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## C H A P T E R 3

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# TRENDS IN INTERNATIONAL INVESTMENT AGREEMENTS, 2010–2011: THE INCREASING COMPLEXITY OF INTERNATIONAL INVESTMENT LAW

STEPHAN W. SCHILL AND MARC JACOB

## INTRODUCTION

Analyzing trends in international investment agreements (IIAs) is necessarily a personal perspective on the past, present, and future of international investment law. This is so because it entails more than just the description of singular episodes of investment treaty-making in 2010/2011, but involves both putting those episodes into perspective in relation to past practice and predicting their potential impact on an uncertain future. In addition, analyzing trends involves reducing the complexity of what is largely bilateral treaty-making to developments that have gained, or have the potential to gain, momentum among a significant number of actors. Finally and more mundanely, an analysis of trends in investment treaty-making has to grapple with the difficulty of obtaining the texts of recently concluded agreements. While some countries maintain easily accessible and well-navigable websites with the relevant information, others are less transparent.<sup>1</sup>

1. This shortcoming at the domestic level is only partly remedied by databases maintained by international organizations. The most comprehensive online database on international investment instruments maintained by the United Nations Conference on Trade and Development (UNCTAD), for example, mostly contains older investment treaties and is thus only of limited help for assessing recent trends in investment treaty-making.

It is for these reasons that the following observations constitute a (potentially highly) selective and subjective assessment and may not be shared by all.

With these caveats in mind, what follows are current trends and events in international investment treaty-making as we see and evaluate them in their importance for the overall regime of international investment law and international investment policy-making. In doing so, we assume that international investment law can sensibly be analyzed as one international legal regime although it is composed of thousands of bilateral treaties and shored up by ad hoc investor-state arbitration.<sup>2</sup> Although we will unfold and refine our observations shortly, if there is one major trend we discern with respect to the sources of international investment law and to the policy goals pursued by the relevant actors, it is an increase in complexity concerning the growing web of IIAs that marks current developments in the field (A). This increasing complexity manifests itself in various ways. Not only does it put many categories used to describe and analyze international investment treaties, their growth, and structure into question, it also makes it more difficult to carve out a common core and framework that holds international investment law together as a discrete field of international law (B).

## A. THE INCREASING COMPLEXITY OF IIA PRACTICE

Trends designate general tendencies or general directions in which objectives or a series of data points—for our purposes: IIAs—appear to move over time. In that sense, past reviews of trends in IIAs in this *Yearbook* have focused on how investment treaty-making has been refined through striking a clearer and more appropriate balance between investor protection and non-investment related public interests. Techniques include altering the content of newly concluded investment treaties,<sup>3</sup> developing new model investment treaties by states such as the United States, Norway, or South Africa,<sup>4</sup> and renegotiating existing investment treaties.<sup>5</sup> This refinement occurred in reaction to discontent with existing IIAs and the balance they strike between the host country's right to regulate and the expectations of investors regarding a transparent, predictable, and consistent investment framework, in reaction to the interpretation of investment treaties by arbitral tribunals as well as in reaction to calls by stakeholders for a better balance between investor

2. On understanding international investment law as a uniform legal regime see generally Ephraim Chalamish, "The future of bilateral investment treaties: A de facto multilateral agreement?," 34 *Brooklyn Journal of International Law* 303 (2009); Santiago Montt, *State Liability in Investment Treaty Arbitration—Global Constitutional and Administrative Law in the BIT Generation* (Oxford and Portland: Hart Publishing, 2009); Stephan Schill, *The Multilateralization of International Investment Law* (Cambridge: Cambridge University Press, 2009); Jeswald W. Salacuse, *The Law of International Investment Treaties* (New York: Oxford University Press, 2010).

3. Peter Muchlinski, "Trends in international investment agreements: Balancing investor rights and the right to regulate. The issue of national security," in Karl P. Sauvant, ed., *Yearbook on International Investment Law and Policy 2008/2009* (New York: Oxford University Press, 2009), pp. 35, 36–50.

4. Peter Muchlinski, "Trends in international investment agreements, 2008/2009: Review of the model bilateral investment treaties of Norway, South Africa and the United States," in Karl P. Sauvant, ed., *Yearbook on International Investment Law and Policy 2009/2010* (New York: Oxford University Press, 2010), pp. 41, 55–85.

5. Edward G. Kehoe and Paul B. Maslo, "Trends in international investment agreements, 2009/2010: Recent steps in the evolution of bilateral investment treaties and the UNCITRAL arbitration rules," in Karl P. Sauvant, ed., *Yearbook on International Investment Law and Policy 2010/2011* (New York: Oxford University Press, 2011), p. 37.

rights, investor obligations, and non-investment related public interest.<sup>6</sup> Stating that there is a trend to rebalance investor rights and the host country's right to regulate by modifying investment treaty practice is often understood to mean two things: first, that it is normatively apposite to distinguish between older (read: "atavistic and outdated") and modern (read: "better") approaches to investment treaty-making; and second, that the trend thus discerned is widely shared among investment treaty-makers in the sense of representing a common view about where international investment law should be headed more generally.

Certainly, many countries are moving towards more refined international investment treaties, as observed in past reviews of IIAs in this *Yearbook*. Yet we would challenge an all-too-ready assumption that there is a uniform and general development in investment treaty practice from traditional, shorter, and unrefined investment treaties to more elaborate and "well-intended" models. While the statistics continue to point to a rise in IIAs as a whole, we observe that the landscape of such conventions as a whole is becoming increasingly multifaceted.

First, state practice differs with respect to investment treaty-making (1). This holds true both with respect to whether investment treaty obligations are pursued in self-standing instruments or as part of more comprehensive preferential trade and investment agreements (PTIAs) (a), and when considering that different states have made use of different models for concluding both bilateral investment treaties (BITs) and PTIAs in 2010 and 2011 (b). In addition, the debate about the proper content and balance between investor rights and host country powers continues. Above all, the desirability and hence future of investor-state arbitration continues to be a highly contested item on the investment policy agenda (2).

Second, the landscape of IIAs becomes more intricate because of the emergence of new actors in international investment policy- and treaty-making and a gradual redefinition of "center" and "periphery" in the field. Not only is there a further increase in South-South investment cooperation, but a number of countries that so far have not been considered trendsetters are leaving their imprint on investment treaty-making. This changes the geography of international investment law. In other words, developments are no longer exclusively coined by traditional European and North American capital exporting countries. This holds specifically true in respect of a marked increase in the treaty-making activity of Asian countries, including China, India, Japan, and the Republic of Korea. This may move the future center of investment treaty-making eastwards: from its current focus on transatlantic cooperation towards Asian-Pacific and transpacific cooperation (3).

Finally, there is a marked drift towards stronger regionalism in international investment law, with regional organizations serving both as instruments granting investment protection and as new actors in investment treaty-making (4). This holds true above all for ASEAN and the European Union, but also for other regional organizations. These developments suggest the existence of different strategies and philosophies pursued by different actors IIAs and herald the broader emergence of a more pluralistic universe of IIAs.

## 1. DIVERSIFICATION OF APPROACHES TO IIAS

In statistical terms, IIAs have continued to mushroom in 2010 and 2011. According to UNCTAD's *World Investment Report 2011*

6. Muchlinski, "Trends in international investment agreements," *op. cit.* n. 3, p. 36.

[i]n 2010, a total of 178 new IIAs were concluded (54 bilateral investment treaties (BITs), 113 double taxation treaties (DTTs) and 11 IIAs other than BITs and DTTs ('other IIAs'). As a result, at the end of 2010 the IIA universe contained 6,092 agreements, including 2,807 BITs, 2,976 DTTs and 309 'other IIAs'.<sup>7</sup>

Yet, out of the seemingly high number of 54 new BITs, 20 were renegotiated treaties, including seven by the Czech Republic.<sup>8</sup> Furthermore, it is noteworthy, as pointed out in the World Investment Report 2011, that "[t]wenty of the 54 BITs signed in 2010 were between developing and/or transition economies, as were four of the 11 other IIAs, a trend possibly related to developing countries' growing role as outward investors."<sup>9</sup> The first five months of 2011 show a similar leaning with the conclusion of 48 new IIAs, including 23 BITs, 20 DTTs and five "other IIAs."<sup>10</sup>

The fundamental criticism often raised against IIAs, i.e., that the entire system is hopelessly flawed and biased to the detriment of host countries in general and developing countries in particular, and should thus be abolished altogether in its present state,<sup>11</sup> is not reflected in state practice. IIAs are still being concluded, although some countries aim at modifying the content of traditional investment treaties. Thus, it is notable that the content of IIAs is becoming increasingly diverse and complex. This holds true both in respect of investment treaty obligations that are pursued as part of PTIAs (a), and those that form part of self-standing BITs (b).

## a. Preferential trade and investment agreements

At one end of the spectrum, the universe of IIAs is becoming increasingly multifaceted because international obligations relating to foreign investment are not only exclusively pursued in self-standing investment promotion and protection treaties, but are often coupled with provisions on international trade in "other IIAs" or rather PTIAs.<sup>12</sup> These agreements integrate international trade and international investment—two sub-fields of international economic law whose regulation in international treaties has generally developed separately from each other despite numerous obvious commonalities and overlaps and despite various efforts to integrate trade and investment under the auspices of the WTO, most recently during the Doha Round.<sup>13</sup>

7. UNCTAD, *World Investment Report 2011—Non-Equity Modes of International Production and Development*, Sales No. E.11.II.D.2 (New York: United Nations, 2011), p. 100 (internal footnotes omitted), available at <http://www.unctad-docs.org/files/UNCTAD-WIR2011-Full-en.pdf>.

8. *Id.*, at p. 120, endnote 6.

9. *Id.*, at p. 100.

10. *Id.*, at p. 100.

11. See, for example, Public Statement on the International Investment Regime, August 31, 2010, available at [http://www.osgoode.yorku.ca/public\\_statement](http://www.osgoode.yorku.ca/public_statement).

12. UNCTAD designates the agreements discussed in this section as "other IIAs." In essence, these "other" IIAs do however establish preferential treatment among the contracting parties at a bilateral level, above all in matters of market access and trade. For that reason, we prefer to designate them as Preferential Trade and Investment Agreements.

13. In 1996, the relationship between trade and investment formed part of the so-called Singapore Issues to be considered during the Doha Round. See World Trade Organization, "Ministerial Declaration" (December 13, 1996), *International Legal Materials*, vol. 36 (1997), 218 at 20. Despite a positive vote of the Working Group on

This integration, together with the involvement of experts on international trade law, explains not only a much more detailed approach to drafting investment protection provisions, but also accounts for increased sensitivity in treaty-drafting for overlap and conflicts among trade and investment and for concurrence of economic and competing non-economic concerns. After all, “trade and...”—debates have characterized international trade law for much longer than “investment and...”—debates have influenced international investment law. As an aside, it is curious to note that PTIAs are generally much easier to retrieve using standard legal research methods than many self-standing BITs. This may be due to the higher attention PTIAs attract in the domestic political process, not least because of the broader coverage of interests, but also due to the fact that PTIAs are generally used much more strategically by policy-makers to enhance and promote market access of traders and investors of the contracting parties. This requires knowledge of the relevant economic actors about the new market and trading opportunities, a factor that may explain the more systematic publication of such agreements. The combination of investment and trade therefore seems to increase the transparency of the process by which these agreements are negotiated, ratified, and implemented.

What is of particular interest for present purposes is that different approaches also exist in respect of PTIAs, namely as regards the scope of investment-related provisions. In general, one can distinguish between three different categories: agreements that include a fully fledged investment chapter with provisions similar to those found in classical BITs (1); agreements with more limited investment-related provisions that focus, for example, on market access or investment liberalization in certain industry sectors (2); and agreements relating primarily to investment cooperation at the inter-governmental level (3).

### (1) Type I agreements

Free trade agreements of the United States usually conform to the first type of PTIAs identified above.<sup>14</sup> But many other states also adopt similar agreements. An example from the 2010/2011 review period is the free trade agreement (FTA) between Canada and Panama of May 14, 2010.<sup>15</sup> It includes a fully-fledged chapter on investment protection, including the standard investor

Trade and Investment established to study the relationship between both fields in 2001 (see World Trade Organization, “Ministerial Declaration” (November 14, 2001), *International Legal Materials*, vol. 41 (2002), 746 at 20), considerations about a multilateral investment agreement in the WTO were taken off the negotiation agenda after the vigorous confrontation between developed and developing countries at the Cancun Summit. See World Trade Organization, “Decision by the General Council” (August 1, 2004), available at [http://www.wto.org/english/tratop\\_e/dda\\_e/ddadraft\\_31jul04\\_e.pdf](http://www.wto.org/english/tratop_e/dda_e/ddadraft_31jul04_e.pdf). See further Pierre Sauvé, “Multilateral rules on investment: Is forward movement possible?” 9 *Journal of International Economic Law* 325 (2006), pp. 329–40. Prior to the Doha Round, efforts at dealing with investment issues in the WTO were limited to the Agreement on Trade-Related Investment Measures (TRIMs), the General Agreement on Trade in Services (GATS) to the extent it applied to trade in services through the establishment of a commercial presence, and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) as far as it protects intellectual property rights.

14. See Warren H. Maruyama and Charles B. Rosenberg, “The investment chapter of the U.S.-Colombia FTA: New protections for U.S. investors,” 11 *Journal of World Investment and Trade* 409 (2010), pp. 413–16; Gilbert Gagné, “The U.S. policy on the protection of foreign investment: From the NAFTA to the U.S.-Korea FTA,” 12 *Journal of World Investment and Trade* 807 (2011), p. 808.

15. Free Trade Agreement between Canada and the Republic of Panama (Canada-Panama FTA), signed May 14, 2010, not yet entered into force, available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/panama/index.aspx?view=d>.

rights generally found in BITs, comprising national treatment, most-favored-nation (MFN) treatment, fair and equitable treatment, full protection and security, the prohibition of direct and indirect expropriation without compensation, free capital transfer, and access to investor-state arbitration. Largely following the 2004 Canada Model BIT,<sup>16</sup> and unlike traditional European-style investment treaties, the investment chapter of the Canada-Panama FTA contains a number of clarifications in order to strike a better balance between investor protection and competing non-investment concerns. Thus, in defining the meaning of investment, the Agreement, after enumerating assets that typically constitute an investment, stipulates that “investment does not mean [...] a claim to money that arises solely from a commercial contract for the sale of a good or service [...] or the extension of credit in connection with a commercial transaction [...]; or any other claim to money.” This makes plain that, in line with arbitral jurisprudence, an investment has to have a more lasting relationship with the host country and cannot lie in simple trade relations.<sup>17</sup> Similarly, the Agreement spells out, in line with the North American Free Trade Agreement (NAFTA) Free Trade Commission’s Interpretative Note on Article 1105 NAFTA,<sup>18</sup> that the grant of fair and equitable treatment and full protection and security is restricted to what is required by customary international law, and that the breach of another provision of the agreement or a separate international agreement does not establish a breach of fair and equitable treatment.<sup>19</sup> Likewise, the definition of expropriation is clarified in accordance with an annex to the investment chapter that is similar to the one found in the 2004 U.S. Model BIT<sup>20</sup> and the 2004 Canada Model BIT.<sup>21</sup>

Unlike typical BITs, the investment chapter in the Canada-Panama FTA contains a number of specific provisions that can be explained by the closer interaction of trade and investment issues in PTIAs. Not only does Article 9.03 of the Agreement clarify that other chapters of the Agreement prevail in case of conflict with the investment chapter, it also clarifies that measures that derogate from national and MFN treatment “consistent with the TRIPS Agreement and waivers to the TRIPS Agreement adopted under Article IX of the WTO Agreement” are permissible.<sup>22</sup> Similarly, the free capital transfer guarantee in the investment chapter is not violated to the extent that a party may restrict certain transfers under Article XI of the WTO Agreement.<sup>23</sup> Finally, the Agreement states that the issuance of a compulsory license, granted in relation to intellectual property that is consistent with the WTO Agreement, does not constitute a direct or

16. See 2004 Canada Model Agreement for the Promotion and Protection of Investments (2004 Canada Model BIT), available at <http://italaw.com/documents/Canadian2004-FIPA-model-en.pdf>.

