by the investor, on the basis of the prevailing commercial market rate, however, in no event less than the prevailing LIBOR—rate of interest or equivalent, from the date of expropriation until the date of payment.[193]

3. Where a Contracting Party expropriates the assets of a company which is considered as a company of this Contracting Party pursuant to paragraph 2 of Article 1 of the present Agreement and in which an investor of the other Contracting Party owns shares, the provisions of paragraph 1 shall apply so as to ensure due compensation to this investor.[194]

4. The investor shall be entitled to have the legality of the expropriation reviewed by the competent authorities of the Contracting Party having indeed the expropriation.[195]

5. Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, in the areas of public health, safety, [human rights] and the environment, do not constitute indirect expropriation.[196]

6. FREEDOM OF TRANSFER

OVERVIEW AND INTRODUCTION

- Freedom of transfer provision is essential to the proper functioning of a liberal capital transfer market such as the EU.
- An REIO clause suspends the application of freedom of transfer.
- The necessity of an REIO clause will depend upon whether the EU enters into an exclusive, mixed or bilateral IIA.

[193] Source: Bulgaria-Austria BIT (1997).
[194] Source: Bulgaria-Austria BIT (1997).
[195] Source: Bulgaria-Austria BIT (1997).
[196] Source: US model BIT (2004), Annex B.

- Exceptions may be necessary but should not allow States to avoid obligations.

102. The provision on the free transfer of funds (capital and payments[197]) is an investor-specific form of investment protection. The provision is essential due to States' competition for resources, including those derived from the domestic and international investment pools. To the investor, the repatriation of funds for distribution to shareholders, for instance, is "critical for the success of an investment".[198] A State offering a liberalised capital transfer market, i.e. the highest level of protection, has better standing from an economic-competitive point of view: "[l]imits on the ability of governments to interfere with the operation of foreign investors reduce the political risks associated with an investment, which should result in greater levels of investment in a given economy".[199] An investment cannot be considered protected unless the agreement provides for free payment, conversion[200] and repatriation of funds.[201]

OPTIONS

1. The REIO Clause: Exclusive, Mixed or Bilateral EU IIAs?

103. An REIO clause has the purpose, for example, of either not extending benefits that arise from EU membership to foreign investors under the MFN provision, or of

[197] Funds are broadly defined as profits, capital (to make the initial investment), royalties, proceeds of sale and other types of payments. See: United Nations Conference on Trade and Development (UNCTAD) and Sauvant, *International Investment Agreements: Key Issues*, 1:34; United Nations Conference on Trade and Development (UNCTAD), *Trends in International Investment Agreements: An Overview*, UNCTAD Series on Issues in Interational Investment Agreements UNCTAD/ITE/IIT/13 (New York: United Nations, 1999), 81.

[198] Abba Kolo and Thomas W. Wälde, "Capital Transfer Restrictions under Modern Investment Treaties," in *Standards of Investment Protection* (Oxford, U.K, New York, USA: Oxford University Press, 2008), 213-214; Citing: B. Land, "Similarities and Differences between Oil and Mining Contracts", 1996, 128-130, http://www.oilandgas.com/ogel.

[199] Marc Bungenberg, Joern Griebel, and Steffen Hindelang, eds., *International Investment Law and EU Law* (Berlin, Heidelberg: Springer Verlag, 2011), 32; Steven McGuire and Michael Smith, *The European Union and the United States: Competition and Convergence in the Global Arena*, The European Union series (Basingstoke [England]; New York: Palgrave Macmillan, 2008), 142, http://lccn.loc.gov/2008015918.

[200] Zachary Elkins, Andrew T. Guzman, and Beth A. Simmons, "Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000," *International Organization* 60, no. 4 (October 2006): 825, http://www.journals.cambridge.org/abstract_S0020818306060279.

temporarily exempting from application a provision that may be in conflict with regional law under the Freedom of Transfer provision. In respect of the latter, this clause is of particular importance to a 'freedom of transfer' provision in individual EUMS BITs in situations where the free movement of funds needs to be restricted within the REIO with immediate effect.[202]

104. The crux of the matter is an exclusively European point of discussion and is thus best explained by way of example, using the European legal situation: Whatever is articulated in EU Law—either through the constitutional treaties or directives—falls under the exclusive competence of the EU. In accordance with Article 63(1) TFEU there exists free movement of capital (direct investment) and current payments (payment of interest, or payments for goods and services)[203] throughout the EU as well as with third states. Therefore the EU, first, has created the most liberal system of movement of funds yet[204] and, secondly, enjoys exclusive competence thereof.

105. In relation to the discussion on freedom of transfer provisions in either bilateral (MS only), mixed (EU and MS) or exclusive (EU only) IIAs, the above denotes the following: An exclusive EU IIA would not necessarily have to include an REIO clause, since the "domestic law" can only be EU law. An exemption from the freedom of transfer as indicated in the TFEU is arguably clear enough for any tribunal to take note of. However, both mixed and bilateral EU IIAs must include an REIO clause for the reason that it allows an individual EUMS to temporarily stop applying the freedom of transfer if the REIO takes such a decision.[205] The issue of the EU

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[201] United Nations Conference on Trade and Development (UNCTAD), *Transfer of Funds*, UNCTAD Series on Issues in International Investment Agreements UNCTAD/ITE/IIT/20 (New York: United Nations, 2000), 3.

[202] As was evident by the lack of REIO clauses in the various which were the subject of the following cases: *Case C-205/06 Commission of the European Communities v Republic of Austria* (Grand Chamber, European Court of Justice 2009); *Case C-118/07 Commission of the European Communities v. Republic of Finland* (Grand Chamber, European Court of Justice 2009); *Case C-249/06 Commission of the European Communities v. Kingdom of Sweden* (Grand Chamber, European Court of Justice 2009).

[203] The distinction between capital as 'funds for investment purposes' and payment as 'transfers of current nature' has been suggested by the ECJ on numerous occasions, e.g.: *Case C-286/82 and 26/83 Graziana Luisi and Guiseppe Carbone v Ministero del Tesoro* (European Court of Justice 1984), §20-21.

[204] Abba Kolo, "Transfer of Funds: The Interaction between the IMF Articles of Agreement and Modern Investment Treaties: A Comparative Law Perspective," in *International Investment Law and Comparative Public Law*, ed. Stephan W. Schill (Oxford, U.K, New York, USA: Oxford University Press, 2010), 353.

[205] International Monetary Fund (IMF), *Balance of Payments and International Investment Position Manual*, 99.

having competence to take the urgent and safeguard measures indicated in Articles 64, 66 and 75 TFEU with immediate effect, and the requirement for EUMS to provide for such situations in their BITs for risk of breach of EU law has been addressed.[206] Without this clause, a tribunal may not necessarily take into consideration relevant safeguards provided for in EU law,[207] and deny the supremacy of EU law over individual EUMS obligations expressed in BITs.[208]

106. While the Swiss and the German model BITs cover FTAs, customs unions and common markets, the UK and French model BITs also include any other form of REIO.[209] EUMS IIAs that do not feature this type of provision are in breach of EU law, as demonstrated in a number of recent cases handed down by the ECJ.[210] Hence, depending on who the parties to such an EU IIA were to be–if exclusive: the EU and third States, if mixed: the EU, EUMS and third States or if bilateral: EUMS and third States only–an REIO clause may or may not be an essential feature to be included in the freedom of transfer provision.

