Goettingen Journal of International Law 5 (2013) 2, 487-531

The Possible Future of Promoting and Protecting European Investments in Sub-Saharan Africa

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doi: 10.3249/1868-1581-5-2-schoenwald

Abstract[1]

Sub-Saharan Africa (SSA) represents an interesting target market for European investors. However, the level of investment protection in SSA is rather outdated. Considering that Article 207 (1) of the *Treaty on the Functioning of the European Union* confers upon the European Union (EU) the exclusive competence to negotiate and conclude new investment treaties, the scope of this article is to determine what a possible future treaty aiming at protecting foreign investments concluded between the EU and SSA could look like. Following a brief introduction (A.) and after determining the potential parties of a new investment treaty between the EU and SSA (B.), it will be examined whether the current standard clauses can be introduced into the new treaty as well (C.), and to what extent new concepts can, should or even have to be included in a respective new agreement (D.).

A. Introduction

Despite various negative news reported in 'Western' media, Africa is on the move.[2] This is clearly reflected by numerous indicators which document the constant improvement of Africa's economic development.[3] With an increase in the demand for services by the population of Sub-Saharan Africa (SSA),[4] this

1 This article is the revised version of a paper presented by the author at the 2nd Conference of the Postgraduate and Early Professionals/Academics of the Society of International Economic Law (PEPA/SIEL), held in Goettingen (Germany) on 25 and 26 January 2013. The author is very grateful for the comments on the paper given by Steffen Hindelang and Yannick Radi, as well as by other participants of the conference. This article is also influenced by various comments the author received with respect to two similar papers presented, respectively, at the Second African International Economic Law Network Regional Conference, held in Johannesburg (South Africa) on 7 and 8 March 2013, and at the Workshop of the European Society of International Law Interest Group on International Economic Law (ESIL IG IEL), held in Amsterdam (Netherlands) on 23 May 2013. The author is very thankful for all the comments on these papers. Special thanks are due to Stephan W. Schill who commented on the author's paper at the ESIL IG IEL workshop in Amsterdam.

2 Cf. C. Roxburgh *et al.*, 'Lions on the Move: The Progress and Potential of African Economies' (June 2010), available at http://www.mckinsey.com/insights/africa/lions_on_the_move (last visited 31 January 2014), 2.

3 *Ibid.*, vi. Cf. also the World Bank's 2011 Africa Development Indicators, available at http://data.worldbank.org/sites/default/files/adi_2011-web.pdf (last visited 31 January 2014).

4 This is, for instance, indicated by the rise of supermarkets, see T. Reardon *et al.*, 'The Rise

large region has become a very interesting target market for European investors.[5] In addition, the abundant untapped resource deposits vested in SSA are of significant interest for European mining corporations.[6]

As a result of the continent's positive development, the influx of foreign direct investments (FDIs) has constantly increased during the last decade.[7] However, with a share of mere 14.8 percent of all FDIs flowing into Africa in 2011, Europe ranks only third, trailing Asia (56.7 percent) and the Middle East (16.3 percent).[8] Recently, several African governments specifically asked for more FDIs from European corporations.[9] This gives rise to the question of why European corporations appear rather reluctant to invest in SSA.

Besides the (asserted) high risks foreign investors are facing,[10] one reason for the reluctance might be the outdated investment protection provided. For instance, various bilateral investment treaties (BITs) and other types of international investment agreements (IIAs) concluded between the SSA States and European countries date back to the 1960s and 1970s.[11] Consequently, the

of Supermarkets in Africa, Asia, and Latin America', 85 *American Journal of Agricultural Economics* (2003) 5, 1140, 1140. Also, there is an increasing demand for telecommunication services. Cf. C. Garbacz & H. G. Thompson Jr, 'Demand for Telecommunication Services in Developing Countries', 31 *Telecommunications Policy* (2007) 5, 276, 276.

5 Cf. J. Cantwell, 'Globalization and Development in Africa', in J. H. Dunning & K. A. Hamdani (eds), *The New Globalism and Developing Countries* (1997), 155, 155-156.

6 Cf. *ibid*., 160.

7 See, e.g., UNCTAD, *World Investment Report 2012: Towards a New Generation of Investment Policies* (2012), 40-41.

8 For further information, see *ibid*., 3-4.

9 Cf. M. Carbone, 'The European Union and China's Rise in Africa: Competing Visions, External Coherence and Trilateral Cooperation', 29 *Journal of Contemporary African Studies* (2011) 2, 203, 211-213.

10 Typical non-economic risks faced by foreign investors in Africa are political and macro-economic instability, low growth, weak infrastructure, poor governance, inhospitable regulatory environments, and ill-conceived investment promotion strategies. See C. Dupasquier & P. N. Osakwe, 'Foreign Direct Investment in Africa: Performance, Challenges, and Responsibilities', 17 *Journal of Asian Economics* (2006) 2, 241, 241. See for a more general analysis of the interconnection between risks and effects of foreign directs investments on the domestic and foreign company E. Petrović & J. Stanković, 'County Risk and Effects of Foreign Direct Investment', 6 *Facta Universitatis: Economics and Organization* (2009) 1, 9.

11 For example, Benin concluded BITs with Germany in 1978, Switzerland in 1966, and the United Kingdom in 1987, also concluding BITs with Belgium and Luxembourg as well as with the Netherlands in 2001. Similarly, Cameroon (which concluded BITs with Belgium and Luxembourg in 1980, Germany in 1962, the Netherlands in 1965, Switzerland in 1963, and the United Kingdom in 1982, but with Italy in 1999), the

Central African Republic (which concluded BITs with Germany in 1965 and Switzerland in 1973), Chad (which concluded BITs with France in 1960, Germany in 1967, Italy in 1969, and Switzerland in 1967), the Democratic Republic of Congo (which concluded BITs with France in 1972, Germany in 1969, and Switzerland in 1972, but which has also concluded BITs with Belgium and Luxembourg in 2005, Greece in 1991, and Portugal in 2011), Côte d'Ivoire (which concluded BITs with Germany in 1966, Italy in 1969, the Netherlands in 1965, Sweden in 1965, and Switzerland in 1962, but which has also concluded BITs with Belgium and Luxembourg in 1999 and the United Kingdom in 1995), Gabon (which concluded BITs with Italy in 1968, Romania in 1979, and Switzerland in 1972, but with Belgium and Luxembourg in 1998, Germany in 1998, Portugal in 2001, and Spain in 1995), Guinea (which concluded BITs with Italy in 1964 and Switzerland in 1962, but with Germany in 2006 and Serbia in 1996), Liberia (which concluded BITs with France in 1979, Germany in 1961, and Switzerland in 1963, but with Belgium and Luxembourg in 1985), Mali (which concluded BITs with Germany in 1977 and Switzerland in 1978, but with the Netherlands in 2003), Niger (which concluded BITs with Germany in 1964 and Switzerland in 1962), Rwanda (which concluded BITs with Germany in 1967 and Switzerland in 1963, but with Belgium and Luxembourg in 2007), Senegal (which concluded BITs with Germany in 1964, the Netherlands in 1979, Romania in 1980, Sweden in 1967, Switzerland in 1962, and the United Kingdom in 1980, but with Italy in 2000, Portugal in 2011, Spain in 2007, and Turkey in 2010), Sierra Leone (which concluded a BIT with Germany in 1965, but with the United Kingdom in 2000), Sudan (which concluded BITs with France in 1978, Germany in 1963, the Netherlands in 1970, and Romania in 1978, but with Belgium and Luxembourg in 2005, Bulgaria in 2002, Italy in 2005, and Switzerland in 2002), and Togo (which concluded BITs with Germany in 1961 and Switzerland in 1964, but with Belgium and Luxembourg in 2009) also have rather old BITs with European countries. Rather outdated as well are the BITs concluded by Burundi (with Belgium and Luxembourg in 1989, Germany in 1984, and the United Kingdom in 1990, but with the Netherlands in 2007), Cape Verde (with Austria in 1991, Germany in 1990, Italy in 1997, the Netherlands in 1991, Portugal in 1990, and Switzerland in 1991), Eritrea (which concluded BITs with Italy in 1996, but with the Netherlands in 2003), Ghana (which concluded BITs with Bulgaria in 1989, Denmark in 1992, France in 1999, Germany in 1995, Italy in 1998, the Netherlands in 1989, Romania in 1989, Switzerland in 1991, and the United Kingdom in 1989, but with Spain in 2006), Guinea-Bissau (which concluded a BIT with Portugal in 1991), Lesotho (which concluded BITs with Germany in 1982 and the United Kingdom in 1981, but with Switzerland in 2004), Mauritania (which concluded BITs with Belgium and Luxembourg in 1983, Germany in 1982, Romania in 1988, and Switzerland in 1976, but with Italy in 2003 and Spain in 2008), Namibia (which concluded BITs with France in 1998, Germany in 1994, and Switzerland in 1994, but with Austria in 2003, Finland in 2002, Italy in 2004, the Netherlands in 2002, and Spain in 2003), Nigeria (which concluded BITs with Bulgaria in 1998, France in 1990, Germany in 2000, Italy in 1990, the Netherlands in 1992, Romania in 1998, and the United Kingdom in 1990, but with Finland in 2005, Serbia in 2002, Spain in 2002, Sweden in 2002, Switzerland in 2001, and Turkey in 2011), São Tomé and Príncipe (which concluded a BIT with Portugal in 1997), Somalia (which concluded a BIT with Germany in 1981), South Africa (which

concluded BITs with Austria in 1996, Belgium and Luxembourg in 1998, Czech Republic in 1998, Denmark in 1996, Finland in 1998, France in 1995, Germany in 1995, Greece in 1998, Italy in 1997, the Netherlands in 1995, Spain in 1998, Sweden in 1998, Switzerland in 1995, Turkey in 2000, and the United Kingdom in 1994), Swaziland (which concluded BITs with Germany in 1990 and the United Kingdom in 1995), Tanzania (which concluded BITs with Denmark in 1999, Finland in 2001, Italy in 2001, the Netherlands in 2001, Sweden in 1999, Switzerland in 2004, and the United Kingdom in 1994, but with Germany in 1965), and Zimbabwe (which concluded BITs with Austria in 2000, Czech Republic in 1999, Denmark in 1996, France in 2001, Germany in 1995, Italy in 1999, the Netherlands in 1996, Portugal in 1994, Serbia in 1996, Sweden 1997, Switzerland in 1996, and the United Kingdom in 1995). On the contrary, Angola, for instance, quite recently concluded BITs with Germany in 2003, Italy in 2002, Portugal in 2008, Spain in 2007, and the United Kingdom in 2000. The same applies to Botswana (which concluded BITs with Belgium and Luxembourg in 2006 and Germany in 2000), Burkina Faso (which concluded BITs with Belgium and Luxembourg in 2001, Germany in 1996, and the Netherlands in 2000, but also has concluded a BIT with Switzerland in 1969), the Comoros (which concluded a BIT with Belgium and Luxembourg in 2001), the Republic of Congo (which concluded BITs with Germany in 2010, Italy in 1994, Portugal in 2010, and Spain in 2008, but also with Switzerland in 1962 and the United Kingdom in 1989), Djibouti (which concluded BITs with France in 2007, Italy in 2006, and Switzerland in 2001), Equatorial Guinea (which concluded BITs with Portugal in 2009 and Spain in 2003, but with France in 1982), Ethiopia (which concluded BITs with Austria in 2004, Belgium and Luxembourg in 2006, Denmark in 2001, Finland in 2006, France in 2003, Germany in 2004, Italy in 1994, the Netherlands in 2003, Spain in 2009, Sweden in 2004, Switzerland in 1998, Turkey in 2000, and the United Kingdom in 2009), Gambia (which concluded BITs with the Netherlands in 2002, Spain in 2008, Switzerland in 1993, and the United Kingdom in 2002), Kenya (which concluded BITs with Finland in 2008, France in 2007, Germany in 1996, Italy in 1996, Slovakia in 2011, Switzerland in 2006, and the United Kingdom in 1999, but with the Netherlands in 1970), Madagascar (which concluded BITs with Belgium and Luxembourg in 2005, France in 2003, Germany in 2006, and Switzerland in 2008, but with Norway in 1966 and Sweden in 1966), Malawi (which concluded BITs with Italy in 2003 and the Netherlands in 2003), Mauritius (which concluded BITs with Belgium and Luxembourg in 2005, Czech Republic in 1999, Finland in 2007, France in 2010, Portugal in 1997, Romania in 2000, Sweden in 2004, and Switzerland in 1998, but with Germany in 1971), Mozambique (which concluded BITs with Belgium and Luxembourg in 2006, Denmark in 2002, Finland in 2004, France in 2002, Germany in 2002, Italy in 1998, the Netherlands in 2001, Portugal in 1996, Spain in 2010, Sweden in 2001, Switzerland in 2002, and the United Kingdom in 2004), Uganda (which concluded BITs with Belgium and Luxembourg in 2005, Denmark in 2001, France in 2003, Italy in 1997, the Netherlands in 2000, and the United Kingdom in 1998, but with Germany in 1966 and Switzerland in 1971), and Zambia (which concluded BITs with Belgium and Luxembourg in 2001, Finland in 2005, France in 2002, Italy in 2003, and the Netherlands in 2003, but with Germany in 1966 and Switzerland in 1994). The Seychelles have not concluded a single BIT with a European country. States not mentioned in this list have either not

level of investment protection occurs rather antiquated. Even if the BITs were concluded more recently, they mostly contain the level of protection provided in the 1960s and 1970s and do not contain, for instance, provisions on labor standards, environmental protection, or human rights.[12] Therefore, negotiations aiming at concluding new BITs should be initiated.

