

EU Competence in Foreign Direct Investment: Will the EU Court of Justice End the Controversy?

David Leys*

Since the enactment of the provisions on foreign direct investment in the Treaty of Lisbon, a controversy has arisen on the competence of the EU and the Member States in this field. Recently, the presence of certain investment provisions in the concluded EU-Singapore Free Trade Agreement (EUSFTA) has made the controversy more practical. In an effort to clarify the issue of competence, the European Commission decided to request an Opinion from the EU Court of Justice. The EU Court of Justice will most probably end the controversy and have the last word on the question.

I INTRODUCTION

The Commission concluded negotiations on the investment provisions in the EU-Singapore Free Trade Agreement (EUSFTA) on 17 October 2014.¹ Unlike many previous Free Trade Agreements (FTAs) involving the EU and its Member States, the EUSTA contains important innovations in the area of Foreign Direct Investment (FDI), particularly improved investment protection rules.² But who in the EU is competent to approve these provisions? Can these investment provisions of EUSFTA be approved simply by EU institutions, or must they be ratified by each of the twenty-eight Member States? The latter process could involve several years of debate and lead to a counter-productive situation.

To avoid this, the Commission decided to ask the EU Court of Justice (ECJ) to clarify the EU competence to sign and ratify the EUSFTA.³ Which EUSFTA provisions fall within the EU's exclusive competence, the Member States' competence or shared competence? Like the Commission, we expect that the ECJ will have the last word on the issue – which also affects the fate of Bilateral Trade Agreements (BITs) previously concluded by

Member States. Perhaps the ECJ will see an EU investment policy or a common investment policy.

In this article, we highlight the provisions on FDI in the Treaty of Lisbon, i.e., in the Treaty on the Functioning of the European Union (TFEU). Second, we examine the controversy on the scope of the EU competence in FDI by looking at the questions of foreign portfolio investments, protection of investment, and BITs. Third, we discuss the role played by the ECJ in clarifying sensitive issues. Finally, we analyse the rules of procedure for requesting an Opinion from the ECJ and stress that the ECJ will have the last word.

2 PROVISIONS ON FOREIGN DIRECT INVESTMENT IN THE TREATY OF LISBON

How exclusive is EU competence in FDI? To answer this question, we must first examine how the Treaty of Lisbon handles the Common Commercial Policy (CCP), because FDI comes under CCP. Indeed, Article 207(1) of the TFEU states explicitly that CCP includes trade in goods, in services,⁴ in trade-related aspects of intellectual

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* Lawyer at the Brussels Bar and Fellow at the European Law Institute, d.leys@avocat.be. The author would like to thank Yohan Benizri for providing guidance and suggestions on the content of the article.

¹ Newsletter, DG Trade website, EU and Singapore conclude investment talks, 17 Oct. 2014, <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1164>.

² The innovations concerning protection of investment contained in the EUSFTA are not present in the twelve Bilateral Trade Agreements (BITs) in place between Singapore and EU Member States (covering thirteen Member States).

³ Newsletter, DG Trade website, Singapore: The Commission to Request a Court of Justice Opinion on the trade deal, 30 Oct. 2014, <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1185>.

⁴ All four modes of supply.

property⁵ and in FDI. Also, Article 206 of the TFEU highlights that ‘the Union shall contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and on FDI’.

The Treaty of Lisbon strengthens the EU exclusive competence in CCP. Article 3(1)(e) of the TFEU expressly stipulates that the CCP – and presumably thus FDI – falls within the exclusive competence of the EU. This means that only the EU may legislate and adopt legally binding acts in CCP.⁶ This is consistent with the *Opinion 1/75* of the ECJ which underlined that the Member States do not have a shared competence with the EU in CCP.

In addition, Article 207(4) of the TFEU recalls that ‘for the negotiation and conclusion of agreements in the fields of FDI, the Council shall act unanimously where such agreements include provisions for which unanimity is required for the adoption of internal rules’.⁷

We can conclude from the wording of these articles that the EU has an exclusive competence to conclude agreements in FDI. But what does FDI cover? For example, does it include the investment provisions of EUSFTA that involve the protection of investment?

