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## The European Union's Competence on Foreign Investment: "New and Improved"?

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# The European Union’s Competence on Foreign Investment: “New and Improved”?

DOMINIK MOSKVAN\*

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The Treaty on the Functioning of the European Union (TFEU) brought numerous changes to European Union (EU) law in 2009. One such change brought the competence on foreign investment under the exclusive competence of the EU. In light of current investment negotiations, which are eroded by the lack of unity amongst the EU and its Member States, this paper explores the evolution of EU foreign investment competence before and after the enactment of the TFEU, concluding that the competence bears significant limitations stemming from the past that have not been compensated for thus far.

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Whereas EU exclusive competence may enhance the negotiation leverage of the EU when compared to single Member States, portfolio investments are still excluded from the scope of the competence even after the adoption of the TFEU. Post-Lisbon limitations also pertain to the application of the TFEU to Member States' property ownership governance despite the fact that investment revolves around the property rights or is even based on them. Such a narrow scope of competence prevents the EU from committing itself to guarantees due to expropriation of investments that are relatively common to investment arbitration. Furthermore, competence conferred on the EU in Article 207 of the TFEU curbs implementation of harmonization measures should they be enacted in connection with the investment treaty.

Recent negotiations of the Transatlantic Trade and Investment Partnership (TTIP), however, showed the opposition of certain Member States to the exclusive competence of the Commission, which undermined the major strength of the conferral—unified negotiation power of the Union. Future TTIP negotiations, resistance of Member States to the already-concluded Comprehensive Economic and Trade Agreement (CETA), and legal counselors advising their clients to optimize for an extra-EU bilateral treaty (BIT) construction of their intra-EU BIT investments, in light of an unresolved conflict of intra-EU BITs with EU law, all provoke further thoughts of future potential adjustments of EU investment competence. The EU's competence on foreign investment under the TFEU is still relatively new, but is already in need of improvement.

#### I. MULTI-LEVEL CHARACTER OF EU AND NATIONAL COMPETENCES

The EU, as well as other international organizations and states, is subject to international public law. However, the EU is vitally different from other international organizations or state formations, including confederations or federations, because the EU acquired part of its capacity to act from the sovereignty of its Member States. As a result, the decisions made on the supranational EU-level are binding upon all Member States.<sup>1</sup> The EU may only act within the limits of the competence that the Member States decide to attribute to the Union. The term “competence” then delineates areas of power which Member States conferred on the Union, motivated, amongst others reasons, by the prospect of a more effective decision-making process at the level of the EU bodies.<sup>2</sup> The distinctive feature of competence norms

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1. See Kimmo Kiljunen, *The European Constitution in the Making*, 2004 CENTRE FOR EUROPEAN POLICY STUDIES 21–22, [http://aei.pitt.edu/32581/1/20\\_EU\\_Constitution.pdf](http://aei.pitt.edu/32581/1/20_EU_Constitution.pdf) [<https://perma.cc/BFH4-VSAD>] (noting the EU may only act within the limits of the competence that the Member States decided to attribute to the Union); See ALINA KACZOROWSKA-IRELAND, *EUROPEAN UNION LAW* 175–76 (4th ed. 2016).

2. See KACZOROWSKA-IRELAND, *supra* note 1, at 176–78.

lies in the capacity to change legal relations.<sup>3</sup> The authority for legislative, judicial, and executive measures, formerly executed by the EU's Member States, become a sovereign power of the EU after their conferral,<sup>4</sup> and is used within the institutional and procedural design of the EU.

The areas the Member States have attributed to the EU have expanded remarkably over the years, and this process has had the effect of shrinking the individual spheres of competence of EU Member States. Exclusive competence entitles the EU to legislate in delineated areas while simultaneously precluding Member States from adopting measures on their own unless authorized. On the other hand, shared and supporting competences allow for action from both the Union and Member States. Whereas in shared competence, Member States adopt binding acts only if the Union has not exercised its own competence, supporting competence allows for the Union to support, coordinate, and complement actions of Member States. However, supporting competence does not entitle the Union to legislate in defined fields.

Historically, the division of the EU's competences was not entirely clear, which led to some creative interpretations by the Court of Justice of the European Union (CJEU).<sup>5</sup> The unclear setting of competences made some Member States fear that the EU would encroach on their sovereignty.<sup>6</sup> Structural limitations on Member States' freedom to act and on their margin of appreciation, which by definition happened by stealth,<sup>7</sup> were later labeled as "EU competence creep" or "creeping competence drift." Past experiences with competence creep, however, do not converge with recent developments following the adoption of the TFEU, and complaints against the competence drift are becoming less legitimate.<sup>8</sup> It can be stoically said that the autonomy of Member States fluctuates depending on the relationship with the

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3. See Gerard Conway, *Conflicts of Competence Norms in EU Law and the Legal Reasoning of the ECJ*, 11 GERMAN L.J. 966, 975 (2010).

4. See Kiljunen, *supra* note 1, at 22.

5. See KACZOROWSKA-IRELAND, *supra* note 1, at 87.

6. *Id.*; See Conway, *supra* note 3, at 967, for an elaboration on horizontal and vertical competence relationships (asserting that the EU has not been able to for Conway's assertion that the EU has not been able to define the competences in more detail than their delineation in Article 2 TFEU).

7. Sacha Prechal, *Competence Creep and General Principles of Law*, 3 REV. OF EUR. ADMIN. L. 5, 19–20 (2010).

8. See KACZOROWSKA-IRELAND, *supra* note 1, at 87.

competences of the EU.<sup>9</sup> The foreign investment competence of the EU bears signs of this dynamism too. General uncertainty about the future collective adoption of an EU comprehensive foreign investment policy further fuels questions concerning the delineation of investment competence and its potential competence creep.<sup>10</sup> The discourse concerning the division of competences is extremely important for all actors involved—Member States, EU citizens, and the Union.<sup>11</sup>

## II. FOREIGN INVESTMENT: COMPETENCE SHIFT

Enacted on December 1, 2009, the TFEU brought numerous changes to the EU legal system. One of the alterations contained in the TFEU was a change to the foreign investment competence regime, with foreign direct investment (FDI) becoming part of the Common Commercial Policy (CCP) thereby falling under the exclusive competence of the EU.<sup>12</sup> Before the TFEU was adopted, protection of FDI belonged to the competence of both Member States and the European Union. Member States strived for substantive investment safeguards on the basis of diplomatic protection and bilateral and multilateral treaties,<sup>13</sup> and was one of the reasons a significant number of BITs were signed between future Member States.

### A. *The Pre-Lisbon Era*

The role of the EU was rather limited before the adoption of the Treaty of Lisbon. The Common Commercial Policy (CCP) of the Union, outlined in Articles 131 to 134 of the Treaty establishing the European Community (TEC), did not extend to investments,<sup>14</sup> and the protection of foreign

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9. Paul P. Craig, *Competence and Member State Autonomy: Causality, Consequence and Legitimacy* 17 (Oxford Legal Studies Research Paper No. 57, 2009), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1474325](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1474325) [<https://perma.cc/BQ8U-76UC>].