The scope of this paper is to analyze what shape the future of investment protection for European investors in SSA could take. The first part will elaborate the possible parties to a new international treaty aiming at protecting foreign investors. It will be argued that, besides investment treaties between the European Union (EU) and single SSA States, treaties between the EU and at least two regional organizations in SSA can indeed be concluded. The simple availability of a treaty aiming at protecting foreign investors does not of course automatically create sufficient investment protection. Instead, actual concrete provisions of the BIT are of great importance. It will be argued in the second part of this paper that the current standard clauses cannot be included in a possible investment treaty between the EU and one or more SSA regional organizations. As a result, a possible treaty aiming at protecting foreign investors between the

concluded any BIT, or have not reported their BITs to the United Nations Conference on Trade and Development (UNCTAD). All named BITs can be retrieved at http://www.unctadxi.org/templates/DocSearch____779.aspx (last visited 31 January 2014). However, it has to be noted that South Africa terminated its BIT with Belgium and Luxemburg in 2012 and announced its intention to terminate its other BITs with other European countries. See letter from Maite Nkoana-Mashabane, Minister of International Relations and Co-Operation, to Johan Maricou, Ambassador of the Kingdom of Belgium to South Africa, on 7 September 2012 entitled 'Termination of the Bilateral Investment Treaty with the Belgo-Luxembourg Economic Union' (unpublished). See also 'South Africa Begins Withdrawing From EU-Member BITs', *Investment Treaty News* (30 October 2012), available at http://www.iisd.org/itn/2012/10/30/news-in-brief-9/ (last visited 31 January 2014). In 2013, South Africa equally terminated its BITs with Spain, the Netherlands (cf. L. Kolver, 'SA Proceeds With Termination of Bilateral Investment Treaties', *Engineering News* (21 October 2013), available at http://www.engineeringnews.co.za/article/sa-proceeds-with-termination-of-bilateral-investment-treaties-2013-10-21 (last visited 31 January 2014), Germany, Switzerland (cf. R. Hunter, 'South Africa Terminates Bilateral Investment Treaties with Germany, Netherlands and Switzerland', available at http://www.rh-arbitration.com/south-africa-terminates-bilateral-investment-treaties-with-germany-netherlands-and-switzerland/ (last visited 31 January 2014), and Canada (A. Green, 'Canada 'Very Disappointed' at South Africa's Investment Treaty Termination', *This is Africa* (30 May 2013), available at http://www.thisisafricaonline.com/Business/Legal-Bulletin/Canada-very-disappointed-at-South-Africa-s-investment-treaty-termination?ct=true (last visited 31 January 2014).

12 See the BITs listed *supra* note 11.

EU and a SSA regional organization has to introduce new and adapt existing concepts in order to provide sufficient protection for FDIs. The third part will provide a short outlook on these concepts and how they might affect the future development of investment protection – not only on the bilateral, but also on a multilateral level. As an alternative to a BIT, other well-established treaty regimes, such as the so-called *Cotonou-Agreement* for example, could be adapted in order to include investment protection as well.

B. Possible Parties of New Investment Treaties

In order to ensure a very efficient and high level of investment protection, it seems desirable that the new investment treaties should be negotiated and concluded between the EU on the one side, and one or more SSA regional organizations on the other side. Considering that these new investment treaties would be treaties within the meaning of Article 2 (1) (a) of the 1986 *Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations* (VCLT-IO),[13] the respective parties to these treaties have to be (at least limited) subjects of public international law (I.), and must have the competence to negotiate and conclude such agreements (II.).

I. The Possible Parties as Subjects of Public International Law

Historically, only States and a few rather exotic entities[14] were considered to be subjects of public international law.[15] Whereas States remain the most important subjects of public international law, other subjects have emerged. Among them are International Organizations (IOs).[16] IOs gain their status as subjects of public international law from the founding parties – in most cases

13 *Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations*, 21 March 1986, Art. 2 (1) (a), UN Doc A/CONF.129/15, 25 ILM 543, 545-546 [VCLT-IO]. The VCLT-IO is not yet in force (as of 12 April 2014). However, its substantive provisions are generally accepted as the applicable international law, thus reflecting customary international law. See A. Aust, *Modern Treaty Law and Practice*, 3rd ed. (2013), 347.

14 Namely the Holy See, the Sovereign Order of Malta, and the International Committee of the Red Cross. For more information, see C. Walter, 'Subjects of International Law', in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Vol. IX (2012), 634, 636, para. 7.

15 *Ibid.*, 635, para. 2.

16 *Ibid.*, 636, para. 5. See also *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, ICJ Reports 1996, 66.

States – which transfer some of their sovereign rights to the IO.[17] As a result, IOs are only limited subjects of public international law.[18]

As a result, in order to be able to conclude a new treaty aiming at protecting foreign investors between the EU on the one side and one or more SSA regional organizations on the other, the parties have to be subjects of public international law. Article 47 of the *Treaty on European Union* (TEU) explicitly states that the EU is a (limited) subject of public international law.[19] Similar clauses can be found in the founding treaties establishing the Economic and Monetary Community of Central Africa (CEMAC),[20] the Common Market for Eastern and Southern Africa (COMESA),[21] the East African Community (EAC),[22] the Economic Community of Central African States (ECCAS),[23] the Economic Community of West African States (ECOWAS),[24] the Inter-Governmental Authority on Development (IGAD),[25] the Southern African Customs Union

17 See K. Schmalenbach, 'International Organizations or Institutions, General Aspects', in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Vol. V (2012), 1126, 1131-1132, para. 22.

18 *Ibid.*, 1131, para. 19.

19 The consolidated version of the TEU can be found in OJ C 83/15 (30 March 2010).

20 *Treaty on the Economic and Monetary Community of Central Africa*, 16 March 1994, Art. 3 (as amended on 25 June 2008), available at http://www.cemac.int/sites/default/files/documents/files/traite_revise_cemac.pdf (last visited 31 January 2014), 3 [CEMAC Treaty]. Member States of CEMAC are Cameroon, Central African Republic, Chad, Equatorial Guinea, Gabon, and Republic of the Congo.

21 *Common Market for Eastern and Southern Africa Treaty*, 5 November 1993, Art. 186 (1), 33 ILM 1067, 1112 [COMESA Treaty]. Current Member States of COMESA are Burundi, Comoros, Democratic Republic of the Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia, and Zimbabwe.

22 *Treaty for the Establishment of the East African Community*, 30 November 1999, Art. 138 (1), 2144 UNTS 255, 322 [EAC Treaty]. Member States of EAC are Burundi, Kenya, Rwanda, Tanzania, and Uganda.

23 *Treaty Establishing the Economic Community of Central African States*, Art. 87 (1), 23 ILM 945, 964 [ECCAS Treaty]. Member States of ECCAS are Angola, Burundi, Cameroon, Central African Republic, Chad, Democratic Republic of Congo, Equatorial Guinea, Gabon, Republic of the Congo, as well as São Tomé and Príncipe.

24 *Revised Treaty of the Economic Community of West African States*, 24 July 1993, Art. 88 (1), 2373 UNTS 233, 271 [ECOWAS Treaty]. Member States of ECOWAS are Benin, Burkina Faso, Cape Verde, Côte d'Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, and Togo.

25 *Agreement Establishing the Inter-Governmental Authority on Development*, 21 March 1996, Art. 3, Doc IGAD/SUM-96/AGRE-Doc, 6 [IGAD Agreement]. Member States of IGAD are Djibouti, Eritrea (currently suspended), Ethiopia, Kenya, Somalia, South

(SACU),[26] the Southern African Development Community (SADC),[27] and the West African Economic and Monetary Union (*Union Economique et Monétaire Ouest Africaine*, UEMOA).[28]

However, some treaties do not contain such an explicit provision.[29] Therefore, these treaties have to be interpreted in order to determine whether they implicitly provide for the subjectivity of the IO. As these treaties are treaties within the meaning of Article 2 (1) (a) of the 1969 *Vienna Convention on the Law of Treaties* (VCLT),[30] the relevant provisions on treaty interpretation are

Sudan, Sudan, and Uganda.

26 *Southern African Customs Union Agreement*, 21 October 2002, Art. 4 (1), available at http://www.sacu.int/main.php?include=docs/legislation/2002-agreement/main.html (last visited 31 January 2014) [SACU Agreement]. Member States of SACU are Botswana, Lesotho, Namibia, South Africa, and Swaziland.

27 *Treaty of the Southern African Development Community*, 17 August 1992, Art. 3 (1), 32 ILM 116, 123 (as amended on 14 August 2001) [SADC Treaty]. Member States of SADC are Angola, Botswana, Democratic Republic of the Congo, Lesotho, Madagascar (currently suspended), Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe.

28 *Treaty Establishing the West African Economic and Monetary Zone* [*Traite Modifie de l' Union Economique et Monétaire Ouest Africaine*], 10 January 1994, Art. 9, available at http://www.uemoa.int/Documents/TraitReviseUEMOA.pdf (last visited 31 January 2014), 7 [UEMOA Treaty]. Member States of the UEMOA are Benin, Burkina Faso, Côte d'Ivoire, Guinea-Bissau, Mali, Niger, Senegal, and Togo.

29 For instance, the *Constitutive Act of the African Union*, 11 July 2000, 2158 UNTS 3 [AU Act], the T*reaty Establishing the African Economic Community*, 3 June 1991, 30 ILM 1241 [AEC Treaty], the *Treaty Instituting the Arab Maghreb Union*, 17 February 1989, 1546 UNTS 151 [AMU Treaty], the *Treaty Establishing the Community of Sahel-Saharan States* (4 February 1998) [CEN-SAD Treaty], and the *Greater Arab Free Trade Agreement*, 25 February 2004, available at http://www.mit.gov.jo/portals/0/Facilitate%20and%20Develop%20Trade%20Among%20Arab%20States.pdf (last visited 31 January 2014) [GAFTA Agreement] do not contain any explicit references to the legal personality of the organizations established by these treaties. For more information about the *CEN-SAD Treaty*, see African Union, 'Status of Integration in Africa (SIA)' (April 2009), available at http://europafrica.files.wordpress.com/2009/05/status-of-integration-in-africa-27-04-09.pdf (last visited 31 January 2014), 84-95, paras 298-342),

30 *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 [VCLT]. Art. 5 VCLT explicitly states that that the VCLT is applicable to any constituent instrument of an international organization without prejudice to any relevant rules of the organization. Thus, in cases of conflict, the provisions of the constituent instrument supersede as *leges speciales* the provisions of the VCLT as *leges generales*. K. Schmalenbach, 'Article 5', in O. Dörr & K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2012), 89, 96, para. 15. As the *AU Act*, the *AEC Treaty*, the *AMU Treaty*, the *CEN-SAD-Treaty*, and the *GAFTA Agreement* do not contain provisions on how these

Articles 31 to 33 VCLT.[31] By interpreting the *AU Act*, the *AEC Treaty*, the *AMU Treaty*, the *CEN-SAD Treaty*, and the *GAFTA Agreement* in accordance with the 'general rule of interpretation'[32] contained in Article 31 VCLT, it must be taken into account that the objectives of the African Union (AU) enumerated in Article 3 *AU Act* render it necessary that the AU possesses legal personality. Similarly, the *AEC Treaty* refers in its Article 98 (2) to the competence of the Secretary General of the African Economic Community (AEC) to enter into contracts on behalf of the AEC. The same applies to the CEN-SAD. The objectives of the Arab Maghreb Union (AMU) enumerated in Article 2 *AMU Treaty*, however, indicate that the AMU is designed to be more of an internal forum of the Member States, than an actor on the international plain, and therefore it does not have legal personality under public international law in general. The same applies to the Greater Arab Free Trade Area (GAFTA).[33]

II. Competence to Negotiate and Conclude Treaties Aiming at Protecting Foreign Investors

The mere fact that an IO possesses subjectivity under public international does not suffice to assume that the IO is also competent to negotiate and conclude IIAs. Being only limited subjects of public international law, the competences of IOs depend on the rights that the Member States have transferred to the respective IO.[34] Similarly, Article 6 VCLT-IO states that "[t]he capacity of an international organization to conclude treaties is governed by the rules of that organization".[35] This provision is considered to reflect customary international

treaties shall be interpreted, Arts 31-33 VCLT are applicable and govern the interpretation of the aforementioned treaties. Art. 26 *AU Act* (*supra* note 29, 42) and Art. 87 *AEC Treaty* (*supra* note 29, 1279), stipulating that the African Court of Justice and Human Rights has the competence to interpret the *AU Act*, respectively the *AEC Treaty* does not contradict this finding.

31 For general information about the interpretation of treaties, see Aust, *supra* note 13, 205-226.

32 *Ibid.*, 207 *et seq.*

33 For more information about the GAFTA, see T. Broude, 'Regional Economic Integration in the Middle East and North Africa: A Primer', 1 *European Yearbook of International Economic Law* (2010), 269, 292-294.

34 Cf. P. Sands Q. C. & P. Klein, *Bowett's Law of International Institutions*, 6th ed. (2009), 476-477, paras 15-007-15-008. See also *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports 1949, 174, 182.

35 VCLT-IO, Art. 6, *supra* note 13, 549.

law.[36] Therefore, the treaties establishing the various IOs have to be analyzed in order to determine whether the EU and the various SSA regional organizations have at least the competence to negotiate and conclude IIAs.

1. The EU's Competence to Negotiate and Conclude IIAs

According to Article 207 (1) in conjunction with Articles 3 (1) (e) and 206 of the *Treaty on the Functioning of the European Union* (TFEU),[37] the EU holds exclusive competence in the field of FDIs.[38] Despite the *prima facie* clear wording of Article 207 (1) TFEU, the scope of the EU's competence remains unclear, mostly because the notion of 'foreign direct investments' is neither defined in the TEU, nor in the TFEU.[39] Therefore, the term 'foreign direct investment' in Article 207 (1) TFEU has to be interpreted.

As neither the TEU nor the TFEU contain any provisions on how to interpret the constituent treaties of the EU,[40] it would seem logical and in accordance with Article 5 VCLT that – in the absence of a *lex specialis* – Articles 31 to 33 VCLT would govern the interpretation of Article 207 (1) TFEU as *leges generales*. However, the (European) Court of Justice (ECJ)[41] has labeled the *Treaty Establishing the European Economic Community*[42] as an "independent source of law" of a "special and original nature",[43] and not as an international treaty within the meaning of Article 2 (1) (a) VCLT.[44] In its subsequent

36 A. Peters, 'Treaty-Making Power', in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Vol. X (2012), 56, 63, para. 35.

37 The consolidated version of the TFEU can be found in OJ C 115/47 (9 May 2008).

38 See for the continued validity of BITs concluded by EU Member States M. Burgstaller, 'The Future of Bilateral Investment Treaties of EU Member States', in M. Bungenberg, J. Griebel & S. Hindelang (eds), *European Yearbook of International Economic Law – Special Issue: International Investment Law and EU Law* (2011), 55, 67.

39 M. Bungenberg, 'The Division of Competences Between the EU and its Member States', in Bungenberg, Griebel & Hindelang, *supra* note 38, 29, 35.

40 H. Rösler, 'Interpretation of EU Law', in J. Basedow, K. J. Hopt & R. Zimmermann (eds), *The Max Planck Encyclopedia of European Private Law*, Vol. II (2012), 979, 979. Art. 344 TFEU prescribes only that a dispute about the interpretation of the TEU and TFEU has to be settled by the mechanisms provided within the TEU and TFEU (thus pursuant to Article 19 (1) (2) TEU by the ECJ), but does not prescribe how the ECJ has to interpret the constituent instruments of the EU.

41 In this article, 'ECJ' is used as the well-known abbreviation even though its new name, after the *Treaty of Lisbon*, is simply the 'Court of Justice'.

42 *Treaty Establishing the European Economic Community*, 25 March 1957, 298 UNTS 3.

43 *Flaminio Costa v. ENEL*, Case C-6/64, [1964] ECR 585, 594.

