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by

Louis-Marie Chauvel*

Abstract

By virtue of Article 207 TFEU, the EU has exclusive competence over Foreign Direct Investment (FDI). As the main issuer and destination of FDI worldwide, the position of the EU regarding International Investment Agreements (IIAs) may drastically modify the legal Framework of International Investment Law (IIL). This study relies on the criteria put forward by Laurent COHEN-TANUGI and other scholars in order to assess if the EU has gained normative influence in the field of IIL. We first observe that the EU has developed a consistent position regarding IIAs provisions, an important step towards gaining and exercising normative influence. Through a comparison of the content of EU FTAs and its negotiating partners' usual practice, and through a study of the first developments of the EU's proposal for a Multilateral Investment Court, we put forward the first signs of EU's normative influence, even though it has difficulties to become global. These signs could be hindered by a growing opposition to investments' protection among the EU's citizens, civil society and Member States. Such oppositions were seen at both the EU level and national level, given that IIAs are mixed agreements. These resistances ay be precluding the EU to conclude IIAs and therefore to gain normative influence. We thus explore two possible pathways for the EU to conclude these agreements in spite of oppositions although these pathways would not necessarily allow for the EU to gain more normative influence. This leads to the conclusion that the EU will not have a global normative influence as long as its policy regarding IIL does not get support from the public opinion and representatives inside the EU.

Keywords: Normative Influence; EU External Action; International Investment Agreements; International Investment Law; Common Commercial Policy; EU Democratic Process; Mixed Agreements; Civil Society; CETA; TTIP

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Normative Influence of the European Union in the Field of International Investment Law

Introduction

For a long time, the European Union (EU) stayed apart of International Investment Law (IIL). Indeed, the EU did not have competence in this field of law, which belonged to Member States. The latter were, indeed, the initial signatories of International Investment Agreements (IIAs)[1] and parties to more than 1,200 IIAs[2] out of the approximately 3,000 currently in force[3]. EU Law, however, has progressively came across Investment law at the beginning of 21st Century.[4] First, it was the consequence of the 2004 accession, as the new Member States had concluded IIAs with other Member States prior to the said accession. Second, IIAs concluded by Member States with third countries were subject to an infringement procedure for not respecting the Treaty provisions on the free movement of capital. However, the main encounter with International investments prior to the entry into force of the Lisbon Treaty was twofold: first, the European Communities (EC) became party to the Energy Charter Treaty, which contained provisions on the protection of foreign investments.[5] Second, the EC integrated provisions on the liberalization of investments in their Free trade agreements (FTAs) while exercising their competence in the field of establishment, thus developing a first model for these provisions called the minimum platform on investment. Alternatively, Member States' IIAs only covered protection of investments post-establishment without providing for investment liberalization, a specificity that has

[1] The expression "International Investment Agreements" consists of Bilateral Investment Agreements and Free Trade Agreements embodying a chapter on the protection of Foreign Investments.
[2] DE MESTRAL Armand, *The Evolving Role of the European Union in IIA treaty-making*, *in* De Mestral Armand and Lévesque Céline (eds.), "Improving International Investment Agreements", London/New York, Routledge (2013), pp.42-58, p.48.
[3] UNCTAD, *Rapport sur l'investissement dans le monde 'Nationalité des investisseurs : enjeux et politiques' – Repères et vue d'ensemble*, New York and Geneva, United Nationa, 2016, 37p., p.20.
[4] On this progressive encounter see LEBEN Charles, *Introduction, in* Kessendjian Catherine et Leben Charles (eds.), "Le droit européen et l'investissement", Paris, Ed. Panthéon Assas (2009), pp.15-18 ; DE MESTRAL Armand, *The Evolving Role of the European union in IIA treaty-making, op.cit.*, pp.47-50 ; HERVE Alan, *L'Union européenne comme acteur émergent du droit des investissements étrangers : pour le meilleur ou pour le pire?*, CDE (2015), pp. 179-234, pp. 189-195.
[5] Council and Commission Decision 98/181/EC, ECSC, Euratom of 23 September 1997 on the conclusion, by the European Communities, of the Energy Charter Treaty and the Energy Charter Protocol on energy efficiency and related environmental aspects, [1998] OJ L 69/1.

been referred to as the European model of International Investment Agreements.[6] Consequently, the EC have never been an important actor in the field of IIL.

The Treaty of Lisbon changed this situation. Indeed, as per Article 207 TFEU Foreign Direct Investment falls in the scope of application of the EU Common Commercial Policy (CCP). This may have a major impact on IIL. Indeed, the EU detains the main stocks and is the most important source and destination of Foreign Direct Investments worldwide. Moreover, IIAs concluded by the EU may replace more than 1,200 IIAs. Consequently, the EU's competence may cause a major change regarding IIL as it could become the main player in this field of law. Indeed, Professor De Mestral considered that an EU model BIT may "*influence the course of development of all BITs*"[7].

Six years after the EU acquired this exclusive competence, having completed the negotiations of three IIAs[8] and having begun the negotiations of other ILAs[9], the question remains on whether the EU has used its potential so as to become a major normative player and influencer in the field of IIL, on a bilateral, and more generally, on a global level.

Although it is different, the concept of normative influence is close to Ian Manners's definition of normative power : « the ability to shape what passes for normal in international relations »[10]. Normative power is a characterization of the EU as an international actor as a whole and is a theoretical concept[11] developed to identify the EU's international identity[12]. The purpose of the present study is more narrow as it consists in a more empirical approach. The purpose of this study will be to determine whether the EU, a new actor in the field of IIL, has or is in the process of acquiring the ability to shape what 'passes for normal' when it comes to IIAs norms. Thus, it differs from normative power as it is not a study of the EU as a whole, and moreover, it does not rely on the dissemination of the EU *acquis* in other countries' national laws, but on the influence of the EU in the wording and conception of IIAs worldwide. As a consequence, the concept of normative influence can be defined according to Laurent Cohen-Tanugi as « the capacity of [the EU] to influence the

[6] DOLZER Rudolf, SCHREUER Christoph, *Principles of International Investment Law,* Oxford, Oxford University Press (2012), 2nd ed., 417p., p.89 ; DE NANTEUIL Arnaud, *Droit international de l'investissement,* Paris, Pédone (2014), 431p., p.285.
[7] DE MESTRAL Armand, *The Evolving Role of the European Union in IIA treaty-making, op. cit*., p.58. A similar conclusion can be found in TITI Catharine, *International Investment Law and the European Union : Towards a New Generation of International Investment Agreements*, EJIL (2015), pp.639-661, p.661.
[8] CETA with Canada: Joint Statement Canada-EU Comprehensive Economic and Trade Agreement (CETA), 29 February 2016, available at http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154330.pdf (consulted on 19 June 2017) ; EU-Singapore FTA: *European Commission – EU and Singapore conclude investment talk: Speaking Point by Commissioner for Trade Karel De Gucht*, 17 October 2014 ; EU Vietnam FTA, *European Commission – Press Statement by the President of the European Commission Jean-Claude Juncker, the President of the European Council Donald Tusk and the Prime Minister of Vietnam Nguyen Tan Dung*, 2 December 2015.
[9] With China, see the China page on the website of DG Trade, available on http://ec.europa.eu/trade/policy/countries-and-regions/countries/china/, (consulted on 23 June 2017) ; Myanmar: *Joint Statement – launching of Negotiations of the Investment Agreement between the Republic of the Union of Myanmar and the European Union*, 20 March 2014.
[10] MANNERS Ian, *Normative Power Europe : A Contradiction in Terms ?,* JCMS (2002), pp.235-258, p.253.
[11] MANNERS Ian and DIEZ Thomas, *Reflecting on Normative Power Europe,* in Berenskoetter Felix and Williams Michael, "Power in World Politics", London/New York, Routledge (2007), pp.173-188, pp. 175-177.
[12] *Ibid.*, pp.183-186 ; MARTIN-MAZÉ Médéric, *Unpacking Interests in Normative Power Europe*, JCMS (2015), pp. 1285-1300, p. 1286.

definition of norms […] at an international scale »[13]. However, some criteria set out by Manners and other scholars may be used for this analysis. First, normative power derives from a normative basis. It will thus be necessary to determine if there are core values and principles that the EU commits to put forward in the field of IIL. Second, to establish if the EU has acquired normative influence, it is necessary to stress the ways in which the EU needs to expand its normative basis. For this purpose, we will rely on the classification of these means of Professor Tuomas Forsberg[14]. Among its four mechanisms[15], two appear to be adapted to the object of this study *i.e.* the shaping of international agreements. The first means is that of *persuading others* which translates to the power to argue and persuade other actors. For the purpose of the present study, the EU's power of persuasion will be interpreted as the influence of the EU to impose its model to a negotiating partner in the process of an IIA negotiation. The second means is *the power of example*[16], understood as the extent to which the practice of the EU serves as role model for other actors. For the purpose of the present study, the EU's *power of example* will be considered in order to determine if the negotiating partners of the EU have yet been subject to a contagion of EU's IIA model and allowed it to expand globally. The two remaining means will be excluded from the scope of the present study: *shaping the discourse of what is normal* as it concerns the diffusion of broad concepts and *invoking norms* as it does not apply to the negotiation of agreements.

