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'Pastis Power Europe': An Assessment of the EU's Actorness in International Investment Politics

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About the Author

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Abstract

This paper assesses the extent to which the transfer of exclusive competence over foreign direct investment to the European Union (EU) in the Treaty of Lisbon allows it to become a strong actor in the international investment arena. Drawing on legal and international political economy concepts, it challenges a widespread assumption according to which an exclusive EU competence would benefit not only its economic competitiveness but also increase the attractiveness of its regulatory system. Legal and political problems, arising from the limits to the EU's competence in Union law and from its awkward interaction with international investment law, limit its ability to negotiate favourable international investment agreements and imply that the EU's role in this field is unlikely to come to parallel its salient position in trade. Indeed, the transfer of competence might give rise to a paradoxical situation in which the EU's international bargaining position is weakened not only in investment but also in international economic policy-making more broadly regarded.

Introduction: A new exclusive competence for the European Union

Foreign direct investment (FDI) is increasingly relevant internationally as a means of linking markets in a globalised economy and trading system. It is also, pursuant to Article 207(1) of the Treaty on the Functioning of the European Union (TFEU), a component of the European Union's (EU) Common Commercial Policy (CCP), which falls within the Union's exclusive competence as per Article 3(1)(e) TFEU.[1] This transfer of competence that the Treaty of Lisbon made to the Union, the first source and recipient of both capital and investment worldwide, has the potential to give rise to systemic shifts in the international investment landscape.[2] As such, it has been hailed by policy-makers and academics alike as a feat which would not only benefit the Union in economic terms but also permit the accomplishment of a position in the international investment landscape to parallel its role in the international trade arena, in which the EU is generally regarded as an effective actor or even a 'market power', with a strong and ambitious role supported internally by its exclusive competence and externally both by the size of its market and by the difficulties which its many veto players create for the acquiescence to concessions in international negotiations.[3]

This paper questions an assumption which until today has been taken at face value by both academics and policy-makers, namely that the competence transfer would strengthen the EU's competitive position and bargaining power in international investment politics. Its approach draws both on legal and political economy perspectives, in particular from the concepts of actorness and coherence, which allow for an assessment of the extent to which the transfer of competence over FDI to the EU executed by the Treaty of Lisbon allows the Union to become a competitive international actor in international investment politics. In this context, competitiveness

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[1] C. Brown & I. Naglis, "Dispute Settlement in Future EU Investment Agreements", in M. Bungenberg, A. Reinisch & C. Tietje (eds.), *EU and Investment Agreements: Open Questions and Remaining Challenges*, Baden-Baden, Nomos, 2013, p. 21.
[2] S. Meunier, "Integration by Stealth: How the European Union Gained Competence over Foreign Direct Investment", *EUI Working Papers*, no. 66, 2014, p. 1.
[3] For an economic analysis of the consequences of competence transfer, see for instance K. Blomkvist, "The Impact of a Common EU FDI Approach on Individual Member States and Overall EU Competitiveness", Paper presented at the 13th annual *SNEE European Integration Conference*, 17-20 May 2011, pp. 12-14; for the concept 'market power', see C. Damro, "Market Power Europe", *Journal of European Public Policy*, vol. 19, no. 5, 2012, p. 682; see also R. Putnam, "Diplomacy and Domestic Politics: The Logic of Two-Level Games", *International Organization*, vol. 42, no. 3, 1988, pp. 437-438; A. Young, "The Rise (and Fall?) of the EU's Performance in the Multilateral Trading System", *Journal of European Integration*, vol. 33, no. 6, 2011, pp. 719-723.

is understood as the relative efficiency of an economy in achieving specific results, a concept which in this paper is applied to the EU's ability to conclude international investment agreements (IIA).[4] A well-known conceptualisation of actorness, upon which this paper is based, is proposed by Jupille and Caporaso, for whom an international actor is an entity which possesses *authority* or legal competence to take action internationally; is *autonomous* or institutionally distinct; is *cohesive* or able to frame and convey consistent policy preferences; and is *recognised* internationally.[5]

After an overview of the economic and political economy reasons which were employed to justify the competence transfer, this paper will analyse the EU's actorness in terms of its legal competence, its institutional autonomy and cohesion, and finally its international recognition, examining in each case the implications of the competence transfer for the EU's ability to negotiate internationally on FDI. It argues that, regardless of its theoretical benefits, the distribution of competences enshrined in the Treaty of Lisbon, together with the EU's own development of its policy and the constraints set by existing international investment policy and law, thwart its possibilities of becoming a strong, coherent international actor in the international investment regime. Paraphrasing former Trade Commissioner Pascal Lamy, the strictures which still limit the EU's competence imply that, far from allowing it to become a 'market power' in international investment as it is in trade, the EU's post-Lisbon position in the international investment regime is more reminiscent of what one might term a 'Pastis power' whose potentially massive influence is decisively 'clouded' by the internal limits to its competence and by the external environment in which it must find a place.[6]

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[4] European Commission, *Communication from the Commission: Towards a comprehensive European international investment policy*, COM(2010) 343 final, Brussels, 7 July 2010, p. 7; A. Dimopoulos, *EU Foreign Investment Law*, Oxford, Oxford University Press, 2011, p. 230; J. Griebel, "The New EU Investment Policy Approach", in M. Bungenberg, J. Griebel, S. Hobe & A. Reinisch (eds.), *International Investment Law: A Handbook*, Baden-Baden, Nomos, 2015, p. 309; S. Rao & P. Sharma, "International Competitiveness and Regulatory Framework: A Canadian Perspective", in J. Curtis & A. Sydor (eds.), *NAFTA at 10*, Ottawa, Minister of Public Works and Government Services Canada, 2006, p. 213.

[5] L. Greiçevci, "EU Actorness in International Affairs: The Case of EULEX Mission in Kosovo", *Perspectives on European Politics and Society*, vol. 12, no. 3, 2011, pp. 286-287; J. Jupille & J. Caporaso, "States, Agency and Rules: The European Union in Global Environmental Politics", in C. Rhodes (ed.), *The European Union in the World Community*, Boulder, Lynne Rienner, 1998, pp. 214, 216.

[6] See P. Lamy, European Commissioner for Trade, "The Convention and trade policy: concrete steps to enhance the EU's international profile", Speech, Brussels, 5 February 2002, p. 3: "under the Pastis principle, a little drop of unanimity can taint the entire glass of QMV [qualified majority voting] water".

Accounting for the competence transfer: counting chickens before they are hatched?