44 Advocate General Poiares Maduro, referring to the *Flaminio Costa v. ENEL* Judgment,

decisions, the ECJ did not apply the VCLT even once when interpreting any of the constituent treaties of the EU and its predecessors.[45] Instead, it even explicitly denied the applicability of the VCLT when it ruled out the legal possibility of Member States to invoke their right to suspend the operation of an international treaty in case of a material breach pursuant to Article 60 VCLT in order to defend their non-performance of the *Treaty Establishing the European Community*.[46] When the ECJ had to interpret any constituent instrument of the EU and its predecessors, it mainly used the grammatical, systematic, and purposive methods of interpretation.[47] With regard to the first and foremost method, the ECJ uses coordinate versions of texts in the different official languages.[48] By doing so, the ECJ applied the principle codified in Article 33 (1) VCLT without of course explicitly referring to this principle. Similarly, the other two methods of interpretation, which the ECJ often employed,[49] are very similar to the principles codified in Article 31 VCLT. The historical method of interpretation, as codified in Article 32 VCLT, was only rarely employed by the ECJ, mostly because of the complex and incompletely published legislative history.[50] However, even the principle codified in Article 32 is only a subsidiary method of treaty interpretation. Summing up, there is no difference in practice between the methods of interpretation of an international treaty prescribed by the VCLT and the methods of interpretation of the constituent instruments of the EU and its predecessors developed by the ECJ. As a result, Article 207 (1) TFEU has to be interpreted in accordance with the grammatical, systematical, and purposive method of interpretation.

The only promising method of interpreting Article 207 (1) TFEU in order to determine its scope is the grammatical method. In order to employ this method, the various authentic texts have to be compared. According to Article

even stated that "[t]he [ECJ] held that the Treaty is not merely an agreement between States, but an agreement between the peoples of Europe. [...] In other words, the Treaty has created a municipal legal order of trans-national dimensions, of which it forms the 'basic constitutional charter'." Opinion of Mr. Advocate General Poiares Maduro, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, Joined Cases C-402/05 & C-415/02 P, [2008] ECR I-6351, I-6370, para. 21.

45 Schmalenbach, *supra* note 30, 93, para. 9.

46 *Commission of the European Economic Community v. Grand Duchy of Luxembourg and Kingdom of Belgium*, Joined Cases C-90/63 & C-91/63, [1964] ECR 625, 631.

47 Rösler, *supra* note 40, 979.

48 *Ibid.*

49 *Ibid.*

50 *Ibid.*

358 TFEU in conjunction with Article 55 (1) TEU, the original versions of the TFEU in Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish, and Swedish are the authentic versions of the TFEU. However, in each of these versions, Article 207 (1) TFEU refers only to the term 'foreign direct investment'.[51] Hence, a comparative analysis of the various authentic versions of the TFEU is not beneficial to the interpretation of the term 'foreign direct investment' in Article 207 (1) TFEU. However, besides a simple comparative analysis of the various authentic versions of the TFEU, the ECJ also interprets provisions of the TFEU in accordance with the grammatical method by interpretation in good faith and by determining the ordinary meaning of the term in question, taking the object and purpose of the treaty into consideration.[52] Considering that the main purpose of Article 207 (1) TFEU is to ensure a coherent European investment policy, to enlarge the EU's bargaining power, and to strengthen the EU as an actor in bilateral and multilateral negotiations on investment policy,[53] the object and purpose of Article 207 (1) TFEU is not useful for the interpretation of the term 'foreign direct investment'. Instead, emphasis should be placed on the ordinary meaning of the term 'foreign direct investment'. The ordinary meaning of this term can be determined by referring to definitions contained in the so-called secondary law of the EU, judgments of the ECJ, legally non-binding texts of the organs of the EU, IIAs between EU Member States, IIAs between EU Member States and third States, free trade agreements (FTAs) of the EU and its Member States with third States or other IOs and which contain an investment

[51] Bulgarian: *преките чуждестранни инвестиции*; Czech: *přímé zahraniční investice*; Danish: *direkte udenlandske investeringer*; Dutch: *directe buitenlandse investeringen*; English: *foreign direct investment*; Estonian: *välismaistesse otseinvesteeringutesse*; Finnish: *ulkomaisten suorien sijoitusten*; French: *investissements étrangers directs*; German: *ausländische Direktinvestitionen*; Greek: *άμεσες ξένες επενδύσεις*; Hungarian: *továbbá a külföldi közvetlen befektetésekre*; Irish: *hinfheistíocht dhíreach choigríche*; Italian: *investimenti esteri diretti*; Latvian: *ārvalstu tiešajiem ieguldījumiem*; Lithuanian: *tiesioginėmis užsienio investicijomis*; Maltese: *investiment barrani dirett*; Polish: *bezpośrednich inwestycji zagranicznych*; Portuguese: *investimento estrangeiro directo*; Romanian: *investiţiile străine directe*; Slovak: *priamym zahraničným investíciám*; Slovenian: *tujih neposrednih naložbah*; Spanish: *inversiones extranjeras directas*; Swedish: *utländska direktinvesteringar*.

[52] Cf. G. van Calster, 'The EU's Tower of Babel: The Interpretation by the European Court of Justice of Equally Authentic Texts Drafted in More Than one Official Language', 17 *Yearbook of European Law* (1997), 363, 374-375.

[53] Cf. Secretariat of the European Convention, *Draft Articles Concerning External Action in the Constitutional Treaty*, Doc CONV 685/03, 23 April 2003, 3-4, 53.

chapter, IIAs of non-EU Member States, the jurisprudence of international courts and tribunals, and academic writings.

The now-expired capital market *Directive 88/361/EEC* of 24 June 1988 defines direct investments as

> "[i]nvestments of all kinds by natural persons or commercial, industrial or financial undertakings, and which serve to establish or to maintain lasting and direct links between the person providing the capital and the entrepreneur to whom or the undertaking to which the capital is made available in order to carry on an economic activity. This concept must therefore be understood in its widest sense".[54]

The ECJ, though not providing an all-embracing definition of foreign investments, has indicated that physical transfer of financial assets could be a movement of capital as long as it was "essentially concerned with the investment of funds".[55] Even after the expiration of *Directive 88/361/EEC*, the ECJ still used the nomenclature annexed to this directive as an indication of which operations constitute capital movement.[56] The first and most important category of capital movements indicated in this nomenclature includes movements linked to direct investments. This notion is associated with the establishment of, extension of, or participation in new or existing undertakings via equity or securities holdings which establish or maintain direct links between the person providing the capital and the undertaking to which the capital is made available in order to carry out an economic activity.[57] The ECJ reaffirmed these criteria in its 2006

54 *Council Directive of 24 June 1988 for the Implementation of Article 67 of the Treaty (88/361/EEC)*, OJ (EU) 1988/L 178/5 (8 July 1988), 11 (explanatory notes).

55 *Graziana Luisi and Giuseppe Carbone v. Ministero del Tesoro*, Joined Cases C-286/82 & C-26/83, [1984] ECR 377, 404, para. 21. See also *Criminal Proceedings Against Guerrino Casati*, Case C-203/80, [1981] ECR 2595, 2614, para. 10.

56 *Manfred Trummer and Peter Mayer*, Case C-222/97, [1999] ECR, I-1661, I-1678, paras 21-22; *Commission of the European Communities v. Portuguese Republic*, Case C-367/98, [2002] ECR I-4731, I-4772, para. 37; *Commission of the European Communities v. Kingdom of Spain*, Case C-463/00, [2003] ECR I-4581, I-4629, para. 52; *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland*, Case C-98/01, [2003] ECR I-4641, I-4661, para. 39 [Commission v. United Kingdom and Others]; *Commission of the European Communities v. Italian Republic*, Case C-174/04, [2005] ECR I-4933, I-4961, para. 27 [Commission v. Italy].

57 A. Dimopoulos, EU Foreign Investment Law (2011), 38. Cf. also *Commission of the European Communities v. Federal Republic of Germany (VW Case)*, Case C-112/05, [2007]

Test Claimants judgment.[58] However, these findings apply only to investments within the internal market, and thus are not applicable to foreign investments due to the fact that such an investment either flows into the EU from a third State or flows out to such a State.

The European Commission considers FDIs to generally "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",[59] thus aligning with the criteria established by the capital market *Directive 88/361/EEC* and the aforementioned judgments of the ECJ. The European Parliament, reacting to this communication, states in its *Resolution on the Future European International Investment Policy* that it is especially aware of the pertinent ECJ judgments, but finds that there is no clear definition of the term 'foreign direct investment' and therefore asks the Commission to provide a clear definition of the investments to be protected under the future European international investment policy.[60]

Even among EU Member States there is no uniform definition of the term 'foreign direct investment'.[61] For example, the nearly 200 BITs concluded between two EU Member States (so-called intra-EU BITs)[62] do not specifically define 'foreign direct investments', but more broadly the term 'investments',

ECR I-8995, I-9027, paras 18-19; *Commission v. United Kingdom and Others*, *supra* note 56, 4648, para. 5; *Commission v. Italy*, *supra* note 56, I-4661, para. 40; S. Hindelang, 'The EC Treaty's Freedom of Capital Movement as an Instrument of International Investment Law?', in A. Reinisch & C. Knahr (eds), *International Investment Law and Context* (2007), 43, 47; S. L. E. Johannsen, 'Die Kompetenz der Europäischen Union für ausländische Direktinvestitionen nach dem Vertrag von Lissabon', *Beiträge zum Transnationalen Wirtschaftsrecht No. 90* (2009), 11-12.

58 *Test Claimants in the FII Group Litigation v. Commissioners of Inland Revenue*, Case C-446/04, [2006] ECR I-11753, I-11869-I-11870, paras 180-182.

59 European Commission, *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: Towards a Ccomprehensive European International Investment Policy*, Doc COM(2010)343 final (7 July 2010), 2.

60 European Parliament, *European Parliament Resolution of 6 April 2011 on the Future European International Investment Policy (2010/2203(INI))*, OJ (EU) 2012/C 296 E/05 (2 October 2012), para. 11.

61 Cf. J. Karl, 'The Competence for Foreign Direct Investment: New Powers for the European Union?', 5 *Journal of World Investment & Trade* (2004) 3, 413, 420.

62 The conformity of intra-EU BITs with EU law in general is largely doubted. See W. Shan & S. Zhang, 'The Treaty of Lisbon: Half Way Toward a Common Investment Policy', 21 *European Journal of International Law* (2010) 4, 1049, 1054-1056 with further references.

which spreads from "any financial asset",[63] thus a very broad definition, to "financial assets arising out of self-employment",[64] to "financial assets assessed

[63] See 1997 *Austria–Bulgaria BIT*, Art. 1 (1); 1990 *Austria–Czech Republic BIT*, Art. 1 (1); *Austria–Estonia BIT*, Art. 1 (1); 1994 *Austria–Latvia BIT*, Art. 1 (1); 2002 *Austria–Malta BIT*, Art. 1 (2); 1988 *Austria–Poland BIT*, Art. 1 (1); 2002 *Austria–Slovenia BIT*, Art. 1 (2); 1988 *Belgium–Bulgaria BIT*, Art. 1 (1); 1997 *Belgium–Cyprus BIT*, Art. 1 (2); 1989 *Belgium–Czech Republic BIT*, Art. 1 (2); 1996 *Belgium–Estonia BIT*, Art. 1 (2); 1986 *Belgium–Hungary BIT*, Art. 1 (1); 1996 *Belgium–Lativa BIT*, Art. 1 (2); 1987 *Belgium–Malta BIT*, Art. 1 (1); 1987 *Belgium–Poland BIT*, Art. 1 (1); 1996 *Belgium–Romania BIT*, Art. 2 (1); 1999 *Belgium–Slovenia BIT*, Art. 1 (1); 1987 *Bulgaria–Cyprus BIT*, Art. 1 (1); 1989 *Bulgaria–France BIT*, Art. 1 (1); 1986 *Bulgaria–Germany BIT*, Art. 1 (1); 1994 *Bulgaria–Hungary BIT*, Art. 1 (1); 1984 *Bulgaria–Malta BIT*, Art. 1 (1); 1999 *Bulgaria–Netherlands BIT*, Art. 1 (1); 1994 *Bulgaria–Poland BIT*, Art. 1 (1); 1994 *Bulgaria–Romania BIT*, Art. 1 (1); 1989 *Cyprus–Hungary BIT*, Art. 1 (1); 1990 *Czech Republic–Finland BIT*, Art. 1 (1); 1990 *Czech Republic–France BIT*, Art. 1 (1); 1990 *Czech Republic–Germany BIT*, Art. 1 (1); 1991 *Czech Republic–Greece BIT*, Art. 1 (1); 1991 *Czech Republic–Netherlands* BIT, Art. 1 (1); 1990 *Czech Republic–Spania BIT*, Art. 1 (1); 1991 *Danmark–Estonia BIT*, Art. 1 (1); 1988 *Danmark–Hungary BIT*, Art. 1 (1); 1992 *Danmark–Latvia BIT*, Art. 1 (1); 1992 *Danmark–Lithuania BIT*, Art. 1 (1); 1994 *Danmark–Romania BIT*, Art. 2 (1); 1992 *Estonia–Finland BIT*, Art. 1 (1) (a); 1992 *Estonia–France BIT*, Art. 1 (1); 1992 *Estonia–Germany BIT*, Art. 1 (1); 1992 *Estonia–Netherlands BIT*, Art. 1 (1); 1994 *Estonia–United Kingdom BIT*, Art. 1 (a); 1988 *Finland–Hungary BIT*, Art. 1 (1); 1992 *Finland–Latvia BIT*, Art. 1 (1) (a); 1992 *Finland–Lithuania BIT*, Art. 1 (1) (a); 1992 *Finland–Romania BIT*, Art. 1 (1) (a); 1990 *Finland–Slovakia BIT*, Art. 1 (1) (a); 1992 *France–Latvia BIT*, Art. 1 (1); 1992 *France–Lithuania BIT*, Art. 1 (1); 1976 *France–Malta BIT*, Art. 1 (1); 1995 *France–Romania BIT*, Art. 1 (1); 1990 *France–Slovakia BIT*, Art. 1 (1); 1998 *France–Slovenia BIT*, Art. 1 (1); 1986 *Germany–Hungary BIT*, Art. 1 (1); 1993 *Germany–Latvia BIT*, Art. 1 (1); 1992 *Germany–Lithuania BIT*, Art. 1 (1); 1980 *Germany–Portugal BIT*, Art. 1 (1); 1993 *Germany–Slovenia BIT*, Art. 1 (1); 1989 *Greece–Hungary BIT*, Art. 1 (1); 1995 *Greece–Latvia BIT*, Art. 1 (1); 1992 *Greece–Poland BIT*, Art. 1 (1); 1997 *Greece–Romania* BIT, Art. 1 (1); 1987 *Hungary–Netherlands BIT*, Art. 1 (1); 1992 *Hungary–Poland BIT*, Art. 1 (2); 1989 *Hungary–Spania BIT*, Art. 1 (1); 1987 *Hungary–United Kingdom BIT*, Art. 1 (1) (a); 1994 *Latvia–Netherlands BIT*, Art. 1 (a); 1994 *Latvia–United Kingdom BIT*, Art. 1 (a); 1994 *Lithuania–Netherlands BIT*, Art. 1 (a); 1993 *Lithuania–United Kingdom BIT*, Art. 1 (a); 1984 *Malta–Netherlands BIT*, Art. 1 (a); 1986 *Malta–United Kingdom BIT*, Art. 1 (a); 1992 *Netherlands–Poland BIT*, Art. 1 (a); 1991 *Netherlands–Slovakia BIT*, Art. 1 (a); 1996 *Netherlands–Slovenia BIT*, Art. 1 (a); 1987 *Poland–United Kingdom BIT*, Art. 1 (a); 1998 *Slovenia–Spania BIT*, Art. 1 (2); and 1996 *Slovenia–United Kingdom* BIT, Art. 1 (a). All aforementioned BITs are available at http://www.unctadxi.org/templates/DocSearch____779.aspx (last visited 31 January 2014).

