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Reconciling European Union Law Demands with the Demands of International Arbitration

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ESSAYS

RECONCILING EUROPEAN UNION LAW DEMANDS WITH THE DEMANDS OF INTERNATIONAL ARBITRATION

*George A. Bermann **

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INTRODUCTION

European Union (“EU” or “Union”) law and the law of international arbitration have traditionally occupied largely separate worlds, as if arbitral tribunals would rarely be the fora for the resolution of EU law claims and as if EU law, in turn, had little concern with arbitration. For several reasons, this pattern has recently been altered, although the relationship between EU

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law and international arbitration law is at present anything but settled. From the present perspective, the past looks like an age of innocence, for as these two worlds have begun to intersect, they have not done so entirely harmoniously.

Part I of this Essay traces the traditional divide between EU law and the law of international arbitration. This Essay then identifies two developments, both emanating from the EU-law side of the equation, that are in the process of altering this landscape. The first, discussed in Part II, is the prospective amendment on arbitration to the Brussels Regulation on Jurisdiction and Enforcement of Judgments; the second, discussed in Part III, is the transfer of exclusive competence over policy in the area of foreign direct investment, itself a developing arena of international arbitration, to the EU from the Member States. Because both developments are so nascent, it is difficult to gauge the magnitude of the problems they may create, much less delineate the steps required to mitigate them. At this early stage, this Essay simply draws attention to the new realities and to the nature of the challenges they present.

I. *THE DISTANT WORLDS OF EU AND INTERNATIONAL ARBITRATION LAW*

EU law and international arbitration law have long failed to intersect, almost as if the two fields were mutually indifferent. This state of affairs owes more to traditional assumptions made by EU law than to any made by the law of international arbitration.

A. *EU Law and Private International Law*

The law of the European Union has long ranged over a wide variety of fields. From the start, constitutional and administrative law occupied a central place in the landscape, alongside a host of domains that EU law from early on specifically addressed: agriculture, fisheries, and transport law, as well as competition law, among others. Treaty amendments later brought whole new subjects within the purview of EU law, environmental¹ and

1. See Consolidated Version of the Treaty on the Functioning of the European Union art. 191, 2010 O.J. C 83/47, at 132–33 [hereinafter TFEU].

consumer protection² being only the most conspicuous examples. Of course, the fundamental Community objective—the common market, and later the internal market—brought EU law into virtually any field in which harmonization of Member State law might conduce a more fully integrated market.³ Product liability was the paradigmatic example.⁴

From other fields, however, EU law long kept its distance. Criminal law comes to mind, but so too does private international law. The original Treaty Establishing the European Economic Community strongly suggested that harmonization of rules among the Member States on matters of private international law required a convention outside the Community law system,⁵ and the 1968 Brussels Convention on Jurisdiction and the Recognition of Judgments in Civil and Commercial Matters (“Brussels Convention”)⁶ took precisely that form. With the Maastricht Treaty, private international law was brought within the ambit of EU law, but relegated to the third, non-Community law pillar on justice and home affairs.⁷ Only with the Treaty of Amsterdam did it become part of Community law proper.⁸ Thus, until relatively recently, the distance between EU law and international arbitration reflected a much larger divide between EU law and private international law.

B. *The Brussels Convention and Regulation*

The 1968 Brussels Convention is an instrument that addressed core issues of private international law, but did so

2. See *id.* art. 169, at 124.

3. See *id.* art. 114, at 94–95.

4. See Council Directive 85/374/EEC on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products, 1985 O.J. L 210, amended by Directive 1999/34/EC of the Parliament and Council on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products, 1999 O.J. L 141/20.

5. See Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 220(4), 298 U.N.T.S. 11, at 87 [hereinafter EEC Treaty].

6. Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1968 O.J. C 27/1 [hereinafter Brussels Convention].

7. See Treaty on European Union (Maastricht text), July 29, 1992, Title VI, 1992 O.J. C 191/1, at 61–62 [hereinafter Maastricht TEU].

8. See Consolidated Version of the Treaty Establishing the European Community art. 65, 1997 O.J. C 340/173, at 203 [hereinafter EC Treaty 1997 Consolidated Version] (as amended by the Treaty of Amsterdam).

strictly outside the Community law framework.⁹ In fact, due to an express exclusion from coverage, neither of the convention's two main pillars—mutual limitations on the exercise of jurisdiction over domiciliaries of other Member States and the reciprocal obligation to recognize and enforce each others' judgments in civil and commercial matters—had any application to arbitration.¹⁰ It would already have been abundantly clear from the terms in which it was couched that the convention did not address the exercise of jurisdiction by arbitral tribunals or the recognition or enforcement of awards.¹¹ But the exclusion went much further. Although the matter is subject to some doubt, the convention was largely understood also to exclude questions of judicial jurisdiction and the recognition or enforcement of judicial judgments insofar as the underlying claim or judgment directly related to arbitration. Accordingly, neither suits to enforce arbitration agreements, nor actions for interim relief in aid of arbitration, nor actions for the annulment of awards, nor suits to enforce a foreign arbitral award, nor indeed any civil or commercial litigation directly concerning arbitration fell within the scope of the convention, even though such litigation might in every other respect meet the conditions required for the convention's application. This supposition on the part of national courts was eventually confirmed by the Court of Justice of the European Union ("Court" or "Court of Justice") in its *West Tankers* judgment,¹² rendered in 2009, well after the Brussels Convention had been transformed into EU legislation proper.¹³

The exclusion was not irrational. By the time of the Brussels Convention, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (or New York Convention)¹⁴ was already a decade old. Although the New York Convention did not, and still does not, comprehensively govern the role of courts in relation to arbitration agreements and

9. Brussels Convention, *supra* note 6.

10. *Id.* art. 1, ¶ 4, at 4 ("The Convention shall not apply to . . . arbitration.").

11. See generally *id.* arts. 2–45, at 4–14.

12. *Allianz SpA v. West Tankers Inc.*, Case C-185/07, [2009] E.C.R. I-663.

