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Gabriel M. Lentner

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The Scope of the EU's Investment Competence after Lisbon

Siegfried Fina* & Gabriel M. Lentner*

* Professor Dr. Siegfried Fina is a Jean Monnet Professor of European Union Law and Associate Professor of European Union Law and Technology Law at the University of Vienna School of Law and Danube University Krems in Austria. Parallel to his academic work in Austria, Professor Fina serves as Visiting Professor of Law and Co-Director of the Stanford-Vienna Transatlantic Technology Law Forum at Stanford Law School

* Gabriel M. Lentner is Research and Teaching Fellow at Danube University Krems and a PhD candidate in International Law at the University of Vienna School of Law in Austria. Gabriel Lentner serves as an international Fellow of the Transatlantic Technology Law Forum at Stanford Law School.

Abstract:

Through the 2009 Lisbon Treaty, the Member States of the European Union conferred upon the EU new exclusive competences. The EU's common commercial policy was broadened to include foreign direct investment. However, the precise scope of the EU's new competence in the field of investment is not entirely clear. This presents EU decision makers in the various EU institutions with a multitude of complications. Building on the existing literature, the present paper analyses the scope of the EU's competences pertaining to investment in light of recent developments by drawing on precedents regarding the scope of EU competences and institutional practice. This paper argues that, taking into account the jurisprudence of the Court of Justice of the European Union, the new competence must be interpreted broadly, including the regulation of market access and material standards of protection and dispute settlement. The first part of this paper addresses the nature and definition of competence in EU law; the second part analyses the scope of the EU's investment competence. The analysis sheds light on divergent institutional opinions and is followed by a discussion of whether portfolio investments and protection standards as well as dispute settlement are covered by the EU's competences. The final part deals with future International Investment Agreements and negotiations in practice.

I. Introduction

Foreign direct investment is an essential component of the world economy. The global flows of foreign direct investment (FDI) amounted to an estimated 1.26 trillion US dollars in 2014.¹ The increased importance of global investment flows means that rules on investment promotion and protection are vital in stimulating trade relations and have a positive influence on the quality and quantity of investments.²

In recognition of these developments, the Member States of the European Union conferred upon the EU new exclusive competences through the Lisbon Treaty³ in

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1. U.N. CONF. ON TRADE & INT'L DEV. GLOBAL INVESTMENT TRENDS MONITOR No. 18 at 3, UNCTAD/WEB/DIAE/IA/2015/1, (Jan. 29, 2015), available at http://unctad.org/en/PublicationsLibrary/webdiaeia2015d1_en.pdf.
 2. Molly Leshner & Sébastien Miroudot, *The Economic Impact Of Investment Provisions In Regional Trade Agreements* (Org. for Econ. Cooperation & Dev., Working Paper No. 36, 2006). For a critical view, see, e.g. Gus Van Harten, *A Critique of Investment Treaties and Investor-State Arbitration*, 3 JURIDIKUM 338 (2013). For an interesting discussion of 20 years of the North American Free Trade Agreement (NAFTA) from different perspectives, see, e.g., Jorge G. Castaneda, *NAFTA's Mixed Record*, 93 FOREIGN AFFAIRS 134 (2014); Carla A. Hills, *NAFTA's Economic Upsides*, 93 FOREIGN AFFAIRS 122 (2014); Michael Wilson, *NAFTA's Unfinished Business* 93 FOREIGN AFFAIRS 128 (2014).
 3. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1 [hereinafter Lisbon Treaty].

2009.⁴ With regards to the Common Commercial Policy (i.e., the worldwide external trade-policy representation of the internal market of the EU), these competences were extended to include FDI.⁵ With this, FDI now squarely falls within the ambit of the EU's exclusive competences as part of its Common Commercial Policy (CCP) pursuant to Article 3(1)(e) of the Treaty on the Functioning of the European Union (TFEU). This means that negotiation and ratification of FDI-related treaties will now be conducted by the organs of the EU rather than by individual Member States.⁶ Overall, the inclusion of competences on foreign investment reflects a growing trend in international economic agreements such as Free Trade Agreements (FTAs) to also include rules on investment protection and promotion.⁷

However, the precise scope of the EU's new competence in the field of investment is not entirely clear and has already been the subject of countless discussions.⁸ This uncertainty presents EU decision makers in the various EU institutions with a multitude of complications,⁹ not least because the scope of this new competence directly affects the range of policy options available and thus the future shape of EU investment policy.¹⁰ It is therefore of utmost importance to determine the precise scope of the EU's investment competence.

Building on the existing literature, the present paper analyses the scope of the EU's competences pertaining to investment in light of recent developments. The paper conducts this analysis by drawing on precedents regarding the scope of EU competences and institutional practice. This paper then argues that the new competences must be interpreted broadly to include the regulation of market access and material standards of protection and dispute settlement, if one takes into account the jurisprudence of the Court of Justice of the European Union (CJEU, formerly the European Court of Justice, ECJ).

The first part of this paper addresses the nature and definition of competence in

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4. For an overview *see e.g.* EUROPEAN YEARBOOK OF INTERNATIONAL ECONOMIC LAW (SPECIAL ISSUE: INTERNATIONALL INVESTMENT LAW AND EUROPEAN LAW) (Marc Bungenberg, Jörn Griebel & Steffen Hindelang eds., 2011).
 5. *See* Consolidated Version of The Treaty on the Functioning of the European Union art. 207, May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU].
 6. Julie A Maupin, *Where Should Europe's Investment Path Lead? Reflections on August Reinisch, "Quo Vadis Europe?"*, 12 SANTA CLARA J. OF INT'L L. 183, 185 (2014).
 7. Marc Bungenberg, *The Division of Competences between the EU and Its Member States in the Area of Investment Politics*, in EUROPEAN YEARBOOK OF INTERNATIONAL ECONOMIC LAW 31 (Marc Bungenberg, Jörn Griebel & Steffen Hindelang eds., 2011).
 8. *See* August Reinisch, *The EU on the Investment Path - Quo Vadis Europe? The Future of EU BITs and other Investment Agreements*, 12 SANTA CLARA J. OF INT'L L. 111, 115 n.6 (2014).
 9. Mark A Clodfelter, *The Future Direction of Investment Agreements in the European Union*, 12 SANTA CLARA J. OF INT'L L. 159, 161 (2014).
 10. Boris Rigod, *"Global Europe": The EU's New Trade Policy in its Legal Context*, 18 COLUMBIA J. OF EUR. L. 277, 291 (2012).

EU law before the second part analyses the scope of the EU's investment competence. The analysis sheds light on divergent institutional opinions and is followed by a discussion of whether portfolio investments and protection standards as well as dispute settlement are covered by the EU's competences. The second part of this paper deals with future International Investment Agreements and negotiations in practice.

II. Competence in EU law

Before looking at the specifics of the EU's competences, it is important to distinguish between the capacity to enter into treaties and agreements under international law and the competence to do so. The former is one of the inherent and necessary attributes of international legal personality and is enjoyed (only) by subjects of international law.¹¹ The latter delimits the scope and extent of that capacity, particularly in the relationship between the EU and its Member States, and is therefore a question of internal EU law.¹² Only that capacity is of interest for present purposes.

To most U.S. lawyers, the issues relating to EU competences appear to be unnecessarily complicated.¹³ In the U.S. system, the U.S. Constitution grants the central government exclusive power in the area of foreign affairs.¹⁴

However, the legal system of the EU cannot be compared to the federal system of the U.S. with regard to its external powers. The EU's competences rest on the principle of conferral. Under article 5(2) Treaty on European Union (TEU), this means that "the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States."¹⁵ This principle also applies to the EU's external powers.¹⁶ This explains why a stand-off has developed between the Commission, Parliament, and the Member States pertaining to the exact scope of the new investment competence.¹⁷

11. The ICJ recognized that international organizations must be deemed to have the powers necessary for the exercise of their functions and the fulfilment of their purposes. *See* *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. 174, 182 (Apr. 11); *THE OXFORD ENCYCLOPAEDIA OF EUROPEAN COMMUNITY LAW* 521 (Akos G. Toth ed., 1991).