[64] See 1988 *Austria–Hungary BIT*, Art. 1 (1), available at http://www.unctadxi.org/templates/DocSearch____779.aspx (last visited 31 January 2014).

in the host State in accordance with the host State's laws and regulations"[65] – if they even contain a definition of 'investments'[66] – and thus encompass not only FDIs, but also, for instance, portfolio investments. The same applies to the definition of 'investment' in BITs between EU Member States and non-EU Member States (so called extra-EU BITs).[67] Recently adopted model BITs

[65] See 1996 *Austria–Lithuania BIT*, Art. 1 (1); 1996 *Austria–Romania BIT*, Art. 1 (1); 1996 *Belgium–Lithuania BIT*, Art. 1 (2); 1999 *Bulgaria–Czech Republic BIT*, Art. 1 (1); 1993 *Bulgaria–Danmark BIT*, Art. 1 (1); 1997 *Bulgaria–Finland BIT*, Art. 1 (1); 1993 *Bulgaria–Greece BIT*, Art. 1 (1); 1993 *Bulgaria–Portugal BIT*, Art. 1 (1); 2005 *Bulgaria–Slovakia BIT*, Art. 1 (1); 1995 *Bulgaria–Spania BIT*, Art. 1 (2); 1994 *Bulgaria–Sweden BIT*, Art. 1 (1) (a); 1995 *Bulgaria–United Kingdom BIT*, Art. 1 (1); 2001 *Cyprus–Czech Republic BIT*, Art. 1 (1); 1991 *Czech Republic–Danmark BIT*, Art. 1 (1); 1994 *Czech Republic–Estonia BIT*, Art. 1 (1); 1993 *Czech Republic–Hungary BIT*, Art. 1 (1); 1996 *Czech Republic–Ireland BIT*, Art. 1 (1); 1994 *Czech Republic–Latvia BIT*, Art. 1 (1); 1994 *Czech Republic–Lithuania BIT*, Art. 1 (1); 2002 *Czech Republic–Malta BIT*, Art. 1 (1); 1993 *Czech Republic–Portugal BIT*, Art. 1 (1); 2008 *Czech Republic–Romania BIT*, Art. 1 (1); 1990 *Czech Republic–Sweden BIT*, Art. 1 (1); 1990 *Czech Republic–United Kingdom BIT*, Art. 1 (a); 1990 *Danmark–Poland BIT*, Art. 1 (1) (a); 1999 *Danmark–Slovenia BIT*, Art. 1 (1); 1997 *Estonia–Greece BIT*, Art. 1 (1); 1993 *Estonia–Poland BIT*, Art. 1 (2); 1992 *Estonia–Spania BIT*, Art. 1 (2); 1992 *Estonia–Sweden BIT*, Art. 1 (1); 1996 *Finland–Poland BIT*, Art. 1 (1); 1998 *Finland–Slovenia BIT*, Art. 1 (1); 1986 *France–Hungary BIT*, Art. 1 (1); 1989 *France–Poland BIT*, Art. 1 (1); 1961 *Germany–Greece BIT*, Art. 1 (1); 1989 *Germany–Poland BIT*, Art. 1 (1) (a); 1996 *Germany–Romania BIT*, Art. 1 (1); 1996 G*reece–Lithuania BIT*, Art. 1 (1); 1997 *Greece–Slovenia BIT*, Art. 1 (1); 1999 *Hungary–Latvia BIT*, Art. 1 (1); 1999 *Hungary–Lithuania BIT*, Art. 1 (1); 1992 *Hungary–Portugal BIT*, Art. 1 (b); 1993 *Hungary–Romania BIT*, Art. 1 (1); 1993 *Hungary–Slovakia BIT*, Art. 1 (1); 1996 *Hungary–Slovenia BIT*, Art. 1 (1); 1987 *Hungary–Sweden BIT*, Art. 1 (1); 1989 *Italy–Poland BIT*, Art. 1 (1); 1993 *Lativa–Poland BIT*, Art. 1 (2); 1995 *Lativa–Portugal BIT*, Art. 1 (1); 1995 *Lativa–Spania BIT*, Art. 1 (2); 1992 *Latvia–Sweden BIT*, Art. 1 (1); 1992 *Lithuania–Poland BIT*, Art. 1 (2); 1998 *Lithuania–Portugal BIT*, Art. 1 (1); 1998 *Lithuania–Slovenia BIT*, Art. 1 (1); 1994 *Lithuania–Spania BIT*, Art. 1 (2); 1992 *Lithuania–Sweden BIT*, Art. 1 (1); 1994 *Netherlands–Romania BIT*, Art. 1 (a); 1993 *Poland–Portugal BIT*, Art. 1 (1); 1992 *Poland–Spania BIT*, Art. 1 (2); 1989 *Poland–Sweden BIT*, Art. 1 (1); 1993 *Portugal–Romania BIT*, Art. 1 (2); 1995 *Portugal–Slovakia BIT*, Art. 1 (1); 1997 *Portugal–Slovenia BIT*, Art. 1 (1); 1994 *Romania–Slovakia BIT*, Art. 1 (1); 1995 *Romania–Spania BIT*, Art. 1 (1); 2002 *Romania–Sweden BIT*, Art. 1 (1); 1995 *Romania–United Kingdom BIT*, Art. 1 (a); and 1999 *Slovenia–Sweden BIT*, Art. 1 (1). All aforementioned BITs are available at http://www.unctadxi.org/templates/DocSearch____779.aspx (last visited 31 January 2014).

[66] The 1974 *Germany-Malta BIT* and the 2002 *Italy–Malta BIT* do not contain a definition of the term 'investment'. Both BITs are available at http://www.unctadxi.org/templates/DocSearch____779.aspx (last visited 31 January 2014).

[67] Compare 2004 *France–Bahrain BIT*, Art. 1 (1); 2007 *French–Chinese BIT*, Art. 1 (1); 2005 *Germany–Afghanistan BIT*, Art. 1 (1); 2001 *Germany–Bosnia and Herzegovina BIT*,

of EU Member States,[68] non-EU Member States,[69] COMESA,[70] SADC,[71] the Association of Southeast Asian Nations (ASEAN),[72] and the International

Art. 1 (1); and 2000 *United Kingdom–Sierra Leone BIT*, Art. 1 (a), defining an investment to be any asset, with 1996 *Poland–Jordan BIT*, Art. 1 (2); 2003 *Spania–Albania BIT*, Art. 1 (2); 2005 *Spania–China BIT*, Art. 1 (1); and 2006 *United Kingdom–Mexico BIT*, Art. 1, requiring that the investment has been made in accordance with the laws and regulations of the host State. All aforementioned BITs are available at http://www.unctadxi.org/templates/DocSearch____779.aspx (last visited 31 January 2014).

68 Examples for recently adopted model BITs of EU Member States are the 2006 *France Model BIT* (*Draft Agreement Between the Government of the Republic of France and the Government of the Republic of (...) on the Reciprocal Promotion and Protection of Investments*, available at http://www.italaw.com/documents/ModelTreatyFrance2006.pdf (last visited 31 January 2014)), the 2008 *Germany Model BIT* (*Treaty Between the Federal Republic of Germany and … Concerning the Encouragement and Reciprocal Protection of Investments*, available at http://www.italaw.com/sites/default/files/archive/ita1025.pdf (last visited 31 January 2014)), and the 2003 *Italy Model BIT* (*Agreement Between the Government of the Italian Republic and the Government of (...) on the Promotion and Protection of Investments*, available at http://www.italaw.com/sites/default/files/archive/ITALY%202003%20Model%20BIT%20.pdf (last visited 31 January 2014)).

69 Examples for recently adopted model BITs of non-EU Member States are the 2004 *Canada Model BIT* (*Agreement Between Canada and ... for the Promotion and Protection of Investments*, available at http://italaw.com/documents/Canadian2004-FIPA-model-en.pdf (last visited 31 January 2014)), the 2007 *Colombia Model BIT* (*Bilateral Agreement for the Promotion and Protection of Investments Between the Republic of Colombia and ...*, available at http://italaw.com/documents/inv_model _bit_colombia.pdf (last visited 31 January 2014)), the 2003 *India Model BIT* (*Agreement between the Government of the Republic of India and the Government of the Republic of (...) for the Promotion and Protection of Investments*, available at http://italaw.com/sites/default/files/archive/ita1026.pdf (last visited 31 January 2014)), the (now outdated) 2004 *U.S. Model BIT* (*Treaty Between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment*, available at http://www.state.gov/documents/organization/117601.pdf (last visited 31 January 2014)), and its successor, the 2012 *U.S. Model BIT* (*Treaty Between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment*, available at http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf (last visited 31 January 2014)).

70 *Investment Agreement for the COMESA Common Investment Area* (2007), available at http://www.tralac.org/wp-content/blogs.dir/12/files/2011/uploads/Investment_agreement_for_the_CCIA.pdf (last visited 31 January 2014).

71 *SADC Model Bilateral Investment Treaty Template* (2012), available at http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf (last visited 31 January 2014).

72 *ASEAN Comprehensive Investment Agreement* (2009), available at http://www.asean.org/images/2012/Economic/AIA/Agreement/ASEAN%20Comprehensive%20Investment%20Agreement%20(ACIA)%202012.pdf (last visited 31 January 2014).

Institute for Sustainable Development (IISD)[73] do not provide a uniform definition of the term 'investment' either.[74]

Article 1 (6) of the 1992 *Energy Charter Treaty* (ECT)[75] defines investments as "every kind of asset" associated with an economic activity in the energy sector, thus following the rather broad approach. Article 25 (1) of the 1965 *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States* (ICSID Convention) refers generally to "an investment",[76] but does not further specify or define this term. However, with regard to the notion of 'investments' in Article 25 (1) of the Convention, an tribunal of the International Centre for the Settlement of Investment Disputes (ICSID), an entity belonging to the World Bank, decided in the case of *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*[77] that an investment in the meaning of Article 25 (1) *ICSID Convention* is characterized by (i) a contribution in money, in kind, or in industry; (ii) long duration; (iii) the presence of risk; and (iv) the promotion of economic development.[78] The International Monetary Fund (IMF) distinguishes in its *Balance of Payments Manual* between FDIs and portfolio investments.[79]

73 *IISD Model International Agreement on Investment for Sustainable Development* (2005), available at http://www.italaw.com/sites/default/files/archive/ita1027.pdf (last visited 31 January 2014) [IISD Agreement].

74 Whereas 2006 *France Model BIT*, Art. 1 (1) (*supra* note 68), 2008 *Germany Model BIT*, Art. 1 (1) (*supra* note 68), 2004 *U.S. Model BIT* (*supra* note 69), Art. 1, and 2012 *U.S. Model BIT*, Art. 1 (*supra* note 69) define investments as "any assets", 2003 *Italy Model BIT*, Art. 1 (1) (*supra* note 68), 2007 *Colombia Model BIT*, Art. 1 (2) (*supra* note 69), 2003 *India Model BIT*, Art. 1 (b) (*supra* note 69), 2009 *ASEAN Comprehensive Investment Agreement*, Art. 4 (a), (c) (*supra* note 72) require that the investment has to be made in accordance with the laws and regulations of the host State. 2004 *Canada Model BIT*, Art. 1 (*supra* note 69), and 2007 *Investment Agreement for the COMESA Common Investment Area*, Art. 1 (*supra* note 70) contain a very detailed and narrow definition of the term 'investment'. *SADC Model Bilateral Investment Treaty Template*, Art. 2 (*supra* note 71) does not provide one definition, but provides three different definitions – an enterprise-based definition, an asset-based definition based 2004 *Canada Model BIT*, Art. 1 (*supra* note 69), and an asset-based definition based on 2012 *U.S. Model BIT*, Art. 1 (*supra* note 69), thus reflecting the prevailing controversy of defining 'investments'.

75 *The Energy Charter Treaty*, 17 December 1994, Art. 1 (6), 2080 UNTS 95, 101.

76 *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 18 March 1965, Art. 25 (1), 575 UNTS 159, 174.

77 *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction of 23 July 2001, 42 ILM 609, 622, para. 52.

78 Several other arbitral tribunals have applied this definition. See M. Sornarajah, *The International Law on Foreign Investment*, 3rd ed. (2010), 309.

79 International Monetary Fund (ed.), *Balance of Payments and International Investment Position Manual*, 6th ed. (2009), 100 *et seq.* & 110, paras 6.8 *et seq.* & 6.55-6.57.

According to the IMF, FDI is a "category of cross-border investment associated with a resident in one economy having control or a significant degree of influence on the management of an enterprise that is resident in another economy".[80] Further, pursuant to the IMF, "[p]ortfolio investment is defined as cross-border transactions and positions involving debt or equity securities, other than those included in direct investment or reserve assets".[81]

Summing up, even the grammatical method of interpreting Article 207 (1) TFEU does not provide much clarity.[82] The plain wording of Article 207 (1) TFEU expresses a distinction between direct and non-direct investments and confers upon the EU only the competence to negotiate and conclude international agreements regarding the former investments. However, this distinction remains vague and cannot be determined by employing the grammatical method of interpretation.

Some commentators argue that the EU has an implied external competence relating to non-direct investments based on Articles 63 to 66 TFEU, thus on provisions governing the free movement of capital.[83] In addition, an extensive interpretation of Article 207 (1) TFEU resulting in the inclusion of non-direct investments could be considered based on the *effet utile* principle. This principle aims at ensuring that EU law is given full effect.[84] It could be argued that the competence granted by Article 207 (1) TFEU, limiting the scope of future EU IIAs to only direct investments, cannot be used effectively if non-direct investments are excluded, as the boundaries between direct and non-direct investments are blurred.[85] This would also explain why all BITs concluded by EU Member States – either as intra-EU BIT or as extra-EU BIT – do not distinguish

80 *Ibid.*, 100, para. 6.8.