A series of economic and political economy arguments have been invoked to support the extension of EU competence to FDI, many of which were advanced by the European Commission in its long-lasting attempts to encourage a competence transfer.[7] The economic arguments are related to the alleged benefits for both home and host economies which mainstream economic theory ascribes to international investment, linked first and foremost to the creation of scale economies, the strengthening of productivity and competitiveness, and the general increase of welfare. The political economy arguments can be driven back to the strengthening of the EU's actorness and bargaining power in the international investment arena.[8]

First, the fact that investment is increasingly interlinked with and even replacing other forms of trade would imply that competence over investment has become a precondition for effective action in international economic policy. This point is rendered even more significant by the increasing relevance of investment in international trade negotiations and in the context of the diminishing role of individual EU member states in an international landscape ever more populated by new centres of economic power with which they must increasingly compete.[9]

Second, the establishment of unified standards, rules, and procedures in a cohesive Common Investment Policy (CIP) streamlining 28 conflicting jurisdictions would increase transparency. It would also improve policy coherence and increase the EU's attractiveness as a host and its competitiveness as a source of investment, not only by

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[7] For a historical overview, see Meunier, *op.cit.*

[8] J. Dunning, *Multinational Enterprises and the Global Economy*, 2nd edn., Reading, Addison-Wesley, 1993, pp. 315-317; M. Bungenberg & S. Hobe, "The Relationship of International Investment Law and European Union Law", in M. Bungenberg, J. Griebel, S. Hobe & A. Reinisch (eds.), *International Investment Law: A Handbook*, Baden-Baden, Nomos, 2015, p.1604; G. Navaretti & A. Venables, *Multinational Firms in the World Economy*, Princeton, Princeton University Press, 2004, pp. 39-48; S. Woolcock, *The EU's Approach to International Investment Policy after the Lisbon Treaty*, Study PE 433.854-855-856 Brussels, European Parliament Directorate General for External Policies of the Union, October 2010, p. 16. On the EU's approach, see for instance European Commission, *Towards a comprehensive European international investment policy, op.cit.,* pp. 2-3, 8; European Commission, *Communication from the Commission: Trade for All: Towards a more responsible trade and investment policy*, COM(2015) 0497 final, Brussels, 14 October 2015, pp. 8-10.

[9] Bungenberg & Hobe, *op.cit.*, p. 1604; Meunier, *op.cit.*, p. 3; J. Terhechte, "Art. 351 TFEU, the Principle of Loyalty and the Future Role of the Member States' Bilateral Investment Treaties", in M. Bungenberg, J. Griebel & S. Hindelang (eds.), *International Investment Law and EU Law*, Berlin and Heidelberg, Springer, 2011, p. 79; Woolcock, *op.cit.*, p. 10.

permitting for IIA negotiations with as many states simultaneously but also by lowering administrative costs for EU and third-country investors.[10] Moreover, the CIP would significantly strengthen the EU's negotiating power and give it a scale advantage in comparison to its member states individually considered.[11] The EU could make use of this leverage in international negotiations to obtain more favourable market access and protection conditions for its investors, improving their competitiveness and their position in the international investment playing field.[12] The new competence would thus allow the EU to punch at its weight in multilateral as well as bilateral and regional negotiations, promoting not only its economic interests but also its regulatory regime and putting an end to a situation in which it had lagged behind other economies which had achieved an agenda-setting and policy-shaping role in the global investment regime.[13]

Third, by extending the same rights and obligations to all EU investors, the CIP would diminish substantial inequality between member states with different economic and regulatory configurations and thus limit competitive distortions within the internal market which result from inter-member state competition to attract FDI, levelling the playing field between them and benefiting in particular investors from countries with less extensive IIA networks.[14]

The EU's increased leverage in international negotiations would allow it not only to boost its international competitiveness but also promote its values and consolidate its actorness in international investment negotiations, with the potential to shape not only member-state and third-country approaches but also the international investment

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[10] M. Burgstaller, "The Future of Bilateral Investment Treaties of EU Member States", in M. Bungenberg, J. Griebel & S. Hindelang (eds.), *International Investment Law and EU Law*, Berlin and Heidelberg, Springer, 2011, p. 70; Woolcock, *op.cit.*, p. 17.
[11] M. Bungenberg, "The Division of Competences between the EU and its Member States in the Area of Investment Politics", in M. Bungenberg, J. Griebel & S. Hindelang (eds.), *International Investment Law and EU Law*, Berlin and Heidelberg, Springer, 2011, pp. 36, 41.
[12] 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?", *Journal of International Economic Law*, vol. 15, no. 1, 2012, p. 53; C. Hermann, "Die Zukunft der mitgliedsstaatlichen Investitionspolitik nach dem Vertrag von Lissabon", *Europäische Zeitschrift für Wirtschaftsrecht*, vol. 21, no. 6, 2010, p. 210; Woolcock, *op.cit.*, p. 17.
[13] Chaisse, *op.cit.*, pp. 52-53; Woolcock, *op.cit.*, p. 17.
[14] Burgstaller, *op.cit.*, p. 70; J. Griebel, "The New Great Challenge after the Entry into Force of the Treaty of Lisbon: Bringing about a Multilateral EU-Investment Treaty", in M. Bungenberg, J. Griebel & S. Hindelang (eds.), *International Investment Law and EU Law*, Berlin and Heidelberg, Springer, 2011, pp. 139-140; Woolcock, *op.cit.*, p. 17.

regime overall.[15] For instance, the EU's weight in the global investment landscape could permit the multilateralisation of its bi- and plurilateral agreements, while its distinctively high standards and consideration of non-economic and equity objectives could make its approach a standard of international best practice.[16] Ultimately, this increased international leverage might allow it to achieve its long-standing aim of concluding a multilateral investment framework within the World Trade Organisation.[17]

The remainder of this paper will assess the extent to which such expectations have been fulfilled by the transfer of competence over FDI to the EU. It argues that these theoretical benefits are currently overridden by the distribution of competences enshrined in the Treaty of Lisbon, by the EU's practical operationalisation of its new competence, and by its trouble finding a place in the international investment regime itself.

Authority: redefining exclusivity

The EU's legal competence to act

This section considers the extent of and limits to the EU's exclusive power, that is, in Jupille and Caporaso's terms, its 'authority' in the international investment policy field. It analyses the dispositions in EU primary law and their interpretation by EU institutions, particularly the Court of Justice of the EU (CJEU).

The EU's competence in international investment covers FDI, a term which the Treaty of Lisbon employs in Articles 206 and 207 TFEU but neither defines nor circumscribes.[18] Nevertheless, a binding characterisation seems to have emerged, particularly in light of the jurisprudence of the CJEU and EU secondary law, which draws on internationally widespread definitions such as those advanced by the Organisation for Economic

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[15] M. Götz, "Pursuing FDI Policy in the EU – Member States and Their Policy Space", *Journal of Economics and Political Economy*, vol. 2, no. 2, 2015, pp. 295-296, 299-300; Bungenberg & Hobe, *op.cit.*, p. 1610.
[16] Götz, *op.cit.*, p. 300.
[17] Woolcock, *op.cit.*, p. 13.
[18] Chaisse, *op.cit.*, p. 57.