3 DEFINITION OF FOREIGN DIRECT INVESTMENT

After a careful parsing of the Treaty of Lisbon, we must confess that there is no definition of FDI. The lack of this definition may be problematic. In particular, it is hard to know whether FDI narrowly refers to provisions liberalizing investment (i.e., pre-establishment of market access and national treatment) or more broadly to provisions protecting investment. Without a clear definition, one cannot tell whether the EU can exclusively (without Member States) legislate FDI *stricto sensu* (liberalization of investment) or *lato sensu* (liberalization of investment, protection of investment and portfolio investment).

If we consider three primary legal definitions, the answer would seem to be *stricto sensu*. All three definitions delineate FDI primarily in terms of liberalization. First is the definition of FDI from the Organisation for Economic Cooperation and Development (‘OECD’):

a category of investment that reflects the objective of *establishing a lasting interest* by a resident enterprise in one economy (direct investor) in an enterprise (direct investment enterprise) that is resident in an economy other than that of the direct investor. The lasting interest implies the existence of a long-term relationship between the direct investor and the direct investment enterprise and a significant degree of influence on the management of the enterprise. The direct or indirect ownership of 10% or more of the voting power of an enterprise resident in one economy by an investor resident in another economy is evidence of such a relationship. Some compilers may argue that in some cases an ownership of as little as 10% of the voting power may not lead to the exercise of any significant influence while on the other hand, an investor may own less than 10% but have an effective voice in the management. Nevertheless, the recommended methodology does not allow any qualification of the 10% threshold and recommends its strict application to ensure statistical consistency across countries.⁸ (emphasis added)

Similarly, paragraph 359 of the International Monetary Fund (‘IMF’) Balance of Payments Manual specifies that:

Direct investment is the category of international investment that reflects the objective of a resident entity in one economy obtaining a lasting interest in an enterprise resident in another economy. (The resident entity is the direct investor and the enterprise is the direct investment enterprise.) 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.⁹ (underlines added)

Finally, Annex 1 of the European Council Capital Liberalization Directive 88/361/EEC states that direct investments are:

Investments of all kinds by natural persons or commercial, industrial or financial undertakings, and which serve to *establish or to maintain lasting and direct links* between the person providing the capital and the entrepreneur to whom or the undertaking to which the

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⁵ Agreement on Trade-Related Aspects of Intellectual Property rights (‘TRIPS’).

⁶ Article 2(1) of the TFEU.

⁷ It means that the political influence of the Member States is secured.

⁸ OECD Glossary of Foreign Direct Investment Terms and Definitions, <http://www.oecd.org/investment/investmentfordevelopment/2487495.pdf>.

⁹ Balance of Payments Manual, International Monetary Fund, p. 86, <http://www.imf.org/external/pubs/ft/bopman/bopman.pdf>.

capital is made available in order to carry on an economic activity. This concept must therefore be understood in its widest sense.¹⁰ (emphasis added)

We consider these three definitions too restrictive; they do not reflect all the facets of FDI. An autonomous EU definition of FDI must be enacted in the Treaty of Lisbon, and hopefully legal clarification on FDI by the ECJ will be a step in this direction.

4 CONTROVERSY ON THE EU COMPETENCE IN FOREIGN DIRECT INVESTMENT

Since the entry into force of the Treaty of Lisbon on 1 December 2009, the competence of the EU and the Member States in FDI has become controversial.¹¹ What are the key questions of this controversy – questions that will most likely be brought to the attention of the ECJ?