Therefore, the study of the EU's normative influence will comprise three stages: first, the determination of the EU's normative basis in the field of IIAs. Second, the determination of the EU's capacity to has impose its pattern to its negotiating partners. Third, the examining of whether the EU's IIAs have become a role model. These criteria are consistent with those put forward by Laurent Cohen-Tanugi in the context of norms at international and treaty levels: to be able to impose its view in an international negotiation, on the one hand and to develop norms that can serve as role models at an international scale, on the other hand.[17] Moreover, the concept of normative basis can be understood as a requirement highlighted by Laurent Cohen-Tanugi in its conclusion: the existence of a consistent position among the Union and its Member States on a particular matter.[18]

[13] Laurent COHEN-TANUGI in COHEN-TANUGI Laurent, *L'influence de l'Union européenne : une ambition entravée*, Paris, La Documentation Français (2002), Coll. Les notes de l'IFRI, n°40, 54p., p.9, translation by the author.
[14] FORSBERG Tuomas, *Normative Power Europe, Once Again: A Conceptual Analysis of an Ideal Type*, JCMS (2011), pp.1183-1204.
[15] *Ibid.,* pp. 1196-1198. The four mechanisms of normative powers identified by Forsberg are *Persuading others, Invoking Norms*, *Shaping the discourse of what is normal* and *The power of example.*
[16] *Ibid.*, Forsberg himself argues that this last mechanism should be referred to as a sign of normative influence. It could be related to the concept of mimesis. See NEGRI Vincent and SCHULTE-TENCKOFF Isabelle, *Mimesis: pour une lecture anthropologique dynamique de la construction du droit*, in Negri Vincent and Schulte-Tenckoff, "MIMESIS: Towards International Normativity - Between Mimetism and Dissemination", Paris, Pédone (2016), pp.15-32.
[17] *Ibid.,* p.11.
[18] *Ibid.*, pp.40-41.

Once this first study conducted, special focus will be put on various internal oppositions to the EU's policy regarding IIAs[19]. Our purpose will be to determine whether these oppositions may hinder the EU's ability to conclude IIAs, as they may impede its growing normative influence.

To complete this study, we will evaluate the appropriateness of possible legal pathways in order to gain greater normative influence.

The present study will therefore comprise two parts. In the first part, we will assess the existence of a growing normative influence of the EU in the field of IIL through the emergence of a normative basis regarding IIAs norms and the how the EU's institutions have been able, progressively, to spread it (Chapter 1). Second, we will put the focus on the ways in which the numerous oppositions to IIAs among the EU's Member States, citizens and Civil society may impede the EU's growing normative influence (Chapter 2).

Chapter 1: A Growing Normative Influence

Since acquiring an exclusive competence in FDIs, the EU has shown the first signs of a normative influence in the field of IIL. It has developed a consistent position on International Investment Agreements norms (I). However, if the EU has acquired a bilateral influence, it can hardly be said to have developed a global influence on IIL (II).

I. A Consistent Position on International Investment Agreements Norms

The EU has taken several years to develop a consistent position on IIAs (A) but eventually succeeded in establishing a consistency of key elements of its negotiated FTAs (B) in spite of some wording differences (C).

A. The Progressive Development of a Consistent EU Position Regarding IIAs

When the EU acquired exclusive competence in FDIs, it had never negotiated complete agreements on the protection of foreign investments. The question was, therefore, what would be the position of the EU regarding IIAs: would it rely on the practice of its Member States[20] or develop another practice, more balanced and favourable to the States' right to regulate? Indeed, EU Member States' bilateral investment agreements (BITs) were mostly

[19] See RAPOPORT Cécile, *La participation du public à l'élaboration des partenariats transatlantiques*, to be published ; FLAESCH-MOUGIN Catherine, *Commerce et démocratie – Quelques réflexions sur l'ère post Lisbonne*, in Kada Nicolas, "Mélanges en l'honneur du Professeur Henri Oberdorff", Paris, LGDJ (2015), pp. 107-123.

[20] For a descrption of this practice see TITI Catharine, *International Investment Law and the European Union : Towards a New Generation of International Investment Agreements*, *op.cit.,* pp.647-651.

concluded with developing countries[21] and were short and very protective of investors and investments. This was the path that was proposed by the Council in its first negotiating directives for IIAs in which, the Council recommended that, in the field of investment protections, the EU was to rely on the Member States' best practices with the objective to provide for the best protection to investors and investments and not to balance it with the right to regulate.[22]

The debate on the EU's position on investments actually took place in 2010 and 2011 when the Commission issued a Communication[23] in which it took a position on IIAs. This Communication triggered answers from the Council[24] and Parliament[25].

The Commission's position regarding IIL is close to that of the EU Member States *i.e.* that the main objective of its policy in international investments was to secure the situation of investors in the territory of a foreign partner and to create a level playing field. The Commission did acknowledge, in a lapidary way, the necessity, for the EU, to ensure that IIAs are consistent with other policies such as environment or consumer protection. At the time of the issuing of the Communication, the Commission did not have the purpose to influence International investment law and did not even intend to adopt a consistent model on investment protection as it preferred to adapt to the negotiating partners[26]. Moreover, as stressed by Professor Reinisch, no consensus existed amongst the EU institutions[27]. The Council favoured the protection of investments whereas the Parliament, relying on the experience of developed countries that had concluded IIAs amongst themselves[28], advocated to limit the arbitrators' leeway in order to protect the right to regulate of the EU and its Member States[29]. The Parliament therefore encouraged the development of a template[30], with no intention of influencing IIL globally.

The first negotiations with developed countries, Singapore[31] and Canada[32], have shown the need to strike a balance between the right to regulate and investments protection. These

[21] BITs between developing and developed countries tend to be more protective of investments as only one of the partners exports investments while the other search to increase the stream of investments. See SORNARAJAH Muthucumaraswamy, *The International Law of Foreign Investments*, Cambridge, Cambridge University Press (2012), 525p., p.177.
[22] *Council - Negotiating directives (Canada, India and Singapore)* of 12 September 2011, unpublished, available at http://www.bilaterals.org/?eu-negotiating-mandates-on&lang=en (consulted on 13 June 2017).
[23] *European Commission – Communication to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions "Towards a comprehensive European international investment policy"*, 7 July 2010, COM(2010)343 final.
[24] *Council – Conclusions on a comprehensive European investment policy,* 3041st Foreign Affairs Council Meeting, 25 October 2010.
[25] *European Parliament – Resolution on the future European international investment policy,* 6 April 2011, 2010/2203(INI), P7_TA(2011)0141.
[26] *European Commission – Communication to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions "Towards a comprehensive European international investment policy", op.cit.*, Pt.3, p.6.
[27] REINISCH August, *The Future Shape of EU Investment Agreements*, ICSID Review (2016), pp.179-196, pp.183-184.
[28] *European Parliament – Resolution on the future European international investment policy, op.cit.*, Pt.H.
[29] *Ibidem,* Pts. 23-26.
[30] *Ibidem*, Pts. 9-10.
[31] EU-Singapore Free Trade Agreement – Authentic text as of May 2015, negotiations concluded 14 October 2014, available at http://trade.ec.europa.eu/doclib/press/index.cfm?id=961 (Consulted on 13 June 2017).
[32] Comprehensive Economic and Trade Agreement between Canada, of the one part, and EU and its Member States, on the other, available at http://www.consilium.europa.eu/en/press/press-releases/2016/10/28-eu-canada-trade-agreement/ (consulted on 13 June 2017).

negotiations thus showed the need to deviate from the Member States' best practice[33]. However, it was during TTIP negotiations that the EU's position regarding IIL definitively changed. The Commission held a public consultation on the TTIP investment chapter. Based on the results of this consultation[34], the Commission issued a concept paper. This paper was the first in which the Commission expressed its intention to use the EU's negotiating weight in order to influence IIL framework at a global scale and to develop a pattern for its future negotiations[35]. This pattern was issued one month later in the form of the Commission's position on the investment chapter of TTIP[36], which was confirmed as the model for future EU IIAs[37]. It has been consistently followed for EU IIAs, except for the EU-Singapore FTA, the negotiations of which were concluded prior to the issuing of the said proposal.

B. The Consistency of Key Elements in EU IIAs.

The EU has, to date, completed the negotiations of three IIAs: the CETA with Canada, the EU-Singapore FTA and the EU-Vietnam FTA. There has been a remarkable consistency in the provisions of these agreements, proving the existence of a solid position of the EU regarding IIL[38]. The key elements of IIAs negotiated by the EU are the covering of pre and post establishment (1), a set of rules destined to protect the right to regulate (2) and a new investment court system covering only post establishment protections (3).

1. Treaties' Scope Covering Pre-Establishment

As mentioned above, the EU Member States' IIAs put the stress on the protection of investments after these have been made in the host state. These are s.c. post-establishment protections. However, IIAs negotiated by the EU cover pre-establishment and market access of foreign investments. Indeed, they contain provisions on market access of foreign investments. Moreover, National Treatment (NT) and Most favoured nation treatment

[33] *European Parliament – Resolution of the 8 June 2011 on EU-Canada Trade Relations,* [2012] OJ C 380 E/20, Pts. 12-13.
[34] *European Commission - Report Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)*, 13 January 2015, SWD(2015) 3 final.
[35] *European Union – Concept paper "Investment in TTIP and beyond - the path for reform Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court"*, 12 May 2015, available at chrome-extension://oemmndcbldboiebfnladdacbdfmadadm/http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF (consulted on 13 June 2017), p.4.
[36] *European Commission – Draft text TTIP Chapter II Investments*, 12 June 2015, available at http://trade.ec.europa.eu/doclib/press/index.cfm?id=1364 (Consulted on 13 June 2017), to be read jointly with the whole proposal of the Commission regarding TTIP.
[37] *European Union – Concept paper "Investment in TTIP and beyond", op.cit.*, p.4.
[38] For more detailed descriptions of the elements of the EU model see HERVÉ Alan, *L'Union européenne comme acteur emergent du droit des investissements étrangers : pour le meilleur ou pour le pire?*, *op.cit.* ; GUILLENTEGUY Laura, *La protection des investissements dans les accords externs de l'Union européenne,* Mémoire sous la direction de Lebullenger Joël et Rapoport Cécile, Université de Rennes 1 (2015), 162p., unpublished, available at CEDRE library, University of Rennes 1 ; TITI Catharine, *International Investment Law and the European Union : Towards a New Generation of International Investment Agreements, op.cit.*, pp.654-661 ; GUICHARD-SULGER Benjamin, *Le nouveau modèle européen d'accords portant sur l'investissement étranger : Un modèle singulier et innovant?*, Geneva Jean Monnet Working Paper, No 26/2016, available at http://www.ceje.ch/index.php/download_file/view/462/2714/ (consulted on 14 June 2017). Only this last reference has been redacted after the Commission's proposal on TTIP provisions.

