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Foreign Investment Insurance and EU Law

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Foreign investment insurance and EU law

Angelos Dimopoulos *

Abstract: *This contribution discusses the EU law ramifications on Member State investment guarantee systems. It examines firstly the legal framework on investment guarantee schemes in EU Member States, noting in particular the role of export credit agencies (ECAs), as well as the different types of insurance available, before exploring the EU competence over foreign investment insurance. After arguing that the EU has exclusive competence over insurance covering FDI under Article 207 TFEU, the issue of harmonisation of rules on foreign investment insurance is addressed, concentrating on the need and the desirability of such harmonisation, as well as its potential scope and the challenges that the drafting of appropriate harmonised rules present. Finally, the effects of EU law on international agreements relating to investment guarantee are examined focusing on the participation of the EU and its Member States in MIGA and the existence and content of subrogation clauses in Member State BITs and EU investment agreements. In conclusion, it is argued that the EU's exclusive competence over FDI requires a reassessment of national rules on foreign investment insurance, which may offer an excellent opportunity to reconsider the substance of foreign investment insurance provisions.*

Keywords: Investment guarantees, EU law, MIGA, FDI, Common Commercial Policy, investment insurance, export credit agencies

JEL Codes: F21, G22, G28, K33

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1. Introduction

One of the main characteristics of foreign investment is the assumption of risk. In order for a business activity to qualify as a foreign investment and enjoy the prerogatives granted to foreign investors under national law and international investment agreements (IIAs), the assumption of some form of risk is required. An investor has to incur or share the risks arising from the setting up or the operation of a business activity abroad.¹ Indeed, the assumption of risk constitutes a benchmark for determining the existence of jurisdiction *ratione materiae* under the ICSID Convention,² as well as under a number of Bilateral Investment Treaties (BITs).³

A closer look to the risks that foreign investors face when they operate an investment activity abroad reveals that investors are susceptible to different types of risks. Next to the commercial risks that are related to the nature of the business activity undertaken, foreign investors are susceptible to additional commercial and non-commercial risks, which result from adverse sovereign actions and inactions in the host state. Government regulatory measures and/or political conditions that exist in the host state give rise to risks that are harder to predict and tackle with. In order to secure themselves from such ‘political’ risks, which can significantly influence the existence and operation of a foreign investment, investors resort to political risk insurance and investment guarantees. In this way, investors avail themselves with a significant risk management and risk mitigation tool, which provides a more stable environment for investments abroad, and unlocks better access to finance.⁴

In order to facilitate investment flows, a number of state sponsored investment guarantee schemes has been created, offering investment guarantees and political risk

¹ M. Sornarajah, *The international law on foreign investment* (CUP, 2010), p. 8-19; F. Yala, ‘The notion of Investment in ICSID Case Law: A Drifting Jurisdictional Requirement?’, (2005) 22 *Journal of International Arbitration* 105, 113.

² See indicatively *Salini and Italstradale v. Kingdom of Morocco*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 23 July 2001, 42 ILM 609; *Consorzio Groupement LESI and ASTALDI v. Algeria (LESI Dipenta)*, ICSID Case No ARB/05/3, Award, 10 January 2005, (2004) 19 *ICSID Rev-FILJ* 426, para. 73.

³ See for example Article 1 of the US Model BIT of 2012 which provides that “‘**investment**’ means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or *the assumption of risk*... [emphasis added]”.

⁴ P. Garver, ‘The changing face of political risk’ in K. Lu, G. Verheyen and S. Perera (eds) *Investing with Confidence: Understanding Political Risk Management in the 21st Century* (World Bank, 2009), p. 81f.

insurance (PRI) to foreign investment activities. Supplementing private insurance of investment projects, which is available to foreign investors and may cover both commercial and political risks, many industrialized countries have considered necessary to establish, both at national and at international level, investment guarantee schemes. At national level most state sponsored investment guarantee schemes undertake to insure entirely or partially political risks. At the international level, the most important guarantee scheme is the Multilateral Investment Guarantee Agency (MIGA), a World Bank institution, which offers political risk insurance for investment projects in a broad range of sectors in 143 developing countries. Taking cognizance of national guarantee schemes and facilitating their function, most BITs include subrogation clauses, which enable the home state or its investment guarantee agency to succeed to the investor's claims against the host state.⁵

Within this framework, most EU Member States established national investment guarantee schemes and included subrogation clauses in their BITs with third countries.⁶ Many EU Member States have devised state sponsored investment guarantee schemes, which offer to their nationals a number of insurance products, covering a number of political, and sometimes commercial, risks that investors assume when they undertake business activities abroad. Considering that investment promotion and protection were fields falling under Member State competence, investment guarantee schemes have been set up and operate exclusively at national level. Similar to BITs, national investment guarantee schemes have been available only to nationals of a specific Member State, while the products offered and the conditions under which investment guarantees are provided differ from one Member State to the other.

The role of Member States in investment insurance, however, obtains a new dimension after the entry into force of the Lisbon Treaty and the recognition of EU exclusive competence over foreign direct investment (FDI).⁷ The establishment of EU exclusive competence has given rise to active EU involvement in developing a

⁵ Sornarajah, above note 1, p. 222.

⁶ J. Schokkaert, 'European Conventional Practice of Protection of Investments Abroad', (2002) 3 *Journal of World Investment & Trade* 615, 639-640.

⁷ As of 2009, foreign direct investment falls under the scope of the EU's Common Commercial Policy (Article 207 TFEU), which, according to Article 3(e) TFEU, is exclusive. For an extensive analysis of the author's views on the scope and nature of the new EU competence see A. Dimopoulos, *EU Foreign Investment Law* (OUP, 2011), chapter 2.

comprehensive EU foreign investment policy.⁸ EU institutions aim to substitute Member States in the exercise of their foreign investment policies, by gradually setting aside Member State BITs with third countries and concluding new EU IIAs.⁹ Of course, the establishment of a comprehensive EU investment policy raises a number of political, practical and doctrinal legal questions, which have become the subject matter of controversy and heated scholarly debate. Nevertheless, investment guarantees and PRI present one of the least explored aspects of the impact of EU exclusive competence and the establishment of a comprehensive EU investment policy on foreign investment law.

Within this context, this contribution intends to clarify the EU law ramifications on Member State investment guarantee systems. In order to understand whether and how EU law impacts on foreign investment insurance, the legal framework on foreign investment guarantees in EU Member States is firstly identified and briefly discussed. Afterwards, the scope of EU competence over investment insurance is examined, followed by an analysis of the impact of EU law on national investment guarantees schemes, considering whether EU law “threatens” their existence and limits the scope for their operation. Finally, the effects of EU law on international agreements relating to investment guarantee are examined, focusing on MIGA and the existence and content of subrogation clauses in Member State BITs and EU IIAs.

2. The legal framework on foreign investment insurance in EU Member States

The creation of state sponsored investment insurance schemes has been a priority in many investment-exporting EU Member States. Aiming to enhance the competitiveness and to support the investment activities of local companies, most

⁸ See in particular Commission Communication, *Towards a comprehensive European international investment policy*, COM (2010) 343, Brussels 7.7.2010; European Parliament Resolution of 6 April 2011 on the future European international investment policy (2010/2203INI); Council of the European Union, *Conclusions on a comprehensive European international investment policy*, Luxembourg 25.10.2010 .