4.1 Foreign Portfolio Investment

First, does an implied EU exclusive competence in FDI include foreign portfolio investment? In its Communication towards a comprehensive European international investment policy, the Commission argued that there is an implied EU exclusive competence for foreign portfolio investments because they may affect common rules on the free movement of capital between Member States and third countries, as per provisions on capital and payments enacted in the TFEU (Articles 63–66),¹² as well as Article 3(2) of the TFEU. This argument is supported by the Council, which stressed that the EU's international and investment policy should be further elaborated according to the respective competence of the EU and its Member States as defined in the Treaty

of Lisbon.¹³ The European Parliament follows the Commission and the Council, but it excludes 'speculative forms of investment' from FDI.¹⁴

On the contrary, Member States, supported by certain academics, stress that FDI does not include portfolio investments. According to Krajewski,¹⁵ Chaisse,¹⁶ Bungenberg¹⁷ and Reinisch,¹⁸ portfolio investments cannot be covered by Article 207 of the TFEU because FDI refers to long-term investment in a foreign country and the drafters of the Treaty of Lisbon wanted to limit the EU competence in FDI.

Interestingly, in the case *European Commission v. Portugal*, the ECJ compared 'direct investment' to 'portfolio investments.' The first consists of 'investments in the form of participation in an undertaking through the holding of shares which confers the possibility of effectively participating in its management and control' and the second refers to 'investment in the form of acquisition of shares on the capital market solely with the intention of making a financial investment without any intention to influence the management and control of the undertaking'.¹⁹

4.2 Protection of Investment

Second, does an implied EU exclusive competence in FDI cover protection of investment once an investment has been made? This question has become urgent because the EUSFTA (unlike the FTA between South Korea and the EU and its Member States, for example²⁰) deals with protection of investment. The investment chapter in the EUSFTA clarifies and improves investment protection rules (on fair and equitable treatment and indirect expropriation), and it improves operation of the dispute settlement system (breaches of the investment protection

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- ¹⁰ Council Directive 88/361/EEC of 24 Jun. 1988 for the implementation of Art. 67 of the Treaty, <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1426931371158&uri=CELEX:31988L0361>.
- ¹¹ Reclaiming Public Interest in Europe's International Investment Policy; EU Investment Agreements in the Lisbon Treaty Era: A Reader, Seattle to Brussels Network, Amsterdam, July 2010; A. De Luca, *Integrating Non-trade Objectives in the Oncoming EU Investment Policy: What Policy Options for the EU?*, CLEER Working Papers 2013/4, http://www.asser.nl/media/1639/cleer_13-4_web.pdf.
- ¹² 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, 7 Jul. 2010, COM(2010)343 final, http://trade.ec.europa.eu/doclib/docs/2010/july/tradoc_146307.pdf.
- ¹³ Conclusions on a comprehensive European international investment policy, 3041st Foreign Affairs Council meeting, Luxembourg, 25 Oct. 2010; http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/117328.pdf.
- ¹⁴ European international investment policy, European Parliament resolution of 6 Apr. 2011 on the future European international investment policy (2010/2203 (INI)), §11 <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P7-TA-2011-0141+0+DOC+PDF+V0//EN>.
- ¹⁵ Markus Krajewski, 'The reform of the Common Commercial Policy', to appear in: A. Biondi & P. Eeckhout (eds), *European Union Law after the Treaty of Lisbon*, p. 16, <http://www.europarl.europa.eu/document/activities/cont/201012/20101207ATT07788/20101207ATT07788EN.pdf>.
- ¹⁶ J. 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. Intl. Econ. L. 57, <http://jiel.oxfordjournals.org/content/15/1/51.full.pdf+html>.
- ¹⁷ M. Bungenberg, *The Division of Competences Between the EU and Its Member States in the Area of Investment Politics*, in *International Investment Law and EU Law* 29 at 36 (M. Bungenberg et al. eds, 2011).
- ¹⁸ A. Reinisch, *The EU on the Investment Path – Quo Vadis Europe? The future of EU BITs and other Investment Agreements*, Santa Clara J. Intl. L. 140 (2014), <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1151&context=scujil>.
- ¹⁹ See Case C-171/08, *European Commission v. Portugal*, 8 Jul. 2010, para. 49; Joined Cases C-282/04 and C-283/04, *European Commission v. Netherlands*, 28 Sep. 2006, para. 19.
- ²⁰ Article 7.10 of the EU–South Korea FTA, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2011:127:FULL&from=EN>.

provisions, transparency, binding code of conduct, safeguards for the parties).²¹

The Commission and some authors such as Kuijper, Dimopoulos and Karl²² believe that the reference to FDI in Article 207 of the TFEU covers both liberalization of investment and protection of investment.