Cooperation and Development or the International Monetary Fund.[19] FDI can consequently be understood as a long-term investment by an enterprise in a third country which confers lasting interest and managerial control to the investor.[20] By linking the concept of FDI to the achievement of control or influence in the enterprise, the EU maintains a distinction which, while traditional in the economic and legal literatures, is not employed in practice in IIAs: it differentiates FDI from foreign portfolio investment (FPI), the short-term cross-border placement of private equity which focusses on the rate of financial return alone.[21] Member states have actively opposed the Commission's claim that competence over FDI implies competence over its less-intrusive cousin FPI, and this choice seems to have been accepted overall by academia and policy-makers as denoting that FPI remains an area of shared competence.[22] Nevertheless, the desire to conclude comprehensive EU IIAs has meant that such agreements are in practice likely to contain broad, asset-based definitions of investment which include both FDI and FPI. Hence, EU IIAs shall in practice be concluded as mixed agreements.[23] This requirement imposes the use of a lengthy and complex decision-making procedure which is unlikely to strengthen the EU's actorness in international investment politics, as we shall see henceforth.[24] Moreover, the vague definition of FDI enshrined in the Treaties also implies that legal uncertainty

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[19] Bungenberg & Hobe, *op.cit.*, p. 1612; Directive 88/361/EEC of 24 June 1988, for the implementation of Article 67 of the Treaty, *Official Journal of the European Union*, L178/5, 8 July 1988, Annex I; European Court of Justice, judgement in *Commission of the European Communities v. Kingdom of Spain*, C-463/00, 2003, ECR I-4581, para. 53; International Monetary Fund, *Balance of Payments and International Investment Position Manual*, 6th edn., Washington D.C., IMF, 2013, pp. 100-102; Organisation for Economic Co-operation and Development, *OECD Benchmark Definition of Foreign Direct Investment*, 4th edn., Paris, OECD, 2008, p. 17; A. Reinisch, "The Division of Powers between the EU and its Member States 'After Lisbon'", in M. Bungenberg, J. Griebel & S. Hindelang (eds.), *International Investment Law and EU Law*, Berlin and Heidelberg, Springer, 2011, p. 46.

[20] Bungenberg & Hobe, *op.cit.*, p. 1612; Burgstaller, *op.cit.*, p. 62.

[21] Bungenberg & Hobe, *op.cit.*, p. 1612; F. Hoffmeister & G. Ünüvar, "From BITS and Pieces towards European Investment Agreements", in M. Bungenberg, A. Reinisch & C. Tietje (eds.), *EU and Investment Agreements: Open Questions and Remaining Challenges*, Baden-Baden, Nomos, 2013, p. 66; European Court of Justice, judgement in *Commission of the European Communities v. Kingdom of the Netherlands*, joined cases C-282/04 and C-283/04, 2006, ECR-2008 I-9141, para. 19; P. Koutrakos, *EU International Relations Law*, 2nd edn., Oxford and Portland, Hart, 2006, p. 47; Reinisch, "The Division of Powers", *op.cit.*, p. 46; P. Strik, *Shaping the Single European Market in the Field of Foreign Direct Investment*, Oxford, Hart, 2014, p. 12.

[22] Chaisse, *op.cit.*, p. 58; Dimopoulos, *EU Foreign Investment Law*, *op.cit.*, pp. 78, 123; European Commission, *Towards a comprehensive European international investment policy*, *op.cit*., p. 8; Hoffmeister & Ünüvar, *op.cit.*, p. 66; Koutrakos, *op.cit.*, p. 47.

[23] J. Griebel, "The New EU Investment Policy Approach", in M. Bungenberg, J. Griebel, S. Hobe & A. Reinisch (eds.), *International Investment Law: A Handbook*, Baden-Baden, Nomos, 2015, p. 314.

[24] Reinisch, "The Division of Powers", *op.cit.*, p. 49; Terhechte, *op.cit.*, pp. 92-93.

is likely to subsist, not only for the EU's third-country IIA counterparties but crucially also within the Union itself.[25]

Furthermore, this differentiation impacts not only the negotiation of EU IIAs but also the regulation of investment within the EU: differing governance mechanisms may give rise not only to inconsistent international negotiations but also inconsistent policy-making within the EU. They may discourage investment outright by giving rise to diverging degrees of market access and differing investment regulation and protection processes and standards. This may increase legal uncertainty and complexity for investors, who in practice do not tend to differentiate between FDI and FPI.[26] It seems that far from creating a 'one-stop' policy area streamlining 28 conflicting jurisdictions with contradictory aims and approaches, the competence transfer has in practice achieved the opposite effect by adding yet another level of policy- and decision-making to an already crowded policy field, with a potentially negative bearing on the EU's attractiveness as a source and host for investment and as a partner in IIA negotiations.

Limits to the EU's competence

The Union's exclusive competence over FDI is limited by EU primary law in two ways. A first set of limitations arises from the doctrine of parallelism: the EU's exclusive competence does not extend to areas in which it is not exclusively competent under EU internal market law, such as transport (Article 207(5-6) TFEU).[27] Secondly, its competence in investment protection is limited pursuant to Article 345 TFEU, according to which it cannot "prejudice the rules in Member States governing the system of property ownership". This implies that member states remain competent to decide on nationalisation and privatisation of property. Nevertheless, CJEU jurisprudence has considered that the definition of the conditions which justify expropriation is a matter of investment regulation and thus of EU competence.[28] For this reason, the EU has tended to employ the investment protection provisions in its IIAs not only to ring-fence

[25] Burgstaller, *op.cit.*, p. 70.
[26] Woolcock, *op.cit.*, p. 12.
[27] Dimopoulos, *EU Foreign Investment Law*, *op.cit.*, pp. 96, 98.
[28] *Ibid.*, p. 338.

the prerogative to expropriate of the EU's third-country counterparties, but also that of its own member states.[29]

Nevertheless, limits arise not only from EU primary law but also from its interpretation. A paradigmatic example in this regard is that of investor-state dispute-settlement (ISDS). In line with their mainstream economic reasoning, most EU institutions, that is the Commission, the Council and even, albeit with reservations, the European Parliament, have defended the use of ISDS: they consider it to be not only a necessary element of comprehensive investment protection – for instance because it would allegedly depoliticise conflicts by removing the host state's direct influence and increase the speed of procedures and enforceability of awards – but also crucial to maintain the EU's international economic and regulatory competitiveness.[30] This notion was encapsulated by a 2010 Communication by the European Commission, which considered ISDS to be "such an established feature of investment agreements that its absence would in fact discourage investors and make a host economy less attractive than others".[31]

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[29] J. Basedow, *The European Union's International Investment Policy: Explaining Intensifying Member State Cooperation in International Investment Regulation*, PhD thesis, London, London School of Economics and Political Science, 2014, p. 60.

