basic treaty clearly and unambiguously indicates that it should be so interpreted: which is not so in the present case." (para. 167).

In the recent case *Tza Yap Shum v. Peru* (2009), the Tribunal refused to permit the claimant to invoke the MFN clause in the China-Peru BIT, in order to establish a jurisdictional basis for the dispute. The Tribunal argued that "*Since the Contracting Parties specifically established the possibility of submitting "other matters" to ICSID arbitration and since they have established specifically such occurrence in the wording of the BIT, we, the Tribunal, conclude that it is our duty to give the BIT wording the meaning it was really intended. As a result, the Tribunal hereby determines that the specific wording of Article 8(3) should prevail over the general wording of the MFN clause in Article 3 and Claimant's arguments on the contrary must be dismissed*" (cf. para. 216).

In the case *Renta 4 et al. v. Russia* (2009), under the Arbitration Institute of the Stockholm Chamber of Commerce, the Tribunal accepted the general proposition that MFN clauses may extend the tribunal's jurisdiction beyond the scope of the underlying treaty's jurisdictional clause. However the Tribunal by majority ultimately decided that the specific MFN clause in the Spain-Union Soviet Socialist Republics BIT could not be read to enlarge the competence of the Tribunal.

A positive solution as to the extension of the MFN Clause was expressed by the Tribunal in the case *Gas Natural v. Argentine*, Decision on Preliminary Questions on Jurisdiction (2005): "*the issue of applying a general most-favored-nation clause to the dispute resolution provisions of bilateral investment treaties is not free from doubt*". The Tribunal declared to be "*satisfied, however, that the terms of the BIT between Spain and Argentina show that dispute resolution was included within the scope of most-favored-nation treatment, and that our analysis (...) is consistent with the current thinking as expressed in other recent arbitral awards. We remain persuaded that assurance of independent international arbitration is an important – perhaps the most important – element in investor protection. Unless it appears clearly that the state parties to a BIT or the parties to a particular investment agreement settled on a different method for resolution of disputes that may arise, most-favored-nation provisions in BITs should be understood to be applicable to dispute settlement*".

Similarly in the case *Suez v. Argentine*, Decision on Jurisdiction (2006), the Tribunal observed that: "*after an analysis of the substantive provisions of the BITs in question, the Tribunal finds no basis for distinguishing dispute settlement matters from any other matters covered by a bilateral investment treaty. From the point of view of the promotion and protection of investments, the stated purposes of the Argentina-Spain BIT, dispute settlement is as*

important as other matters governed by the BIT and is an integral part of the investment protection regime that two sovereign states, Argentina and Spain, have agreed upon". The Tribunal concluded that "*Claimants InterAguas and AGBAR, relying on Article IV of the Argentina-Spain BIT, may invoke the more favorable treatment afforded in the Argentina-France BIT and may therefore bring an ICSID arbitration without the necessity of first having recourse to the local courts of Argentina*" (para. 66).

It is to be noted that the more recent practice of the States in negotiating BITs seems to be critical towards the application of the MFN Clause to dispute settlement. Particularly the practice of Canada and US in BIT and Free Trade Agreements now includes provisions that limit MFN treatment to substantive investment protection and often expressly exclude MFN Clauses to investor-State dispute settlement. Article 10.4(2) of the Draft Central American-US Free Trade Agreement provides that the parties agree that the MFN Clause inserted in their treaty "*does not encompass international dispute resolution mechanisms*" and therefore could not "*lead to conclusions similar to the Maffezini case*". Moreover, the 2007 Norway Model BIT introduced a clear provision stating: "*For greater certainty, treatment referred to in paragraph [1] does not encompass dispute resolution mechanisms provided for in this Agreement or other International Agreements*" (Article 4, para. 3).

5. Questions related to the interpretation and application of MFN Clauses

- Is the MFN clause to be interpreted in its broader sense including the provision on the settlement of disputes even when it is referred to the "treatment"?
- Are the requirements of prior recourse to local courts a substantive or procedural provision?
- Is a waiting period necessary for the investor after the exhaustion of the local remedies and prior to the submission before an international arbitration tribunal?
- Are expropriation claims to be included in a MFN Clause when the Clause itself is generally referred to disputes between the Contracting Parties of a BIT?
- Is the principle "expression unius est exclusion alterius" valid in interpreting the MFN Clause?
- Considering that some States, by virtue of the accession to the EU, argue that intra-EU BITs are terminated, is there any consequence on the applicability of the MFN Clause?

– The Tribunal in *Plama v. Bulgaria* posed the following question: "*But what if one BIT provides for UNCITRAL arbitration and another provides for ICSID? Which is more favourable?*". Can the MFN Clause be applied to the selection of an arbitration system?

6. Basic references

GAILLARD, Establishing Jurisdiction Through a Most-Favored-Nation Clause, NYLJ, 2005

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III. The Fair & Equitable Treatment (FET) (Issue G.2.c on the General Outline)

1. Definition and preliminary observations

Originated as a treaty clause containing a declaration of principles, the Fair and Equitable Standard (FET) is one of the key standards of investment protection. According to this provision foreign investments are granted by the host State a treatment in compliance to a minimum standard of fairness, irrespective of the standards the host State applies to domestic investment under its national law. It has been noted that an unfair and unequitable treatment by the host State towards the investor, determining the impairment of his property rights or his capacity to develop the investment, might be considered a new type of expropriation (BRONFMAN, Fair and Equitable Treatment: an Evolving Standard, Max Planck YUNL, 2006, p. 610 ff.)

FET has been frequently invoked in investment disputes with a remarkable relevance in the arbitration practice. A great number of claims have been successfully grounded on the violation of FET by the host State for a broad range of measures. The problematic issue in applying the FET standard is the broadness of the clause interpretation, determining limits of application of the FET. Most investment agreements include the FET standard, but they do not specify its exact meaning or the criteria to be applied to determine the effects of the FET in relation to the measures adopted by the host State towards the investment. Therefore arbitral tribunals have been frequently involved in determining "*whether the obligation to grant "fair and equitable treatment" is synonymous with the minimum standard of treatment of foreign investment required under customary international law, or whether it means something different – albeit with some overlap*" (*Identifying Core Elements in Investment Agreements in the APEC Region*, UNCTAD Series on International Investment Policies for Development, 2008).

In relation to the meaning and content of the FET, the opinion of Mann expressed in 1981 is well known and was repeatedly commented by other authors: "*the term 'fair and equitable treatment' envisages conduct far beyond a minimum standard and affords protection to a greater extent and according to a much more objective standard than any previously employed form of words. A tribunal would not be concerned with a minimum, maximum or average standard. It will have to decide whether in all circumstances the conduct in issue is fair and equitable or unfair and inequitable. (...) The terms are to be understood and applied independently and autonomously.*"

However, as it has been noted in the ICSID case *Mondev International Ltd v. US* of 11 October 2002 with particular reference to the FET standard provided in the NAFTA under Article 1105(1) (see *infra*), "*A reasonable evolutionary interpretation (...) is consistent both with the* travaux*, with normal principles of interpretation and with the fact that (...) the terms "fair and equitable treatment" and "full protection and security" had their origin in bilateral treaties in the post-war period. In these circumstances the content of the minimum standard today cannot be limited to the content of customary international law as recognised in arbitral decisions in the 1920s*".

2. FET in the multilateral instruments, Free Trade Agreements and in BITs

a) Multilateral Instruments

The first reference to the FET is found in Article 11, para. 2 (a)(1) of the 1948 Havana Charter for an International Trade Organisation, assessing that

foreign investments should be assured "just and equitable treatment". As a specific investment protection standard, it appeared in the 1959 Abs-Shawcross Draft Convention on Foreign Investment (Article I), and in the 1967 Draft Convention on the Protection of Foreign Property (the OECD Convention) (Article 1 (a)).

The FET clause is included in the 1985 Convention establishing the MIGA (Article 12 (d)), establishing that "*In guaranteeing an investment, the Agency shall satisfy itself as to: (...) the investment conditions in the host country, including the availability of fair and equitable treatment and legal protection for the investment*".

The Section III of the World Bank Guidelines on the Treatment of Foreign Direct Investment also provides that "*2. Each State will extend to investments established in its territory by nationals of any other State fair and equitable treatment according to the standards recommended in these Guidelines*".

Article 10 of the 1994 Energy Charter Treaty provides that "*(1) Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment*".

The standard of FET was also included in the 1998 Draft MAI, in Section IV, Investment Protection, Article 1.1: "*Each Contracting Party shall accord to investments in its territory of investors of another Contracting Party fair and equitable treatment and full and constant protection and security*".

At the regional level, the FET standard was accepted by the ACP Contracting States in the 1989 Lomé Convention IV, as revised successively, which provided under Article 110 (1), iv) that "*private foreign investors complying with the objectives and priorities of ACP-EC development co-operation should be encouraged to participate in the development efforts of the ACP States. Fair and equitable treatment should be accorded to such investment as well as a propitious, secure and predictable investment climate*" and under Article 258, b) also stated that "*The ACP States and the Community, recognizing the importance of private investment in the promotion of their development co-operation and acknowledging the need to take steps to promote such investment, shall (b) accord fair and equitable treatment to such investors*".

Article 1105 (1) of the NAFTA requires the State parties to "*accord investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment*".