2. Complete Liberalisation *v* Exceptions Applied in Good Faith and to Guarantee Financial Security

107. The maximum protection can only be granted if the transfer of funds is liberalised. Therefore, exceptions must not serve to avoid or derogate from obligations of protection towards the investor, which is the overriding principle of the agreement.

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[206] *Case C-205/06 Commission of the European Communities v Republic of Austria*; *Case C-249/06 Commission of the European Communities v. Kingdom of Sweden*; *Case C-118/07 Commission of the European Communities v. Republic of Finland*.

[207] The tribunal may do so even in if the BITs refers to "in accordance with domestic law" and taking into consideration Article 31 VCLT, as indicated in: Eleanor V.E. Sharpston, *Opinion of Advocate General Sharpston: Case C-118/07 Commission of the European Communities v Republic of Finland*, Opinion (Luxembourg: European Court of Justice, September 10, 2009), http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62007C0118:EN:HTML paras. 34-35.

[208] *Eureko BV v Slovak Republic, Award on Jurisdiction, Arbitratbility and Suspension* Investment Claims (Permanent Court of Arbitration 2010), §245.

[209] United Nations Conference on Trade and Development (UNCTAD), "The REIO Exception in MFN Treatment Clauses," International Investment Policies for Development (2004): 44, www.unctad.org/en/docs/iteiit20047_en.pdf.

[210] *Case C-205/06 Commission of the European Communities v Republic of Austria*; *Case C-249/06 Commission of the European Communities v. Kingdom of Sweden*; *Case C-118/07 Commission of the European Communities v. Republic of Finland*.

108. Certain exceptions usually exist, however, and the EU will have to decide how to deal with, for instance, developing country-specific exceptions.[211] The scope of the exceptions related to 'public purposes' is potentially broad,[212] yet its application is narrow in practice (although self-judging) because it refers either to a state of necessity *or* can permit a developing State to take restrictive measures in accordance with GATS Article XII.[213] Examples of broad exceptions can be found in, for instance, the Canada and Norway model IIAs, which allow for "equitable, non-discriminatory and good faith application of measures relating to maintenance of safety, soundness, integrity or financial responsibility of financial institutions"[214] and for "restrictions (…) when necessary to ensure compliance with laws and regulations concerning financial security",[215] respectively. Exceptions protecting the rights of creditors are also common,[216] and ensure that judicial decisions restraining property (e.g. liens) are not considered illegal.[217] This is largely conducive with the public security interest exceptions articulated in Article 66 and Article 64(3) TFEU.

109. The EU does not impose the principle of reciprocity on third States concerning the free movement of capital and payments. Therefore, and in accordance with Title III TFEU,[218] the EU may provide for at least transitional or temporary exceptions[219] to developing States in future IIAs. For instance, only a few IIAs contain an explicit

[211] Although there are no exceptions in: Swedish, Dutch, Greek, German, Finnish, Danish model BITs, Austria-Bulgaria BIT, Germany-Romania BIT, Finland-Ethiopia BIT, Bulgaria-Slovakia BIT.
[212] Broad exceptions in line with EU law are: safeguard measures, serious balance of payments problems, "les circonstances exceptionnels [causant] un déséquilibre grave pour la balance des paiments" (France, UK model BIT).
[213] Of the model BITs we surveyed, Austria seems to be the only EUMS that includes self-judging exceptions: "A contracting Party may prevent a transfer through the equitable, non-discriminatory and good faith application of laws and regulations/ of measures on the issuing, trading and dealing in securities, concerning the payment of contributions or penalties, futures and derivatives, reports or records of transfer, or in connection with criminal offences and orders or judgments in administrative and adjudicatory proceedings, provided that such measures and their application shall not be used as a means of avoiding the Contracting Party's commitments or obligations under the Agreement." (Austria model BITs)
[214] Foreign Affairs and International Trade Canada, *Canada model FIPA 2004*, Article 14(3) and (6), 16-17.
[215] Norway model BIT, 2007.
[216] For example ECT 1998, Article 14(4); NAFTA 1994, Article 1109(4); US model BIT 2004, Article 7.
[217] Kenneth J. Vandevelde, "The Bilateral Investment Treaty Program of the United States," *Cornell International Law Journal* 21, no. 2 (1988): 248, note 312.
[218] Entitled: Cooperation with Third Countries and Humanitarian Aid
[219] The appropriate derogation provision will need to outline the precise conditions under which measures are taken and contain a mechanism that ensures its temporary nature.[219] Transitional provisions, on the other hand, are those measures that the host state may maintain whilst preparing the

balance-of-payment exception.[220] An example of the successful use of a broad exception by a developing State aimed at managing balance of payments is the Chilean "encaje". The IMF evaluated the monetary system in its entirety in a research review and came to the following conclusion: the system of capital controls[221] was one of the financial sector reforms that supposedly granted more monetary policy autonomy to the government and prevented rapid shifts in funds derived from foreign investments.[222] The system and transitional exception thus contributed to Chile's sustainable development over the last two decades, a result that appears to be in the EU's interest also.[223]

PROPOSAL

110. The following proposal is based on the above analysis as well as Article 14 of the ECT, excluding only the ECT-specific references to the energy sector:

(1) Each Contracting Party shall with respect to Investments in its Area of Investors of any other Contracting Party guarantee the freedom of transfer into and out of its Area, including the transfer of:

(a) The initial capital plus any additional capital for the maintenance and development of an Investment;

(b) Returns;

(c) Payments under a contract, including amortization of principal and accrued interest payments pursuant to a loan agreement;

(d) Unspent earnings and other remuneration of personnel engaged from abroad in connection with that Investment;

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economy for liberalisation. United Nations Conference on Trade and Development (UNCTAD), *Transfer of Funds*, 9.

[220] Kolo, "Transfer of Funds: The Interaction between the IMF Articles of Agreement and Modern Investment Treaties: A Comparative Law Perspective," 356-357.

[221] Two-fold system of capital controls: 1. Subject capital inflows to a one-year, non-interest paying deposit with the central bank 2. Submit funds to a 10 to 30% unremunerated reserve requirement (URR).

[222] Akira Ariyoshi et al., *Capital Controls: Country Experiences with Their Use and Liberalization* (Washington DC, USA: International Monetary Fund (IMF), 2000), 70, http://www.imf.org/external/pubs/ft/op/op190/index.htm. The authors do, however, point out the many differing views on the actual success of the "encaje".

[223] This in particular is one aspect which can be elaborated upon in a new chapter as explained in the overall conclusion to this submission.