[30] T. Braun, "For a Complementary European Investment Protection", in M. Bungenberg, J. Griebel & S. Hindelang (eds.), *International Investment Law and EU Law*, Berlin and Heidelberg, Springer, 2011, p. 96; Brown & Naglis, *op.cit.*, pp. 18, 27; Council of the European Union, "Conclusions on a Comprehensive European international Investment Policy", 3041st Foreign Affairs Council, Luxembourg, 25 October 2010, para. 18; European Commission, *Recommendation from the Commission to the Council on the modification of the negotiating directives for an Economic Integration Agreement with Canada in order to authorise the Commission to negotiate, on behalf of the Union, on investment*, 12838/11 EXT 2, Brussels, European Commission, 14 July 2011, p. 5; European Parliament, "Resolution on the future European International Investment Policy", Official Journal of the European Union, C296E, 2 October 2012, para. 32; S. Hindelang, "The Autonomy of the European Legal Order", in M. Bungenberg & C. Herrmann (eds.), *Common Commercial Policy after Lisbon*, Berlin and Heidelberg, Springer, 2013, p. 187; N. Lavranos, "Designing an International Investor-to-State Arbitration System after Opinion 1/09", in M. Bungenberg & C. Herrmann (eds.), *Common Commercial Policy after Lisbon*, Berlin and Heidelberg, Springer, 2013, pp. 201-204; S. Schill, "Luxembourg Limits: Conditions for Investor-State Dispute Settlement under future EU Investment Agreements", in M. Bungenberg, A. Reinisch & C. Tietje (eds.), *EU and Investment Agreements: Open Questions and Remaining Challenges*, Baden-Baden, Nomos, 2013, p. 38. Many criticisms are levied against the current ISDS system, an analysis of which is beyond the scope of this paper. For an assessment, see M. Bungenberg, "Investment Protection at Crossroads", in J. Auvret-Finck (ed.), *Vers un Partenariat Transatlantique de l'Union Européenne*, Brussels, Larcier, 2015, pp. 125-136.

[31] European Commission, *Towards a comprehensive European international investment policy, op.cit.,* pp. 9-10.

The Union's legal personality (Article 47 TEU) enables it to conclude international agreements in which it confers jurisdiction to courts or tribunals to resolve disputes which arise from their application in a manner which is binding for EU institutions, as explicitly recognised by the CJEU.[32] Nevertheless, in a series of Opinions under Article 218(11) TFEU, the Court has established stringent limits on its possible modalities in the EU.[33] Pursuant to Opinions 1/91, 1/92, 1/00, or 1/09, this competence is conditional to the dispute-settlement procedure not affecting competence distribution between the EU and its member states or between different EU institutions, the autonomy of EU law, or the CJEU's exclusive mandate to guarantee its uniform interpretation and application.[34]

Although arbitral tribunals do not purport to establish binding interpretations of EU law, in the CJEU's view factual spill-overs could occur if EU member states or institutions were prevented from implementing measures undertaken in conformity with EU law because an international court or tribunal finds that they run counter to obligations enshrined in an EU IIA.[35] Consequently, the issue of ISDS touches not only upon the extent of EU competence under the CCP but, by potentially impacting the autonomy of the EU legal order, raises fundamental uncertainties concerning EU 'constitutional' law.[36] In a broad reading of Article 19(1) TEU, the Court has interpreted its own competence to interpret and apply EU law as an exclusive one, thus designating itself as the sole actor empowered to determine the interaction between EU and international law and therefore the admissibility and configuration of ISDS in the EU.[37] The CJEU has conditioned the application of ISDS within the Union to the respect of EU competence distribution and to its own monopoly in the interpretation and application of EU law.[38] This severely limits the possibilities for an independent, efficient

[32] Dimopoulos, *EU Foreign Investment Law*, *op.cit.*, p. 116; European Court of Justice, *Opinion 1/91*, delivered pursuant to the second subparagraph of Article 228(1) of the Treaty – Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area, ECR 1991, I-6079, paras. 39-40; Hindelang, *op.cit.*, p. 190.
[33] Schill, *op.cit.*, pp. 43-44.
[34] Dimopoulos, *EU Foreign Investment Law*, *op.cit.*, p. 117; Hindelang, *op.cit.*, p. 190; Schill, *op.cit.*, pp. 46-48.
[35] *Ibid.*, p. 50; Strik, *op.cit.*, p. 250.
[36] Schill, *op.cit.*, pp. 39-40.
[37] R. Cafari Panico, "Recent Developments in EU Investment Agreements", NYU Transnational Notes, 14 July 2014; Hindelang, *op.cit.*, pp. 189, 197; Lavranos, "Designing an International", *op.cit.*, p. 206; Schill, *op.cit.*, pp. 40-41.
[38] *Ibid.*, pp. 49, 51, 53.

ISDS in future EU IIAs.[39] For instance, it would require the CJEU to issue preliminary rulings on questions of EU law arising in investment disputes: this would not only defeat the purpose of ISDS, as it would ultimately enable the domestic court of one of the parties to the dispute to determine the outcome of dispute-settlement cases, but has also been explicitly barred by the Court itself. Indeed, it rejects the competence of arbitral tribunals to ask for preliminary rulings on the grounds that their independence from member state judicial systems and public authorities and the fact that they are not bound by CJEU case law or the primacy of EU law imply that they cannot be regarded as ordinary courts as defined in Article 267 TFEU.[40]

By forcing it to adopt substantially different investment protection standards than its component states and indeed most nation states, the CJEU could deteriorate the EU's chances of concluding IIAs; by complicating dispute-resolution systems, it could decrease legal certainty and raise the costs of dispute settlement, thus discouraging investment.[41] Moreover, the Court's position gives rise to significant moral hazard concerns by allowing EU member states to argue the non-applicability of an arbitral award on the grounds of its incompatibility with EU law.[42]

The issue of ISDS lays claim to a situation of wide-ranging inter-institutional cacophony or incoherence: regardless of the limits established by the CJEU, the Commission proposed and the Council and the European Parliament adopted a Regulation to allocate financial responsibility between the Union and its member states and to

[39] Lavranos, "Designing an International", *op.cit.*, p. 218; N. Lavranos, "The MOX Plant judgment of the ECJ: How exclusive is the jurisdiction of the ECJ?", *European Energy and Environmental Law Review*, vol. 15, no. 10, 2006, p. 291; Schill, *op.cit.*, p. 43.
[40] Bungenberg & Hobe, *op.cit.*, p. 1628; Burgstaller, *op.cit.*, p. 74; European Court of Justice, judgement in *Eco Swiss v. Benetton*, C-126, 1999, ECR I-3055, para. 34; Hindelang, *op.cit.*, p. 196; Lavranos, "Designing an International", *op.cit.*, pp. 216, 219; H. Lenk, "New Voices: Challenging the Notion of Coherence in EU Foreign Investment Policy", *European Journal of Legal Studies*, vol.8, no. 2, 2015, p. 18; D. Rovetta, "Investment Arbitration in the EU after Lisbon: Selected Procedural and Jurisdictional issues", in M. Bungenberg & C. Herrmann (eds.), *Common Commercial Policy after Lisbon*, Berlin and Heidelberg, Springer, 2013, pp. 227, 231; Schill, *op.cit.*, pp. 53-54.
[41] Lavranos, "Designing an International", *op.cit.*, p. 219.
[42] *Ibid.*, p. 219.

address the choice of respondent in ISDS proceedings under EU IIAs.[43] This Financial Responsibility Regulation is problematic not only due to its technical inconclusiveness but also because of its awkward interaction with international law and because it fails to address the CJEU's main reservation with ISDS, namely the possibility of performance requirements demanded by an arbitral court.