The Model International Agreement on Investment for Sustainable Development which was finalized in 2005 and intended as a basis for bilateral, regional and multilateral negotiations and agreements, combines FET with the minimum standard of treatment. Article 7, (A) (Minimum international standards) provides that "*Each Party shall accord to investors or their investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security*", specifying under para. B that "*Paragraph (A) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments. The concepts of "fair and equitable treatment" and "full protection and security" are included within this standard, and do not create additional substantive rights*".

More recently, the ASEAN Comprehensive Investment Agreement signed in Cha-am, Thailand, in 2009, includes a rather wide provision concerning the FET, requesting the Contracting States to guarantee that "*1. Each Member State shall accord to covered investments of investors of any other Member State, fair and equitable treatment and full protection and security. 2. For greater certainty: (a) fair and equitable treatment requires each Member State not to deny justice in any legal or administrative proceedings in accordance with the principle of due process; and (b) full protection and security requires each Member State to take such measures as may be reasonably necessary to ensure the protection and security of the covered investments*".

b) Bilateral Instruments

At the bilateral level, the practice of including the FET standard as a safeguard clause for foreign investors was initially diffused in the US treaties on Friendship, Commerce and Navigation (FCN), simply providing for "equitable treatment" or using the more complete wording "fair and equitable treatment".

Also in the US BITs, the FET clause is generally linked to international law. This connection is particularly clear in the US Model BIT, which provides that (Article 5, n.1): "*Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security*". This provision further clarifies that (n. 2) "*For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and*

security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights".

Among the number of US BITs, it can be mentioned the US-Argentina BIT, which under Article II provides that: "*2. a) Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law*".

The 2004 Japan-United Mexican States for the Strengthening of the Economic Partnership, in relation to the general treatment accorded to investments, provides that (Article 60) "*Each Party shall accord to investments of investors of the other Party treatment in accordance with international law, including fair and equitable treatment and full protection and security*".

A further variation in the link to international law as a standard for the FET in the relation between contracting States in a BIT implies the reference to customary international law. This is the case of the above mentioned 2007 Colombia Model BIT, as well as the 2005 US-Uruguay BIT (Article 5, para.1: "*Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security*").

Article 5 of 2007 Norway Model BIT provides that "*Each Party shall accord to investors of the other Party, and their investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security*".

Colombia Model BIT of 2007 requires the contracting parties to accept that (Article III (3)) "Each Party shall accord fair and equitable treatment in accordance with customary international law, and full protection and security in its territory to investments of investors of the other Contracting Party", specifying that (Article III (4))"*For greater certainty, a. The concepts of "fair and equitable treatment" and "full protection and security" do not require additional treatment to that required under the minimum standard of treatment of aliens in accordance with the standard of customary international law. (...) c. "Fair and equitable treatment" includes the prohibition against denial of justice in criminal, civil, or administrative proceedings in accordance with the principle of due process embodied in the main legal systems of the world*".

The German Model BIT introduced in 2008 among the general provisions concerning the admission and protection of investments states that (Article 2 (2)): "*Each Contracting State shall in its territory in every case accord*

investments by investors of the other Contracting State fair and equitable treatment as well as full protection under this Treaty".

Article 5 of 2004 Canada Model BIT provides that "*1. Each Party shall accord to covered investments treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security. 2. The concepts of "fair and equitable treatment" and "full protection and security" in paragraph 1 do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens*".

Similarly the 2006 Canada-Peru BIT (Article 5, para. 1) specifies that (Article 5, para 2) "*The concepts of "fair and equitable treatment" and "full protection and security" in paragraph 1 do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens*".

3. Different languages of the FET Clauses

The practice of bilateral treaties has evidenced different approaches to dealing with the FET standard. In its 2008 Report concerning the investment agreements in the APEC (Asia-Pacific Economic Cooperation) Region, UNCTAD emphasizes the different drafting of the FET clauses depending on the existence of a link between the wording "fair and equitable treatment" and a more general reference to "treatment under international law".

It has been noted that some treaties (only a few BITs, however) simply do not include any FET standard. This has important consequences for the investor who will have a reduced protection against unfair measures possibly adopted by the host State and will only claim for the violation of the minimum standard of treatment as prescribed by customary international law for the aliens (cf. BRONFMAN, Fair and Equitable Treatment: an Evolving Standard, 2006, p. 624 ff.).

Some BITs do not contain any reference to international law, simply providing that each contracting party shall accord to investments of the other contracting party "a fair and equitable treatment". See among others the 2004 BIT between India and Indonesia (Article 3); 1996 UK-Ecuador BIT (Article 2, para.2) "*Investments of nationals or companies of each Contracting Party shall be accorded fair and equitable treatment and shall enjoy protection and security (...)*". A slight variation (but rare) of this type of clause is when the BIT simply refers to "equitable" treatment, without mentioning the "fairness" of the treatment. See Article 2 of the 2002 Lebanon-Malaysia BIT and Article III of the 1991 Indonesia-Norway BIT ("equitable and reasonable").

The NAFTA FET clause inserted in Article 1105 (quoted above) is an example of a clear connection between the principle of FET and international law, when requiring the Contracting Parties to grant "*treatment in accordance with international law, including fair and equitable treatment*". In the interpretation given in the NAFTA system it has been noted that this does not mean that investments should be given treatment beyond what is required under international law minimum standard of treatment (cf. UNCTAD Report 2008). It is significant that the Canadian Statement on Implementation of NAFTA states that Article 1105(1) "*provides for a minimum absolute standard of treatment, based on longstanding principles of customary international law*" (cf. Canada, Department of External Affairs, North American Free Trade Agreement, Canadian Statement on Implementation, Canada Gazette, 1 January 1994). See also the FET clause contained in Article 7, (A) of the 2005 Model International Agreement on Investment for Sustainable Development, both mentioned above.

The FET as provided for in the NAFTA was attentively examined in the ICSID case *Mondev v. US*. More recently it has been analyzed by two arbitral tribunals, reaching different conclusions. In the ICSID case *Glamis Gold v. United States*, Award of 8 June 2009, the Arbitral Tribunal was involved with the interpretation of FET as provided in Article 1105 NAFTA. The Tribunal stated that (para. 615) "*[t]he customary international law minimum standard of treatment is just that, a minimum standard. It is meant to serve as a floor, an absolute bottom, below which conduct is not accepted by the international community. Although the circumstances of the case are of course relevant, the standard is not meant to vary from state to state or investor to investor*". The Tribunal moreover affirmed that "*The fair and equitable treatment promised by Article 1105 is not dynamic; it cannot vary between nations as thus the protection afforded would have no minimum*". Then the Tribunal in order to identify possible parameters for the FET standard made reference to the decision in the 1926 *Neer* case (*Neer v. Mexico*, 4 R. Int'l Arb. Awards, 1926)(para. 616): "*The fundamentals of the Neer standard thus still apply today: to violate the customary international law minimum standard of treatment codified in article 1105 of the NAFTA, an act must be sufficiently egregious and shocking – a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons – so as to fall below accepted international standards and constitute a breach of article 1105(1). The Tribunal notes that one aspect of evolution from Neer that is generally agreed upon is that bad faith is not required to find a violation of the fair and equitable treatment standard, but its presence is conclusive evidence of such. Thus, an act that is egregious or shocking may also*

evidence bad faith, but such bad faith is not necessary for the finding of a violation. The standard for finding a breach of the customary international law minimum standard of treatment therefore remains as stringent as it was under Neer; it is entirely possible, however that, as an international community, we may be shocked by State actions now that did not offend us previously".

In the NAFTA case *Merrill&Ring Forestry v. Canada*, Award of 31 March 2010, the Tribunal was also called to determine the meaning of the FET clause contained in Article 1105 NAFTA in relation to the minimum standard granted by international law. In this perspective the *Neer* case was again quoted, although in a more critical manner (paras. 201 and 209): "*The approach of the Neer Commission and of other tribunals which dealt with due process may best be described as the first track of the evolution of the so called minimum standard of treatment. In fact, as international law matured and began to focus on the rights of individuals, the minimum standard became a part of the international law of human rights, applicable to aliens and nationals alike. (...) State practice with respect to the standard for the treatment of aliens in relation to business, trade and investments, while varied and sometimes erratic, has shown greater consistency than in respect of the first track, as it has generally endorsed an open and non-restricted approach to the applicable standard to the treatment of aliens under international law. At the same time it shows that the restrictive Neer standard has not been endorsed or has been much qualified. The parties have extensively discussed whether the customary law standard might have converged with the fair and equitable treatment standard, but convergence is not really the issue. The situation is rather one in which the customary law standard has led to and resulted in establishing the fair and equitable treatment standard as different stages of the same evolutionary process*". In its conclusion on the issue the Tribunal observed that (para. 213): "*the applicable minimum standard of treatment of investors is found in customary international law and that, except for cases of safety and due process, broader than that defined in the Neer case and its progeny. Specifically this standard provides for the fair and equitable treatment of alien investors within the confines of reasonableness. The protection does not go beyond that required by customary law, as the FTC has emphasized. Nor, however, should protected treatment fall short of the customary law standard*".