13. Council Regulation 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters art. 1(2), 2001 O.J. L 12/1, at 3.

14. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 38 [hereinafter New York Convention].

arbitral awards, it addressed the core issues, namely the obligation of national courts to refer parties to arbitration¹⁵ and to afford recognition and enforcement to foreign awards.¹⁶ But rather than try to delineate exactly what issues the New York Convention left over for regulation at the European level, the Brussels Convention created a categorical carve-out for arbitration.¹⁷ This left the Brussels Convention with plenty of terrain to cover, but arbitration was not part of it. When the convention became transformed into secondary EU legislation in the form of Council Regulation 44/2001 (“Brussels Regulation”),¹⁸ the carve-out remained.¹⁹

The Brussels Regulation is currently the subject of proposed revisions. In light of the controversy stirred by *West Tankers*,²⁰ the European Commission (“Commission”) has proposed, among other things, integrating arbitration into the Brussels Regulation regime.²¹ The outcome remains uncertain.²²

C. Authority to Make Preliminary References

Among the ways in which EU law penetrates the Member States’ legal orders is through the mechanism of the preliminary

15. *Id.* art. II, at 38–40.

16. *Id.* art. III, at 40.

17. See Brussels Convention, *supra* note 6, art. 1, at 4.

18. See generally Council Regulation 44/2001, *supra* note 13.

19. *Id.* art. 1(2)(d), at 3.

20. *Allianz SpA v. West Tankers Inc.*, Case C-185/07, [2009] E.C.R. I-663.

21. See Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast), at 4–6, COM (2010) 748 Final (Dec. 14, 2010). The proposal would require a Member State court to stay its proceedings if its jurisdiction is contested on the basis of an arbitration agreement and an arbitral tribunal has been seised of the case or court proceedings relating to the arbitration agreement have been commenced in the Member State of the seat of the arbitration. According to the proposal, this modification “will enhance the effectiveness of arbitration agreements in Europe, prevent parallel court and arbitration proceedings, and eliminate the incentive for abusive litigation tactics.” *Id.* at 8–9.

22. In its Green Paper, the Commission proposed a full or partial deletion of the arbitration exclusion so as to bring all court proceedings in support of arbitration within the scope of the Regulation, possibly coupled with a grant of exclusive jurisdiction for such proceedings to the courts of the Member State of the place of arbitration. Commission of the European Communities, Green Paper on the Review of Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, at 8–9, COM (2009) 175 Final (Apr. 21, 2009).

reference—a means by which national courts may, and on occasion must, refer questions to the Court of Justice on the interpretation and validity of EU law when necessary to dispose of cases before them.²³ The details of this device, which has been part of the procedural landscape from the very start of the European Economic Community in 1958, need not concern the reader here. Importantly, preliminary references have given the Court of Justice extraordinary opportunities to expound authoritatively on EU law and a basis for supposing that Member State courts, having suspended proceedings to make the reference, would follow the Court's rulings upon resuming them.²⁴ Moreover, the Court's preliminary rulings—though issued in the context of a particular referral—have carried as much precedential weight for future cases in national courts as any other judgment of the Court.²⁵

The relevant treaty provision contemplates preliminary references from a “court or tribunal of a Member State.”²⁶ The Court of Justice early on took the position that arbitral tribunals, though sitting in the territory of a Member State and governed by that state's law of arbitration, did not constitute tribunals *of* a Member State.²⁷ Thus, they could not request preliminary rulings from the Court of Justice on the meaning or validity of EU law even if the dispute before them raised such issues, even importantly.²⁸ This was a perfectly reasonable and indeed the more probable reading of the treaty. However, it did mean that, even when a cause of action in arbitration not only entailed application of EU law but actually arose under EU law, the tribunal was left to its own devices in coming to a proper understanding of the relevant EU law norms.²⁹

Though regrettable from the perspective of ensuring EU law's maximal efficacy, the situation was not dire. First, advocates appearing before arbitral tribunals could be counted on to

23. TFEU, *supra* note 1, art. 267, 2010 O.J. C 83, at 164.

24. GEORGE A. BERMAN ET AL., *CASES AND MATERIALS ON EUROPEAN UNION LAW* 321–24 (3d ed. 2010).

25. *Id.*

26. TFEU, *supra* note 1, art. 267, 2010 O.J. C 83, at 164.

27. *See Nordsee Deutsche Hochseefischerei GmbH v. Reederei Mond Hochseefischerei Nordstern AG*, Case 102/81, [1982] E.C.R. 1095, ¶¶ 10, 13.

28. *See id.* ¶¶ 14–15.

29. *See id.*

educate those tribunals reasonably well about the contours of EU law, as appropriate, leaving the tribunals without the benefit of direct rulings from the Court in those cases, but seldom leaving them in the dark. Second—and the Court took specific note of this fact—if and when arbitration agreements, arbitral measures, or arbitral awards happened to come before Member State courts for one reason or another, those courts, being “courts or tribunals of Member States,” would have standing to make any appropriate references.³⁰ In fact, arbitration agreements, arbitral measures, and arbitral awards commonly come before national courts in the context of civil or commercial litigation. Those proceedings may have fallen into a carve-out from the Brussels Convention, but they are not excluded from the EU’s preliminary reference mechanism.³¹

Assuming the Court’s reading of the preliminary reference mechanism to be correct, the fact remains that the constitutive treaties, which have been fundamentally revised on several occasions over the years, could readily have been amended to bring arbitral tribunals within the category of tribunals authorized to make preliminary references to the Court. That step was never taken. Even as the Commission was urging private parties to bring claims for damages against enterprises for their violations of EU competition law,³² knowing that at least some of those claims would be found to fall within the ambit of a broadly drafted arbitration clause, the carve-out remained intact.

The EU itself has thus been responsible for much of the distance dividing EU law and international arbitration practice. For its part, the international arbitration community had no particular interest in maintaining that separation but could not itself do much about it.³³ In any event, neither the Brussels Convention’s and the Brussels Regulation’s exclusion of judicial proceedings concerning arbitration nor arbitrators’ inability to make references to the Court prevented international arbitration

30. *Id.*

31. See *supra* note 10 and accompanying text; see also *Nordsee Deutsch*, [1982] E.C.R. 1095, ¶¶ 14–15.

32. See generally Commission of the European Communities, White Paper on Damages Actions for Breach of the EC Antitrust Rules, COM (2008) 165 Final (Apr. 2, 2008).