12. Toth, *supra* note 11 at 522.

13. Clodfelter, *supra* note 9, at 161.

14. *Id.*

15. TEU art. 5(2).

16. ANGELOS DIMOPOULOS, *EU FOREIGN INVESTMENT LAW* 67 (2011).

17. Colin Brown, *Changes in the Common Commercial Policy of the European Union After the Entry into Force of the Treaty of Lisbon: A Practitioner's Perspective*, in *EUROPEAN YEARBOOK OF INTERNATIONAL ECONOMIC LAW: COMMON COMMERCIAL POLICY AFTER LISBON* 174 (Marc Bungenberg & Christoph Herrmann eds., 2013).

On the one hand, Member States take the view that there is some form of competence for investment left with the Member States.¹⁸ On the other hand, the European Commission assumes a comprehensive and exclusive EU competence in the field of investment.

Such disagreement is not novel. The following will therefore carefully elaborate on the background of competence in EU law, in order to provide a deeper understanding of the underlying issues, before turning to the practical questions regarding the scope of the investment competence.¹⁹ First, the European Union does not enjoy *competence de la competence* (*Kompetenz-Kompetenz*).²⁰ Hence, the EU may only act within the limits set out by the Treaties.²¹ According to Article 5(2), it must act “within the limits of the competences conferred upon it by the Member States.”²² This principle of conferral²³ applies to “both the internal action and the international action of the [Union]”²⁴ since the Treaties do not distinguish between internal and external competences with regard to their constitutional nature.²⁵

Second, alongside the explicit competences, such as the CCP (Arts 206ff TFEU), the EU soon recognized the existence of its implied powers. Developed under international law,²⁶ the doctrine of implied powers provides for such implied competences which may be found by interpreting the explicit provisions on

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18. See Press Release, Council of the EU, Conclusions on a comprehensive European international investment policy, (October 25, 2010), available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/117328.pdf.
 19. For an interesting theoretical account of the term ‘competence,’ see Erich Vranes, *Die EU-Außenkompetenzen im Schnittpunkt von Europarecht, Völkerrecht und nationalem Recht*, 133 JURISTISCHE BLÄTTER 11 (2011).
 20. Bernhard Schima, *Art 5 EUV, in KOMMENTAR ZU EUV UND AEUV* ¶ 11 (Heinz Mayer ed., 2011); Jürgen Bast & Armin von Bogdandy, *Art 5 EUV, in DAS RECHT DER EUROPÄISCHEN UNION: KOMMENTAR* ¶ 6 (Eberhart Grabitz, Meinhard Hilf & Martin Nettesheim eds., 2014).
 21. DAMIAN CHALMERS; GARETH DAVIES & GIORGIO MONTI, *EUROPEAN UNION LAW: CASES AND MATERIALS* 637 (2d ed., 2010).
 22. TEU art. 5(2).
 23. Under international law it is a fundamental rule that international organizations may only exercise those powers that have been given to them. This principle is called the principle of conferred powers, or attributed powers, or the principle of speciality; often also the French expression *compétences d’attribution* is used. Legality of the Use by a State of Nuclear Weapons in Armed Conflict, 1996 I.C.J. 66 (July 8); see also Niels M Blokker, *International Organizations or Institutions, Implied Powers*, in MAX PLANCK ENCYCLOPAEDIA OF PUBLIC INTERNATIONAL LAW (Rüdiger Wolfrum ed., 2009).
 24. Opinion 2/94, *On Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms* 1996 E.C.R. I-1759, ¶ 24.
 25. Indeed, the CCP is listed under the Union’s exclusive competences in TFEU art. 3; cf. ROBERT SCHÜTZE, *EUROPEAN CONSTITUTIONAL LAW* 199 (2012).
 26. The International Court of Justice famously held that “[u]nder international law, an Organization must be deemed to have those powers which, though not expressly provided in the [constitutional] Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.” *Reparations for Injuries*, *supra* note 11, at 182; Blokker, *supra* note 23, ¶ C; JAMES CRAWFORD, *BROWNIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 188 (2012).

competences in connection with the purpose and aim of the treaties.²⁷ This was first recognized in the *ERTA* case²⁸ concerning the European Community's (EC) external powers, in which the court held that the EC's authority to enter into international agreements "may equally flow from other provisions of the Treaty and from measures adopted, within the framework of these provisions, by the Community institutions."²⁹ With the Treaty of Lisbon, this case law,³⁰ albeit controversial, was codified in TFEU article 216(1).³¹

Thus, in interpreting the scope of competences conferred to the Union by the Treaties, the Union has been embracing the constitutional technique of teleological interpretation (after initially following international law logic, i.e., *in dubio mitius*³²).³³ It is important to note that with the exception of *Germany v. European Parliament and Council of the European Union*,³⁴ the European Court of Justice has accepted all the teleological interpretations of Union competences by the legislator of the EU and has itself interpreted Union legislation in a teleological manner.³⁵ These precedents point to the continuance of such teleological interpretations with regards the new investment competence. Hence, when analysing the scope of the external competences of the EU, one must take into consideration the existing case-law of the European Courts.

III. The Scope of the EU's Competences for Investments

The EU's competence and decision-making rules pertaining to investment are provided in Article 207 of the CCP. Generally, the scope of the CCP, after the entry into force of the Lisbon amendments, covers all matters relating to trade in goods

27. Schima, *supra* note 20, ¶ 17.

28. Case 22/70, Commission of the European Communities v. Council of the European Communities, 1971 E.C.R. 263.

29. *Id.* ¶ 16.

30. *Id.*; Opinion 1/76, 1977 E.C.R. 741, 2 C.M.L.R. 279; Joined Cases 3, 4 & 6/76, Kramer et. al., 1976 E.C.R. 1279.

31. Chalmers, Davies & Monti, *supra* note 21, 640. For a critical view on the 'attempt' to codify this case law, see e.g. Marise Cremona, *A Constitutional Basis for Effective External Action? An Assessment of the Provisions on EU External Action in the Constitutional Treaty*, (Eur. U. Inst. Working Paper, Nov. 30, 2006).

32. Case 8/55, Federation Charbonniere de Belgique v. High Authority of the European Coal and Steel Community; 1955 E.C.R. 245.

33. Schütze, *supra* note 25, 155. See, most famously, Case C-84/94, United Kingdom of Great Britain and Northern Ireland v. Council, 1996 E.C.R. I-5755.

34. Case 376/98, Federal Republic of Germany v. European Parliament and Council of the European Union, 2000 E.C.R. I-08419.

35. Case 376/98, Federal Republic of Germany v. European Parliament and Council of the European Union, 2000 E.C.R. I-08419. For accepting teleological interpretations of EU competences see e.g. Casagrande v. Landeshauptstadt München, Case 9/74 E.C.R. 773 (1974); United Kingdom of Great Britain and Northern Ireland v. Council, Case C-84/94 E.C.R. I-5 755 (1996).

and services, commercial aspects of intellectual property, and FDI pursuant to Article 207(1) TFEU.³⁶ The EU is hence expressly entitled to adopt unilateral measures and conclude international agreements in that regard.³⁷

Article 207(6) TFEU then establishes two general external limits to the CCP.³⁸ First, the exercise of the CCP competence “shall not affect the delimitation of competences between the Union and the Member States.” This indicates an explicit rejection of the reasoning of the United States Supreme Court decision in *State of Missouri v Holland*.³⁹ In *Holland*, a 1920 decision, the Supreme Court held that Congress is empowered under the Constitution to implement treaties through federal law, even if those laws were otherwise beyond Congress’s other Article I powers. TFEU article 207(6) makes clear that the EU’s CCP competence should find a systemic limit in the internal competences of the EU.⁴⁰ Furthermore, the exercise of the CCP competence is not supposed to lead to harmonization of national provisions, where the treaties exclude such harmonization. This incorporates the “express saving clauses” found in other policy areas into the CCP.⁴¹

A. Legislative History

Before the entry into force of the Lisbon treaty, the then-EC had neither express nor implied exclusive competences in the area of international investment.⁴² The EC possessed only shared competences in the field of international investment.⁴³ On this basis, the EC has negotiated agreements covering investment in services and acted in the field of investment pertaining to access/admission rules.⁴⁴ Competences regarding investment protection and protection against unfair or uncompensated

36. Robert Schütze, *European Community and Union, Decision-Making and Competences on International Law Issues*, iMAX PLANCK ENCYCLOPAEDIA OF PUBLIC INTERNATIONAL LAW ¶ 6 (Rüdiger Wolfrum ed., 2011).