(e) Proceeds from the sale or liquidation of all or any part of an Investment;

(f) Payments arising out of the settlement of a dispute;

(g) Payments of compensation.

(2) Transfers under paragraph (1) shall be effected without delay and (except in case of a Return in kind) in a Freely Convertible Currency.

(3) Transfers shall be made at the market rate of exchange existing on the date of transfer with respect to spot transactions in the currency to be transferred. In the absence of a market for foreign exchange, the rate to be used will be the most recent rate applied to inward investments or the most recent exchange rate for conversion of currencies into Special Drawing Rights, whichever is more favourable to the Investor.

(4) Notwithstanding paragraphs (1) to (3), a Contracting Party may protect the rights of creditors, or ensure compliance with laws on the issuing, trading and dealing in securities and the satisfaction of judgments in civil, administrative and criminal adjudicatory proceedings, through the equitable, non-discriminatory, and good faith application of its laws and regulations.[224]

7. EXCEPTIONS

OVERVIEW AND INTRODUCTION

- Exceptions allow for exclusion of liability, including where measures relate to the protection of the environment and human rights.
- General exceptions modelled on Article XX GATT ensure that States have regulatory space to achieve specific policy objectives
- Appropriately worded IIAs can discourage States from relaxing environmental regulation.

[224] In the case of the EU, a good faith application of its regulations falls under the following: European External Action Service (EEAS), "Sanctions or Restrictive Measures," *EEAS Common Foreign and Security Policy > Sanctions*, n.d., http://www.eeas.europa.eu/cfsp/sanctions/index_en.htm.

- EU must decide whether it should self-judge measures that concern essential security interests.
- The parameters of essential security interests may be expanded or limited.

111. Although they do not further investor protection—tending rather to have the opposite effect—exceptions may give the host territory confidence to admit investments given the (theoretical) safety valve or regulatory space that they provide. In addition, it should also be borne in mind that exceptions are generally interpreted narrowly.[225] They can include, for example, the exclusion of liability in respect of measures relating to the protection of essential security interests, public order, human health or the environment. This is especially pertinent in the context of the EU given that it has announced that "…the new European international investment policy should be guided by the principles and objectives of the Union's external action, including the rule of law, human rights and sustainable development as well as taking into account the other policies of the Union and its Member States".[226] In addition, the EU has a proactive environmental policy[227] and it should have the freedom to enforce measures that have as their legitimate objective, the protection of the environment, without being exposed to liability for compensation.

OPTIONS

1. Policy Concerns

112. The inclusion of general exceptions to IIA obligations modelled on Article XX of the GATT ensures that States have the regulatory space to achieve specific policy objectives without breaching IIA obligations.[228] One such area that the EU may wish

[225] As can be seen by the approach taken by the Tribunal in *Enron Corporation v Argentina*, which noted that, "… any interpretation resulting in an escape route from the obligations defined cannot be easily reconciled with that object and purpose (of the BIT). Accordingly, a restrictive interpretation of any such alternative is mandatory".
[226] European Commission, *Towards a Comprehensive European International Investment Policy*, §17.
[227] See, for example, Article 11 TFEU.
[228] For example, the official commentary on the 2003 Canadian Model FIPA states that: "General exceptions to the disciplines of the Agreement are included in order to meet several important policy goals: the protection of human, animal or plant life or health, as well as the conservation of living or non-living exhaustible resources; to ensure that Parties may adopt or maintain reasonable measures for prudential purposes; to guarantee a Party's ability to protect information related to, or to take measures necessary to protect, its essential security interests; and to exclude cultural industries from the

to achieve a specific policy objective is in relation to its concern in promoting a greener environment, for example. This particular example is chosen and analysed given that the EU has attempted to be a role-model for the protection of the environment around the globe[229] and, as has been expressed in a Communication from the Commission to the Council,

> Investment agreements should be consistent with the other policies of the Union and its Member States, including policies on the protection of the environment […] Investment policy will continue to allow the Union, and the Member States to adopt and enforce measures necessary to pursue public policy objectives.[230]

However, it should be borne in mind that, given the flexibility of a general exceptions clause, the EU could craft it in any way it wishes to ensure that it has the regulatory space to achieve any policy objective.

113. Although a survey of BITs has found that exception clauses appear in a significant number of BITs, these exceptions clauses usually relate to specific obligations, such as national treatment, or to specific exceptions for essential security interests, public order or taxation, for example. They are not general exceptions modelled on Article XX GATT.[231] Canada is exceptional in including this type of provision into its BITs among OECD States. In addition, the China-New Zealand FTS incorporates *verbatim* both Article XX GATT and Article XIV GATS.[232] Article 10 of the Canadian Model BIT is instructive and merits reproduction here.

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provisions of the Agreement". Available at, <www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/what_fipa.aspx?lang=en&menu_id=45&menu=R#structure>.

[229] For example, it is a party to a number of international treaties on the environment and climate change, including the two United Nations climate treaties, the UN Framework Convention on Climate Change (UNFCCC) 1992 and the Kyoto Protocol. The latter requires the 15 countries that were EU members at the time to reduce their collective emissions in the 2008-2012 period by 8% to below 1990 level. Emissions monitoring and projections show that the EU is well on track to meet this target. Regulatory space for environmental policy objectives such as this would ensure that it is not left exposed to investment treaty claims as a result of its attempt to meet international treaty obligations on the environment.

[230] European Commission, *Towards a Comprehensive European International Investment Policy*, 5.

[231] William W. Burke-White and Andreas von Staden, "Investment Protection in Extraordinary Times: The Interpretation of Non-precluded Measure Provisions in Bilateral Investment Treaties," *Virginia Journal of International Law* 48, no. 2 (2008): 307.

[232] Article concerns General Exceptions to the WTO's GATS. It provides an important level of protection for national laws dealing with various consumer protection and privacy problems.

> 1. Subject to the requirement that such measures are not applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary:
>
> (a) to protect human, animal or plant life or health;
>
> …
>
> (c) for the conservation of living or non-living exhaustible natural resources.

114. Environmental concerns are also explicitly provided for under Article 1114 NAFTA in a differently formulated clause:

> Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.[233]

115. Reference to the environmental concerns of the State is, in principle, a good idea as it may avoid a finding by a tribunal that environmental concerns amount to expropriation.[234] The formulation in Article 1114 NAFTA above is not necessarily the best model to follow, however. It has a potentially limited effect given its wording. First, the wording of this provision is tautological as it refers to "any measure otherwise consistent with this Chapter". Furthermore, the phrase "sensitive to environmental concerns" is somewhat weaker than the equivalent wording in Article XX GATT. Finally, the exception cannot be invoked in connection with regulation that concerns environmentally unacceptable activity in another NAFTA State.[235] On balance, therefore, it would seem that a model similar to that provided in Article 10 of

[233] Our research of EUMS BITS revealed that a similar construction may be found in Article XVII(2) of the newly signed but not yet in force Canada-Romania BIT (2009). It may also be found in the existing BITs of Romania-Canada (1997) (Article XVII). As Andrew Newcombe and Lluís Paradell point out, "The use of general exceptions clauses modelled on Article XX, GATT, or Article XIV, GATS, is not common in IIAs. Canada is unique amongst Organization for Economic Cooperation and Development (OECD) states in including the exceptions in its BITs". Newcombe and Paradell, *Law and Practice of Investment Treaties*, 500.