33. See *supra* notes 14–16 and accompanying text (discussing the New York Convention).

from entering into and remaining in a “golden age.”³⁴ EU law’s and arbitration’s coexistence, though awkward and even unnatural, prevailed.

II. *NEW INTERSECTIONS: A VIOLATION OF EU LAW AS A PUBLIC POLICY DEFENSE*

The landscape described above is, of late, changing in potentially dramatic ways, though its new contours are not yet clear. First, the Court of Justice has advanced a highly robust concept of European Union public policy.³⁵ This is a development with obvious implications for the outcome of actions to annul arbitral awards or to secure their recognition or enforcement.³⁶ Second, the Lisbon Treaty,³⁷ having made regulation of foreign direct investment an exclusive competence of the EU, opens up still another front on which EU law imperatives may operate to alter the international arbitration landscape, in this case, the rapidly growing field of investor-state arbitration.³⁸

There is nothing new in public policy constituting a ground upon which an otherwise proper arbitral award may be annulled in a court of the arbitral situs or denied recognition or enforcement elsewhere. That is standard fare, as evidenced by the New York Convention itself,³⁹ the United Nations Commission on International Trade (“UNCITRAL”) Model Law,⁴⁰ and the positive law of just about every jurisdiction in the world that experiences arbitration.⁴¹ (Under the Brussels

34. See Amr Shalakany, Book Review, 9 EUR. J. INT’L L. 576, 577 (1998) (reviewing RICHARD B LILlich & CHARLES N. BROWER, *INTERNATIONAL ARBITRATION IN THE 21ST CENTURY: TOWARDS ‘JUDICIALISATION’ AND UNIFORMITY?* (1994)); Caroline S. Richard, *Washington, DC: IFA-ASIL Conference—Arbitration: The End of the Golden Age*, GLOB. ARB. REV., Apr. 27, 2010, at 36, 36–37.

35. See *infra* Part II.A.2.

36. See *infra* notes 43–45 and accompanying text; see also *infra* Part II.A.2.

37. Treaty of Lisbon amending the Treaty on European Union and the Treaty Establishing the European Community, 2007 O.J. C 306/01 [hereinafter Lisbon Treaty].

38. See *infra* Part III.

39. New York Convention, *supra* note 14, art. V(2)(b).

40. U.N. Comm’n on Int’l Trade Law, UNCITRAL Model Law on International Commercial Arbitration, art. 34(2)(b)(ii), U.N. Doc. A/40/17/Annex I (June 21, 1985) [hereinafter UNCITRAL Model Law].

41. See GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 2620–33 (3d ed. 2009).

Regulation, it is even a ground on which a Member State court may withhold recognition or enforcement of another Member State's judgments.⁴²) Specifically, a Member State court may deny recognition or enforcement of a foreign award—even one rendered on the territory of another Member State—for violation of the former's public policy.⁴³

A. *The Notion of EU Public Policy*

EU Member States, like states generally, enjoy freedom to determine what does and does not rise to the level of public policy within their respective legal orders. If state sovereignty has any meaning at all, this must be among its features. However, the EU Member States find themselves in a peculiar position vis-à-vis public policy, due to the partial surrender of sovereignty that EU membership is commonly assumed to entail. The Court of Justice has taken the firm position that Member States must take EU law into account in determining what constitutes public policy within their legal orders. The setting in which the Court made this claim most explicit was none other than arbitration. In *Eco Swiss*, the Court ruled, among other things, that if a Member State treats offense to public policy as a ground for annulling a local award, it must equally treat offense to EU public policy as such a ground.⁴⁴ The Court readily found EU competition policy, practically as an entire field, entitled to public policy treatment in the context of award annulment at the national level.⁴⁵

The Court might have predicated this requirement on a generalized proposition that EU law takes primacy over national law. However, EU law primacy is a politically potent assertion that the Member States have never been fully willing to inscribe expressly in the founding treaties⁴⁶ and one that certainly has not

42. Council Regulation 44/2001, *supra* note 13, art. 34(1), at 10.

43. See, e.g., *id.*; New York Convention, *supra* note 14, art. V(2)(b); UNCITRAL Model Law, *supra* note 40, art. 34(2)(b)(ii).

44. *Eco Swiss China Time Ltd. v. Benetton Int'l NV*, Case C-126/97, [1999] E.C.R. I-3055, ¶ 37.

45. *Id.* ¶¶ 36–40. For reaffirmation of competition law's "public policy" status, see *T-Mobile Netherlands BV v. Raad van bestuur van de Nederlandse Mededingingsautoriteit*, Case C-8/08, [2009] E.C.R. I-4529, ¶ 49; *Manfredi v. Lloyd Adriatico Assicurazioni SpA*, Joined Cases C-295–98/04, [2006] ECR I-6619, ¶ 31.

46. A "primacy clause" has only appeared in the Treaty Establishing a Constitution for Europe, art. I-6, 2004 O.J. C 310/1, at 12 ("The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy

gone uncontested among the Member States.⁴⁷ The Court thus found a safer basis for this claim in the so-called “principle of equivalence.”⁴⁸ The Court had announced this principle essentially as a general proviso to an even more general principle that the Member States enjoy “procedural autonomy” in determining the ways in which their judiciaries implement and enforce EU law in cases coming before them.⁴⁹ The Court had made its concession of Member State procedural autonomy subject to two important limiting principles. One such norm was precisely the principle of equivalence, according to which Member States courts are not permitted to discriminate procedurally against legal claims derived from EU law as compared to their treatment of analogous claims derived from domestic law.⁵⁰ Through this “national treatment” rule of sorts, the Court sought to ensure that EU-law-based claims would receive no less favorable procedural consideration in the courts of Member States than comparable domestic law claims received.⁵¹ (The Court’s other limiting principle was the “principle of effectiveness,” according to which a Member State must in any event make available to individuals relying on EU law procedures and remedies that are adequate to ensure their enjoyment of the benefits that EU law affords them.⁵²)

The Court’s requirement in *Eco Swiss* that Member State courts give no less weight to EU public policy than to national public policy in the context of actions for the annulment of

over the law of the Member States.”). That instrument never entered into force due to negative referenda in several Member States. See BERMANN ET AL., *supra* note 24, at 28, 244–45. The Treaty of Lisbon did not carry such a provision into either the Treaty on European Union or the Treaty on the Functioning of the European Union. See *id.* at 244–45.