⁹ Proposal for a regulation of the European Parliament and of the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries, Brussels 7.7.2010, COM (2010) 344; Report on the proposal for a regulation of the European Parliament and of the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries (COM(2010)0344 – C7-0172/2010 – 2010/0197(COD), A7, 0148/2011, 14.4.2011.

Member States have devised specialized agencies and developed specific schemes which offer PRI for foreign investments.¹⁰ Taking advantage of the competitive strengths of governments as insurers, which can use their networks for political risk assessment and insurance monitoring, investment guarantee schemes can offer low-cost insurance products that are not available in the private-sector insurance market.¹¹ Besides, investment guarantee schemes not only allow better access to project finance at competitive prices, but also enable home countries to promote their development policies. By offering better insurance terms for investments that benefit host-state development, state sponsored PRI can also constitute a tool for addressing the development objectives of home states.¹²

As of 2012, nineteen (19) EU Member States have set up state-sponsored investment insurance schemes, promoting FDI outflows.¹³ However, the establishment, role and functions of state-sponsored investment insurance systems, as well as the services and insurance products they offer to investors differ considerably among Member States.

To start with, Member State investment insurance systems are organized along different structures. Although the existence of public interference with investment insurance is common to all systems, the degree and nature of such interference differs considerably among Member States. In some Member States PRI insurance is provided by specialized state agencies, which are organized as government departments and their operation is thoroughly regulated under national law. A typical example of this category presents the UK Export Credits Guarantee Department, the powers of which are expressly determined in the Export and Investment Guarantees

¹⁰ K. Gordon, 'Investment Guarantees and Political risk Insurance: Institutions, Incentives and Development' in OECD (ed) *OECD Investment Policy Perspectives 2008* (OECD, 2008), p. 97.

¹¹ OECD, *World Investment and Political Risk, Annual Report 2009*, (OECD, 2009), p. 49-51.

¹² R. Dolzer and C. Schreuer, *Principles of International Investment Law* (OUP, 2008), p. 208; Gordon, above note 10, p. 105-106.

¹³ The Member States which offer publicly sponsored PRI are Austria (OEKB – Oesterreichische Kontrollbank AG), Belgium (ONDD – Office National du Ducroire/ Nationale Delcrederedienst), Czech Republic (EGAP – Export Guarantee and Insurance Corporation), Denmark (EKF – Eksport Kredit Fonden), Finland (FINNVERA PLC), France (COFACE – Compagnie Française d'Assurance), Germany (PWC – PricewaterhouseCoopers AG), Greece (ECIO – *Export Credit Insurance Organisation*), Hungary (MEHIB – Hungarian Export Credit Insurance), Italy (SACE – Servizi Assicurativi del Commercio Estero), Luxembourg (Office du Ducroire Grand Duché de Luxembourg), Netherlands (ATRADIUS Dutch State Business), Poland (KUKE – Export Credit Insurance Corporation Joint Stock Company), Portugal (COSEC – Companhia de Seguro de Créditos); Slovakia (EXIMBANKA SR – Export-Import Bank of the Slovak Republic), Slovenia (SEC - Slovene Export Corporation Inc), Spain (CESCE – Compañía Española de Seguros de Crédito a la Exportación), Sweden (EKN – Exportkreditnämnden) and the UK (ECGD – The Export Credits Guarantee Department UK).

Act 1991.¹⁴ Offering more autonomy and independence, some Member States have entrusted the provision of investment insurance to agencies that are organized as publicly owned companies. A typical example presents the Italian investment insurance agency SACE (Servizi Assicurativi del Commercio Estero), which as of 2004 operates as a corporate entity that is fully owned by the Italian Ministry of Economy and Finance.¹⁵ Finally, in a growing number of Member States state-sponsored investment guarantees are offered by private insurance companies, which have concluded specific agreements for the provision of PRI services with national governments. In certain cases the insurance agencies that are entrusted with the provision of PRI are formerly publicly owned companies that have been fully privatized, such as COFACE in France,¹⁶ in others they present special purpose banks, such as OEKB in Austria,¹⁷ while in some Member States, like Germany, investment insurance is provided by private insurance firms (PwC).

Despite the different structure of investment insurance systems across the EU, it is noteworthy that PRI is provided in all Member States by the same institutions that offer export credit guarantees. Identifying the linkages between trade and investment and the common need of exporters and investors for risk insurance so as to secure better access to financing, most Member States have entrusted their Export Credit Agencies (ECAs) with promoting state-backed investment insurance schemes. This does not mean, though, that the same rules relating to export credit guarantees are also applicable for investment guarantees, nor that all ECAs engage into investment insurance activities. In a number of Member States, ECAs offer only trade-related export credits.¹⁸ More importantly, the products of investment insurance and the conditions under which they are offered are regulated separately from export credits. Considering that export credits have become the subject of significant harmonization in the EU and worldwide,¹⁹ the limitation of the relevant rules on export credit

¹⁴ Article 2 Export and Investment Guarantees Act 1991.

¹⁵ Article 6 of Law 326/2003.

¹⁶ COFACE was privatised in 1994.

¹⁷ See indicatively the history of OeKB, available at <http://www.oekb.at/en/about-oekb/oekb-at-a-glance/history/pages/default.aspx>.

¹⁸ See for example Bulgaria (Bulgarian Export Insurance Agency (BAEZ)), Lithuania (Lietuvos Eksporto Importo Draudimas (LEIDAS)) and Estonia (Krediidi Ja Ekspordi Garanteerimis SA(KREDEX)).

¹⁹ Council Directive 98/29/EC of 7 May 1998 on harmonisation of the main provisions concerning export credit insurance for transactions with medium and long-term cover, OJ L148/22; OECD Arrangement on Officially Supported Export Credits, 2007 Revision, OECD TAD/PG (2011)13. See also below sections 4.c and 4d.

facilities indicates that Member States are not limited by these instruments in the determination of the appropriate legal regime. In that regard, investment guarantees and export credits share the same institutional setting, without however being subject to the same set of substantive rules.

The lack of a common framework becomes also obvious when the insurance products offered and the conditions attached to their offer are examined. Similar to MIGA, most national schemes offering state sponsored investment insurance cover the political risks of nationalization and expropriation, limitations on payments and currency transfers, war and civil disturbance, and in certain instances breach of state contracts.²⁰ However, taking into consideration that political risks are highly unpredictable and their effects are subject to multiple interpretations,²¹ the determination of the occurrence of a risk may differ considerably under different schemes. More importantly, some national schemes cover additional risks; for example the Dutch and Italian schemes cover natural disasters risks.²²

But even with regard to the common risks covered, the terms attached to investment guarantees vary considerably between Member States. Pricing and related practices vary widely among national agencies, as they charge different rates, have different deductible and related policies, and have different service charges for processing insurance contracts. Taking into consideration that political risks are difficult to evaluate and very costly to monitor, PRI services can vary significantly.²³ Moreover, given the public nature of national investment guarantee schemes, the provision of PRI products may be linked with the promotion of responsible business models, thus rendering PRI subject to the investor adhering to certain environmental, labour and other standards.²⁴ However, such criteria are not uniformly adopted by all national PRI providers. Hence, given that a basic purpose of state sponsored investment guarantees is to facilitate investments in politically risky environments that would not have occurred without such insurance, any differences in the terms

²⁰ I. Shihata, *Multilateral Investment Guarantee Agency and foreign investment* (Martinus Nijhoff, 1988), p. 122-139.