37. *Id.*

38. *Id.* ¶ 7.

39. *State of Missouri v. Holland*, 252 U.S. 416 (1920); Schütze, *supra* note 36.

40. Schütze, *supra* note 36; Thomas Cottier & Lorena Trinberg, *Artikel 207 AEUV*, in *EUROPÄISCHES UNIONSRECHT* ¶ 146 (Hans von der Groeben, Jürgen Schwarze & Armin Hatje eds., 7th ed., 2015).

41. See Schütze, *supra* note 36.

42. Wenhua Shan & Sheng Zhang, *The Treaty of Lisbon: Half Way toward a Common Investment Policy*, 21 *EUR. J. OF INT'L L.* 1049, 1050 (2010).

43. “All Union agreements, including foreign investment provisions, are mixed agreements, without including a declaration of competence, providing only in a general manner that the EU and its Member States act within the scope of their respective competence.” ANGELOS DIMOPOULOS, *EU FOREIGN INVESTMENT LAW* 66 (2011); Wenhua Shan, *Towards a Common European Community Policy on Investment Issues*, 2 *J. OF WORLD INVESTMENT* 603 (2001).

44. Niklas Maydell, *The European Community's Minimum Platform on Investment or the Trojan Horse of Investment Competence*, in *INTERNATIONAL INVESTMENT LAW IN CONTEXT* 73-92 (August Reinisch & Christina Knahr eds., 2008).

expropriation remained with the Member States, which concluded Bilateral Investment Treaties to that effect.⁴⁵ This meant that, unlike the US, the EU has not included comprehensive investment provisions covering liberalization and investment protection in any preferential trade agreements.⁴⁶

Most EU Member States' governments believed that a comprehensive investment competence was necessary to adapt to the realities of the world economy.⁴⁷ In recognition of the fact that financial flows supplement trade in goods, and today they represent a significant share of commercial exchanges, the governments decided to extend the exclusive competences provided by the CCP.⁴⁸ However, it was only at a later stage that the European Convention for a Treaty Establishing a Constitution for Europe included in its proposal the competences for FDI in the CCP chapter.⁴⁹ The reason why it was eventually included may be explained in light of the negotiations surrounding the WTO Doha Round, where investment policy was initially on the agenda. The FDI competence was therefore necessary for the EU to conclude any final agreements in Doha.⁵⁰

Its inclusion was not uncontested, however. The German and the French foreign ministers of that time, along with other delegates, suggested, without success, that FDI be deleted from the CCP chapter.⁵¹ Surprisingly, FDI was preserved as it stood in the Constitutional Treaty even during the Lisbon Treaty negotiations, although its consequences were already being discussed,⁵² and investment policy was removed from the WTO Doha Agenda in 2003.⁵³ Eventually, the wording of Article 207 of the TFEU identically reflected Article III-315 of the

45. Stephen Woolcock, *EU Trade and Investment Policymaking After the Lisbon Treaty*, 45 *INTERECONOMICS* 22, 23 (2010).

46. *Id.*

47. Wolfgang Weiß, *Art 206 TFEU*, in *DAS RECHT DER EUROPÄISCHEN UNION: KOMMENTAR* ¶ 2 (Eberhart Grabitz, Meinhard Hilf & Martin Nettesheim eds., 2011).

48. Draft Articles on External Action in the Constitutional Treaty, CONV 685/03, 23 Apr. 2003, at 54 available at <http://european-convention.europa.eu/pdf/reg/en/03/cv00/cv00685.en03.pdf>.

49. Marc Bungenberg, *The Division of Competences between the EU and Its Member States in the Area of Investment Politics*, in *EUROPEAN YEARBOOK OF INTERNATIONAL ECONOMIC LAW* 30-31 (Marc Bungenberg, Jörn Griebel & Steffen Hindelang eds., 2011).

50. *Id.*

51. Reinisch, *supra* note 8, at 2.

52. JAN CEYSSENS, *TOWARDS A COMMON FOREIGN INVESTMENT POLICY?—FOREIGN INVESTMENT IN THE EUROPEAN CONSTITUTION*, 32 *Legal Issues Of Econ. Integration* 259, 278FF (2005); JOACHIM KARL, *THE COMPETENCE FOR FOREIGN DIRECT INVESTMENT: NEW POWERS FOR THE EUROPEAN UNION?*, 5 *J. OF WORLD INVESTMENT AND TRADE* 413FF (2004).

53. See for example: Paul Sauvé, *Multilateral Rules on Investment: Is forward Movement Possible?*, 9 *J. OF INT'L ECON. L.* 325 (2006). On the Cancun Ministerial Summit in general see e.g. Jagdish Bhagwati, *Don't Cry for Cancun*, 83 *FOREIGN AFFAIRS* 52 (2004); Razeen Sally, *The End of the Road for the WTO?* 5 *WORLD ECONOMICS* 1 (2004); Bungenberg, *supra* note 7, at 31.

Draft Treaty Establishing a Constitution for Europe⁵⁴ with regards to the FDI competence.

B. Foreign Direct Investment (Article 207 TFEU)

The text of Article 207 of the TFEU, regarding the CCP, follows the former Article 131 of the Treaty of the European Community (TEC) but it adds the words “foreign direct investment” in parallel to “international trade” as the areas in which the Union intends to progressively prohibit restrictions.⁵⁵ Pursuant to TFEU Article 3(1)(e), as the EU enjoys exclusive competence in the entire CCP, this also covers FDI.⁵⁶

The inclusion of FDI in the CCP has attracted great interest and discussion among European and international scholars,⁵⁷ mostly because there is neither any definition of the term “foreign direct investment” in the treaties, nor any clarification of the exact scope of the FDI competence under the CCP.⁵⁸ A more precise definition would have been desirable, since foreign direct investment in practice necessitates a broad regulatory framework.⁵⁹ It is questionable, however, whether all aspects of the regulation of foreign investment are covered by the FDI competence as included in the TFEU.

Since the relevant provisions do not provide any guidance regarding the scope of the new investment competence, five main interpretations have been advanced.⁶⁰ The interpretation put forward here follows the so-called “Comprehensive FDI Competence” Interpretation,⁶¹ which provides for an exclusive EU competence to enter into international obligations similar to those included in the U.S. Free-Trade Agreements.⁶² This interpretation covers admission, capital movement (transfer), post-admission treatment including fair and equitable treatment (FET),

54. Draft Treaty Establishing a Constitution for Europe as approved by the Intergovernmental Conference, Jun. 18, 2004, OJ C310/01, available at: <http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2004:310:SOM:EN:HTML>.

55. Shan and Zhang, *supra* note 42, 1058.

56. Rafael Leal-Arcas, *The European Union's new common commercial policy after the Treaty of Lisbon*, in *THE TREATY OF LISBON AND THE FUTURE OF EUROPEAN LAW AND POLICY* 271 (Martin Trybus & Luca Rubini eds., 2012).