The Regulation aims to establish consistent rules in order both to protect third-country investors from possible harm caused by intra-EU disputes on the allocation of financial responsibility, and the EU itself from potential abuse of uncertainties raised by an ambiguous distribution of competence by third-country investors but also the EU's own member states.[44] Nevertheless, the complex distribution of competences and responsibilities in the EU will in practice often render the unambiguous identification of a single actor liable for injury to an international investor impossible.[45] Moreover, in reality it may be difficult to determine whether EU law requires a specific action by a member state, for instance if it establishes the need to achieve a particular result but does not specify the means in which the latter should be accomplished.[46] Union responsibility for the actions of member states could thus give rise to moral hazard concerns with the latter violating their international obligations and shifting responsibility to the EU.[47] Furthermore, the fact that proposed settlements, even those which concern disputes in which member states are not involved, shall have to be approved by a Committee of member state representatives, may increase the risk of disputes *within* the EU itself even after the resolution of the arbitration case, negatively impacting the efficiency and cohesion of the EU's action and giving rise to substantial economic costs.[48]

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[43] European Commission, *Proposal for a Regulation establishing a framework for managing financial responsibility linked to investor-state dispute settlement tribunals established by international agreements to which the European Union is party*, COM(2012) 335 final, Brussels, 21 June 2012, p. 3; Regulation 912/2014 of the European Parliament and of the Council of 23 July 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, *Official Journal of the European Union*, L 257, 28 August 2014, pp. 121-134; Strik, *op.cit.*, p. 114.
[44] Brown & Naglis, *op.cit.*, pp. 32, 34.
[45] Cafari Panico, *op.cit.*
[46] Strik, *op.cit.*, p. 116.
[47] Dimopoulos, *EU Foreign Investment Law*, *op.cit.*, p. 341.
[48] *Ibid.*, p. 32; Regulation 182/2011, laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, *Official Journal of the European Union*, L 55, 28 February 2011, pp. 13-18; Regulation 912/2014, *op.cit*., art. 22.

Moreover, because EU IIAs will in practice mostly be defended by individual member states, the Commission shall be obliged to monitor every single one in order to ensure the consistent interpretation of EU IIAs and the protection of EU interests.[49] In practice it may be unable to prevent member states from defending their own line unless it initiates infringement proceedings against them *post facto* (Articles 259-260 TFEU). Additionally, questions arise as to the Commission's technical competence and sheer administrative capacity to deal even with the cases which it shall have to defend, let alone cope with their financial implications, which arise not only from hefty settlements often awarded by arbitration tribunals but also from fees and costs associated with the arbitration procedure itself.

In conclusion, it is not only EU constitutional law but also the interpretation made thereof which sets limits on its actorness in international investment politics. The fact that its legal bases are not as solid as they should be arguably renders the creation of a consistent, coherent CIP much more difficult, as will be illustrated forthwith by examining the EU's autonomy and cohesion in this domain.

Autonomy and cohesiveness: from BITs and pieces to a single voice?

The fact that the EU's competence is limited even at its legal source implies that problems arise also in the other facets which make up actorness. Jupille and Caporaso differentiate between autonomy and cohesiveness, which are both aspects which concern an actor's practical operationalisation of its competence. In this context, institutional autonomy refers to the EU's ability to independently design and pursue an agenda within the limits set by the transfer of legal authority.[50] The problems which arise in the EU's CIP as regards its autonomy are illustrated by the negotiation process for EU IIAs: the multiplicity of stakeholders with veto power in the policy-making process decisively limits the EU's ability to act autonomously. In its turn, cohesiveness refers to the overcoming of internal divergences and agreement on a shared message to convey internationally with a single voice.[51] As the next session will show, the EU's policy does not reflect a cohesive approach: its actorness is undermined not only by its constitutional strictures but also by its own policy.

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[49] Brown & Naglis, *op.cit.*, p. 32.
[50] E. da Conceição-Heldt & S. Meunier, "Speaking with a Single Voice: Internal Cohesiveness and External Effectiveness of the EU in Global Governance", *Journal of European Public Policy*, vol. 21, no. 7, 2014, p. 965.
[51] *Ibid.*, pp. 964, 975.

Autonomy: The multi-level game of EU IIAs

The negotiation and conclusion of EU IIAs is conducted in accordance with Articles 207(3-4) and 218 TFEU and is subject to a process involving the Commission, the Council, and the European Parliament.[52] According to Article 207(3) TFEU, the Commission proposes the opening of negotiations to the Council and represents the Union in international negotiations. As the CCP is a field to which the ordinary legislative procedure applies, not only the Council but also the European Parliament must consent to the conclusion of the negotiated text (Articles 207(2), 218(6)(a)(v) TFEU). The Treaties establish a somewhat lopsided attribution of rights to these institutions, according to which the Parliament's formal role is limited to voting the agreement up or down whereas the Council is additionally in charge of approving the opening of negotiations and issuing the negotiating directives for the Commission (Articles 207(3), 218(3-4) TFEU). Similarly, whereas the Commission is obliged to consult with the Council, via its Trade Policy Committee (TPC), throughout the negotiation process, the Parliament is only kept informed (Article 218(4) and (10) TFEU). Nevertheless, in practice both institutions eagerly participate in the negotiation and conclusion process for EU IIAs and the Commission is in constant dialogue both with the TPC and the European Parliament's Committee on International Trade, enabling both co-legislators to indicate their preferences for the negotiation.[53] The Commission's main incentive to safeguard the co-legislators' involvement and to observe its negotiating directives is to prevent the threat of defection by one of the veto players at the moment of ratification of the negotiated outcome.[54]

Moreover, because EU IIAs are mostly concluded as part of broader mixed agreements, their ratification will require the approval of each national parliament according to its own specific domestic procedure.[55] The set of agreements for which the EU could achieve domestic ratification – Putnam's proverbial 'win-set' – may be further narrowed by the constitutional strictures and political dynamics of particular

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[52] Griebel, "The New EU Investment Policy Approach", *op.cit.*, p. 309.
[53] Brown & Naglis, *op.cit.*, p. 22; Dimopoulos, *EU Foreign Investment Law*, *op.cit.*, p. 138; N. Lavranos, "The Remaining Decisive Role of Member States in Negotiating and Concluding EU Investment Agreements", in M. Bungenberg, A. Reinisch & C. Tietje (eds.), *EU and Investment Agreements: Open Questions and Remaining Challenges*, Baden-Baden, Nomos, 2013, p. 166.
[54] Lavranos, "The Remaining Decisive Role", *op.cit.*, p. 166; Putnam, *op.cit.*, pp. 437-438.
[55] Bungenberg & Hobe, *op.cit.*, p. 1611; M. Hahn, "EU Rules and Obligations Related to Investment", in M. Bungenberg, J. Griebel, S. Hobe & A. Reinisch (eds.), *International Investment Law: A Handbook*, Baden-Baden, Nomos, 2015, p. 681; Cafari Panico, *op.cit;* Lavranos, "The Remaining Decisive Role", *op.cit.*, pp. 165, 167.

member states, for instance by the necessity of consent of regional Parliaments in federal countries.[56] A recent example in this regard is the Walloon Minister-President's announcement that the region's Parliament – which is just one of six Belgian Parliaments which must consent to the ratification of international agreements – would not grant the Belgian federal government power to ratify the EU-Canada Comprehensive Economic and Trade Agreement (CETA) in its present form, due notably to concerns about the ISDS.[57] Furthermore, some member states foresee the review of international agreements by their domestic constitutional courts.[58] Finally, the CJEU is entitled to make the ultimate decision as to the conformity with EU law of an EU IIA, although this competence is conditional to the request of an Opinion by a member state or by the Council, the Commission, or the European Parliament (Article 218(11) TFEU). Nevertheless, in light of the diverging interests of stakeholders as to the configuration of the CIP, this possibility does not seem far-fetched.