²¹ C. Hill, 'How investors react to political risk' (1998) 8 *Duke Journal of Comparative and International Law* 283, 287-290.

²² Gordon, above note 10, p. 98.

²³ D. James, 'Political Risk Insurance after September 11 and the Argentine Crisis: An Underwriter's View from London' in T. Moran (ed.) *International Political Risk Management: The Brave New World* (World Bank, 2004), p. 29-35.

²⁴ For example, environmental standards under the OECD Common Understanding, the OECD Convention against Bribery of Foreign Public Officials and the OECD Guidelines for Multinational Enterprises.

under which PRI is offered can impact greatly on the decision of investors whether and where to pursue specific economic activities.

As expected, national investment guarantee schemes are not available to all investors but only to those who have a close tie to the home country. Nevertheless, the eligibility requirements differ greatly between EU Member States. While all national schemes avail their insurance services to their nationals, some Member States may expand their protection to overseas subsidiaries of domestic companies, while others exclude local subsidiaries of foreign companies. In Germany, for example, a condition for eligibility is that “there must be an explicit German interest in the realisation of the project abroad”,²⁵ which indicates that subsidiaries of foreign companies in Germany are not eligible for investment protection. On the other hand, SACE offers PRI not only to Italian companies but also to investments that are materialized by foreign intermediaries controlled by Italian companies.²⁶

At this point it is important to point out that national investment guarantee schemes are offered not only for investments in third countries, but also for investments in another Member State. The vast majority of schemes do not distinguish between intra-EU and extra-EU foreign investment insurance in terms of eligibility, although the substantive cover policy for insurance of intra-EU investments is not always the same as extra-EU investments. The fact that national investment guarantee schemes cover equally intra-EU and extra-EU investments is key for the determination of the impact of EU law on their function.

Last but not least, national investment guarantee schemes are complemented by Member State BITs. As BITs serve also the objective of promoting investment flows by protecting investors against the occurrence of similar risks, the existence of BITs and the availability of investment dispute settlement play a role in assessing risk and offering investment insurance.²⁷ Next to offering a criterion for defining the terms under which PRI is provided, BITs are particularly important, as they include subrogation clauses. Subrogation clauses in BITs enable the PRI provider to succeed

²⁵ Federal Ministry of Economics and Technology, Investment Guarantees of the Federal Republic of Germany, available at <http://www.agaportal.de/en/dia/grundlagen/garantievoraussetzungen.html>

²⁶ “Il PRI si applica anche all’investimento realizzato tramite una controllata estera”. SACE, Polizza Investimenti, available at http://www.sace.it/GruppoSACE/content/it/consumer/products/investments_protection/investments/index.html?tab=1

²⁷ Dolzer & Schreuer, above note 12, p. 209; L. Poulsen, ‘The importance of BITs for foreign direct investment and political risk insurance: revisiting the evidence’, in K. Sauvant (ed.), *Yearbook on International Investment Law & Policy 2009/2010* (OUP, 2010), chapter 14.

to the investor's claims against the host state.²⁸ As a result, EU Member States have strived to include subrogation clauses in their BITs with third countries, which allow public insurers to pursue the claims that private investors have against the host state under the BIT, either directly by initiating state-to-state or investor-state arbitration,²⁹ or indirectly via the investor.³⁰

3. EU competence in the field of foreign investment insurance

In order to determine whether and how EU law can affect the investment guarantee schemes that are set up by EU Member States, it is necessary to consider firstly what are the exact competences of the EU in the field of foreign investment insurance. Identifying the scope and nature of EU powers presents the foundation determining if the EU and/or its Member States can adopt legislation and conclude international agreements in this field. In that respect, without entering into a detailed analysis of the scope of EU competence in the field of foreign investment in general, it is important to identify whether the relevant Treaty provisions cover also foreign investment insurance.

In that respect, EU competence over insurance of direct investments has to be considered firstly, as most investment guarantee schemes limit the products and services they offer to direct investments.³¹ Consequently, Article 207 TFEU on the Common Commercial Policy has to be thoroughly reviewed. As the Lisbon Treaty established for the first time an express exclusive competence over FDI,³² the scope of the new FDI competence has to be carefully considered, focusing on whether it covers

²⁸ See for example Article 6 of the German Model BIT of 2008 which provides: "If either Contracting State makes payment to any of its investors under a guarantee it has assumed in respect of an investment in the territory of the other Contracting State, the latter Contracting State shall, without prejudice to the rights of the former Contracting State under Article 9, recognize the assignment, whether under a law or pursuant to a legal transaction, of any right or claim from such investors to the former Contracting State. Furthermore, the latter Contracting State shall recognize the subrogation of that Contracting State to any such right or claim (assigned claim), which that Contracting State shall be entitled to assert to the same extent as its predecessor in title."

²⁹ Note however, that public insurers are not entitled to submit claims based on subrogation to ICSID arbitration, which would thus require to create a limited exception to the state-to-state exclusion provided under Article 25(1) of the ICSID Convention. See C. Schreuer, *The ICSID Convention: A Commentary* (CUP, 2009), p. 186-189.

³⁰ For the different types of subrogation clauses under BITs, see UNCTAD, *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking* (UNCTAD, 2007), p. 114-115.

³¹ For example in Germany, an explicit eligibility requirement is that "the project must be a new direct investment (no portfolio investment)". See Investment Guarantee Requirements, available at <http://www.agaportal.de/pages/dia/grundlagen/garantievoraussetzungen.html>.

³² See Articles 3(1)e and 207 TFEU.

FDI insurance. Although EU institutions rely almost exclusively on Article 207 TFEU as a broad, all-encompassing power conferring provision,³³ the inclusion of FDI as part of the Common Commercial Policy does not necessarily mean that the EU can take action under Article 207 TFEU with regard to all matters concerning FDI. First of all, Union competence is limited only to FDI, hence non direct foreign investment, such as portfolio investment are excluded from the scope of Article 207 TFEU.³⁴ Secondly, Article 207 TFEU covers only extra-EU FDI. The Common Commercial Policy concerns only relations with third countries; hence Article 207 TFEU does not confer competence to the EU over intra-EU FDI.