57. See Reinisch, *supra* note 8.

58. Shan & Zhang, *supra* note 42, 1058.

59. Wolfgang Weiß, Art 207 AEUV, in *DAS RECHT DER EUROPÄISCHEN UNION: KOMMENTAR* ¶ 40 (Eberhart Grabitz, Meinhard Hilf & Martin Nettesheim eds., 2011).

60. For an overview, see Shan & Zhang, *supra* note 42, at 1061ff (with further references).

61. *Cf id.* at 1064.

62. Marc Bungenberg, *Going Global? The EU Common Commercial Policy After Lisbon*, in *EUROPEAN YEARBOOK OF INTERNATIONAL ECONOMIC LAW* 143 (Christoph Herrmann & Jörg Philipp Terhechte eds., 2010).

performance requirements and free movement of key personnel, compensation for expropriation, and investor–state dispute settlement.⁶³ Indeed, the European Commission assumes that all such issues typically regulated in bilateral investment treaties (BITs) fall under this new exclusive competence of the EU.⁶⁴ It should be noted that the Council adopts a contrary view and insists on national rather than EU competences regarding the protection of expropriation and dispute resolution clauses.⁶⁵ These issues are addressed in the following sections.

1. *Definition of Investment*

The concept of “investment” is not clearly established in international investment law.⁶⁶ Most modern BITs adopt a broad definition of investment.⁶⁷ For example, an ICSID arbitral tribunal described it in the *Salini Costruttori* case as the following:

The doctrine generally considers that investment infers: contributions, as certain duration of performance of the contract and a participation in the risks of the transaction . . . [and] the contribution to the economic development of the host State of the investment.⁶⁸

Here, a distinction between portfolio investments and FDI is generally accepted,⁶⁹ with the distinguishing factors being durability and influence in decision-making processes. FDI usually creates durable economic ties and is directed by long-term profits,⁷⁰ whereas portfolio investment focuses on establishing rather short-term relationships between an investor and the enterprise and are focused on earnings emanating from the acquisition as well as sales of shares and other securities.⁷¹

European law has traditionally distinguished between direct investment and

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63. Angelos Dimopoulos, *The Common Commercial Policy after Lisbon: Establishing Parallelism between Internal and External Economic Relations?* 4 CROATIAN YEARBOOK OF EUR. L. AND POLY 23-25 (2008); cf. Shan and Zhang *supra* note 42, 1064.
64. Nikos Lavranos, *New Developments in the Interaction between International Investment Law and EU Law*, 9 L. & PRAC. OF INT'L CTS. & TRIBUNALS 409, 412 (2010).
65. Frank Hoffmeister, *Aktuelle Rechtsfragen in der Praxis der europäischen Außenhandelspolitik*, ZEITSCHRIFT FÜR EUROPARECHTLICHE STUDIEN 385, 391 (2013).
66. Christoph Schreuer, *Investments, international protection*, in MAX PLANCK ENCYCLOPAEDIA OF PUBLIC INTERNATIONAL LAW ¶36 (Rüdiger Wolfrum ed., 2011); Michael Hwang S.C., *Recent Developments in Defining “Investment”*, 25 ICSID REV. FOREIGN INV. L. J. 21-25 (2010).
67. August Reinisch, *Future Shape of EU Investment Agreements*, 28 ICSID REV. FOREIGN INV. L. J. 181 (2013).
68. *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 52 (July 23, 2001).
69. See RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 64 (2008).
70. IMF, *BALANCE OF PAYMENTS AND INTERNATIONAL INVESTMENT POSITION MANUAL* 86 (6th ed., 2011), available at <http://www.imf.org/external/np/sta/bop/bopman.pdf>.
71. OECD, *BENCHMARK DEFINITION OF FOREIGN DIRECT INVESTMENT* 22 (4th ed., 2008), available at <http://www.oecd.org/dataoecd/26/50/40193734.pdf>.

indirect or portfolio investment.⁷² The ECJ's interpretation of the term "direct investment"⁷³—as formerly used in article 57(2) of the TEC and now article 64(2) of the TFEU, in accordance with Directive 88/361/EEC⁷⁴—follows this distinction.⁷⁵ The International Monetary Fund⁷⁶ (IMF) and the Organization for Economic Co-operation and Development⁷⁷ (OECD) have similarly defined foreign direct investment.⁷⁸ Based on these definitions, FDI is understood as requiring the establishment of lasting direct relations between the investor and the company in question, which is satisfied when the owned shares or voting power amounts to at least 10 per cent.⁷⁹

In its much-debated Lisbon Judgment, the German Constitutional Court (Bundesverfassungsgericht) wrote—citing a commentator⁸⁰—that “[m]uch, however, argues in favour of assuming that the term ‘foreign direct investment’ only encompasses investment which serves to obtain a controlling interest in an enterprise.”⁸¹ It concluded that investment protection agreements that cover portfolio investments would have to be concluded as mixed agreements and therefore would have to be negotiated and concluded by not only the EU but also by its individual Member States.⁸²

Different arguments have been made in response. On the one hand, the argument that TFEU article 207(1) does not encompass portfolio investments is compelling,

72. Weiß, *supra* note 59, ¶46.

73. Case C-446/04, *Test Claimants in the FII Group Litig. v. Comm'rs of Inland Revenue*, 2006 E.C.R. I-11753, ¶ 177.

74. Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty, 1988 O.J. (L 178) 5.

75. See Case C-112/05, *Commission v. Germany*, 2007 E.C.R. I-08995, ¶ 18; Case C-174/04, *Commission v. Italy*, 2005 E.C.R. I-04933, ¶ 28; *Commission v Netherlands*, Joined cases C-282/04 & C-283/04, 2006 E.C.R. I-9141, ¶ 19.

76. The IMF defines ‘direct investment’ as reflecting the objective of obtaining a lasting interest by an entity resident in one country in an enterprise resident in another economy. The lasting interest implies the existence of a long-term relationship between the direct investor and the enterprise and a significant degree of influence by the investor on the management of the enterprise: IMF, *Balance Of Payment Manual* (5th ed., 1993), available at www.imf.org/external/pubs/ft/bopman/bopman.pdf.

77. See OECD, *BENCHMARK DEFINITION OF FOREIGN DIRECT INVESTMENT* 48(4th ed., 2008).

78. Shan & Zhang, *supra* note 42, at 1059.

79. Clodfelter, *supra* note 9, at 660 pointing out that “[t]he 10 per cent benchmark has been characterised as having indicative value, further indications, which may be relevant in an overall assessment, comprising criteria such as the representation of an investor in the Board of Directors, participation in the policy-making process, inter-company transactions, interchange of managerial personnel, provision of technical information, and provision of long-term loans at lower than existing market rates.” *Id.* with further references.

80. CHRISTIAN TIETJE, *DIE AUSSENWIRTSCHAFTSVERFASSUNG DER EU NACH DEM VERTRAG VON LISSABON* (2009).

81. Lisbon Treaty Judgment, BVerfG, 2 BvE 2/08, June 30, 2009, par. 379, available at http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html.