17. See Romak S.A. v. The Republic of Ukraine, PCA Case No. AA280, UNCITRAL, *award* (November 26, 2009), 173–208 (with further references); cf. also *La République d’Italie c. La République de Cuba*, ad hoc arbitration, *sentence finale* (January 15, 2008), 148–53, 198.

18. See NAFTA Free Trade Commission, “Notes of Interpretation of Certain Chapter 11 Provisions,” Point 2, July 31, 2001, available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/NAFTA-Interpr.aspx?lang=en>.

19. See Canada-Panama FTA, *op. cit.* note 15, art. 9.06.

20. See 2004 U.S. Model Treaty Concerning the Encouragement and Reciprocal Protection of Investment (2004 U.S. Model BIT), art. 6 in connection with Annex B, available at <http://www.state.gov/documents/organization/117601.pdf>.

21. Cf. 2004 Canada Model BIT, *op. cit.* note 16, art. 13 in connection with Annex B.13(1).

22. *Id.*, see art. 9.09(4).

23. *Id.*, see art. 9.10(6).

indirect expropriation requiring compensation under the investment chapter.<sup>24</sup> Such stipulations are rarely found in instruments that deal with investment protection alone and are most likely the result of the interaction between investment and trade experts in negotiating PTIAs.

Compared to more traditional BITs, the Canada-Panama FTA is also innovative as it contains a provision on the interaction of investment protection with health, safety, and environmental standards, and on corporate social responsibility. Article 9.16 of the Agreement thus states that:

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 to encourage the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If a Party considers that the other Party has offered such an encouragement, it may request discussions with the other Party and the two Parties shall enter discussions with a view to avoiding any such encouragement.

Article 9.17 on corporate social responsibility, in turn, provides:

Each Party should encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognized standards of corporate social responsibility in their internal policies, such as those statements of principle that have been endorsed or are supported by the Parties. These principles address issues such as labour, the environment, human rights, community relations and anti-corruption.

Further innovative features of the investment chapter of the Canada-Panama FTA relate to investor-state arbitration. Not only is the number of provisions dealing with this issue considerably greater than in traditional BITs as well as other FTAs; the Agreement also contains more precise provisions on investor-state arbitration. For example, it excludes from investor-state arbitration claims arising under provisions that are typical for PTIAs, but do not necessarily appear in BITs, such as claims for breach of transparency requirements or of market access provisions in certain situations, including national security.<sup>25</sup> Furthermore, the Agreement establishes a limitation period of three years from the date on which the claimant first acquired knowledge of the alleged breach,<sup>26</sup> and provides for mechanisms to exclude multiple and parallel proceedings through waivers of potentially competing claims in other fora<sup>27</sup> and through consolidation of proceedings raising common questions of law or fact.<sup>28</sup>

In addition, the Agreement contains a number of provisions that react to the increasingly voiced concern that investment treaty arbitration is not merely a special form of commercial arbitration but an internationalized form of public law adjudication.<sup>29</sup> Accordingly, typical

24. *Id.*, see art. 9.11(5).

25. *Id.*, see arts. 9.20(a) and art. 9.37.

26. *Id.*, see art. 9.22(e)(i).

27. *Id.*, see art. 9.22(e)(ii) and (iii).

28. *Id.*, see art. 9.27.

29. Cf. Stephan Schill, "International investment law and comparative public law: An introduction," in Stephan Schill, ed., *International Investment Law and Comparative Public Law* (New York: Oxford University Press, 2010),

commercial arbitration rationales that are based on (often rather hypothetical) party autonomy and equality of arms are increasingly perceived as requiring qualification in light of the public law nature of international investment arbitration. The Canada-Panama FTA reacts to this perception by strengthening the public law strictures of investor-state dispute settlement. First, it contains a provision on arbitrator qualifications that is somewhat unusual and reacts to criticism that arbitrators are sometimes not sufficiently qualified to handle the type of dispute submitted to investor-state arbitration. Thus, Article 9.25 of the Agreement requires that arbitrators “shall have expertise or experience in public international law, international trade or international investment rules, or the resolution of disputes arising under international trade or international investment agreements.”

Second, Article 9.34(2) limits the type of remedies an arbitral tribunal can impose to monetary damages and restitution of property and prohibits punitive damages in Article 9.34(4). Third, it establishes mechanisms for the interaction between investor-state arbitration and the contracting states as treaty-makers<sup>30</sup> by ensuring information and participation of the non-disputing state-party in investor-state arbitrations<sup>31</sup> and by creating an inter-governmental commission that can render interpretative statements that are binding on arbitral tribunals.<sup>32</sup> This may ensure that there is an institutional mechanism to counter potentially far-reaching law making by arbitral tribunals. Finally, the Agreement provides for increased transparency of the investor-state arbitral process, including the public availability of awards and documents submitted to the tribunal, public hearings, and the possibility for *amicus curiae* interventions.<sup>33</sup> All these features stress the public law dimensions of investor-state arbitration and differences regarding commercial arbitration.

The intention to achieve a better balance between economic and non-economic concerns is further reinforced by the fact that parallel to the FTA, Canada and Panama concluded side-agreements on labor cooperation<sup>34</sup> and on environmental matters.<sup>35</sup> Thereby, the parties reacted to fears that trade and investment agreements may have a detrimental effect on labor standards and environmental protection. Under the Agreement on Labour Cooperation, Canada and Panama agreed to cooperate in promoting and enforcing fundamental labor principles and labor rights, including those covered by the International Labour Organization’s 1998 Declaration on Fundamental Principles and Rights at Work, such as the right to freedom of association, the right to collective bargaining, the abolition of child labor, the elimination of forced labor, and

pp. 3, 10–23 (with further references). Public law dimensions exist because investment tribunals themselves exercise international public authority in two regards: first, because arbitral tribunals review government acts, and, second, because they concretize and flesh out international investment law semi-autonomously from specific investment treaties by developing an increasingly dense body of arbitral precedent.

30. See generally Anthea Roberts, “Power and persuasion in investment treaty arbitration: The dual role of states,” 104 *American Journal of International Law* 179 (2010).

31. See Canada-Panama FTA, *op. cit.* note 15, art. 9.28.

32. *Id.*, see art. 9.32.

33. *Id.*, see art. 9.39 and art. 9.31.

34. Agreement on Labour Cooperation between Canada and the Republic of Panama (Canada-Panama Labour Agreement), signed May 14, 2010, available at [http://www.hrsdc.gc.ca/eng/labour/labour\\_globalization/ila/pdf/cpalc.pdf](http://www.hrsdc.gc.ca/eng/labour/labour_globalization/ila/pdf/cpalc.pdf).

35. Agreement on the Environment between Canada and the Republic of Panama (Canada-Panama Environment Agreement), signed May 14, 2010, available at [http://www.ec.gc.ca/caraib-carib/F32C0CA6-34E8-48E0-A5B7-8134B4DCB23E/Panama\\_Agreement\\_1\\_E.pdf](http://www.ec.gc.ca/caraib-carib/F32C0CA6-34E8-48E0-A5B7-8134B4DCB23E/Panama_Agreement_1_E.pdf).

the elimination of discrimination in respect of employment and occupation.<sup>36</sup> Furthermore, they agreed to maintain acceptable minimum employment standards, relating, for example, to minimum wages, the protection of occupational health and safety, and non-discrimination of migrant workers.<sup>37</sup> Canada and Panama also agreed not to waive or derogate from these standards in order to promote trade and investment,<sup>38</sup> and to ensure effective compliance with labor standards through governmental enforcement action and private action in administrative and judicial proceedings.<sup>39</sup>

Under the Agreement on the Environment, Canada and Panama build on the concept that free trade and investment liberalization should not take place at the expense of the environment,<sup>40</sup> by committing both parties to encourage high levels of domestic environmental protection, to enforce those laws,<sup>41</sup> and more generally to enhance good environmental governance. This is to be achieved, *inter alia*, by not relaxing environmental regulation to attract trade and investment,<sup>42</sup> by maintaining procedures for effective environmental impact assessment<sup>43</sup> and for compliance with environmental laws,<sup>44</sup> by promoting public awareness of environmental regulation,<sup>45</sup> and by encouraging best practices of corporate social responsibility.<sup>46</sup> Furthermore, the Agreement on the Environment contains enforcement, complaint, and coordination mechanisms both at the inter-state level and in relation between the state and its citizens. Thus, under the Agreement, residents can request investigations of alleged violations of environmental standards in their respective country.<sup>47</sup> In addition, the Agreement provides for inter-state mechanisms to exchange information on environmental measures,<sup>48</sup> for a joint committee that oversees the implementation of the Agreement,<sup>49</sup> and for inter-state dispute settlement.<sup>50</sup> Finally, the Agreement creates an institutional framework for engaging in closer environmental cooperation, for example through technical and financial assistance.

Overall, the Canada-Panama FTA illustrates how many contracting parties adapt their investment treaties to live up to the challenges investment protection and investor-state arbitration raise in respect of the public interest. What is striking about the Canada-Panama FTA is that it not only integrates trade and investment and modifies the provisions of the investment chapter as compared to traditional BITs by clarifying substantive rights and implementing transparency in investor-state arbitration, but that it complements an agreement on international

36. See Canada-Panama Labour Agreement, *op. cit.* note 34, art. 1(a)-(d).

37. *Id.*, see art. 1(e)-(g).

38. *Id.*, art. 2.

39. *Id.*, arts. 3–5.

40. On the objectives of the Agreement see Canada-Panama Environment Agreement, *op. cit.* note 35, art. 2.

41. Canada-Panama Environment Agreement, *op. cit.* note 35, see arts. 3 and 4.

42. *Id.*, art. 5.

43. *Id.*, art. 6(1).

44. *Id.*, art. 4.

45. *Id.*, arts. 6(2) and 7.

46. *Id.*, art. 11.

47. *Id.*, arts. 8, 9 and 14.

48. *Id.*, art. 15.

49. *Id.*, art. 17.

50. *Id.*, art. 24.

economic relations with an agreement on environmental and one on labor issues. By these means, international investment law is embedded not only within a broader international economic approach, but becomes part of an entire governance framework that encompasses environmental and labor issues.

Other type I PTIAs concluded in 2010 and 2011 largely share the approach of the Canada-Panama FTA to clarify substantive provisions, in particular expropriation and fair and equitable treatment, but also in respect of excluding the application of MFN treatment to matters of procedure. Not all, however, include provisions on transparency in investor-state dispute settlement. Thus, the investment chapters of the Singapore-Costa Rica FTA<sup>51</sup> and of the Peru-Korea FTA,<sup>52</sup> which include language on fair and equitable treatment and the concept of expropriation that is broadly in line with that of the Canada-Panama FTA and exclude the application of MFN treatment to questions of procedure, do not include transparency provisions for investor-state arbitration.

The Peru-Korea FTA, however, is notable as it contains provisions clearly related to the financial and monetary crises of the recent past. Thus, the Agreement contains one Annex that expressly permits the contracting states to adopt temporary safeguard measures in the event of serious balance of payments problems or external financial difficulties or in cases where capital movements cause serious difficulties for macroeconomic management, including the operation of monetary or exchange rate policies.<sup>53</sup> Furthermore, it contains one additional Annex dealing with public debt, which provides:

1. The Parties recognize that the purchase of debt issued by a Party entails commercial risk. For greater certainty, no award may be made in favor of a disputing investor for a claim with respect to default or nonpayment of debt issued by a Party unless the disputing investor meets its burden of proving that such default or nonpayment constitutes an uncompensated expropriation [...] or a breach of any other obligation under this Chapter.
2. No claim that a restructuring of debt issued by a Party breaches an obligation under this Chapter may be submitted to, or if already submitted continue in, arbitration under this Chapter if the restructuring is a negotiated restructuring at the time of submission, or becomes a negotiated restructuring after such submission, except for a claim that the restructuring violates Article 9.3 or 9.4 [i.e., national treatment or MFN treatment].
3. Subject to paragraph 2, an investor of the other Party may not submit a claim under this Chapter that a restructuring of debt issued by a Party breaches an obligation under this Chapter (other than Article 9.3 or 9.4) unless 270 days have elapsed from the date of the events giving rise to the claim.<sup>54</sup>

51. Singapore-Costa Rica Free Trade Agreement (Singapore-Costa Rica FTA), signed April 6, 2010, available at [http://www.fta.gov.sg/fta\\_C\\_crsfta.asp?hl=32](http://www.fta.gov.sg/fta_C_crsfta.asp?hl=32).

52. Peru-Korea Free Trade Agreement (Peru-Korea FTA), signed March 21, 2011, entered into force August 1, 2011, available at [http://www.sice.oas.org/TPD/PER\\_KOR/PER\\_KOR\\_Texts\\_E/PER\\_KOR\\_ToC\\_E.asp](http://www.sice.oas.org/TPD/PER_KOR/PER_KOR_Texts_E/PER_KOR_ToC_E.asp).

53. Peru-Korea Free Trade Agreement, *op. cit.* note 52, Annex 9C, available at [http://www.sice.oas.org/TPD/PER\\_KOR/PER\\_KOR\\_Texts\\_E/09\\_KPFTA\\_Investment.pdf](http://www.sice.oas.org/TPD/PER_KOR/PER_KOR_Texts_E/09_KPFTA_Investment.pdf). Similarly, Comprehensive Economic Partnership Agreement between the Republic of India and Japan, signed February 16, 2011, entered into force August 1, 2011, art. 97, available at [http://commerce.nic.in/trade/ijcepa\\_basic\\_agreement.pdf](http://commerce.nic.in/trade/ijcepa_basic_agreement.pdf).

54. Peru-Korea FTA, *op. cit.* note 52, Annex 9D.

This Annex has to be seen against the background of recent difficulties of countries like Argentina to restructure their public debt in light of the threat of investment treaty arbitrations being brought by non-cooperating creditors.<sup>55</sup> This is in line with other PTIAs containing special provisions related to financial services.<sup>56</sup> Overall, the provisions of type I PTIAs therefore are not only much more elaborate and precise than those in traditional BITs in finetuning the relationship between investment protection and competing public policy concerns; they embed investment protection into a broader framework of economic, environmental, and labor-related governance.

## (2) Type II agreements

The second type of PTIAs are agreements with a focus on international trade that contain only limited provisions on investment, mostly relating to market access and to investment liberalization in certain industry sectors. The European Free Trade Association (EFTA) has concluded a number of such treaties in 2010 and 2011, including the FTAs with Peru,<sup>57</sup> Ukraine,<sup>58</sup> and Hong Kong.<sup>59</sup> Unlike traditional—in particular, European—BITs, they focus on investment liberalization rather than investment protection. Yet, with the objective “to substantially increase investment opportunities in the free trade area to contribute to the sustainable development of the Parties,”<sup>60</sup> these investment chapters of EFTA-FTAs go beyond commitments in the General Agreement on Trade in Services (GATS).<sup>61</sup> Typically, they provide for national treatment as regards the establishment of a commercial presence (subject to specific reservations)<sup>62</sup> and contain commitments relating to key personnel.<sup>63</sup> At the same time, the investment chapters in most EFTA-FTAs confirm the contracting parties’ right to regulate foreign investors.<sup>64</sup> In addition, the EFTA-Hong Kong FTA and the EFTA-Ukraine FTA contain capital transfer provisions with exceptions for restrictions to protect against balance of payments problems.<sup>65</sup> The EFTA-Ukraine

55. See *Abaclat and Others (Case formerly known as Giovanna a Beccara and Others) v. The Argentine Republic*, ICSID Case No. ARB/07/5, *decision on jurisdiction and admissibility* (August 4, 2011) (accepting jurisdiction for claims of bondholders under the Italian-Argentine BIT).