Although the extent of EU competence over FDI protection may be more controversial, FDI insurance seem to fall squarely within the scope of the new EU competence. The EU's exclusive powers in the field of state-sponsored guarantee schemes can be directly founded on *Opinion 1/75*, which established that EU competence in the field of Common Commercial Policy covers also state-backed financing and guaranteeing of exports.³⁵ *Opinion 1/75* is well-known as the first case where the Court recognized the *a priori* exclusive character of Union competence in the field of the Common Commercial Policy.³⁶ In that case the Court recognized that the EC had exclusive competence to conclude the OECD "Understanding on a Local Cost Standard", which concerned export credits. Examining the scope of (at the time) Community competence, the Court pointed out that the Common Commercial Policy covered export policy, and thus, covered systems of aids for exports, including export credits.³⁷ In fact, the existence and exclusive nature of EU competence over export credit insurance had become apparent since 1970, when the transitional period for the implementation of the Common Commercial Policy ended, as the EU had adopted

³³ Indicatively see Commission Communication on Investment Policy, p. 5; Commission Proposal for a Regulation of the European Parliament and of the Council, establishing a framework for managing financial responsibility linked to investor-state dispute settlement tribunals established by international agreements to which the European Union is party, Brussels, 21.6.2012, COM(2012) 335final (Financial Responsibility Regulation Proposal).

³⁴ On the author's views regarding the scope of FDI competence see Dimopoulos, above note 7, p. 42-43, 96.

³⁵ *Opinion 1/75*, [1975] ECR 1355.

³⁶ See P. Eeckhout, *External Relations of the European Union. Legal and Constitutional Foundations*, (OUP, 2011), p. 14-17; M. Cremona, "The external dimension of the internal market" in C. Barnard and J. Scott, eds., *The Law of the Single European Market* (Hart, 2002), p. 354-358.

³⁷ As the Court stated "[t]he field of the common commercial policy, and more particularly that of export policy, necessarily covers systems of aid for exports and more particularly measures concerning credits for the financing of local costs linked to export operations". *Opinion 1/75*, p. 1362.

specific legislation harmonizing national laws concerning state-sponsored credit insurance of exports.³⁸

Drawing a parallel between export credit insurance and FDI insurance, it is important to highlight first that EU action in the field of investment, like in trade in goods, is based on the same constitutional and institutional foundations, as both areas are covered by the Common Commercial Policy. More specifically, as the scope of the Common Commercial Policy has expanded from trade in goods to other areas, including FDI, the analysis of the main characteristics of competence in matters of trade in goods are also pertinent for the other fields covered by the Common Commercial Policy.³⁹ Secondly, export credit insurance and FDI insurance share the same organizational and functional characteristics. Both insurance systems are provided under the same institutional and organizational framework, namely national ECAs. More importantly, they serve the same goal, as both instruments offer guarantees to facilitate trade and investment outflows respectively. As a result, to the extent that export credit insurance falls within the scope of EU competence in the field of trade in goods, FDI insurance is also covered by the EU's FDI competence.

Having established that Article 207 TFEU confers exclusive competence to the EU in the field of FDI insurance, it is also necessary to examine whether the EU has competence as regards state-backed insurance of other forms of extra-EU foreign investment and intra-EU FDI. Such examination is necessary, not only for determining EU competence over intra-EU FDI but also because portfolio investments are eligible under some national investment guarantee schemes.⁴⁰ In addition, given that the definition and coverage of direct investment under Article 207 TFEU and national investment guarantee schemes may not be identical, a thorough analysis of the impact of EU exclusive competence over national investment guarantees. For example, direct investment in the field of transport does not fall under

³⁸ Council Directive 70/509/EEC on the adoption of a common credit insurance policy for medium- and long-term transactions with public buyers OJ L254/1, 23.11.1970; Council Directive 70/510/EEC on the adoption of a common credit insurance policy for medium- and long-term transactions with private buyers, OJ L254/26, 23.11.1970.

³⁹ At this point, it is necessary to highlight that the Lisbon Treaty did away with the different legal frameworks concerning different aspects of the Common Commercial Policy, providing a single, unified framework for all areas covered thereunder. See indicatively, M. Krajewski, 'The Reform of the Common Commercial Policy' in A. Biondi, P. Eeckhout and S. Ripley (eds) *European Union Law after the Treaty of Lisbon* (OUP, 2012), p. 302-307.

⁴⁰ For example SACE in Italy covers in principle any Italian capital invested abroad.

the scope of the Common Commercial Policy, but under the shared competence of the EU and its Member States.⁴¹

Unlike extra-EU FDI, primary EU law does not confer express powers with regard to non-direct foreign investment or intra-EU FDI. EU competence is implied, based on the internal market provisions. Taking as an example portfolio investment, the chapter on capital movements confers competence to the EU to regulate insurance of portfolio investments. Considering that the notion of capital is extended to portfolio investment,⁴² and that Article 63 TFEU covers all measures that are likely to affect capital movements, the EU has broad competence to regulate state-backed insurance of portfolio investment, as PRI can naturally affect capital movements. However, such competence is shared with the Member States;⁴³ hence Member States are not precluded, as a matter of principle, from taking action concerning insurance of portfolio investment.

4. The impact of EU law on the existence and operation of Member States' foreign investment insurance systems

In general, the existence and exercise of EU competence creates an obligation for Member States to ensure that national law is compatible with EU law. In light of their obligation to respect the primacy and preserve the autonomy of Union law, Member States have to ensure that national laws do not conflict with the existence of exclusive EU competence and EU substantive rules.⁴⁴

a. Extra-EU FDI insurance and the need for harmonization of national rules

In order to ascertain whether national legal frameworks on investment guarantees comply with EU law, the implications of EU exclusive competence on FDI have to be assessed firstly. As a rule, Member States are pre-empted from taking any action in

⁴¹ Article 207(5) TFEU; *Opinion I/2008* [2009] ECR I-11129, para. 162.

⁴² S. Hindelang, *The Free Movement of Capital and Foreign Direct Investment: the scope of protection in EU Law* (OUP, 2009), p. 69.

⁴³ On the author's views regarding the shared nature of Union competence regarding non-FDI forms, see Dimopoulos, above note 7, p. 104-108; cf the recent Financial Responsibility Regulation Proposal, where the Commission argues that Article 63 TFEU confers exclusive competence on the EU.

⁴⁴ M. Cremona, 'Defending the Community Interest: the Duties of Cooperation and Compliance' in M. Cremona and B. DeWitte (eds) *EU Foreign Relations Law- Constitutional Fundamentals* (Hart, 2008), p. 144-152.

fields of EU exclusive competence, so that the mere existence of national rules violates EU law, regardless of whether there is an actual incompatibility between national and EU rules, or if the EU has exercised its exclusive competence or not.⁴⁵ As a result, bearing in mind that Article 207 TFEU confers exclusive competence over FDI insurance, any national law related to investment guarantees is *per se* incompatible with EU law, irrespective of whether and when the EU exercises its FDI competence.⁴⁶

The inapplicability of the relevant national rules that enable state-backed PRI should not necessarily lead to the abolition of investment guarantees schemes. In order to avoid the unwanted consequence of limiting the competitiveness of EU companies by hampering their access to investment guarantees, EU institutions can take active initiatives and establish a common framework for FDI insurance systems. Such action can be based on Article 207(2) TFEU, which enables the EU to adopt autonomous measures, both in the form of substantive rules and rules necessary for the implementation of international agreements, in all fields covered by the Common Commercial Policy.⁴⁷

Besides, the existence of exclusive competence necessitates the establishment of common rules on state-backed investment guarantees. The need for a uniform legal framework dealing with common principles for insurance and guarantee arrangements, premia and cover policies, becomes apparent when the role of uniformity in the Common Commercial Policy is considered. Aiming to protect the unity of the common market by avoiding distortions in competition and risks of trade

⁴⁵ Joined Opinion of AG Tizzano in the *Open Skies* cases [2002] ECR I-9427, para 112-114; Opinion of AG Maduro in Case C-205/06 *Commission v. Austria* [2009] ECR I-1301 and Case C-249/06, *Commission v. Sweden*, [2009] ECR I-1335, para. 28; Cremona, above note 44, p. 129.