[234] For example, *Santa Elena v Costa Rica*, Award, 17 February 2000, 5 ICSID Reports 153, §72.

the Canadian model BIT based on Article XX GATT would serve the aims of the EU better.

116. In addition, reference should be made to Article 1114(2) NAFTA, which attempts to deal with the problem of States relaxing environmental standards to attract investment. This has come into sharper focus now that EU MS may be in a situation where they negotiate investment agreements on behalf of or in partnership with the EU which has competence over market access:

> The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If a Party considers that another Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement.

117. Although it is framed in hortatory language and doubtful whether any specific enforceable obligations are created,[236] it does offer an expression of the intent of the parties to ensure robust environmental protection. If similar wording were included in the preamble, as was the case with the proposed MAI (in addition to an explicit obligatory clause) this expression of intent would be strengthened and form part of the context of the IIA for the purposes of interpretation. In addition, it has the merit of furthering the EU's environmental policies by encouraging both EUMS and third states to maintain tight environmental regulation.

2. Self-judging Nature of Essential Security Interests Exceptions

118. One controversial issue that surrounds essential security interests exceptions is whether they are self-judging in nature—"which it considers necessary"—as can be

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[235] Simon Baughen, "Investor Rights and Environmental Obligations: Reconciling the Irreconcilable?," *Journal of Environmental Law* 13, no. 2 (February 2001): 199, http://jel.oupjournals.org/cgi/doi/10.1093/jel/13.2.199.

[236] NAFTA contains an Environmental Side Agreement which provides for arbitration against a party that consistently fails to enforce its environmental laws.

seen in the ECT at Article 24, NAFTA at Article 2102 and in Article XVII(6)(a) of the newly signed but not yet in force Canada-Romania BIT for example, and alternatively in Article XXI GATT.[237] This goes to the standard of review to be employed in the interpretation of the provision. The language used is important since this is what the self-judging nature of the provision is likely to turn upon.[238] As long as the State acts in good faith in adjudging the measures as 'necessary', the measures will be in accordance with the BIT.[239] If language tantamount to that used in Article XXI GATT is not used, tribunals will likely take an objective approach.[240]

119. The most extreme form of protecting essential security interests is where these are made immune from judicial review in the IIA exception. For example, the India-Singapore CECA (2005), provides that

> Any decision of the disputing Party taken on such security considerations shall be non-justiciable in that it shall not be open to any arbitral tribunal to review the merits of any decision…

120. As such, the EU will have to decide whether it would rather be the judge of a measure which concerns an essential security interest or leave this to a *post hoc* judicial review. The more balanced approach is offered by the former approach, as can be seen in the ECT, rather than making these kinds of measures immune from judicial review. Either way, this is a departure from the present weight of BITs in EUMS, which are either not self-judging or make no provision at all with respect to essential security interests. Article 7(1) of the UK model BIT is an example of non-self-judging essential security EUMS practice where provision is made in EUMS BITs:

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[237] Contrast this with, for example, Argentina-US BIT (1991), El-Salvador-US BIT (1999) or Croatia-US BIT (1996), which provide "[t]his Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfilment of its obligations with respect to the maintenance or restoration of international peace and security, or the protection of its own essential security interests". Incidentally, the tribunals CMS Gas Transmission Company v Argentina, Award, ICSID Case No ARB/01/8, IIC 65 (2005); §366-373, Enron Corporation and Ponderosa Assets, LP v Argentina, Award, ICSID Case No ARB/01/3; IIC 292 (2007), §322-342, LG&E Energy Corp and ors v Argentina, Decision on Liability, ICSID Case No ARB 02/1; IIC 152 (2006); (2007) 46 ILM 36. 2, §12, *Sempra Energy International v Argentina*, Award, ICSID Case No ARB/02/16; IIC 304 (2007). §364-391, all found that the provision is not self-judging.

[238] See for example, *CMS v Argentina*, §370; *Enron v Argentina*, §335; *LG&E v Argentina*, §212.

[239] *LG&E v Argentina*, §214.

[240] As was the case in the interpretation of Article XI of the Argentina-US BIT by the tribunals in *CMS Gas Transmission Company v Argentina*, *LG&E v Argentina*; *Enron v Argentina*; and *Sempra v Argentina*.

> The provisions of this Agreement relative to the grant of treatment not less favourable than that accorded to the nationals or companies of either Contracting Party or of any third State shall not be construed so as to preclude the adoption or enforcement by a Contracting Party of measures which are necessary to protect national security, public security or public order…[241]

3. Limitation of Exceptions

121. In light of self-judging exceptions, the EU may wish to indicate to investors that it would limit the reach of exceptions. This practice can be seen for example in some BITs that limit essential security interests exceptions by adding qualifications such as measures taken in times of "…emergency in that Contracting Party or in international relations…". There is evidence for this in the Korea-Japan BIT (2002), which provides at Article 16:

> 1. Notwithstanding any other provisions in this Agreement other than the provisions of Article 11, each Contracting Party may:
>
> (a) take any measure which it considers necessary for the protection of its essential security interests;
>
> (i) taken in time of war, or armed conflict, or other emergency in that Contracting Party or in international relations; or
>
> (ii) relating to the implementation of national policies or international agreements respecting the non-proliferation of weapons;

122. The breadth of 'essential security interests' more generally is also an issue to consider. As such, it may be necessary to include an exhaustive list to delimit the scope or, alternatively, to include a term such as 'or other emergency' which could extend to economic crises or natural disasters, for instance. It would be in the interests of the EU to include such a provision that would extend to economic crises, especially in light of recent events, to ensure that a safety valve is available if necessary. To this

[241] See also Article 3, German model BIT 2008 (MFN and National Treatment exception).

end, Article XI of the US–Argentina BIT (1991), which provides for 'emergency' situations, has been considered broad enough to include economic emergencies.[242]

PROPOSAL

123. Given the above considerations and hallmarks of EU policy, the following model is suggested in respect of exceptions under a EU Model BIT:

Preambular language:

> The Parties recognise that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures.[243]

Exceptions clause:

> 1. Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting, maintaining or enforcing any measure that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental and human rights concerns.
>
> 2. Subject to the requirement that such measures are not applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or enforcing measures necessary:
>
> (a) to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement;
>
> (b) to protect human, animal or plant life or health; or
>
> (c) for the conservation of living or non-living exhaustible natural resources.[244]
>
> 3. Nothing in this Agreement shall be construed:

[242] *CMS v Argentina*, §359-365; *LG&E v Argentina*, §238; *Enron v Argentina*, §232.
[243] Source: Article 1114(2) NAFTA.