47. See BERMANN ET AL., *supra* note 24, at 279–310.

48. See *Van Schijndel v. Stichting Pensioenfonds voor Fysiotherapeuten*, Joined Cases C-430–431/93, [1995] E.C.R. I-4705, ¶¶ 13, 17; *Rewe-Zentralfinanz eG v. Landwirtschaftskammer für das Saarland (Cassis de Dijon)*, Case 33/76, [1976] E.C.R. 1989, ¶ 5.

49. See *Van Schijndel*, [1995] E.C.R. I-4705, ¶¶ 13, 17; *Cassis de Dijon*, [1976] E.C.R. 1989, ¶ 5.

50. See *Van Schijndel*, [1995] E.C.R. I-4705, ¶¶ 13, 17; *Cassis de Dijon*, [1976] E.C.R. 1989, ¶ 5.

51. *Van Schijndel*, [1995] E.C.R. I-4705, ¶¶ 13, 17; *Cassis de Dijon*, [1976] E.C.R. 1989, ¶ 5.

52. *Van Schijndel*, [1995] E.C.R. I-4705, ¶¶ 13, 17; *Cassis de Dijon*, [1976] E.C.R. 1989, ¶ 5.

arbitral awards is in fact little more than a corollary of the principle of equivalence, and to that extent is not particularly remarkable. But applying the principle of equivalence to public policy has vastly greater consequences than applying it to such purely procedural matters as the statute of limitations or rules on standing to sue. How far-reaching, after all, is EU public policy? More specifically, when is an EU law norm “merely” an EU law norm, and when does it attain the status of EU public policy? Might all of EU law constitute EU public policy? The stakes are considerable.

Applying the principle of equivalence to public policy in the arbitration context raises other complications as well. Courts are generally assumed to have authority to raise public policy *sua sponte* as a ground for setting aside or refusing recognition or enforcement of an arbitral award. The New York Convention⁵³ and the UNCITRAL Model Law⁵⁴ make that quite clear. However, it is also widely thought that none of the Model Law or convention grounds for setting aside or refusing recognition or enforcement of an award—not even public policy—is mandatory, in the sense that a court has no choice but to set aside or deny recognition or enforcement once the ground is established.⁵⁵ Rather, courts may—though they are highly unlikely to do so—choose to refrain from setting aside an award or from denying it recognition or enforcement even though they conclude that the award or its enforcement would offend public policy.⁵⁶ But may

53. See New York Convention, *supra* note 14, art. V(2)(b) (“Recognition and enforcement of an arbitral award may also be refused *if the competent authority* in the country where recognition and enforcement is sought *finds that . . .* (b) The recognition or enforcement of the award would be contrary to the public policy of that country.” (emphasis added)). Most of the grounds for denying recognition or enforcement of an award under the convention are preceded by the language: “Recognition and enforcement of an arbitral award may be refused, at the request of the party against whom it is invoked, *only if that party furnishes* to the competent authority where the recognition and enforcement is sought, *proof that . . .*” *Id.* art. V(1) (emphasis added).

54. See UNCITRAL Model Law, *supra* note 40, art. 34(2)(b)(ii) (“An arbitral award may be set aside . . . only if: . . . (b) *the court finds that . . .* (ii) the award is in conflict with the public policy of this State.” (emphasis added)). Most of the grounds for denying recognition or enforcement of an award under the Model Law are preceded by the language “An arbitral award may be set aside . . . only if (a) the party making the application furnishes proof that . . .” *Id.* art. 34(2)(a) (emphasis added).

55. The operative term in the New York Convention and in the UNCITRAL Model Law is the permissive “may.” See *supra* notes 53–54.

56. RESTATEMENT (THIRD) OF THE U.S. LAW OF INT’L COMMERCIAL ARBITRATION § 5-14(a) & cmt. c (Tentative Draft No. 2, 2010) [hereinafter RESTATEMENT].

Member State courts truly treat violation of EU public policy in that fashion? It is doubtful that they may, even though the principle of equivalence would seem to allow it. If this is so—i.e., if Member State courts may in the arbitration context “overlook” violations of domestic public policy, but may in no event “overlook” violations of EU public policy—then EU law will, to that extent, have turned the New York Convention’s and the UNCITRAL Model Law’s public policy ground from a permissive one into a mandatory one.

B. *What Constitutes EU Public Policy?*

Cases that have arisen since *Eco Swiss* have required the Court of Justice to start tracing more seriously the perimeters of EU public policy in the arbitration setting. In *Mostaza Claro v. Centro Móvil Milenium*,⁵⁷ the Court was asked to decide whether a Member State court hearing an action to set aside an award was required to determine whether the arbitration agreement that founded its jurisdiction to hear the case was unfair and unenforceable under the provisions of Directive 93/13 on unfair clauses in consumer contracts,⁵⁸ even if the respondent consumer never raised that claim during the arbitration.⁵⁹ In that case, a Spanish telecom company initiated arbitration against Mostaza Claro on account of its failure to comply with the minimum contractual period of its subscription. Although it had, by contract with the company, the right to insist on a judicial forum, it appeared in the arbitration without jurisdictional objection and interposed a defense, losing on the merits. At that point, Mostaza Claro brought annulment proceedings, arguing that the arbitration agreement from which the award stemmed was invalid under EU law because it was an unfair contract term within the meaning of Directive 93/13.⁶⁰ The national court felt called upon to revisit one of the questions that had arisen in *Eco Swiss* and on which a preliminary reference had been made in that case, but one which the Court of Justice in *Eco Swiss* had

57. *Mostaza Claro v. Centro Móvil Milenium*, Case C-168/05, [2006] E.C.R. I-10,421.