⁴⁶ It is worth pointing out that in order to avoid a direct incompatibility of Member States BITs with EU law, it has been suggested that Article 351 TFEU applies by analogy to Member States international agreements that were concluded prior to the conversion of EU competence in a given field from shared to exclusive (S. Johannsen, 'Die Kompetenz der Europäischen Union für ausländische Direktinvestitionen nach dem Vertrag von Lissabon' (2009) 90 *Beiträge zum Transnationalen Wirtschaftsrecht* 1, 23-26; T. Eilmansberger, 'Bilateral Investment Treaties and EU Law', (2009) 46 *CMLR* 383, 397-398). Even if this argument were accepted (cf Dimopoulos, above note 7, p. 306), Article 351 TFEU safeguards only Member States' international agreements and it cannot be used for safeguarding national laws.

⁴⁷ Contrary to Article 133 EC Treaty, which stipulated that the EC enjoyed competence only to negotiate and conclude international agreements in the fields of trade in services and commercial aspects of intellectual property, the Lisbon Treaty enables the EU to adopt autonomous measures with regard to all aspects of the Common Commercial Policy. Consequently, it is not necessary to use different legal bases having different institutional and decision-making rules to adopt secondary legislation with regard to FDI. See also M. Krajewski, 'External Trade Law and the Constitutional Treaty: Towards a federal and more democratic common Commercial Policy?', (2005) 42 *Common Market Law Review* 91, 107.

deflection that could arise if Member States pursued their individual policies, the principle of uniformity requires the adoption of common rules throughout the EU in the field covered by the Common Commercial Policy.⁴⁸

b. Non-FDI and intra-EU FDI insurance and the desirability for harmonization

Harmonization of national rules on state-backed investment insurance is not only necessary insofar as extra-EU FDI is concerned, but it is also highly desirable insofar as insurance of other forms of foreign investment is concerned. As incompatibilities between national law and EU law may also arise in fields of shared competence, harmonization of national rules on non-FDI insurance is of vital importance, when the latter conflict with a specific provision of EU law.⁴⁹ Besides, even if there is no conflict between national rules and EU law, harmonization is essential to ensure the smooth functioning of the internal market.

More specifically, as regards incompatibilities of national rules on PRI with EU law, typical examples of such incompatibility present the different eligibility requirements that are set under national investment guarantee schemes. As was discussed above, some national schemes avail their insurance products to overseas subsidiaries of domestic companies, while others exclude local subsidiaries of foreign companies.⁵⁰ By excluding local subsidiaries of other EU firms from state-backed investment insurance, national schemes violate the principle of equal treatment. Although locally incorporated, but foreign-controlled subsidiaries satisfy the conditions provided under Article 54 TFEU, they do not enjoy the benefit of investment insurance that is conferred to local companies.⁵¹ As the Court manifestly declared in *Factortame II*, the nationality of the person owning or controlling an EU company does not appear to present a legitimate criterion justifying different treatment of EU companies.⁵² Besides, it is difficult to imagine how public security and public policy could justify different treatment in terms of investment insurance.⁵³ Of course, the existence of such incompatibilities does not mean that national law has

⁴⁸ Cremona, above note 36, p. 354-358.

⁴⁹ Case C-55/00 *Gottardo v. INPS* [2002] ECR I-413, para. 33.

⁵⁰ See above notes 25 and 26.

⁵¹ Case C-307/97 *Saint-Gobain v Finanzamt Aachen-Innenstadt* [1999] ECR I-6161, para. 59; *Gottardo v INPS*, above note 49, para. 32; Cremona, above note 44, p. 136-138.

⁵² Case C-221/89 *Factortame II* [1991] ECR I-3905, paras. 29-33.

⁵³ Articles 45 and 46 TFEU.

to be set aside. As the Court emphasized in *Gottardo*, the Member State that offers preferential treatment to only certain EU nationals can extend this advantage unilaterally to all other EU nationals.⁵⁴ Consequently, by requiring from all Member States to offer investment guarantees to all EU companies, EU law is in essence imposing the *de facto* harmonization of rules concerning eligibility for PRI.

In addition, harmonization of national rules on PRI is indispensable, even when compatibility issues do not arise. Similar to export credit insurance, the establishment of common rules regarding the conditions, prices and cover policies for investment insurance would ensure that distortions of competition among enterprises within the EU are successfully avoided.⁵⁵ Harmonization of national laws regarding insurance of non-direct investments and intra-EU FDI can be considered necessary for the completion of the internal market, and, consequently, harmonization can be achieved in the framework of the internal market by virtue of Articles 114 and 115 TFEU.

c. The appropriate scope for harmonization

The establishment of common rules on PRI should focus primarily on the insurance products offered rather than on the structure of investment guarantee schemes. Similar to export credit insurance, harmonization is necessary as regards the substantive terms of insurance, namely the constituents of the cover, the premium and country cover policy.⁵⁶ It is the terms under which investment insurance is provided that can affect the conditions of competition between EU investors. On the other hand, EU law does not require the harmonization of the institutional setting under which state-backed PRI is provided, let alone its abolition and its substitution by an EU-wide investment guarantee scheme.

More specifically, the existence of exclusive competence on FDI insurance does not mean that national ECAs cannot any longer provide investment insurance. As long as PRI is offered under the same conditions everywhere in the EU, Member States can establish the institutional framework that they consider most appropriate for the provision of state-backed PRI. As proven in the field of trade over the past

⁵⁴ *Gottardo v INPS*, above note 49, para. 34.

⁵⁵ The aim to lessen distortions of competition between Member States was, alongside uniformity, the main goal pursued by the harmonization of rules on export credit insurance. See recitals 3, 4, 5, 9 and 10 of Directive 98/29/EC.

⁵⁶ Chapters I, II and III of Annex I to Directive 98/29/EC.

forty years, the existence of divergent institutional settings does not distort competition, but on the contrary offers the necessary flexibility to Member States to set up guarantee schemes taking into consideration domestic experiences.⁵⁷

Although EU law does not require the substitution of national ECAs with an EU-wide investment guarantee scheme, this does not mean that the EU is not empowered to establish one. So far, a number of specific EU financial instruments have been established, such as the European Investment Bank (EIB) Investment Facility for outward investment in ACP countries,⁵⁸ and the Facility for Euro-Mediterranean Investment and Partnership (FEMIP), which is the principal financial instrument for facilitating private sector investment in the Mediterranean region.⁵⁹ One of the main tools offered under both schemes are investment guarantees, which aim explicitly to promote development objectives in the recipient countries. Although these schemes were established under the umbrella of the EU's development cooperation policies, the EU can set-up in the context of its new and comprehensive investment policy a broad EU-wide guarantee scheme, which will offer PRI for all investment projects originating in the EU. Such scheme can be established as a special-purpose fund based on Articles 207 and 352 TFEU, or, following current practice, as an independent financial instrument under the aegis of the EIB.