4. The core elements of the FET standard according to the arbitral case-law

Although considering all the differences in the drafting of the FET clause in BITs, arbitral tribunals have often gone beyond the discussion whether FET corresponds to the minimum standard protection granted by international

law, and have identified some core elements distinguishable in the FET standard. These elements are hereby indicated with reference to the most recent arbitral practice.

a) Due process/denial of justice

The violation of this basic principle of law determines an international wrongful act of denial of justice. The denial of justice can be interpreted on the basis of customary international law. The breach of such obligation might be attributed to the host State judiciary or even to the executive. This requirement is considered to be so fundamental that in the practice of US BIT and FTA is specifically indicated. See 2004 US Model BIT, Article 5, para. 2 (a) which provides "*"fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world*".

The due process principle has been coped with in various ICSID cases. Among them, the standard by which a denial of justice should be affirmed was widely evaluated in the case *Mondev International Ltd v. USA* (2002). In that case the issue of the "denial of justice" was examined with reference to NAFTA Article 1105 (1). The Tribunal observed: "*(...) in applying the international minimum standard, it is vital to distinguish the different factual and legal contexts presented for decision. It is one thing to deal with unremedied acts of the local constabulary and another to second-guess the reasoned decisions of the highest courts of a State. Under NAFTA, parties have the option to seek local remedies. If they do so and lose on the merits, it is not the function of NAFTA tribunals to act as courts of appeal*". The Tribunal recalled a previous NAFTA case, *Azinian v. United Mexican States* (1999), where it was affirmed that: "*The possibility of holding a State internationally liable for judicial decisions does not, however, entitle a claimant to seek international review of the national court decisions as though the international jurisdiction seised has plenary appellate jurisdiction. This is not true generally, and it is not true for NAFTA*". In the *Azinian* case the Tribunal also held that: "*A denial of justice could be pleaded if the relevant courts refuse to entertain a suit, if they subject it to undue delay, or if they administer justice in a seriously inadequate way… There is a fourth type of denial of justice, namely the clear and malicious misapplication of the law. This type of wrong doubtless overlaps with the notion of 'pretence of form' to mask a violation of international law*". The qualification of a "due process violation" also reminds of the ICJ judgement *Elettronica Sicula (ELSI)* case (*United States v. Italy*, 20 July 1989), when a Chamber of the Court considered as an arbitrary conduct "*a wilful disregard*

of due process of law, (...) which shocks, or at least surprises, a sense of judicial propriety".

In the same *Mondev* case, the Tribunal was requested to consider whether to confer immunity from suit on a public authority of a State in respect of wrongful conduct affecting an investment can be considered "denial of justice" and consequently a failure to provide fair and equitable treatment to the investment, thus contravening Article 1105(1). In this respect the Tribunal was called to consider also the international case-law on immunities of public authorities, including the jurisprudence of the European Court of Human Rights. The Tribunal stated that: "*These decisions concern the "right to a court", an aspect of the human rights conferred on all persons by the major human rights conventions and interpreted by the European Court in an evolutionary way. They emanate from a different region, and are not concerned, as Article 1105(1) of NAFTA is concerned, specifically with investment protection. At most, they provide guidance by analogy as to the possible scope of NAFTA's guarantee of "treatment in accordance with international law, including fair and equitable treatment and full protection and security". But the Tribunal would observe that, as soon as it was decided that (...)was covered by the statutory immunity (a matter for Massachusetts law), then the existence of the immunity was arguably to be classified as a matter of substance rather than procedure in terms of the distinction under Article 6(1) of the European Convention*".

More recently, the issue of the due process was raised in the ICSID case *Bayindir Insaat Turizm Ticaret Ve Sanayi v. Pakistan*, Award of 27 August 2009. The Tribunal stated that it agreed "*with Bayindir when it identifies the different factors which emerge from decisions of investment tribunals as forming part of the FET standard. These comprise the obligation to act transparently and grant due process*" (para. 178).

In the ICSID case *Toto Costruzioni v. Lebanon*, Decision on Jurisdiction of 11 September 2009, the Tribunal denied its jurisdiction over the investor's claim of delays in two lawsuits before the *Conseil d'Etat* as breach of the fair and equitable standard provision in the Italy–Lebanon BIT as the claimant had not satisfied a prima facie case. The Arbitral Tribunal affirmed that (para. 164): "*Moreover, a state can only be held liable for denial of justice when it has not remedied this denial domestically. As summarized by Jan Paulsson: 'States are held to an obligation to provide a fair and efficient system of justice, not to an undertaking that there will never be an instance of judicial misconduct. National responsibility for denial of justice occurs only when the system as a whole has been tested and the initial delict has remained uncorrected... The very definition of denial of justice encompasses the notion of exhaustion of local remedies. There can be no denial of justice*

before exhaustion" (the Tribunal quoted PAULSSON, Denial of justice in International Law, 2007, p. 245-246).

In the recent ICSID case *GEA v. Ukraine*, Award of 31 March 2011, the breach of the obligation to Fair and Equitable Treatment, invoked in relation to due process, was examined as applied to the refusal of Ukrainian courts to recognise and enforce an ICC Award.

b) Non-discrimination and arbitrariness

The principle of due process is strictly connected with the obligation of non discrimination and arbitrariness.

The principle of non discrimination/arbitrariness was affirmed by the ICJ in the *ELSI* case: "*Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. This idea was expressed by the Court in the Asylum case, when it spoke of "arbitrary action" being "substituted for the rule of law" (Asylum, Judgment, I.C.J. Reports 1950, p. 284). It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety*" (para. 128).

In the ICSID case *Lemire v. Ukraine*, Decision on Jurisdiction and Liability, 14 January 2010 (para. 261), the Tribunal affirmed that "*Discrimination, in the words of pertinent precedents, requires more than different treatment. To amount to discrimination, a case must be treated differently from similar cases without justification; a measure must be "discriminatory and expose[s] the claimant to sectional or racial prejudice"; or a measure must "target[ed] Claimant's investments specifically as foreign investments"*.

As to arbitrariness, in the same case *Lemire v. Ukraine*, the Tribunal confirmed that (para. 262) arbitrariness has been described as "*founded on prejudice or preference rather than on reason or fact*"; "*...contrary to the law because…[it] shocks, or at least surprises, a sense of juridical propriety*"; or "*wilful disregard of due process of law, an act which shocks, or at least surprises a sense of judicial propriety*"; or conduct which "*manifestly violate[s] the requirements of consistency, transparency, even-handedness and non-discrimination*". The Tribunal also made reference to the definition of "arbitrary" measure given by Schreuer (who acted as expert in the ICSID Case *EDF (Services) Limited v. Romania*, Award of 8 October 2009, and was quoted by the Tribunal at para. 303 of the Award): "*a. a measure that inflicts damage on the investor without serving any apparent legitimate purpose; b. a measure that is not based on legal standards but on discretion, prejudice or personal preference; c. a measure taken for reasons that are different from those put forward by the decision maker; d. a measure taken in wilful disregard of due process and proper procedure*." The Tribunal then affirmed that (para. 263): "*Summing up, the underlying*

notion of arbitrariness is that prejudice, preference or bias is substituted for the rule of law".

d) Due diligence

This obligation is also known as "obligation of vigilance". It has been analyzed in some arbitral disputes, but often in connection to the principles of standard of full protection and security (cf. also the Full Protection and Security standard, *infra*).

e) Legitimate expectations: transparency, consistent conduct

These basic requirements for the investor's operation in the host State are strictly connected. Transparency should guarantee that the legal framework for the investment in the host State is stable and predictable to the investor and any measures undertaken by the host State can be reconnected to the legal order that was opened to the investor. As it has been noted, this legal framework "*consist[s] of legislation and treaties, of assurances contained in decrees, licences and similar executive assurances as well as in contractual undertakings* (…)". Under this issue the FET standard implies the protection of the investor's right to plan and establish the investment, having duly examined the law order of the host State (DOLZER, SCHREUER, 2008). The 1998 Draft MAI included in its Section III a complete provision focused on transparency, stating that "*Each Contracting Party shall promptly publish, or otherwise make publicly available, its laws, regulations, procedures and administrative rulings and judicial decisions of general application as well as international agreements which may affect the operation of the Agreement*". Problems might also arise due to unconsistent positions taken by the State, such as the reversal of assurances.

In the case *GAMI v. Mexico*, NAFTA–UNCITRAL Award of 15 November 2004, on the interpretation of Article 1105, the Arbitral Tribunal stated (paras. 92 ff): "*The challenging task for this Tribunal is to apply these abstractions. It is necessary first to enquire how they relate to compliance with national law. 93. To repeat: NAFTA arbitrators have no mandate to evaluate laws and regulations that predate the decision of a foreigner to invest*". Other precedent NAFTA disputes are *Metalclad v. United Mexican States*, ICSID Award of 30 August 2000, *Waste Management v. United Mexican States*, ICSID Award of 30 April 2004.