56. See, for example, Singapore-Costa Rica FTA, *op. cit.* note 51, art. 11.3.

57. Free Trade Agreement between the Republic of Peru and the EFTA States (EFTA-Peru FTA), signed June 24/July 14, 2010, entered into force July 1/October 1, 2011, available at <http://www.efta.int/free-trade/free-trade-agreements/peru.aspx>.

58. Free Trade Agreement between the EFTA States and Ukraine (EFTA-Ukraine FTA), signed June 24, 2010, not yet entered into force, available at <http://www.efta.int/free-trade/free-trade-agreements/ukraine.aspx>.

59. Free Trade Agreement between the EFTA States and Hong Kong, China (EFTA-Hong Kong FTA), signed June 21, 2011, not yet entered into force, available at <http://www.efta.int/free-trade/free-trade-agreements/hong-kong.aspx>.

60. See, for example, EFTA-Peru FTA, *op. cit.* note 57, art. 1.2(c).

61. EFTA-FTAs typically regulate trade in services and investment in separate chapters. While the Agreements reaffirm the Parties’ commitments under GATS (see EFTA-Peru FTA, *op. cit.* note 57, art. 4.1(1)), the investment chapter typically does not apply to trade in services (art. 5.1).

62. See, for example EFTA-Peru FTA, *op. cit.* note 57, arts. 5.3 and 5.4.

63. *Id.*, art. 5.5.

64. *Id.*, art. 5.6.

65. EFTA-Hong Kong FTA, *op. cit.* note 59, arts. 4.7 and 4.8; EFTA-Ukraine FTA, *op. cit.* note 58, arts. 4.12 and 4.13.

FTA probably comes closest to a type I PTIA as it further contains provisions requiring fair and equitable treatment and full protection and security, MFN treatment, national treatment concerning access to courts, and transparency of laws, regulations, judicial and administrative decisions.<sup>66</sup> Rules on expropriation and investor-state dispute settlement are, by contrast, not included in type II PTIAs.

Type II PTIAs are not only concluded by EFTA. There are also inter-state PTIAs that contain more limited rules on investment regulation. For example, the China-Costa Rica FTA merely “reaffirms” the commitments related to investment protection made in an earlier BIT<sup>67</sup> and adds, similar to mode III of the GATS, commitments on market access in trade in services, including through establishment of a commercial presence, subject to a positive list approach.<sup>68</sup> In addition, it provides that in sectors where specific commitments are undertaken, the parties shall ensure the reasonable, objective, and impartial administration of domestic regulation;<sup>69</sup> maintain or create institutions for objective, impartial, and effective review of decisions by administrative agencies;<sup>70</sup> and ensure effective, timely, and transparent implementation of administrative procedures relating to trade in services.<sup>71</sup> Finally, the China-Costa Rica FTA includes provisions on free capital transfer subject to certain restrictions.<sup>72</sup> Similarly, the Japan-Peru Economic Partnership Agreement integrates the earlier Japan-Peru BIT into the FTA by reference<sup>73</sup> and adds provisions on market access and liberalization in trade in services and establishes the principle of cooperation between the contracting parties in order to liberalize and facilitate trade and investment, including through investment promotion.<sup>74</sup>

### (3) Type III agreements

Finally, there is a third type of PTIAs, which, unlike type I and type II PTIAs, does not contain binding commitments on either investment protection or investment liberalization. Instead, this class of treaties sets out commitments restricted to investment cooperation, often coupled with the creation of an institutional framework for inter-governmental dialogue that aims at achieving binding obligations on investment protection and/or liberalization in the future. Notwithstanding this prospective slant, these agreements are part of the PTIA universe as they encompass both trade and investment matters.

Some type III PTIAs are of great political importance and represent the first symbolic steps in overcoming past conflicts and confrontation. This is certainly the case with the Trade and Investment Framework Agreement between the United States and Libya of May 20, 2010.<sup>75</sup> The

66. EFTA-Ukraine FTA, *op. cit.* note 58, arts. 4.3, 4.5, 4.6 and 4.9.

67. China-Costa Rica Free Trade Agreement (China-Costa Rica FTA), signed April 6, 2010, entered into force August 1, 2011, available at <http://fta.mofcom.gov.cn/topic/encosta.shtml>, art. 89.

68. *Id.*, see arts. 92–95.

69. *Id.*, art. 96(1).

70. *Id.*, art. 96(2).

71. *Id.*, arts. 96(3), 96(4) and 100.

72. *Id.*, art. 98.

73. Agreement Between Japan and the Republic of Peru for an Economic Partnership, signed May 31, 2011, available at <http://www.mofa.go.jp/policy/economy/fta/peru.html>, art. 2(3).

74. *Id.*, see art. 200.

75. Trade and Investment Framework Agreement between the United States and the Libyan Arab Jamaririya, signed May 20, 2010, available at [http://www.ustr.gov/webfm\\_send/1938](http://www.ustr.gov/webfm_send/1938).

Agreement stresses its “desir[e] to enhance the bonds of friendship and spirit of cooperation”<sup>76</sup> between the contracting parties and “recogniz[es] the importance of fostering an open and predictable environment for international trade and investment.”<sup>77</sup> With that objective, all the Agreement does, however, is to establish a Libyan-United States Council on Trade and Investment,<sup>78</sup> whose function it is, *inter alia*, to “monitor trade and investment relations between the Parties, identify opportunities for expanding trade and investment [...], consult with the private sector and civil society in order to promote an attractive trade and investment climate [...], and make recommendations [...] on matters related to trade and investment.”<sup>79</sup> While the establishment of the Council may be a first step towards increased economic cooperation, its main immediate significance appears to be its attempt to overcome the difficulties in past political relations between the United States and Libya.<sup>80</sup>

The Economic Cooperation Framework Agreement between Mainland China and Taiwan of June 29, 2010 is also a clear manifestation of political symbolism.<sup>81</sup> While also establishing a bilateral committee, the Cross-Straits Economic Cooperation Committee,<sup>82</sup> the function of the Agreement goes well beyond the United States-Libya Agreement; above all, it has more immediate legal effects and economic impact. Thus, the Agreement not only sets out principles for economic cooperation between the parties and defines concrete measures for such cooperation, such as the gradual reduction and elimination of tariffs, providing for bilateral investment promotion and protection, and promoting trade and investment facilitation and industry exchanges.<sup>83</sup> It also implements the so-called “Early Harvest Program,” which consists of tariff reductions for goods and involves the reduction or elimination of restrictive measures in trade in services.<sup>84</sup> In addition, the Agreement envisages concrete consultations on further liberalizing trade in goods,<sup>85</sup> trade in services,<sup>86</sup> and investment.<sup>87</sup> Future investment rules are to include an investment protection mechanism, transparency on investment-related regulations, a reduction on investment restrictions, and the promotion of investment facilitation.<sup>88</sup>

76. *Id.*, Preamble, 1st recital.

77. *Id.*, Preamble, 2nd recital.

78. *Id.*, art. 2.

79. *Id.*, art. 3.

80. By contrast, other type III PTIAs, such as the Agreement on Trade and Economic Cooperation between the Government of the United States of America and the Government of the Federative Republic of Brazil, signed on March 18, 2011, available at [http://www.ustr.gov/webfm\\_send/2666](http://www.ustr.gov/webfm_send/2666), which establishes an intergovernmental Commission to promote bilateral economic and trade cooperation similar to the United States-Libya treaty of May 20, 2010, appear more clearly geared at enhancing mutual economic benefits. Yet, in this case, concluding a type III agreement may be a step for the United States to break Brazil’s traditionally skeptical position on binding international obligations relating to investment.

81. Economic Cooperation Framework Agreement China-Taiwan, signed June 29, 2010, entered into force January 1, 2011, English translation available via [http://www.moea.gov.tw/Mns/populace/news/wHandNews\\_file.ashx?news\\_id=19723&serial\\_no=6](http://www.moea.gov.tw/Mns/populace/news/wHandNews_file.ashx?news_id=19723&serial_no=6).

82. *Id.*, art. 11.

83. *Id.*, art. 2.

84. *Id.*, see arts. 7 and 8.

85. *Id.*, art. 3.

86. *Id.*, art. 4.

87. *Id.*, art. 5.

88. *Id.*, art. 5(2).

Other type III agreements are more concrete and oblige the parties to undertake, within a specified delay, consultations on agreeing on binding investment provisions in the future, without however, specifying the range of investor rights to be included in such an agreement. This is the case, for example, with the Malaysia-Chile FTA. It lays down a principle of cooperation, *inter alia*, to facilitate investment,<sup>89</sup> but defers negotiations on an investment chapter for a maximum of two years.<sup>90</sup> More specific is the content of an exchange of letters accompanying the Hong Kong-New Zealand Closer Economic Partnership Agreement that entered into force on January 1, 2011. It sets out an agreement of the parties to enter into negotiations of an Investment Protocol that should include the traditional set of investor rights, including national treatment, MFN treatment, fair and equitable treatment, full protection and security, rules on capital transfer, and protection against expropriation; furthermore, negotiations should include discussion on appropriate dispute settlement procedures.<sup>91</sup>

The key difference between type III PTIAs and type I or type II agreements is that they do not contain substantive obligations relating to either investment liberalization or investment protection. Instead, type III PTIAs typically envisage an institutional or procedural framework to prospectively structure bilateral efforts at investment cooperation or investment facilitation and, at best, provide that binding investment rules should be negotiated in the future. In that sense, type III PTIAs often constitute first attempts at formalizing bilateral trade and investment cooperation based on the concept that substance will follow procedure.<sup>92</sup>

Although the different variants of PTIAs all take a combined approach to dealing with trade and investment matters as part of one holistic approach to international economic governance, they nevertheless differ greatly in their approaches to questions of foreign investment. Some PTIAs deal with questions of investment protection, others with investment liberalization, again others merely with institutional and procedural arrangements for investment cooperation. This indicates that the universe of investment agreements is steadily more varied and complex and reaffirms that manifold differences exist in respect of the finer details. Notwithstanding, it seems possible to discern the existence of specific models of how PTIAs deal with investment-related questions. This allows a reduction of complexity at least in respect of idealized classes of agreements that are based on similar, if not identical principles.

89. Malaysia-Chile Free Trade Agreement (Malaysia-Chile FTA), signed May 15, 2010/November 13, 2010, available at [http://www.miti.gov.my/cms/documentstorage/com.tms.cms.document.Document\\_62ac20fc-c0a81573-44934493-bf60f59a/MCFTA-consolidated%20text-full.pdf](http://www.miti.gov.my/cms/documentstorage/com.tms.cms.document.Document_62ac20fc-c0a81573-44934493-bf60f59a/MCFTA-consolidated%20text-full.pdf), art. 9.1.

90. *Id.*, art. 14.5 (providing that “[u]nless otherwise agreed, no later than two years after the entry into force of this Agreement, the Parties shall undertake consultations with regard to the inclusion of a Chapter on Services and a Chapter on Investment to this Agreement, on a mutually advantageous basis.”).

91. See Exchange of Letters on the Conclusion of an Investment Protocol to the New Zealand—Hong Kong, China Closer Economic Partnership Agreement, available at <http://mfat.govt.nz/downloads/trade-agreement/hongkong/NZ-HK-CEP-Investment-EOL.pdf>.

92. This approach appears similar to the concept followed by former General Counsel of the World Bank Aron Broches when pushing for the creation of the International Centre for Settlement of Investment Disputes (ICSID) in the early 1960s despite the failure of international negotiations regarding the applicable substantive law. Broches famously advanced the “procedure before substance” formula, arguing that the substantive law on investment protection would develop along with the practice of dispute settlement. Cf. Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (New York: Oxford University Press, 2008), p. 20.

## b. Different approaches to investment protection treaties

The diversification of approaches to, and the increasing complexity of, IIAs is not only noticeable with regard to PTIAs, but also in respect of traditional BITs. To be sure, one can observe shifts away from the traditional lean European-style BITs modeled after the Abs-Shawcross Draft<sup>93</sup> in treaties that seek greater elaboration and expressly rebalance investment protection and competing public interests, partly in reaction to recent decisions by investment treaty tribunals, partly in reaction to policy debates about the relationship between investment protection and non-investment related concerns.<sup>94</sup> All the same, this is hardly a universal trend. Instead, as examples of BITs concluded in 2010 and 2011 illustrate, several countries continue to adopt traditionally sparse European-style BITs, as if the debates about rebalancing and the public interest in international investment law had never existed.

An example of such a treaty is the Spain-Mozambique BIT of October 18, 2010.<sup>95</sup> It contains a classical short preamble and the traditional range of investor rights without clarifications and public interest-related provisions that have become familiar in BITs elsewhere, such as concretizations of fair and equitable treatment, of the concept of indirect expropriation, or of the scope of MFN clauses, or rules on transparency in investor-state arbitration. Another example is the Bangladesh-United Arab Emirates BIT signed on January 17, 2011.<sup>96</sup> Although it clarifies that its MFN clause does not apply to judicial and procedural matters,<sup>97</sup> it does not make the effort to concretize fair and equitable treatment or the concept of indirect expropriation, nor does it include rules on transparency in investor-state arbitration. The orthodox and skeletal European-style BIT is therefore not a phased-out model of the international investment law of the past, but still considered by several countries to be an appropriate instrument to meet the needs of present day international investment relations.<sup>98</sup>

93. Prior to the 2004 U.S. Model BIT, BITs were generally relatively brief treaties containing approximately one dozen articles with broad principles and few exceptions and carve-outs. The underlying model goes back to the Draft Convention on Investments Abroad, the so-called Abs-Shawcross Draft, a combination of two earlier draft conventions, one prepared by Herman Joseph Abs, the then-Chairman of Deutsche Bank, the other by Lord Shawcross, a former British Attorney-General and then-Director of Shell Petroleum Company. The Abs-Shawcross Draft heavily influenced the 1967 OECD Draft Convention on the Protection of Foreign Property. See Schill, *The Multilateralization of International Investment Law*, *op. cit.* note 2, pp. 35–36, 40.

94. See on this Muchlinski, “Trends in international investment agreements,” *op. cit.* note 3, pp. 36–50.

95. Acuerdo para la Promoción y Protección Recíproca de Inversiones entre España y Mozambique, signed October 18, 2010, not yet entered into force, available at <http://www.lamoncloa.gob.es/NR/rdonlyres/6DA2B1A8-DBD0-4B6B-9A35-C1B012C5C626/122901/20101018180332776.pdf>.

96. Agreement between the Government of the People’s Republic of Bangladesh and the Government of the United Arab Emirates for the Promotion and Reciprocal Protection of Investment, signed January 17, 2011, not yet entered into force, available at [http://www.businesslaws.boi.gov.bd/components/com\\_Eregistry/attach/UAE.pdf](http://www.businesslaws.boi.gov.bd/components/com_Eregistry/attach/UAE.pdf).

97. *Id.*, art. 4(6).

98. This is also the case with the renegotiated Pakistan-Kuwait BIT of February 2011, which moved, as compared to its predecessor, more towards a European-style BIT. See Agreement between the Government of the Islamic Republic of Pakistan and the Government of the State of Kuwait for the Encouragement and Reciprocal Protection of Investments, signed February 14, 2011, and Agreement on the Promotion and Safeguarding of Capital Movement and Investment between the Government of the State of Kuwait and the Government of the Islamic Republic of Pakistan, signed March 17, 1983, entered into force March 15, 1986, both available at [http://pakboi.gov.pk/pdf/BIT/Kuwait\\_bit\\_050311.pdf](http://pakboi.gov.pk/pdf/BIT/Kuwait_bit_050311.pdf).