10. 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*, at 2, 10, COM (2010) 343 final (July 10, 2010) [hereinafter *European Commission Communication*].

11. Member States might fear unclear delimitation of the Union's powers and EU citizens might demand a higher degree of legitimacy and democracy in Union's competences while the Union expects such a setting of powers which would enable the community to effectively reach their objectives and face future challenges. See KACZOROWSKA-IRELAND, *supra* note 1, at 87.

12. See ASJA SERDAREVIC, *THE EUROPEAN UNION AS A COLLECTIVE ACTOR IN THE WORLD TRADE ORGANIZATION* 43 (2013).

13. Andrej Karpat, *Priame zahraničné investície ako oblasť výlučnej právomoci Eurpskej unie* [European Union's Exclusive Competence on Foreign Direct Investment] NOTITIAE EX ACADEMIA BRATISLAVENSI IURISPRUDENTIAE 1/2011 94, 94 (Czech).

14. See Christian Soderlund, *Intra-EU BIT Investment Protection and the EC Treaty* 24(5) J. OF INV. ARB. 455, 462 (2007).

investments fell within the ambit of the competences of the Member States. Among the instruments for safeguarding investments in EU Member States, BITs became the most common form of investment promotion and protection.<sup>15</sup> This was due to the fact that the EU's competences were restricted solely to market entry investment aspects, and therefore unsuitable for the conclusion of BITs.<sup>16</sup> However, the overlapping existence of BITs and EU internal market law resulted in a conflict of these two systems.

The Treaty Establishing the European Economic Community, which was concluded in 1957, did not foresee that the relations between the six Member States would be governed exclusively on the level of Community law.<sup>17</sup> Member States slowly became parties to agreements between each other, but they also entered into agreements with third countries as well.<sup>18</sup> A great burst of external relations, particularly in the field of commerce, occurred in the 1970s.<sup>19</sup> However, international relations became an area where the Member States viewed the treaty-making power of the Union with suspicion.<sup>20</sup> This might have been caused by the seeming imbalance between the internal and external competence vested to the community by the TEC. The proponents of the doctrine of parallelism, which called for the Union to have equal powers internally and externally, viewed the Community as having not only the competences expressly granted to it in the Treaty, but also the powers to take action on any topic that falls within its internal competence.<sup>21</sup>

15. *Id.*

16. Jan Asmus Bischoff, *Just a Little BIT of 'Mixity'? The EU's Role in the Field of International Investment Protection Law*, 48 COMMON MKT. L. REV. 1527, 1534 (2011).

17. Bruno de Witte, *Old-Fashioned Flexibility: International Agreements Between Member States of the European Union*, in CONSTITUTIONAL CHANGE IN THE EU: FROM UNIFORMITY TO FLEXIBILITY? 31, 32 (Gráinne De Búrca & Joanne Scott eds., 2000).

18. *See id.* at 33, for a discussion distinguishing *inter se agreements*, which are agreements signed between two or more Member States, from *inter se agreements cum tertiis*, which are agreements concluded between a Member State and a third state.

19. Tokyo round of GATT negotiations; first trade agreements with EFTA members; preferential agreements with southern Mediterranean countries, Maghreb, ACP countries as well as Latin America. While most of the competence in the CCP was at that time interpreted by the ECJ as exclusive, Member States were not entirely precluded from negotiations as CCP was being implemented gradually. *See* PAUL CRAIG & GRAINNE DE BURCA, *THE EVOLUTION OF EU* 226 (2011); PAUL CRAIG & GRAINNE DE BURCA, *EU LAW: TEXT, CASES, MATERIALS* 321 (2011).

20. TREVOR HARTLEY, *THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW: AN INTRODUCTION TO THE CONSTITUTIONAL AND ADMINISTRATIVE LAW OF THE EUROPEAN UNION* 161 (2007).

21. *Id.*

This argument is analogous to the justification behind the emergence of the implied powers of the Union first narrowly formulated in 1956,<sup>22</sup> and further extensively developed in 1987.<sup>23</sup> Like the doctrine of parallelism, the purely judicial construction<sup>24</sup> of implied powers stems from a discrepancy between the task given and the competence conferred for its execution.<sup>25</sup> The Court confirmed the theory of implied powers, arguing that if the Treaty confers a specific task on the EU institutions, it also must delegate “the powers which are indispensable in order to carry out that task.”<sup>26</sup>

The EU’s power to enter into relations with third countries was further strengthened through the establishment of the *ERTA/AETR*<sup>27</sup> doctrine in the EU legal order. In the *ERTA* judgment, the European Court of Justice (ECJ) introduced the doctrine by stating:

To determine in a particular case the Community’s authority to enter into international agreements, regard must be had to the whole scheme of the Treaty no less than to its substantive provisions. Such an authority arises not only from an express conferment by the Treaty . . . but may equally flow from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the Community institutions.<sup>28</sup>

The teleological approach<sup>29</sup> in the judgment represents an approval of the doctrine of parallelism.<sup>30</sup> The *ERTA* doctrine was codified in Article 3(2) and Article 216(1) TFEU,<sup>31</sup> but interpretation as to how they exactly

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22. See generally Case 8/55 Fed’n Charbonnière Belgique v. High Auth., 1956 E.C.R. 246.

23. See generally Joined Cases 281, 283-5, 287/85 Ger., Fr., et. al v. Comm’n, 1987 E.C.R. 3203.

24. See SERDAREVIC, *supra* note 12, at 43.

25. While the background of the debate concerning the doctrine of parallelism shows a striking gap between internal and external competences, the theory of implied powers points out to the gap between the authority given and the authority needed. HENRY SCHERMERS & DENIS WAELBROECK, *JUD. PROTECTION IN THE EUR. UNION* 374 (6th ed. 2001) (“. . . Community had authority to enter international agreements on subjects for which such an authority had not been expressly granted.”).

26. See Joined Cases 281, 283-5, 287/85, Ger., Fr., et. al v. Comm’n, 1987 E.C.R. 3203, ¶ 28.

27. Econ. Comm’n for Eur., Inland Transp. Comm., *European Agreement concerning the Work of Crews of Vehicles Engaged in International Road Transport (AETR)*, ECE/TRANS/SC.1/2006/2 (Aug. 9, 2006).

28. See Case 22/70, Comm’n v. Council, 1971 E.C.R. 263, ¶¶ 15–16.

29. BART VAN VOOREN & RAMSES A. WESSEL, *EU EXTERNAL RELATIONS LAW* 87 (2014).

30. See HARTLEY, *supra* note 20, at 164 (“The Court therefore had to find a way of upholding the Commission’s contention in principle, without applying to the facts of the case . . . [T]his was done by holding that a transfer of treaty-making power occurred 1969 when the internal measure came into effect.”).