82. For the contrary view, see e.g., Hoffmeister, *supra* note 65, at 390.

since any other interpretation would disregard the explicit wording of “foreign *direct* investment” in that article.⁸³ On the other hand, Hoffmeister argues for an exclusive competence also covering portfolio investments on the basis of article 207(1), invoking an *argumentum a maiore ad minus*: If the ‘strong’ form of investments, i.e., direct investments, are covered by the competence, the less intensive version of investments, i.e., portfolio investments, must be covered as well.⁸⁴ Indeed, most modern BIT’s include both direct and indirect investments. As a result, limiting the scope of the investment competence to only FDI would effectively render the inclusion of investment as an exclusive competence within the ambit of the CCP devoid of any practical meaning.⁸⁵ Additionally, any other interpretation would run counter to the clear intention of the drafters “to maximise the coherence and efficiency of EU external action.”⁸⁶

An exclusive competence covering portfolio investments may also be found in TFEU Articles 63ff in connection with article 3(2).⁸⁷ Article 63 provides that the movement of capital between Member States of the Union and third countries shall be free of restrictions, including also portfolio investments.⁸⁸ Article 3(2) provides for

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83. See also Jörg Philipp Terhechte, *Article 351 TFEU: The Principle of Loyalty and the Future Role of the Member States' Bilateral Investment Treaties*, in EUROPEAN YEARBOOK OF INTERNATIONAL ECONOMIC LAW 79 (Christoph Herrmann & Jörg Philipp Terhechte eds., 2011). See also Jan Asmus Bischoff, *Just a Little BIT of “Mixity”?* *The EU's Role in the Field of International Investment Protection Law*, 48 COMMON MARKET L. REV. 1537 (2011); Julien Chaisse, *Promises and Pitfalls of the European Union Policy on Foreign Investment—How will the New EU Competence on FDI affect the Emerging Global Regime?*, 15 J. OF INT'L ECON. L. 51, 58 (2012); Christian Tietje, *Die Gemeinsame Handelspolitik der EU im System des Welthandelsrechts: ein Spannungsverhältnis zwischen fortschreitender Liberalisierung und zunehmendem Protektionismus*, in EUROPÄISCHE UNION NACH LISSABON: BEITRÄGE ZU ORGANISATION, AUSSENBEZIEHUNGEN UND STELLUNG IM WELTHANDELSRECHT 51 (Meinhard Hilf & Eckhard Pache eds., 2009); Marc Bungenberg, *Going Global? The EU Common Commercial Policy After Lisbon*, in EUROPEAN YEARBOOK OF INTERNATIONAL ECONOMIC LAW 146f (Christoph Herrmann & Jörg Philipp Terhechte eds., 2010); Till Müller-Ibold, *Vorbem Art 206-207 AEUV*, in EU-VERTRÄGE, KOMMENTAR ¶ 19 (Carl-Otto Lenz & Klaus Dieter Borchardt eds., 5th ed. 2010); Christoph Ohler, *Die Umsetzung der Gemeinsamen Handelspolitik nach dem Vertrag von Lissabon*, in RECHTSFRAGEN DER IMPLEMENTIERUNG DES VERTRAGS VON LISSABON 431 (Thomas Eilmansberger, Stefan Griller & Walter Obwexer eds., 2011).
84. Hoffmeister, *supra* note 65, at 385; Frank Hoffmeister, *Wider die German Angst – Ein Plädoyer für die transatlantische Handels- und Investitionspartnerschaft (TTIP)*, 53 ARCHIV DES VÖLKERRECHTS 56 (2015).
85. Similarly Hoffmeister, *Wider die German Angst*, *supra* note 84, at 56.
86. *Final Report Of Working Group VII On External Action*, CONV 459/02 (Dec 16, 2002), at 16, ¶ 19, available at <http://www.europarl.europa.eu/meetdocs/committees/deve/20030218/489393EN.pdf>. Hoffmeister, *Wider die German Angst*, *supra* note 84, at 56.
87. Vranes, *supra* note 19, at 15; Hoffmeister, *Wider die German Angst*, *supra* note 84, at 56-57; *European 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*, at 3, COM (2012) 335 final (June 21, 2012).
88. This includes portfolio investments, *see* Directive of the Council 88/361, O.J. 1988, L 178/5, Annex 1 and ECJ, Case 282/04 and 283/04, *Commission v. Netherlands*, ECLI:EU:C:2007: 608, ¶ 9.

the exclusive competence of the Union whenever rules included in an international agreement “may affect common rules or alter their scope.”⁸⁹ For portfolio investments, the series of company law and capital market Directives⁹⁰ establish such a harmonized regulatory framework, which would be affected by provisions generally included in investment agreements.⁹¹ Thus, in line with the Commission’s view,⁹² the EU enjoys an exclusive competence over matters of portfolio investment.⁹³

Supporting this conclusion, the established EU doctrine of implied powers (now codified in Article 216(1) of the TFEU) suggests that the expansive teleological⁹⁴ interpretation adopted by the European Courts⁹⁵ is likely to be continued.⁹⁶ It is therefore very probable that the Court, when called to rule on this issue, will consider portfolio investments to be within the EU’s implied external powers on the basis of Articles 63 and 64 of the TFEU.⁹⁷

In practice, the Council of the EU has provided the Commission with a mandate

89. Critically *see* among many Weiß, *supra* note 59, ¶ 46.

90. *E.g.* Directive 2001/34/EC on the admission of securities to official stock exchange listing and on information to be published on those securities, 2001 O.J. L184/1; Directive 85/611/EEC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), 1985 O.J. L375/3; Directive 2001/108/EC amending Council Directive 85/611/EEC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), with regard to investments of UCITS, 2002 O.J. L41/35; Directive 2004/39/EC on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC, 2004 O.J. L145/1.

91. Hoffmeister, *Wider die German Angst*, *supra* note 84, at 57. For the opposite conclusion, arguing that Member States still retain considerable powers in light of the broad scope of regulatory measures affecting portfolio investment, *see e.g.* Dimopoulos, *supra* note 43, at 105.

92. The European Parliament appears to generally share this approach, *see* Resolution of the European Parliament of 6.4.2011, ¶ 11.

93. For an authority sharing this view, *see* Hoffmeister, *Wider die German Angst*, *supra* note 84, at 57.

94. Indeed, the European Court has accepted almost all teleological interpretations of EU competences, *see, e.g.* Case C-9/74, *Casagrande v. Landeshauptstadt München*, 1974 E.C.R. 773; Case C-84/94, *United Kingdom of Great Britain and Northern Ireland v. Council*, 1996 E.C.R. I-5 755.

95. *See* Case 22/70, *Commission of the European Communities v. Council of the European Communities*, 1971 E.C.R. 263. In this so-called ERTA Case the ECJ affirmed the implied powers doctrine by stating that the authority to enter into international agreements “arises not only from an express conferment by the Treaty but may equally flow implicitly from other provisions of the Treaty, from the act of accession and from measures adopted within the framework of those provisions, by the Community institutions.”; *see also* Opinion 2/91, *Convention No. 170 of the International Labour Organization*, 1993 E.C.R. I-1061 (“Authority to enter into international commitments may not only arise from an express attribution by the Treaty, but may also flow implicitly from its provisions [. . .] whenever Community law created for the institutions of the Community powers within its internal system for the purpose of attaining a specific objective, the Community had authority to enter into the international commitments necessary for the attainment of that objective even in the absence of an express provision in that connection.”).

96. Reinisch, *supra* note 8, at 141.

97. *Id.*

pertaining to current investment treaty negotiations to include also portfolio investments. The Council has, however, retained its right to conclude such agreements as so-called mixed agreements (i.e., agreements negotiated and concluded by both the EU and its Member States).⁹⁸

2. Investment Protection

Another contested issue is the question of whether the new investment competence only covers the liberalization of investment (i.e., the pre-establishment phase) or covers post-establishment measures and protection as well.⁹⁹ Past investment-related agreements of the EC/EU were limited to that of admission, in which a GATS-inspired market access approach was adopted.¹⁰⁰ However, the Commission now takes the view that the new EU's investment power covers not only investment access/admission matters (generally not regulated by BITs)¹⁰¹ but also comprises all standards of investment protection included in International Investment Agreements (IIAs) or BITs, respectively (including expropriation).¹⁰² While this assertion by the Commission has been challenged,¹⁰³ it must be noted that, as is reflected in the ECJ's Opinion 1/78, the objective of the CCP is not confined to trade liberalization but also covers trade regulation.¹⁰⁴ Thus, the new FDI competence should be interpreted as also covering investment protection and

98. Hoffmeister, *supra* note 65, 391.

99. DAVID KLEIMANN, CENTER FOR EUROPEAN POLICY STUDIES, TAKING STOCK: EU COMMON COMMERCIAL POLICY IN THE LISBON ERA, (April 29, 2011), *available at* <http://www.ceps.eu/system/files/book/2011/04/WD%20345%20Kleimann%20on%20EU%20CCP.pdf>.