The issue of transparency has been afforded in various ICSID cases, among others the most recent cases are: *Plama*, Award f 12 November 2008, *Siag & Vecchi*, Award of 1 June 2009; *Lemire v. Ukraine*, Decision on Jurisdiction and Liability, 14 January 2010. In the latter case, the Tribunal observed (para. 284) "*The FET standard defined in the BIT is an autonomous treaty standard, whose precise meaning must be established on a case-by-case*

basis. It requires an action or omission by the State which violates a certain threshold of propriety, causing harm to the investor, and with a causal link between action or omission and harm. The threshold must be defined by the Tribunal, on the basis of the wording of Article II.3 of the BIT, and bearing in mind a number of factors, including among others the following: - whether the State has failed to offer a stable and predictable legal framework; (...) - whether there is an absence of transparency in the legal procedure or in the actions of the State".

f) Good faith

This element of the FET standard is commonly recognised as a general principle of law, requiring the parties to act honestly and fairly with each other. In the ICSID case *Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, Award and Dissenting opinion of 1 June 2009, the Tribunal affirmed (para. 450): "*The general, if not cardinal, principle of customary international law that States must act in good faith is thus a useful yardstick by which to measure the Fair and Equitable standard*".

Similarly, in the ICSID case *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Kazakhstan*, Award of 29 July 2008 (confirmed by the Ad Hoc Committee with Decision of 25 March 2010) the Tribunal affirmed that: "*The parties rightly agree that the fair and equitable treatment standard encompasses* inter alia *the following concrete principles: (...)- the State is obliged to act in good faith*".

5. The Full Protection and Security Standard

Considering the various questions connected with the FET clause, it is worth mentioning the Full Protection and Security clauses. This standard of protection has often been absorbed by the FET. In fact in the practice of the investment agreements, the obligation of the contracting States to accord full protection and security, in its various languages, often appears in addition and/or as an integration of the FET standard.

In connection with the FET clause, Article 10, para. 1 of the 1994 Energy Charter Treaty also provides that not only each Contracting Party will encourage and create stable, equitable, favourable and transparent conditions for Investors of the other Contracting Parties, including a commitment to accord fair and equitable treatment, but also "[s]*uch Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal*".

Still in connection with the FET clause, the 1998 Draft MAI in Section IV, Investment Protection, Article 1.1 provided that: "*Each Contracting Party*

shall accord to investments in its territory of investors of another Contracting Party (...) full and constant protection and security".

Under its Article 1105 (1) the NAFTA agreement requires the contracting States to "*accord investments of investors of another Party treatment in accordance with international law, including (...) full protection and security*".

Similarly the 2005 IISD Model Agreement combines FET and Full Protection and Security standards with the minimum standard of treatment. Article 7, (A) (Minimum international standards) provides that "*Each Party shall accord to investors or their investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security*", specifying under para. B that "*Paragraph (A) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments. The concepts of "fair and equitable treatment" and "full protection and security" are included within this standard, and do not create additional substantive rights*".

The recent ASEAN-Australia-New Zealand Free Trade Agreement (AANZFTA), entered into force on 1 January 2010, provides for a detailed set of provisions concerning investment protection. In particular its Article 6 (Treatment of Investment) connects the standard to customary international law and provides that (para. 1) "*Each Party shall accord to covered investments fair and equitable treatment and full protection and security*". Under para. 2 the AANZFTA clarifies that "*For greater certainty: (...) full protection and security requires each Party to take such measures as may be reasonably necessary to ensure the protection and security of the covered investment; and the concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required under customary international law, and do not create additional substantive rights*". Moreover, in view of possible violations of these standards of treatment of investments, para. 3 states that "*A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article*".

Most BITs contain a clause providing that the contracting States will grant FET standard and accord the full protection and security to investors. The provision was also contained in a number of US Friendship, Commerce and Navigation Treaties. Among others the Friendship, Commerce and Navigation Treaty between United States and Italy states under Article V (1) that "*The nationals of each High Contracting Party shall receive, within the territories of the other High Contracting Party, the most constant protection*

and security for their persons and property, and shall enjoy in this respect the full protection and security required by international law".

The Full Protection and Security provision can be differently drafted, generally in respect of the context. The arbitral practice, however, does not seem to attach a decisive importance to the wording of the clause in order to determine the exact scope of the clause. As generally agreed, the standard of Full Protection and Security is to be interpreted as aiming at securing the physical safety of the assets, installation and individuals connected to a foreign investment. The obligation of a State to ensure Full Protection and Security implies the obligation to preserve public order and safety of the investment adopting measures i) to prevent harmful events, ii) to restore a security condition as it was before the harmful events, and iii) to impose sanctions preventing the occurrence of damages. In this respect, cf. among others the ICSID cases *Wena Hotels Ltd v. Arab Republic of Egypt*, Award of 8 December 2000; *PSEG Global et al. v. Republic of Turkey*, Award of 19 January 2007; *The Channel Tunnel Group Ltd, France-Manche SA v. United Kingdom and the Republic of France*, Partial Award of 30 January 2007.

Despite the limited relevance of the standard in investment arbitration, an issue that remains unsolved is whether or not Full Protection and Security is to be considered absorbed in the protection granted by the FET. This issue has been examined in various cases. In the case *Occidental Exploration and Production Company v. The Republic of Ecuador*, (LCIA case) Final Award of 1st July 2004, the Tribunal observed that "*the Respondent has breached its obligations to accord fair and equitable treatment under Article II (3) (a) of the Treaty* [US-Ecuador BIT]. *In the context of finding the question of whether in addition there has been a breach of full protection and security under this Article becomes moot as a treatment that is not fair and equitable automatically entails an absence of full protection and security of the investment*" (para. 187).

In the *Azurix v. Argentine Republic*, Award of 14 July 2006, the Tribunal stated that it was "*persuaded of the interrelationship of fair and equitable treatment and the obligation to afford the investor full protection and security. The cases referred to above* [cf. Occidental case] *show that full protection and security was understood to go beyond protection and security ensured by the police. It is not only a matter of physical security; the stability afforded by a secure investment environment is as important from an investor's point of view. The Tribunal is aware that in recent free trade agreements signed by the United States, for instance, with Uruguay, full protection and security is understood to be limited to the level of police protection required under customary international law. However, when the terms "protection and security" are qualified by "full" and no other*

adjective or explanation, they extend, in their ordinary meaning, the content of this standard beyond physical security. To conclude, the Tribunal, having held that the Respondent failed to provide fair and equitable treatment to the investment, finds that the Respondent also breached the standard of full protection and security under the BIT". In this case the BIT concerned was between US and Argentine.

6. Questions related to the interpretation and application of FET

- What is the relationship between FET and customary international law minimum standard?
- Whenever the FET clause in a BIT is not expressly linked to the minimum standard of international law, is it possible to determine its meaning going beyond the limits of the minimum standard in similar cases?
- How should the measure of compensation of investors be determined in case of violation of the FET standard?

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IV. The Impact of the European Union on International Investment Law and Arbitration (Issue L on the General Outline)

1. Introduction

This subject has recently become extremely important after the entry into force of the Lisbon Treaty, explicitly conferring competence to the European Union in the matter of foreign direct investments.

The traditional impact of European law on international investment arbitration was mainly exercised through the selection mechanisms of the applicable law to investment disputes. The European law being a source of law that an arbitration tribunal may be called to apply directly or indirectly, as incorporated in a national law that the tribunal has to apply. In this regard two non-ICSID arbitral decisions, one in 2007 and the other in 2010, addressed the matter of application by new EU Member States of BITs stipulated with Member States, prior to their admission to the Union.

The new recent impact of the EU on the International investment law is twofold.

First it is due to three judgments of the European Court of Justice in 2009 and 2010, condemning three European States for not having denounced or freed themselves from the BITs with third countries which contain engagements that are or may result to be in contradiction with European law.

Second, it is due to the effects of the entry into force of the Lisbon Treaty on 1 December 2009, which extends to direct investments the exclusive competence of the EU in matters of commercial policy. This will cause the presence in the international investment world of a new actor, the EU, that, from its starting attitude and behaviour, seems to be willing to assume an active and somehow innovating role in the world of international investment law and arbitration.

2. European law applicable in Investment Arbitration

a) In ICSID arbitration

An analysis of traditional methods and solutions applicable law must start, nowadays, with the ICSID system, which was the system within the context of which classic solutions were consolidated and the most significant developments occurred.

Indeed, in the framework of bilateral treaties for the protection of investments (BIT) the ICSID arbitration plays a dominant role. It therefore appears opportune to focus this examination on the latter (see in this regard MAURO, Gli accordi bilaterali, 2003, esp. p. 321 ff.; MC LACHLAN, SHORE, WEINIGER, International Investment Arbitration, 2007, esp. p. 45 ff.).

Obviously, when the ICSID mechanism is preferred, courts must apply the rules of the Washington Convention, especially the provision in Article 42 (1) on the applicable law. In the specific context of opting for ICSID arbitration which is based on a BIT, it is quite evident that also the BIT substantial and procedural rules must be applied in principle.

It is to be noted that this conclusion is clearly expressed, as in the Italo-Argentinian BIT of May 25, 1990 in Article 8 (7) which states: "The Arbitral Tribunal shall decide on the basis of the law of the Contracting Party to the dispute – including the precepts of the latter that apply to conflicts of laws -, of the provisions of this Agreement, of clauses in any special agreements regarding investment, and on the basis of international principles of law that are applicable to the subject matter.

Another example is the BIT between Holland and the Czechoslovak Republic of 29 April 1991, which was applied in the arbitration award of 26 October 2010 discussed, infra, Subsection B. Article 8 (6) of this Treaty states: "The arbitral tribunal shall decide on the basis of the law, taking into account in particular though not exclusively: the law in force in the Contracting Party concerned; the provisions of this Agreement, and other relevant Agreements between the Contracting Parties; the provisions of special agreements relating to the investment; the general principles of international law.".