EU institutions have not been very eager to set up a common EU investment guarantee scheme. On the contrary, the Commission has indirectly indicated its willingness to retain national ECAs as the appropriate institutional setting for offering PRI.⁶⁰ The hesitance of the Commission to support the creation of an EU investment guarantee agency does not mean that there is a “gap” in its vision of creating a comprehensive EU investment policy. Following in the footsteps of trade policy, the use of national ECAs for the provision of state-backed PRI based on uniform rules allows for the optimal exploitation of existing, well-functioning structures.

⁵⁷ In fact, in the field of trade law there were proposals for the creation of a European Export Bank that would replace national ECAs, but was rejected by the Member States. See Commission Proposal for a Council Regulation setting up a European Export Bank, COM (76) 28 final, 17.2.1976.

⁵⁸ For an analysis of the Investment Facility see European Investment Bank, *Investment Facility Annual Report* (2010).

⁵⁹ Regulation (EC) No 1638/2006 of the European Parliament and of the Council of 24 October 2006 laying down general provisions establishing a European Neighbourhood and Partnership Instrument, OJ L310, 9.11.2006.

⁶⁰ Investment Policy Communication, p. 6.

d. Drafting harmonized rules on foreign investment insurance and compatibility with EU law

Considering that the appropriate scope for harmonization covers the substantive terms of insurance, namely the constituents of the cover, the premium and country cover policy, EU policy-makers have to identify how to regulate these subject matters. However, unlike export credit insurance, EU institutions have little guidance as regards the formulation of rules on foreign investment insurance. In the field of export credit insurance, most EU legislation consists of texts which have been elaborated within the framework of the OECD. The substantive provisions of Directive 98/29/EC⁶¹ are provided in Annex I, which replicates the rules of the OECD Arrangement on Officially Supported Export Credits with regard to export credit guarantees.⁶² Besides, the content of EU rules on export credit insurance has also been drafted in light of the EU's obligation under the WTO, and in particular under the Agreement on Subsidies and Countervailing Measures (SCM).⁶³ Directive 98/29/EC prohibits export credit guarantees or insurance programmes at premium rates which are inadequate to cover the long-term operating costs and losses of the programmes, as they constitute prohibited export subsidies under the WTO.⁶⁴

Similar international initiatives and obligations in the field of foreign investment insurance are missing. Nevertheless, taking into account that investment insurance raises to a certain extent similar concerns to export credit insurance with regard to subsidies and distortion of competition in the internal market, EU institutions can use the existing legal framework on export credit insurance as a basis for developing common rules on investment insurance. Moreover, the Commission can draw upon the best practices of national investment insurance agencies, developing a common framework that will reflect the interests of all relevant stakeholders.

Secondly, the development of common rules for investment insurance on the basis of export credit rules could be particularly useful in order to avoid potential

⁶¹ Above note 19.

⁶² Ibid.

⁶³ Recital 10 of Directive 98/29/EC.

⁶⁴ Annex 1, items (j) and (k) of the SCM Agreement. On the SCM agreement and its linkages to EU trade law see L. Rubini, 'The International Context of EC State Aid Law and Policy: the Regulation of Subsidies in the WTO' in A. Biondi, P. Eeckhout and T. Flynn (eds) *The Law of State aid in the European Union* (OUP, 2004), p. 151-188.

conflicts with EU state aid law. State-sponsored foreign investment insurance constitutes a legally binding guarantee offered by undertakings that are “under the dominant influence of the public authorities”, thus being an advantage that constitutes state aid in the form of guarantees.⁶⁵ However, unlike export credit guarantees, investment guarantees are not exempted from the scope of Notice on State Aid in the form of guarantees,⁶⁶ despite the fact that they share similar characteristics.

More specifically, the application of state aid rules in the field of export credit guarantees is very limited, as the Commission subjects to state aid scrutiny only short-term (up to two years) export credit guarantees, and only to the extent they cover “marketable” risks, namely commercial and political risks concerning exports in other OECD member countries.⁶⁷ On the contrary, export credit guarantees with medium and long-term cover have almost never been the subject of state aid control, as it has been widely considered that consistency with the OECD arrangement and the WTO SCM Agreement is sufficient.⁶⁸ This carve-out from state aid rules is explicitly limited to export credit guarantees, and does not apply to foreign investment insurance. As regards foreign investment insurance, there is only a very limited exemption concerning aid for extra-EU FDI from small and medium enterprises (SMEs).⁶⁹ In fact, the Commission has scrutinized in a number of cases national measures offering aid related to foreign direct investment.⁷⁰ Although the offer of investment guarantees has never been the subject of scrutiny by the Commission, the applicability of State aid rules in the field of foreign investment and state guarantees

⁶⁵ Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees OJ 155/2008, para 1.2. (henceforth 2008 Notice). For an overview on the application of state aid rules in the field of guarantees see P. Schloesslen, ‘State aid under the form of guarantees’ in W. Mederer, N. Pesaresi and M. van Hoof (eds) *EU Competition Law*, Volume IV, State aid, Book one (Claeys & Casteels, 2008).

⁶⁶ 2008 Notice, para. 1.3, last sentence.

⁶⁷ Communication of the Commission applying Articles 92 and 93 of the Treaty to short-term export-credit insurance, OJ C281/4, 17.9.1997, as amended by para.3.1. of Communication of the Commission – Temporary Union framework for State aid measures to support access to finance in the current financial and economic crisis OJ C6/5, 11.01.2011. For a thorough analysis on the application of state aid rules in the field of export credit insurance see B. Martenczuk, ‘Export Aid and EC State Aid Control’ in J. Flett (ed), *EC State Aid Law: Liber Amicorum in Honour Francisco Santaolalla* (Kluwer, 2008), p. 169-190.

⁶⁸ Ibid., p. 175-178.

⁶⁹ Article 4(1) of Commission Regulation 70/2001 on the application of articles 87 and 88 f the EC Treaty to State aid to small-and medium-sized enterprises, OJ L10/33, 13.1.2001 (SME Block Exemption Regulation).

⁷⁰ See Commission Decision of 14 October 1998 on a proposal to grant aid to LiftGmbH, OJ L142, 5.6.1999; Commission Decision of 15 February 2003 on a proposal to grant aid to Vila Gale, OJ L61, 27.2.2004; Commission Decision of 7 March 2007 on State Aid C41/2004 to Orfama, OJ L183, 13.7.2007.

and the lack of an exemption similar to export credits, indicates that in principle PRI schemes are subject to state aid rules.

As a result, the development of common rules on investment insurance on the basis of the current legal framework on export credit guarantees would help minimize legal uncertainty as regards the compatibility of national investment guarantee schemes with state aid law. In that respect, the regulatory framework on export credit insurance would present an excellent basis, given that state-sponsored investment guarantees are usually long-term and cover political risks, thus essentially covering risks that under export credit would qualify as non-marketable.