(a) to require any Contracting Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests;[245]

(b) to prevent any contracting Party from taking any actions that it considers necessary for the protection of its essential security interests.

(i) taken in time of war, or armed conflict, or other emergency in that Contracting Party or in international relations; or

(ii) relating to the implementation of national policies or international agreements respecting the non-proliferation of weapons;[246]

8. DISPUTE SETTLEMENT MECHANISM

OVERVIEW AND INTRODUCTION

- Providing recourse for aggrieved investors is fundamental to any effective IIA.
- The EU intends to provide an investor-State dispute settlement mechanism in an EU IIA.
- EUMS courts may refer the review of EU acts or legislation to the ECJ.
- Recourse is possible in principle through the ECJ but there remains uncertainty as to whether IIAs are applicable law.
- Amendment of existing investor-State dispute resolution mechanisms is necessary and desirable if the EU is to be a respondent.
- A fork-in-the-road clause may limit an investor's dispute settlement options but it has an important public policy rationale.

124. Providing recourse for aggrieved investors is fundamental to any practicable IIA and, as such, provision is often made for dispute resolution either at domestic or international fora.[247] It is clear that the EU intends to follow suit, as is evidenced by

[244] Sources: Article 10 Canada model BIT; Article XVII Canada-Romania BIT (1997); Canada-Romania BIT (2009) (not yet in force).
[245] Sources: Article 24, Energy Charter Treaty and Article 2102 NAFTA, and alternatively Article XXI GATT.
[246] Source: Article 16 Korea-Japan BIT (2002).
[247] See, for example, US-Argentina BIT (1991), Article VII (2).

the following announcement by the Council[248]:

> [The Council] stresses, in particular, the need for an effective investor-to-state dispute settlement mechanism in the EU investment agreements and invites the Commission to carry out a detailed study on the relevant issues concerning international arbitration systems, including *inter alia* the legal and political feasibility of EU membership in international arbitration institutions… [249]

125. In the context of an EU BIT, a number of complications arise in respect of the traditional fora for investment dispute resolution. Investors regularly seek a remedy through national courts of the host state in which the investment was made. However, an EUMS tribunal does not have jurisdiction to review the legality of EU acts or legislation.[250] This is therefore not an option for investors under an EU IIA where the treatment emanates from the EU. On the other hand, if treatment emanates from an EUMS, national courts may apply national law, including EU law, and therefore it is not inconceivable to provide for national court proceedings in an IIA. This, however, may not be an optimal solution for foreign investors given that they may perceive national courts as biased. Alternatively, some other options are suggested below. In addition, a consideration of fork-in-the-road provisions will ensue.

OPTIONS

1. Recourse through the ECJ

126. The judicial review of EU acts or legislation falls within the exclusive competence of the ECJ, according to Article 344 TFEU.[251] Since agreements entered into by the EU form an integral part of EU law,[252] a violation of a mixed agreement to which the EU is a party may, in principle, form the basis of a claim to the ECJ. In fact, this is made clear by the Statement submitted by the EC to the Secretariat of the ECT pursuant to Article 26(3)(b)(ii) of the ECT.[253] Under Article 263 of the TFEU,

[248] European Commission, *Towards a Comprehensive European International Investment Policy*, 10.
[249] Council of the European Union, *Conclusions on a Comprehensive European International Investment Policy*.
[250] Article 19(3)(b) TEU provides that local tribunals may request the ECJ for an interpretation of EU law in this respect.
[251] See also Case C-459/03 *Commission v Ireland* [2006] ECR I4635.
[252] Case 181-73 *R & V Haegeman v Belgium,* Judgment of the Court, 30 April 1974.
[253] Statement submitted by the European Communities to the Secretariat of the Energy Charter

the grounds on which the EU or an EUMS may be in violation are "[a] 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". It should be borne in mind that, for a natural person to be the claimant in a case, Article 263 states a number of conditions that would need to be met.

127. Should an investor wish to make a complaint before national courts or the ECJ however, the question of who is the right respondent is likely to arise. This may be, for instance, an EUMS, the EU or its institutions. Again the approach to the ECT, a mixed agreement, is set out in the Statement of the EC to the Secretariat of the Energy Charter and represents one possible approach for a future EU model BIT:

> The [EC] and their [EUMS] have both concluded the Energy Charter Treaty and are thus internationally responsible for the fulfilment of the obligations contained therein, in accordance with their respective competences.
>
> The [EC] and [EUMS] will, if necessary, determine among them who is the respondent party to arbitration proceedings initiated by an Investor of another Contracting Party…[254]

128. Seeking recourse through the ECJ is not an ideal solution, however. This is especially in light of the fact that no action regarding an alleged violation of the WTO agreements has yet been successful given that the ECJ has refused to give direct effect to WTO law.[255] As such, it is unclear whether, in fact, it would apply an EU BIT. In addition, the (perceived) problem of bias is not addressed by this solution.

2. Adapting Present Investor-State International Dispute Settlement Systems

129. Investor-State arbitration is the most frequent avenue pursued in respect of investment disputes. This can be conducted, for example, under the ICSID Convention, using the UNCITRAL Rules, at the International Chamber of Commerce

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pursuant to Article 26(3)(b)(ii) of the Energy Charter Treaty, Official Journal of the European Communities L 69/115 (9 March 1998).

[254] Ibid.

[255] Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials*, 4th ed. (Oxford; New York: Oxford University Press, 2008), 215.

(ICC), the Stockholm Chamber of Commerce (SCC) or through *ad hoc* arbitration. First, the most fundamental hurdle is in respect of arbitration under the ICSID Convention or Additional Facility Rules in that only States can be party to arbitral proceedings conducted thereunder.[256] As such, ICSID would have to be amended if the EU was to be a party to investment disputes. Second, under the UNCITRAL Rules, like those pertaining to the ICC or SCC, there is no provision for the public notice of proceedings, access to documents, open hearings or *amicus curiae* briefs. Further, awards are subject to enforcement under the New York Convention, which in turn exposes them to judicial review at the national level. Nevertheless, all of these rule-systems remain popular amongst investors seeking redress from States. As such, seeking their amendment to allow the EU to be party to proceedings and increasing their transparency in the public interest is a prudent course of action.[257]

3. Fork-in-the-Road

130. The construction of a fork-in-the-road clause generally provides for a direct choice between domestic courts or international arbitration.[258] This avoids a multiplicity of claims and potentially conflicting awards. The words chosen in each construction may vary but the result is often the same. In fact, as will be illustrated below, practice indicates that international proceedings are rarely barred as a result of a fork-in-the-road-clause. It may also be the case that no provision is made.[259]

A typical example is provided by the France-Argentina BIT:

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[256] Note the Statement of the EC that, "[a]s far as international arbitration is concerned, it should be stated that the provisions of the ICSID Convention do not allow the European Communities to become parties to it. The provisions of the ICSID Additional Facility also do not allow the Communities to make use of them". European Communities, "Statement Submitted by the European Communities to the Secretariat of the Energy Charter Pursuant to Article 26(3)(b)(ii) of the Energy Charter Treaty" (Official Journal of the European Communities, March 9, 1998), 69.