In its 2010 communication 'Towards a comprehensive European international investment policy', the Commission argues that Article 345 of the TFEU does not exclude harmonization of legislative or regulatory provisions regarding property issues.²³ For its part, the ECJ has expressly confirmed that Article 345 of the TFEU does not impede the EU from adopting measures to harmonize certain aspects of intellectual property rights.²⁴ For example, Member States cannot define the conditions under which expropriation takes place. They only have the competence to decide whether and when expropriation occurs. To the same extent, Member States must adhere to minimum standards of protection enacted in Articles 49 and 63 of the TFEU.

On the contrary, some Member States, supported by certain academics such as Krajewski,²⁵ Bungenberg and Leczykiewicz,²⁶ are convinced that the EU competence in FDI does not cover all aspects of protection of investment (e.g., expropriation), which remain in the ambit of the Member States according to Articles 207(6) and 345 of the TFEU.

Moreover, according to Reinisch, Article 206 TFEU speaks about progressive abolition of restrictions on FDI. This would mean that CCP is mainly concerned with liberalization of investment.²⁷ In addition, the German Constitutional Court stated that:

The extension of the CCP to FDI (Article 207.1 TFEU) confers exclusive competence on the EU also in this

area. Much, however, argues in favor of assuming that the term FDI only encompasses investment which serves to obtain a controlling interest in an enterprise [...]. The consequences of this would be that exclusive competence only exists for investment of this type whereas investment protection agreements that go beyond this would have to be concluded as mixed agreements.²⁸

Finally, according to Bungenberg, the EU does not have exclusive competence to conclude investments chapters containing Investor State Dispute Settlement (ISDS).²⁹ ISDS may be regarded as incompatible with the EU exclusive competence as provided in the Treaty of Lisbon.³⁰ We do not agree with that argument. The EU is responsible for its own measures and the Member States for their own measures unless measures are taken under EU obligation for ISDS, as per internal EU Regulation No. 912/2014 of 23 July 2014.³¹

4.3 BITs Concluded by Member States

Third, how does the implied EU exclusive competence in FDI affect BITs concluded by Member States? Do they become incompatible with EU law? According to the Commission, most of the matters contained in BITs (e.g., certain standards of protection in the post-investment phase and unlawful expropriation) fall within the scope of the EU exclusive competence under Article 207 of the TFEU.

In order to replace bilateral BITs, the Commission proposed the Grandfathering Regulation establishing transitional arrangements for BITs between Member States and third countries.³² It entered into force in January 2013. The Grandfathering Regulation is not limited to

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²¹ Summary of the investment provisions in the EU-Singapore Free Trade Agreement, see http://trade.ec.europa.eu/doclib/docs/2014/october/tradoc_152845.pdf.

²² L. Schicho, *Member States BITs after the Treaty of Lisbon: Solid Foundation or First Victims of EU Investment Policy*, Research Paper in Law of College of Europe, 02/2012, p. 4.

²³ See http://trade.ec.europa.eu/doclib/docs/2010/july/tradoc_146307.pdf.

²⁴ Case C-350/92, *Kingdom of Spain v. Council of the European Union*, 13 Jul. 1995, paras 9–14.

²⁵ M. Krajewski, *External Trade Law and the Constitution Treaty: Towards a Federal and More Democratic Common Commercial Policy?* Com. Mkt L. Rev. 2005 <http://www.tombeurcounsel.eu/teksten/europa/EU%20-%20GW%20-%20handelsbeleid.pdf>.

²⁶ L. Schicho, *supra* n. 22.