In addition, in respect of countries that edge towards greater precision in the formulation of investment treaty texts, one cannot necessarily discern a single predominant motivation for the increased elaboration. Instead, the agendas pursued by countries supporting more precise treaty texts apparently differ. Thus, not all countries use concretizations in order to achieve greater domestic policy space or to rebalance investor protection and competing public interests by restricting standards such as fair and equitable treatment, the scope of MFN clauses, etc. Instead, some countries clarify and concretize investment treaties also to pursue a more robust policy of protecting foreign investment, while making sure that environmental standards, human rights, and labor standards are not reduced to attract investment. An example of this is the Austria-Kazakhstan BIT of January 13, 2010.<sup>99</sup> While its length goes significantly beyond traditional European-style BITs,<sup>100</sup> it contains the classical investor rights, including unrefined fair and equitable treatment, expropriation provisions, and an umbrella clause which explains that “[t]his means, amongst others, that the breach of a contract between the investor and the host State will amount to a violation of this Agreement.”<sup>101</sup> On balance, the clarifications speak the clear language of a treaty that is intended to provide robust protection to foreign investors, while excluding a race to the bottom on environmental and labor issues.

Other BITs, by contrast, make use of more extensive treaty texts and clarifications to create more policy space, including tackling financial and monetary contingencies. Thus, the Japan-Papua New Guinea BIT of April 26, 2011 includes provisions that permit prudential measures relating to financial services,<sup>102</sup> and temporary safeguard measures to deal with balance-of-payments and external financial difficulties, even in contravention of national treatment.<sup>103</sup> With a view to better accomplishing the objectives of the agreement, the BIT also establishes an intergovernmental Joint Committee that has the function to discuss and review the implementation and operation of the agreement, to share information, and to discuss any other investment-related matters in order to encourage favorable conditions for investors.<sup>104</sup>

Likewise, the Japan-Colombia BIT of September 12, 2011 is very elaborate and more than forty pages long.<sup>105</sup> This BIT also contains numerous provisions aiming at ensuring that the parties have sufficient room to maneuver, for example, by tying fair and equitable treatment to customary international law and by excluding the application of MFN treatment to questions of

99. Agreement for the Promotion and Reciprocal Protection of Investment between the Government of the Republic of Austria and the Government of the Republic of Kazakhstan (Austria-Kazakhstan BIT), signed January 12, 2010, not yet entered into force, available at [http://www.parlament.gv.at/PAKT/VHG/XXIV/I/I\\_01333/imfname\\_224254.pdf](http://www.parlament.gv.at/PAKT/VHG/XXIV/I/I_01333/imfname_224254.pdf).

100. It includes a more comprehensive preamble and wordier provisions on dispute settlement and capital transfer, plus provisions on avoiding a weakening of environmental and labor standards in order to encourage investment. There are also provisions on transparency of laws and regulations.

101. Austria-Kazakhstan BIT, *op. cit.* note 99, see art. 11(1).

102. Agreement between the Government of Japan and the Government of the Independent State of Papua New Guinea for the Promotion and Protection of Investment (Japan-Papua New Guinea BIT), signed April 26, 2011, not yet entered into force, available at [http://www.meti.go.jp/policy/trade\\_policy/epa/pdf/JPN\\_PNG\\_E.pdf](http://www.meti.go.jp/policy/trade_policy/epa/pdf/JPN_PNG_E.pdf), art. 18.

103. *Id.*, see art. 17.

104. *Id.*, art. 21.

105. Agreement between Japan and the Republic of Colombia for the Liberalization, Promotion and Protection of Investment (Japan-Colombia BIT), signed September 12, 2011, not yet entered into force, available at [http://www.meti.go.jp/policy/trade\\_policy/epa/pdf/J-COL%20Text%28English%29.pdf](http://www.meti.go.jp/policy/trade_policy/epa/pdf/J-COL%20Text%28English%29.pdf).

dispute settlement.<sup>106</sup> Most notable, however, is a provision on investor-state arbitration, which provides:

In any investment dispute submitted to arbitration under this Chapter, at the request of a disputing party, a Tribunal shall, before rendering a decision or award, submit to the disputing parties a proposed decision or award. Within sixty (60) days after the date of submission of the proposed decision or award, the disputing parties may submit written comments to the Tribunal concerning any aspect of the draft decision or award. The Tribunal shall consider any such comments and render its decision or award within one hundred and five (105) days of the date of submission of the proposed decision or award.<sup>107</sup>

This innovation concerning investment treaty arbitration is geared towards ensuring the correctness of an arbitral decision and/or incentivizing settlements. At the same time, it creates the danger of prolonging the procedure through renewed submissions on the draft award and may discourage cooperation of the losing party. How successful this procedural innovation will be is hence a matter of its practical application and the reaction of disputing parties.

Overall, while a large number of BITs concluded in 2010–2011 depart from the original model of lean BITs and instead develop into longer and increasingly detailed treaties that contain clearer rules on the relation of investment protection and competing public interests, other BITs continue to follow more traditional models with more ambiguous treaty provisions. While this could be interpreted unkindly as displaying a lack of experience in up-to-date investment treaty-making, it can also be seen as a resurgence of divergent interests of states in investment treaty-making and in relation to the appropriate balance between investment protection and competing public interests. The pendulum swings not only forth, but also back.

At any rate, what the different approaches to traditional BITs indicate, akin to the different approaches concerning PTIAs, is that it is difficult to speak of general, or even universal, trends in investment treaty-making. Instead, it seems that the different approaches to the crafting of conventions dealing with investment illustrate the existence of different underlying preferences and interests of states and other relevant actors. Yet, unlike during the debates about the establishment of a New International Economic Order, these differences do not relate to fundamental disagreement between Western capital-exporting countries and developing countries, as well as the socialist block, about the very idea of international investment protection under international law, but rather concern the balance of property protection and other interests.

The complexity of IIAs rises as the ready possibility of grouping countries into either capital-exporting or capital-importing countries with clear, unidirectional interests in respect of investment protection disappears. Bright and earnest functional and ideological lines are increasingly smudged. Nowadays, most countries, including developing and transitioning markets, have to balance the partly divergent interests of different internal constituencies and interests groups and integrate them into a comprehensive investment policy that may take a whole range of different forms: from self-standing instruments to integrated approaches to trade and investment, from approaches that focus solely on investment protection to treaties that encompass investment

106. *Id.*, art. 3(1) in connection with the interpretive note (concerning MFN treatment); arts. 4(1) and (2) in connection with the interpretive note (concerning fair and equitable treatment); art. 11 in connection with Annex III (concerning expropriation).

107. *Id.*, art. 38.

liberalization and investment cooperation, from treaties with strong investment protection provisions to those that leave host states more policy space to pursue the public interest. In other words, investment treaty-making and trends in IIAs are characterized by the interaction of multiple and multidirectional interests that render this field of international law increasingly complex as compared to only a decade ago.

## 2. CONTINUING BACKLASH AGAINST INVESTMENT TREATY ARBITRATION

Another debate rekindled in 2010 and 2011 that may lead to a further diversification of investment treaty practice. It concerns investor-state dispute settlement under international investment treaties. So far, despite mounting criticism that investor-state arbitration might oust domestic courts from the legitimate exercise of jurisdiction over investor-state disputes, and may give rise to interpreting investment treaties in favor of investors and to the detriment of host countries,<sup>108</sup> and despite the withdrawal of some countries from investment treaties including investor-state arbitration<sup>109</sup> or the ICSID Convention,<sup>110</sup> most BITs and type I PTIAs still comprise an investor-state arbitration mechanism. A significant early exception, however, has been the U.S.-Australia FTA, which only contains provisions on state-to-state dispute resolution.<sup>111</sup>

The continued backlash against investor-state arbitration is further fueled by the very critical April 2011 statement by Australia's Gillard Government on the country's future trade and investment policy, which provides:

The Gillard Government supports the principle of national treatment—that foreign and domestic businesses are treated equally under the law. However, the Government does not support provisions that would confer greater legal rights on foreign businesses than those available to domestic

108. See, for example, Public Statement on the International Investment Regime, *op. cit.* note 11.

109. For example, on April 30, 2008, Venezuela communicated to the Netherlands its intention to terminate the Dutch-Venezuelan BIT as of November 1, 2008. See Luke Eric Peterson, Venezuela Surprises the Netherlands with Termination Notice for BIT, *Investment Arbitration Reporter* (May 16, 2008), available at <http://www.iareporter.com/Archive/IAR-05-16-08.pdf>. Withdrawal from international investment treaties is not limited to Latin America. On August 20, 2009, the Russian Federation notified the Depository of the Energy Charter Treaty (ECT) of its intention to not become a Contracting Party of that treaty. See acknowledgment of notification by the Energy Charter Depository, available at <http://www.encharter.org/index.php?id=414>. Pursuant to art. 45(3) (a) of the ECT, such notification ended the provisional application of the ECT to Russia. On the notification and its effect on existing disputes, see *Yukos Universal Ltd. v. Russian Federation*, PCA Case No. AA 227, *interim award on jurisdiction and admissibility* (November 30, 2009), 36–40, 244–398.

110. In May 2007, Bolivia denounced the ICSID Convention; its withdrawal became effective on November 3, 2007. See ICSID, Press Release, Bolivia Submits a Notice Under art. 71 of the ICSID Convention (May 16, 2007), available at <http://tinyurl.com/57ky25>. In July 2009, Ecuador also denounced the ICSID Convention; its withdrawal from the Convention became effective on January 7, 2010. See ICSID, Press Release, Ecuador Submits a Notice Under Article 71 of the ICSID Convention (July 9, 2009), available at <http://tinyurl.com/289ct5p>. Finally, Venezuela withdraw from the ICSID Convention which became effective on July 25, 2012. See ICSID, News Release, Venezuela Submits a Notice under Article 71 of the ICSID Convention (January 26, 2012), available at <http://tinyurl.com/8atcaoo>.

111. See William S. Dodge, “Investor-state dispute settlement between developed countries: Reflections on the Australia-United States free trade agreement,” 39 *Vanderbilt Journal of Transnational Law* 1 (2006).

businesses. Nor will the Government support provisions that would constrain the ability of Australian governments to make laws on social, environmental and economic matters in circumstances where those laws do not discriminate between domestic and foreign businesses. The Government has not and will not accept provisions that limit its capacity to put health warnings or plain packaging requirements on tobacco products or its ability to continue the Pharmaceutical Benefits Scheme.

In the past, Australian Governments have sought the inclusion of investor-state dispute resolution procedures in trade agreements with developing countries at the behest of Australian businesses. The Gillard Government will discontinue this practice. If Australian businesses are concerned about sovereign risk in Australian trading partner countries, they will need to make their own assessments about whether they want to commit to investing in those countries.<sup>112</sup>

This statement has already influenced the international discussion on the overall benefits and drawbacks of investment treaty arbitration. At the same time, commentators continue to debate the scope that the statement leaves to investor-state arbitration. An Australian observer familiar with the internal political process considers it unclear whether the Gillard Government's statement excludes investor-state dispute resolution under investment treaties altogether, or whether it merely indicates that its inclusion in future treaties on a case-by-case basis will depend on Australian business interests meeting a higher burden of proof.<sup>113</sup> The latter reading, in fact, may be supported by a recommendation in the Final Report of Australia's Productivity Commission of December 2010 on "Bilateral and Regional Trade Agreements" that preceded the Gillard Government's statement. In it, the Commission recommended:

The Australian Government should not include matters in bilateral and regional trade agreements that would serve to increase barriers to trade, raise costs or affect established social policies without a comprehensive review of the implications and available options for change. On specific matters, the Australian Government should:

[...]

c) seek to avoid the inclusion of investor-state dispute settlement provisions in BRTAs [i.e., Bilateral and Regional Trade Agreements] that grant foreign investors in Australia substantive or procedural rights greater than those enjoyed by Australian investors.<sup>114</sup>

This suggests that investor-state dispute settlement mechanisms in Australia's future investment treaties may be possible, provided they do not give foreign investors more rights than Australians. While such a reading appears possible, overall it seems likely that Australia's position lends further support to the broader backlash against investment arbitration.<sup>115</sup> Australia's position is

112. Gillard Government Trade Policy Statement: Trading Our Way to More Jobs and Prosperity (April 2011), at p. 14, available at <http://www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobs-and-prosperity.pdf>.

113. See Luke R. Nottage, "The rise and possible fall of investor-state arbitration in Asia: A skeptic's view of Australia's 'Gillard Government Trade Policy Statement,'" 8(5) *Transnational Dispute Management* (2011), at p. 3.

114. Australian Government Productivity Commission, *Bilateral and Regional Trade Agreements*, Productivity Commission Research Report (November 2010), at p. xxxviii, available at [http://www.pc.gov.au/\\_\\_data/assets/pdf\\_file/0010/104203/trade-agreements-report.pdf](http://www.pc.gov.au/__data/assets/pdf_file/0010/104203/trade-agreements-report.pdf).

115. In that sense also Nottage, *op cit.* note 113, at p. 4. See further also Leon E. Trakman, "Investor state arbitration or local courts: Will Australia set a new trend?," 46 *Journal of World Trade* 83 (2012); Jürgen Kurtz, "Australia's rejection of investor-state arbitration: Causation, omission and implication," 27 *ICSID Review-For. Inv. L. J.* 65

buttressed by the fact that as early as February 2011, the Investment Protocol to the Australia-New Zealand Closer Economic Relations Trade Agreement did not include investor-state dispute settlement.<sup>116</sup> Furthermore, because Australia is involved in a number of negotiations of investment treaties in Asia and the Pacific region, including the Trans-Pacific Partnership,<sup>117</sup> it is clear that the country's position has the potential of influencing a broader range of investment treaty partners. This shows that even in respect of some standard investor rights, above all, access to international arbitration, countries diverge sometimes considerably in the preferences they express in international investment treaty-making. In fact, the debates about whether to include investor-state arbitration in IIAs may develop into the most important policy debate in the medium-term future.

### 3. CHANGING GEOGRAPHY: FOCUS ON ASIA AND THE TRANSPACIFIC

International investment treaty-making does not only evolve in respect of form and content, but also in respect of the relevant actors. While investment treaties were once traditionally concluded between a capital-exporting country from Europe or North America and a capital-importing country, investment treaties today span investment relations between North and South as well as East and West, and govern relations between developed countries as well as between developing and transitioning markets. Hence, the geography of international investment law is undergoing changes. In fact, the rise of South-South BITs has been observed as a trend in IIAs for several years. By the end of 2004, already one fourth of all BITs were so-called South-South BITs concluded between developing countries.<sup>118</sup> The portion of such South-South BITs is increasing further. As noted before, “[t]wenty of the 54 BITs signed in 2010 were between developing and/or transition economies, as were four of the 11 other IIAs.”<sup>119</sup> Notably, the model of investment treaties that has prevailed so far in South-South relations was the same as that used for North-South treaties. This indicates that the standard content of BITs is generally considered by developing countries as an appropriate way to further their interest in investment cooperation.

Yet, along with the increase in South-South investment treaty-making and the rise of actors in the former periphery of international investment law, one can also notice a shift in who the trend-setting actors are. Above all, there is a marked increase in treaty-making in Asia. Over the past few years, countries like China, India, and Japan are becoming not only important regional actors, but have expanded their treaty network well beyond the region with countries other than the

(2012). More generally on the backlash in investment arbitration see Michael Waibel, Asha Kaushal, Kyo-Hwa Chung and Claire Balchin, eds., *The Backlash Against Investment Arbitration: Perceptions and Reality* (Alphen aan den Rijn: Kluwer Law International, 2010).