31. Treaty on the Functioning of the Eur. Union, art. 216(1), Oct. 26, 2012, 2012 O.J. (C 326) 47 (“The Union may conclude an agreement with one or more third countries

relate to each other might pose difficulties.<sup>32</sup> In practice, the relation between exclusive competence that is not expressly defined and an agreement capable of affecting Community law should be analyzed, even in cases where the two areas do not necessarily overlap.<sup>33</sup> The *ERTA* judgment concludes that Member States should not engage in international obligations that would affect internal Community law.<sup>34</sup> Participation of the Community in the negotiation would ensure that the result is consistent with its legislation.<sup>35</sup> Holdgaard comments that the Union removes the external competence(s) of Member States that could affect internal Community law and establishes a parallel external Community competence.<sup>36</sup>

The ECJ further opined on the implied treaty-making powers under the doctrine of parallelism in the World Trade Organization (WTO)<sup>37</sup> and Organization for Economic Cooperation and Development (OECD)<sup>38</sup> cases. Therein, the Court expressed some doubts concerning the causal link between the internal powers and exclusive competence.<sup>39</sup> In other words, the fact that the Community has internal power in a specific area does not automatically translate into exclusivity. However, two clear-cut cases regarding the Community's exclusive powers are: (i) instances where the Union's adopted internal legislation could be affected by contracted agreement, and (ii) instances where the Treaty specifically express the delegation may negotiate with non-members of the Community.<sup>40</sup>

What started exclusively as an internal institutional dispute between the Commission and the Council of Ministers in *ERTA*, developed into a pure

or international organizations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.") [hereinafter TFEU].

32. See Bischoff, *supra* note 16, at 1545.

33. Tristan Baumé, *Competence of the Community to Conclude the New Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters: Opinion 1/03 of 7 February 2006*, 7(8) Ger. L.J. 681, 683 (2006).

34. RASS HOLDGAARD, *EXTERNAL RELATIONS LAW OF THE EUROPEAN COMMUNITY: LEGAL REASONING AND LEGAL DISCOURSES* 100 (Kluwer Law Int'l 2008).

35. Piet Eeckhout, *Bold Constitutionalism and Beyond*, in *THE PAST AND FUTURE OF EU LAW: THE CLASSICS OF EU LAW REVISITED ON THE 50TH ANNIVERSARY OF THE ROME TREATY* 218, 220 (Miguel Poiaras Maduro & Loïc Azoulai eds., 2010).

36. HOLDGAARD, *supra* note 34, at 100.

37. Opinion 1/94, 1994 E.C.R. I-5267.

38. Opinion 2/92, 1995 E.C.R. I-521.

39. Opinion 1/94, 1994 E.C.R. I-5267, I-5414; Opinion 2/92, 1995 E.C.R. I-512, I-559.

40. HARTLEY, *supra* note 20, at 171.

federalist conflict over the division of powers. This conflict led to severe schisms in the Community's legislations and were not rectified until years later.<sup>41</sup> The Union, however, translated the EU's competence into the successful conclusion of free trade and association agreements.<sup>42</sup>

Member States, on the other hand, tried to restrain the *ERTA* doctrine by increasing their interest in contracting mixed association agreements, which became a norm, even though Member States' activity was often technically unnecessary, and the Union had the competence to sign it alone.<sup>43</sup> In the reality of international negotiations, it became more convenient to rely on shared competence, even though according to the *ERTA* doctrine, the Commission could have invoked exclusive competence in front of the ECJ.<sup>44</sup> The Open Skies agreement was concluded as a mixed agreement, being a direct result of *ERTA*'s jurisprudence.<sup>45</sup> When negotiating topics that were not under EU exclusive competence, the negotiations would feature representatives of Member States as well as those of the Commission sitting in the room together; however, in such cases only the Commission's representatives spoke.<sup>46</sup> It was often a political question as to whether the Member States would allow the Community to proceed on its own or if Member States would demand negotiation of a mixed agreement.<sup>47</sup>

Agreements based on shared competence had to be ratified by national parliaments. As national parliaments did not usually concern themselves with the EU's external policies, the ratification process was in most cases a formality, which was sometimes intentionally delayed so that a Member State could gain political leverage in EU internal issues.<sup>48</sup> Such agreements

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41. The backlash was represented by the antagonistic position of Member States against the adoption of Community environmental policy, as they feared that the transfer of internal competence would result in acquisition of external competence. Hjalte Rasmussen, *Le Juge International, in Evitant de Statuer Obeit-il a un Devoir Judiciaire Fondamental*, 29 GERMAN Y.B. INT'L L. 252, 276 (1986).

42. Bischoff, *supra* note 16, at 1535.

43. Pieter Jan Kuijper, *Fifty Years of EC/EU External Relations: Continuity and the Dialogue Between Judges and Member States as Constitutional Legislators*, 31(6) FORDHAM INT'L L.J. 1579, 1580 (2007).

44. *Id.* at 1581 ("...it became much easier for the Member States in the Council to insist on a mixed character of international agreements in these fields, and it required much persistence from the Commission and a constant willingness to go to the ECJ to invoke that declaration and to insist on exclusive competence. In the daily reality of external relations, where time is short and questions of competence have to be decided quickly, these were qualities that were difficult to muster.")

45. Markus Burgstaller, *European Law Challenges to Investment Arbitration*, in THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY 455, 481 (Michael Waibel et al. eds., 2010).

46. Stephen Woolcock, *The Treaty of Lisbon and the European Union as an Actor in International Trade*, 1 ECIPE WORKING PAPER, Nov. 2010, at 8.

47. ANGELOS DIMOPOULOS, EU FOREIGN INVESTMENT LAW 88 (2011).

48. Stephen Woolcock, *supra* note 46, at 8–9.

are often described as mixed agreements as they combine competences of the EU and of the Member States. Apart from the most notable mixed agreements, which fell under the exclusive competence of common commercial policy, mixed agreements were also typical for governing services and intellectual property. The complexity of requiring ratification from the EU as well as from Member States of such agreements raised confusion both within the EU as well as with the Union's external trading partners.<sup>49</sup>

### *B. The Lisbon Era*

Although the European Union has been showing signs of significant growth of competences over the years,<sup>50</sup> exclusive competence on investment matters was not initially intended to be included in the European Treaties.<sup>51</sup> In the beginning, as already established, the Union's competence related only to the admission of new investments of third countries.<sup>52</sup> However, the increasing economic interactions within the internal market, the extended scope of freedom of capital movement relations with third countries in the Maastricht Treaty, together with the intensified monetary cooperation anchored in the Amsterdam Treaty of 1997, contributed to the Union's interest in including FDI into the Union's exclusive competence. Interestingly, and somewhat contradictorily, the Treaty of Nice introduced a concept of non-exclusive Common Commercial Policy (CCP) powers.<sup>53</sup> The debate about extending the Union's competence was materially developed further during the Constitutional Convention meetings beginning in 2002, despite the discussion being insufficient in general.<sup>54</sup> The Treaty of Lisbon broadened the scope of the CCP and returned to the idea of exclusive competence.