²⁷ A. Reinisch, *Note, The Future Shape of EU Investment Agreements*, ICSID Rev. 181 (2013), <http://icsidreview.oxfordjournals.org/content/28/1/179.full.pdf+html>.

²⁸ German Constitutional Court, 2 BvE 2/08 (30 Jun. 2009), para. 379, http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/06/es20090630_2bve000208en.html.

²⁹ Youri Devuyt, *The European Union's Competence in International Trade after the Treaty of Lisbon*, J. Intl. & Comp. L. 656.

³⁰ Dr Taida Begic Sarkinovic, *Towards Shaping the New EU Investment Policy*, 2 Latin Amer. J. Intl. Trade L. 616 (2014).

³¹ Regulation (EU) No. 912/2014 of the European Parliament and of the Council of 23 Jul. 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party. <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0912&from=EN>.

³² Regulation (EU) No. 1219/2012 of the European Parliament and of the Council of 12 Dec. 2012, OJ 2012, L 315/40, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:351:0040:0046:En:PDF>.

FDI *stricto sensu* because it covers protection of investment and portfolio investments as well.³³

Nevertheless, Article 1 of the Grandfathering Regulation states clearly that the division of competences established by the TFEU must be respected. Also, the Grandfathering Regulation recalls that the EU may authorize Member States to act in EU exclusive matters. Legal clarification of this issue is needed from the ECJ.

5 TOWARD THE END OF THE CONTROVERSY ON THE EU COMPETENCE IN FOREIGN DIRECT INVESTMENT

On 30 September 2014, the Commission decided to request an Opinion from the ECJ providing legal clarification on the EU competence to approve the investment chapter of the EUSFTA. This decision was confirmed by the new Juncker Commission on 4 March 2015.³⁴ The Commission's legal service is preparing an official request for an Opinion from the ECJ. The request for the Opinion will be ready before summer 2015. It will relate both to whether the envisaged EUSFTA is compatible with the provisions of the Treaty of Lisbon and to whether the EU has the power to enter into that agreement (Article 196, §2 of the Rules of Procedure of the Court of Justice).

5.1 Rules of Procedure for an Opinion at the European Court of Justice

In requesting an Opinion, the Commission is following rules of procedure. The ECJ always plays an important role for the legal clarification of the EU competence in external relations and in CCP.³⁵ This is confirmed by Reinisch who recalls that 'the ECJ will have the final word on all matters of EU law – in both the prescriptive and normative senses of the word – to play to its strengths'.³⁶

According to Article 208, §11 of the TFEU, the 'EU Commission may obtain the Opinion of the ECJ as to

whether an agreement envisaged is compatible with the Treaties'. Such a request may also be introduced by a Member State, the European Parliament, or the Council.

The President of the ECJ shall prescribe a time-limit within which a Member State, the European Parliament, or the Council may submit written observations (Article 196, §3 of the Rules of Procedure of the ECJ).

As soon as the request for an Opinion has been submitted, the President shall designate a Judge-Rapporteur and the First Advocate General shall assign the case to an Advocate General (Article 197 of the Rules of Procedure of the ECJ).

According to Article 198 of the Rules of Procedure of the ECJ, the ECJ may decide that the procedure shall also include a hearing. In any event, the ECJ shall deliver its Opinion as soon as possible, after hearing the Advocate General. Finally, the Opinion, signed by the President, the Judges who took part in the deliberations, and the Registrar, shall be delivered in open court. It shall be served on all the Member States and on the European Parliament, the Commission, and the Council.

Where the Opinion of the ECJ is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised.

5.2 Last Word of the ECJ on the Controversy about the EU Competence in FDI

Fortunately, the ECJ will soon answer the critical question: Can the chapter on FDI in the EUSFTA be concluded by the EU solely, or by the EU and the Member States through a mixed agreement? As an authoritative interpreter, the ECJ has the power to decide this controversial issue.