116. Protocol on Investment to the New Zealand-Australia Closer Economic Relations Trade Agreement, signed February 16, 2011, available at <http://mfat.govt.nz/downloads/trade-agreement/australia/CER-investment-protocol-16-2-11.pdf>.

117. See note 138 *infra*.

118. UNCTAD, *South-South Cooperation in International Investment Arrangements*, UNCTAD Series on International Investment Policies for Development, Sales No. E.05.II.D.26 (New York and Geneva: UNCTAD, 2005), at p. 6. See also Uché U. Ewelukwa, “South-south trade and investment: The good, the bad and the ugly—African perspectives,” 20 *Minnesota Journal of International Law* 513 (2011).

119. UNCTAD, *World Investment Report 2011*, *op. cit.* note 7, p. 100.

traditional capital-exporters in Europe and North America. This coincides with Asian countries becoming increasingly important outward investors and with a shift in focus from the transatlantic to the transpacific. This development has not gone unnoticed in the pertinent literature with several monographs and journal specials focusing on international investment law and policy and investor-state dispute settlement in Asia.<sup>120</sup> As noted in a recent piece:

Investment treaty-making is on the rise in Asia. While other regions, such as Latin America, have recently lost enthusiasm for liberalized investment treaties and investor-state arbitration, Asian countries are strengthening their networks of international investment agreements (IIAs) as they seek to liberalize investment flows both into and out of their countries.<sup>121</sup>

Indeed, the increasing importance of Asian countries is notable in statistical terms. Out of 41 IIAs other than double taxation treaties listed in UNCTAD Investment Policy Monitors between January 2010 and September 2011, 23 included at least one country from Asia and eight involved the participation of two such countries.<sup>122</sup>

Moreover, several of Asia's regional heavyweights are becoming increasingly active in concluding BITs and other IIAs, notably China, India, and Japan. China in fact is already the country with the second most BITs worldwide, topped only by Germany.<sup>123</sup> In 2010 and 2011, it has further increased its network of IIAs by concluding the symbolic Cross-Straits Economic Cooperation Framework Agreement with Taiwan<sup>124</sup> and a Free Trade Agreement with Costa Rica.<sup>125</sup> Already in 2009, China and ASEAN had concluded an IIAs.<sup>126</sup> What is notable apart from the breadth of the network of Chinese IIAs is how their content has

120. See Vivienne Bath and Luke Nottage, eds., *Foreign Investment and Dispute Resolution Law and Practice in Asia* (London: Routledge, 2011); TDM Special: China, 7(4) *Transnational Dispute Management* (2010); TDM Special: Resolving International Business Disputes by ADR in Asia, 8(5) *Transnational Dispute Management* (2011).

121. Lindsey Marchessault, "Recent trends in international investment agreements in Asia," 8(1) *Transnational Dispute Management* (2011), p. 3.

122. The data are collected from the lists contained in UNCTAD, *Investment Policy Monitor No. 2* (April 2010); *Investment Policy Monitor No. 3* (October 2010); *Investment Policy Monitor No. 4* (January 2011); *Investment Policy Monitor No. 5* (May 2011); and *Investment Policy Monitor No. 6* (October 2011), all available at <http://www.unctad.org>.

123. See UNCTAD, *Recent Developments on International Investment Agreements (2008–June 2009)*, IIA Monitor No. 3 (New York and Geneva: UNCTAD, 2009), p. 3, available at [http://www.unctad.org/en/docs/webdi-aeia20098\\_En.pdf](http://www.unctad.org/en/docs/webdi-aeia20098_En.pdf). This is corroborated by recent UNCTAD lists dating to June 1, 2011, which mention a total of 137 BITs concluded by Germany and 130 BITs concluded by China. See UNCTAD, *Country-specific Lists of BITs*, available at <http://www.unctad.org/Templates/Page.asp?intItemID=2344&lang=1>. Generally on Chinese investment treaties see Norah Gallagher and Wenhua Shan, *Chinese Investment Treaties: Policies and Practice* (New York: Oxford University Press, 2009).

124. See notes 81–88 *supra* and accompanying text. On China's FTA policy more generally see also Guiguo Wang, "China's FTAs: Legal characteristics and implications," 105 *American Journal of International Law* 493 (2011).

125. See notes 67–72 *supra* and accompanying text.

126. Agreement on Investment of the Framework Agreement on Comprehensive Economic Cooperation between the Association of Southeast Asian Nations and the People's Republic of China, signed August 15, 2009, available at <http://www.aseansec.org/22974.pdf>. For an analysis of the investor-state arbitration clause in this agreement see further Wei Shen, "Is this a great leap forward?," 27 *Journal of International Arbitration* 379 (2010).

developed.<sup>127</sup> While its first generation BITs did not contain national treatment provisions and restricted investor-state dispute settlement to disputes about expropriation-related compensation, China started adapting its treaty practice to reflect the more robust content of investment treaties typically concluded by European and North-American countries, including full-fledged investor-state dispute settlement and national treatment. These changes arguably reflect China's new position as not only a capital-importing country, but also an important source of outward foreign investment. More recently, Chinese investment treaties may move closer to the positions expressed in the 2004 U.S. Model BIT by becoming more nuanced in balancing investment protection and host country policy space; this suggests the emergence of a third generation of Chinese investment treaties.<sup>128</sup> In that context, it will be interesting to see the outcome of the currently ongoing negotiations about an investment agreement between China and the United States.<sup>129</sup> This treaty may merge the stances of two trend-setting countries in international investment law and thus coin future developments in investment treaty-making. At the same time, it faces significant challenges in respect of an array of controversial issues, including market access and investment liberalization, the scope of business sectors covered, intellectual property rights, and the scope of investor-state arbitration.<sup>130</sup>

Apart from China, a number of other Asian countries are becoming increasingly active in concluding IIAs. This includes established economic heavyweights, like Japan or Korea, but also emerging markets like Malaysia and India. Most notably, Japan and India concluded a Comprehensive Economic Partnership Agreement in 2011.<sup>131</sup> In addition, each of these concluded further BITs and FTAs during 2010 and 2011, such as the India-Latvia BIT,<sup>132</sup> the India-Lithuania BIT,<sup>133</sup> the Japan-Papua New Guinea BIT,<sup>134</sup> the Japan-Peru FTA,<sup>135</sup> or the Japan-Columbia BIT.<sup>136</sup> Similarly, Korea, Hong Kong, Malaysia, and Singapore emerged as increasingly active players in investment treaty-making in 2010 and 2011. In addition, as will be noted in more detail below, regionalism in investment cooperation is also becoming increasingly important in Asia.

127. See Stephan Schill, "Tearing down the great wall—The new generation investment treaties of the People's Republic of China," 15 *Cardozo Journal of International & Comparative Law* 73 (2007).

128. Elodie Dulac, "The emerging third generation of Chinese investment treaties," 7(4) *Transnational Dispute Management* (2010).

129. See Warren H. Maruyama, Jonathan T. Stoel, and Charles B. Rosenberg, "Negotiating the U.S.-China bilateral investment treaty: Investment issues and opportunities in the twenty-first century," 7(4) *Transnational Dispute Management* (2010).

130. *Id.*, pp. 9–16.

131. India-Japan Comprehensive Economic Partnership Agreement, *op cit.* note 53. More generally on the role of Japan and India in international investment treaty-making see Shotaro Hamamoto, "A passive player in international investment law: Typically Japanese?," in Bath and Nottage, *op cit.* note 120; Prabash Ranjan, "International investment agreements and regulatory discretion: A study of India," 9 *Journal of World Trade and Investment* 209 (2008).

132. The treaty was signed on February 18, 2010, as reported in UNCTAD, *Investment Policy Monitor No. 2, op. cit.* note 122.

133. The treaty was signed on March 31, 2011, as reported in UNCTAD, *Investment Policy Monitor No. 5, op. cit.* note 122.

134. See notes 102–104 *supra* and accompanying text.

135. See notes 73–74 *supra* and accompanying text.

136. See notes 105–107 *supra* and accompanying text.

Although it seems too early—and perhaps in any event too crude—to speculate about the emergence of an “Asian way” in international investment treaty-making,<sup>137</sup> it seems clear that the rise of Asian actors in the field will leave significant imprints on the system of international investment law; at the very least, this diversifies the geography of international investment law. Although one will have to wait and see whether Asian countries develop novel solutions on procedural and substantive issues in international investment law, the rise of Asia will likely lead to a redefinition of center and periphery. Whereas Asia so far has been closer to the outside fringe of investment flows, investment treaty-making, and investor-state dispute resolution, developments at all three levels are progressively transforming Asia into a central hub of international investment cooperation. It is not unlikely that the focus of international investment law will shift eastwards, moving from the transatlantic past and present to a transpacific future. Currently, we are only at the beginning of this development. Yet, the conclusion of a United States-China BIT and of a Trans-Pacific Partnership, which is being negotiated since 2010 between Australia, Brunei, Chile, Malaysia, New Zealand, Peru, Singapore, the United States, and Vietnam,<sup>138</sup> may usher in a new era in international investment cooperation. This era may not coincide with a paradigm shift in international investment law, but it will certainly be an epoch with a more diverse range of actors and voices.

#### 4. RISING REGIONALISM

New actors and voices are particularly likely to materialize within a growing trend towards a new brand of regionalism in international investment law. Regionalism, in this context, involves two aspects: first, the use of regional instruments, instead of bilateral instruments, to grant investment protection and to pursue investment liberalization; and second, regional organizations themselves become actors in international investment law by concluding investment-related agreements with non-members. This trend is notable above all in Europe with the EU rising to become a new player in international investment law (a). At the same time, regional approaches are also rapidly gaining momentum in Asia, Africa, and Latin America (b). They build on and follow earlier efforts at regional economic integration in matters of investment relations, including NAFTA,<sup>139</sup> Mercado Común del Sur (MERCOSUR), the Caribbean Community (CARICOM),<sup>140</sup> the Asia-Pacific Economic Cooperation (APEC), the

137. Cf. in respect of investment arbitration Luke Nottage and Romesh Weeramantry, “Investment arbitration in Asia: Five perspectives on law and practice,” in Bath and Nottage, eds., *op cit.* note 120.

138. See Trans-Pacific Partnership Leaders Statement, November 21, 2011, available at <http://www.ustr.gov/about-us/press-office/press-releases/2011/november/trans-pacific-partnership-leaders-statement>. Meanwhile, Canada and Mexico announced their interest in joining the negotiations. See Statement by U.S. Trade Representative Ron Kirk, On Announcements from Mexico and Canada Regarding the Trans-Pacific Partnership, available at <http://www.ustr.gov/about-us/press-office/press-releases/2011/november/statement-us-trade-representative-ron-kirk-announ>. For discussion, see also Jane Kelsey, “Investment developments in the Trans-Pacific Partnership Agreement,” 2(2) *Investment Treaty News* (January 12, 2012), available at <http://www.iisd.org/itn/2012/01/12/investment-developments-in-the-trans-pacific-partnership-agreement/>.

139. North-American Free Trade Agreement (NAFTA), signed December 17, 1992, entered into force January 1, 1994, *International Legal Materials*, vol. 32 (1993), 289 and 605.

140. On mechanisms of investment protection and dispute settlement in Southern and Central America see comprehensively Christian Leathley, *International Dispute Resolution in Latin America* (Alphen aan den Rijn: Kluwer Law International, 2007).

Association of Southeast Asian Nations (ASEAN),<sup>141</sup> the Common Market for Eastern, Southern Africa (COMESA), and the Southern African Development Community (SADC),<sup>142</sup> together with several regional agreements in the Middle East.<sup>143</sup> However, the renewed efforts at regionalism in international investment law may have a deeper impact by transforming the governance structures in international investment relations from a state-centered system to one that revolves around regional supranational and international organizations.

## a. The EU as a new actor in international investment law

The EU's agenda regarding international investment law is still in its formative stage. It follows from the EU's new exclusive competence concerning foreign direct investment (FDI) granted under the Treaty of Lisbon, which amended the EU's two foundational treaties with effect from December 1, 2009.<sup>144</sup> While this dynamic was long presaged by broader policy realignments that intended to strengthen and harmonize the position of the EU in bi- and multilateral negotiations in trade in services, it continues to vex investment and EU lawyers and treaty-makers alike. Three provisions work together in this respect. Article 207(1) of the Treaty on the Functioning of European Union (TFEU) provides that the EU's Common Commercial Policy shall be based on uniform principles and that this includes FDI.<sup>145</sup> Article 3(1)(e) TFEU assures the EU exclusive competence over the Common Commercial Policy. Consequently, as Article 2(1) TFEU makes clear, the member states can only become active in this sphere when empowered by the Union.

The new competence results in considerable head-scratching in several respects. For one, the question arises as to what to do with around 1200 BITs concluded by different Member States. From the perspective of EU law, these are ultimately likely to run into trouble when challenged directly by way of infringement actions or indirectly through preliminary reference proceedings.<sup>146</sup> The European Court of Justice (ECJ) has already ruled that BITs containing repatriation clauses jar with EU provisions exceptionally warranting restrictions on the free movement of capital and payments between Member States and third countries.<sup>147</sup> Member States that do not

141. See generally on APEC and ASEAN Yoshi Kodama, "Asia-Pacific region: APEC and ASEAN," 30 *International Law* 367 (1996). On the respective instruments and principles of investment protection in the Asia-Pacific region see Muthucumaraswamy Sornarajah, "Protection of foreign investment in the Asia-Pacific economic co-operation region," 29(2) *Journal of World Trade* 105 (1995), pp. 122–25.

142. See on COMESA and SADC generally Padamja Khandelwal, "COMESA and SADC, prospects and challenges for regional trade integration," IMF Working Paper WP/04/227 (Dec. 2004), available at <http://www.imf.org/external/pubs/ft/wp/2004/wp04227.pdf>.

143. See Paul Peters, "Dispute settlement arrangements in investment treaties," 22 *Netherlands Yearbook of International Law* 91 (1991), p. 160 (listing three regional agreements on the promotion and protection of investment among Arab countries).

144. Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed December 13, 2007, entered into force December 1, 2009 (2007) O.J. C 306/1. Comprehensively on the EU and its engagement with international investment law see Angelos Dimopoulos, *EU Foreign Investment Law* (New York: Oxford University Press, 2011).

145. Consolidated Version of the Treaty on the Functioning of the European Union, signed March 25, 1957 (2010) O.J. C 83/47.

146. The respective provisions are TFEU arts. 258 and 267.

147. See Cases C-205/06 *Commission v. Austria* (Grand Chamber) [2009] ECR I-1301; C-249/06 *Commission v. Sweden* (Grand Chamber) [2009] ECR I-1335; C-118/07 *Commission v. Finland* (Second Chamber) [2009] ECR I-10889.

take appropriate steps to eliminate such or similar incompatibilities most likely fail to fulfill their obligations under EU law.<sup>148</sup> At the same time, even if now *ultra vires* from a strict supranational point of view, rights and obligations arising from extra-EU IIAs concluded prior to the entry into force of the Lisbon Treaty might still temporarily come within the indulgent fold of the first paragraph of Article 351 TFEU, a proviso designed to protect pre-accession agreements.<sup>149</sup> So-called intra-EU IIAs, in turn, are confronted with again different issues arising from the interplay between EU law and international agreements among Member States.<sup>150</sup>

Further difficulties aside from potential overlap between layers of IIAs concern the future of investment policy- and investment treaty-making in the EU and revolve around the elaboration of specific standards of protection and the structure of dispute settlement mechanisms.<sup>151</sup> Through revising the EU treaties, the Member States have plainly opted for a new direction in terms of a common European investment policy. But of course that does not mean that all the 27 (soon 28) Member States see eye to eye on this matter. In particular, the large BIT users might harbor notable reservations vis-à-vis what could be considered an abrogation of sovereign treaty-making power. At the same time, resources are limited. Neither the European mass users of IIAs nor the European Commission are likely to have the resources to either renegotiate dozens of agreements or bring hundreds of infringement cases against non-conforming Member States. Second, the former might not consider it desirable to change the *status quo* or prudent to upset their treaty partners, while the Commission also has to be mindful not to overplay its hand and irritate several (influential) Member States.