100. CHRISTIAN TIETJE, DIE AUSSENWIRTSCHAFTSVERFASSUNG DER EU NACH DEM VERTRAG VON LISSABON 14 (2009).

101. See e.g. Dolzer & Schreuer, *supra* note 69, at 79ff.

102. *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*, COM (2012) 335 final, at 3 *available at* http://trade.ec.europa.eu/doclib/docs/2012/june/tradoc_149567.pdf.

103. See further Reinisch, *supra* note 8, 131; Tietje, *supra* note 100; T. R. Braun, *Füreinen komplementären, europäischen Investitionsschutz*, in *INTERNATIONALER INVESTITIONSSCHUTZ UND EUROPARECHT* 191 (Marc Bungenberg, et al. eds., 2010). For a discussion of different interpretations see Shan and Zhang, *supra* note 42, at 1061; SVEN JOHANNSEN & ERIK LEIF, *DIE KOMPETENZ DER EUROPÄISCHEN UNION FÜR AUSLÄNDISCHE DIREKTINVESTITIONEN NACH DEM VERTRAG VON LISSABON* 15 (2009).

104. Opinion 1/78, Natural Rubber Agreement, 1979 E.C.R. 2871, at ¶¶ 39–49. In this opinion, the ECJ stated: “A ‘commercial policy’ understood in that sense would be destined to become nugatory in the course of time. Although it may be thought that at the time when the EC treaty was drafted liberalization of trade was the dominant idea, it nevertheless does not form a barrier to the possibility of the Community’s developing a commercial policy aiming at a regulation of the world market for certain products rather than at a mere liberalization of trade.”

regulation measures.¹⁰⁵

In supporting its claim, the Commission invokes the case law of the ECJ, which has consistently held that the Union's competence for the common commercial policy includes obligations that apply to post-establishment matters even when Member States retain the possibility of adopting internal rules.¹⁰⁶ It is thus well-established that the Union's competence in the field of trade in goods also covers post-importation matters, such as the granting of national treatment and most favored nation treatment in respect of taxes and other internal laws and regulations, or the abolition of unnecessary obstacles to trade arising from technical regulations and standards.¹⁰⁷ The same must be true for investment. Hence, the competence covers the standards which apply to post-establishment matters, including national and most-favored nation treatment, fair and equitable treatment and protection against expropriation without compensation.¹⁰⁸

In regard to expropriation, some authors have invoked TFEU Article 345 in efforts to exclude expropriation from the scope of the EU's newly acquired investment competence.¹⁰⁹ Article 345 provides that "[t]he Treaties shall in no way prejudice the rules in Member States governing the system of property ownership." However, treaties providing for investor protection do not affect the system of property ownership.¹¹⁰ Instead, these treaties require that expropriation be subject to certain conditions (e.g., the payment of compensation).¹¹¹ Additionally, in light of settled case law of the ECJ, Article 345 has been preponderantly construed rather narrowly as merely constituting a restriction on the exercise of competences and not as a negation of the existence of competences in particular.¹¹² Indeed, a footnote excluding expropriation from the scope of the FDI competence was eventually

105. See *Communication from the Commission to the European Parliament, The Council, the European Economic and Social Committee and the Committee of the Regions, Towards a comprehensive European international investment policy*, COM (2010) 343 final (July 7, 2010), [hereinafter 2010 Commission Communication], available at http://trade.ec.europa.eu/doclib/docs/2010/july/tradoc_146307.pdf; August Reinisch, *207 AEUV*, in *KOMMENTAR ZU EUV UND AEUV*, ¶ 26 (Heinz Mayer ed., 2011).

106. Opinion 1/94 of the European Court of Justice, 1994 E.C.R. I-5267, ¶ 29, ¶¶ 32-33.

107. 2010 Commission Communication, *supra* note 105, at 3.

108. *Id.* at 4.

109. See e.g. Kingreen Thorsten, *Artikel 345*, in *EUV/AEUV: KOMMENTAR* ¶ 5 (Christian Calliess & Matthias Ruffert eds., 2011), referring also to divergent views.

110. 2010 Commission Communication, *supra* note 105, at 8.

111. *Id.*

112. *Id.*; sharing this view see e.g. Christoph Hermann, *Die Zukunft der mitgliedstaatlichen Investitionspolitik Nach Dem Vertrag Von Lissabon*, 77 *Europäische Zeitschrift Für Wirtschaftsrecht* 207 (2010); Marc Bungenberg, *The Division of Competences between the EU and Its Member States in the Area of Investment Politics*, in *European Yearbook Of International Economic Law*. 36 (Marc Bungenberg, Jörn Griebel & Steffen Hindelang eds., 2011); Ingo Brinker, *Artikel 295*, in *Eu-Kommentar* ¶ 6 (Jürgen Schwarze ed., 2000). See also Case 182/83 *Fearon v Irish Land Commission*, 1984 ECR 3677.

removed.¹¹³

Furthermore, it is important to note that with the inclusion of FDI, the drafters of the treaty clearly intended to broaden the EU's competence rather than to restrict it.¹¹⁴ Adopting a teleological interpretation, the main aim and purpose of investment treaties (be it investment chapters in FTAs or BITs) is to promote investments by guaranteeing, among other things non-discriminatory treatment of investors from either contracting party by granting most favoured nation treatment, fair and equitable treatment, free transfer of capital without restrictions, and compensation in case of unjustified expropriation.¹¹⁵ A competence of the EU in that regard must therefore be interpreted in light of these considerations. It is worth noting in this respect that in light of the past positions taken by the Court of Justice for analogous situations, the Commission's justification of the EU competences is rather convincing.¹¹⁶

3. *Dispute Settlement*

With respect to dispute settlement, the European Commission concludes that procedural guarantees in the form of state-to-state and investor-to-state dispute settlement (ISDS) are covered by the EU's investment powers.¹¹⁷ Having established that the EU's exclusive competence covers post-establishment issues, this must also include the necessary procedural guarantees.¹¹⁸ Dispute settlement fulfils a crucial function in effectively securing the substantive protections granted by International Investment Agreements.¹¹⁹

The competence for investor-state dispute settlement has also been recognized by

113. Clodfelter, *supra* note 9, at 661 with further references.

114. Markus Burgstaller, *The Future of Bilateral Investment Treaties of EU Member States*, in *INTERNATIONALER INVESTITIONSSCHUTZ UND EUROPARECHT* 55, 64 (Marc Bungenberg, et al. eds., 2010).

115. *Id.* at 413.

116. Jan Kleinheisterkamp, *Financial Responsibility In The European International Investment Policy* (LSE L., Soc. and Econ. Working Papers 5, 2013); ANGELOS DIMOPOULOS, *EU FOREIGN INVESTMENT LAW* 122-124 (2011).

117. Reinisch, *supra* note 8, at 118.

118. *Id.* While the CJEU rejected the EU's accession to the European Convention of Human Rights, it expressly held that 'an international agreement providing for the creation of a court responsible for the interpretation of its provisions and whose decisions are binding on the institutions, including the Court of Justice, is not, in principle, incompatible with EU law.' *Opinion 2/13, Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms* (18 December 2014) at ¶ 182. For a discussion of this opinion in the context of investor-dispute settlement mechanisms, see Stephan Schill, *Editorial: Opinion 2/13 – The End for Dispute Settlement in EU Trade and Investment Agreements?*, 16 *J. OF WORLD INVESTMENT & TRADE* 379 (2015).