The decision-making process established in the ordinary legislative procedure has some undeniable advantages; for instance, by strengthening the European Parliament's role in the negotiation and conclusion of international agreements, it increases the political legitimacy of IIAs.[59] Nevertheless, this lengthy, complex decision-making procedure also has a series of drawbacks. For instance, the simultaneous elevation of the decision-making process to the EU level and the multiplication of actors involved could both distance investment policy-making from relevant stakeholders such as investors or civil society, making it less responsive to their input, while also rendering it more susceptible to the influence of special-interest groups, which might find it less costly to mobilise and undertake collective action to lobby for their interests.[60] The decision-making process not only makes their adoption process

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[56] Putnam, *op.cit.*, pp. 437-438.
[57] A. Barker & J. Brundsen, "Beware the Walloons, Belgium tells Cameron in EU deal warning", *Financial Times*, 12 February 2016. It may also be due to domestic political problems in Belgium. See for instance C. Defoy, "La Wallonie s'oppose au CETA et irrite la N-VA", *Radio-Television Belge Francophone*, 27 April 2016; or "La Wallonie refusera les pleins pouvoirs au Fédéral pour signer le CETA", *Radio-Television Belge Francophone*, 13 April 2016.
[58] Lavranos, "The Remaining Decisive Role", *op.cit.*, p. 167; Terhechte, *op.cit.*, p. 92.
[59] Brown & Naglis, *op.cit.*, p. 22; A. Dimopoulos, "The Common Commercial Policy after Lisbon: Establishing Parallelism between Internal and External Economic Relations?", *Croatian Yearbook of European Law and Policy*, vol. 4, 2008, p. 126.
[60] M. Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups*, 20th edn., Cambridge, Harvard University Press, 2002, pp. 53-56.

long and uncertain but also risks politicising IIAs, which are becoming increasingly controversial and politically salient.[61]

The need to accommodate the demands not only of different institutions and third-country counterparties but also of every single EU member state as well as veto players within them sets extremely narrow limits to the Union's 'win-set' and will increase inflexibility and delays in policy-making.[62] Member state leverage *vis-à-vis* the EU will allow them to demand issue-linkages or side-payments, and their diverging interests as regards international investment may imply that lowest-common denominator decisions prevail or even lead to deadlock within the EU. Particularly because EU IIAs are mostly negotiated as component parts of broader agreements, investment provisions may become a space for compromise.[63] Although such a reduced 'win-set' domestically could theoretically enhance the EU's bargaining position internationally, in line with theories on the 'paradox of weakness' in international negotiations, it is unlikely to do so in the case of EU IIA negotiations.[64] This is because such agreements shall not be negotiated in a vacuum but on the basis of an intricate network of existing member state IIAs, whose existence implies that the alternative to an agreement negotiated with the EU for third countries – and indeed for EU member states – will often not be an absence of protection but agreements in the format of the highly-protective IIA classically concluded by European states (European IIA).[65]

Cohesiveness: The subsistence of member state policies

The EU's actorness in IIA negotiations is not only limited by constitutional constraints set by EU primary law; it is also restricted by policies designed and adopted by the EU institutions themselves. Three dimensions to this issue can be identified: first, the establishment by the EU of interim regimes to deal with transitional issues arising from the transfer of competence; second, its approval of the subsistence of certain

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[61] P. Chase, "The United States, European Union and International Investment", *The German Marshall Fund of the United States Economic Policy Program*, 2011, p. 2.
[62] Putnam, *op.cit.*, pp. 437-438.
[63] Griebel, "The New EU Investment Policy Approach", *op.cit.*, pp. 313, 325.
[64] For instance T. Schelling, *The Strategy of Conflict*, Cambridge, Harvard University Press, 1960.
[65] J. Gaffney & Z. Akçay, "European Bilateral Approaches", in M. Bungenberg, J. Griebel, S. Hobe & A. Reinisch (eds.), *International Investment Law: A Handbook*, Baden-Baden, Nomos, 2015, p. 201; A. Reinisch, "The Likely Content of Future EU Investment Agreements", in M. Bungenberg, J. Griebel, S. Hobe & A. Reinisch (eds.), *International Investment Law: A Handbook*, Baden-Baden, Nomos, 2015, p. 1903.

member state policies; and third, the interaction of EU competence with policies which remain under member state jurisdiction.

As regards the first element, the CIP was not created on the basis of a *tabula rasa*, and the entry into force of the Treaty of Lisbon raised the thorny issue of the future of existing regulatory frameworks and particularly that of member state bilateral investment treaties (BIT), a weighty legacy amounting to over 1,400 individual agreements.[66] Although the principle of uniform application of EU law made BITs concluded by member states with third countries subsequently to their EU accession redundant, a pragmatic Commission saw the benefits of maintaining them pending the development of a network of EU IIAs. Their conservation would not only ensure legal certainty and protection for investors, thereby preventing a possible discouragement of international investment, but also ensure coherence with international law, under which such BITs remain valid because they were concluded with countries not signatories to the Treaty of Lisbon.[67] The Commission thus proposed a Regulation, agreed upon by the Council and the European Parliament after nearly three years of negotiation, which establishes a regime to gradually phase out member-state BITs and their capacity to conclude them.[68] Under the so-called 'Grandfathering' Regulation, BITs concluded by member states with third countries (extra-EU BITs) which have been notified to the Commission generally remain valid until a Union-wide agreement with the same third country enters into force, although the Commission may in some cases request their termination and member states are required to eliminate incompatibilities with EU law therein and ensure that they do not obstruct the negotiation or conclusion of EU IIAs.[69] What is more, member states may amend or even conclude new extra-EU BITs after vetting by the Commission's new Committee for Investment Agreements.[70] The Commission may call for the inclusion of specific provisions or standard clauses such as transfer or termination provisions or a

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[66] Cafari Panico, *op.cit.*

[67] N. J. Calamita, "The Making of Europe's International Investment Policy: Uncertain First Steps", *Legal Issues of Economic Integration*, vol. 39, no. 3, 2012, p. 302; Chase, *op.cit.*, p. 5; European Union, "Consolidated Versions 2007", *op.cit.*, arts. 4(3) TEU, 351 TFEU; Hoffmeister & Ünüvar, *op.cit.*, p. 80; Koutrakos, *op.cit.*, p. 48; Strik, *op.cit.*, p. 186; Terhechte, *op.cit.*, p. 87.