[257] Support for this idea is evidenced by the fact that "[t]he Commission will explore with interested parties the possibility that the European Union seek to accede to the ICSID Convention (noting that this would require amendment of the ICSID Convention)", in European Commission, *Towards a Comprehensive European International Investment Policy*, 10. The European Communities has successfully negotiated the amendment of a number of international agreements/organisations. A recent example is the World Customs Organisation

[258] France-Algeria BIT 1993, Article 8(2); Austria-Bosnia Herzegovina BIT 2002, Article 12; UK-Mexico BIT 2006, Article 11(5)(b); Belgium-Luxembourg-Albania 1999, Article 11(3).

[259] From our survey of German BITs, this would appear to be the prevalent approach, requiring only to choose between investment arbitration fora. See Article 10, German Model BIT 2008. See also,

> Once an investor has submitted the dispute either to the jurisdiction of the Contracting Party involved or to international arbitration, the choice of one or the other of these procedures shall be final.

131. Once an investor chooses to settle in the host State courts, it then loses its right to international arbitration. It can often happen that there is confusion over whether the investor has made a choice between international arbitration or domestic litigation.[260] Given the advantages for investors of the former over the latter, where real doubt occurs it should be presumed that the investor has chosen international arbitration, as it is likely to have been the more favourable option. In practice, in order for a fork-in-the-road provision to be triggered, domestic proceedings must have been instituted prior to the choice of international arbitration, and that dispute must be in respect of the parties, subject matter, legal basis and facts, and the petitum. This can be significant where a contract claim is brought at the national level while a BIT claim is brought at the international level, yet both arise from the same set of facts. In other words, tribunals have held that the "fundamental basis of a claim sought to be brought before the international forum must be autonomous of claims to be heard elsewhere".[261] As such, the vast majority of tribunals have found some difference between the claims or parties and hence not let the fork-in-the-road clause deny an international arbitration jurisdiction.[262]

Although it is clearly beneficial for the investor to have as many options for as long as possible, from a public policy point of view the non-provision of a fork-in-the-road provision is not an option. Hence, the above wording as identified from the French-Argentina BIT above is recommended.

Switzerland-Pakistan BIT (for an interpretation *SGS v Pakistan* (Decision on Jurisdiction) 6 August 2003, 18 ICSID Review- FILJ (ICSID Case No Arb/03/11).

[260] See Christopher Schreuer, "Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road," *Journal of World Investment & Trade* 5, no. 2 (2004): 241. In fact, tribunals have made a distinction between claims established under the BIT and claims established under national law/contract, e.g. in *CMS v Argentina,* §511. As Schreuer stated: "Not every appearance before a tribunal of a host state will constitute a choice under a fork in the road provision." In the first case, the tribunal retains its competence to decide upon the treaty claim, even if the investor has resorted to national courts for a contract claim.

[261] See *Pantechniki SA Contractors & Engineers v Republic of Albania* ICSID Case No ARB/07/21.

[262] In this sense, the case *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v. Argentina*, ICSID Case No ARB/97/3, Decision on Annulment, 3 July 2002, § 55 is the prevailing authority.

IV. THE ADVANTAGES AND DISADVANTAGES OF AN EU MODEL BIT

OVERVIEW

- An EU model BIT provides for a consistent template from which the EU and EUMS can draw upon in concluding IIAs with third states.
- An EU model BIT means that EUMS will have to relinquish some flexibility in their negotiation of future IIAs.
- EU interests will be addressed in an EU model BIT.
- Added value of transparency, certainty and stability in the negotiation process.
- Many challenges presented by the increased number, needs and nature of actors in the negotiation and drafting of an EU [model] BIT.
- The key advantage for EUMS is the increased bargaining power it gives them in concluding BITs with third states.
- Make the EU a more attractive place to invest by incorporating gold standards in an EU model BIT.
- The adoption of an EU model BIT allows for the (necessary) conclusion of mixed agreements to ensure maximum investor protection.
- EU-wide BIT will guard against forum shopping.

WHY AN EU MODEL BIT?

132. The fundamental advantage of an EU model BIT is that it provides for a consistent approach among the EU and EUMS when they negotiate stand-alone IIAs between themselves as well as with third states. As a result, however, the provision of an EU model BIT will not remove the need to negotiate and conclude separate IIAs, which will inevitably deviate from the model. Even with the new competence of the EU in respect of FDI, the EU will still have to conclude mixed agreements, with EUMS being signatories to a given IIA alongside the EU.[263] As such, an EU model BIT simply offers a template.[264]

[263] Bungenberg, "Centralizing European BIT Making Under the Lisbon Treaty" (presented at the 2008 Biennial Interest Group Conference in Washington DC), 6, www.asil.org/files/ielconferencepapers/bungenberg.pdf.
[264] See Armand De Mestral, "Is a Model EU BIT Possible—Or Even Desirable?," *Columbia FDI Perspectives*, no. 21, Vale Columbia Center on Sustainable International Investment (March 24, 2010), http://www.vcc.columbia.edu/content/model-eu-bit-possible-or-even-desirable.

133. It will be important to make the case to EUMS for a model BIT over other investment protection options as well as their current independent BITs, the latter potentially being terminated in due course. To this end, the added value that such an instrument provides will have to be highlighted. Having a model BIT does oblige EUMS to relinquish some flexibility in their negotiation of BITs. This may have political implications for individual EUMS where they wish to grant certain concessions to some states, especially in respect of developing countries.[265] Indeed, in respect of the US model BIT, it has been pointed out that:

> Comparing the FCNs, the [present] European BIT program, and the US [Model] BIT program, the US program appears to be the least flexible. This is where its inherent problems lie. The United States' pattern of success in concluding BITs indicates that only countries that are heavily dependent on the United States for aid will be willing to adopt the Model BIT as proposed. Numerous other developing nations, however, will refuse to conclude BITs with the United States unless the provisions are modified.[266]

134. On the other hand, an EU model BIT could provide investors with a comprehensive umbrella of protection, which could provide for guaranteed market access in the pre-establishment phase and the highest level of protection in the post-establishment phase. While it would not eliminate the uncertainty of negotiations in the individual case, it would significantly mitigate this.[267] Similarly, it also increases the transparency of investment protection in the EU context, providing investors with certainty and stability throughout the 27 EUMS.