The Commission hence had a first stab at both issues, that is, the future of Member States' BITs and the structure and content of the EU's future investment policy. A Communication paper of July 2010 sketches envisaged future developments (1),<sup>152</sup> while a parallel Proposal for

148. The second paragraph of TFEU art. 351 imposes an obligation to phase out incompatibilities. In a more general sense, the principle of sincere cooperation is also pertinent. See art. 4(3) of the Consolidated Version of the Treaty on European Union, signed February 7, 1992 (2010) O.J. C 83/13.

149. See Thomas Eilmansberger, "Bilateral investment treaties and EU law," 46 *Common Market Law Review* 398 (2009); and the Bundesverfassungsgericht (German Federal Constitutional Court), 123 *Entscheidungen des Bundesverfassungsgerichts (BVerfGE)* 267 (421–22) (citing Christian Tietje, "Die Außenwirtschaftsverfassung der EU nach dem Vertrag von Lissabon," 83 *Beiträge zum Transnationalen Wirtschaftsrecht* 17 (2009), available at <http://www.wirtschaftsrecht.uni-halle.de/Heft83.pdf>).

150. The various legal difficulties, including the possibility of carrying on with Member State BITs and the particularly thorny question of intra-EU IIAs, have been addressed in detail elsewhere and are not central to this contribution. See in particular the "Symposium on International Investment Law and the European Union" in Part Two of the previous volume of the *Investment Yearbook*, Karl P. Sauvant, ed., *Yearbook on International Investment Law and Policy 2010/2011* (New York: Oxford University Press, 2011). See also Christer Söderlund, "Intra-EU BIT investment protection and the EC treaty," 24 *Journal of International Arbitration* 455 (2007); Frank Hoffmeister and Peter Ondrusek, "The European Community in international litigation," 61 *Revue Hellenique de Droit International* 205 (2008); Markus Burgstaller, "European law and investment treaties," 26 *Journal of International Arbitration* 181 (2009); Nikos Lavranos, "New developments in the interaction between international investment law and EU law," 9 *Law and Practice of International Courts and Tribunals* 409 (2010); Ramon Torrent, "The contradictory overlapping of national, EU, bilateral and multilateral rules on foreign direct investment," 34 *Fordham International Law Journal* 1377 (2011).

151. Points that were flagged in UNCTAD, *World Investment Report 2010—Investing in a Low-Carbon Economy*, Sales No. E.10.II.D.2 (New York and Geneva: United Nations, 2010), p. 84, available at [http://www.unctad.org/en/docs/wir2010\\_En.pdf](http://www.unctad.org/en/docs/wir2010_En.pdf).

152. *Towards a comprehensive European international investment policy*, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions (Commission Communication), COM (2010) 343 final (July 7, 2010).

secondary legislation lays out how it would like the transition to go about (2).<sup>153</sup> In addition, other EU institutions, above all the European Parliament and the European Council, have weighed in on the debate (3).

### (1) The Commission's Communication on the European international investment policy

The Commission's Communication is fairly broad and policy-oriented and a mere 12 pages long. After alluding to a "new frontier"<sup>154</sup> for the Common Commercial Policy, it tentatively fleshes out the skeletal reference to FDI in Article 207(1) TFEU. In the Commission's view,

Foreign direct investment (FDI) is generally considered to include any foreign investment which serves to establish lasting and direct links with the undertaking to which capital is made available in order to carry out an economic activity. When investments take the form of a shareholding this objective presupposes that the shares enable the shareholder to participate effectively in the management of that company or in its control. This contrasts with foreign investments where there is no intention to influence the management and control of an undertaking. Such investments, which are often of a more short-term and sometimes speculative nature, are commonly referred to as "portfolio investments."<sup>155</sup>

In spite of this definition, it is not inconceivable that portfolio investments could also be regulated, albeit then presumably by way of an implied (i.e., necessary) competence.<sup>156</sup> Overall, the Commission expresses itself favorably concerning the general benefits of investment flows for economic growth, employment, and development, both in host and home countries, and acknowledges the leading position of the EU in this respect. It further accepts that the existing IIAs "constitute one important element of building confidence in the legal security required for taking sound investment decisions."<sup>157</sup> At the same time, the Commission expresses concern at the uneven playing field for European corporations, given that not all Member States have secured similarly robust treaty protection, and on account of the fact that European BITs are traditionally only post-admission treaties that leave a gap as concerns market access.<sup>158</sup> The all-important red thread is that the Union could obtain better leverage in this sphere than the Member States acting individually.

The Communication then outlines the Commission's vision for a future joint European investment policy. One pillar is integrating investment liberalization and protection. Referencing

153. *Proposal for a Regulation of the European Parliament and of the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries* (Proposal), COM (2010) 344 final (July 7, 2010). This would of course still have to be adopted according to the ordinary legislative procedure of TFEU art. 294.

154. Commission Communication, *op. cit.* note 152, p. 2.

155. *Id.*, pp. 2–3 (footnotes omitted).

156. *Id.*, p. 8. Cf. Steffen Hindelang and Niklas Maydell, "Die Gemeinsame Europäische Investitionspolitik—Alter Wein in neuen Schläuchen?" in Marc Bungenberg et al. (eds.), *Internationaler Investitionsschutz und Europarecht* (Baden, Baden: Nomos, 2010), pp. 11, 75–77.

157. Commission Communication, *op. cit.* note 152, p. 5.

158. *Id.*, p. 5.

OECD research, it aims for the inclusion of investment provisions in broader trade agreements.<sup>159</sup> Thus, binding commitments under international law will remain the vehicle of choice. These guarantees will be negotiated by the Union, building upon the substance of the currently existing Member State BITs.<sup>160</sup> As a consequence, it is hoped that Member State bilateral agreements should gradually become unnecessary. Apart from the obvious participation in the supranational European context, Member State activity should in future largely be devoted to additional investment promotion.<sup>161</sup>

Concerning the overall character of future investment agreements, the Commission strives for “the best available standards” and “high quality.”<sup>162</sup> This is in line with the general qualitative (rather than quantitative) comparative law approach supranational actors tend to employ.<sup>163</sup> Almost in the same breath, it disclaims the desirability or feasibility of a “one-size-fits-all” model and reserves the right to take the specific negotiation contexts into account on a case-by-case basis; the possibility of sectoral and multilateral agreements is also mooted.<sup>164</sup> Unsurprisingly, the Commission Communication’s intent is to get the ball rolling.

In terms of potential partner countries, “the Union should go where its investors would like to go.”<sup>165</sup> The Commission is particularly attentive towards competitive markets with a significant growth potential. In the short term, the EU would therefore seek to inject this new approach into current negotiations concerning broader economic and trade agreements with Canada,<sup>166</sup> India,<sup>167</sup> Singapore,<sup>168</sup> and the MERCOSUR.<sup>169</sup> In the medium term, the Commission expresses an interest in exploring a stand-alone investment agreement with China<sup>170</sup> and a more

159. *Id.*, pp. 4–5.

160. *Id.*, pp. 4–5.

161. *Id.*, p. 6.

162. *Id.*, p. 6.

163. See, e.g., Joined cases C-120/06 P and C-121/06 P *Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM) and Fabbrica italiana accumulatori motocarri Montecchio Technologies, Inc. (FIAMM Technologies) v. Council of the European Union and Commission of the European Communities*, Opinion of AG Poiares Maduro [2008] ECR I-6513 at 55 (rejecting “a mathematical logic of the lowest common denominator”).

164. Commission Communication, *op. cit.* note 152, pp. 6–7.

165. *Id.*, p. 6.

166. Negotiations for a Comprehensive Economic and Trade Agreement (CETA) were launched in May 2009 following a joint study on the desirability of future deepened economic engagement. The latter is available at [http://trade.ec.europa.eu/doclib/docs/2009/march/tradoc\\_142470.pdf](http://trade.ec.europa.eu/doclib/docs/2009/march/tradoc_142470.pdf). The most recent round of EU-Canada negotiations at the time of writing took place in October 2011.

167. Negotiations concerning an EU-India FTA began in June 2007. The last summit was held in Brussels in late 2010, the next was expected to take place in February 2012.

168. FTA negotiations have been underway since March 2010. The EU is both Singapore’s largest foreign investor and trading partner.

169. Talks were previously suspended in October 2004, but resumed in 2010. The next round of negotiations for an “ambitious and balanced” FTA was slated for March 2012. One pillar includes provisions on services and investment. See *Statement of the EU and MERCOSUR after the 7th round of negotiations on the future Association Agreement between both regions* of November 11, 2011, available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=752>.

170. In addition to prior policy strategies, the EU and China are currently engaged in so called High Level Economic and Trade Dialogue (HED). Such a meeting took place in December 2010. It is hoped that the HED will, *inter alia*, lead to the opening of negotiations on investment. See *Third meeting of the EU-China High Level Economic and Trade Dialogue (HED) in Beijing* of December 21, 2010, MEMO/10/698, available at [http://trade.ec.europa.eu/doclib/docs/2010/december/tradoc\\_147155.pdf](http://trade.ec.europa.eu/doclib/docs/2010/december/tradoc_147155.pdf). Observing stagnating investment flows, the

comprehensive agreement with Russia that might supplant the current Partnership and Cooperation Agreement.<sup>171</sup>

An obvious keystone for future EU investment policy is that any agreement concluded must conform to the supranational principle of legality and other EU policies. Above all, desired clauses, including provisions protecting payments and intangible assets, cannot violate primary EU law. As to the substantive standards of protection, the Commission Communication looks to “best practices” of Member States.<sup>172</sup> Familiar items such as non-discrimination (both most-favored-nation treatment and national treatment) and absolute standards of protection (fair and equitable treatment and full protection and security) are considered important sources of inspiration.<sup>173</sup> Expropriation conditions feature likewise, as do umbrella clauses. Concerning the former, the Commission takes its cue from the case law of the ECJ and considers it warranted that any expropriation be non-discriminatory and proportionate in light of the legitimate aim to be achieved, for example, by being accompanied by adequate compensation. Alas, the interesting specifics are left open, with the Communication defensively speaking of a need for an (enigmatic) “balance” between investor interests and regulation in the public interest.<sup>174</sup> In this respect it further hints at the EU’s general commitment to the rule of law, human rights, and sustainable development, and the OECD Guidelines for Multinational Enterprises as an “important instrument.”<sup>175</sup> Whether, and if so, to what extent, such considerations might be a genuine counterweight in certain situations is, however, left open.

The Commission shows itself to be more assertive as to the desirability of binding investor-state dispute settlement.<sup>176</sup> This is considered essential in order to effectively secure investment commitments. It will exist parallel to state-to-state mechanisms, which already feature in recent European FTAs.<sup>177</sup> What it envisages is “state-of-the-art” dispute settlement reflecting select Member State practices that are transparent, consistent, and predictable.<sup>178</sup> In particular, an appellate mechanism or quasi-permanent body of arbitrators should be considered.<sup>179</sup> The Commission Communication however immediately draws attention to the fact that—as they presently stand—various frameworks, including ICSID as per its well-known reference to states in Article 67, are not suited to accommodating the EU as a potential party and that new routes might hence have to be explored.<sup>180</sup> Concerning international responsibility, the Communication

Commission has also courted stakeholders’ views on the future of EU-Chinese investment relations in a questionnaire dated May 2, 2011, available at [http://trade.ec.europa.eu/doclib/docs/2011/may/tradoc\\_147866.pdf](http://trade.ec.europa.eu/doclib/docs/2011/may/tradoc_147866.pdf).

171. Russia and the EU are currently negotiating a new legally binding agreement in the form of a comprehensive framework on trade and investment to succeed their Partnership and Cooperation Agreement, signed June 24, 1994 (1997) O.J. L 327/3.

172. Commission Communication, *op. cit.* note 152, p. 8.

173. *Id.*, p. 8.

174. *Id.*, p. 9.

175. The 2011 edition of the latter is available at <http://www.oecd.org/dataoecd/43/29/48004323.pdf>.

176. Commission Communication, *op. cit.* note 152, p. 10.

177. See, e.g., Free Trade Agreement between the European Union and its Member States and the Republic of Korea (EU-Korea FTA) (2011) O.J. L 127/6, ch. 14.

178. Commission Communication, *op. cit.* note 152, p. 10.

179. *Id.*, p. 10.

180. Although detailed discussion on this point is beyond the remit of this contribution, likely alternatives could include the Permanent Court of Arbitration (PCA) and its Optional Rules for Arbitration covering international organizations or an altogether bespoke mechanism.

is predictably of the opinion that the EU, represented by the Commission, should be the sole defendant in investment claims.<sup>181</sup> Overall, the Commission Communication illustrates the strong desire of the Commission to transform the EU into a powerful actor in international investment law, whose future investment policy is coined by European, rather than Member State interests.

## (2) The Commission's proposal for a transition regime

In contrast to the Communication, the Commission's proposal is legalistic and narrowly tailored. It consists of an explanatory memorandum preceding a draft regulation and seeks to address the existing BITs between Member States and third countries.<sup>182</sup> In essence, the proposal outlines a transitional legal regime whereby the individual Member States can be authorized to maintain in force, amend, or conclude bilateral agreements with third countries.<sup>183</sup> It seeks to provide an "explicit guarantee of legal certainty as regards the conditions under which investors operate."<sup>184</sup> This transitory solution is plainly modeled on former EU practice concerning existing Member State trade agreements at the dawn of the supranational Common Commercial Policy in the late 1960s and early 1970,<sup>185</sup> but it is more generous to existing rights in that review follows, rather than precedes, authorization.

The intended mechanism is designed to fit with the exclusivity of the novel EU FDI competence under the TFEU and in particular the Treaty's Article 2(1). It proposes that within a certain timeframe Member States notify the Commission of all their bilateral agreements relating to investment with third countries that they wish to maintain or permit to enter into force.<sup>186</sup> As per Article 3 of the proposal, such notification brings about automatic authorization, which is however without prejudice to the Member States' other obligations. The Commission shall further review these notified agreements as per the three criteria set out in Article 5 of the proposal, if necessary by way of consultation with the Member State in question, that is, as to (a) compatibility with EU law other than the Common Commercial Policy; (b) overlap with any Union agreement in force with that third country; (c) obstruction to the development and implementation of the EU's investment policies. No later than five years after entry into force of the proposed regulation, the Commission shall report to the Council and European Parliament on the need for continued authorization. A further legislative proposal will be required should the Commission recommend discontinuance or modification of these provisions. Importantly, Article 6 envisages that automatic authorization can be withdrawn by the Commission when the criteria just mentioned are not met and when the Council has not taken, within a year, a decision on the authorization of negotiations regarding overlapping agreements following a Commission

181. Commission Communication, *op. cit.* note 152, p. 10.

182. Note that it only deals with extra-EU BITs, i.e., IIAs between EU Member States and third countries. As stated in the draft preamble, agreements between Member States relating to investment are not covered. Such intra-EU BITs are considered an aberration from the supranational European perspective, certainly if the matter falls within the (exclusive) jurisdiction of the ECJ.

183. Proposal, *op. cit.* note 153, art. 1.

184. *Id.*, p. 2.

185. See Council Decision No. 69/494/EEC of December 16, 1969 on the progressive standardization of agreements concerning commercial relations between member states and third countries and on the negotiation of Community agreements (1969) O.J. L 326/39.