We believe that the ECJ will recognize the EU competence for an FDI *lato sensu*. Excluding portfolio investments would be a serious obstacle to developing a comprehensive EU investment policy. Portfolio investments are inextricably linked to direct investment in

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³³ For instance, Art. 1(1) of the 2008 German Model BIT states: 'the term "investments" comprises every kind of asset which is directly or indirectly invested by investors of one Contracting State in the territory of the other Contracting State'. <http://www.italaw.com/sites/default/files/archive/ita1025.pdf>.

³⁴ Newsletter, DG Trade, 4 Mar. 2015, European Commission to request a Court of Justice opinion on the trade deal with Singapore, <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1269>; Mlex Insight, EU readies request for court guidance on Singapore trade deal, 4 Mar. 2015, <http://www.mlex.com/TI/Content.aspx?ID=651712>.

³⁵ Opinion of the Court of 11 Nov. 1975 given pursuant to Art. 228 of the EEC Treaty – Opinion 1/75, <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1426956508578&uri=CELEX:61975CV0001>; Opinion of the Court of 26 Apr. 1977 – Opinion given pursuant to Art. 228 (1) of the EEC Treaty – 'Draft Agreement establishing a European laying-up fund for inland waterway vessels' – Opinion 1/76, <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1426956581618&uri=CELEX:61976CV0001>; Opinion of the Court of 4 Oct. 1979 – Opinion given pursuant to the second subparagraph of Art. 228(1) of the EEC Treaty – International Agreement on Natural Rubber – Opinion 1/78, <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1426956750700&uri=CELEX:61978CV0001>; Opinion of the Court of 19 Mar. 1993 – Opinion delivered pursuant to the second subparagraph of Art. 228 (1) of the EEC Treaty – Convention N° 170 of the International Labour Organization concerning safety in the use of chemicals at work – Opinion 2/91, <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1426956809037&uri=CELEX:61991CV0002>; Opinion of the Court of 24 Mar. 1995 – Competence of the Community or one of its institutions to participate in the Third Revised Decision of the OECD on national treatment – Opinion 2/92, <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1426956859820&uri=CELEX:61992CV0002>; Opinion of the Court of 15 Nov. 1994 – Competence of the Community to conclude international agreements concerning services and the protection of intellectual property – Art. 228 (6) of the EC Treaty – Opinion 1/94, <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1426956929110&uri=CELEX:61994CV0001>; Opinion pursuant to Article 300(6) EC – Opinion 1/03, <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1426957043609&uri=CELEX:62003CV0001>; Opinion pursuant to Article 300(6) EC – Opinion 1/08, <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1426956929110&uri=CELEX:62008CV0001>; Opinion 1/13, <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1426957106615&uri=CELEX:62013CV0001>.

³⁶ A. Reinisch, *The EU on the Investment Path – quo vadis Europe? The Future of EU BITs and other Investment Agreements*, Santa Clara Journal of International Law, 2014, p. 152.

several BITs.³⁷ It would not make sense for the EU to conclude less favourable investment chapters than those contained in standard BITs.

However, the ECJ may make an exception for ISDS. Part of a 'package protection of investment', ISDS may be incompatible with the EU system of legal protection guaranteed by the ECJ. If the ISDS competes with the EU legal order, the autonomy of EU law could be impaired.³⁸ And the Member States have the obligation to take their disputes exclusively to the ECJ (Article 344 TFEU). We can hardly believe that the ECJ will accept that party-appointed arbitrators interpret and apply certain aspects of EU law. The ECJ will most likely not allow ISDS to be comprised in FDI *lato sensu* and require that Member States remove ISDS clauses in their BITs. As Julie Maupin says, 'the Court is a zealous guardian of its own jurisdiction'.³⁹

6 A NOTE ON ADOPTION

Although the ECJ will have the last word on the legal controversy over the EU competence in FDI, Member States still have the last word on *adoption* of investment chapters in FTAs like the EUSFTA. According to Article 207(4) of the TFEU, the Member States can still veto the adoption of EU investment chapters in FTAs.