NUMBER, NEEDS AND NATURE OF EUMS

135. An EU model BIT would consolidate many of the current EUMS BITs, establishing a common benchmark for third states with regard to market access, non-

[265] See Valerie H. Ruttenberg, "United States Bilateral Investment Treaty Program: Variations on the Model, The," *University of Pennsylvania Journal of International Business Law* 9 (1987): 123. In addition, David Müller, "European Model BIT - What do we Need it for?" (Abstract, Prague, Czech Republic: Charles University, n.d.).
[266] Ruttenberg, "United States Bilateral Investment Treaty Program," 125.
[267] Müller, "European Model BIT - What do we Need it for?".

discrimination, and the free transfer of capital and personnel.[268] The challenge that this presents is triggered by the increased number, needs and nature of actors in the negotiation and drafting process of an EU model BIT. In this sense, "[EUMS] might have different priorities in any given third state, depending on how extensively their investors are engaged in that state and how strongly they are interested in attracting investors from there. Individual [EUMS] may also have different preferences for political and historical reasons".[269] Furthermore, the interests of potential third states will have to be taken into account. For example, as was the case with the drafting of the US Model BIT, "[…] agreements with Latin American states implicated Calvo-related issues, and "graduated" and "non-graduated" developing countries set different priorities for investment-related concerns".[270]

136. As a result, since the engineering of an EU model BIT will require the consolidation of diverse EU and EUMS policies and principles, there is an inevitable bargaining process that will ensue in the drafting process.[271] Thus, there are likely to be numerous political compromises with the result that no party involved in the drafting process will be fully satisfied. One of the major challenges for the EU will be to address its fundamental interests in promoting the rule of law, human rights, sustainable development and good governance, for example.[272] Incorporation of these interests represents added value for the EU but the value of a model BIT for EUMS, given that they will have less control over the drafting process, is less obvious.

LEVERAGE

137. The key advantage for EUMS is the leverage over third states that concluding an EU-wide BIT provides. It is much more favourable for third states to conclude a

[268] European Commission DG Trade, *Upgrading the EU Investment Policy*, 1.
[269] See the discussion by Joachim Karl, "The Competence for Foreign Direct Investment—New Powers for the European Union?," *Journal of World Investment & Trade* 5, no. 3 (2004): 413 and 425-6.
[270] K. S Gudgeon, "United States Bilateral Investment Treaties: Comments on Their Origin, Purposes, and General Treatment Standards," *Int'l Tax & Bus. Law* 4 (1986): 105.
[271] Karl, "The Competence for Foreign Direct Investment—New Powers for the European Union?," 413, fn. 69.
[272] Marc Bungenberg, "Centralizing European BIT Making Under the Lisbon Treaty" (presented at the 2008 Biennial Interest Group Conference, Washington, D.C., 2008), 13, www.asil.org/files/ielconferencepapers/bungenberg.pdf.

treaty with 27 States at once rather than with each State individually.[273] This will give the EU and EUMS greater bargaining power when they enter into negotiations with third States and, more generally, will attract potential parties to conclude IIAs with them.[274] A harmonised approach to investment will also make the EU an attractive place for FDI from third States because it guarantees an equal playing field for foreign investors throughout the EU.[275]

138. Not only are EUMS stronger when they act together as they have a greater bargaining power, but they may also have an opportunity to ensure that the gold standards of investment protection are included in all EU investment agreements. This would be a means of competing with NAFTA, for example. The European Commission Directorate-General for Trade has pointed out that "[i]n comparison to NAFTA countries' agreements, EU agreements and achievements in the area of investment lag behind because of their narrow content. As a result, European investors are discriminated vis-à-vis their foreign competitors and the EU is losing market shares".[276] In this way, an EU model BIT could incorporate the gold standards from a variety of investment protection instruments, making the EU a more attractive place for investment, in addition to raising investment protection globally.

PRACTICAL CONSIDERATIONS

139. In order to grant the maximum protection possible to investors, an EU model BIT may be necessary to ensure that mixed agreements are possible. This is because the EU may not have the competence to conclude IIAs in respect of some areas and would require EUMS to be parties also. There appears to be a debate as to the precise remit of the EU's competence in respect of FDI. The wording of Article 207 TFEU does not refer to investment protection and therefore leaves the question about the contents of the EU's competence unclear. The majority view in the literature is that Article 207 TFEU covers not only issues of investment liberalisation but also of investment protection. Some argue that this coverage should extend to all typical

[273] Bungenberg, Griebel, and Hindelang, *International Investment Law and EU Law*, 140.
[274] Marc Bungenberg, "Centralizing European BIT Making Under the Lisbon Treaty" (presented at the 2008 Biennial Interest Group Conference, Washington, D.C., 2008), 22.
[275] Burgstaller, "The Future of Bilateral Investment Treaties of EU Member States" *in* Bungenberg, Griebel, Hindelang, eds. *International Investment Law and EU Law*.
[276] European Commission DG Trade, *Upgrading the EU Investment Policy*, 1.

forms of investment protection including measures regarding expropriation. This is the view of the European Commission, for example.[277] Others commentators restrict the EU's investment competence to so-called performance standards, i.e. non-discrimination, fair and equitable treatment and full protection and security because the principle of neutrality vis-à-vis the EUMS systems of property ownership (Article 345 TFEU) excludes an EU competence regarding expropriation.[278]

140. An EU model BIT presents a subsidiary advantage in that it goes some way to preventing forum shopping between EUMS by third State investors. Since an EU model BIT extends standards throughout the EU, there is no incentive for potential investors to shop for the best investment protection amongst EUMS. This can help to circumvent the avoidance of obligations by investors, especially where these derive from the interests of the EU, for example in respect of environmental protection, human rights or labour standards.

V. CONCLUSION

141. In the above legal analysis we have presented the gold standards existent in international investment law, having reference to doctrine, case law and drawing from EUMS BITs as well as IIAs outside the spectrum of the EU. Moreover, we have identified the major advantages and disadvantages of having an EU model BIT in order to establish whether these gold standards could be included in such an IIA, or whether they can be used for guidance in future individual EUMS BITs. .

142. There were, however, a number of areas that were beyond the scope of this particular memorandum. It would nevertheless be pertinent to consider these at a later stage and we suggest that follow-up work should be conducted in respect of the below points of discussion.

[277] European Commission, *Towards a Comprehensive European International Investment Policy*, 5.
[278] Christian Tietje, "Die Außenwirtschaftsverfassung der EU nach dem Vertrag von Lissabon," ed. Christian Tietje and G. Kraft, *Beiträge zum Transnationalen Wirtschaftsrecht* 83, no. 9 (2009): 14.

143. At various points in this memorandum we have raised but not elaborated upon some questions of EU competence. A chapter on which gold standards best fit with EU objectives on external and investment policy would logically follow from the two chapters in the present memorandum. That exercise could include an analysis of competences to conclude agreements on certain aspects both within the EU institutions as well as with regard to the EU and its EUMS competences.