Furthermore the Washington Convention rules must be applied in order to obtain an arbitration award that complies with the *ratione personae* and *ratione materiae* requirements of the Washington Convention and with the specifications, effects and control mechanisms inherent to ICSID arbitration. This will occur, furthermore, subject to the limit of the conflict between the BIT provisions and binding international rules, both general and specific (*jus cogens*) which must always be applied.

The core element of this analysis is thus surely Article 42 (1) of the Washington Convention. As is widely known, the provision covers two different cases: when there is an agreement between the parties on the matter, and when an agreement is lacking. In the first case the court shall decide in accordance "*with such rules of law as may be agreed by the parties*". In this regard commentators and ICSID arbitration practice appears to agree in stressing that adopting the expression "rules of law", instead of the traditional "law", also allows parties to choose non-state rules, such as general principles and *lex mercatoria* rules. Naturally the decision to choose the applicable rules state law may also be employed to govern just a portion of an investment agreement. In this regard, it must be ascertained to what extent subjecting an agreement or a portion thereof to state or non-national rules is compatible with other rules of law which would otherwise be

applicable, whether they are state, international or, nowadays, even rules of law of the European Union.

It is equally widely-known that, in cases where the parties do not select the applicable rules of law, an ICSID Tribunal court shall apply "*the law of the Contracting State party to the dispute (including its rules on the conflict of laws)*". In the context of this legal and political debate some considerations appear especially useful.

The first consideration concerns the explicit indication, among the host state rules to be applied, of the conflicts of laws rules. This is a special option that is usually excluded from national legal systems and international covenants on private international law. Said systems, while allowing considerable latitude of choice, total or partial, of a foreign law by parties to an agreement, do not also include reference to conflict of law systems because such conflict rules could in turn lead to applying material rules differing from those chosen by the parties as applicable to their agreement. The reference, in Article 42 (1), to conflict of law rules of the State hosting an investment appears to carry considerable weight, inasmuch as it is a global reference to the host state's legal system, including all the rules which apply to the case under consideration, or can apply even though they may originate from different legal systems.

It is certain that the provision refers to traditional conflict rules intended the application of laws other than the law of the State hosting the investment in order to regulate certain matters which need to be regulated by the law of different States which have a better or a preferable "legislative competence". It is also certain that said provision is indicative of an overall fair and correct legal system in the host state, which is alive and open. It can therefore include, as well as the rules of a foreign juridical system that may be taken as reference, applicable international law as well, both conventional or customary. Especially important in this context are the primary and secondary European legislation regulating investments in EU Member States.

The second consideration refers to international law as in Article 42 (1) of the Washington Convention. To start with, it should be noted that there is a marked difference between the French version on one hand, and the English and Spanish versions on the other. The former refers solely to "principles of international law" whereas the other two refer more extensively to all the "rules of international law", including treaty law and therefore, bilateral treaties on the protection of investments possibly in force between the two States involved. The difference could be clear-cut and fraught with consequences, but in practice it is not considered important by commentators and ICSID awards, which appear to agree that both general principles of

international law and special treaty law must be observed and applied by ICSID Tribunals.

The further clarification concerns the role that international law (treaty and/or customary law) plays with respect to a host State's domestic legal system, and which remains however still applicable in principle. From the early jurisprudence of ICSID tribunals, and with the agreement of the majority of commentators, two functions have been attributed to international law on the basis of the reference contained in Article 42 (1); one to fill any gaps in the applicable state law and one to "correct" state law in the event that it conflicts with international law. Jurisprudence of ICSID tribunals and the related doctrine are so well-known that it would be superfluous or too incomplete to refer to them.

However two observations are necessary. The first is that the "corrective" function does not imply, obviously, any corrections to applicable State law in a technical or literal sense, but simply substantial non-application of it by an ICSID tribunal in a specific case when, in principle, it would be under obligation to apply said State law. Consequently, in that case, the provisions of the state law in question would be replaced by international law, both conventional rules and customary rules that to be reference is made by Article 42 (1) of the Washington Convention.

The second observation refers to the fact that non-application of the state law which conflicts with international law cannot necessarily imply its total replacement with international law every time it appears that the state law in question contains a provision that is or might be in conflict with international law. For example, the attitude adopted by the Tribunal in the ICSID case *Compania del Desarollo de Santa Helena v. Costa Rica* issued on 17 February 2000 does not seem acceptable (cf. GIARDINA, Diritto internazionale e diritto interno in tema di espropriazioni, Rivista dell'arbitrato, 2001, p. 120 ff.)

A decision was taken to settle the entire dispute exclusively on the basis of international law after having ascertained that an agreement existed between the parties that in the event of a conflict between domestic law and international law, the latter would prevail. With this in mind the Tribunal opted for identifying and applying international standards of reference totally ignoring the applicable domestic law.

On the basis of the aforementioned premises, so as to definitively formulate and assess the application of European law (current and future) in the context of the application of international law of investment in Europe, there are two alternatives to take into consideration.

The first possibility is to consider that European law and the laws of Member States, although differing from one another, substantially constitute an integrated whole in the context of which, furthermore, European law prevails over conflicting State laws. The latter, as is well known, and according to jurisprudence of the European Court of Justice and national tribunals, should be directly disregarded by domestic judges so as to ensure the prevalence of EU law. In this respect EU law should be seen as an integrating, superordinated part of domestic regulations of all Member States, and as especially enforceable so as to override common state regulations. The result would be that when the law of a EU Member State should be applied pursuant to Article 42 (1) of the Washington Convention, the EU law (and especially the law regulating foreign investment) would be directly applicable. It should not be forgotten, however, that also as regards European law – as an integrated, superordinated part of Member State's regulations – this is without prejudice to the provision contained in the last sentence of Article 42 (1), which requires adherence to international law in any case, whether it is treaty law or customary law, according to the above-described procedures and extent.

The second possibility is to consider EU law a sort, although unusual, of international treaty law, taken into consideration and protected because of the final sentence in Article 42 (1). In this way EU law would be protected by "filling in the gaps" and "correcting" State law that is incompatible with it. Also in this way, therefore, EU law, in its nature of international treaty law, would be protected and applied, but always in accordance with the principles and rules of general international law concerning compatibility between conventions and international treaty law and international customary law.

The choice between these two alternatives cannot be made exclusively on the basis of technical-juridical criteria. Other criteria may be taken into consideration, particularly of a political and economic type. For example, the first criteria, of a domestic type, might be preferred by EU institutions because it stresses and further favours the supremacy of EU law over the laws of Member States from a federal viewpoint. The second criteria, of a basically international type, might be preferred by States and those who feel they must stress and further favour the autonomy of single States in abidance with and the conduct of their international relations with third countries.

It must however be kept in mind that, at this point in time, both criteria would appear to adequately ensure both the full application of EU law to foreign investments, and current compliance with international law, both *treaty and customary law*, to the extent to which it has to be applied according to Article 42 (1) of the Washington Convention.

b) In non-ICSID arbitration

Two non-ICSID arbitral awards that compared some principles of European law with the BITs seem particularly relevant.

In the Eastern Sugar v. Czech Republic case of 27 March 2007, decided according to the Arbitration Rules of the Stockholm Chamber of Commerce, the investing company maintained that the Czech Republic had breached its rights under the 1991 BIT between the Czech Republic and the Netherlands, because of an alleged discriminatory application of the EU agricultural policy to the company.

On this case see POTESTÀ, Bilateral Investment Treaties and the European Union. Recent Developments in Arbitration and Before the ECJ, The Law and Practice of International Courts and Tribunals, 2009, p. 225 ff. BURGSTALLER, European Law and Investment Law, Journal of International Arbitration, 2009, p. 181 ff.

The Czech Republic asserted that the Tribunal lacked jurisdiction because the BIT was terminated in 1991 due to the Republic having joined the European Union. Especially because the BIT and EU law concern the same matters, the latter, being posterior, should prevail according to the relevant principles of international law, as incorporated in Article 59 of the Vienna Convention of 1969 on the Law of Treaties.

The Arbitral Tribunal firstly noted that the contents of the BIT and of applicable EU Law were not completely identical (for a critical examination of this point of the arbitration award, see POULAIN, Quelques interrogations sur le statut des Traités bilatéraux de promotion et de protection des investissements au sein de l'Union Européenne, Revue générale de droit international public, 2007, p. 803 ff., esp. p. 811 ff. and TEYNIER, L'applicabilité des traités bilatéraux sur les investissements entre Etats membres de l'Union européenne, Cahiers de l'Arbitrage 2008/1, p. 12 ff, spec. p. 14 ff.)

It also noted that the dispute had arisen before the Czech Republic was admitted to the European Union, and therefore the arbitral clause continued to be valid and effective. Consequently the Tribunal declared it had jurisdiction and continued the proceedings as to the merit of the dispute.