(MFN) clauses, or non-discrimination clauses, apply to the establishment and acquisition of investments, contrary to Member States' model BITs.

This consistent option allows for the liberalisation of investments by applying, to foreign investors, the rules applied to national investors, regarding the establishment or acquisition of their investment[39]. However, this liberalization has occurred in some arguments through a positive list and in other through a negative one.

This liberalisation is completed by one of the main characteristics of EU IIAs: a wording of Investment protection provisions consistently bringing balance between the protection of investors and the States' right to regulate.

2. Substantive Provisions Balancing States' Right to Regulate and Investment Protection

The conclusion of IIAs with developed countries, has obliged the EU to go beyond the best practice of Member States in view of striking a balance between the States' right to regulate, on the one hand and the protection of investors and investments, on the other hand. This balance can be found in the drafting of non-discrimination clauses, substantive protections and of clauses in order to influence the interpretation of the agreement.[40]

Contrary to most of European Model bilateral investment treaties[41], Most Favored Nation treatment (MFN) and National treatment (NT) only apply to investors in "like situations" or "similar circumstances"[42], therefore avoiding the risk of an obligation to treat in the same way investors in different situations[43]. Moreover, these clauses are limited by General exceptions inspired from the GATT Article XX[44] that excludes the existence of a breach when the measure at stake follows certain public policy objectives. Moreover, in order to avoid that an investment tribunal use more stringent standards from another agreement, MFN clause contains a statement excluding its ripple effect.[45]

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[39] CETA, *op.cit.*, Articles 8.6. and 8.7. ; EU-Singapore FTA, *op.cit.*, Article 9.3 ; TTIP EU's proposal, *op.cit.*, Section 1 of Investment Chapter, Articles 2.3 and 2.4 : EU-Vietnam Free Trade Agreement, Agreed text as of January 2016, available at http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437 (consulted 19 June 2017), Part on Trade in Services, Investment and e-Commerce, Chapter II, Section 1, Articles 3 and 4.

[40] For an assessment of the effectivity of these mechanisms to ensure this balance see CHAUVEL Louis-Marie, *L'équilibre entre le droit de réglementer et la protection des investisseurs dans l'Accord économique et commercial global entre l'Union européenne et le Canada,* Mémoire sous la direction de Rapoport Cécile et Lévesque Céline, Université de Rennes 1 and University of Ottawa (2016), 184p., unpublished, available at CEDRE library, University of Rennes 1.

[41] For instance, French Model BIT (2006), available at http://www.italaw.com/documents/ModelTreatyFrance2006.pdf (consulted 19 June 2017), Article 4.

[42] CETA, *op.cit.*, Articles 8.6. and 8.7. ; EU-Singapore FTA, *op.cit.*, Article 9.3 ; TTIP EU's proposal, *op.cit.*, Section 1 of Investment Chapter, Articles 2.3 and 2.4 : EU-Vietnam Free Trade Agreement, *op.cit.*, Part on Trade in Services, Investment and e-Commerce, Chapter II, Section 1, Articles 3 and 4.

[43] This remark does not apply to the EU-Singapore FTA, which does not contain a MFN clause.

[44] CETA, *op.cit.*, Article 28.3 ; EU-Singapore FTA, *op.cit.*, Article 9.3 §3 ; TTIP EU's proposal, *op.cit.*, Chapter VII, Article 7.1. ; EU-Vietnam FTA, *op.cit.*, Chapter VII.

[45] CETA, *op.cit.*, Article 8.7 §4 ; TTIP EU's proposal, *op.cit.*, Section I, Article 2-4 §4 ; EU-Vietnam FTA, *op.cit.*, Chapter II, Section I, Article 4, §6.

As for substantive provisions, every EU IIA provides for a framing of the right to expropriate a foreign investor[46] and Fair and Equitable Treatment (FET) of investors. However, to protect the right to regulate, these provisions have been strictly defined in order to prevent arbitrators from adopting an overly broad interpretation of what can be considered as a breach. In view of limiting the interpretation of indirect expropriation, a detailed definition is given in an annex, detailing the elements to take into account for the purpose of the said definition. The same annex sets out the *police powers* doctrine[47], therefore avoiding an interpretation based on the sole effect[48] of a measure. This annex is very similar to the one found in the Canadian FIPA Model.[49] Whereas FET is usually not defined, or only through a reference to International customary law it is, for the first time in IIAs, exhaustively defined thanks to a list of behaviours that can be considered as breaches of this standard[50].

A provision protecting the right to regulate was added after the publication of the concept paper of the Commission and is therefore not integrated in the EU-Singapore agreement. This provision reaffirms the right to regulate by stating that nothing in the agreement is provided in order to prevent the Parties from regulating "*through measures necessary to achieve legitimate policy objectives"*, completed by a list of examples. This provision also states that the agreement cannot be considered as a commitment that the Parties will not change their legal framework in a manner that negatively affects the investor[51].

These key elements on substantive provisions are completed by the creation of a new investment Court system (ICS) instead of the traditional Investor-State Dispute Settlement (ISDS) arbitration.

3. A New Investment Court System Only Competent over Post-Establishment Provisions

The main novelty of the EU's approach on IIAs is the new Investment Court System[52]. This system is a shift from the ISDS arbitration, set out in most of IIAs. It comprises

[46] CETA, *op.cit.*, Article 8.12 ; EU-Singapore FTA, *op.cit.*, Article 9.6; TTIP EU's proposal, *op.cit.*, Section 2 of Investment Chapter, Article 5 ; EU-Vietnam FTA, *op.cit.*, Article 16.
[47] CETA, *op.cit.*, Annex 8-A ; EU-Singapore FTA, *op.cit.*, Annex 9-A ; TTIP EU's proposal, *op.cit.*, Annex I to Section 2 ; EU-Vietnam FTA, *op.cit.*, Annex on expropriation.
[48] The sole effect doctrine is to consider that an indirect expropriation occurs when a measure deprives substantially and for a large amount of time the investor of its investment, without looking at the purpose of the measure. See Dolzer Rudolf and Schreuer Christoph, Principes of International Investment Law, *op.cit.*, p. 112.
[49] Canadian Foreign Investment Protection Agreement model (2004), available at www.italaw.com/documents/Canadian2004-FIPA-model-en.pdf (consulted on 19 June 2017), Annex B.13(1).
[50] CETA, *op.cit.*, Article 8.10; EU-Singapore FTA, *op.cit.* Article 9.4; TTIP EU's proposal, *op.cit.*, Section 2, Article 3 ; EU-Vietnam FTA, *op.cit.*, Article 14.
[51] CETA, *op.cit.*, Article 8.9 ; TTIP EU's proposal, *op.cit.*, Section 2, Article 2 ; EU-Vietnam FTA, *op.cit.*, Article 13bis.
[52] For more detailed analyses, see GUICHARD-SULGER Benjamin, *Le nouveau modèle européen d'accords portant sur l'investissement étranger : Un modèle singulier et innovant?*, *op.cit.*, pp. 24-37 ; LÉVESQUE Céline, *The European Commission Proposal for the Creation of an Investment Court System: the Q and A that the Commission won't be issuing,* Kluwer Arbitration Blog, available at http://kluwerarbitrationblog.com/2016/04/06/the-european-union-commission-proposal-for-the-creation-of-an-investment-court-system-the-q-and-a-that-the-commission-wont-be-issuing/#comments (consulted on 19 June 2017).

procedural rules that were already set out in the initial proposals of the EU on IIAs, that contained the usual arbitral mechanism such as the EU-Singapore FTA. However, the main change in this regard is the creation of a new Court on investment, comprising an appeal mechanism.

First, ISDS mechanisms in EU FTAs do not apply to pre-establishment protection of investors, due to an exclusion from their scope of non-discrimination clauses when they apply to establishment or acquisition of investments[53]. Thus, this creates two types of procedures: regarding disputes related to the liberalization of investments, States may use the State-to-State disputes settlements. With regard, however, to post-establishment protections, investors are entitled to bring actions against States before ISDS[54].

Second, the EU's IIAs have confined the ISDS. A choice on the rules on arbitration remains possible between those of the International Centre for the Settlement of Investment Disputes (ICSID), those of the United Commission on International Trade Law (UNCITRAL) or a third option agreed upon by the State and the Investor[55], as in many IIAs worldwide. However, the EU's IIAs provide for alternatives to arbitration[56], set out early exclusions for frivolous or unfounded claims[57] and develop transparency rules[58].

Third, since the publication of the Concept Paper by the Commission, IIAs negotiated by the EU have incorporated a system in which arbitrators are appointed by both Parties permanently and receive a retainer[59], thus forming an investment Court with a permanent President. They also have to conform themselves to a code of conduct. Moreover, for the first time in IIAs providing for ISDS, an appeal mechanism is created[60].