58. Council Directive 93/13/EEC on Unfair Terms in Consumer Contracts, 1993 O.J. L 95/29.

59. See *Mostaza Claro*, [2006] E.C.R. I-10,421, ¶ 20.

60. See *id.* ¶ 18.

found unnecessary to answer.⁶¹ (Since the annulment action in *Eco Swiss* was time barred under national law, and since application of the national limitations period offended neither the principle of equivalence nor the principle of effectiveness, the annulment action could not in any event go forward.)⁶² The question was a straightforward one: Must a Member State court in an action to annul an arbitral award entertain a claim that an arbitration agreement is void even if the party making that claim failed to raise that claim at any time during the arbitral proceedings themselves?

The Court of Justice's reasoning in *Mostaza Claro* built largely on its prior decision in *Océano Grupo Editorial SA v. Rocío Murciano Quintero*,⁶³ a case not involving arbitration. In *Océano Grupo*, a Member State court had been debating whether to invalidate a forum selection clause in a consumer contract that designated a court of the seller's place of business as the exclusive forum, on the ground that the clause was unfair within the meaning of Directive 93/13, despite the consumer's failure to raise that issue.⁶⁴ (The forum selection clause furnished the national court its only basis for jurisdiction.) The Court held in *Océano Grupo* that Member State courts are required to raise such a question sua sponte if necessary, specifically basing that result on the principle of effectiveness.⁶⁵ It described Article 6(1), which prohibited Member States courts from treating an unfair term as binding on the consumer,⁶⁶ as "a mandatory provision" and as "essential to the accomplishment of the tasks entrusted to the Community and, in particular to raising the standard of living and the quality of life in the territory."⁶⁷ The Court analogized the directive's importance to the EU to the importance it had

61. See *id.* ¶ 20; see also *Eco Swiss China Time Ltd. v. Benetton Int'l NV*, Case C-126/97, [1999] E.C.R. I-3055, ¶¶ 30, 42.

62. See *Eco Swiss*, [1999] E.C.R. I-3055, ¶¶ 43–48.

63. *Océano Grupo Editorial SA v. Rocío Murciano Quintero*, Joined Cases C-240–44/98, [2000] E.C.R. I-4941.

64. See *id.* ¶¶ 15–19.

65. See *id.* ¶¶ 25–29.

66. See Council Directive 93/13/EEC, *supra* note 58, art. 6(1) ("Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.").

67. See *Mostaza Claro*, [2006] E.C.R. I-10,421, ¶¶ 36–37.

ascribed in *Eco Swiss* to competition law and concluded that the effectiveness of Article 6(1) would be frustrated if Member State courts required the consumer himself or herself to challenge a contractual term's fairness.⁶⁸ The Court reaffirmed *Océano Grupo* on several occasions thereafter, both in connection with Directive 93/13⁶⁹ and with other consumer protection instruments.⁷⁰

Thus, largely on the *Océano Grupo* precedent, the Court in *Mostaza Claro* ruled that the mere failure of a party to raise the fairness issue in arbitration did not excuse the annulment court from raising that issue on its own motion.⁷¹ Presumably, the principle of effectiveness required the Member State court not only to raise the issue sua sponte, but also to annul an award if it found the arbitration agreement to be unfair within the meaning of the directive.

In *Mostaza Claro*, the Court relied secondarily on the principle of equivalence, holding in effect that that principle required the national legal order to give as full effect to EU public policy as it gives to domestic public policy.

[W]here its domestic rules of procedure require a national court to grant an application for annulment of an arbitration award where such an application is founded on failure to observe national rules of public policy, it must also grant such an application where it is founded on failure to comply with Community rules of this type.⁷²

The Court was less than fully clear on whether Spanish law itself required a court to raise a national public policy even though the consumer failed to do so, but presumably it did, or else the principle of equivalence would not justify the result that the Court reached. A fair reading of the case thus suggests that if any right is so fundamental under domestic law that public policy treats it as unwaivable, then an equally fundamental right under EU law must, as a matter of public policy, be treated as unwaivable as well. Presumably, the Court of Justice would decide

68. *See id.* ¶¶ 37–39.

69. *See, e.g.,* Pannon GSM Zrt v. Györfi, Case C-243/08, [2009] E.C.R. I-4713; Cofidis SA v. Fredout, Case C-473/00, [2002] E.C.R. I-10,875, ¶¶ 32–35.

70. *See, e.g.,* Rampion v. Franfinance SA, Case C-429/05, [2007] E.C.R. I-8017, ¶¶ 60–65 (holding that national courts must be able, of their own motion, to raise consumer claims arising under Directive 87/102 on consumer credit purchases).

71. *See Mostaza Claro*, [2006] E.C.R. I-10,421, ¶ 40.

72. *See id.* ¶ 35.

for itself which EU law norms attain the status of a fundamental right for these purposes.

The Court in *Mostaza Claro* did not assert that all EU law norms constitute public policy for purposes of the annulment of arbitral awards. As noted, it specifically characterized Article 6(1) of Directive 93/13 as “mandatory.”⁷³ However, Article 6(1) did not by its own terms declare itself to be mandatory. Rather, the Court merely inferred that conclusion from “[t]he nature and importance of the public interest underlying the protection which the Directive confers on consumers.”⁷⁴

The *Mostaza Claro* judgment clearly signals the Court of Justice’s readiness to determine on a field-by-field, and possibly on an enactment-by-enactment, basis whether the public interest underlying an EU law norm has “the nature and importance” sufficient to justify its violation being treated as necessarily a violation of EU public policy. That is a problematic exercise on its own terms, especially since the factors cited by the Court in reaching that conclusion—namely, the mandatory nature of the norm, its corresponding to a task of the EU enumerated in Article 3 of the then EC Treaty (in particular, the task of raising the standard of living and quality of life), and the importance of the underlying public interest—are potentially very widely applicable across EU law.⁷⁵ Indeed, the principles of proportionality and subsidiarity suggest that no EU legislative norm should even exist on a given subject unless it is an important one from the point of view of achieving the EU’s objectives and one that the Member States are incapable of effectively addressing themselves at the national level.⁷⁶ In any event, the greater the ease with which the Court of Justice concludes that an EU law norm is “mandatory,” as that term is used in *Mostaza Claro*, the greater the likely intrusion on Member States’ freedom to determine for themselves the content of public policy. It should be remembered that the role of public policy as a legal concept is hardly limited to the annulment and recognition or enforcement of arbitral awards. It is pervasive of a

73. See *id.* ¶ 36.

74. *Id.* ¶ 38.