[68] Brown & Naglis, *op.cit.*, pp. 17, 23-24; Bungenberg & Hobe, *op.cit.*, p. 1621; Gaffney & Akçay, *op.cit.*, p. 200; Hoffmeister & Ünüvar, *op.cit.*, p. 82; Regulation 1219/2012, establishing transitional arrangements for bilateral investment agreements between member states and third countries, *Official Journal of the European Union*, L 351, 20 December 2012, pp. 40-46.

[69] Bungenberg & Hobe, *op.cit.*, pp. 1621-22; Gaffney & Akçay, *op.cit.*, pp. 199-200; Hahn, *op.cit.*, p. 683; Hoffmeister & Ünüvar, *op.cit.*, pp. 82-83.

[70] *Ibid*.

most-favoured nation (MFN) clause to extend the benefits of a member state BIT to the entirety of EU investors.[71]

Second, and in an approach which might be labelled as pragmatic, the EU has allowed for the endurance of certain aspects of member state investment policies. For instance, whereas the EU's competence over FDI regulation extends to investment promotion, member states will be permitted to maintain investment promotion schemes in parallel to EU ones as long as they do not contradict Union policy.[72] The most important example of such schemes is investment insurance, an area in which most member states possess well-established policy frameworks which aim to encourage outward investment.[73] State-sponsored insurance covers risks which in contrast to many commercial and natural dangers are not insured by private insurance firms, for instance "riots, civil war, terrorism, currency risks, expropriation [...] breaches of contracts and non-honouring of sovereign financial obligations".[74] The EU has until now not provided answers to questions related to their complementation or replacement by an EU-wide scheme and plays only a supervisory role in this field.[75]

Third, investment touches in practice upon a panoply of policy areas which remain under national or at most shared competence. They include fiscal, labour, or procedural law; property ownership and industrial relations systems; or environmental, health, and social policies.[76] Because EU primary law does not confer competence on the EU to circumscribe governments' ability to legislate in such domains, the Treaty of Lisbon has not eliminated substantive inequality or the hazard of arbitration between member state regulatory systems. This issue is particularly crucial because such standards are often the ones upon which investors challenge states for breaches of IIA provisions.[77]

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[71] Brown & Naglis, *op.cit.*, pp. 23-24; Bungenberg & Hobe, *op.cit.*, p. 1621; Hahn, *op.cit.*, p. 683.
[72] A. Dimopoulos, "Foreign Investment Insurance and EU Law", in M. Bungenberg, A. Reinisch & C. Tietje (eds.), *EU and Investment Agreements: Open Questions and Remaining Challenges*, Baden-Baden, Nomos, 2013, p. 179; Dimopoulos, *EU Foreign Investment Law*, *op.cit.*, p. 61; Strik, *op.cit.*, p. 128.
[73] Basedow, *op.cit.*, p. 36; Dimopoulos, "Foreign Investment Insurance", *op.cit.*, pp. 173-174.
[74] Basedow, *op.cit.*, p. 36; Dimopoulos, "Foreign Investment Insurance", *op.cit.*, p. 173.
[75] Bungenberg & Hobe, *op.cit.*, p. 1616.
[76] Basedow *op.cit.*, p. 35; Braun, *op.cit.*, p. 99; Lavranos, "The Remaining Decisive Role", *op.cit.*, p. 165; Reinisch, "The Likely Content", *op.cit.*, p. 1903.
[77] Götz, *op.cit.*, p. 299.

In the construction of the CIP, the EU is hence limited by a series of factors: the fact that the principle of conferral of competences (Article 5.1 TEU) limits its engagement in certain policy areas, together with the lack of provisions in the Treaties as to the transition to a common policy, and the necessity to phase out a vast web of finely-honed member state investment policies.[78] Consequently, the EU has been compelled to adopt a pragmatic, *ad hoc* approach in the construction of the CIP, based on individual inter-institutional secondary EU law compromises in parallel to individual investment negotiations. However, this approach leaves many important issues unresolved and has also arguably aggravated existing problems.

As regards the 'Grandfathering' Regulation, although it complies with the *pacta sunt servanda* principle and permits member states to pursue IIA negotiations with countries to which they ascribe a higher priority than the EU, it has, in utter contrast to its stated intentions, arguably created legal uncertainty for investors because it does not resolve but rather procrastinates definite decisions on the design of the EU's new competence, focussing on short-term attempts to bridge gaps which prolong an already uncertain state of flux.[79] By placing member states between the 'rock' of renegotiating their extra-EU BITs and the 'hard place' of being subject to a request to terminate such agreements outright or to judicial procedures within the EU, the Commission could decrease member states' leverage in negotiations with third countries, worsening their bargaining position in the amendment of extra-EU BITs. Moreover, the Regulation does not resolve the considerable problem of BITs concluded *between* EU member states. Additionally, the Regulation reflects an introspective approach of doubtful practicability: for instance, whereas an MFN clause in extra-EU BITs would eliminate inequality between EU investors, it is unlikely to be accepted by third countries, as it would give rise to an unequal situation in which third-country investors would be protected only in the member state with which their home state had concluded the BIT, whereas all EU investors would benefit from investment protection.[80]

The decision to maintain national policies such as investment insurance mechanisms financed and administered at a national level is even more problematic. This

[78] Hoffmeister & Ünüvar, *op.cit.*, p. 85; Schill, *op.cit.*, p. 39; Woolcock, *op.cit.*, p. 68.
[79] Burgstaller, *op.cit.*, pp. 69-70; Gaffney & Akçay, *op.cit.*, p. 200; Götz, *op.cit.*, p. 299; Woolcock, *op.cit.*, p. 15.
[80] *Ibid.*, p. 14.

approach may respond to difficulties in designing and financing a common investment insurance scheme for all EU member states and may be justified also on the grounds of the principle of subsidiarity.[81] Moreover, it may represent an attempt by the EU to maintain competition between member states, thus encouraging an optimisation of investment insurance design and coverage. Nevertheless, the lack of common guidelines on investment insurance may lead to a 'race' of subsidies between member states, giving rise to competitive distortions and legal uncertainty.[82] Ultimately, the decision to phase out some member state competences whilst maintaining others lays claim to an approach which is not only incoherent internally but also *vis-à-vis* international actors and which prevents the development of a cohesive EU voice in the international investment regime.[83] Indeed, initiatives such as the maintenance of member state investment insurance schemes or the approval of new extra-EU member state BITs are likely to increase regulatory competition between them, weakening cohesiveness and, by offering member states and third countries an attractive alternative to potential EU IIAs, possibly hindering the negotiation of the latter.