Hence, more than the development of a strong policy and position internally, the EU has succeeded in developing a consistent IIA practice, allowing for the drawing of a pattern in the EU's investment policy by listing different key elements. This consistency is not affected by the minor differences in the wording of the negotiated IIAs.

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[53] CETA, *op.cit.*, Article 8.18; EU-Singapore FTA, *op.cit.*, Article 9.11; TTIP EU's proposal, *op.cit.*, Section 3 of Investment Chapter, Article 1 ; EU-Vietnam FTA, *op.cit.*, Sections 3, Article 1.

[54] LÉVESQUE Céline, *The Challenges of 'Marrying' Investment Liberalisation and Protection in the Canada-EU CETA*, in Bungengerg Marc, Reisnisch August and Tietje Christian (eds.), "EU and Investment Agreements: Open Questions and Remaining Challenges", Baden-Baden, Nomos/Hart Publishing (2013), pp.121-144, pp.132-134.

[55] CETA, *op.cit.*, Article 8.23 ; EU-Singapore FTA, *op.cit.*, Article 9.16; TTIP EU's proposal, *op.cit.*, Section 3 of Investment Chapter, Article 6 ; EU-Vietnam FTA, *op.cit.*, Section 3, Article 7.

[56] CETA, *op.cit.*, Article 8.19 and 8.20 ; EU-Singapore FTA, *op.cit.*, Articles 9.12 to 9.14; TTIP EU's proposal, *op.cit.*, Section 3 of Investment Chapter, Sub-section 2 ; EU-Vietnam FTA, *op.cit.*, Section 3, Sub-section 2.

[57] CETA, *op.cit.*, Article 8.32 and 8.33 ; EU-Singapore FTA, *op.cit.*, Article 9.22 and annex 9-G; TTIP EU's proposal, *op.cit.*, Section 3 of Investment Chapter, Articles 16 and 17 ; EU-Vietnam FTA, *op.cit.*, Section 3, Article 18 and 19.

[58] CETA, *op.cit.*, Article 8.36 ; EU-Singapore FTA, *op.cit.*, Articles 9.20 and 9.21; TTIP EU's proposal, *op.cit.*, Section 3 of Investment Chapter, Article 18 ; EU-Vietnam FTA, *op.cit.*, Section 3, Article 20.

[59] CETA, *op.cit.*, Article 8.27 ; TTIP EU's proposal, *op.cit.*, Section 3 of Investment Chapter, Article 9 ; EU-Vietnam FTA, *op.cit.*, Section 3, Article 12.

[60] CETA, *op.cit.*, Article 8.28 ; TTIP EU's proposal, *op.cit.*, Section 3 of Investment Chapter, Article 10 ; EU-Vietnam FTA, *op.cit.*, Section 3, Article 13.

C. A Consistent Position in spite of Minor Wording Differences

Different IIAs negotiated by the EU are not perfectly identical. An examination of some of the main differences, leads to the conclusion that, although the ILAs' provisions may lead to slightly differing outcomes, they do not substantially affect the consistency of the EU's IIAs policy. Three main differences are to be found in the right to regulate provision, the annex on indirect expropriation and the list of FET breaches given by IIAs.

Provisions in order to reaffirm the right to regulate have been, as noted by Simon Lester[61], drafted differently. While CETA[62] and EU-Vietnam FTA[63] only "reaffirm" the right to regulate to achieve public policy objectives, EU TTIP proposal affirms that provisions on investment "*shall not affect*" the right to regulate through measures "*necessary*" to achieve a legitimate objective[64]. Although, the TTIP-proposal version is drafted more as an operative exception, its effect may be limited by the requirement of necessity of the measure. Consequently, the outcome may be somewhat different; however, the general objective and balance achieved through these provisions are not altered.

Moreover, whereas EU-negotiated FTAs' annexes on expropriation have required the taking into account of the intent of a measure in view of assessing if it can amount to an indirect expropriation[65], the one embodied in the EU's TTIP proposal does not[66]. This requirement is quite important as it may create a burden to prove the State's intent to expropriate[67] or the existence of a disproportionate burden for the investor, but it appears as a minor difference compared to the general objective and wording of these annexes.

The list of behaviours that can constitute a breach of FET has also varied. Indeed, the EU-Singapore FTA list of breaches includes a failure to meet with legitimate expectations created by a State's specific representation and that have encouraged the investment[68]. The other IIAs negotiated by the EU only include such a breach as an element informing the existence of another listed breach and not as a standalone breach[69].

Consequently, EU negotiated FTAs are not perfectly similar. However, the differences in wording, although they can marginally change the regime of some provisions, cannot hinder the existence of a strong consistent position of the EU, as a first element of its normative

[61] LESTER Simon, *The Right to Regulate in EU Investment Chapters*, IELP Blog, available at http://worldtradelaw.typepad.com/ielpblog/2016/03/the-right-to-regulate-provision-in-the-ceta-investment-chapter.html (consulted on 19 June 2017).
[62] CETA, *op.cit.*, Article 8.9, §1.
[63] EU-Vietnam FTA, *op.cit.*, Section 2, Article 13bis, §1.
[64] EU TTIP Proposal, *op.cit.*, Section 2 Article 2, §1.
[65] CETA, *op.cit.*, Annex 8-A, §2 (c) ; EU-Singapore FTA, Annex 9-A, §2 (c) ; EU-Vietnam FTA, Annex on expropriation, §2 (c).
[66] EU Proposal on TTIP, Section 2, Annex 1, §2 (c).
[67] KRIEBAUM Ursula, *FET and Expropriation in the Comprehensive Economic Trade Agreement between the European Union and Canada (CETA),* TDM (2016), pp.1-26, p.10.
[68] EU-Singapore FTA, *op.cit.*, Article 9.4 § 2 (e).
[69] CETA, *op.cit.*, Article 8.10 § 4 ; EU-Vietnam FTA, *op.cit.*, Section 2, Article 14 § 6 ; EU TTIP Proposal, *op.cit.*, Section 2, Article 3 § 4.

influence. Nonetheless, it remains to be determined if the EU has acquired a global influence, having regard to its negotiating practice.

II. A Hardly Emerging Global Normative Influence

While there is no doubt that the EU has a clear position on IIL, other elements of normative influence should be taken into account. These elements are the EU's capacity to impose its position in negotiations and the possibility that the EU's positions can be considered as a role model in light of Forsberg's criteria *i.e. persuading others* and *power of example*. This study shows that, if the EU has a clear influence at a bilateral level (A), it can hardly be considered to exercise a normative influence at a global level (B).

A. A Clear Normative Influence in Bilateral Negotiations

The EU has acquired a real normative influence in bilateral negotiations, as shown by its negotiating results that consistently differ from the usual positions of the EU's negotiating partners (1). However, the more visible mark of this influence is the abrupt modification of CETA in order to incorporate the new investment court system during legal revision (2).

1. Negotiating Results Diverging from Partners' Usual Practice

As already stressed, the EU has succeeded in maintaining a strong consistency regarding the treaties it has negotiated with different partners. However, in view of arguing that this consistency indicates normative influence during bilateral negotiations, a comparison needs to be made between the EU's practice and the usual practice of its partners. The study will, more specifically, focus on the recently negotiated IIAs by Singapore and Vietnam as well as on the Canadian FIPA Model.

In light of the recently negotiated agreements by Singapore[70], the EU-Singapore FTA presents a few specificities. With the exception of the BIT with Colombia[71], none of the treaties Singapore has recently concluded include an annexes that contain a precise definition of the notion of expropriation. With regard to FET, the BIT with Colombia is also the only one to provide a definition, albeit not exhaustive, of this requirement as being limited to

[70] Agreement between the government of the Republic of Turkey and the government of the Republic of Singapore concerning the reciprocal promotion and protection if investments, signed on 19 February 2008 ; Agreement between the government of United Mexican States and the government of the Republic of Singapore on the reciprocal promotion and protection of investments, signed on 12 November 2009 ; Agreement between the government of the Republic of Singapore and the government of the Republic of Colombia on the promotion and protection of investments, signed on 16 July 2013.
[71] Singapore-Colombia BIT, *op.cit.*, Annex 2.

International Customary Law and by identifying denial of justice as a breach of this standard[72]. The main differences concern the ISDS mechanism as the treaties Singapore's recent IIAs do not contain provisions on transparency or alternatives to arbitration.

The same conclusion can be inferred from the study of recent BITs signed by Vietnam[73]. These are very short and do not contain most of the key elements put forward earlier. Indeed, only one of these treaties defines FET by a reference to customary law and denial of justice but not through an exhaustive list of breaches[74]. These major differences from the usual practice of Singapore and Vietnam show the real normative influence of the EU, translating to its ability to impose its conceptions on IIAs provisions.

It goes differently for Canada. Indeed, in the case of the first version of CETA, released on September 26th 2014, it appears that the EU and Canada may have influenced each other. The annex defining the indirect expropriation is widely inspired by the one in the Canadian FIPA model. Moreover, the Canadian FIPA Model contains provisions on the transparency of proceedings[75] and several provisions with wording close to that of CETA. However, it does not contain, namely, a limitation of the spill-over effect of the MFN clause or an exhaustive list of FET breaches. The emergence of this list is, in fact, due to a necessary bargain between Canada and the EU. Canada urged for a FET clause defined by reference to international customary law, whereas the EU urged for a definition more protective of investors. The EU, therefore, proposed the 'exhaustive list approach', which was accepted by Canada as a codification of customary international law on the Standard of treatment[76].

Therefore, by consistently imposing its position diverging from the usual one of its negotiating partners, the EU has demonstrated an important normative influence in bilateral negotiations, of which CETA's legal review may be the best proof.