49. *Id.* at 9.

50. KACZOROWSKA-IRELAND, *supra* note 1, at 87; Craig, *supra* note 9, at 23–24.

51. Armand de Mestral, *The EU as a Maker of Investment Agreements: The Potential Impact on Canada and the Broader World System of Bilateral Investment Treaties*, POLICY BRIEF (2008), <http://labs.carleton.ca/canadaeurope/wp-content/uploads/sites/9/2008-12-18-InvestmentAgreementsdeMestral.pdf> [<https://perma.cc/6K8R-WZCC>].

52. Bischoff, *supra* note 16, at 1535.

53. Marise Cremona, *External Relations and External Competence of the European Union*, in *THE EVOLUTION OF EI LAW* 238, 246 (Paul Craig & Gráinne De Búrca eds., 2011); Mestral, *supra* note 51, at 2.

54. Miguel Poiars Maduro, *Europe and the Constitution: What If This Is As Good As It Gets?*, in J.H.H. WEILER & MARLENE WIND, *EUROPEAN CONSTITUTIONALISM BEYOND THE STATE* 77, 77 (2003) (“...[T]he European Constitution appears as a simple functional consequence of the process of market integration without a discussion of the values it

The conferral of the competence in the field of FDI to the Union was inconsistent. After elimination of the exclusive competence on investments from the Constitutional Treaty at one point,<sup>55</sup> FDI was included into Article III-217 of the final text later on<sup>56</sup> and was recognized as one of the areas of the common commercial policy.<sup>57</sup> Moreover, the characteristic feature of the construction of the competence in the Constitutional Treaty was one of extraordinary vagueness.<sup>58</sup> After the Treaty failed to get approval in public voting in France and the Netherlands, drafters of the TFEU did not follow their previous intention to include FDI within the exclusive competence.<sup>59</sup> An opposite stance was adopted in the latest stage of the preparatory work of the TFEU when the CCP was amended to embrace FDI, leaving no room for a qualified legal discussion on that matter.<sup>60</sup> Due to the lack of transparency surrounding the inclusion of FDI competence into the EU's exclusive competence, Meunier points out that the process of conferral of the investment competence happened stealthily.<sup>61</sup>

According to Article 207(1) TFEU, FDI is considered to be part of the CCP of the Union.<sup>62</sup> The Union conducts action in FDI under the exclusive competence as defined by Article 3 TFEU.<sup>63</sup> The CCP is one of five scopes of exclusive competence in the TFEU, together with the customs union, the establishing of the competition rules necessary for the functioning of the internal market, monetary policy for the Member States whose currency

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necessarily embodies: it has been taken as a logical constitutional conclusion without a constitutional debate.”).

55. The European Convention, SUMMARY SHEET OF PROPOSALS FOR AMENDMENTS CONCERNING EXTERNAL ACTION, INCLUDING DEFENCE POLICY 103, CONV 707/03 (Brussels, 2003).

56. Draft Treaty establishing a Constitution for Europe art. III-216 850/03, July 18, 2003, Europa.

57. KOEN LENAERTS ET AL., CONSTITUTIONAL LAW OF THE EUROPEAN UNION ¶ 20-006 (2d ed. 2005).

58. PANOS KOUTRAKOS, EU INTERNATIONAL RELATIONS LAW 495 (2006) (“It is recalled, for instance, that, according to Article I-1(1), the Union is to exercise the competences conferred by the Member States ‘on Community basis’. This provision is as remarkable for its extraordinary vagueness as it is for its apparent disregard for the subtleties of the development of the Community legal order and the distinct term in which CFSP is articulated within the new Constitutional structure.”).

59. *See generally* Sophie Meunier, *Integration by Stealth: How the European Union Gained Competence over Foreign Direct Investment*, EUROPEAN UNIVERSITY INSTITUTE 9 (Working Paper No. RSCAS 2014/66) (Dec. 2014) [http://cadmus.eui.eu/bitstream/handle/1814/34161/RSCAS\\_2014\\_66.pdf?sequence=1](http://cadmus.eui.eu/bitstream/handle/1814/34161/RSCAS_2014_66.pdf?sequence=1) [<https://perma.cc/CU4G-WYPV>].

60. ALEXANDER J. BELOHLAVEK, OCHRANA PRIMYCH ZAHRANICNICH INVESTIC V EVROPSKE UNII ¶ 479 (2010).

61. *See generally* Meunier, *supra* note 59.

62. *See* TFEU, *supra* note 31, art. 207(1).

63. *Id.* art. 3.

is the euro, and the conservation of marine biological resources under the common fisheries policy.<sup>64</sup>

All key aspects of external trade and investment have thus come under exclusive EU competence, including the aforementioned mixed agreements.<sup>65</sup> Among others, this also applies to agreements with trade-related elements in services and intellectual property pursuant to Article 207(1) TFEU.<sup>66</sup> Up to the date when the TFEU came into effect, FDI fell under the competence shared by the Union and the Member States. Before 2009, Member States would sign BITs, while the Commission would negotiate instruments concerning trade and investment in services (such as modes in GATS), other aspects of investment in GATT, or TRIMs.<sup>67</sup> The inclusion of these agreements into the exclusive competence ends the lengthy period of discussion concerning the competence division between the Union and Member States.

### III. COMPETENCE SHIFT: LIMITATIONS OF THE REDEFINED COMPETENCE

FDIs, as already stated, now fall under the EU's exclusive competence. Apart from the fact that the Union's exclusive competence should enhance the negotiation leverage of the EU compared to single Member States,<sup>68</sup> there are notable limitations too.

The first potential limitation to the competence conferred by Article 207 TFEU is its relative incomprehensiveness regarding different forms of investments. The definition in the TFEU pertains only to certain forms of investments, namely those that are direct. Simultaneously, Member States still retain their competence to conclude treaties on indirect forms of investments, and Bischoff therefore concludes that the competence for investment is mixed.<sup>69</sup> The view, which would suggest that portfolio

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64. *Id.* art. 3(e).