7 CONCLUSION

To summarize, the Treaty of Lisbon has strengthened the EU exclusive competence in CCP and FDI, but it remains

unclear how the ECJ will apply this to the EUSFTA, which contains certain innovations regarding the protection of investment.⁴⁰ If the ECJ defines FDI *stricto sensu* in its Opinion, the EU and the Member States will have to conclude the investment chapter of the EUSFTA through a mixed agreement, which could create confusion among the EU's trading partners.⁴¹ In the meantime, it will be interesting to monitor the observations of the parties, the opinion of the Advocate-General, and the ECJ's hearing (if there is one). It will also be interesting to see how the Grandfathering Regulation will be implemented by the Member States.

Looking further ahead, will the ECJ Opinion help lead to a cohesive, consistent and comprehensive international EU investment policy? According to Jörg Philipp Terhechte, 'the German Federal Constitutional Court has no desire to await a judgment by the ECJ on a concrete case, which will undoubtedly find in favour of there being a Union competence'.⁴² And 'at any length literature on this subject considers that the ECJ's submissions on the interpretation of this term could have been more broadly worded'.⁴³ We believe that a common investment policy is half-recognized in the Treaty of Lisbon. The expected ECJ Opinion will perhaps fully recognize a common investment policy. This would allow the EU to be competitive at the international level.⁴⁴ Also, it would ease the negotiations and conclusions of the investment chapter of the Transatlantic Trade and Investment Partnership (TTIP) and of other FTAs between the EU and third countries.⁴⁵

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- ³⁷ E. Denza, *Bilateral Investment Treaties and EU Rules on Free Transfer: Comment on Commission v. Austria, Commission v. Sweden and Commission v. Finland*, (2010) 35 ELRev, p. 263.
- ³⁸ Recently, in its Opinion 2/13, the ECJ rejected the draft accession agreement for the membership of the EU to the European Convention on Human Rights because the ECJ wanted to keep its exclusive jurisdiction as the sole interpreter of EU law. The ECJ did not want the European Court of Human Rights to issue preliminary rulings of EU law (Art. 267 TFEU).
- ³⁹ J. Maupin, *Where Should Europe's Investment Path Lead? Reflections on August Reinisch, quo vadis Europe?*, Santa Clara J. Intl. L. pre-publication draft of 1 Aug. 2013, p. 36, file:///C:/Users/dleys/Downloads/SSRN-id2327842.pdf.
- ⁴⁰ Shanda L. King, *The Future of Europe's International Investment Agreements*, 2012, file:///C:/Users/dleys/Downloads/SSRN-id2352123%20(1).pdf.
- ⁴¹ A. Niemann, 'The Common Commercial Policy: from Nice to Lisbon', in F. Laursen, *The EU's Lisbon Treaty: Institutional Choices and Implementation*, Ashgate, 2012, http://www.politik.uni-mainz.de/cms/Dateien/Niemann_2012_Common_Commercial_Policy.pdf.
- ⁴² J.P. Terhechte, *(National) Constitutional Law Limitations on the Advancement of the EU's Common Commercial Policy*, in *Common Commercial Policy after Lisbon*, *European Yearbook of International Economic Law*, 28 (M. Bungenberg & C. Hermann eds, Springer 2013), file:///C:/Users/dleys/Downloads/9783642342547-c2%20(3).pdf.
- ⁴³ *Ibid.*
- ⁴⁴ Memorandum from Janina M. Mank, André Marini & Jason Rudall to European Commission, June 2011, Graduate Institute of Geneva, p. 9, http://graduateinstitute.ch/files/live/sites/iheid/files/sites/cte/shared/CTEI/Law%20Clinic/Memoranda%202011/European_Commission_Project.pdf.
- ⁴⁵ Dr R. Kläger, *The Impact of the TTIP on Europe's Investment Arbitration Architecture*, 2/2014, ZDAR, p. 68 to 73, file:///C:/Users/dleys/Downloads/Klaeger,%202014%20(2).pdf.