186. Proposal, *op. cit.* note 153, art. 2.

recommendation to this effect. In such cases, the Commission shall first deliver a reasoned opinion outlining necessary steps to the respective Member State and consultations shall take place. If all of this is to no avail, the Commission will take a decision on withdrawal and remove the censured agreement from the list. Evidently, this opens up the possibility for annulment proceedings brought by the concerned Member State under Article 263 TFEU.

The Proposal also foresees the possibility of authorizing Member State amendments of existing agreements and even the signature and conclusion of new third-country IIAs.<sup>187</sup> Indeed, several Member States—not all of them economic heavyweights that might be thought to want to go it alone—have happily continued to sign IIAs right up to the very same day as, and even after, the Lisbon Treaty came into force.<sup>188</sup> According to the Proposal, this requires notification of the Commission. Authorization is again automatic per envisaged Articles 9 and 11, provided there is no conflict with EU law, no interference with the objectives of negotiations underway or imminent between the EU and the respective third country, and no obstruction to the development and implementation of the EU's policies in the sphere of investment. The Commission is to be kept informed and may require the inclusion of appropriate renegotiation clauses that secure the EU's future interests. Once more, review of these procedures is envisaged five years later. Another provision stipulates that Member States shall for IIAs falling within the scope of the proposed regulation inform the Commission without undue delay of meetings, allegations of inconsistent measures, and dispute resolution issues and intentions.<sup>189</sup> Member States can request confidentiality when reporting on negotiations.<sup>190</sup>

Based on the proposal's likeness to former transition strategies regarding the Common Commercial Policy and Member State trade agreements, as well as sheer *Realpolitik*, it does not seem far-fetched to expect that the Commission will pursue a generally lenient course concerning extra-EU IIAs, at least in the short to mid term.<sup>191</sup> However, at the time of writing, its proposal has not yet been adopted, presumably not in small part to the palpable writhing of the heavy BIT users. For them, it might be more amenable to consider the new FDI competence a flexible tool that essentially allows delegation of negotiations on a case-by-case basis where the EU as a whole might have more clout than a particular Member State, rather than an end to their own networks of international law commitments. Whatever the merits of the Commission's endeavors, the envisaged transitory scheme of authorizing national IIAs would clearly add another layer of complexity. Even if successfully adopted, the question remains—similar to the conundrum as concerns Member State trade agreements—what the position would be should authorization one day be withdrawn.

187. *Id.*, arts. 8–12.

188. Even a brief perusal of the UNCTAD *Country-specific Lists of BITs*, available at <http://www.unctad.org/Templates/Page.asp?intItemID=2344&dlang=1>, confirms this. To name only a particularly emblematic example, Germany and Pakistan signed a new Agreement on the Encouragement and Reciprocal Protection of Investments on December 1, 2009, the very day the Treaty of Lisbon came into force. Germany ratified the BIT in July 2011, Pakistan in 2010. See [http://www.pakistan.diplo.de/Vertretung/pakistan/en/05\\_\\_Business\\_\\_Economy/1\\_\\_ExternalEconomicPromotion/Invest\\_\\_Schutz\\_\\_Abk\\_\\_Seite.html](http://www.pakistan.diplo.de/Vertretung/pakistan/en/05__Business__Economy/1__ExternalEconomicPromotion/Invest__Schutz__Abk__Seite.html).

189. Proposal, *op. cit.* note 153, art. 13.

190. *Id.*, art. 14.

191. Even more than three decades down the line, there were still dozens, if not hundreds, of such trade treaties floating around. Cf. Council Decision No. 2001/855/EC of November 15, 2001 authorizing the automatic renewal or continuation in force of provisions governing matters covered by the Common Commercial Policy contained in the friendship, trade, and navigation treaties and trade agreements concluded between member states and

## (3) Positions of other EU institutions

A turf war between the different European institutions would obviously do little to disentangle the situation. By and large, the Council of the EU (which represents national governments) has received the Commission's ideas rather favorably, if somewhat defensively.<sup>192</sup> Although the Council expressly appreciated the development of a common policy framework on investment and of a level playing field for all EU investors, it also stressed in its Conclusions that the new legal framework "should not negatively affect investor protection and guarantees enjoyed under the existing agreements,"<sup>193</sup> that is, the BITs concluded by the Member States with third countries. For the Council, the bedrock of any future developments is plainly the experience and the best practices of the Member States. Notably, it did not elaborate upon the social and environmental dimension of foreign investment beyond a token reference, but rather underlined "effective and ambitious investment protection and market access"<sup>194</sup> in the same breath. Unsurprisingly, the Council is the supranational political institution that will most likely lean towards the *status quo*. It thus opportunely bounced the ball back to the Commission to "[develop] further initiatives."<sup>195</sup>

In closely related developments, the EU's General Affairs Council voted in Fall 2011 to amend certain negotiation directives to take the new FDI competence on board.<sup>196</sup> The Council thus authorized the Commission to open negotiations with Canada, India, and Singapore. The contents of these guidelines are not in the public domain. It remains to be seen how resilient the "old" European approach will prove to be in the long run. In particular the outcome of the negotiations with Canada and potential NAFTA cross-pollination will be interesting to witness.

What further adds to the intricacy and uncertainty of this novel regional drive is that the European Parliament (EP), which participates in the ordinary legislative procedure and has certain budgetary control, appears less than enamored by the existing efforts. Evidently, polycentricity regarding investment law and policy also plays out in the supranational governance structure of the Union. In short, the EP plays "good cop" to the BIT-preferring Member States' "bad cop" and has struck a chord with the international NGO community and a more concerned global public. In a Resolution dated April 6, 2011 that resists the thrust of the Council's Conclusions, the EP pointed to what it considers shortcomings in the current Member State practices.<sup>197</sup> Intoning the need for a coordinated European framework, it castigates the "vague language" of many IIAs,<sup>198</sup> expresses reservations about the resulting "level of discretion" of

third countries (2001) O.J. L 320/13. Note that these were no longer authorized after April 2005 due to a political impasse. The makeshift truce between the position under public international law and EU law thus finally appears to have broken down in that sphere.

192. *Conclusions on a comprehensive European international investment policy*, 3041st Foreign Affairs Council Meeting, Luxembourg, October 25, 2010.

193. *Id.*, p. 2.

194. *Id.*, p. 3.

195. *Id.*, p. 4.

196. See Press Release, 3109th General Affairs Council Meeting, Brussels, September 12, 2011, available at [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/EN/genaff/124579.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/genaff/124579.pdf).

197. *Resolution on the Future European International Investment Policy* (Resolution), April 6, 2011 (2010/2203(INI)). Moreover, the EP's Committee on International Trade held a close vote on April 13, 2011 on transitional matters, in which it signaled both a desire for legal certainty and for clarity as regards the conditions of authorization and the larger timeframe for moving from the current system to the new centralized regime.

198. See G. One should however be slow to consider "vague" language in international law necessarily defective. Quite often this can be a compromise that allows different interests to vest their chosen meaning into the words

investment tribunals and generally demands respect for the “capacity for public intervention.”<sup>199</sup> The EP also calls for greater transparency and broader participation echo perennial concerns and evoke the at time uneasy hybridity of international investment law. The EP is critical as regards “speculative forms of investment,”<sup>200</sup> although quite where to draw the line remains obscure. It seeks to carve out exceptions in the field of intellectual property and generic medicine. Fair and equitable treatment is to be tied to customary international law standards.<sup>201</sup> Investor obligations and compliance with human rights and anti-corruption standards, again recurrent bones of contention, also feature.<sup>202</sup> The Resolution broadly takes a cue from post-NAFTA IIAs and emphasizes the right to regulate in spheres such as national security, environment, public health, workers’ and consumers’ rights, industrial policy, and cultural diversity.<sup>203</sup> In terms of dispute settlement, local remedies are predictably favored.<sup>204</sup> All the same, the EP is also cautious not to bite the hand that feeds it by resolving that “investor protection for all EU investors must remain the first priority of investment agreements” and by basing any future endeavor on the “best practices drawn from member state experiences.”<sup>205</sup>

Overall, the EP does well to beseech a balance between public and private interests, but it falls somewhat short of being particularly productive or innovative in this respect. It remains to be seen whether the critique uttered by the EP will have its desired impact on the other institutions and the Member States, particularly with regard to the negotiation mandates concerning investment chapters in future FTAs. What is plain to see is that, almost like a fractal, the recent debate within the EU resembles a reduced-size copy of the global debate on where investment law and policy should be headed at the beginning of the second decade of the new millennium.

Another supranational body that has weighed in on the new FDI competence is the EU’s European Economic and Social Committee. In an opinion dated July 13, 2011, it generally welcomed the Commission’s Communication, favoring robust and modern IIAs that address investor needs on a flexible scenario-by-scenario basis.<sup>206</sup> For instance, the Committee took a dim view as to the investment protection in many of the current and prospective trade partners of the EU. At the same time, the opinion considers it vital that the EU integrate its investment strategy with its (progressive) policies in fields such as the environment, work, health, and safety regulation. It also sees investment clearly connected to development, rather than simply being a matter of self-serving business interest.

settled upon and thus remain engaged. For a critique of a rigidly predetermined “thing in itself” view of international legal text see Armin von Bogdandy and Marc Jacob, “The Judge as law-maker: Thoughts on Bruno Simma’s declaration in the *Kosovo* opinion,” in Ulrich Fastenrath et al. (eds.) *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (New York: Oxford University Press, 2011), pp. 809–24.

199. Resolution, *op. cit.* note 197, art. 13.

200. *Id.*, 23–24.

201. *Id.*, 19.

202. *Id.*, 37.

203. *Id.*, 25.

204. Albeit with the caveat “where they are reliable enough to guarantee due process.” See *Id.*, 31.

205. *Id.*, 15 and 19.

206. *Opinion of the European Economic and Social Committee on the Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions—Towards a comprehensive European international investment policy*, REX/320, July 13, 2011.

Concerning concluded agreements, an FTA with Korea, which had been negotiated since May 2007, was signed on October 6, 2010 and is provisionally applied since July 1, 2011.<sup>207</sup> It was hailed by the EU as the first of its “new generation” FTAs. In terms of the above typology, it is a type II agreement, with only select provisions on investment, chiefly national treatment and market access.<sup>208</sup>

The wider debate occasioned by the EU competence shift is unlikely to abate anytime soon, be it in national and supranational institutions and forums or in sectors of civil society, practitioners’ circles, and legal academia. Certain governments, including those of the Czech Republic, Slovenia, and Malta have already terminated or announced the termination of existing intra-EU BITs out of a perceived functional duplicity.<sup>209</sup> Others have been quite outspoken about the continued need for complementary and bespoke layers of investment protection, as the continued practice of concluding IIAs post December 2009 evinces. The EU’s appetite for a new direction in investment law and policy is patent. That alone contributes to greater diversification in the international landscape. But even more so, it seems to us simplistic to speak of simply one EU approach, tempting as it might be. As the above shows, and as the Union bears witness to on an almost daily basis in other fields, it is more of a *space* for political activity than a single rational *actor* pursuing an unambiguous master plan. The same holds true for the investment sphere, where a kaleidoscope of opinions exists, ranging from sternly pro-investor through various shades of regulatory capitalism to heavily pro-regulation. Whatever view comes out on top at the end of this protracted and multipolar policy process, however, is unlikely to completely silence all detractors.

## b. Other regional approaches

While much of the commentary in the past months focused on investment law and policy realignment in the context of European economic integration, other regions have also witnessed important developments. Each of these warrants in-depth attention but given the remit of the present synopsis, we will focus on select recent efforts that demonstrate a rich tapestry of regional initiatives.

Turning to Africa, the heads of state and government of the COMESA, the East African Community (EAC), and the SADC held the second Tripartite summit in June 2011.<sup>210</sup> The Tripartite is an initiative that seeks to promote the harmonization of trade arrangements amongst three African regional economic communities in light of the broader goals of the African Union (AU) of fostering economic integration, growth and sustainable development, and reducing poverty. While estimates vary, close to 600 million people live in the Tripartite’s member countries, which is more than half the population of the AU and around 58 percent in terms of contribution

207. Notice concerning the provisional application of the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part (2011) O.J. L 168/1.

208. EU-Korea FTA, *op. cit.* note 177, arts. 7.11–7.12.

209. One can of course speculate to what extent past, pending, or prospective arbitral proceedings also play a role in these decisions. Cf. Wenhua Shan and Sheng Zhang, “The Treaty of Lisbon: half way toward a common investment policy,” 21 *European Journal of International Law* 1049 (2011), p. 1056.

210. See on this and the following *Communique of the Second COMESA-EAC-SADC Tripartite Summit*, June 12, 2011, available at <http://www.sadc.int/english/current-affairs/news/communique-of-the-second-comesa-eac-sadc-tripartite-summit/>.

to its GDP. At the summit, the members further launched negotiations for a single integrated market of 26 countries in pursuit of the eventual African Economic Community that the AU seeks to establish by 2034. Besides infrastructure and industrial development, the Tripartite is built on a third pillar: market integration through trade facilitation. In this respect, negotiations are underway for the establishment of a Tripartite FTA. The process is expected to take up to five years. Precise details as to the contents are yet to emerge.

What is particularly intriguing is that this presents an opportunity to disentangle the “spaghetti bowl” of intra-Tripartite BITs that currently exists. Given a suitable investment chapter, the member countries would no longer have to sign IIAs among themselves and might want to terminate existing agreements. Another possibility would be to seek to consolidate extra-Tripartite IIAs or at least agree on a harmonized regional approach to negotiations with third countries. Given the multiple levels of regional integration efforts, the situation in Africa is to an extent even more intricate than in Europe. For instance, COMESA has had an investment agreement for the COMESA Common Investment Area (CCIA) replete with many familiar trappings as well as a regional investment agency since 2007.<sup>211</sup> SADC and EAC have also launched investment initiatives in the form of a Protocol on Finance and Investment in the case of SADC<sup>212</sup> and a model investment code in the case of EAC.<sup>213</sup> Moreover, there is overlap between these efforts. Eight COMESA and SADC members take part in both the CCIA and in the Protocol on Finance and Investment. Four EAC states are part of the CCIA. In short, the scene continues to bustle, with several liberalization and integration programs underway in parallel.

Regional consolidation and harmonization initiatives are also ongoing in Asia, acknowledged to be the most active region as concerns investment treaty-making for quite some time and witness to a plethora of interlocking and overlapping investment relationships. One well-known instance is the ASEAN Comprehensive Investment Agreement (ACIA). Signed in February 2009 and meant to replace prior IIAs, it is not in force at the time of writing but part of the broader ASEAN Economic Community agenda.<sup>214</sup> Again, the network of linkages is complex and multifaceted. Leaving ACIA aside, ASEAN has also established frameworks for economic cooperation with several economic powers, including China, the Republic of Korea, and Australia plus New Zealand.<sup>215</sup> It continues to negotiate on services and investment with

211. Investment Agreement for the COMESA Common Investment Area, adopted May 23, 2007, available at <http://vi.unctad.org/files/wksp/iiawksp08/docs/wednesday/Exercise%20Materials/invagrecomesa.pdf>. See further Peter Muchlinski, “The COMESA Common Investment Area: Substantive standards and procedural problems in dispute settlement,” SOAS School of Law Research Paper No. 11/2010, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1698209](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1698209).

212. SADC Protocol on Finance and Investment, signed August 2008, available at [www.sadc.int/index.php/download\\_file/view/95/226](http://www.sadc.int/index.php/download_file/view/95/226).

213. See for the Investment Framework of the East African Community (EAC) [http://www.eac.int/invest/index.php?option=com\\_content&view=article&id=63&Itemid=49](http://www.eac.int/invest/index.php?option=com_content&view=article&id=63&Itemid=49).