2. A Blatant Example of Bilateral Influence: CETA's Legal Review

A first version of the CETA had been negotiated and agreed upon by both parties on September 26th 2014[77]. This consolidated version contained the provisions on the liberalisation

[72] *Ibid.*, Article 4 § 2.
[73] Agreement between the governement of the Oriental Republic of Uruguay and the governement of the Socialist Republic of Vietnam on the Promotion and Protection of investments, Signed on 12 May 2009 ; Agreement between the Kingdom of Marocco and the Socialist Republic of Vietnam, signed on 15 June 2012.
[74] *Ibid.*, Article 2 §2.
[75] Canadian FIPA Model, *op.cit.*, Article 38.
[76] LÉVESQUE Céline, *Les négociations transatlantiques sur l'investissement : Un travail d'équilibriste, illustré par la norme de traitement juste et équitable*, in Deblock Christian, Lebullenger Joël et Paquin Stéphane, "Un nouveau pont sur l'Atlantique : l'Accord économique et commercial global entre l'Union européenne et le Canada", Montréal, Presses de l'Université du Québec (2015), pp. 169-180. For FET clauses, it may be thought that a wide spreading of the EU's definition may influence International customary law. However, this is far from certain as only few FTAs refer to customary international law and that its very existence is contested. Furthermore, customary international law in rulings based on NAFTA article 1105 has been determined by each arbitral tribunal, mostly by references to previous decisions and without achieving any real consistency. On this, see DUMBERRY Patrick, *The Fair and Equitable Treatment Standard : A Guide to NAFTA Case Law on Article 1105,* The Hague, Wolters Kluwer (2013).
[77] Consolidated CETA text, 26 September 2014.

and protection of investments that have not been modified since, and a chapter on ISDS similar to the one in the EU-Singapore FTA. However, in December 2015, Commissioner Malmström manifested the intention of the Commission[78] to modify the draft of CETA in order to incorporate the innovations of the EU's proposal on TTIP investment provisions developed after the Commission's concept paper. At a workshop organised by the International Trade Committee of the European Parliament (INTA), Canadian CETA's Chief negotiator, Steve Verheul, welcomed this announcement in a lukewarm manner[79]. He said that the addition of a provision affirming the right to regulate posed no difficulty. He also stated that the modification of ISDS provisions needed more reflexion as the attachment to its own model was a reason for Canada's circumspection about the signature of the Trans-Pacific Partnership. Moreover, he stressed that a reopening of negotiations may lead to a reconsideration of several provisions and hinder the balance of interests set out in the negotiated agreement.

Nevertheless, less than three months later, Commissioner for Trade Malmström and Trade Minister Freeland of Canada announced a modification of the agreement, which included the provision on the right to regulate and the Investment Court System developed in the EU's proposal on TTIP, thanks to the procedure of legal review[80]. They presented this change as a mark of their common will to "*reform investment protection and dispute resolution provisions*".

These important changes at the stage of legal scrubbings, without even reopening negotiations, moreover on a proposition that did not entirely convince its negotiating partner three months prior, shows the undeniable leverage the Commission possesses on bilateral negotiations of IIAs. This begs the question on whether the EU was able to transform this bilateral influence into normative influence at a global scale, essential for the modification of the IIL framework.

B. A Difficult Transition towards Global Normative Influence

The transition of EU's normative influence regarding IIL from bilateral to global appears difficult. If the EU gains a growing multilateral influence on its proposal to create a multilateral investment court (1), it lacks a crucial element of normative influence as its IIAs do not serve as a role model for IIAs globally (2).

[78] *European Parliament - Committee on International Trade, workshop on CETA Agreement, video recording*, 9 December 2015 available at http://www.europarl.europa.eu/news/en/press-room/20151207IPR06357/committee-on-international-trade-meeting-09-12-2015-p-m (consulted 19 June 2017), at 32'.
[79] *Ibid.,* at 52'.
[80] Joint Statement Canada-EU Comprehensive Economic and Trade Agreement (CETA), 29 February 2016, *op.cit.*

1. A Growing Multilateral Influence: Negotiations of a Multilateral Court on Investments

The most important sign of the EU's will to influence IIL framework further than its bilateral negotiations is the inclusion, in the IIAs it has negotiated, of a provision on the establishment of a multilateral investment court, drafted as follows:

"The Parties shall enter into negotiation for an international agreement providing for a multilateral investment tribunal in combination with, or separate from, a multilateral appellate mechanism applicable to disputes under this Agreement. The Parties may consequently agree on the non-application of relevant parts of this Section. The Trade Committee may adopt a decision specifying any necessary transitional arrangements"[81].

The corresponding provision in CETA is drafted slightly differently as it provides that "*The parties shall pursue with other trading partners the establishment of a multilateral investment tribunal and appellate mechanism of the resolution of investment disputes*"[82], inviting to a more proactive role of Canada and the EU.

This provision has a double role. First, it establishes a procedure allowing to replace the ICS mechanism set out in these agreements by the multilateral investment court once it is created. Second, and more importantly, it is a tool to develop a multilateral influence through bilateral negotiations as it creates an obligation, albeit not legally binding, to enter in a multilateral negotiation for the creation of a multilateral investment court.

The path to these negotiations has been quickly followed as Canada and the EU have jointly taken the lead on the creation of the said multilateral court. They have co-chaired several meetings. The first one in the margins of UNCTAD world investment forum, a technical exchange at an Investment Treaty dialogue in Paris hosted by OECD, an inter-governmental experts meeting in Geneva gathering 40 countries and an informal ministries meeting during the World Economic Forum in Davos[83]. The number of these meetings in a short period of time may appear as an encouraging sign for the prompt development of this international dispute settlement mechanism. However, it is difficult to further assess the state of advancement of these negotiations as the conclusions of these meetings have not been published and, with the exception of the meeting in Geneva, the number of States involved has not been made public.

[81] EU-Vietnam FTA, *op.cit.*, Section 3, Article 15.
[82] CETA, *op.cit.*, Article 8.29.
[83] The list of these meeting can be found on the Commission's webside, available at http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608 (consulted one 21 June 2017) : UNCTAD investment world forum, Nairobi, 17-21 July 2016 ; OECD-hosted Investment Treaty Dialogue, Paris, 17 October 2016 ; Inter-governmental experts group, Geneva, 13-14 December 2016 ; World Economic Forum, Davos, 20 January 2017.

Nonetheless encouraging elements for the global influence of the EU on this matter can be found in the work of the UNCITRAL on the revision of ISDS and the new Indian Model BIT. Indeed, on the 10th of July, UNCITRAL has opened a workgroup on the revision of ISDS[84], which is presented by DG TRADE as a step of its agenda. If nothing indicates clearly the role of the EU in the opening of such a discussion[85], its new model is expressly presented as a possible path for a reform of ISDS worldwide[86]. Moreover, the new Indian model BIT provides for the possibility of an appeal court, if possible relying on one created at multilateral level[87]. As noted by Joel Dahlquist and Luke Eric Peterson, it is an indirect influence of the EU resulting from the role model status given to its IIA pattern. However, it seems that beyond this example, the said pattern does not serve as a Role Model, precluding the EU from having acquired a normative influence at a global scale on IIL yet.

2. A Precluded Global Influence: An Absence of Role Model of EU IIAs

In order to determine if the EU's IIAs have become a role model, one needs to observe the subsequent practice of its negotiating partners in view of determining if they continued to use the provisions developed in the IIAs concluded with the EU. This would mean that they have accepted these provisions that would progressively be used worldwide, as it was the case for the annex defining indirect expropriation, developed in the US and Canadian BIT models and that is, currently, integrated in many IIAs worldwide. This would consist of a contagion, demonstrating the EU's *power of example* in the field.

Since their negotiation with the EU, Canada signed two BITs[88], Singapore signed one[89] while Vietnam signed none. These treaties do not contain the key elements of EU FTAs detailed earlier[90]. Moreover, the Singapore-Nigeria FTA contain provisions closer to the Canadian FIPA model, for example Article 10 on Health, safety and environmental measures, the wording of which is very close to Article 11 of the Canadian Model.

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[84] *UNCITRAL – Press Release "UNCITRAL to consider possible reform of investor state dispute settlement"*, 14 July 2017, UNIS/L/250.
[85] Such a work on a reform of ISDS has first been evoked in 2014, in *United Nations General Assembly – Official Records, Sixty-ninth session, Supplement No 17 "Report of the United Nation Commission on International Trade Law, Forty-seventh session (7-18July 2014)"*, A/69/17, para 127 and further explored in 2015, see *United Nations General Assembly – Official Records, Seventy-first session, Supplement No 17 "Report of the United Nation Commission on International Trade Law, Forty-ninth session (27 June - 14July 2016)"*, A/71/17, paras. 187-194.
[86] *UNCITRAL – Note by the Secretariat "Possible future work in the field of dispute settlement: Reforms of investor-State dispute settlement"*, 20 April 2017, A/CN.9/917, pp.8-9, footnote 23.
[87] DAHLQUIST Joel and PETERSON Luke Eric, *Analysis: In Final Version of its New Model Investment Treaty, India Dials Back Ambition of Earlier Proposals – But Still Favors Some Big Changes*, IA Reporter, January 2016, available at https://www.iareporter.com/articles/analysis-in-final-version-of-its-new-model-investment-treaty-india-dials-back-ambition-of-earlier-proposals-but-still-favors-some-big-changes/ (consulted on 21 June 2017).
[88] Agreement between the Government of Canada and the Hong Kong's Special Administrative Region of the People's Republic of China for the Promotion and Protection of Investments, signed on 10 February 2016 ; Agreement between the Canada and Mongolia for the Promotion and Protection of Investments, signed on 8 September 2016.
[89] Investment Promotion and Protection Agreement between the Government of the Federal Republic of Nigeria and the Government of the Republic of Singapore, signed on 4 November 2016.
[90] See *supra*, Chapitre 1 :I.B.