65. Woolcock, *supra* note 46, at 8.

66. TFEU, *supra* note 31 ("The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies.").

67. Woolcock, *supra* note 46, at 10.

68. Burgstaller, *supra* note 45, at 482.

69. Thus, contracting mixed governing indirect investments shall require activity of the EU and Member States at the same time. Bischoff, *supra* note 16, at 1534.

investments fall under the comprehensive protection of FDI in investment treaties, is not generally accepted by international investment law. This is due to the fact that inclusion of portfolio investments under the definition of FDI with no foundation in a relevant treaty is erroneous, although not uncommon,<sup>70</sup> due to the close interrelation between the two.<sup>71</sup> Although the categorization of portfolio investment as a form of direct investment is not necessarily a sporadic practice in international investment law, such a classification aptly points out that the competences conferred on the EU in non-direct investments are not exclusive but shared since Article 4(1) TFEU stipulates that, “The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3<sup>72</sup> and 6<sup>73</sup> TFEU.” Although portfolio investment is described as a specific form of investment in the shaping EU comprehensive investment policy,<sup>74</sup> both FDI and portfolio investment are viewed as significant features of economic interaction:

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70. MUTHUCUMARASWAMY SORNARAJAH, *INTERNATIONAL LAW ON FOREIGN INVESTMENT* 9, 196 (3d ed. 2010).

71. *Fedax N.V. v. Republic of Venezuela*, 37 LL.M. 1378 (1998).

72. TFEU, *supra* note 31, art. 3 (“(1.) The Union shall have exclusive competence in the following areas: (a) customs union; (b) the establishing of the competition rules necessary for the functioning of the internal market; (c) monetary policy for the Member States whose currency is the euro; (d) the conservation of marine biological resources under the common fisheries policy; (e) common commercial policy. (2.) The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.”).

73. TFEU, *supra* note 31, art. 6 (“The Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States. The areas of such action shall, at European level, be: (a) protection and improvement of human health; (b) industry; (c) culture; (d) tourism; (e) education, vocational training, youth and sport; (f) civil protection; (g) administrative cooperation.”).

74. *European Commission Communication*, *supra* note 10, at 2–3 (“Foreign direct investment (FDI) is generally considered to include any foreign investment which serves to establish lasting and direct links with the undertaking to which capital is made available in order to carry out an economic activity. When investments take the form of a shareholding this objective presupposes that the shares enable the shareholder to participate effectively in the management of that company or in its control. This contrasts with foreign investments where there is no intention to influence the management and control of an undertaking. Such investments, which are often of a more short-term and sometimes speculative nature, are commonly referred to as portfolio investments.”).

The Lisbon Treaty's attribution of EU exclusive competence on FDI integrates FDI into the common commercial policy. It also allows the EU to affirm its own commitment to the open investment environment which has been so fundamental to its prosperity and to continue promoting investment, both direct investment and portfolio investment, also as a tool of economic development.<sup>75</sup>

Since portfolio investments are not included in the scope of the Union's exclusive FDI competence in Article 207(1), should a treaty on their protection be signed, these agreements would have to be ratified by the EU as well as by the Member States<sup>76</sup> since they would have to be concluded as mixed agreements.<sup>77</sup> It is, however, possible that the Union would acquire full competence over FDI matters if the Court considers the *AETR* doctrine, codified in Article 3(2) TFEU,<sup>78</sup> to apply to investment treaties pursuant to *Pringle*.<sup>79</sup> The Commission has requested that the Court determine pursuant to the procedure envisaged by the Article 218(11) TFEU<sup>80</sup> whether the Free Trade Agreement with Singapore is compatible with the

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75. *Id.* at 11.

76. Burgstaller, *supra* note 45, at 479–80.

77. If one part of an agreement may be divided into two parts, one of which falls into the purview of exclusive powers, and another to the competence of EU Member States, the agreement has to be concluded by both the Union and Member States. Should exclusive powers of the Union mix with non-exclusive, the Union cooperates with EU Member States, but may activate the competence and pre-empt Member States from their treaty-making powers. Marcus Klamert & Niklas Maydell, *Lost in Exclusivity: Implied Non-exclusive External Competences in Community Law*, 13(4) EUR. FOREIGN AFF. REV. 493, 493–94 (2008).

78. TFEU, *supra* note 31, art. 3(2) (“The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.”).

79. Case C-370/12 Thomas Pringle v Government of Ireland [2012], ¶¶ 100–101 (“In that regard, it must be recalled that, under Article 3(2) TFEU, the Union is to have ‘exclusive competence for the conclusion of an international agreement when its conclusion . . . may affect common rules or alter their scope’. It follows also from that provision that Member States are prohibited from concluding an agreement between themselves which might affect common rules or alter their scope. However, the arguments put forward in this context have not demonstrated that an agreement such as the ESM Treaty would have such effects.”).

80. TFEU, *supra* note 31, art. 218(11) (“A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised.”).

primary law of the EU.<sup>81</sup> The Commission asked the Court to interpret the scope of the Union’s exclusive and shared competence<sup>82</sup> also in matters relating to foreign investments.<sup>83</sup> To connect the dots of the EU’s investment competence it should be recalled that the Court has established that Article 207(1) by being part of the CCP relates only to the external action with third states and not the trade in the internal market.<sup>84</sup>

Opinion of Advocate General Sharpston delivered in December 2016 suggests the Court declare the EU does not have exclusive competence over portfolio investment regarding the conclusion of Free Trade Agreement with Singapore, and in so far as the Agreement applies to other than foreign direct investment, investment falls within the shared competences of the Union and its Member States.<sup>85</sup> AG Sharpston dismissed the Commission’s argument of extending the *ERTA/AETR* principle to the Agreement under Article 3 (2) TFEU, which was submitted to the Court based on the view that “common rules” in Article 3 (2) TFEU should be read as to include “treaty provisions”.<sup>86</sup> Since there is no EU secondary legislation under Articles 63 (1) and 64 (2) TFEU relating to types of investment other than FDI,<sup>87</sup> and since no other argument was presented for the competence to be exclusive,<sup>88</sup> the substantive rules on investments other than foreign direct investment in Section 9 (a) of the Agreement should be considered to fall under shared competence.<sup>89</sup>

The second potential limitation to the execution of the Union’s exclusive competence on FDI is Article 345 TFEU. This article, which is not a Lisbon novelty to EU law and which is to be found in the General and Final Provisions of the TFEU, limits the scope of the Treaty’s application

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81. *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*, COM (2014) 8218 final (Oct. 30, 2014) [hereinafter *Commission Decision*].

82. *Id.* at 2 (“Does the Union have the requisite competence to sign and conclude alone the Free Trade Agreement with Singapore? More specifically, which provisions of the agreement fall within the Union’s exclusive competence?; which provisions of the agreement fall within the Union’s shared competence?; and is there any provision of the agreement that falls within the exclusive competence of the Member States?”).

83. *Id.* at 1 (“In particular, doubts have been raised with regard to the extent and the nature of the Union’s competence in respect of some elements of the chapters of the agreement on the protection of foreign investment, transport services, intellectual property, transparency and sustainable development. It is therefore advisable to seek from the Court of Justice an opinion clarifying the extent and the nature of the Union’s competence.”).

84. Case C-137/12 *Comm’n v. Council* 2013 EUR-Lex CELEX 675, ¶ 56.

85. Opinion of AG Sharpston in Opinion Procedure 2/15 at 370.

86. *Id.* at 359.

87. *Id.* at 360.

88. *Id.* at 361.