81 *Ibid.*, 110, para. 6.54.

82 The same conclusion is reached by Dimopoulos, *supra* note 57, 42 and Bungenberg, *supra* note 39, 35-36.

83 European Commission, *supra* note 59, 8. See also *Fabrique de fer de Charleroi SA and Dillinger Hüttenwerke AG v. Commission of the European Communities*, Joined Cases C-351/85 & C-360/85, [1987] ECR 3639 and *Commission of the European Communities v. Council of the European Communities (European Agreement on Road Transport)*, Case C-22/70, [1971] ECR 263.

84 See, e.g., *Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A.*, Case C-106/77, [1978] ECR 629, 643, paras 14-16; *Rhiannon Morgan v. Bezirksregierung Köln and Iris Bucher v. Landrat des Kreises Düren*, Joined Cases C-11/06 & C-12/06, [2007] ECR I-9161, I-9206, para. 26; *Halina Nerkowska v. Zakład Ubezpieczeń Społecznych Oddział w Koszalinie*, Case C-499/06, [2008] ECR I-3993, I-3999, para. 18.

85 See, e.g., Dimopoulos, *supra* note 57, 42 and Bungenberg, *supra* note 39, 36-37.

between direct and non-direct investments.[86] Such an extensive interpretation of Article 207 (1) TFEU would likewise correlate with the suggestions of the European Commission and the European Parliament, which prefer that future EU IIAs cover direct and non-direct investments.[87]

Yet, both arguments are criticized by other commentators. According to these commentators, the first argument "ignores the express intention of the drafters of the Lisbon Treaty to limit the EU's competence to foreign direct investment".[88] Furthermore, it "cannot explain why the inclusion of foreign direct investment in Article 207 TFEU was necessary in the first place".[89] If the EU automatically has an implied external competence for every explicit internal competence, the EU would similarly have an implied external competence for foreign direct investment, as it has an explicit internal competence for FDIs.[90] The second argument – resulting in fact in an interpretation *contra legem* – is not in line with the principle of conferral, a substantial principle of EU law, codified in Articles 4 (1) and 5 (1), (2) TEU.[91] According to this principle, the EU's competences have to be explicitly provided for in the TEU or the TFEU.[92] As demonstrated above, this is not the case with regard to non-direct investments.

Although these critical arguments are *prima facie* convincing, they disregard that Article 352 TFEU allows for a flexible adjustment of EU competences in relation to all objectives of the EU.[93] This provision stipulates that, whenever an action by the EU is deemed necessary to attain one of the objectives set out in the treaties, but the treaties do not provide the powers required, the Council

86 Cf. *supra* notes 63-67.

87 European Commission, *supra* note 59, 8; European Parliament, *supra* note 60, para. 11.

88 M. Krajewski, 'The Reform of the Common Commercial Policy', in A. Biondi, P. Eeckhout & S. Ripley (eds), *EU Law After the Treaty of Lisbon* (2012), 292, 302.

89 *Ibid.*

90 Cf. Shan & Zhang, *supra* note 62, 1054-1056.

91 Cf. also TFEU, Art. 7, *supra* note 37.

92 For an in-depth analysis of the principle of conferral, see A. Weber, 'The Distribution of Competences Between the Union and the Member States', in H.-J. Blanke & S. Mangiameli (eds), *The European Union After Lisbon* (2012), 311.

93 See, e.g., C. Lebeck, 'Implied Powers Beyond Functional Integration?: The Flexibility Clause in the Revised EU Treaties', 17 *Journal of Transnational Law and Policy* (2008) 2, 303, 329-332. The exact scope of Art. 352 TFEU is disputed and was of great concern for the *Bundesverfassungsgericht* [the German Federal Constitutional Court] in its judgment on the *Lisbon Treaty*. See *Lissabon-Vertrag* [Lisbon Treaty], Case 2 BvE 2/08 *et al.*, 123 BVerfGE 267, 393-395 (paras 325-328). See to this P. Kiiver, 'The Lisbon Judgment of the German Constitutional Court: A Court-Ordered Strengthening of the National Legislature in the EU', 16 *European Law Journal* (2010) 5, 578, 583.

can – and should – adopt 'appropriate measures', thus any measure which the Council considers as necessary in order to attain the objective in question effectively. Thus, Article 352 TFEU is an exception to the principle of conferral, which must step back in such instances. In respect of the scope of Article 207 (1) TFEU, it has to be noted that – mainly because the blurred boundaries between direct and non-direct investments – the objective of Article 207 (1) TFEU in particular – namely to ensure a coherent European investment policy, to enlarge the EU's bargaining power, and to strengthen the EU as an actor in bilateral and multilateral negotiations on investment policy[94] – but also of the EU's common commercial policy (CCP) in general, cannot be attained effectively if the EU does not have competence with regard to non-direct investments. Thus, provided that the Council adopts 'appropriate measures' in accordance with Article 352 TFEU, the EU has the competence to negotiate and conclude IIAs covering both, direct and non-direct investments.[95] Moreover, based on this argumentation, the EU's competence encompasses the current standard clauses in IIAs, such as the definition of investments covered by the respective IIA (regularly 'any asset'), a clause determining that the investment has to be in accordance with the laws and regulations of the host entity upon establishment of the investment ('accordance with the law clause'), the 'most-favorable nation treatment clause' (also referred to as the 'MFN clause'), the 'national treatment clause' (also referred to as the 'NT clause'), the 'fair and equitable treatment clause' (also referred to as the 'FET clause'), a provision limiting expropriations of foreign investors and outlawing any expropriation not accompanied by the payment of a compensation (also referred to as the 'expropriation/compensation clause'), and the 'investor-State-dispute settlement clause' (also referred to as the 'ISDS clause').[96]

2. The Competence of the Various SSA Regional Organizations to Negotiate and Conclude IIAs

Article 207 (3) TFEU provides the EU with the exclusive competence to negotiate and conclude IIAs not only with States, but also with IOs. Considering

94 Cf. Secretariat of the European Convention, *supra* note 53, 3-4, 53.

95 The alternative would be a mixed agreement by the EU and its Member States on the one side and third States or regional organizations on the other side, or an amendment of the TFEU, aiming at transferring the competence to negotiate and conclude IIAs also covering non-direct investments to the EU. This alternative is for example suggested by Bungenberg, *supra* note 39, 40-42.

96 The fact that the EU has the competence to negotiate and conclude IIAs containing these

that there are several IOs in SSA and that an IIA between the EU on the one side and a regional organization in SSA on the other side would be beneficial in order to create a common level of investment protection for European investors in SSA, and also to avoid single States being played against each other,[97] it has to be assessed whether the IOs' competence extends to negotiating and concluding IIAs.

With the exception of the *AU Act*, the *CEMAC Treaty*,[98] the *CEN-SAD Treaty*, the *SACU Agreement*, and the *UEMOA Treaty*, all constituent treaties of the various regional organizations contain provisions relating to foreign investments.[99] However, with the noteworthy exception of Article 24 (1) *SADC Treaty*,[100] no treaty provision explicitly allows the respective IO to negotiate

standard clauses does not imply that there are no problems related to these clauses. These problems will be discussed *infra*, section C.

97 UNCTAD, *World Investment Report 2013: Global Value Chains: Investment and Trade for Development* (2013), 103-107, which reports about increasing regionalism in IIA negotiations.

98 It has to be noted, though, that in 1999 CEMAC passed the *CEMAC Investment Charter*, 17 December 1999, Regulation No. 17/99/CEMAC-020-CM-03, which is basically a framework that aims at harmonizing the investment codes of the CEMAC Member States. Cf. S. A. Khan & L. T. Bamou, 'An Analysis of Foreign Direct Investment Flows to Cameroon', in S. Ibi Ajayi (ed.), *Foreign Direct Investment in Sub-Saharan Africa: Origins, Targets, Impact and Potential* (2006), 75, 85-86. Although the mere presence of the *CEMAC Investment Charter* does not allow the conclusion that the CEMAC has the competence to negotiate and conclude IIAs, it would seem logical and – considering CEMAC's mission to promote the development of its Member States (*CEMAC Treaty*, Art. 2, *supra* note 20) – desirable that CEMAC serves as a forum and coordinator of the interests of its Member States with regard to future IIAs between the EU and CEMAC Member States.

99 See Arts 4 (2) (c), 42 (1) (b) (iii) & 65 (1) (b) (i) *AEC Treaty* (*supra* note 29, 1253, 1266 & 127); Arts 3 (c), 4 (3) (e), 84 (c), 100 (f), 100 (h), 104 (1) (c), 106 (2) (b), 138 (1) (c), 139 (2) (c), 146 (b), 148 (ii), 153 (a) & 158-160 *COMESA Treaty* (*supra* note 21, 1075, 1090, 1094-1096, 1102-1108); Arts 79 & 80 *EAC Treaty* (*supra* note 22, 290-291), Art. 46 (1) (a) *ECCAS Treaty* (*supra* note 23, 957); Arts 3 (2) (f), 3 (2) (i), 34 (b) (i) & 66 (2) (d) *ECOWAS Treaty* (*supra* note 24, 238-239, 253 & 265); Arts 7 (c) & 13A (l) *IGAD Agreement* (*supra* note 25, 7 & 12); and Arts 5 (2) (i), 21 (3) (c) & 24 (1) *SADC Treaty* (*supra* note 27, 125, 130).

100 It should be noted that SADC already made use of this competence at least to some extent by adopting the *SADC Model BIT Template* (*supra* note 71). However, this instrument is – as it name already suggests – only a template for BITs concluded by SADC Member States and is not intended to be a model for BITs concluded directly by SADC. For more information, see H. Mann, 'The SADC Model Bit Template: Investment for Sustainable Development' (30 October 2012), available at http://www.iisd.org/itn/2012/10/30/the-sadc-model-bit-template-investment-for-sustainable-development/ (last visited 31

and conclude international agreements. Instead, the treaty provisions consider it rather as a forum to coordinate the various interests of its Member States. By doing so, the respective IO might serve as negotiating partner for the EU, but the IIA has ultimately to be signed by the Member States of the IO. Solely the *COMESA Treaty*, with its investment chapter in Articles 158 to 160 and its Article 153 (a) could be interpreted to grant COMESA the competence to negotiate and conclude IIAs. Other treaties, such as Articles 79 and 80 *EAC Treaty*, Article 46 (1) (a) *ECCAS Treaty*, and Articles 3 (2) (f) and 3 (2) (i) *ECOWAS Treaty*, refer only to the creation of a common investment code.

To sum up, with the exception of SADC and maybe also COMESA, regional organizations in SSA do not have the competence to conclude IIAs. Notwithstanding, they can serve as forum to coordinate the wide range of interests of their Member States during the negotiation of an IIA with the EU and, by doing so, could ensure that their Member States are not played against each other. The negotiated IIA has to be signed by the IO's Member States. Although so far most treaties aiming at protecting foreign investors are only bilateral, the examples of the TFEU, containing provisions on intra-EU investments, the *North American Free Trade Agreement* (NAFTA),[101] and the ECT clearly indicate that plurilateral treaties aiming at protecting foreign investors are possible.

C. Introducing the Current Standard Clauses Into the New Investment Treaty Regime

The mere presence of a treaty aiming at protecting foreign investors does evidently not suffice in order to provide sufficient investment protection. Ever since the very first BIT was concluded in 1959 between Germany and Pakistan, all 2,000+ BITs contain certain standard clauses. Among these clauses are the definition of the investments covered by the respective BIT (regularly 'any asset'), a clause determining that the investment has to be in accordance with the laws and regulations of the host State upon establishment of the investment ('accordance with the law clause'), a 'most-favorable nation treatment clause' (also referred to as a 'MFN clause'), a 'national treatment clause' (also referred to as a 'NT clause'), a 'fair and equitable treatment clause' (also referred to as a 'FET clause'), a provision limiting expropriations of foreign investors and outlawing

January 2014).

101 *North American Free Trade Agreement*, 17 December 1992, 32 ILM 289 & 32 ILM 605.

any expropriation not accompanied by the payment of a compensation (also referred to as an 'expropriation/compensation clause'), and an 'investor-State-dispute settlement clause' (also referred to as an 'ISDS clause'). As these clauses virtually constitute the basis for investment protection worldwide, they should be also included in possible new IIAs covering European investments in SSA. As explicated above, the EU has the competence to negotiate and conclude IIAs containing these clauses.[102] Similarly, SADC and COMESA comprise the competence to negotiate and conclude IIAs containing these clauses.[103] In fact, an interpretation of the relevant provisions of the constituent treaties of the EU, SADC, and COMESA can be solely based on the *effet utile* principle and does not lead to an (exceptionally allowed) interpretation *contra legem*.[104] However, with regard to the EU, this finding might not be applicable to the 'expropriation/compensation clause', as the inclusion of such a clause into a future EU IIA potentially constitutes a violation of Article 345 TFEU. Pursuant to this provision, the "[t]reaties shall in no way prejudice the rules in Member States governing the system of property ownership".[105] Thus, the EU competence does not encompass the right to expropriate. It has to be noted, though, that the usual 'expropriation/compensation clause' stipulates the requirements for a lawful expropriation which are considered to be part of customary international law.[106] Consequently, the inclusion of an 'expropriation/compensation clause' in a future EU IIA would not interfere with the domestic rules governing the system of property ownership in the EU Member States, and therefore would not violate Article 345 TFEU. Beyond that, the scope of Article 345 TFEU only concerns the right of Member States to nationalize private property or to privatize public property.[107] Therefore, "Article 345 TFEU does not deal with the determination of the conditions under which an expropriation might take

102 *Supra*, section B. II. 1.

103 Of course the Member States of the other IOs in SSA, not having the competence to conclude an IIA with the EU, can agree on an IIA containing these standard clauses because of their sovereignty.

104 Cf. Karl, *supra* note 61, 420.

105 TFEU, Art. 345, *supra* note 37.

106 Under customary international law, an expropriation is considered to be lawful if the expropriation is (i) in the public interest or for a public purpose, (ii) accomplished in a non-discriminatory fashion, (iii) in conformity with due process, and (iv) accompanied by a prompt, adequate and effective compensation. Cf. U. Kriebaum & A. Reinisch, 'Property, Right to, International Protection', in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Vol. VIII (2012), 522, 525-528, paras 19-31.

107 See, e.g., *Fearon and Irish Land Commission*, Case C-182/83, [1984] ECR 3677, 3684-3685, para 6.

place".[108] This determinations still falls within the scope of possible regulation covered by Article 207 TFEU.[109] Further, Article 345 TFEU does not exclude the domestic rules governing the system of property ownership from the fundamental provisions of the TEU and the TFEU.[110] As a result, the general provisions on the common market, competition, State aid, and CCP apply to the domestic rules governing the system of property ownership.[111]

Although the aforementioned standard clauses can be generally included in future EU-SSA IIAs, some alterations are necessary.