It is difficult to draw conclusions on this matter as IIAs negotiated by the EU are very recent and there is a very limited subsequent practice of the EU's contracting partners. However, the EU's IIAs do not serve as role model, to date.

In conclusion, the EU developed a consistent position on IIL and IIAs drafting, therefore possessing a normative basis for its action in this field. The consistency with which it has imposed it to its partners shows the existence of a normative influence at a bilateral scale, proving its ability to *persuade others*. However, at a global level, if the EU has begun to spread its proposal of a multilateral investment court, its IIA pattern is not currently a role model and precludes, for the time being, the EU from ruling by example. Therefore, the EU has a growing normative influence, that may in the future develop globally. Nevertheless, internal oppositions to IIAs may impede this possibility.

Chapter 2: An Impeded Normative Influence

The growing normative influence of the EU on IIL may nevertheless be impeded and not deploy its effects. Indeed, as already discussed, the normative influence of the EU in the field of IIL depends mainly on its IIAs and its ability to influence its partners. If it were not able to conclude such IIAs once negotiated, this would considerably hinder its capacity to influence in two ways. First, a complete incapacity to conclude any IIA would put an end to the EU's ability to influence IIL. Second, the mere difficulty and uncertainty of the EU's IIAs ratification process could damage its image as a reliable negotiating partner and could discourage its counterparts to concede to meet its position[91]. Yet, IIAs and more importantly their investment chapters have been contested by European citizens, civil society organizations (CSOs) and Parliaments, both at EU and Member States level, which makes it difficult to conclude an IIA (I). Moreover, it appears difficult to find effective pathways to develop, nonetheless, the EU's normative influence in this domain (II).

I. The Difficulty to Conclude IIAs Due to Internal Oppositions

FTAs containing provisions on the protection of investments have given rise to protests and oppositions from civil society organizations, citizens and Parliaments. These have existed first at the EU level (A) mostly against Transatlantic Trade and Investment Partnership (TTIP) and CETA. However, the main risk of hindrance to the possibility to conclude

[91] See HERVÉ Alan, *Les résistances des Etats membres au développement des relations conventionnelles de l'Union européenne : quels enseignements tirer de la conclusion de l'accord de libre-échange UE/Canada et de l'accord d'association UE/Ukraine?*, RTDEur. (2017), pp. 119-123 ; JAN KUPIJER Pieter, *Post-CETA: How we got there and how to go on*, RTDEur. (2017), pp.181-187, pp.181-182.

such agreements exists at a national scale, as IIAs must be concluded as mixed agreements[92] (B).

A. First Oppositions to IIAs at EU Level

Through the use of different tools set out in various EU law provisions, Union citizens attempted to oppose both Transatlantic partnerships and ISDS. These attempts failed to meet their objective (1) and the European Parliament has progressively granted its support to ISDS (2).

1. Failed Attempts to Oppose Investment Protection Chapters by EU Citizens

EU Citizens and CSOs have used a wide range of instruments in order to show their opposition to investment protection and ISDS.

First, several petitions were submitted to the Parliament on the grounds of Article 227 TFEU. As noted by Professor Rapoport, 32 petitions opposed Transatlantic partnerships[93]. Several of these petitions have stated a specific opposition to ISDS[94] and investment protection. These petitions were registered by the Parliament but their precise effect on the negotiation is difficult to assess[95].

Second, regarding the specific question of investments, an opposition also emerged from the public consultation on investment protection in EU-US trade talks launched by the Commission. Indeed, 97% of answers advocated for the refusal to include ISDS in FTAs of the European Union[96]. However, the European Commission did not take into account this opposition and underlined in its conclusions, on the results of this consultation, that an important proportion of the respondents had only copied pre-written statements[97].

A third protest, which also did not give satisfaction to its proponents, was the use of the European Citizens Initiative (ECI) mechanism, set out in Article 11§4 TEU and Regulation

[92] ECJ, Opinion 2/15, EU:C:2017:376.
[93] RAPOPORT Cécile, *La participation du public à l'élaboration des partenariats transatlantiques*, to be published.
[94] Petition No 1122/2014 by Klaus-D. Gehrke (German) concerning negotiations for the Transatlantic Trade and Investment Partnership (TTIP), 28 March 2014; Petition No 1400/2015 submitted by Rosmarie Stubl (German) on behalf of the Deanery Wasserburg on the Inn, supported by 1.067 co-signatories on the Transatlantic Trade and Investment Partnership (TTIP), 25 January 2016 ; Petition No 2328/2014 by Gael Drillon (French) against the TTIP and the TISA, 30 October 2014 ; Petition No 2694/2013, by G.R. (French), on the Transatlantic Trade and Investment Partnership arrangements between the EU and the United States, 9 December 2013.
[95] RAPOPORT Cécile, *La participation du public à l'élaboration des partenariats transatlantiques*, *op.cit.*
[96] *European Commission – Press release "Report presented today: Consultation on investment protection in EU-US trade talks"*, 13 January 2015, IP/15/3201.
[97] *Ibid* and *European Commission - Report Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP), op.cit.*, para. 2.2.

No 211/2011[98]. The "Stop TTIP" initiative asked for the withdrawal of the decision authorizing TTIP negotiations and the adoption of a decision not to conclude CETA[99]. The Commission however refused to register the initiative as the decision not to conclude CETA is a destructive decision and that a decision to open negotiations is a preparatory act[100]. Even if this refusal has recently been annulled by the General Court[101], it is not certain that the Commission has the possibility to withdraw its proposal to conclude CETA. Nevertheless, new oppositions may arise through this mechanism.

Finally, a last opposition to comprehensive trade agreements including ISDS mechanisms was launched by the organisers of the "Stop TTIP" ECI called "CETA check". Its purpose was to invite citizens to contact their Member of European Parliament to make them refuse to approve the conclusion of CETA[102]. Despite this activism, the Parliament approved CETA[103] after its position regarding ISDS evolved.

2. A Progressive Support to IIAs by the European Parliament

As discussed earlier, in its first resolutions on investment protection, the European Parliament did not oppose ISDS and investment protection but urged for a balance of these protections with States' right to regulate[104]. However, it opposed the addition of an ISDS mechanism with Canada and developed countries[105].

This lukewarm position towards ISDS was confirmed by the procedure of adoption of its resolution on the negotiations of TTIP[106]. Indeed, as described by Marie-Cécile Cadilhac, the vote on this resolution had to be delayed in order to settle a choice between two options: on the one hand, not to include an ISDS mechanism and, on the other hand, to develop a new investment court system[107]. Eventually, the resolution of the European Parliament decided to call for the inclusion of an Investment Court system including an appeal mechanism[108]. This shows that, even amongst the EU institutions, support for ISDS was not obvious, which may have precluded the EU from providing such a mechanism in its FTAs.

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[98] Regulation No 211/2011 of the Parliament and Council on the citizens' initiative [2011] OJ L 65/1.
[99] Description of the "Stop TTIP" initiative on the website of the Commission, available at http://ec.europa.eu/citizens-initiative/public/initiatives/non-registered/details/2041 (consulted 21 June 2017).
[100] *European Commission – Decision addressed to Michael Efler "Your request for registration of a proposed citizens' initiative entitled 'STOP TTIP'"*, 10 September 2014, C(2014) 6501 final.
[101] GC, Case T-754/14, *Efler e.a. v. Commission*, EU:T:2017:323.
[102] *Description of "CETA check"*, available at https://stop-ttip.org/about-cetacheck/?noredirect=en_GB (consulted on 21 June 2017).
[103] *European Parliament - legislative resolution of 15 February 2017 on the draft Council decision on the conclusion of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part* , 15 February 2015, (10975/2016 –C8-0438/2016 –2016/0205(NLE))
[104] See *supra*, p.6.
[105] *European Parliament – Resolution of the 8 June 2011 on EU-Canada Trade Relations, op.cit.*, paras.12-13.
[106] *European Parliament - Resolution of 8 July 2015 containing the European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP)*, P8_TA(2015)0252.
[107] CADILHAC Marie-Cécile, *Négociations du TTIP : le mécanisme de règlement des différends investisseurs-Etats soulève un « vent de panique » au Parlement européen*, RTDEur. (2015), pp.613-615.
[108] *European Parliament - Resolution of 8 July 2015 containing the European Parliament's recommendations to the European Commission on the negotiations for the Transatlantic Trade and Investment Partnership (TTIP)*, *op.cit.*, para.2 (d) (xv).

However, the agreement on the investment court system has allowed the EU to develop a consistent position, supported by the EU institutions, as confirmed by the European Parliament's approval of CETA.

Consequently, despite the opposition from EU citizens and CSOs, the support of the EU institutions, mainly by the European Parliament of the EU's position regarding IIAs, avoids the risk of failing to conclude IIAs. However, the "mixity" of agreements requires them to be ratified by every Member State. Hence, oppositions at national level, that remain vivid, may hinder the capacity of the EU to conclude IIAs.

B. Remaining Oppositions to IIAs at National Level

Oppositions to investment protection in FTAs still exist at national level, as Member States have to agree unanimously on a decision to sign mixed agreements and have to complete their ratification processes in order to conclude EU IIAs. These oppositions were voiced by citizens who used direct and participatory democracy tools granted by National constitutions (1) and from national and regional parliaments on the signature and ratification of EU FTAs containing provisions on the protection of investments (2).