144. A further follow-up chapter could engage in a deeper analysis of the various traditions and standards evident in EUMS BITs. One of the greatest challenges for the EU investment policy in general will be a determination of the various traditions and standards EUMS follow when concluding BITs. This is especially so in light of the review period being extended to ten years, thus extending the timeframe for concluding an EU model BIT or commending gold standards to EUMS.[279] Countries such as Germany, France and the UK are of particular interest here since they have been most active in the conclusion of IIAs. However, added value would be achieved if this chapter were to also deal with some of the BITs concluded by the more recent EUMS, who may potentially be inspired, historically and culturally, to include or dispense with terms, aspects or concepts taken into account or disregarded by the EU-15. One aspect to be considered in particular is the feasibility of including the highly contested umbrella clause in a potential EU model BIT.

145. A third chapter in addition to the above should address the advantages and disadvantages of the type of instrument that is ultimately adopted. Although in this particular study we have focused on an EU model BIT, it is admitted that a more comprehensive analysis is desirable, encompassing all possibilities for investment agreements, e.g. FTA, PCA, etc. The reason for our focus on a model BIT has been because, first, an EU model BIT would likely be the most straight-forward option for incorporating the standards as addressed in this memorandum and, secondly, a Model for the Protection of Investment already exists, thus ruling out this latter option for the time being.

[279] Lõrinc Rédei, Paola Buonadonna, and Eimear Ní Bhroin, "Bilateral Investment Treaties: Limiting the Commission's Authority," *European Parliament Press Service* (Brussels, Belgium, May 10, 2011), sec. Press release - Plenary Sessions, http://www.europarl.europa.eu/de/pressroom/content/20110509IPR18971/html/Bilateral-investment-treaties-limiting-the-Commission%27s-authority.

146. Lastly, the feasibility of putting into practice our suggested gold standards may raise difficulties having regard to a number of factors. For instance, newly industrialised countries such as the ASEAN countries may be opposed to the high level of protection suggested in this memorandum. Their increased leverage and bargaining power means that they are becoming less dependent on EU investment. Moreover, acquiring consensus among EUMS on such a high level of protection to investors will require extensive negotiations, especially since the Parliament has already expressed its interest in a more restricted level of protection.

VI. ANNEX

List of IIAs Consulted

147. The group had the opportunity to analyse in depth the practice of a selection of EUMS wherever their BITs referred to issues pertinent to this study. Hence, some EUMS BITs were consulted more frequently than others but this should not be interpreted as giving any particular weight to the practice of one EUMS or another, but rather to highlight practice within the EU where relevant to this study.

Argentina - US BIT 1991
Austria – Bosnia-Herzegovina BIT 2002
Austria - Azerbaijan BIT
Austria – Malta BIT 2002
Austria model BIT
Belgium - Croatia BIT 2001
Belgium-Luxembourg – Albania BIT 1999
Belgium-Luxembourg – Algeria BIT 1991
Belgo-Luxemburg model BIT
Bulgaria - Austria BIT 1997
Bulgaria – Netherlands BIT 1999
Bulgaria – Slovakia BIT 2005
Bulgaria - Austria BIT 1997
Canada model FIPA, 2004
Canada - Peru BIT 2006
Croatia - US BIT, 1996
Czech Republic - Cyprus BIT 2001
Czech Republic - Bulgaria BIT1999
Czech Republic - Malta BIT 2003
Denmark – Albania BIT 1995
Denmark - Algeria BIT 1999
Denmark - Belarus BIT 2004
Denmark - Bosnia BIT 2004
Denmark - China BIT 2002
Denmark - Croatia BIT 2000
Denmark - Egypt BIT 1997
Denmark - India BIT 1995
Denmark - Korea BIT 1996
Denmark – Mongolia BIT1995
Denmark - Mozambique BIT 2002
Denmark - Pakistan BIT 1996
Denmark - Philippines BIT 1997
Denmark - Russian Federation BIT1994
Denmark - Slovenia BIT 1999
Denmark - Tanzania BIT 1996
Netherlands - Cambodia BIT 2003
Netherlands - Cambodia BIT 2006
Denmark – Tunisia BIT 1996
Denmark – Uganda BIT 2001
Denmark – Venezuela BIT 1994
Denmark – Zimbabwe BIT 1996
Denmark – Poland BIT 1989
Denmark model BIT
Energy Charter Treaty
El Salvador - US BIT 1999
Finland – Belarus BIT 2006
Finland – Guatemala BIT 2005
Finland model BIT
Finland - Ethiopia BIT 2006
France-Algeria BIT 1993
France – Argentina BIT 1993
France model BIT
France - Bahrain BIT 2005
Germany - Argentina BIT 1991
Germany – Egypt BIT 2005
Germany – Afghanistan BIT 2005
Germany model BIT 1994
Germany model BIT 2005
Germany model BIT 2008
Greece – India BIT 2007
Greece – Jordan BIT 2005
Greece model BIT
Greece - Azerbaijan BIT 2004
Hungary – Serbia BIT 2001
Hungary – Uzbekistan BIT 2002
Italian model BIT
Italy – Angola BIT 1997
Italy – Angola BIT 2002
Italy-Jordan BIT 2001
Italy - Lithuania BIT 1994

Korea - Japan BIT 2002
NAFTA Agreement
Netherlands – Bulgaria BIT 1999
Netherlands - China BIT 2001
Netherlands - Costa Rica BIT 1999
Netherlands - El Salvador BIT 1999
Netherlands - Ethiopia BIT 2003
Netherlands - Honduras BIT 2001
Netherlands - Jordan BIT 2007
Netherlands - Kuwait BIT 2001
Netherlands - Namibia BIT 2002
Netherlands – Turkey BIT 986
Netherlands - Uganda BIT 2000
Netherlands – Yugoslavia BIT 2002
Netherlands – Belarus BIT 1995
Netherlands – Korea BIT 2003
Netherlands model BIT
Norway model BIT 2007
Portugal – Algeria BIT 2004
Portugal – Bosnia Herzegovina BIT 2002
Portugal – China BIT 2005
Portugal - Libya BIT 2003
Romania - Canada BIT 2009
Spain - Albania BIT 2003
Spain - Argentina BIT 1991
Spain - Colombia BIT 2007
Sweden – China BIT 2002
Sweden - Mexico BIT 2000
Sweden – Poland BIT 1989
Sweden - Russian Federation BIT 1995
Sweden – Slovenia BIT 1999
Sweden – Kazakhstan BIT 2004
Switzerland – Pakistan BIT 1995
Sweden model BIT
UK - Vietnam BIT 2002
UK model BIT
United Kingdom - Albania BIT 1994
United Kingdom - Angola BIT 2000
United Kingdom - Belarus BIT 1994
United Kingdom - Bosnia - Herzegovina BIT 2002
United Kingdom - Côte D'Ivoire BIT 1995
United Kingdom - Cuba BIT 1995
United Kingdom - El Salvador BIT 1999
United Kingdom - Estonia BIT 1994
United Kingdom/Barbados BIT 1993
United Kingdom - Mexico BIT 2006
US - Argentina BIT 1994
US – Ecuador BIT 1993
US model BIT 2004
USSFTA

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