119. Reinisch, *supra* note 8, at 132, with further references.

the EU's legislature, as is reflected in secondary law. For example, Article 13 of the grandfathering regulation¹²⁰ provides the European Commission with considerable powers to participate in proceedings initiated against Member States on the basis of existing BITs of EU Member States.¹²¹ Pursuant to Article 13 of the regulation, the Commission may direct the respective Member States to take or refrain from taking a particular position or action during the dispute settlement proceedings.¹²² Where appropriate, the Commission may even be granted standing to take part in the defense of a Member State in the context of an ISDS initiated by a third state investor.¹²³ This means that the EU (as represented by the Commission) will be the sole defendant when Member State measures become the subject of investment arbitration claims within a Member State by investors from third party countries.¹²⁴

Since investor-state awards by arbitral tribunals are susceptible to annulments or denials of recognition and enforcement in Member State courts, questions that arise with regard to the relationship of these arbitration treaties and EU law face two sets of imperatives: those flowing from the obligation to uphold, recognize, and enforce awards under the arbitration treaties and those flowing from obligations to comply with EU law.¹²⁵ This appears to remain an open question, especially with a view to the principle of the autonomy of EU law.¹²⁶

In practice, investor-to-state dispute settlement in future EU IIAs has been one of the most contentious issues during negotiations. This criticism has been particularly strong regarding the proposed Transatlantic Trade and Investment Partnership (TTIP) negotiations between the EU and the U.S.¹²⁷ The European

120. Regulation No. 1219/2012 of the European Parliament and the Council of 12 December 2012 Establishing Transitional Arrangements for Bilateral Investment Treaties Between Member States and Third Countries, O.J. (L 351) 40.

121. Nikos Lavranos, *In Defence of Member States' BITs Gold Standard: The Regulation 1219/2012 establishing a Transitional Regime for existing Extra-EU BITs: A Member State's Perspective*, 10 TRANSNATIONAL DISPUTE MANAGEMENT 10 (2013).

122. *Id.*

123. *Id.*

124. 2010 Commission Communication, *supra* note 105; George A Bermann, *European Union Law Issue dedicated to Jean-Claude Piris: Essay: Reconciling European Union Law demands with the demands of International Arbitration*, 34 FORDHAM INT'L L. J. 1193, 1213 (2011).

125. Bermann, *supra* note 124, at 1215.

126. See further Steffen Hindelang, *The Autonomy of the European Legal Order: EU Constitutional Limits to Investor-State Arbitration on the Basis of Future EU Investment-Related Agreements*, in EUROPEAN YEARBOOK OF INTERNATIONAL ECONOMIC LAW (Marc Bungenberg & Christoph Herrmann eds., 2013).

127. Most recently, Shawn Donnan & Stefan Wagstyl, *Transatlantic trade talks hit German snag*, FINANCIAL TIMES (March 14, 2014), <http://www.ft.com/cms/s/0/cc5c4860-ab9d-11e3-90af-00144feab7de.html>. According to this report the German government pushes ISDS to be excluded from a future trade and investment deal with the US. See also Neue Zürcher Zeitung, *Deutschland zieht rote Linie bei TTIP - keine privaten Schiedsgerichte*, NZZ (May 3, 2015), available at <http://www.nzz.ch/finanzen/newsticker/deutschland-zieht-rote-linie-bei-ttip---keine-privaten-schiedsgerichte-1.18534559>.

Parliament voiced its concerns about the far-reaching implications of ISDS, which might compromise the right to regulate.¹²⁸ To counter such criticism, the Commission prepared a fact sheet on Investment Protection and Investor-to-State Dispute Settlement in EU agreements providing for a “two-pronged approach” working towards “clarifying and improving investment protection rules” and “improving how the dispute settlement system operates.”¹²⁹ Concerning the Canada-EU FTA (CETA) and TTIP, the European Commission intended to establish an appellate body for investor-state disputes.¹³⁰ To date, CETA and the EU-Vietnam FTA draft texts include a so-called investment court system with the possibility of appellate review.¹³¹ The negotiations concerning TTIP have excluded the investment issue for now.

Regarding financial responsibility,¹³² the EU has adopted a Regulation that establishes a framework for managing financial responsibility linked to investor-state dispute settlement tribunals established by international agreements to which the European Union is party.¹³³ The regulation addresses the issue of allocating responsibility and financial liability between Member States and the EU.¹³⁴ The Commission recognized the need to establish a framework for managing the financial consequences of ISDS.¹³⁵ This is a further important step in defining the future shape of the European international investment policy, clearing the path for substitution of the Member State’s BITs with EU agreements.¹³⁶ The Regulation builds on the one agreement to which the EU is already a party with the possibility

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128. Resolution on the future European International Investment Policy, EUR PARL. 2010/2203 (INI) (March 22, 2011), available at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2011-0141&language=EN>; see e.g., Reinisch, *Future Shape of EU Investment Agreements*, *supra* note 67, at 192.
129. European Commission, Fact Sheet: Investment Protection and Investor-to-State Dispute Settlement in EU Agreements (Nov. 2013), available at http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151916.pdf.
130. European Commission, Fact Sheet: Investment Provisions in the EU-Canada Free Trade Agreement (CETA) 3 (Dec. 2013), available at http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151918.pdf; European Commission, Fact Sheet: Investment Protection and Investor-to-State Dispute Settlement (ISDS) in EU Agreements 2 (Mar. 2014) available at http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152273.pdf.
131. See *infra* notes 151 and 152.
132. For a recent discussion see e.g. Jan Kleinheisterkamp, *Financial Responsibility in European International Investment Policy*, 63 INT’L & COMP. L. Q. 449 (2014).
133. *Regulation 912/2014 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*, O.J. 2014, L 257/121.
134. Reinisch, *supra* note 8, 133.
135. *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*, COM (2012) 335 final, available at http://trade.ec.europa.eu/doclib/docs/2012/june/tradoc_149567.pdf.
136. Kleinheisterkamp, *supra* note 116, at 2.

for ISDS, namely the Energy Charter Treaty.¹³⁷

The central principle guiding the regulation is that financial responsibility flowing from ISDS is to be attributed to the actor which has afforded the treatment in dispute. For treatment afforded by the Union, the Union shall act as respondent pursuant to Article 4 of the Regulation, whereas if a Member State afforded the treatment in dispute, the Member State shall act as respondent pursuant to Article 5 of the Regulation. Also, where the actions of the Member State are required by EU law, financial responsibility lies with the Union according to Article 3(1)(c) of the Regulation.

Among the issues that must be addressed is the fact that Article 3(1)(c) of the Regulation would expose the EU to financial responsibility for (under EU law) perfectly legal legislative acts in the case where an arbitral tribunal considers the EU to be in breach of standards of an investment treaty. While not surprising from the perspective of existing BITs, this would significantly alter the traditional institutional approach towards the liability of the EU.¹³⁸

The regulation also includes rules on the conduct of ISDS procedures under which it is largely at the Commission's discretion as to who will act as respondent when non-EU investors are bringing a claim. In addition to rules on how to structure co-operation between the Commission and the Member State in specific cases, the mechanisms also ensure that any apportionment can be made effective.

However, it is important to recall that any such criteria for allocating responsibility must find their basis in the provisions of the EU investment agreement under which the foreign investor is bringing his or her claim.¹³⁹ This means that, in order to have effect under public international law, the proposed rules regarding the determination of responsibility in this Regulation must be included in the future EU investment agreement. Hence, for the sake of legal certainty, it is important that any future EU investment agreement contains such a clarification.¹⁴⁰ In order to avoid circumvention of the effective application of this Regulation, further clarification is needed to the effect that future EU IIAs must completely and effectively supersede existing BITs of Member States with the same third state.¹⁴¹

137. See Energy Charter Treaty, Annex 1 to the Final Act of the Conference on the European Energy Charter, Dec. 17, 1994, 34 I.L.M. 381 (1995).