214. ASEAN Comprehensive Investment Agreement (ACIA), signed February 26, 2009, entered into force January 1, 2010, available at <http://www.aseansec.org/documents/Final-SIGNED-ACIA.pdf>. For a discussion of the agreement see Muchlinski, “Trends in international investment agreements, 2008/2009,” *op. cit.* note 4, pp. 49–55; Zewei Zhong, “The ASEAN Comprehensive Investment Agreement: Realizing a regional community,” 6(1) *Asian Journal of Comparative Law* (2011), art. 4, available at <http://www.bepress.com/asjcl/vol6/iss1/art4>; Diane A. Desierto, “Investment treaty regulation under the new ASEAN charter regime,” available at <http://ssrn.com/abstract=1963563>.

215. For the ASEAN Free Trade Areas with China, the Republic of Korea and Australia plus New Zealand, see <http://www.aseansec.org/4920.htm>.

India<sup>216</sup> and Japan.<sup>217</sup> Some of them only envisage closer cooperation in investment matters in the future, such as the agreements with India and Japan; others, namely the treaties with Australia and New Zealand, China, and Korea, are quite comprehensive and contain rules on investment protection, including investor-state dispute settlement. They contain many traditional IIA features, both of a substantive and procedural kind.<sup>218</sup> Regional instruments in Asia thus function both as instruments of investment protection among members and as catalysts of investment cooperation with non-members.

Dwelling on South-East Asia, the EU has also contributed to FTA capacity building in the region, not least since bilateral negotiations, especially with the EU itself, are also taking place at the same time.<sup>219</sup> Overall, bilateral agreements in the region continue to exist and flourish, pitting bespoke mutual arrangements against broader regional rules. Naturally, views on core principles differ, including (but not limited to) defining investors and investments, pre-establishment commitments, performance requirements, expropriation guarantees, and the desirability and mode of international dispute resolution. The question of what to do about the resulting overlap and potential contradictions steadily looms larger. While the point is broadly speaking not yet as acute as in the EU context given the varying levels of economic and legal integration, in the long run this issue cannot be left unattended. Policy-makers in the region could do worse than to pay close attention to how the EU quandary pans out.

Another regional organization active in the field is the Asia-Pacific Economic Cooperation (APEC), which has come forward in 2010 with its Strategy for Investment.<sup>220</sup> The strategy aims at promoting greater convergence in the investment sector in member countries and sets out substantive principles that countries should adopt in IIAs, including MFN treatment, national treatment, expropriation and compensation, and dispute settlement through arbitration. In addition, the strategy encourages members to facilitate foreign investment by improving their domestic investment environment, for example, by enhancing transparency, stability, and investment protection at the domestic level. Finally, the strategy encourages activities to promote investment by sharing information about investment opportunities, capacity building, further development of private-public partnerships, and the exchange of good practices.

Developments are also afoot in the framework of the Eurasian Economic Community (EurAsEC).<sup>221</sup> The past two decades have seen various attempts at economic integration within the Commonwealth of Independent States (CIS) that resulted from the breakup of the former Soviet Union. EurAsEC as an international organization moving at differing speeds sprang from deeper association between certain CIS members.<sup>222</sup> Besides the creation of a customs union and

216. See for ASEAN-India continuing negotiations, <http://www.aseansec.org/20406.htm>.

217. See for ASEAN-Japan continuing negotiations, <http://www.aseansec.org/20406.htm>.

218. See, e.g., Agreement on Investment of the Framework Agreement on Comprehensive Economic Cooperation between the Association of Southeast Asian Nations and the People's Republic of China of August 15, 2009.

219. See for ASEAN-EU continuing dialogue, <http://www.aseansec.org/20406.htm>.

220. APEC Committee on Trade and Investment, Annual Report to Ministers 2010, Appendix 7, Strategy for Investment, available via [http://publications.apec.org/publication-detail.php?pub\\_id=1081](http://publications.apec.org/publication-detail.php?pub_id=1081).

221. For more information on the Eurasian Economic Community, see <http://www.eurasian-ec.com/index.php>.

222. Cf. Agreement on Foundation of Eurasian Economic Community, signed October 10, 2000, available at <http://wits.worldbank.org/GPTAD/PDF/archive/EAEC.pdf>.

a common economic space (i.e., an internal market), one of EurAsEC's aims is the pursuit of a level playing field for investment. Two recent multilateral treaties underline this intent to create favorable and stable investment environments.<sup>223</sup> Since there are also various BITs in force between the members, the picture is again one of potential convolution and crosscutting, not least in light of further multilateral CIS IIAs.<sup>224</sup> These three layers (BIT, CIS, and EurAsEC) can certainly be exploited for varying definitions, standards of treatment, and dispute settlement matters. Besides these uneasy parallelisms, the thorny question regarding the permissibility of intra-regional BITs may sooner or later rear its head here too.

A further strengthening of regional approaches to IIAs will also likely take place through the concretization of an FTA with an investment chapter in the context of the so called Trans-Pacific Partnership (TPP). Several governments of countries on the Pacific Rim have expressed a keen interest in a comprehensive agreement that eliminates barriers to trade and investment, including "behind-the-border impediments."<sup>225</sup> The tenth round of negotiations took place in Kuala Lumpur in early December 2011. Japan, Canada, and Mexico have formally expressed interest in joining the current nine states in negotiations. A particularly intriguing feature of the planned FTA is its purported emphasis on crosscutting "horizontal issues" (i.e., broader context), such as competitiveness, regulatory coherence, and development, instead of focusing purely on a series of supposedly unconnected thematic or conceptual issues. It will be interesting to see whether the common assumption that such approaches water down investment promotion and protection on account of a broader portfolio of interests that are taken on board will hold true. Another take is that since most TPP members already have trade and investment agreements, the new FTA seeks deeper engagement and policy realignment, potentially embracing a more liberal slant.<sup>226</sup>

In other regional developments, in March 2011, the Constitutive Treaty of the Union of South American Nations entered into force, establishing the eponymous UNASUR, which seeks to enhance South American regional integration through a supranational entity with an international legal personality modeled on the EU.<sup>227</sup> The founding treaty has been signed and ratified by 12 member states. What is relevant in the present context is that a working group has been established to deal with investment dispute settlement. There are proposals on the table to strengthen diplomatic protection and establish a permanent South American facility for the resolution of investment controversies concerning a UNASUR member state or investor.<sup>228</sup> Its

223. Agreement on Encouragement and Mutual Protection of Investments in Eurasian Economic Community (EurAsEC) Member States, signed December 12, 2008; Agreement on Trade in Services and Investments in the member states of the Single Economic Space, signed December 19, 2010.

224. Such as the Agreement on Cooperation in the Field of Investment Activity of December 24, 1993; Convention on Defense of Investor's Rights of March 28, 1997. To complicate matters further, these are not in force in all EurAsEC states. The Russian Federation for example withdrew from these two treaties.

225. See, e.g., the statement of the Australian Department of Foreign Affairs and Trade, available at <http://www.dfat.gov.au/fta/tpp/index.html>.

226. See, e.g., the observations of the Malaysian Ministry of International Trade and Industry, available at [http://www.miti.gov.my/cms/content.jsp?id=com.tms.cms.section.Section\\_ccec2a77-c0a81573-f5a0f5a0-6f87fd6f](http://www.miti.gov.my/cms/content.jsp?id=com.tms.cms.section.Section_ccec2a77-c0a81573-f5a0f5a0-6f87fd6f). Indeed, several NGOs have already expressed fears to that extent. See, e.g., the reactions to leaked IP negotiation texts: <http://www.citizenstrade.org/ctc/blog/2011/10/22/leaked-trans-pacific-fta-texts-reveal-u-s-undermining-access-to-medicine/>.

227. Constitutive Treaty of the Union of South American Nations, signed May 23, 2008, entered into force May 11 2011, available at <http://unasursg.org/PDFs/unasur/tratado-constitutivo/Tratado-constitutivo-version-ingles.pdf>.

228. See Silvia Karina Fiezzoni, "UNASUR arbitration centre: The present situation and the principal characteristics of Ecuador's proposal," 2(2) *Investment Treaty News* (January 12, 2012), available at <http://www.iisd.org/>

jurisdiction, consent to which would likely have to result from an IIA, an investor-state contract, or otherwise, is planned to ordinarily exclude various sectors and matters such as energy, health, or taxation. Interestingly, awards would be published and be considered to have formal precedential value, thus leading to a specific body of UNASUR investment jurisprudence. Appellate review is also anticipated. Alas, quite how binding precedent would be effectuated in practice remains nebulous. It further remains to be seen whether a bespoke recognition and enforcement regime will materialize and how this can be squared with existing international commitments in this respect. Whether or not this initiative bears fruit, it is clear evidence of the different flavors of investment law and policy emerging across the globe, united by common needs yet diverging according to the respective pressures on the ground.

While obviously not a regional group, important investment policy impulses were also sent by the world's major economies acting in the form of the G-20. Coordinating their economic policy in broad-brush terms, the group's leaders have repeatedly asserted their view that foreign private investment is a key source of "employment, wealth creation and innovation, which in turn contribute to sustainable development and poverty reduction."<sup>229</sup> In the same breath, they have also affirmed their commitment to responsible investment and corporate social responsibility (CSR) standards, particularly the UN Global Compact, the Investment Climate Facility for Africa, the World Bank's annual *Doing Business* report and indicators, and the MDG Call to Action.<sup>230</sup>

Overall, the new efforts at regional integration raise many issues as regards their relation with other IIAs concluded earlier not only among their members, but also between members and third countries. In this context, the debates about the transition regime for investment treaties of Member States in the EU, as well as the future of intra-EU BITs, constitute the most illustrative example. Yet the growing regionalism in international investment relations also has a considerable transformative potential for the governance structure in international investment relations more generally. It may not only complement investment policy- and treaty-making, but arguably increasingly replace states as actors in international investment law. This development is gaining in prominence; many regional organizations not only regulate investment liberalization, investment cooperation, and investment protection among their members, but also themselves conclude investment agreements with non-members. In this respect, regionalism may function either as a stepping-stone during a transitory phase towards genuine multilateralism in international investment law or consolidate in a number of regional blocks that will interact between or amongst each other at the level of international law. Either way, the presence of new and potentially powerful regional actors, above all the EU or ASEAN, will leave its imprint on international investment law and increase its complexity. What remains to be seen is whether this will be organized or disorganized intricacy and how this will be managed by the relevant players.

itn/2012/01/12/unasur/; Christian Leathley, "What will the recent entry into force of the UNASUR Treaty mean for investment arbitration in South America?" Kluwer Arbitration Blog (April 13, 2011), available at <http://kluwerarbitrationblog.com/blog/2011/04/13/unasur-treaty-and-investment-arbitration-in-south-america/>.

229. G-20 Seoul Summit 2010, Annex II, *Multi-Year Action Plan on Development*, November 12, 2010, available at <http://www.g20.utoronto.ca/2010/g20seoul-development.html>.

230. Responsible investment also featured in the draft Cannes Summit Final Declaration. See G-20 Cannes Summit 2011, Final Declaration, *Building Our Common Future: Renewed Collective Action for the Benefit of All*, November 4, 2011, available at <http://www.g20.utoronto.ca/2011/2011-cannes-declaration-111104-en.html> (stressing in particular the importance of agricultural and climate-sensitive investment but also the need for "greater transparency, particularly in mineral and natural resource investment").

## B. CONCLUDING REMARKS

Our review of trends in IIAs in 2010–2011 illustrates, above all, the increasing complexity of the growing web of IIAs. Complexity increases on account of the simultaneous presence of different approaches to and actors involved in investment treaty-making. Thus, some countries increasingly integrate issues of investment protection, liberalization, and cooperation in more comprehensive, but equally diverse free trade agreements, while others continue to pursue their international investment policy through self-standing investment protection agreements. Similarly, while many recent agreements follow the lead taken by the United States to recalibrate their investment treaty obligations, others continue to follow the traditional “lean” European-style model of investment protection treaties. Again, other countries indicate their fundamental opposition to certain features of the current system of international investment protection, predominantly by challenging the usefulness of investor-state arbitration. Finally, complexity also increases due to the emergence of new institutional actors in the field, above all the EU, ASEAN, and other regional organizations, coupled with a regional shift from a transatlantic focus to countries in Asia and the Transpacific. Given how multifaceted these developments are, we consider the emergence of a more pluralistic universe of IIAs to be a better depiction of the situation on the ground than any emergence of a supposed unidirectional general trend.

These developments raise salient and as of now not fully addressed questions as to the relationship between old and new agreements, between PTIAs and investment protection treaties, between regional and bilateral arrangements, and between supranational and international legal norms and frameworks. Furthermore, the increasing complexity also puts many categories used to describe and analyze international investment treaties, including their growth and structure, into question. In fact, it seems barely possible anymore to use the traditional compartmentalization into capital-importing and capital-exporting countries as the main tool to explain the development of, and the discourse about, international investment law. Such distinctions have become increasingly blurred. Consequently, investment treaties have to be thought about less in terms of an orthodox North-South dichotomy and more in terms of instruments that structure investor-state relations in a global market economy by determining the relationship between states and capital as well as between property protection and other public concerns. The different approaches to IIAs often reflect different conceptualizations of the state-market relation, and, especially in democratic societies, divergent views on the interplay between private rights and public self-determination. What is more, dissimilar approaches to investment treaty drafting, in particular differences between the more elaborate and recent generation of investment treaties that are inspired by the 2004 U.S. Model BIT and the more austere European-style investment treaties, result from the different degrees of trust contracting parties have in the ability of investment treaty tribunals to render satisfactory decisions.

Another point to consider is to what extent this increased complexity challenges the view that international investment law is a uniform sub-system of international law. How can we understand order in what seems an increasingly impenetrable thicket of bilateral and regional IIAs? How can we disentangle the “spaghetti bowl” of investment agreements? In light of the desire for differentiated solutions, pushing for a truly multilateral investment treaty, at least in the short- to medium run, seems a futile endeavor. Nevertheless, despite the increasing

complexity, there remains a core of international investment law that allows one to perceive the field as an essentially multilateral framework.<sup>231</sup>

This nucleus, in our view, is based on various centripetal forces that counteract the centrifugal tendencies identified over the course of the present synopsis. To begin with, there are the recurrent principles of investment protection, liberalization, and cooperation, principles which are given form and substance through international investment treaties, albeit with near endless possibility for different modifications and combinations. After all, the current system, including the wildly popular BIT technique, has its origins in the perceived inadequacies of the available alternatives.<sup>232</sup> Furthermore, the institutions IIAs rely on continue to display a notable degree of standardization, in particular as concerns implementation via investor-state arbitration. Spearheaded by a relatively small group of repeatedly appointed arbitrators who work towards generating a *jurisprudence constante* on the core concepts, principles, and rules of international investment law, the prevailing compliance and dispute settlement mechanisms result in more than just a common sociological practice. This assessment is not shaken by a number of neuralgic issues that have created inconsistent and divergent solutions in investment treaty jurisprudence; the mere fact that divergent arbitral views are taken seriously is telling. Moreover, the embedding of IIAs and of investor-state arbitration in general public international law ensures that the agreements are part of a broadly shared legal discourse. Finally, much of the traditional doctrinal reconstruction undertaken by legal scholars keeps the field together despite the increasing intricacy and divergence in the making of IIAs. It is this pluralistic setting within which efforts to consolidate, but also to critique, reimagine, and modify the current regime of international investment law take place.

231. See Schill, *The Multilateralization of International Investment Law*, *op. cit.* note 2, pp. 362–78.

232. See Marc Jacob, “Investments, bilateral treaties,” in Rüdiger Wolfrum, ed., *Max Planck Encyclopedia of Public International Law* (2012), 2–18, 72–79.