75. See *id.* ¶¶ 36–38.

76. See generally George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331 (1994).

legal system, barring the enforcement of otherwise applicable legal norms and decisions across the board.⁷⁷

However, this Essay has a more focused concern, namely, the impact of EU public policy on the law and practice of international arbitration. It is virtually an article of faith that international arbitral awards are presumptively enforceable,⁷⁸ that the role of courts in arbitration is not to correct errors of fact or of law,⁷⁹ and that the grounds for annulling or denying recognition or enforcement of awards—including the public policy exception—are to be narrowly construed.⁸⁰ EU public policy undoubtedly has its place under the public policy umbrella that informs decisions of Member State courts on the annulment and denial of recognition or enforcement of awards. But that place needs definition, and it is the Court of Justice's responsibility to provide it.

This conclusion is only reinforced by the Court of Justice's more recent ruling in *Asturcom Telecomunicaciones SL v. Rodríguez Nogueira*.⁸¹ The facts in that case were essentially comparable to those in *Mostaza Claro*, subject to what turned out to be, in the Court's view, a critical distinction: in *Asturcom*, the consumer did not participate to any extent in the proceedings, and a final award ensued.⁸² Nor did the consumer take any action to have the resulting award annulled. Rather, the claimant telecom company sought the award's enforcement in a Spanish court, prompting a preliminary reference to the Court of Justice.⁸³ (It does not appear from the Court's judgment that the consumer even mounted a defense to the enforcement action in national court.)⁸⁴

77. See generally Monrad G. Paulsen & Michael I. Sovern, "Public Policy" in the Conflict of Laws, 56 COLUM. L. REV. 969 (1956).

78. See RESTATEMENT, *supra* note 56, § 5-6 (a) & cmt. a; see also BORN, *supra* note 41, at 2711.

79. See RESTATEMENT, *supra* note 56, § 5-6 cmt. c; see also BORN, *supra* note 41, at 2712-17, 2721-22, 2730-34, 2841-51.

80. See RESTATEMENT, *supra* note 56, § 5-14 cmts. a & b; see also BORN, *supra* note 41, at 2625-28, 2841-51.

81. *Asturcom Telecomunicaciones SL v. Rodríguez Nogueira*, Case C-40/08, [2009] E.C.R. I-9579.

82. See *id.* ¶ 33.

83. See *id.* ¶¶ 24-27.

84. See *id.* ¶¶ 22-23.

The Court of Justice once again analyzed the case in terms of both the principle of effectiveness and the principle of equivalence. Regarding the former, it found that Spanish law had offered the consumer the possibility of seeking the award's annulment and had given her a sufficiently long limitation period in which to do so.⁸⁵ It concluded in effect that requiring the Spanish court, under those circumstances, to abandon its principles on a matter as important as *res judicata* in order to make EU law marginally more effective would impose too great a price in terms of Member States' basic procedural autonomy.⁸⁶

Analysis under the principle of equivalence proved more difficult. On the one hand, the Court squarely held that if a Spanish court would assess of its own motion whether an arbitration clause conflicts with national rules of public policy, notwithstanding a party's failure to raise the issue at any stage, then it must be no less willing to do so in regard to EU rules of public policy.⁸⁷ The Court reiterated in this connection that Article 6(1) was both a "mandatory provision" and one that "is essential to the accomplishment of the tasks entrusted to the European Community and, in particular, to raising the standard of living and the quality of life throughout the Community."⁸⁸ Once again, due to "the nature and importance of the public interest underlying the protection" afforded by Directive 93/13, Article 6(1) had to be treated as the equivalent of national rules of public policy.⁸⁹ The national court in *Asturcom* needed only to confirm that, as appeared to be the case, Spanish courts would deny enforcement of an arbitral award on national public policy grounds under the circumstances presented in *Asturcom*.⁹⁰

From a general EU law point of view, the *Asturcom* judgment demonstrates the Court's recognition that, for all the demands it imposes on Member State law, the principle of effectiveness does have its limits in terms of its ability to compromise Member

85. See *id.* ¶¶ 39–47.

86. See *id.* ¶¶ 37–46.

87. See *id.* ¶¶ 51–54.

88. *Id.* ¶ 51.

89. *Id.* ¶ 52 ("Article 6 of the directive must be regarded as a provision of equal standing to national rules which rank, within the domestic legal system, as rules of public policy.").

90. See *id.* ¶¶ 55–56.

States' procedural autonomy.⁹¹ But even if the principle of effectiveness does not in itself require a national court to raise sua sponte the unfairness of a consumer contract term under a given set of circumstances, the principle of equivalence may do so. All that need be shown is that the particular remedy in question is one that the national court would afford if national public policy were at stake.⁹²

Given the breadth of EU law, and the potential for any branch of it to deserve public policy status in the eyes of the Court of Justice, Member State courts will frequently confront the question of the reach of EU public policy.⁹³ A Member State court may even feel obliged to raise that question if no litigant before it does. Questions concerning EU public policy abound. Surely not every EU law will necessarily receive public policy status.⁹⁴ But do the cases canvassed in this Essay suggest that at least all of EU consumer protection law has that status?⁹⁵ If consumer protection law, like competition law, has achieved that status, has EU environmental protection law, labor law, or occupational health and safety law done so as well? The contours

91. See *id.* ¶¶ 38–48.

92. *Id.* ¶¶ 52–54.

93. See Hanna Schebesta, *Does the National Court Know European Law? A Note on Ex Officio Application after Asturcom*, 4 EUR. REV. PRIVATE L. 847, 864–70 (2010).

94. In *Van der Weerd v. Minister van Landbouw, Natuur en Voedselkwaliteit*, Joined Cases C-222–25/05, [2007] E.C.R. I-4233, the Court determined that a national court is not required to raise on its own motion arguments based on an alleged violation of Directive 85/511 governing measures to control foot-and-mouth disease. According to the Court:

[T]he principle of effectiveness does not, in circumstances such as those which arise in the main proceedings, impose a duty on national courts to raise a plea based on a Community provision of their own motion, *irrespective of the importance of that provision to the Community legal order*, where the parties are given a genuine opportunity to raise a plea based on Community law before a national court.