A second non-ICSID arbitral award that should be mentioned here is the one issued on 26 October 2010 in the Eureko v. Slovak Republic case. It was a Partial Award issued after a proceeding conducted according to UNCITRAL rules on the basis of the 1991 BIT concluded between the Netherlands and the Czech Republic. The award, which addressed only the questions of the Tribunal's jurisdiction, the arbitrability of the case and the suspension of the proceeding, performed an in-depth examination of the problems here examined. The Dutch company Eureko alleged, pursuant to the 1991 BIT,

that its participation in two Slovakian companies operating in the field of insurance had been harmed, especially in the health sector. Eureko had acquired its stake and interests in 2004 during a period of comparative liberalization of the Slovakian National Health Service. Subsequently the public law system was changed in the period 2006 – 2009, which according to Eureko led to forms of indirect expropriation, treatment that was not fair and equitable, and impediments to the free transfer of profits and dividends, all of which in breach of the BIT.

The Slovakian Republic preliminarily raised an "Intra-EU Jurisdictional Objection" to oppose the application of the BIT in this case, maintaining its non-applicability following the Republic's accession to the Community. The non applicability of the BIT or its termination were based on i) considerations of general international law (Articles 59 and 30 of the Vienna Convention on the Law of the Treaties); ii) considerations pertaining to EU law which is part of Slovakian law being applicable under said BIT; and iii) considerations of non-arbitrability according to German law, applicable for the Arbitral Tribunal had its seat in Germany. Given the importance of the objection raised, the Arbitral Tribunal, with the parties' agreement, asked Dutch government and the European Commission to submit their comments, taking into account the comments that the Commission had submitted in the Eastern Sugar case in 2007.

The Tribunal first of all noted that its competence is based on the 1991 BIT (in particular, on Article 8) which must be interpreted and applied in accordance with international law. Furthermore, the claimant having opted for UNCITRAL arbitration by virtue of said BIT Article 8, and the seat of the Tribunal having been fixed in Germany, German law is the lex loci arbitri which EU law is undoubtedly part of. In addition, the Tribunal decided that due to the fact that the basis for its competence was the BIT, to be interpreted and applied in accordance with international law, the consequences of the application of international law should be assessed and applied "within the framework of the rules of international law and not in disregard of those rules" (Eureko Award para. 281).

The Tribunal therefore examined and rejected the justification for termination of the BIT pursuant to Article 59 of the Vienna Convention on the Law of Treaties, because the parties had subsequently entered into an incompatible agreement "relating to the same subject matter" upon the Republic's entry in the EU. Subsequently the Court declared the contention based on Article 30 of the Vienna Convention inapplicable in this case, according to which a first treaty followed by a second treaty between the same parties can only be applied to the extent to which it is compatible with the second treaty. But such incompatibility could not matter when verifying

the Tribunal's competence, which is based on Article 8 of the BIT, but it could be relevant when issuing the award on the merits which would certainly take EU law into consideration (ibidem, nos. 268-273).

Lastly the Tribunal, reiterating that it has been constituted according to a provision contained in a BIT, concluded that, "Far from being precluded from considering and applying EU law the Tribunal is bound to apply it to the extent that it is part of the law(s) whether under BIT Article 8, German law or otherwise" (ibidem. no. 281) and that " The fact that, at the merits stage, the Tribunal might have to consider and apply provisions of EU law does not deprive the Tribunal of jurisdiction" (ibidem. no. 283).

The approach taken in these awards appears correct, especially for the issue that the two Tribunals had to decide first, namely the basis of their competence.

3. The EU Court of Justice and the effects of European law on BITs between member States and third States

The problem of compatibility with EU law for bilateral agreements on investment protection concluded between Member States and third countries emerged clearly at the time of the two parallel cases brought by the Commission of European Communities, one against Austria (Case C-205/06) and the other against Sweden (Case C-249/06), which led to two parallel decisions of the EU Court of Justice, both issued on 3 March 2009 (for these two judgments of the EU Court and the other one against Finland, see MAURO, Accordi Internazionali sugli investimenti e Unione Europea, 2010, p. 403 ff).

The Commission took action because Austria and Sweden, prior to the accession to the EU, entered into a series of bilateral agreements with various third countries in which they undertook to guarantee that investors in those countries could freely transfer payments in connection with their investments. The Commission, finding that this total freedom to transfer capital could be an hindrance to the restrictions on transfers of capital and payments possibly adopted by the EU Council pursuant to EC Articles 57, 59 and 60. The Commission in its reasoned opinion, asked the two Member States to take all necessary steps to eliminate these incompatibilities in accordance with Article 307, second paragraph CE (now TFEU Article 351). According to the Commission the two States had provided unsatisfactory replies to the reasoned opinion, and Austria in particular was not convincing when stressing that the incompatibility identified had not actually occurred but was merely hypothetical. Therefore the Commission asked the Court of Justice to declare the non-compliance of Austria and Sweden with their duty

to take all appropriate steps to eliminate said incompatibilities, as set forth in EC Article 307, second paragraph.

The Court of Justice declared the non-compliance of Austria and Sweden, and accepted the Commission's arguments according to which incompatibility indeed existed between the BITs of the two countries in question and European law, inasmuch as these two countries would certainly not be able to fulfil their EU obligations as properly and rapidly as required. This was due to the fact that the two countries' BITs did not contain ad hoc safeguard clauses that would have in any case guaranteed application of EU law, as well as the impossibility for the two States to refer to and use other international instruments available to them, such as the denunciation and request to renegotiate the BITs in question, sufficiently quickly and efficiently.

Similarly, with its judgment of 19 November 2009 (Case 118/07) the EU Court of Justice ruled against Finland for failure to comply with its obligations under EC Article 307, second paragraph, with regard to European obligations under EC Articles 57, 59 and 60 and the incompatible provisions of various BITs concluded by Finland with third countries. The Court of Justice specifically rejected the reasoning used by Finland based on the fact that all the disputed BITs, with the exception of the one concluded with the Russian Federation, contain a clause that protects investments "to the extent authorized by the legislation of the Contracting Party" hosting the investment. Consequently – according to Finland, since EU law is an integral part of Finnish law, the disputed BITs cannot provide for different and better treatment for foreign investment than that prescribed for Finnish national investments, which continue to be subject to restrictive measures that may be prescribed by the Council under EC Articles 57, 59 and 60. The Court of Justice was not convinced by this reasoning, affirming that the BITs should be interpreted according to the rules of interpretation laid down by international law as codified by the Vienna Convention of 1969, and it is doubtful that these rules of interpretation can be influenced by the domestic laws of States where they are applied. Furthermore – according to the Court – some of these BITs explicitly state that each contracting party shall act "in accordance with international law".

This judgement, as well as the previous two, deserve a brief comment. A certain inflexibility can perhaps be discerned in the position taken by the Court against Finland for non fulfilment of EU obligations. The Court strongly defending the autonomous interpretation of BITs according to international law. It denied that the BITs in question might accept to limit and balance the standard of treatment required by the BITs themselves to the standard existing at the domestic level for national investments. It is to be

noted in this regard that this is exactly what all treaties adopting the national treatment standard do legally and effectively.

The most recent judgement of the Court of Justice on this matter is Commission v. Sweden (Case C-246/07) issued on April 20, 2010. The object of the action brought by the Commission against Sweden concerned an alleged breach by Sweden of its duty of loyal cooperation under EC Article 10. The reported breach was caused by the unilateral proposal made by Sweden to include a certain substance (the PFOS) among the pollutants listed in Annex A of the 2001 Stockholm Convention on Persistent Organic Pollutants, to which the Community is also a party. This proposal was put forward at the EC Council while the discussion / negotiation regarding the adoption of a joint approach on the matter was still underway.

The Court of Justice stated (no. 69) that "In all the areas corresponding to the objectives of the Treaty, Article 10 EC requires Member States to facilitate the achievement of the Community's tasks and to abstain from any measure which could jeopardise the attainment of the objectives of the Treaty". The Court added (no. 71 ff.) that the duty of genuine cooperation is of general applicability and does not depend on whether or not the Community has exclusive competence. In that case competence was shared by the Community and Member States and the Council had for the time being decided not to put forward a joint proposal on inclusion of the PFOS listed in Annex A of the Stockholm Convention. Thus, according to the Court, having unilaterally proposed the inclusion of the substance in question in the Annex A to the Stockholm Convention, Sweden had dissociated itself from the concerted common strategy agreed upon by the Council and, therefore, had failed to fulfill its obligations under EC Article 10.

The overall assessment of the Court of Justice appears to lead to two main conclusions, as follows. On one hand the Court formally asserts the basic premise that previous international agreements of Member States with third countries must be respected and applied, as EU law has always stated, starting with the ECSC Treaty (Article 71) and the EEC Treaty (Article 234) and lastly, in EC Article 307, Paragraph 1, now Article 351, Paragraph 1, TFEU.

On the other hand, however, the Court attributes the maximum importance to provisions (which also existed previously and are now contained in EC Article 307, Paragraph 2, amended to Article 351, Paragraph 2, TFEU) which require States to take all appropriate steps to eliminate the incompatibilities and, where appropriate, adopt a common attitude and eventually re-negotiate said agreements with third countries on the basis, and it ruled against Member States for non-fulfillment when they failed to re-negotiate or quickly disengage from previous international agreements which are not compatible with the Treaties.

The Court also applied those general principles of European law (such as EC Article 10, presently to TFEU Article 4) which impose a duty of genuine cooperation between Member States and the EU in order to avoid, especially, unilateral acts of the States in international relations that might affect achievement of the EU. The Court accordingly considered unilateral acts of this type undertaken by States as a failure to comply with the duty of genuine collaboration.