I. Determining the Investor to Be Protected by the New Treaty

All IIAs generally only apply to investments made by an investor who is national of one of the contracting parties and who is investing in the other State.[112] In the absence of a multilateral investment treaty,[113] it is therefore essential to determine the nationality of an investor. Consequently, a future EU-SSA IIA has to include some reference to the nationality of the investor as well.

Currently, there are three possibilities for the determination of the nationality of a legal person. A legal person can be the national of the State of its

108 Bungenberg, *supra* note 39, 37.

109 Cf. C. Herrmann, 'Die Zukunft der mitgliedstaatlichen Investitionspolitik nach dem Vertrag von Lissabon', 21 *Europäische Zeitschrift für Wirtschaftsrecht* (2010) 6, 207, 211.

110 D. Booß, 'Art. 345 AEUV', in C. O. Lenz & K.-D. Borchardt (eds), *EU-Verträge Kommentar: EUV, AEUV, GRCh* (2013), 3027, 3028, para. 3.

111 Cf. *ibid*.

112 See, e.g., 2008 *Germany Model BIT*, Art. 1, *supra* note 68. See, however, 2012 *U.S. Model BIT*, Art. 8 (1), *supra* note 69, 10-11, which makes reference to investors of a non-party. To some extent, the 'MFN clause' contained in most IIAs constitutes the exception to this general rule as it allows for the application of another IIA which was concluded between one of the contracting parties to the IIA containing the 'MFN clause' and a third State. For more information, see, e.g., M. Hilf & R. Geiß, 'Most-Favoured-Nation Clause', in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Vol. VII (2012), 384.

113 Such an agreement was proposed by the Organisation for Economic Co-operation and Development (OECD) in 1995 (the draft is available at http://www1.oecd.org/daf/mai/pdf/ng/ng987r1e.pdf (last visited 31 January 2014)), but was never adopted (see for more information S. J. Kobrin, 'The MAI and the Clash of Civilizations', *Foreign Policy* (1998) 112, 97; J. Kurtz, 'NGOs, the Internet and International Economic Policy Making: The Failure of the OECD Multilateral Agreement on Investment', 3 *Melbourne Journal of International Law* (2002) 2, 213; C. Warkentin & K. Mingst, 'International Institutions, the State, and Global Civil Society in the Age of the World Wide Web', 6 *Global Governance* (2000) 2, 237).

incorporation, of the State of its *siège social*, or of the State in which the majority of its shareholders reside.[114] Regardless of the question of which one of these three theories is to be followed, it has to be taken into account that the EU itself is not a State and thus there is – besides the construct of EU citizenship pursuant to Article 20 TFEU – no nationality linked to the EU.[115] Hence, the nationality of a legal person cannot be determined solely under EU law, but has to take into account the laws of the respective Member State. As a result, the definition of a (European) foreign investor has to cope with this fact by defining a European foreign investor as a legal person who is incorporated in one of the EU's Member States, has its *siège social* in one of the EU's Member States, or whose majority of shareholders reside within the EU.

II. Determining the Decisive Laws and Regulations of the Host Entity Pursuant to the 'Accordance With the Law Clause'

As neither the EU nor any of the SSA regional organizations are States,[116] the current standard clause cannot be directly included in a treaty aiming at protecting foreign investors.

Even if 'host State' is replaced by 'host IO' or 'host entity', the notion of 'laws and regulations' is of concern. Due to the very nature of an IO, there is no general, all-encompassing body of laws and regulations available. Instead, the laws and regulations of the particular IO primarily consist of the law within its founding treaty – the so-called primary law[117] with regard to the IO in question. Most provisions of the founding treaties deal with the functioning

114 Cf. R. D. Sloane, 'Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality', 50 *Harvard International Law Journal* (2009) 1, 1, 38.

115 The same applies to the two IOs in SSA which have the competence to conclude IIAs, SADC, and COMESA.

116 *Convention on the Rights and Duties of States*, 26 December 1933, Art. 1, 165 LNTS 19, 25 – which is considered to be part of customary international law (see, e.g., M. N. Shaw, *International Law*, 6th ed. (2009), 198) – determines that a State is defined as having a defined territory, a permanent population, an effective government, and the capacity to enter into relations with other States. *Prima facie*, the EU and most SSA regional organizations fulfill these criteria. However, in order to be considered a State the 'effective government' has to be politically independent (see, e.g., J. Crawford, *Brownlie's Principles of Public International Law*, 8th ed. (2012), 129-130) – a requirement no IO can fulfill because of its large dependency on its Member States and its limited 'sovereign' rights.

117 See, e.g., M. Benzing, 'International Organizations or Institutions, Secondary Law', in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Vol. VI (2012), 74, 74, para. 1.

of the respective IO and allocating competences to its various organs.[118] Other provisions govern the relations between the IO and its Member States.[119] In fact, there are only very few, if any, general provisions directly applicable to the citizens of the Member States.[120] Consequently, these provisions do not constitute a proper body of laws and regulations within the meaning of the 'accordance with the law clause'.

Neither does the so-called secondary law,[121] consisting of regulations and other sources of law adopted by the respective IO. Despite the vast, incomparable competences of the EU for adopting regulations and directives, there is still no contemporary all-encompassing 'European law' available which is directly applicable to the 'EU's citizens'. In fact, most legislative measures adopted by the EU are directives firstly requiring transformation into domestic law by the Member States.[122] The same applies to the various IOs in SSA.

However, the 'accordance with the law clause' can be included in IIAs despite the lack of an all-encompassing body of laws and regulations. Throughout the world, States with a federalist order such as the United States of America, Brazil, Germany, Austria, Switzerland, Nigeria, and Australia are facing the same challenge. IIAs concluded by these States include an 'accordance with the law clause'[123] which is interpreted as to refer to both federal and state law.[124] That is to say, if an investor wants to do business in Nigeria, for example, the investment has upon establishment to be in accordance with the laws and regulations of

118 See the TEU (*supra* note 19) in which most of the 55 provisions govern the functioning of the EU. Similarly, most of the 358 provisions of the TFEU are concerned with the functioning of the EU.

119 See, e.g., TFEU, Art. 175, *supra* note 37.

120 For example, provisions on the common market contained in the TFEU are considered to be directly applicable. See, e.g., P. Craig & G. de Búrca, *EU Law: Text, Cases and Materials*, 5th ed. (2011), 180. Similarly, the provisions on non-discrimination are equally considered to have horizontal direct effect. Rather critical in this regard M. de Mol, 'The Novel Approach of the CJEU on the Horizontal Direct Effect of the EU Principle of Non-Discrimination: (Unbridled) Expansionism of EU Law?', 18 *Maastricht Journal of European and Comparative Law* (2011) 1, 109, 123-130. See in general on the direct effect of treaty provisions *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Admininistratie der Belastingen*, Case C-26/62, [1963] ECR 1, 16.

121 See, e.g., Benzing, *supra* note 117, 74-75, paras 2-3.

122 See TFEU, Art. 288, *supra* note 37. For exceptions to this requirement, see, e.g., *Van Duyn v. Home Office*, Case C-41/74, [1974] ECR 1337, 1347-1349, paras 9-15; Craig & de Búrca, *supra* note 120, 191-194.

123 See 2008 *Germany Model BIT*, Art. 2 (1), *supra* note 68, 5.

124 See 2012 *U.S. Model BIT*, Art. 3 (3), *supra* note 69, 7.

Nigeria as well as with the laws and regulations of the particular State of Nigeria in which the investment will be made.

This interpretation of the 'accordance with the law clause' can certainly be transferred to a possible future EU-SSA IIA as well. The clause has simply to be altered in a way as to provide that upon establishment the investment shall comply upon establishment with the laws and regulations applicable within the IO and the particular Member State in which the investment will be made.

III. Alterations to the Standard 'NT Clause'

According to the 'NT clause', foreign investors have to be treated in the same way as national corporations. This leads only to a 'relative' standard of treatment.[125] What it indicates is that the determination of whether a national measure violates the 'NT clause' requires a comparison between a foreign investor and a national investor or corporation. Precisely, it stipulates that foreign and national investors are comparable, which is more commonly referred to as 'likeness'.[126]

The inclusion of a simple 'NT clause', similar to Article 4 (1) (1) of the 2007 *France–Bahrain BIT*[127] for example, which just states that the contracting Party applies to the nationals of the other contracting Party a treatment not less favorable than the treatment applied to its own nationals, might yield undesirable legal consequences. As will be elaborated in more detail below, future EU-SSA IIAs will have to include clauses on environmental protection, labor standards, and human rights.[128] Especially less and least developed States in SSA might not want to impose as far reaching environmental regulations as the EU has, or in the future will have, in order to ensure that domestic corporations remain competitive. If an EU investor, unlike national investors or corporations, had to comply with rather far reaching environmental protection standards, the 'NT clause' would be violated. Thus, this clause has to be altered and drafted

125 Dimopoulos, *supra* note 57, 155.
126 *Ibid.*
127 2007 *France–Bahrain BIT*, Art. 4 (1) (1), *supra* note 67.
128 *Infra*, section D.

more subtly nuanced in order to ensure that it is inapplicable to clauses on environmental protection, labor standards, and human rights.[129]

IV. Alterations to the Standard 'MFN Clause'

The same conclusion can be drawn in respect of the 'MFN clause'. A simple 'MFN clause', such as Article 3 (1) 2005 *Germany–Afghanistan BIT*,[130] provides that foreign investments covered under the IIA containing the 'MFN clause' are granted the same favorable treatment as foreign investments covered under another IIA. If the clauses on environmental protection, labor standards, and human rights in the future EU-SSA IIAs are not contained in other IIAs applicable to SSA,[131] foreign investors may be inclined to circumvent the clauses in the EU–SSA IIA by referring to the 'MFN clause' and the absence of these clauses in other IIAs. Consequently, the 'MFN clause' in future EU-SSA IIAs has to be altered as well.[132] Such an exception is provided for example in Article 12 2008 *U.S.–Rwanda BIT*[133] pertaining to environmental protection.

In addition, the scope of the 'MFN clause' is currently discussed amongst legal scholars. This discussion relates to the question of whether the 'MFN clause' can be construed extensively, providing the foreign investor with the opportunity to refer to any – from its point of view more favorable – treatment of other foreign investors under other IIAs.[134] Such an interpretation would, however, be too broad and no longer in accordance with the law.[135] Nevertheless

129 Cf. European Parliament, *supra* note 60, paras 25 & 30 which welcomes the fact that a number of IIAs currently have a clause which prevents the watering-down of social and environmental legislation in order to attract investment. An example of such a clause can be found in 2008 *U.S.–Rwanda BIT*, Art. 12 (1), available at http://www.unctad.org/sections/dite/iia/docs/bits/US_Rwanda.pdf (last visited 31 January 2014), 15. See also 2012 *U.S. Model BIT*, Art. 12 (3), *supra* note 69, 17, which allows balancing environmental concerns against investment protection.

130 2005 *Germany–Afghanistan* BIT, Art. 3 (1), *supra* note 67.

131 It has to be noted in this context that a few recently adopted Model BITs and BITs contain already clauses on environmental protection, labor standards, and human rights. Examples are the aforementioned 2008 *U.S.–Rwanda BIT* (*supra* note 129) and the 2005 *U.S.–Uruguay BIT*, available at http://www.unctad.org/sections/dite/iia/docs/bits/US_Uruguay.pdf (last visited 31 January 2014).

132 Cf. European Parliament, *supra* note 60, paras 25 & 30.

133 2008 *U.S.–Rwanda BIT*, Art. 12, *supra* note 129.

134 See Dimopoulos, *supra* note 57, 160.

135 Cf. Sornarajah, *supra* note 78, 322. However, it has to be noted that an ICSID tribunal held in the case *Emilio Augustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Award of 13 November 2000, 40 ILM 1129, 1132-1133, para. 21, that a 'MFN clause'

it is suggested that the drafters of future EU-SSA IIAs should be aware of this leeway and therefore should draft the 'MFN clause' in a way that excludes the possibility of a broad interpretation of the clause, thus ensuring that the 'MFN clause' can only operate in respect of the same matter and cannot be extended to matters different from those actually envisaged by the basic treaty.[136]

V. Alterations to the Standard 'FET Clause'

Whereas 'NT and MFN clauses' provide only a 'relative' standard of treatment,[137] the 'FET clause' provides an 'absolute' standard of treatment,[138] thus providing protection for foreign investments against national measures irrespective of their discriminatory character.[139] Regularly, the wording of the 'FET clause' in an IIA is rather vague.[140] For example, Article 2 (2) 2005 *Germany–Afghanistan BIT* simply states that "[e]ach Contracting Party shall in its territory in any case accord investments by investors of the other Contracting State fair and equitable treatment".[141] Unsurprisingly, the 'FET clause' is one of the most, if not the most, interpreted clauses in investor-State arbitration.[142] Arbitration tribunals greatly extended the scope of the 'FET clause',[143] which subsequently spurred a fierce discussion about its exact scope, first among legal scholars,[144] and subsequently among States.[145] In order to ensure that a future

applies to more favorable clauses on dispute settlement in other IIAs as well. This finding was later upheld in *Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence of 19 June 2009, para. 220.

136 Dimopoulos, *supra* note 57, 161.

137 *Supra* note 125.

138 Dimopoulos, *supra* note 57, 163.

139 Generally, this clause has been considered as an expression of the principle of good faith, protecting foreign investors from abusive conduct by host States, ensuring the application of regulatory fairness and transparency, and safeguarding legitimate expectations of investors. See, e.g., Sornarajah, *supra* note 78, 349-359 for a detailed analysis of the 'FET clause'.

140 Cf. *ibid.*, 204.

141 2005 *Germany–Afghanistan BIT*, Art. 2, *supra* note 67.