1. Citizens' Opposition to Ratification of IIAs

The citizens' opposition to IIAs was particularly stressed on CETA. It was prominent in two States. First, in Germany where citizens brought a claim before the Constitutional Court; second, in Austria where a petition was addressed to the Parliament. This may extend to other Member States the Constitutions of which provide for participatory or direct democracy mechanisms that could allow citizens to block or hinder the ratification of CETA and other IIAs.

In Germany, more than 200,000 claimants requested the Constitutional Court for a decision on the conditions to ratify CETA consistently with the Fundamental Law. They also asked for interim measures in order to prevent the government from taking a position in the Council in favour of the signature of the agreement and its provisional application. The Constitutional Court rejected the demand for interim measures but conditioned the provisional application of the agreement to three conditions: all decisions by bodies created by the agreement should be adopted with a unanimous support of the Council; provisional application of the agreement should only concern EU exclusive competence and Germany should be able to put an end to the provisional application of the agreement. Germany was therefore able to vote on the signature and provisional application of CETA[109]. However,

[109] RAPOPORT Cécile, *La participation du public à l'élaboration des partenariats transatlantiques*, *op.cit.*

the decision on the merits may have an impact on the possibility for Germany to ratify the agreement, therefore possibly impeding EU's normative influence.

In Austria, more than 500,000 citizens have supported a popular initiative to oppose CETA, TTIP and TiSA[110]. Popular initiative is forest out in Article 41 (2) of the Austrian Fundamental Law and allows 100,000 citizens or more to present an initiative to the Parliament on federal matters. The Austrian Parliament has however still not adopted a position on this matter.

This opposition may extend to other Member States in which it may have more important effects as their Constitutions or laws provide for referenda of popular initiative, either consultative of decisional. In the Netherlands, the Advisory Referendum Act of 15 October 2014 allows a group of citizens, if they get 100,000 supports within a six-week period, to present an initiative for a referendum, either abrogative or consultative. If the result is positive and the voters' turnout is superior to one third, the Parliament has to take it into account. This procedure has already been successfully used to oppose the ratification of the EU-Ukraine association agreement, even if the Parliament did not follow the referendum results. Other Member States' Constitutions provide for decisional referendum of popular initiative: Croatia on demand of 10% of voters[111] and Lithuania after a demand by 300,000 citizens[112].

Therefore, several oppositions to recent FTAs containing investment provisions among citizens have driven the latter to use different ways to prevent their Member State from signing or ratifying the FTAs by, namely, bringing a claim before constitutional courts or by inviting the Parliament to oppose them. In addition, the use of a referendum of popular initiative may hinder the conclusion of IIAs. Moreover, the opposition to IIAs has been the fact of national and regional Parliaments.

2. Parliamentary Opposition to Signature and Ratification of IIAs

National Parliaments have two means of expressing their positions on IIAs. First, depending on the provisions of the national Constitutions, they may prevent the governments from accepting the signature of an agreement within the Council. Second, in accordance with the procedures set out in the national Constitutions, Parliaments may need to ratify the agreement. This opposition has been mainly driven by the Walloon regional and French Parliaments.

[110] Stop TTIP initiative website, *562,552 Austrian Citizens Against TTIP, CETA and TiSA*, 7 February 2017, available at https://stop-ttip.org/blog/562552-austrian-citizens-against-ttip-ceta-tisa/ (consulted on 21 June 2017).
[111] Constitution of Croatia, Article 86.
[112] Constitution of Lithuania, Article 9.

The Belgian Constitution provides for a division of competences between regional and National authorities on Foreign affairs. Therefore, when an agreement concerns competences of both National and Regional authorities, the regional government has to issue a waiver giving the full power to sign it to the National government[113]. However, on 14 October 2016, the Walloon Parliament adopted a resolution asking the regional government not to give these powers, as the European Court of Justice (ECJ) had not yet issued its opinion on the compatibility of the ICS mechanism with the EU Treaties and CETA had not been modified in order to favour a State-to-State dispute Settlement over ISDS[114]. This opposition by the Walloon Parliament to the signature of CETA put in peril the whole agreement. This severely hindered the image of the EU as a reliable negotiating partner[115]. Consequently, this lead to the issuing of a binding EU-Canada Joint Interpretative Statement, that reaffirms the provisions protecting the States' right to regulate and the new ICS[116]. Taking into account this Joint Statement and the engagement of Belgium to ask for an opinion of the ECJ under Article 218§11 TFEU on the compatibility of ISDS with EU law, the Walloon Parliament eventually agreed to give full power to the Federal government to sign the CETA[117].

Another Parliament showed circumspection vis-à-vis the CETA. Indeed, on 22 February 2017, 107 Members of the French Parliament brought a claim before the Constitutional Council on the compatibility of CETA with the French constitution[118]. The Constitutional Council has recently issued a decision recognising the compatibility of the CETA with the French Constitution[119]. Moreover, on 2 February 2017, the National Assembly adopted a European Resolution requesting that the government ask for the position of the Parliament before agreeing to the provisional application of CETA; to submit a claim to the ECJ on the compatibility of CETA with EU law, and to submit the ratification of CETA to a referendum[120]. In parallel, several resolutions were proposed before the French Senate in order to encourage the government to ask for the "mixity" of CETA and to block provisional application until national parliaments have given their consent, but were not adopted[121].

[113] Belgian Constitution, Article 167.
[114] *Walloon Parliament – Motion déposée en conclusion du débat sur les projets de Traité CETA et de Déclaration interprétative du Traité*, 14 October 2016, 606 (2016-2017), No 2, para. T.
[115] See HERVÉ Alan, *Les résistances des Etats membres au développement des relations conventionnelles de l'Union européenne : quels enseignements tirer de la conclusion de l'accord de libre-échange UE/Canada et de l'accord d'association UE/Ukraine ?, op.cit.*, pp. 119-123 citing Minister Chrystia Freeland: "It seems evident for me and for Canada that the European Union is not now capable of having an international accord even with a country that has values as European as Canada".
[116] Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States, 27 October 2016.
[117] *Walloon Parliament – Motion déposée en conclusion du débat sur l'Accord économique et commercial global (AECG-CETA)*, 28 October 2016, 633 (2016-2017), No 3.
[118] HAMLAOUI Julia, *CETA. Le Conseil constitutionnel doit trancher*, L'Humanité (23 February 2017).
[119] *Conseil constitutionnel – Décision n°2017-749 DC,* 31 July 2017.
[120] *French National Assembly – Résolution européenne pour un débat démocratique sur l'Accord économique et commercial global (CETA),* 2 February 2017, TA 906.
[121] *French Senate – Proposition de résolution européenne en application de l'article 73 quinquiès du règlement du Sénat "sur la mixité de l'accord économique et commercial global entre l'Union européenne et le Canada,* No 722, registered on 23 June 2016 ; *French Senate – Proposition de resolution européenne en application de l'article 73 quinquiès du règlement du Sénat, sur les conditions de la ratification de l'Accord économique et commercial global entre l'Union européenne et le Canada,* No 862, registered on 29 September 2016.

Moreover, a resolution[122] has been adopted to oppose ISDS and its inclusion in transatlantic partnerships. However, this resolution preceded the Commission's proposal for an ICS and may not be seen as an opposition to its new pattern.

These oppositions by National Parliaments, at an early stage of the signature and ratification processes, have delayed the signature and entry into force of CETA, therefore hindering the EU's credibility on its capacity to conclude a negotiated agreement, even though its partners had agreed to major changes. These oppositions create uncertainty on CETA and future IIAs as 38 national and regional Parliaments have to give their approval for their ratification.

These numerous oppositions, mostly at national level, risk to be very detrimental to the emerging normative influence of the EU on IIL as it could not be able to conclude IIAs and may discourage negotiating partners to consent to important concessions to the EU's pattern. It is also one of the main impediments to normative influence described by Laurent Cohen-Tanugi[123]. Moreover, this impediment on EU's normative influence cannot really be avoided through legal pathways.

II. The Difficulty to Find Pathways to Develop Normative Influence

In order to avoid the difficulties created by the "mixity" of IIAs in the EU and the setbacks thus created on the normative influence of the Union on IIL, two pathways may be envisaged. First, relying on the recent *Opinion 2/15*, Agreements could be redesigned in order to avoid "mixity" (A). Second, the Commission could rely on Regulation No 1219/2012[124] to impose a framework, consistent with its pattern, to Member States' Agreements consistently with its pattern (B). However, a study of these hypotheses shows that neither can be a convenient way, for the EU, to acquire a genuine normative influence on IIL.

A. Relying on Opinion 2/15 to Avoid "Mixity" of IIAs

The ECJ, in its recent *Opinion 2/15* on the competence of the EU to sign and conclude on its own the EU-Singapore FTA, has detailed what is the exact extent of EU's exclusive competence regarding FTAs. It concluded that this wide-ranging FTA embodied only domains within the exclusive competence of the EU except for the protection of portfolio

[122] *French Senate – Résolution européenne sur le règlement des différends entre investisseurs et Etats dans les projets d'accords commerciaux entre l'Union européenne le Canada et les Etats-Unis,* No 57, Adopted on 3 February 2015.
[123] COHEN-TANUGI Laurent, *L'influence normative internationale de l'Union européenne : une ambition entravée ?*, *op.cit.*, pp.27-36.
[124] Regulation of the Parliament and Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third Countries, [2012] OJ L 351/40.

investments[125], ISDS and the institutional provisions relating to these elements, which belong to shared competences. Relying on this finding, it may be possible to draft IIAs in order to avoid "mixity" and the difficulties of national ratifications. However, if this appears as a convenient way to allow conclusion of FTAs (1), its application may hinder the normative influence of the EU (2).