Id. ¶ 41 (emphasis added). For the Court, clearly, not all provisions of EU law provisions have the same “importance . . . to the Community legal order.” *Id.*

95. In *Ingmar GB Ltd. v. Eaton Leonard Technologies Inc.*, Case C-381/98, [2000] E.C.R. I-9305, the Court held that a Member State court must disregard a choice of US law in a commercial agency contract if the effect of applying the chosen law would be to deprive a commercial agent of rights under Directive 86/653 on Protection of Self-Employed Commercial Agents. It described the directive’s protections as “mandatory,” explaining that “it is essential for the Community legal order that a principal established in a non-member country, whose commercial agent carries on his activity within the Community, cannot evade those provisions by the simple expedient of a choice-of-law clause.” *Id.* ¶¶ 21, 25.

of EU public policy remain undefined and the Court of Justice is unlikely to render them definite any time soon.

Exaggerated notions of public policy pose a particular threat to international arbitration on account of their assumed nonwaivability. The efficiency of international arbitration requires that parties bring their legal claims—procedural and substantive alike—before arbitral tribunals rather than reserve them for eventual judicial challenges to unfavorable awards. The threat of waiver in arbitration serves the generally salutary purpose of inducing parties to raise those claims on a timely basis. But it cannot continue to do so unless the public policy defense, even under the potent influence of EU law, is used sparingly.

III. *THE EUROPEAN UNION AND INVESTMENT ARBITRATION*

Even more conspicuous developments in the relationship between EU law and international arbitration are taking place in the foreign direct investment arena.⁹⁶ Here too, it is not too early to contemplate the consequences of these developments, though it is entirely too early to gauge their magnitude.

Traditionally, foreign investment law and policy were not considered to fall within the scope of the EU's common commercial policy—a domain in which the EU, exceptionally, has enjoyed competence exclusive of the Member States.⁹⁷ The EU accordingly could neither legislate within the field nor enter into international agreements, whether in the form of bilateral investment treaties (“BITs”) or otherwise. The arbitration activity resulting from the BITs was therefore also not, in principle, of EU concern.

This, of course, did not mean that a Member State's conduct in the foreign direct investment field could not run afoul of EU laws because Member States may not act in *any* field in a way that offends applicable EU law and policy.⁹⁸ Thus the Commission brought infringement proceedings against Austria, Finland, and Sweden on account of provisions in their BITs that the

96. See *infra* notes 104–09 and accompanying text.

97. See TFEU, *supra* note 1, art. 3(1)(e), 2010 O.J. C 83, at 51 (making the common commercial policy an exclusive Union competence); see also BERMANN ET AL., *supra* note 24, at 1091–94, 1181–82.

98. See *Costa v. ENEL*, Case 6/64, [1964] E.C.R. 585.

Commission thought incompatible with EU law, and the Court of Justice upheld the Commission's contention in each proceeding.⁹⁹ The Court held that these BITs' guarantees of the free and immediate transfer, in freely convertible currencies, of all payments due in connection with investments were incompatible with then EC Treaty Articles 57(2), 59, and 60(1),¹⁰⁰ which entitled the Council of the European Union ("Council") under stated circumstances to restrict the free movement of capital and payments between Member States and third countries.¹⁰¹ The defendant states were found to have failed in their obligations under EC Treaty Article 307(2)¹⁰² by not taking steps to eliminate the incompatibility.¹⁰³ Thus, even if foreign investment law did not as such fall within the Union's competence, actions taken by the Member States in pursuance of that reserved competence could run afoul of general EU law principles.

A. *EU Competence over Foreign Direct Investment*

Change, however, is afoot. The Treaty of Lisbon now gives the EU a central—indeed *the* central—role in foreign direct investment law and policy. Indeed, it brings foreign direct investment squarely within the scope of the common commercial policy, a domain in which the EU already enjoyed exclusive competence.¹⁰⁴ It is not yet entirely clear how the EU will exercise

99. *Commission v. Austria*, [2009] E.C.R. I-1301, ¶ 45; *Commission v. Sweden*, [2009] E.C.R. I-1335, ¶ 45; *Commission v. Finland*, [2009] E.C.R. I-10,889, ¶ 50.

100. Pursuant to the Treaty of Lisbon, these provisions, essentially unchanged, are now found in Articles 64, 66, and 75, respectively, of the TFEU. See TFEU, *supra* note 1, arts. 64, 66, & 75, 2010 O.J. C 83, at 72–73, 75.

101. *Austria*, [2009] E.C.R. I-1301, ¶¶ 35–43; *Sweden*, [2009] E.C.R. I-1335, ¶¶ 36–43; *Finland*, [2009] E.C.R. I-10,889, ¶¶ 38–43.

102. This provision is now found in Article 351 of the TFEU. See TFEU, *supra* note 1, art. 351, 2010 O.J. C 83, at 196.

103. See *Austria*, [2009] E.C.R. I-1301, ¶ 45; *Sweden*, [2009] E.C.R. I-1335, ¶ 45; *Finland*, [2009] E.C.R. I-10,889, ¶ 50.

104. See TFEU, *supra* note 1, art. 3(1)(e), 2010 O.J. C 83, at 51 (making the common commercial policy an exclusive Union competence); *id.* art. 207, at 140–41 (making foreign direct investment a component of the common commercial policy). TFEU Article 207(1) reads, in pertinent part, “The common commercial policy shall be based on uniform principles, particularly with regard to . . . commercial aspects of . . . foreign direct investment.” *Id.* art. 207(1), at 140. Article 2(1) of the TFEU defines “exclusive competence” as meaning that “only the Union may legislate and adopt legally

that competence,¹⁰⁵ or the extent to which it will authorize Member States—as it may under EU constitutional law¹⁰⁶—to continue acting within that sphere. But one can be sure that the EU will do a great deal more than police the Member States' BITs from the sidelines. Debate over a model EU BIT is already well underway,¹⁰⁷ and existing Member State BITs may be terminated or phased out.¹⁰⁸ Moreover, at least in the Commission's view, the EU (represented by the Commission) will not merely defend the actions of the EU institutions if challenged in investment disputes but will also be the sole defendant when Member State measures become the subject of

binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts." *Id.* art. 2(1), at 50.