142 Sornarajah, *supra* note 78, 349.

143 Cf. *ibid.* with further references.

144 Cf. *ibid.*, 353.

145 One of the biggest critics of the 'FET clause' is the Republic of South Africa which decided not to renew its BIT with Belgium and Luxembourg and announced its intention not to renew other BITs with European countries because of the overly extensive interpretation of the 'FET clause' by arbitration tribunals. Cf. South African Department of Trade and Industry, 'Bilateral Investment Treaty Policy Framework Review: Executive

EU-SSA IIA is acceptable to these States, the drafters of a future EU-SSA IIA should be aware of this criticism and, therefore, should adopt the 'FET clause', in as far as to result in both a limited scope and a limited possibility for arbitration tribunals to interpret this clause extensively. One example of such an adopted 'FET clause' is Article 5 2012 *SADC Model Bilateral Investment Treaty Template*.[146]

VI. Alterations to the Standard 'Expropriation/Compensation Clause'

It can be assumed that any 'expropriation/compensation clause' in a future EU-SSA IIA will be modeled after the current standard 'expropriation/compensation clause' reflective of customary international law.[147]

However, there is currently an ongoing debate among legal scholars and States with regard to the extensive interpretation by arbitration tribunals of indirect expropriations as expropriations within the meaning of the 'expropriation/compensation clause'.[148] For instance, arbitration tribunals have

Summary of Government Position Paper', *Government Gazette/Staatskoerant No. 32386* (7 July 2009), available at http://www.northernlaw.co.za/images/stories/files/actsbills/BILATERAL%20INVESTMENTS%20TREATY%20POLIVY.pdf (last visited 31 January 2014), 10-11. Similarly, Indonesia decided to terminate its IIA with the Netherlands per 1 July 2015 and indicated the termination of all other IIAs (see, e.g., Netherlands Embassy in Jakarta, Indonesia, 'Termination Bilateral Investment Treaty', available at http://indonesia.nlembassy.org/organization/departments/economic-affairs/termination-bilateral-investment-treaty.html (last visited 22 April 2014). Whether Indonesia is asking for 'modern' IIAs, or whether the country's move is somehow related to the rejection of its jurisdictional challenges by the ICSID Tribunal in *Churchill Mining and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case Nos ARB/12/14 & 12/40, Decision on Jurisdiction of 24 February 2014, is currently unclear. See C. Tevendale & V. Naish, 'Indonesia Indicates Intention to Terminate All of Its Bilateral Investment Treaties?' (20 March 2014), available at http://www.lexology.com/library/detail.aspx?g=96317cf9-e366-4877-b00c-a997ed3389c5 (last visited 22 April 2014). Cf. also European Parliament, *supra* note 60, para. 24.

146 *SADC Model Bilateral Investment Treaty Template*, Art. 5, *supra* note 71.

147 Cf. *supra*, section C.

148 See, e.g., R. Dolzer & C. H. Schreuer, *Principles of International Investment Law*, 2nd ed. (2012), 101 *et seq.*; Y. Fortier & S. L. Drymer, 'Indirect Expropriation in the Law of International Investment: I Know It When I See It, or Caveat Investor', 19 *ICSID Review Foreign Investment Law Journal* (2004) 2, 293; *Compañía del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award of 17 February 2000, 39 ILM 1317, 1329, paras 69-74.

considered even environmental measures to be indirect expropriations and have awarded compensation thereupon.[149] Such a broad interpretation of the term 'expropriation', resulting in the limitation of possible legislative acts of the host State, is – if at all – only barely in accordance with public international law, as the host State's sovereignty – one of the most fundamental principles of public international law – is at stake. Consequently, it does not wonder that some States favor an alteration of the 'expropriation/compensation clause'.[150] The drafters of a future EU-SSA IIA should take this criticism into consideration when drafting their 'expropriation/compensation clause' in order to ensure that this clause is acceptable to the contracting parties of the EU-SSA IIA. An example for such an altered 'expropriation/compensation clause' is Article 6 (7) of the 2012 *SADC Model Bilateral Investment Treaty Template*, which states that a non-discriminatory "measure of a State Party that is designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment, does not constitute an indirect expropriation under this Agreement".[151]

Further, the determination of the scope of the 'expropriation/compensation clause' in a future EU-SSA IIA has to comply with primary EU law. In order to avoid potential conflicts with Article 17 of the *Charter on Fundamental Rights of the European Union* (CFREU),[152] the 'expropriation/compensation clause' has to be drafted carefully.[153] It is argued that a clause providing that non-discriminatory and transparent measures, aiming at achieving legitimate public policy objectives, such as the protection of public health, the environment, and workers' and consumers' rights, do not amount to indirect expropriation as long as they are proportionate, would sufficiently clarify the rules, protect the right to regulate, and achieve coherence with the CFREU.[154] The same applies of course

149 See, e.g., Sornarajah, *supra* note 78, 398 with references to the case law.

150 Cf. South African Department of Trade and Industry, *supra* note 145, 10-11. See also European Parliament, *supra* note 60, para. 23.

151 *SADC Model Bilateral Investment Treaty Template*, Art. 6 (7), *supra* note 71.

152 *Charter on Fundamental Rights of the European Union*, 7 December 2001, Art. 17, 40 ILM 266, 269.

153 Dimopoulos, *supra* note 57, 191.

154 *Ibid.*, 192.

with regard to Article 14 of the 1981 *African Charter on Human and Peoples' Rights* (ACHPR, also referred to as *Banjul-Charter*).[155]

VII. Attributing Violations of the 'Expropriation/Compensation Clause' and the 'FET Clause' to the Host Entity

Of even greater concern is the attribution of violations of the 'expropriation/compensation clause' and the 'FET clause' to the host entity. In principle, under an IIA concluded between two States, such a violation would constitute an internationally wrongful act within the meaning of Article 2 of the 2001 *Articles on State Responsibility* (ASR).[156] Consequently, the attribution of the wrongful act to the respective host State would be governed by Articles 4 to 11 ASR. According to these provisions, the respective State is basically responsible for any violation of the clauses committed by any State organ, including *ultra vires* acts.[157] As a result, the ASR provides a significant level of protection against wrongful acts by States.

The ASR are inapplicable to IOs. The International Law Commission (ILC) has elaborated a parallel body of norms, and adopted in 2011 the *Draft Articles on the Responsibility of International Organizations* (DARIO).[158] So far, the DARIO are not binding, but are considered to codify, at least in part, customary international law. Despite several similarities, the DARIO vary extremely from the ASR especially in the context of attribution of a wrongful act.[159] As a function thereof, the level of protection against wrongful acts by IOs is lower than the level of protection against wrongful acts by States.

Therefore, a possible future EU-SSA IIA concluded between the EU on the one side and SADC and/or COMESA on the other side should include provisions on the attribution of wrongful acts to the respective IO in order

155 *African Charter on Human and People's Rights*, 27 June 1981, Art. 14, 1520 UNTS 217, 248.

156 *Articles on Responsibility of States for Internationally Wrongful Acts*, Art. 2, GA Res. 56/83 annex, UN Doc A/RES/56/83, 28 January 2002, 2, 2.

157 *Ibid.*, Art. 7, 3.

158 *Draft Articles on the Responsibility of International Organizations*, UN Doc A/66/10 (2011), 54, para. 87.

159 Cf. C. Ahlborn, 'The Use of Analogies in Drafting the Articles on the Responsibility of International Organizations: An Appraisal of the 'Copy-Paste Approach'', 9 *International Organizations Law Review* (2012) 1, 53, 64.

to ensure a similar level of protection for foreign investors as provided by the current BITs concluded between States.

VIII. Settling Disputes Between Host State and Foreign Investor Through International Arbitration

Most IIAs contain an 'ISDS clause' which allows the foreign investor to challenge an alleged violation of the IIA directly through investment arbitration. In fact, this clause is an important aspect of investment protection as it entitles an alien to directly seek judicial remedies against a foreign State in front of an international tribunal, something which is highly exceptional under public international law.[160] Public international law is characterized as the legal regime governing mainly the relations between States – and not granting the individual any enforceable rights against foreign States. Instead, the individual's home State has to enforce the individual's rights against that foreign State.[161] Most 'ISDS clauses' stipulate that a dispute should be settled by the ICSID. With the exception of the Republic of Poland, all EU Member States are contracting parties to the *ICSID Convention*.[162]

The ICSID tribunal only has jurisdiction if both parties to the treaty referring any dispute to ICSID arbitration are equally parties to the *ICSID Convention*. So far, neither the EU nor SSA regional organizations are parties. Given that Article 67 *ICSID Convention* states that only States can be parties, a simple accession of EU and/or SSA regional organizations is not possible. Similarly, pursuant to Article IX (1) of the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York Convention),[163] only States fulfilling the criteria laid down in its Article VIII can accede to it. According to Article VIII, only members to the United Nations – and thus only States – qualify for accession. Even the – for the EU and the IOs in SSA – quite

160 J. Dugard, 'Diplomatic Protection', in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Vol. III (2012), 114, 117, para. 10.

161 For further information, see, e.g., R. McCorquodale, 'The Individual and the International Legal System', in M. D. Evans, *International Law*, 3rd ed. (2010), 284; Shaw, *supra* note 116, 258-259; and K. Parlett, *The Individual in the International Legal System: Continuity and Change in International Law* (2011).

162 ICSID, 'List of Contracting States and other Signatories of the Convention' (11 April 2014), available at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSID-DocRH&actionVal=ShowDocument&language=English (last visited 11 April 2014).

163 *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 10 June 1958, Art. IX (1), 330 UNTS 3, 44.

relevant exception in Article VIII which allows members of specialized agencies to accede to the Convention is futile, as the whole *New York Convention* only refers to "Contracting States". Hence, the EU cannot accede to the *New York Convention*.

The examples of the World Trade Organization (WTO) and the *European Convention of Human Rights* show that multilateral treaties can be adapted to allow for the accession of IOs (in both cases of the EU) to the respective treaty regime.[164] Consequently, one way to overcome the current inapplicability of the Conventions would be to either adapt Article 67 *ICSID Convention* and Article IX *New York Convention* in a manner that it would allow IOs to become party to the *ICSID Convention* or to the *New York Convention*, or to conclude a special protocol allowing IOs to accede to the respective treaty. Given the protracted and problematic procedures of adapting an international treaty, the latter possibility seems more feasible. The conclusion of a special protocol is possible, as has been shown with respect to the so-called *Additional Facility Rules*, allowing States to appear before ICSID tribunals despite the fact that they are not a contracting party to the *ICSID Convention*.[165]

Another possibility for overcoming the problem that only States can be party to the *ICSID Convention* would be to seek a different forum for the settlement of investment disputes. Already today, a few other forums exist which are capable of deciding investment disputes through arbitration, such as the Permanent Court of Arbitration in The Hague (PCA), the International Court of Arbitration of the International Chamber of Commerce in Paris (ICC-ICA), the London Court of International Arbitration (LCIA) and its affiliate, the Mauritius International Arbitration Centre (LCIA-MIAC), the Stockholm Chamber of Commerce (SCC), the Dubai International Arbitration Centre (DIAC), and the Singapore International Arbitration Centre (SIAC). Usually, these forums apply arbitration rules modeled after the 2006 amended 1985 *UNCITRAL Model Law on International Commercial Arbitration*,[166] applying

[164] For more information, see J. L. Mortensen, 'The World Trade Organization and the European Union', in K. E. Jørgensen (ed.), *The European Union and International Organizations* (2009), 80 and J. P. Jacqué, 'The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms', 48 *Common Market Law Review* (2011) 4, 995.

[165] *Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for the Settlement of Investment Disputes*, 1 January 2003, Art. 2, Doc ICSID/11/Rev.1, 10, 10-11.

[166] *UNCITRAL Law Model on International Commercial Arbitration*, 21 June 1985, 24 ILM 1302 (amended in 2006).

likewise to investor-State arbitration and are in fact quite similar to the provisions of the *ICSID Convention*.

Since the seat of arbitration should be neutral,[167] the various forums located in Europe are rather unlikely to be agreed upon in a treaty between the EU and SSA. The same applies *prima facie* to the LCIA-MIAC as its neutrality might be challenged due to its seat in Mauritius, a SSA State. However, due to its affiliation with the LCIA, the LCIA-MIAC provides a very interesting combination of European and African links and therefore might represent an ideal forum for the settlement of investment disputes between European investors and SSA States.[168] Alternatives to the LCIA-MIAC are the DIAC and the SIAC. For assuming jurisdicton, all three relevant forums only require that the parties agreed on the respective forum for arbitration in writing.[169] This requirement could be fulfilled by replacing the referral to ICSID arbitration in the current standard clause on investment arbitration by a referral to LCIA-MIAC, DIAC, or SIAC investment arbitration in the future EU-SSA IIA. In addition, a referral to this arbitration clause should be included in any agreement between foreign investors and SSA IOs or SSA States.[170]

Furthermore, the competences of the ECJ have to be respected when introducing an 'ISDS clause' into a future EU-SSA IIA.[171] Pursuant to Article 19 (1) TEU, the EU Member States are under an obligation to create efficient judicial remedies for every field of law covered by EU law, thus also in the field of the CCP in general and the law on foreign investments in particular. In the latter field, judicial remedies are however very limited. Investment disputes are

167 Cf. J. Fry, 'Arbitration and Promotion of Economic Growth and Investment', 13 *European Journal of Law Reform* (2011) 3 & 4, 388, 390.

168 Cf. R. Baruti, 'Is Africa Finally Confronting its Challenges on Investment Treaty Arbitration?' (4 November 2011), available at http://www.kluwerarbitrationblog.com/blog/2011/11/04/is-africa-finally-confronting-its-challenges-on-investment-treaty-arbitration/ (last visited 31 January 2014).

169 In addition to a simple choice of seat of arbitration, the parties have to agree on various other issues as well, such as applicable law, nomination of arbitrators, nationality of arbitrators, and so on.

170 An even wider approach would be to include the procedural rules into the IIA. Such an approach is currently being pursued by the EU in the context of its negotiations with the United States of America about the *Transatlantic Trade and Investment Partnership Agreement* (TTIP). Cf., e.g., European Commission, 'Fact Sheet: Investment Protection and Investor-to-State Dispute Settlement in EU Agreements' (November 2013), available at http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151916.pdf (last visited 22 April 2014), 7-8.

171 Bungenberg, *supra* note 39, 37.

regularly dealt with by arbitration in front of international tribunals without the requirement of a previous exhaustion of local remedies. The drafters of a future EU-SSA IIA have to make sure that effective judicial remedies are available for any dispute arising in the context of a foreign investment covered under the future EU-SSA IIA and that the competences of the ECJ are well observed. The same applies with regard to Article 7 ACHPR.

Moreover, the inclusion of new clauses in a future EU-SSA IIA on environmental protection, labor standards, and human rights, thus clauses imposing obligations upon the foreign investor, will only be effective if they are also enforceable against the investor.[172] Therefore, the 'ISDS clause' in a future EU-SSA IIA has also to provide a possibility for the State to at least bring counter-claims, or even original claims against the investor in ISDS proceedings.[173] In fact, although many tribunals are rather reluctant to allow such counter-claims, nearly all arbitration rules provide for the right to assert them in investor-State disputes.[174] It is argued that tribunals are already today more likely to do so if the IIA contains a broader 'ISDS clause' which is not limited to obligations specifically provided by the IIA.[175] The reluctance of some tribunals to assert counter-claims can be explained by referring to the possible lack of consent. Consent to arbitration is one of the cornerstones of arbitration as it provides and limits the competence for the arbitrators to decide a dispute.[176] Current 'ISDS clauses' regularly refer to "disputes [...] concerning an obligation of the latter [the State]" and thus limit the jurisdiction to claims brought by investors about obligations of the host State.[177] Consequently, if there is no consent with regard to counter-claims, the tribunal lacks jurisdiction to adjudicate on these

172 Cf. – with regard to human rights – T. Weiler, 'Balancing Human Rights and Investor Protection: A New Approach for a Different Legal Order', 27 *Boston College International & Comparative Law Review* (2004) 2, 429, 429.