1. A Convenient Way to Allow Conclusion of FTAs

In order to avoid "mixity" of FTAs, Guillaume Van der Loo proposes several solutions based on *Opinion 2/15*. There is, first, the possibility to include in the FTA only provisions pertaining to the EU's exclusive competence, including protection of Foreign direct investment (FDI) and to negotiate a separate agreement on the protection of portfolio investments and ISDS in a separate mixed agreement or in a protocol to the agreement[126]. This would allow for the conclusion of the FTA in accordance with the procedures set out in Articles 218 and 207 TFEU and would, therefore, allow the avoiding of the necessity of ratification by national authorities. This possibility has been used in the EU-Japan FTA which only covers investment liberalization while investment protections and ISDS are to be set out in a currently negotiated agreement[127].

This appears therefore as an efficient means for the facilitation of the conclusion of FTAs. However, due to the lack of EU exclusive competence over portfolio investments and ISDS, its application would hinder the EU's normative influence on IIL.

2. Application Difficulties Hindering the EU's Normative Influence

The options suggested by Guillaume Van der Loo would cause a severe impediment to the EU in terms of its normative influence on IIL. Indeed, the EU could, on its own, conclude FTAs with provisions on the protection of FDIs, but the protection of portfolio investments and ISDS would be excluded in a protocol or separate agreement which would have to be ratified by national and regional Parliaments. This would have two detrimental effects on the normative influence of the EU regarding IIL.

First, the fact that investment chapters are included in FTAs may discourage National Parliaments opposed to investment protection to refuse to ratify the agreement, as it would thwart all of what has been negotiated, including provisions in the interest of their State.

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[125] SALMON Jean (ed.), *Dictionnaire de droit international public*, Bruxelles, Bruylant/AUF, 2001, 1198 p. According to the Salmon's dictionary, portfolio investments are "financial investments realised [without purpose] to control an enterprise" thus differing from FDIs, personal translation.

[126] VAN DER LOO Guillaume, *The Court's Opinion on the EU-Singapore FTA: Throwing off the shackles of mixity ?*, CEPS Policy Insights, No 2017/17, available at https://www.ceps.eu/publications/court%E2%80%99s-opinion-eu-singapore-fta-throwing-shackles-mixity (consulted on 22 June 2017), pp.8-9.

[127] *European Commission – Press release "EU and Japan finalise Economic Partnership Agreement"*, 8 December 2017, available at http://trade.ec.europa.eu/doclib/press/index.cfm?id=1767 (consulted on 7 February 2018).

The internal opposition to investment protection may be overruled by the other interests at stake. If the agreement or protocol on ISDS and portfolio investment was the only one to be ratified at national level, this balance of interests would not exist, which could encourage citizens as well as regional and national Parliaments to refuse to ratify those as it would not put in peril the whole FTA.

Second, the separation of FDI protection from ISDS and portfolio investment, increases the abovementioned risk and may discourage potential partners. Indeed, portfolio investments are protected in most IIAs[128]. Moreover, to conclude protections on FDI without knowing if it would allow the investors to bring a claim through ISDS creates uncertainty. Indeed, if the protocol containing ISDS provisions was not concluded, the only remedy to a breach would be the State-to-State disputes settlement mechanism. Consequently, negotiating partners may refuse this delicate construction or not accept to change their model knowing that the agreement may not even enter into force.

Thus, if avoiding "mixity" by isolating shared competence in a separate agreement is a way to facilitate the conclusion of FTAs, it would most probably not favour the EU's normative influence on IIL. A second option may be to rely on Regulation No 1219/2012.

B. Relying on Regulation No 1219/2012 to Frame Member States' Agreements

If the EU was indeed not able to conclude IIAs, it would be in a paradoxical situation *i.e.* it would have acquired a normative influence on a matter on which it does have, in part, an exclusive competence, without being able to use it. However, recently, Member States have continued to conclude IIAs on their own[129]. Consequently, one needs to examine if the possibility given to the Commission by Regulation No 1219/2012 to monitor Member States' IIAs could allow the EU to have normative influence over IIL. It appears that this possibility to control Member States' practice is imprecise (1) and would rather be a supplement than a replacement of the EU's IIAs (2).

1. An Unprecise Possibility to Frame Member States' IIAs

By virtue of the provisions of Regulation No 1219/2012, the Commission exercises a double control over IIAs negotiated by Member States. First, when it authorizes the State to open negotiations, the Commission can make this State add or remove "*any clauses where*

[128] 2,497 out of 2,576 IIAs in force, *UNCTAD – Investment Policy Hub, Mapping of IIAs content.*

[129] For instance, Agreement between the governement of the Republic of Colombia and the governement of the French Republic on the Promotion and Reciprocal Protection of Investments, signed on 10 July 2014 ; Islamic Republic of Iran – Luxembourg BIT, signed on 14 February 2017 ; Slovakia – United Arab Emirates BIT, signed on 22 September 2016 ; Agreement for the Promotion and Protection of Investment between the government of the Republic of Austria and the government of the Kyrgyz Republic, signed on 22 April 2016.

necessary to ensure consistency with the Union's investment policy or compatibility with Union law"[130]. Second, it has the possibility, for the same reasons, the Commission can refuse to give an authorization to sign or conclude the agreement[131].

Several issues can be brought up regarding the Commission's powers. First, it is not clear what is the "Union's investment policy". Indeed, the key elements studied in the first part of this paper are the results of negotiations conducted by the Commission, which have not yet resulted into the conclusion of agreements. It is therefore difficult to know if they can be considered as the Union's investment policy. CETA may appear as a potential beginning of a policy as it has been signed and, therefore, was supported by the Council and approved by the Parliament. However, it is not certain that one agreement can be said to reflect the "Union's investment policy" in the meaning of Regulation No 1219/2012.

Second, the extent of the constitutive elements of the EU's policy appears imprecise. Bearing in mind the case of the FET provision discussed in the first part of the present study, would the EU policy translate by the fact of limiting the definition of FET? Would it be the fact of giving a closed list of breaches of FET? Is the policy on FET the exact list of breaches given in CETA?

Third, the recent *Opinion 2/15* has limited the exclusive competence of the EU to FDI protection. Therefore, it is likely that the Commission does not have the possibility to control the provisions on ISDS incorporated in Member States' IIAs, thus hindering the possibility to use Regulation 1219/2012 to promote ICS or multilateral investment court.

These uncertainties make it difficult to know to which extent this tool would allow the EU to, first, put forward a consistent position, and then exercise normative influence. Moreover, some other specificities of this tool make it more of a supplement than a replacement of EU IIAs.

2. A Supplement Rather than a Replacement of EU IIAs

Regulation No 1219/2012 only allows for the authorization of negotiation when a Member States has decided to open it. The said Regulation does not allow the Commission to invite the Member States to open negotiations. Member States will, therefore, not be negotiating IIAs jointly but individually. They would most probably not be able to achieve the same consistency as the EU's in their final negotiating results. Indeed, the EU has a bilateral normative influence as it is the most important actor in terms of investments worldwide.

Consequently, for several reasons, the Commission's powers set out in this Regulation do not appear as a convenient way to develop the EU's Normative influence in the field of

[130] Regulation No 1219/2012, *op.cit.*, Article 9 (2).
[131] *Ibid.*, Article 11 (3).

IIL. First, the EU is reliant on the Member States' decisions to open negotiations. Second, the extent to which the Commission can control the content of a Member State's IIA is imprecise. Third, Member States, negotiating on their own, may not have as much leverage as the Commission.

However, it may be a convenient tool to supplement the EU's IIAs in order to get normative influence. Indeed, it might be used to put forward some elements of its pattern in Member States' IIAs with third countries that are not negotiating an IIA with the EU.

Conclusion

The EU, as a new but consequent actor in IIL, has rapidly acquired the signs of a normative influence in this domain. Even if it has still not gained a global normative influence, it developed a consistent view on IIAs provisions which it is able to impose to its negotiating partners. By its action on the development of a multilateral investment court, it has begun to change the landscape of IIL. Nonetheless, opposition from citizens, CSOs and Parliaments, mostly at national level, may prevent the EU from concluding IIAs and therefore deeply impede its possibility to gain normative influence over IIL. Moreover, no legal or technical pathway can be found to go around these impediments.

Consequently, the following conclusion can be drawn in light of the developments in the present study: the EU has most of the elements described by Laurent Cohen-Tanugi, Ian Manners and other scholars to develop rapidly a global normative influence. It must, however, first succeed in getting the support of its citizens, CSOs and Member States' Parliaments on its policy regarding IIAs. Only on this condition can the EU become a genuine global actor in International Investment Law.

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List of abbreviations

BIT	Bilateral Investment Treaty
CCP	Common Commercial Policy
CETA	Comprehensive Economic and Trade Agreement
CDE	Cahiers de droit européen
CSO	Civil Society Organisation
ECI	European Citizens' Initiative
ECJ	European Court of Justice
EJIL	European Journal of International Law
EU	European Union
FET	Fair and Equitable Treatment
FIPA	Foreign Investment Protection and Promotion Agreement
FTA	Free-Trade Agreement
GC	General Court
IA Reporter	Investment Arbitration Reporter
ICS	Investment Court System
ICSID	International Centre for the Settlement of Investment Disputes
IIA	International Investment Agreement
IIL	International Investment Law
INTA Committee	International Trade Committee
ISDS	Investor-State Dispute Settlement
JCMS	Journal of Common Market Studies
MFN	Most Favoured Nation
NT	National Treatment
OECD	Organisation for Economic Co-operation and Development

RTDEur.	Revue trimestrielle de droit européen
TDM	Transnational Dispute Management
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TTIP	Transatlantic Trade and Investment Partnership
UNCTAD	United Nations Commission for Trade and Development

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