105. In July 2010, the Commission issued a proposed regulation establishing transitional arrangements for bilateral investment agreements between Member States and third countries. *See* Commission of the European Communities, Proposal for a Regulation of the Parliament and Council Establishing Transitional Arrangements for Bilateral Investment Agreements between Member States and Third Countries, COM (2010) 344 Final (July 2010). The proposal, while affirming the Union's exclusive competence, contemplates that the EU may authorize Member States to keep in place existing BITs and even negotiate and enter into new ones, but only subject to Commission approval. The Commission may deny or revoke authorizations if it finds in the agreements incompatibilities with EU law, overlap with existing EU agreements with third countries, or obstacles to the development and implementation of an EU investment policy. To this end, Member States would have to submit the texts of proposed new BITs to the Commission for review prior to signature. *See id.* at 2; *see also* Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: Towards a Comprehensive European International Investment Policy, COM (2010) 343 Final (July 2010) [hereinafter Commission FDI Communication]. *See generally* Markus Burgstaller, *European Law and Investment Treaties*, 26 J. INT'L ARB. 181 (2009); Marc Bungenberg, *Centralizing European BIT Making under the Lisbon Treaty* (2008) (paper presented at the 2008 Biennial Interest Group Conference, Washington, D.C., Nov. 13–15, 2008), available at <http://www.asil.org/files/ielconferencepapers/bungenberg>.

106. The EU's exclusive competence does not in principle bar it from authorizing continuing Member State activity in the field in question. *See generally* KOEN LENAERTS & PIET VAN NUFFEL, *CONSTITUTIONAL LAW OF THE EUROPEAN UNION* (Robert Bray ed., 2d ed. 2005).

107. *See* Armand de Mestral, *Is a Model EU BIT Possible—or Even Desirable?*, COLUM. FDI PERSP. (Mar. 24, 2010), http://www.ciaonet.org/pbei/vcc/0018506/f_0018506_15859.pdf.

108. *See* Commission FDI Communication, *supra* note 105, at 5. The Commission estimates that Member States have entered into a total nearing 1200 BITs, which collectively account for almost half of the world's investment agreements currently in force. *See id.* at 4.

investment arbitration claims by investors within a Member State coming from third countries.¹⁰⁹

B. *Investor-State Arbitral Awards in Member State Courts*

This Essay, however, is not concerned so much with reconfigurations of competence within the EU for making and enforcing foreign investment law, important though that may be for the balance of power within the EU. It focuses instead on the impact that this shift may have on investment arbitration. With the conferral of exclusive EU competence in the foreign direct investment area will come not only authority to make new international agreements for the protection of investment and to occupy the front line in defending investment treaty claims, but also authority to elaborate autonomous foreign direct investment principles and policies, the content and strength of which cannot yet be known. According to the Commission, the EU will, among other things, seek to harmonize the level of protection that EU investors receive when investing abroad, while formulating investment principles that will allow it to take account of the political, institutional, and economic circumstances in particular countries.¹¹⁰ The Commission also expects to address other outward investment issues like market access, repatriation of profits, and protection of intellectual property rights. Meanwhile, policy on inward investment will be driven by considerations of job creation, resource allocation, and effects on trade and competition. To these and other ends, new legislation at the EU level is contemplated.¹¹¹

It is not too soon to recognize that Member State judiciaries may come to face dilemmas created by conflicting signals from the New York Convention and International Convention on the Settlement of Investment Disputes on the one hand and the foreign direct investment law and policy of the EU on the other. As noted, the demands that EU law has imposed thus far in the foreign investment field have been mostly marginal.¹¹² But as substantive EU policies in the field take shape, Member State judges will experience greater demands emanating from EU law.

109. *See id.* at 10.

110. *See id.* at 7.

111. *See id.* at 10.

112. *See supra* notes 98–103 and accompanying text.

The Commission has certainly taken the view that EU law prevails over any nonconforming BIT norm, and recent Court of Justice rulings, at least to some extent, support that position.¹¹³

The arbitration-related question that now presents itself merges with the public policy question discussed earlier in this Essay. At least outside the context of the International Centre for Settlement of Investment Disputes (ICSID)—in which courts have neither the possibility to annul awards nor to refuse their recognition or enforcement¹¹⁴—investor-state awards are as susceptible to annulment or denials of recognition and enforcement as any other species of international arbitral awards. The Member State courts before which these cases arise once again face two sets of imperatives: those flowing from their obligation to uphold, recognize, and enforce awards absent a good reason to do otherwise under prevailing arbitration treaties or statutes; and those flowing from their obligations to comply with all of European Union law. One does not know the likelihood of investor protection policy attaining the status that competition and consumer protection policy apparently enjoy within the hierarchy of EU legal norms; it need not, and, for the sake of the international law system, probably should not. But the answer to that question ultimately stands to determine whether and to what extent investor-state awards will run into difficulties in Member State courts.

CONCLUSION

Real connections are beginning to develop between EU law and international arbitration law—domains that for decades have pursued their own courses without much involvement of the other. The new fault lines, however, are only barely visible. The potential for notions of EU public policy, as elaborated by the Court of Justice, to render international arbitral awards more broadly susceptible to annulment, nonrecognition, and nonenforcement is already well documented in competition law and consumer protection fields. The only question is how far that

113. See, e.g., *Kadi v. Council and Commission*, Joined Cases C-402/05 P & C-415/05 P, [2008] E.C.R. I-6351.

114. See Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Oct. 17, 1966, 575 U.N.T.S. 159, arts. 52–53.

potential will develop and what its impact on international commercial arbitration will be.

In some respects, the Lisbon Treaty's expansion of the EU's exclusive competence over common commercial policy to include foreign investment is surer to bring about change. The EU stands to become the master of bilateral investment treaties within the European arena and the protagonist in defending claims arising out of inward investment. That alone is of moment. More speculative, but also more intriguing, is the question whether foreign investment law's having become EU law and EU law's claiming primacy over national law may ultimately subject Member State judges to demands from the Court of Justice that fit imperfectly with the demands of international arbitration law that they are long accustomed to respecting.