173 Counter-claims are characterized by their defensive nature. They purport to undermine the primary claim and have to relate to the substance of the already initiated dispute. Cf. C. H. Schreuer, 'Article 46', in C. H. Schreuer, *The ICSID Convention: A Commentary*, 2nd ed. (2009), 731, 749-750, paras 64-71. In contrast, original claims initiate a new dispute.

174 Y. Kryvoi, 'Counterclaims in Investor-State Arbitration', 21 *Minnesota Journal of International Law* (2012) 2, 216, 218.

175 *Ibid.*, 230 (with a substantial analysis of case law on the previous pages).

176 See, e.g., M. L. Moses, *The Principles and Practice of International Commercial Arbitration* (2008), 2.

177 *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award of 7 December 2011, 142, para. 869; Kryvoi, *supra* note 174, 228.

claims.[178] Therefore, it is suggested that a future EU-SSA IIA should explicitly provide for original claims of host States.[179]

D. Introducing New and Adapting Existing Concepts

It has been shown that the current standard clauses can be introduced into a future EU-SSA IIA, although some of them do need some adaptation in order to be reasonable and not to undermine especially the new, non-investment related concepts. These new concepts encompass provisions on human rights, environmental protection, and sustainable development, and will be included in a future EU-SSA-IIA.

Considering that a future treaty between the EU and SSA aiming at protecting foreign investors would be a tool of the EU's CCP, it has to comply with the provisions governing the CCP, thus the principles and objectives of the EU's external action have to be observed pursuant to Article 207 (1) TFEU. Article 205 TFEU determines that these principles and objectives are based on the general provisions of Articles 21 and 22 TEU. Basically, pursuant to Article 21 (1) TEU, any external action – thus also a new treaty aiming at protecting foreign investors – shall be guided by democracy, the rule of law, human rights and fundamental freedoms, respect for human dignity, and respect for the principles of the *United Nations Charter*.[180] As a result, a new treaty aiming at protecting foreign investments concluded between the EU and SSA must

178 It has to be noted though that the parties to a dispute regularly refer to a certain set of arbitration rules which usually include the procedural right to submit counter-claims (see *Convention on the Settlement of Investments Disputes Between States and Nationals of Other States*, 18 March 1965, Art. 46, 575 UNTS 159, 188; *United Nations Commission on International Trade Arbitration Rules*, 6 December 2010, Art. 21 (3), available at http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf (last visited 31 January 2014), 15; *Rules of Arbitration of the International Chamber of Commerce* (2012), Art. 5 (5), available at http://www.iccwbo.org/WorkArea/DownloadAsset.aspx?id=2147489109 (last visited 31 January 2014), 13; *London Court of International Arbitration (LCIA) Arbitration Rules*, Art. 2 (1), available at http://www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration_Rules.aspx (last visited 31 January 2014); and *Rules of the Arbitration Institute of the Stockholm Chamber of Commerce*, 1 January 2010, Art. 5 (1) (iii), available at http://www.sccinstitute.com/filearchive/3/35894/K4_Skiljedomsregler%20eng%20ARB%20TRYCK_1_100927.pdf (last visited 31 January 2014), 7.

179 Such a clause can be found for example in *IISD Agreement*, Art. 18, *supra* note 73, 11.

180 For more information about the CCP, see, e.g., G. Villalta Puig & B. Al-Haddab, 'The Common Commercial Policy After Lisbon: An Analysis of the Reforms', 36 *European Law Review* (2011) 2, 289.

contain provisions on democracy, the rule of law, and human rights, and has to aim at fostering the sustainable development of developing countries[181] as well as at helping to develop international measures to preserve and improve the quality of the environment pursuant to Article 21 (2) TEU.

The protection of the environment plays an exceptionally significant role in the host State's economic development.[182] A developing economy is usually characterized by an energy-intensive industry.[183] This usually leads to an increase in air pollution, which subsequently may have effects on human health,[184] such as chronic and adverse effects on pulmonary development,[185] and even might decrease life expectancy.[186] Obviously, not only does increasing air pollution have a negative impact on human health and life expectancy, but so can any form of environmental pollution.[187] Thus, the introduction of clauses into new IIAs discouraging States to lower their environmental standards in

181 Generally, economic development is understood to involve economic growth, namely the increase in per capita income, and – if currently absent – the attainment of a standard of living equivalent to that of industrialized States. See R. E. Lucas, Jr., 'On the Mechanics of Economic Development', 22 *Journal of Monetary Economics* (1988) 1, 3, 3, who does, however, consider this definition to be too narrow. The World Bank defines economic development as a "[q]ualitative change and restructuring in a country's economy in connection with technological and social progress. The main indicator of economic development is increasing GNP per capita (or GDP per capita), reflecting an increase in the economic productivity and average material wellbeing of a country's population. Economic development is closely linked with economic growth." T. P. Soubbotina, *Beyond Economic Growth: An Introduction to Sustainable Development*, 2nd ed. (2004), 133 (emphasis omitted). The World Bank points out that economic growth does not automatically lead to a development of the respective State, and therefore prefers to refer to 'human development'. Cf. T. P. Soubbotina, *Beyond Economic Growth: Meeting the Challenges of Global Development* (2000), 7.

182 Cf. *Rio Declaration on Environment and Development*, 13 June 1992, Principle 4, UN Doc A/CONF.151/5/Rev. 1, 31 ILM 874, 877.

183 See, e.g., N. Shafik, 'Economic Development and Environmental Quality: An Econometric Analysis', *Oxford Economic Papers* (1994) Supplement 1, 757, 770.

184 See, e.g., M. Kampa & E. Castanas, 'Human Health Effects of Air Pollution', 151 *Environmental Pollution* (2008) 2, 362, 362.

185 W. J. Gauderman *et al.*, 'The Effect of Air Pollution on Lung Development from 10 to 18 Years of Age', 351 *The New England Journal of Medicine* (2004) 11, 1057, 1057.

186 H. R. Anderson, 'Air Pollution and Mortality: A History', 43 *Atmospheric Environment* (2009) 1, 142, 142.

187 F. Mariani, A. Pérez-Barahona & N. Raffin, 'Life Expectancy and the Environment', 34 *Journal of Economic Dynamics and Control* (2010) 4, 798, 798; X. Pautrel, 'Pollution and Life Expectancy: How Environmental Policy Can Promote Growth', 68 *Ecological Economics* (2009) 4, 1040, 1040; Shafik, *supra* note 183, 770.

order to attract more FDIs, containing environmental minimum standards, and requiring that foreign investments shall comply with these minimum standards, is not only desirable from an ecological perspective, but is also necessary if the foreign investor should contribute to the host State's economic development.

Similarly, minimum labor standards can ensure higher wages, and thus can increase the *per capita* income, and enable business competition to focus on productivity and product quality rather than workplace conditions.[188] Thus, clauses on minimum labor standards and on ensuring that these standards are met form essential safeguards to ensure that FDIs covered by the respective IIA contribute to the host State's economic development.

In fact, the inclusion of such clauses is not entirely novel. For instance, the 2004 *Canada Model BIT*,[189] the (now outdated) 2004 *U.S. Model BIT*[190] and its successor the 2012 *U.S. Model BIT*,[191] the 2007 *COMESA Common Investment Area Agreement*,[192] and the 2012 *SADC Model Bilateral Investment Treaty Template*[193] contain clauses relating to at least one aspect of environmental protection, labor standards, and human rights. In addition, the 2005 *U.S.–Uruguay BIT*[194] and the 2008 *U.S.–Rwanda BIT*,[195] which are both modeled after the 2005 *U.S. Model BIT*, contain clauses on environmental protection and labor standards. A clause on environmental protection is contained in the 2009 *Canada–Jordan BIT*[196] and the 2006 *Canada–Peru BIT*.[197]

However, it has also to be noted that the inclusion of such clauses is not yet prevailing. Notably, the 2006 *France Model BIT*,[198] the 2008 *Germany*

188 T. I. Palley, 'The Economic Case for International Labour Standards', 28 *Cambridge Journal of Economic*s (2004) 1, 21, 22. Cf. also K. A. Swinnerton, 'An Essay on Economic Efficiency and Core Labour Standards', 20 *The World Economy* (1997) 1, 73. Rather critical in this regard G. van Liemt, 'Minimum Labour Standards and International Trade: Would a Social Clause Work?', 128 *International Labour Review* (1989) 4, 433, 435.

189 *Supra* note 69.

190 *Supra* note 69.

191 *Supra* note 69.

192 *Supra* note 70.

193 *Supra* note 71.

194 *Supra* note 131.

195 *Supra* note 129.

196 The BIT is available at http://www.unctad.org/sections/dite/iia/docs/bits/Canada-JordanFIPA-eng.pdf (last visited 31 January 2014).

197 The BIT is available at http://unctad.org/sections/dite/iia/docs/bits/canada_peru.pdf (last visited 31 January 2014).

198 *Supra* note 68.

Model BIT,[199] and the 2003 *Italy Model BIT*,[200] and also the 2009 *Canada–Czech Republic BIT*,[201] the 2009 *Canada–Latvia BIT*,[202] the 2009 *Canada–Romania BIT*,[203] and the 2010 *Canada–Slovakia BIT*,[204] do not contain clauses on environmental protection, despite the fact that these Canadian BITs were concluded subsequent to the adoption of the 2004 *Canada Model BIT* which well does.

Further, it has equally to be noted that the simple conclusion of a new, modern IIA will not be sufficient to increase the host State's economic development significantly and substantially. Instead, the whole national and international regulatory framework facilitating FDIs has to be adapted. According to the so-called *Monterrey Consensus*, key aspects of such a framework are a

> "transparent, stable and predictable investment climate, with proper contract enforcement and respect for property rights, embedded in sound macroeconomic policies and institutions that allow businesses, both domestic and international, to operate efficiently and profitable and with maximum development impact".[205]

Besides the inclusion of clauses on environmental protection, labor standards, and human rights in a future EU-SSA IIA, it should be taken into consideration that there are linkages between investment law, trade law, and other aspects of international economic law. Therefore, it is not surprising that Article 207 (1) TFEU does not only contain the EU's exclusive competence to negotiate and conclude IIAs, but also to negotiate and conclude

> "tariff and trade agreements relating to trade in goods and services, and international agreements relating to the commercial aspects of

199 *Supra* note 68.

200 *Supra* note 68.

201 The BIT is available at http://unctad.org/sections/dite/iia/docs/bits/canada_czech%20republic.pdf (last visited 31 January 2014).

202 The BIT is available at http://unctad.org/sections/dite/iia/docs/bits/canada_latvia.pdf (last visited 31 Janauary 2014).

203 The BIT is available at http://unctad.org/sections/dite/iia/docs/bits/canada_romania.pdf (last visited 31 January 2014).

204 The BIT is available at http://unctad.org/sections/dite/iia/docs/bits/Canada_slovakia_new.pdf (last visited 31 January 2014).

205 International Conference on Financing for Development, 'Monterrey Consensus on Financing for Development' (2003), available at http://www.un.org/esa/ffd/monterrey/MonterreyConsensus.pdf (last visited 31 January 2014), 9, para. 21.

> intellectual property, [...] the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping and subsidies".[206]

In order to ensure that this competence is used in the most effective and most coherent way, it is suggested that the EU does not conclude single agreements relating to the various aspects of international economic law, but a more general, more concise agreement covering all aspects mentioned in Article 207 (1) TFEU.[207] This agreement could be a free trade agreement (FTA) with other States or IOs, and could be modeled either after the NAFTA, which contains in Chapter 11 substantive provisions on the promotion and protection of foreign investments,[208] or after the so-called *Cotonou Agreement*,[209] to which provisions on the promotion and protection of foreign investments can be rather easily added.

It seems also preferable that such a FTA is concluded with other IOs, rather than with single States – especially in the event of small single States. The conclusion of a few FTAs between IOs instead of the conclusion of many FTAs with single States ensures on the one hand that smaller States, especially, cannot be played against each other, and thus might contribute significantly to the sustainable development of the smaller States, and on the other hand that world trade is further liberalized and harmonized.

E. Conclusion

Summing up, it has been demonstrated that the new competence of the EU to negotiate and conclude IIAs allows for updating the current level of investment protection in SSA. It is possible to conclude a new IIA between the EU on the one side and SADC and/or COMESA on the other side. The other

206 TFEU, Art. 207 (1), *supra* note 37.

207 Cf. S. Woolcock, 'EU Trade and Investment Policymaking After the Lisbon Treaty', 45 *Intereconomics* (2010) 1, 22, 24.

208 See for an analysis of the investment provisions in the NAFTA T. Weiler (ed.), *NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects* (2004).

209 *Partnership Agreement 2000/483/EC Between the Members of the African, Caribbean and Pacific Group of States of the one Part, and the European Community and its Member States, of the Other Part*, 23 June 2000, OJ (EU) 2000/L 317 (15 December 2000). For more information about the Cotonou Agreement, see S. S. Kingah, 'The Revised Cotonou Agreement Between the European Community and the African, Caribbean and Pacific States: Innovations on Security, Political Dialogue, Transparency, Money and Social Responsibility', 50 *Journal of African Law* (2006) 1, 59.

IOs in SSA do not have the competence to conclude IIAs, but might serve well as forum to coordinate the various interests of SSA States and ensure that they are not played against each other.

Further, most current standard clauses in IIAs can be also included in the new future EU-SSA IIA. Solely the 'ISDS clause' referring to ICSID as forum for the settlement of investment disputes cannot be sustained. However, with the LCIA-MIAC, DIAC, and SIAC, sufficient well-repudiated alternatives to ICSID arbitration exist. Other standard clauses need some careful drafting, but can be adapted.

Due to the fact that the future treaty would be a tool of the CCP, it has to comply with other provisions of the TEU and TFEU. This allows, even requires, the introduction of new concepts into the new treaty, such as human rights, labor standards, environmental protection, sustainable development, and so on. Thus, the possible new EU-SSA IIA might not only increase the level of protection for foreign investors in SSA, and thus might stimulate more FDI flowing from Europe to Africa, fostering economic development in SSA, but also foster the further development of the law of foreign investments by intertwining this field of law with other fields of public international law. Finally, it was suggested – in order to ensure a coherent and efficient CCP and also because foreign investments are closely linked to international trade and development – that the future provisions on the promotion and protection of European investments in SSA should not be contained in a single EU-SSA IIA, but should be a chapter in a future EU-SSA FTA, similar to the NAFTA.