4. The impact of the European Union on the development of International Investment Law

Lastly, it seems appropriate to make some comments about the sure impact that the participation of European Union will have on the world of international investments, their promotion, protection and regulation. EU will undoubtedly become one of the most influential and active players. In other words, it seems appropriate to look to the future and try to predict some of the themes and issues pertaining to international investment law on which EU will be called to take a position or might take the initiative itself, both at the level of bilateral treaties or free trade agreements with third-party countries, and in terms of contributing to consolidate and evolve customary international law on the matter.

It only takes a quick glance at the first documents issued by Union institutions, the Commission, the Council and the Parliament, to realize their possible impact on international investment laws.

The following are merely examples of some of the matters which appear especially important.

The first relates to conditions for exercising the right of expropriation by the host country. The first Commission Communication of July 7, 2010 stressed the need to "clearly define the balance of the interests at stake, such as protection of investors against illegal expropriation or the right of each party to regulate in the public interest". It is also to be pointed out that investment agreements must be compatible with EU and Member States' policies, including policies on environmental safeguards, labour, health and safety in the workplace, consumer protection, cultural diversity, development and competition. In the Proposal for a Regulation on transitional measures for the BITs concluded by Member States with third countries, the Commission provides for maintaining the applicability of the BITs presently in force, but it is also established that the Commission shall perform a review of the same. This review could lead to withdrawal of the authorization to maintain a BIT in force when, under Article 6.1 (a) and (c) of the Proposal "an agreement conflicts with the law of the Union other than the incompatibilities arising from the allocation of competence between the

Union and its Member States…..[or] an agreement constitutes an obstacle to the development and the implementation of the Union's policies relating to investment, including in particular the common commercial policy".

Similarly, the European Council, at its session of 25 October 2010, after having recalled the traditional principles of investor protection usually contained in the BITs, also underlined that "the new European international investment policy should be guided by the principles and objectives of the Union's external action, including the rule of law, human rights and sustainable development as well as taking into account the other policies of the Union and its Member States. The European investment policy must continue to allow the EU and Member States to adopt and enforce measures necessary to pursue public policy objectives" (Section 17).

Lastly, the European Parliament, taking a general approach that aims to provide greater protection for public interests in Europe, has taken a clear position on these issues. In the Parliament Resolution of April 6, 2011, concerning "fair and equitable treatment", the Preamble stresses under letter G, "the possibility of conflict between private interests and the regulatory tasks of public authorities, for example in cases where the adoption of legitimate legislation led to a state being condemned by international arbitrators for a breach of the principle of « fair and equitable treatment»". In Section 25 of the Resolution the Commission is requested to include clauses "laying down the right of the parties to the agreement to regulate, inter alia, in the areas of protection of national security, the environment, public health, and workers' and consumers' rights" in all future agreements .

Furthermore, the European Parliament, in the aforementioned Resolution, referring to principles on treatment of investments according to what has become a customary framework, takes a strong position on some sectors and asks the Commission "to assess the potential impact of the inclusion of an umbrella-clause in future European investment agreements and to present a report to both the European Parliament and the Council".

Lastly, the European Parliament, in Section 24 of the Resolution, "Expresses its deep concern regarding the level of discretion of international arbitrators to make a broader interpretation of investor protection clauses, thereby leading to the ruling out of legitimate public regulations; and calls on the Commission to produce clear definitions of investor protection standards in order to avoid such problems in the new investment agreements".

In conclusion it does appear appropriate to submit that the European Union's entry onto the world stage as a new player in the field of international investment will lead to important upheavals not only within the EU for the relations between Member States and the EU itself, but also for

the relations with third countries. The EU will thus be able to cause important consequences for the evolution of customary international law in various sensitive areas in the field of investments.

5. Questions related to the impact of the EU on international investment law and arbitration

– Does the exclusive EU competence after the Lisbon Treaty cover also indirect investments?

– Is the notion of public interest according to the EU larger that the traditional notion of public interest according to the law of the member States and/or international law?

– Which are the possible solutions of a conflict between BITs and EU law and policy?

- before the EU Court of Justice
- before an Interstate Tribunal created according to a BIT

6. Basic references

MAURO, Gli accordi bilaterali sulla promozione e la protezione degli investimenti, Turin, 2003

MC LACHLAN, SHORE, WEINIGER, International Investment Arbitration, Oxford 2007

POTESTÀ, Bilateral Investment Treaties and the European Union. Recent Developments in Arbitration and Before the ECJ, The Law and Practice of International Courts and Tribunals, 2009

BURGSTALLER, European Law and Investment Law, Journal of International Arbitration, 2009

POULAIN, Quelques interrogations sur le statut des Traités bilatéraux de promotion et de protection des investissements au sein de l'Union Européenne, Revue générale de droit international public, 2007

TEYNIER, L'applicabilité des traités bilatéraux sur les investissements entre Etats membres de l'Union européenne, Cahiers de l'Arbitrage, 2008

MAURO, Accordi internazionali sugli investimenti e Unione Europea, Studi sull'integrazione europea, 2010

PART II
GENERAL ISSUES FOR CONSIDERATION

The Draft presented at the Naples Session contained the following points (Annuaire, vol. 73, pag. 559 f.), which are here reproduced for convenience.

I. The issues suggested for consideration at the Naples Session

1. The relations of BITs with customary law

The first question is whether the extremely numerous bilateral treaties on the protection of foreign investments, given to their substantially homogenous content, have determined the creation of a body of international customary law having an identical content and, thus, obliging also States not parties to BITs or in a measure additional to a possibly applicable BIT. For a positive answer to this question, cf. SCHWEBEL, ASIL Proc. 2004. *Adde:* REINISCH, ICSID Review 2009, 410 at 421; CHALAMISH, The future of BITs: a de facto multi lateral agreement?, Brooklyn Journal of International Law 2008-2009, 305 at 314 ff.

The related point is how a positive answer to the above question is maintained and/or with what possible qualifications, in view of the developments relating to environment, public health and human rights, which have recently occurred.

The second question is whether a BIT, or even a series of BITs, represent a body of rules which are autonomous, as *lex specialis,* from the other rules of general international law, which cannot be used for interpreting or filling the possible *lacunae* of the BITs' regulation.

The related point is whether the above autonomy would be maintained also in respect to peremptory rules of international law.

The additional related point is whether the above autonomy is maintained and/or with what possible qualifications, in the case that the BITs or other international instruments make express references to international rules.

*Adde:*as to BITs interpretation, ARSANJANI, REISMAN, Interpreting treaties for the benefit of third parties: the "Salvors' doctrine" and the use of the legislative history in investment treaties, AJIL 2010, p. 597 ff.

As to NAFTA cf. PUIG, KINNEAR, NAFTA Chapter Eleven at Fifteen: Contributions to a Systemic approach in investment arbitration, ICSID Review 2010, p. 225, at 253 ff.

2. The relations of BITs with the selected arbitration mechanisms

The first question is whether in the case that an applicable BIT permits to the parties to choose between different kinds of mechanisms for the solution of their dispute, the rules of the BIT will be the only applicable rules or the rules of the chosen mechanism have also to be respected. The question especially applies to the ICSID requirements in the case of a BIT based arbitration.

The second question is whether the different kinds of arbitration mechanisms provided for in the BITs determine different kinds of substantive and/or procedural solutions of the disputes submitted.

The related point is whether possible differences of prerequisites, solutions, and effects of the awards determine the choice of the mechanism made by the parties.

3. The interactions of international law with domestic law

a) As to the definition of Investment:

– Is the recourse to municipal law necessary to verify *in concreto* the existence of an Investment? Cf. *Fedax v. Venezuela* of 1998 and *Salini v. Morocco* of 2001.

Adde:Saba Fakes v Turkey of 2010, commentary by MANCIAUX, JDI, 2011, p. 578 ff.

– Is the legality of the Investment according to municipal law a necessary prerequisite? Cf. *Inceysa Vallisoletana v. El Salvador* of 2006, *World Duty Free v. Kenya* of 2006, *Fraport v. Philippines* of 2007.

b) As to the definition of Investor:

– Is nationality to be assessed exclusively on the basis of the relevant domestic law? Cf. *Soufraki v. United Arab Emirates* of 2004, where the Tribunal applied Italian law and considered that Italian nationality was not proved by the Investor, and *Renta v. Russian Federation* of 2009, where the Tribunal applied Spanish law and denied the status of Investor according to Spain-Russian Federation BIT to certain claimants not possessing full legal personality.

c) As to Regulatory Measures

– Are nationalizations to be distinguished from expropriations?

– Are Regulatory Measures to be distinguished from indirect and/or creeping expropriations?

II. The additional issues suggested for consideration

In addition to the above general issues already proposed for consideration at the Naples Session, new issues seem to emerge from recent developments in international case law, doctrine, especially connected to the entry into play of new actors on the scene of international investment law and arbitration.