138. Kleinheisterkamp, *supra* note 131, 461-462; Christian Tietje, Emily Sipiorski & Grit Töpfer, *Responsibility In Investor-State-Arbitration In The Eu: Managing Financial Responsibility Linked To Investor-State Dispute Settlement Tribunals Established By The Eu's International Investment Agreements* (2012), available at <http://bookshop.europa.eu/de/responsibility-in-investor-state-arbitration-in-the-eu-pbBB3012131/>.

139. Kleinheisterkamp, *supra* note 116, at 8.

140. *Id.*

141. *Id.* at 9.

IV. Future IIAs/ investment chapters in FTAs and Negotiations in Practice

With the conferral of exclusive EU competence in the FDI area, the EU will shape and elaborate autonomous FDI principles and policies.¹⁴² Investment protection and liberalization are key instruments of such an international investment policy. In the Commission's view, "a common investment policy should also be guided by the principles and objectives of the Union's external action more generally, including the promotion of the rule of law, human rights, and sustainable development (TFEU Article 205 and TEU Article 21)."¹⁴³ The commission obviously seeks to address all types of investment including portfolio investments and to assimilate the area of investment protection.¹⁴⁴ The uniform treatment for all EU investors will ensure external competitiveness and maximum leverage in negotiations,¹⁴⁵ while allowing investors to take into account the political, institutional, and economic circumstances in particular countries. The Commission intends to follow the available best practices in order to ensure that no EU investor would be worse off than they would be under Member States' BITs.¹⁴⁶

In practice, this suggests that future EU IIAs will include all the standards of substantive treatment of investments currently contained in EU Member State BITs.¹⁴⁷ Also, while most of the BITs of EU Member States limit protection to the post-establishment phase,¹⁴⁸ the Commission has explicitly declared EU policy on international investment as one that adheres to an investment liberalization objective.¹⁴⁹

The Council Negotiating Directives of September 12, 2011 concerning the negotiations with Canada, India, and Singapore¹⁵⁰ confirm the EU's comprehensive investment power in practice by outlining that fair and equitable treatment (FET),

142. Bermann, *supra* note 124, at 1214.

143. *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* at 9, COM (2010) 343 final.

144. *Id.* at 11.

145. *Id.*

146. *Id.*

147. Reinisch, *supra* note 8, at 126.

148. Cf. August Reinisch, *Austria*, in COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES 15, 27 (Chester Brown ed., 2013). Indeed it is argued that most BITs 'worldwide' provide for protection post-establishment only, see Céline Lévesque & Andrew Newcombe, *Canada*, in COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES 53, 74 (Chester Brown ed., 2013).

149. *Communication from the Commission*, *supra* note 142.

150. See the purported text made public by an NGO, *Council Negotiating Directives (Canada, India and Singapore)*, September 12, 2011, available at <http://www.bilaterals.org/spip.php?article20272&lang=en>;

full protection and security, national treatment, and most-favoured-nation (MFN) treatment as well as guarantees against uncompensated expropriation and an umbrella clause should be contained by the respective investment chapter.¹⁵¹ However, the Council's mandates provide that portfolio investment, dispute settlement, and expropriation are aspects to be concluded as mixed agreements.¹⁵² Thus, the issue of the exact scope of the EU's investment competence remains contested.

The final text of the Comprehensive Economic and Trade Agreement between the EU and Canada (CETA), including a chapter on investment, was published on 29 February 2016.¹⁵³ The final text departs from the previously adopted text of 2014 in that it provides for a new dispute settlement mechanism moving towards a permanent multilateral investment court. The EU-Vietnam FTA includes an investment chapter and was finalized and published in January 2016.¹⁵⁴ The EU and Singapore have initialled the text of a FTA (which also includes an investment chapter) on 20 September 2013.¹⁵⁵ The TTIP between the U.S. and EU, has entered its 13th round of negotiations in April 2016.¹⁵⁶ Negotiations with Egypt, Jordan, and Tunisia were launched in 2011, but not much progress had been noted for some time.¹⁵⁷ Aside from these, negotiations on the EU-Morocco Deep and Comprehensive Free Trade Area were launched on 1 March 2013.¹⁵⁸ On 25 March 2013, EU-Japan negotiations were officially launched and a report to the Council assessing the progress achieved during the first year of negotiations with Japan is currently being finalized within the Commission.¹⁵⁹ Negotiations of a BIT with China are also imminent, which would be the first stand-alone bilateral investment treaty

151. On the negotiations with Canada see *The Challenges of 'Marrying' Investment Liberalisation and Protection in the Canada-EU CETA*, in *EU AND INVESTMENT AGREEMENTS: OPEN QUESTIONS AND REMAINING CHALLENGES* 121 (Marc Bungenberg, et al. eds., 2013).

152. See the purported text made public by an NGO, *supra* note 149.

153. See consolidated version of the negotiated CETA text, available at http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf.

154. See consolidated version of the negotiated EU-Vietnam FTA text, available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437>.

155. For the authentic text as of May 2015 text of the agreement see, <http://trade.ec.europa.eu/doclib/press/index.cfm?id=961>.

156. The chapter on investment protection has so far been excluded from the negotiations, see *Report of the Tenth Round of Negotiations for the Transatlantic Trade and Investment Partnership* (July 2015) available at http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153667.pdf.

157. Marc Bungenberg and C. Titi, *Developments in International Investment Law*, in *EUROPEAN YEARBOOK OF INTERNATIONAL ECONOMIC LAW* 429 (Christoph Herrmann, Markus Krajewski & Jörg Philipp Terhechte eds., 2014).

158. See Press Release, European Commission, EU and Morocco Start Negotiation for Closer Trade Ties (April 22, 2013), available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=888>.

159. See European Commission Trade Policy on Japan, available at <http://ec.europa.eu/trade/policy/countries-and-regions/countries/japan/>.

concluded by the EU.¹⁶⁰

V. Conclusion

As this paper demonstrates, there are good arguments in favour of the broad interpretation of the new competence of the EU in the field of investment. This is particularly evident given the need to have a system that will grant the EU the power to act as efficiently as its competitors, namely the US and China. From that perspective, an adequate transfer of competences to the European level is necessary for the EU to establish a coherent trade and investment policy.¹⁶¹ Hence, the EU must enjoy the exclusive and comprehensive competence to enter into international investment obligations, covering admission, capital movement (transfer), post-admission treatment including fair and equitable treatment (FET), performance requirements and free movement of key personnel, compensation for expropriation, and investor–state dispute settlement. Indeed, the European Commission assumes that all such issues that are typically regulated in bilateral investment treaties (BITs) fall under this new exclusive competence of the EU, while the Council insists on national competences regarding the protection of expropriation and dispute resolution clauses. It will be up to the Court of Justice of the European Union to settle these divergent views. If one takes into account the tendencies of its previous case law, the court is likely to rule in favour of the Commissions' view.¹⁶²

160. Press Release, European Commission, Commission Proposes to Open Negotiations for an Investment Agreement with China (May 23, 2013), *available at* <http://trade.ec.europa.eu/doclib/press/index.cfm?id=900>.

161. *See* Bungenberg, *supra* note 7, at 35.

162. A clarification from the Court of Justice of the European Union was requested by the Commission concerning the EU-Singapore FTA. The court's decision is pending. Decision of 30 October 2014, European Commission Decision Requesting an Opinion of the Court of Justice Pursuant to Article 218(11) TFEU on the competence of the Union to Sign and Conclude a Free Trade Agreement with Singapore, C(2014) 8218 final, *available at* <http://ec.europa.eu/transparency/regdoc/rep/3/2014/EN/3-2014-8218-EN-F1-1.PDF>.