89. *Id.* at 370.

in that it shall in no way prejudice Member States property ownership governance.<sup>90</sup> This limitation exists despite the fact that FDI revolves around property rights, or even is based on them.<sup>91</sup> Such a narrow scope of competence prevents the Union from getting directly involved in cases of expropriation that are relatively common to investment arbitration.<sup>92</sup> Despite the property rights limitations on the EU level, the possibility and margins to expropriate, also in the public interest, is fully governed by national laws. Although only national legal systems contain the protection against expropriation, in *Fearon v. Irish Land Commission*,<sup>93</sup> the CJEU subjected national expropriation rules to the principle of non-discrimination.<sup>94</sup> Similar development could be identified in the area of intellectual property rights. The Treaty of Lisbon brought about an exceptional treatment to intellectual property rights on the European level as it allowed for their harmonization pursuant to Article 118 TFEU.<sup>95</sup> Before the adoption of the TFEU, harmonization efforts at the European level were challenged.<sup>96</sup> While the TFEU stipulates that European rules should not prejudice national rules on property rights, intellectual property (IP) rights were given a clear exception to this rule.<sup>97</sup> IP rights, should they be legislated in EU Member States'

90. TFEU, *supra* note 31, art. 345.

91. Karpat, *supra* note 13, at 100.

92. *E.g.*, AES Summit Generation Limited and AES-Tisza Erőmű Kft v. The Republic of Hungary, ICSID Case No. ARB/07/22 (Oct. 30, 2008) (Award); Electrabel S.A. v Hungary, ICSID Case No. ARB/07/19 (Nov. 30, 2012) (Award); Eastern Sugar BV v. Czech Republic, SCC Case No. 088/2004 (Mar. 27, 2007) (Partial Award of Mar. 27, 2007); Eureka B.V. v. The Slovak Republic, PCA 2008-13 (Oct. 26, 2010) (Award).

93. Robert Fearon & Co. Ltd. v. Irish Land Comm'n, Case 182/83, [1984] E.C.R. 03677.

94. *Id.* ¶ 7 (“[A]lthough Article 222 of the Treaty does not call in question the Member States’ right to establish a system of compulsory acquisition by public bodies, such a system remains subject to the fundamental rule of non-discrimination, which underlies the chapter of the Treaty relating to the right of establishment.”).

95. TFEU, *supra* note 31, art. 118 (“In the context of the establishment and functioning of the internal market, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralised Union-wide authorisation, coordination and supervision arrangements. The Council, acting in accordance with a special legislative procedure, shall by means of regulations establish language arrangements for the European intellectual property rights. The Council shall act unanimously after consulting the European Parliament.”).

96. Case C-3 77/98, Kingdom of the Netherlands v. Parliament and Council, 2001 E.C.R. I-7079.

97. DAMIAN CHALMERS, GARETH DAVIES & GIORGIO MONTI, EUROPEAN UNION LAW TEXT AND MATERIALS 397 (3rd ed. 2014).

national laws, shall be exercised in a manner which does not infringe EU law. Analogically to the distinction between the adoption and the exercise of IP rights, it can be argued, that European measures could theoretically set conditions for expropriations (e.g., procedural guarantees), while respecting the right of Member States to execute the nationalization.<sup>98</sup>

The third limitation to the CCP competence that was conferred on the Union is Article 207(6) TFEU.<sup>99</sup> This article limits the exercise of competence in particular with regard to the supporting competences of Article 6(a) TFEU. The EU might not be able to implement an international treaty if harmonization measures were to be enacted in connection with the treaty, since the Union may not adopt harmonization measures if such competence was not conferred on the EU.<sup>100</sup> Examples of such implementation measures may include possible investment treaty commitments regarding establishment of national treatment or guarantees of effective judicial remedies in the

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98. Angelos Dimopoulos, *Creating an EU Investment Policy: Challenges for the Post-Lisbon Era of External Relations*, in *EU EXTERNAL RELATIONS LAW AND POLICY IN THE POST-LISBON ERA* 401, 408 (Paul James Cardwell ed., 2002); Marc Bungenberg, *The Division of Competences Between the EU and Its Member States in the Area of Investment Politics*, 2011 *EUR. Y.B. INT'L ECON. L.* 29, 36–37; ARTHUR HARTKAM, *TOWARDS A EUROPEAN CIVIL CODE* 324 (2011).

99. TFEU, *supra* note 31, art. 207 (“The exercise of the competences conferred by this Article in the field of the common commercial policy shall not affect the delimitation of competences between the Union and the Member States, and shall not lead to harmonisation of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonisation.”).

100. As Krajewski explains: “Article 207(6) TFEU contains a limitation of the exercise of the competences of the common commercial policy according to which the exercise of these competences ‘shall not affect the delimitation of competences between the Union and the Member States, and shall not lead to harmonisation of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonisation.’ Article 207(6) TFEU contains two elements which are closely connected: the first part of the provision stating that the delimitation of competences between the Union and the Member States shall not be affected by the exercise of the competences in the field of the common commercial policy reiterates the general principle of limited and specific conferral of competences (Articles 4(1) and 5(1) and (2) TEU). In the context of external policies this excludes a so-called ‘inverse AETR effect’ by which an implicit internal competence could be derived from an explicit external competence. The second element of Article 207(6) TFEU holds that the exercise of the trade competence may not lead to harmonisation where the treaty expressly prohibits this. This applies in particular to those areas in which the Union is only competent for ‘supporting, coordinating and complementary action’, such as education and health (Article 6(a) TFEU). As the Lisbon Treaty conferred the Union with the exclusive competence to conclude trade agreements covering services, the Union may conclude agreements covering education and health as well. However, the Union may not implement such an agreement if these agreements would require harmonisation measures, because the Union lacks the competence to harmonise in these areas.” Markus Krajewski, *The Reform of the Common Commercial Policy*, in *EU LAW AFTER LISBON* 21 (Andrea Biondi et al. eds., 2010).

investment treaty.<sup>101</sup> In this respect, instead of centralization, the EU shows sign of federalization where implementation of an agreement (unlike signing on the EU level) lies within the competence of states.<sup>102</sup>

Furthermore, the TFEU does not contain any definition of foreign direct investment whatsoever and this fact has to be compensated for by the CJEU case law.<sup>103</sup>

#### IV. POSITIONING THE COMPETENCE WITHIN EU LAW

The Treaty of Lisbon impacted the allocation of competences of the Commission and Member States, and the Treaty development mirrors the expanding interrelation between international investment law and EU law.<sup>104</sup> Extra-EU BITs are to be replaced with newly negotiated treaties, while intra-EU BITs face divergent opinions from the Commission and arbitral tribunals. New investment treaties (TTIP with the USA, CETA with Canada, etc.) are to be negotiated by the EU as a block of states in the EU's exclusive competence. Although the EU declared its ambition to achieve a comprehensive investment policy,<sup>105</sup> conflicts of intra-EU and extra-EU BITs with EU law are to be resolved independently from each other. Cremona aptly reminds, “. . . [T]here is a need to remember the importance of the different objectives of integration in the internal and external dimensions of the ‘Union project’, a difference which is perhaps not always adequately recognized in the demands made in relation to approximation of laws.”<sup>106</sup>

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101. Luis M. Hinojosa-Martinez, *The Scope of the EU Treaty-Making Power on Foreign Investment: Between Wishful Thinking and Pragmatism*, 17 J. WORLD INV. & TRADE 86, 104 (2016).