Last, but not least, the development of common rules on investment insurance would present also an excellent opportunity to promote sustainable investments that contribute to the development of the host countries. The EU can subject investment insurance to compliance with environmental, labour or other relevant standards, either by setting out its own specific requirements, similar to the environmental impact conditions in Germany,⁷¹ and/or by linking eligibility for investment insurance with relevant international standards, such the OECD Convention against Bribery of Foreign Public Officials and the OECD Guidelines for Multinational Enterprises. In this way, Union institutions can find an easier and more effective way to promote sustainable investment activity and link investment protection with public policy considerations, thus offering a credible compromise regarding the different approaches to the future EU investment policy adopted by the Commission and the Parliament.⁷²

5. International agreements concerning investment insurance

In addition to national rules on investment guarantee schemes, the existence of EU competence over foreign investment insurance affects also the conclusion, management and operation of international agreements that deal with foreign

⁷¹ In Germany investments are eligible to participate in investment insurance, as long as they have minimal environmental impact, they improve environmental standards in the host state, or they have other positive effects that outweigh their negative impact on the environment. See Investitionsgarantien der Bundesrepublik Deutschland, Umweltmerkblatt, available at http://agaportal.de/pdf/dia_ufk/info/dia_merkblatt_umwelt.pdf

⁷² On the different approaches adopted by the Commission and the Parliament regarding the objectives and content of EU investment policy, see J. Calamita, 'The Making of Europe's International Investment Policy – Uncertain First Steps' in (2012) 39 *Legal Issues of Economic Integration* (forthcoming); Dimopoulos, above note 7, p. 209-212, 217-220 and 229-230.

investment insurance. Competence over foreign investment insurance is primarily an external competence, in that its subject matter deals with relations with third countries and the activities of EU nationals outside the EU. Therefore, international agreements present a valuable instrument to promote cooperation with third countries, enabling PRI to be fully beneficial in the context of investment disputes, setting up common standards and procedures, and creating international investment insurance systems.

The pronouncement of EU competence in this field of foreign investment insurance, and in particular EU exclusive competence over FDI, imposes obligations on Member States regarding their existing agreements and the conclusion of future agreements on foreign investment insurance. More specifically, EU competence affects Member State BITs that include subrogation clauses and the conclusion of future IIAs by the EU (and its Member States), the membership of Member States in MIGA, and finally the conclusion of future international instruments that establish common rules on investment insurance.

a. Subrogation clauses in BITs and IIAs

Considering firstly subrogation clauses in IIAs, it is important to focus on the scope of subrogation provisions in BITs and IIAs. As was discussed above, subrogation clauses present a common provision in most IIAs, enabling home states and their institutions to succeed to foreign investors' claims against a host state. Unlike national investment insurance systems, IIAs do not include substantive rules on PRI, but rather offer a procedural mechanism, typical under insurance law, which allows for subrogation by operation of law and enable sovereign insurers to take up investors' claims against host states. Therefore, since subrogation presents a core legal mechanism under insurance law,⁷³ regulation of subrogation falls squarely within the scope of EU competence over foreign investment insurance, namely under exclusive competence as regards FDI and shared competence with regard to insurance of other forms of foreign investment.

However, considering that subrogation is a procedural mechanism that concerns the transfer of any associated rights which arise in respect of an investment claim, the coverage of subrogation clauses in an IIA depends also on the existence of

⁷³ See indicatively J. Basedow et al. (eds) *Principles of European Insurance Contract Law* (Sellier, 2009), p. 255-261.

competence over the substantive provision that is the subject matter of the investment claim. For example, were expropriation outside the scope of FDI competence under Article 207 TFEU,⁷⁴ the EU would not have the competence to include subrogation clauses in its IIAs covering the subrogation of expropriation claims. On the contrary, the coverage of subrogation clauses does not depend on the national or supranational nature of the sovereign insurer. Irrespective of whether investment guarantee schemes become EU-wide or remain national, the EU has competence to include subrogation clauses in its IIAs, since national investment insurance systems fall under EU competence and should operate on the basis of common rules.

As a result, the incompatibility of Member State BITs that include subrogation clauses with EU law and the competence of the EU to include subrogation clauses in future EU IIAs follows closely the discussions regarding the validity of Member State BITs and the conclusion of future EU IIAs. More specifically, EU exclusive competence over FDI results in the incompatibility of the provisions of Member State BITs that deal with matters within the scope of EU exclusive competence with EU law, including subrogation of FDI claims.⁷⁵ To the extent that a Member State obtains authorization to retain in force existing BITs,⁷⁶ such authorization extends also to subrogation clauses. As regards the conclusion of future EU IIAs, the EU has competence to include subrogation clauses, linked either with an EU-wide investment guarantee scheme or with existing national guarantee schemes, covering claims falling within the scope of EU competence. Such competence is exclusive, to the extent that the claim covered falls under EU exclusive competence.

Although EU institutions have already expressed their preliminary views on the future of EU investment policy and EU IIAs, official reports lack any reference to subrogation clauses. Given the secondary role that subrogation clauses play and the ambiguity and controversy concerning the scope and objectives of EU investment

⁷⁴ On the author's views on the scope of EU competence over expropriation see Dimopoulos, above note 7, p. 108-116.

⁷⁵ Note that BITs that were concluded prior to a Member State's accession to the EU are safeguarded under Article 351 TFEU and, hence are not *per se* incompatible with EU law. However, Member States still bear the obligation to take all appropriate measures in order to erase incompatibilities. J. Klabbbers, *Treaty Conflict and the European Union* (OUP, 2009), chapter 6; Dimopoulos, above note 7, p. 309-310.

⁷⁶ Article 3, Proposal for a regulation of the European Parliament and of the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries, Brussels 7.7.2010, COM (2010) 344; Report on the proposal for a regulation of the European Parliament and of the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries (COM(2010)0344 – C7-0172/2010 – 2010/0197(COD), A7, 0148/2011, 14.4.2011.

policy in more important areas, such as expropriation and dispute settlement, it is understandable that subrogation clauses have not attracted any attention so far. Given the “comprehensive” nature of future EU IIAs, which aim to integrate traditional, BIT-based investment protection norms with investment liberalization provisions,⁷⁷ it is expected that the subrogation clauses will draw heavily on existing provisions found under Member State BITs.⁷⁸

b. The status of the EU and its Member States under MIGA

The existence of EU competence in the field of foreign investment insurance affects also the status of the EU and its Member States under MIGA. MIGA was established under the premises of the World Bank Group as an international investment guarantee scheme that aims to facilitate investments to developing countries by offering guarantees mainly to direct investments.⁷⁹ Being a World Bank institution, only EU Member States are currently members of MIGA, while the EU is granted an observer status.⁸⁰ The MIGA Convention allows only members of the World Bank group to become MIGA members⁸¹ while neither the MIGA Convention, nor the World Bank is open for participation to supranational organisations such as the EU.

The introduction of EU exclusive competence over FDI insurance raises the question whether the Union has to take up the Member States’ position under MIGA and how such ‘substitution’ can take place. While in other fields of EU exclusive competence the transition from a national to an EU policy framework can occur via the *de facto* assumption of Member States’ obligations by the EU,⁸² or by the substitution

⁷⁷ Investment Policy Communication, p. 5.

⁷⁸ See also General Affairs Council of the European Union, 3109th Council meeting, Brussels, 12.9.2011, where the Council authorized the Commission to negotiate the investment chapters of the FTAs with India, Singapore and Canada following “the Member States’ experience and best practice regarding their bilateral investment agreements”.