1. The quest for an increased consideration of public interest in international investment law and arbitration

This well known issue has been raised since long time by States, particularly developing States but with increased insistence and more generally in recent times. A sure impact on the recent new attitude is due to the fact that some traditionally exporting States have became also investment-receiving States, and consequently, sometimes, respondents in investment arbitrations. In this

new economic financial contest it is envisageable that the protection of foreign investment has an adverse impact on the systems for protection of public interest adopted also in developed countries. At the Naples Session this demand for a better consideration of public or State interest has been stressed by LALIVE (Annuaire vol. 73, p. 564), BUCHER (*ibidem* 565), RANJEVA (*ibidem* 566), MAHIOU (*ibidem* 567). In this context and in addition to the section on Regulatory measures, Human Rights Protection deserves special consideration (cf. DUPUY, FRANCIONI, PETERSMANN, Human Rights in international investment law and arbitration, 2009).

It has also been noted by ABI SAAB (*ibidem* 566) that in investment arbitration the rules of international law are sometimes not properly interpreted and applied by tribunals composed by arbitrators more familiar with purely commercial disputes.

2. The impact of European Union on the international investment law and arbitration

As indicated *supra*, Part I, Section 4, an important influence towards an increased consideration and protection of public interest in international investment law and arbitration is going to be exercised by the EU following the entry into force of the Lisbon Treaty on 1 December 2009. The modification of competences of the EU, now expressly including foreign direct investments within the exclusive competence of the Union, determines the participation of a new important actor in the field of international investment law and arbitration. As indicated *supra*, Part I, Section 4, *in fine*, the impact of this new actor appears capable of determining important evolutions in various sensitive areas, especially that of properly balance investors interests and public interest as established by States and presently also by the EU.

3. Some procedural issues in investment arbitration. The annulment of international arbitration awards: a challenge for the certainty and foreseeability of solutions?

Also this issue has a significant importance in investment arbitration. The analysis needs here to be bifurcated differentiating ICSID arbitration from non-ICSID arbitration.

Providing the BITs, which are the basis for the States consent to arbitration, offer various options for arbitration to the investor, the choice made by the latter is decisive. If ICSID arbitration is chosen, the procedure and the arbitral award will be governed by the Washington Convention. Thus, the award will have the proper nature of an international award, unprovided with a national seat and subject only to the international annulment procedure and annulment grounds provided for in Article 52 of the Convention.

If other kinds of arbitration are selected by the investor, the annulment procedure and grounds for annulment will be those provided for by the law of the seat of the arbitration and the arbitration rules that has been possibly chosen (such as the UNCITRAL Rules and the Rules of the Arbitration Institute of Stockholm).

In the situation described above, it appears that only within the ICSID system the problem can be properly raised as to the coherence of the international investment case law and the lack of certainty sometimes regretted because of the somehow diverging solutions offered by the various *ad hoc* committees charged with the annulment procedures (cf. CRIVELLARO, Annulment of ICSID Awards: back to the "first generation"?, Liber Amicorum Serge Lazareff, Paris, 2011, p. 145-175).

For these reasons and in this respect the issue has been raised of the opportunity of creating a stable appeal board within ICSID, similar to the Appellate Body of the WTO. This solution, somehow debated in the ICSID milieu, was suggested at the Naples Session by TOMUSCHAT, Annuaire, vol. 73, p. 565 f. and MAHIOU, *ibidem*, p. 567, but denied by EL KOSHERI, *ibidem*, p. 567.

In order to properly consider this issue, it should be taken into account that a possible stability of annulment solutions offered by ICSID court of appeal, could eventually reveal as an obstacle to the evolution to ICSID case law. Moreover, a possible stability increase of ICSID case law will have only an indirect influence on other kinds of investment arbitration which remain submitted to the selected arbitration rules and conclusively to the law of the seat of arbitration.

4. The new actors coming from the civil society. The intervention as amicus curiae and transparency in investment arbitration.

Reference is to be made in this respect of new actors coming from the s.c. civil society with their action in favour of the protection of public interest such as those in the field of human health and rights, labour, environment and generally in favour of transparency in investment arbitration.

In order to permit these actions to be exercised, various forms of participation are conceivable, particularly the intervention in the arbitration procedure by these actors as *amici curiae*. International practice shows a certain number of a precedents by the Appellate Body of the WTO, NAFTA, the Iran-US Tribunal and the European Court of Human Rights (on these precedents cf. BISHOP, CRAWFORD, REISMAN, Foreign Investment Disputes, 2005 p. 1504 ff.).

In the ICSID system nothing was initially provided but the need for third party participation and an increased transparency was underlined by STERN,

L'entrée de la societé civile dans l'arbitrage entre Etat et invertisseur, Rev. Arb. 2002, p. 329 ff. and ALEXANDROV, CARLSON, The opportunity to be heard: accommodating amicus curiae participation in investment treaty arbitration, Liber amicorum Bernardo Cremades, 2010. The 2006 reform of the Article 32 and 37 of ICSID Arbitration Rules has introduced the possibility for an arbitration tribunal to admit the participation as *amicus curiae* of third parties, provided that certain conditions are respected, but among which the consent of the parties is not included. For an assessment of the 2006 reform and the relevant practice of ICSID tribunals cf. CRIVELLARO, Transparence de la procédure et l'accès des tiers: Amicus Curiae, CIRDI, Bilan d'un système, Paris, 2011, p. 225 ff. On the issue of transparency v. confidentiality in trade disputes compared with investment disputes, cf. REINISH, Investment protection and dispute settlement in Preferential Trade Agreements. A challenge to BITs, ICSID Review, 2009, p. 410, p. 421 ff.

PART III
THE GENERAL OUTLINE

I. The International Treaties considered

1. Bilateral Investment Treaties

- The Traditional Models (UK, Switzerland, France, Germany, USA)
- Recent New Models (USA, Canada, Germany, Norway)
- The Free Trade Agreements (EFTA – Singapore 2002, USA- Chile 2003; USA- Singapore 2004, USA – Australia 2004) and the Preferential Trade Agreements

2. Multilateral Treaties

- The Washington Convention on Settlement of Investment Disputes between States and Nationals of Other States
- The North American Free Trade Agreement
- The Energy Charter Treaty
- The Central American Free Trade Agreement
- The Draft Multilateral Agreement on Investment of 1998

II. DELIBERATIONS DE L'INSTITUT

Onzième séance plénière Vendredi 9 septembre 2011 (après-midi)

La séance est ouverte à 17 h 45 sous la présidence de M. *Roucounas*.

Le *Président* invite le Rapporteur, M. *Giardina*, à présenter son rapport. Il regrette que le temps qui lui est accordé est malheureusement très limité et appelle le Rapporteur à être synthétique.

The *Rapporteur* was grateful to the President and the Secretary General for allowing him to present his Report to the plenary, however briefly. He recalled that the objective was to achieve a vote on a draft Resolution at the next session of the *Institut* and that many issues remained outstanding. Given the limited time afforded to him, however, he would focus on a series of major points, and was looking forward to hearing the comments of his *consœurs* and *confrères*.

The work of the Commission had originally focused on three issues: the notion of "investment", the notion of "investor" and the issue of regulatory measures tantamount to indirect expropriation. Following recommendations made by the plenary at the Naples session, the Commission had then focused its work on another set of issues, as reflected in the Report that was posted on the website of the *Institut* in July 2011. The Report addressed: the distinction between treaty and contract claims; the issue of most favoured nation ("MFN") clauses; and the concept of fair and equitable treatment ("FET").

The Report provided a full review of the case law and doctrine in relation to MFN clauses, including on whether such clauses applied to substantive issues only or also to jurisdictional issues. The Report was equally comprehensive with respect to FET. It discussed, *inter alia*, whether the FET standard expressed in bilateral investment treaties differed from the minimum standard of customary international law, as referred to in Article 1105 of the North American Free Trade Agreement. The Rapporteur hoped that the plenary could express its view on this topical issue.

The Report also highlighted the current status of discussions relating to the interactions between international investment law and the law of the European Union. The Rapporteur recalled that the Member States had

transferred an exclusive competence to the Union in that respect by the Lisbon Treaty. He noted that the European Court of Justice had already condemned three States (Finland, Austria and Sweden) for maintaining pre-existing bilateral investment treaties with third States, because such treaties ensured free capital transfers and thus infringed the competence of the Council of Ministers to enact restrictions on inbound and outbound capital flows. The Rapporteur also indicated that the European Union would soon enact legislation in relation to inward foreign investment. This showed that the EU was now an important new actor in the field of international investment law, although it was difficult so far to understand where the EU was heading. The overall goal of the Commission was always to preserve EU law; European institutions would thus always consider international investment law through the prism of potential violations of EU law, which may ultimately have a significant impact of that particular field of international law.

The Rapporteur concluded by noting that several members of the Commission were of the view that the scope of the Report was too wide and that the upcoming draft Resolution should focus on one of the issues mentioned above. Another potential topic could have been the protection of public interest in investor-State arbitration, as many arbitral tribunals tended to apply reasonings and arguments that were more appropriate to commercial arbitrations than to investment arbitrations.

The Rapporteur concluded by apologizing for the brevity of his presentation and reiterated that he was looking forward to the input of the plenary on the work of his Commission.

The *President* thanked the Rapporteur for his report and opened the floor for a very brief debate.

Mr *Torres Bernardes* congratulated the Rapporteur for his report in the name of the plenary. He hoped that the increased involvement of European institutions and EU law would result in a heightened sensitivity to the public interest among investor-State arbitral tribunals. He expressed the concern of many members of the *Institut* when stating that some arbitrators had been regrettably careless when it came to the protection of that public interest.

La séance est levée à 18 h 05.