102. Krajewski, *supra* note 100, at 22.

103. CJEU defined FDI as follows:

[I]nvestments of any kind made by natural or legal persons which serve to establish or maintain lasting and direct links between the persons providing the capital and the undertakings to which the capital is made available in order to carry out an economic activity. . . while the shares held by the shareholder enable him to participate effectively in the management of that company or in its control.

Case C-326/07, *Comm'n v. Italian Republic* 2009 E.C.R. I-02291 ¶ 35.

104. Markus Burgstaller, *European Law and Investment Treaties*, 26 J. INT'L ARB. 181, 183 (2009).

105. *European Commission Communication*, *supra* note 10.

106. Cremona, *supra* note 53, at 239.

The distinction of treatments<sup>107</sup> between extra-EU and intra-EU investment protections may, however, lead to forum shopping through the corporate nationality planning. Although the predictability of the standards of protection offered by Member States was proclaimed as a substantial resort out of the interaction of EU law and international investment law,<sup>108</sup> some legal counselors already advise their clients to consider an option for an extra-EU BITs legal reconstruction of national identities of their companies conducting foreign investment due to the fear of uncertain legal regulation of intra-EU BITs.

The corporate nationality has become an elusive criterion in investment treaty arbitration<sup>109</sup> and law firms have been publicly advising investors to restructure their investments by pulling them out of the EU, hence enabling them to use extra-EU BITs, which remain uncontested.<sup>110</sup> This is due to the fact that whether they are protected by BITs or EU law, the express knowledge of provisions according to which investors can act would allow investors to internalize this particular risk into their decision-making process as to whether, how, and at what costs they invest.<sup>111</sup> Moreover, if investors voluntarily opt not to use legal investment protection instruments provided in BITs in order to avoid a possible backlash against BITs in future, the investment environment clearly does not provide for the needed legal certainty.

Putting it in Ziegler's words: "If the EU does not manage to quickly convince investors that either the existing BITs of its members or the new EU FTAs do provide a good protection, investors might prefer to use vehicles in countries that do satisfy their needs in a less ambiguous way."<sup>112</sup> Since extra-EU BITs are to remain in place pursuant to Regulation 1219/2012, investors from EU Member States may profit from structuring their investment via a third state with an extra-EU BIT in order to achieve protection similar to intra-EU BITs. Despite the shift to the exclusive competence of the Union to contract extra-EU BITs after the ratification of the Treaty of Lisbon, the Commission has hesitated for years to tackle intra-EU BITs and

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107. Stephan W. Schill, *Ordering Paradigms in International Investment Law: Bilateralism – Multilateralism – Multilateralization*, in *THE FOUNDATIONS OF INTERNATIONAL INVESTMENT LAW* 109, 121 (Douglas et al. eds., 2014).

108. *Memorandum of the European Commission Q&A: Commission launches comprehensive European International Investment Policy*, EUR. COMM'N TRADE (July 7, 2010), <http://trade.ec.europa.eu/doclib/press/index.cfm?id=590> [<https://perma.cc/S36P-XQ35>].

109. Schill, *supra* note 107, at 121.

110. Sidley Austin LLP, *International Arbitration Update* (2/2009); Winston and Strawn LLP, *Latest Development Concerning European Investment Treaties* (2012).

111. Anthea Roberts, *Triangular Treaties: The Extent and Limits of Investment Treaty Rights*, 56 (2) *HARV. INT'L L.J.* 353, 388 (2015).

112. Andreas R. Ziegler, *The New Competence of the European Union in the Area of Foreign Direct Investment (FDI): A Third Country Perspective*, in 2013 *EUR. Y.B. INT'L ECON. L.* 235, 243.

start procedures against each MS that has intra-EU BITs that conflict with EU law. Finally, in June 2015 five EU MS were requested to terminate their intra-EU BITs.<sup>113</sup>

Internally, the intensification of the power struggle between the European bodies, namely the European Parliament, the European Commission, and the Council during the negotiation of Regulation 1219/2012 manifested significant difficulties in communication regarding FDI between the various administrative structures in the Union.<sup>114</sup> This might also be due to the fact that after the adoption of the Treaty of Lisbon the Parliament's competences increased and Parliament's role was substantially enhanced<sup>115</sup> to the detriment of the Council's powers.<sup>116</sup>

Taking together the Commission's efforts to harmonize FDI in the EU, Member States' disagreement, ineffective communication of future intentions, inconsistency of attention to the distinction between intra-EU BITs and extra-EU BITs, the absolute lack of solutions to replace intra-EU BITs, and most importantly the problematic negotiations of the TTIP and the CETA, the expectations of smooth FDI-policy changes might not have been met yet.<sup>117</sup>

113. European Commission Press Release IP/15/5198, Commission Asks Member States to Terminate Their Intra-EU Bilateral Investment Treaties (June 18, 2015).

114. 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 States' Perspective*, 10 *TRANSNAT'L DISPUTE MGMT.*, March 2013, at 11–12, <http://ssrn.com/abstract=2226979> [<https://perma.cc/8WYM-LWP7>]. Lavranos mentions that the battle of European Parliament against the Council and the Member States featured “outrageous and unfounded allegations,” that European Parliament did not show any proficiency in FDI matters, and that the relations between the Council, the Commission and European Parliament were “heavily poisoned.” *Id.*

115. Krajewski, *supra* note 100, at 26.

116. Markus Krajewski, *New Functions and New Powers for the European Parliament: Assessing the Changes of the Common Commercial Policy from the Perspective of Democratic Legitimacy*, in 2013 *EUR. Y.B. INT'L ECON. L.* 10.

117. The Commission's report on governance guidelines from 2003 for instance mentions: Promoting new forms of governance is by no means the sole responsibility of the European institutions, and even less so that of the Commission alone. It is the responsibility of all levels of public authority, private undertakings and organised civil society because good governance — openness, participation, accountability, effectiveness and coherence — are what the public expects at the beginning of the 21st century.

European Commission, *Report from the Commission on European Governance 5* (2003), [http://ec.europa.eu/governance/docs/comm\\_rapport\\_en.pdf](http://ec.europa.eu/governance/docs/comm_rapport_en.pdf) [<https://perma.cc/YG9W-56AL>] (last visited Aug. 15, 2016).