⁷⁹ For an overview of PRI offered under MIGA see indicatively I. Shihata, ‘The roles of ICSID and MIGA’ in K. Lu, G. Verheyen and S. Perera (eds) *Understanding Political Risk Management in the 21st Century* (World Bank, 2009), p. 2-35.

⁸⁰ F. Hoffmeister, ‘Outsider or Frontrunner? Recent Developments under International and European Law on the Status of the European Union in International Organizations and Treaty Bodies’ (2007) 44 *Common Market Law Review* 41, 48-49.

⁸¹ Article 4a MIGA Convention.

⁸² For example trade policy agreements such as the GATT. Cases 22-24/72 *International Fruit Company* [1972] ECR 1219

of Member State bilateral agreements by Union agreements,⁸³ in certain fields the Union is not entitled to participate in international agreements. In such cases, Member States can participate in the relevant international fora and conclude international agreements, acting as “trustees” of the common Union interest.⁸⁴

The latter option is particularly appealing when reconsidering the status of the EU and Member States under MIGA and the implications of EU exclusive competence. If Member States are considered to be acting on behalf of the Union, this enables the EU to be represented in MIGA and exercise its exclusive competence, without requiring the renegotiation of the MIGA Convention in order to allow EU participation. More importantly, by rendering Member States “trustees” of the Union interests, the Member States’ membership to MIGA is not in conflict with EU exclusive competence and hence Member States do not have to withdraw from MIGA, at least to the extent that it covers FDI, in order to comply with their Union law obligations.⁸⁵

Of course, by considering that Member States act on behalf of the Union in the context of MIGA, raises specific obligations for the Union and the Member States. In particular, Member States would bear the additional obligation to form a common position and exercise their rights in a uniform manner, after consulting with the Commission. As the Court ruled in the *IMO* case,⁸⁶ Member States are required on the basis of the duty of cooperation (Article 4(3) TEU) to abstain from any unilateral action that may affect the Union’s exclusive competence.⁸⁷ On the other hand, this would not necessarily mean that the MIGA Convention would become a Union agreement, like in the case of the GATT, especially since there has not been a full transfer of competences from the Member States to the Union.⁸⁸

Similar to subrogation clauses, EU institutions have been silent so far as regards the status of the EU’s and Member States’ membership in MIGA. In contrast

⁸³ For example civil justice agreements, such as the new Lugano Convention. Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2009] OJ L147/5, 10.6.2009.

⁸⁴ See M. Cremona, ‘Member States as Trustees of the Union Interest: Participating in international agreements on behalf of the European Union’ in A. Arnulf et al (eds), *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood* (Hart, 2011), 435-457.

⁸⁵ See also above note 75.

⁸⁶ Case C-45/07 *Commission v. Greece* [2009] ECR I-701.

⁸⁷ Cremona, above note 84, p.446.

⁸⁸ MIGA is in that perspective comparable to the MARPOL 73/78 treaty, which according to the Court is not considered as an international agreement binding on the Union, since there has not been a full transfer of competences to the EU. See Case C- 308/06 *Intertanko* [2008] ECR I-4057.

with the ICSID Convention, the other important investment agreement under the auspices of the World Bank, EU institutions seem to neglect that FDI insurance is also covered under Article 207 TFEU and should be part of a comprehensive EU investment policy. Bearing in mind the significant legal, political and economic ramifications concerning ICSID arbitration in the era of EU IIAs,⁸⁹ it is understandable why this agreement has attracted the focus of foreign investment policy-makers. Nevertheless, given the less contestable course of action that is proposed with regard to MIGA, EU institutions should seek to clarify the legal status in order to enhance legal certainty and contribute to the establishment of a truly comprehensive EU investment policy.

c. The conclusion of other international agreements on investment insurance

Finally, it is worth pointing out that the EU can conclude international agreements relating to foreign investment insurance. As discussed above, there are not yet any international agreements establishing common rules for the provision of investment guarantees.⁹⁰ If the EU and its Member States consider participating in such international agreements in the future, the EU has exclusive competence to negotiate and conclude them insofar as they deal with FDI insurance. Furthermore, the Union should be the main actor participating in the negotiation and drafting of soft-law instruments concerning investment insurance, similar to the ones established under the OECD framework with regard to export credits.⁹¹ Nevertheless, Member States may participate to the extent the agreement covers matters falling under shared competence. Hence, future international agreements on investment insurance can be concluded either as Union agreements or as mixed agreements, a political decision which will arguably follow future practice regarding the conclusion of future EU IIAs as pure Union or mixed agreements.

6. Conclusions

⁸⁹ For a discussion on the potential of ICSID arbitration under EU IIAs see M. Burgstaller, 'Investor-State Arbitration in EU International Investment Agreements with Third States' (2012) 39 *Legal Issues of Economic Integration* 207.

⁹⁰ See above part 4.d.

⁹¹ The OECD Arrangement (above note 19) is a "Gentlemen's Agreement among the Participants". Only the EU participates in the Arrangement, and has implemented it in the Union legal order via Regulation No 1233/2011 (OJ L326, 8.12.2011).

The development of a comprehensive EU investment policy creates a new era for foreign investment regulation in Europe. EU institutions and Member States alike are already discussing what should be the appropriate scope and content of EU investment policy, considering the objectives and characteristics of such policy, its implications on Member States' existing investment policies and the best means to ensure a smooth transition from national to EU policy-making in this field. Within this framework, foreign investment insurance presents one of the least explored fields, as EU institutions have not yet officially expressed their views or taken any concrete action regarding the impact of EU law on national investment insurance systems. Although investment insurance does not raise similar economic and political concerns as expropriation or investor-state arbitration, this does not mean that investment insurance merits less attention. From a doctrinal point of view, the existence and exercise of EU competence over foreign investment necessitates specific action. As EU exclusive competence over FDI covers also FDI insurance, the preservation of national investment guarantee schemes conflicts as such with EU law. A similar conclusion can also be reached with regard to subrogation clauses included in Member State BITs, as well as Member States' participation in MIGA. In order to retain national investment guarantee schemes and Member States' participation to MIGA, the establishment of uniform rules is required, whereby the EU will authorize, coordinate and harmonize national legal frameworks on investment insurance.

The establishment of common rules on investment insurance is not only necessary for ensuring the operation of national investment guarantee schemes on solid legal grounds. If EU institutions aim to establish a truly comprehensive EU investment policy, they have to take action as regards investment insurance. The development of common rules on foreign investment insurance presents an excellent opportunity to reconsider a number of substantive questions on investment insurance such as whether investment guarantees should be provided at national or EU-level; whether intra-EU investments should be offered the same insurance products as extra-EU investments; what should be the appropriate eligibility criteria; whether investment insurance should be conditional on development considerations; whether investment insurance schemes should be exempted in their entirety from state aid scrutiny; how should subrogation work; whether international rules on investment guarantees are needed in order to protect the competitiveness of EU investors and

promote investment policy objectives. Opening a debate on these questions may not be politically feasible at the moment. However, by acknowledging their importance, EU institutions and Member States can build the foundations for their future development.