EU investment protection has been challenged on sundry levels from the very beginning.<sup>118</sup> Kuijper asserts that with the adoption of the Treaty of Lisbon, the EU even failed clearly to delineate its treaty-making powers and opted for a solution that may lead to a considerable controversy within such an important area<sup>119</sup> of the Treaty instead.<sup>120</sup> Koutrakos criticized the vagueness of the competence wording already in the Constitutional Treaty,<sup>121</sup> and Meunier pointed out that the process of investment competence conferral could be labelled, rather harshly, as a historical accident or action happening by stealth.<sup>122</sup> Cameron argues that the overlapping frameworks of EU law and investment treaties create confusion among investors and without the required attention might lead to the creation of disincentives.<sup>123</sup> Belohlavek believes that the Commission's behavior in the field of FDI has been filled with arrogance, an attitude that can be quite deadly in a competitive globalized international community.<sup>124</sup> Burgstaller contends that the infringement proceedings against Sweden, Finland, and Austria document the determination of the Commission to encroach on the Member States' BITs practice even before the Treaty of Lisbon came into the effect.<sup>125</sup> There are also suggestions of the continuous unqualified approach of the Parliament to the matter.<sup>126</sup> Leal-Arcas confirms the existing doubts surrounding FDI matters in the EU, pointing out the pitfalls of uncertain interpretation and the lack of preparations.<sup>127</sup> Krajewski points out that the CCP has not become more transparent through the TFEU.<sup>128</sup> Lenk asserts that the Union's efforts to form a comprehensive (intra-EU and extra-EU) investment policy has been

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118. Such challenges include: ineffective translation of competence distribution into concluded agreements, insufficient conferral of powers to the Union, politicization of the Common Commercial Policy, and the involvement of the European Parliament. Marc Bungenberg, *supra* note 93, at 42.

119. Van Vooren and Wessel refer to the CCP as the forming heart of EU external relations law. VAN VOOREN & WESSEL, *supra* note 29, at 87.

120. Kuijper considers Article 216 an "awkward formulation" that is to codify *ERTA* doctrine and Opinion 1/76, while the TFEU mentions potential or exclusive treaty-making powers, although the Court codified them as exclusive in nature, just as Article 3 TFEU did. See Pieter J. Kuijper, *Super-Power Frustrated? The Cost of Non-Lisbon In the Field of External Relations*, in 51 GERMAN Y.B. INT'L L. 18–19 (2009).

121. KOUTRAKOS, *supra* note 58, at 495.

122. Meunier, *supra* note 59.

123. PETER D. CAMERON, INTERNATIONAL ENERGY INVESTMENT LAW: THE PURSUIT OF STABILITY 362 (2010).

124. BELOHLAVEK, *supra* note 60, ¶ 37.

125. Burgstaller, *supra* note 45, at 464.

126. Lavranos, *supra* note 114, at 12.

127. Rafael Leal-Arcas, *The European Union's Trade and Investment Policy after the Treaty of Lisbon*, 11 J. WORLD INV. & TRADE 463, 487 (2010).

128. Krajewski, *supra* note 116, at 15.

affected by persistent horizontal and institutional incoherence.<sup>129</sup> Paparinskis explains that the first steps of the new extra-EU investment policy have been affected by inconsistencies.<sup>130</sup>

Despite the Commission's active role, the competence shift within the CCP has not become publicly understandable.<sup>131</sup> The most problematic part is that none of the agents involved seem to consider the implications of the growing assertiveness of EU law against the international obligations of EU Member States.<sup>132</sup> Such consequences include the doubts of investors as to whether they will be able to depend on investment treaties (current or negotiated) in the future, or whether they will be able to enforce their awards in the EU.

## V. CONCLUDING REMARKS

The general approach of the EU towards its trade and investment agenda changed in 2006 into a vigorous use of bilateral negotiations as the Union experienced opposition from emerging countries as well as the U.S. The use of bilateral agreements was seen as a reliable instrument to efficaciously realize the Union's market power that was in decline. The

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129. Inconsistence and incoherence in stances among EU Member States, the Commission's argumentation between intra-EU and extra-EU aspects of investment protection, as well as diverging positions within the Commission's DG Trade and DG FISMA (institutional incoherence). Hannes Lenk, *Challenging the Notion of Coherence in EU Foreign Investment Policy*, 8 EUR. J. LEGAL STUD. 6, 18–19 (2015).

130. Martins Paparinskis, *International Investment Law and the European Union: A Reply to Catherine Titi* 26 (3) EUR. J. INT'L L. 663, 669 (2015) (“...the definition of most-favoured-nation treatment in the EU–Canada Comprehensive Economic and Trade Agreement (CETA) explains that substantive obligations in other treaties are not ‘treatment’, unless particular measures are adopted pursuant to them. Why? The proposition that obligations in other treaties do constitute ‘treatment’ seems to be reflective of consensus in investment arbitration. What is the reason for such a sharp departure from a generally accepted reading of the clause, which is seemingly expressed in the form of an interpretation of the ordinary meaning rather than an exception? Third, the definition of fair and equitable treatment has been supplemented by an explanation of what conduct can constitute its breach. The idea of elaborating fair and equitable treatment in this manner is an interesting one (even if the pedigree and implications of some elements may be more obvious than others). However, the effort to ensure greater predictability may be undercut by significant differences already present within the EU practice: ‘targeted discrimination’ in the CETA but not in the draft EU–Singapore Free Trade Agreement (FTA); a rule on contractual breaches in the FTA but not in the CETA; and ‘legitimate expectations’ expressed as part of the obligation in the FTA but only something to be taken into account in application in the CETA.”).

131. Krajewski, *supra* note 116, at 15.

132. BELOHLAVEK, *supra* note 60, ¶ 143.

future erosion of the EU's market position will likely continue and this will contribute to favoring the use of bilateral instead of multilateral trade agreements with the EU.<sup>133</sup> However, as far as competence is concerned, should an investment treaty be signed in the future, it shall be done in the Union's competence, whose precise scope is expected to be bindingly interpreted by the Court in the Opinion on the Free Trade Agreement with Singapore.<sup>134</sup> With the lack of clarity concerning the scope of the investment competence, and a parallel elevated assertiveness of the Member States at the expense of the European Commission with respect to the CETA and TTIP in the changing political (post-Brexit) environment,<sup>135</sup> it is questionable whether the competence shift may yield any results for the EU even if the CJEU pronounces the competence as exclusive, whether it is through the interpretation of the TFEU or the more general doctrine of implied powers.

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133. Woolcock, *supra* note 46, at 14.

134. *Commission Decision*, *supra* note 81.

135. Nikos Lavranos, *Why the EU's Foreign Direct Investment (FDI) Competence Should be Re-nationalized*, EFILA BLOG (Aug. 25, 2016), <https://efilablog.org/2016/08/25/why-the-eus-foreign-direct-investment-fdi-competence-should-be-re-nationalized> [<https://perma.cc/8UQC-6B5K>].