Moreover, on the grounds that it would reduce its flexibility in negotiations, and despite the European Parliament's calls for the EU to design one, the Commission has actively rejected the key mechanism for increasing consistency and accountability in international investment negotiations, a Model IIA which could serve as their standardised foundation.[84] A Model IIA is necessary not only to ensure transparency but also to ensure the consistent interpretation and application of its IIAs at the national and subnational level.[85] Furthermore, it would guarantee that IIAs are drafted with high technical standards and allow for consistency across negotiations, and strengthen the EU's bargaining position by establishing clear guide and red lines.[86]

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[81] European Union, "Consolidated Versions 2007", *op.cit.*, art. 5(3) TEU.
[82] Dimopoulos, "Foreign Investment Insurance", *op.cit.*, p. 192.
[83] C. Gebhard, "Coherence", in C. Hill & M. Smith, *International Relations and the European Union*, 2nd edn., New York, Oxford University Press, 2011, p. 108.
[84] Bungenberg, "The Division of Competences", *op.cit.*, p. 29; Bungenberg & Hobe, *op.cit.*, p. 1609; European Parliament, "Resolution", *op.cit.,* paras. 9-10; Griebel, "The New EU Investment Policy Approach", *op.cit.*, pp. 309-310, 313; Hoffmeister & Ünüvar, *op.cit.*, p. 62.
[85] Calamita, *op.cit.*, pp. 326-327.
[86] *Ibid.*, pp. 317, 321; Griebel, "The New EU Investment Policy Approach", *op.cit.*, p. 310; Woolcock, *op.cit.*, p. 10.

All in all, the EU's actorness in the international investment regime is weakened not only by legal constraints which affect its autonomy, but also by its own operationalisation of the policy. Indeed, the maintenance of different levels of policy-making has the potential to create legal uncertainty and, especially given the lack of an EU Model IIA to structure negotiations, lead to wasted resources, duplication of efforts, and inconsistency across negotiations which may decrease the EU's credibility as an international actor.

Recognition: the elephant in the room

The last element of actorness identified by Jupille and Caporaso is recognition. The EU's actorness is also limited in this regard: although its legal personality is confirmed in Article 47 TEU, the EU is only partially recognised as an actor in the international investment regime.[87] Its actorness is thus not limited only by restrictions internal to the EU – linked to its legal competence, institutional autonomy, and cohesiveness – but also by external limitations.[88] In this context, one can distinguish between problems which the EU encounters finding a place within the international investment regime and issues arising from the interaction between EU law and international law.

The EU within the international investment regime

The challenge that the EU's recognition encounters in the international investment regime can again be exemplified by its participation in the ISDS system. Indeed, its actorness in this domain is structurally limited not only by EU law but also by international law. Unsurprisingly, the most important challenges for the EU in this regard come from the fact that it is not a state. This implies that it cannot become party to the crucial instrument ensuring full recompense to investors, the New York Convention.[89] Moreover, it means that it cannot become a member of the sole institutionalised arbitration mechanism designed specifically for international investment disputes, the International Centre for Settlement of Investment Disputes (ICSID).[90] As ICSID arbitration is available only where an investor's home and host states

[87] R. Wessel, "The International Legal Status of the European Union", *European Foreign Affairs Review*, vol. 2, 1997, p. 112.
[88] Da Conceição-Heldt & Meunier, *op.cit.*, p. 965.
[89] Chase, *op.cit.*, p. 7; United Nations, "Convention on the Recognition and Enforcement of Arbitral Awards", New York, *United Nations Conference on International Commercial Arbitration*, 1958, art. 1.
[90] Gaffney & Akçay, *op.cit.*, p. 190; Hoffmeister & Ünüvar, *op.cit.*, pp. 75-76, 79.

are parties to its Convention, the EU will not be able to make use of it in future EU IIAs.[91] Nevertheless, the fact that EU IIAs shall in practice be concluded as mixed agreements implies that the EU will be able to make indirect use of ICSID arbitration in the areas of the agreement covered by mixed competence: foreign investors from states which are ICSID members shall be able to bring claims against member states which are equally members of ICSID, albeit not against the EU itself.[92] As all EU member states except Poland are parties to its Convention, ICSID arbitration will in fact be broadly applicable.[93]

The interaction between EU and international law

The interaction between EU and international law is more problematic, and indeed, the secondary law inter-institutional compromises agreed upon to date attest to an introspective EU approach which is in some respects in direct conflict with international law. Previous sections of this paper touched upon the Financial Responsibility Regulation, which is problematic because the EU, as an international organisation to which its member states have conferred powers, is in some cases internationally responsible for acts of its member states which run counter to the obligations assumed under IIAs, even those to which the Union is not party and despite the Regulation's explicit inclusion of a provision stating its inapplicability in the case of member state BITs.[94] As IIAs cover all measures which affect investment adopted by local, regional, or national governments, including areas which remain under exclusive member state competence, this question is not just academic.[95]

Important problems arise also as regards the 'Grandfathering' Regulation, particularly because it does not cover the approximately 190 intra-EU BITs in force today. These are agreements concluded between EU member states, mostly before the accession

[91] Gaffney & Akçay, *op.cit.*, p. 190; Hoffmeister & Ünüvar, *op.cit.*, p. 76.
[92] Cafari Panico, *op.cit.*
[93] Brown & Naglis, *op.cit.*, p. 19; Hoffmeister & Ünüvar, *op.cit.*, p. 76.
[94] Brown & Naglis, *op.cit.*, p. 29; Cafari Panico, *op.cit.;* Regulation 912/2014, 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, *Official Journal of the European Union*, L 257, 28 August 2014, art. 1; Strik, *op.cit.*, p. 114. For an assessment of the EU's international responsibility for its member states' actions, see G. Gaja, "Articles on the Responsibility of International Organizations", *United Nations Audiovisual Library of International Law*, 9 December 2011.
[95] Chase, *op.cit.*, p. 7.

of at least one of them to the Union.[96] They exemplify many of the legal problems which arise from the interaction of EU and member state investment policies. First, they conflict with the exclusive Union competence for FDI.[97] Second, substantive guarantees and protection standards in intra-EU BITs are higher than those guaranteed by EU law; this gives rise to discrimination between investors on the grounds of nationality and has the potential to create distortive impacts on investment flows within the internal market.[98] Third, intra-EU BITs grant investors access to ISDS arbitration: this not only implies differential – and thus discriminatory – treatment to that afforded to investors from other EU member states, but also conflicts with the EU law obligation to exhaust local remedies in member state courts and undermines the CJEU's exclusive authority to interpret and apply EU law.[99] Fourth, they allow investors to 'treaty-shop' or 'forum-shop' between member state and EU investment policies and between investment arbitration and national courts.[100]

Nevertheless, this issue has proven divisive among member states: to date, only those which are handling many BIT claims have been receptive to the Commission's reiterated demands to terminate them.[101] In contrast, capital-exporting member states are reluctant to renounce the favourable conditions enshrined in intra-EU BITs.[102] Their divergent interests mean that member states are far from having an aligned position on the validity of intra-EU BITs and particularly their ISDS clauses.[103]

The different approach taken by the EU as regards intra- and extra-EU BITs has a seemingly obvious reason: whereas intra-EU BITs are a purely internal matter, extra EU-BITs involve third countries which, not being signatories to the Treaty of Lisbon, should not be affected by its entry into force.[104] Nevertheless, in stark contrast to EU law, from an international law perspective, intra-EU BITs, as international treaties concluded by

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[96] Bungenberg & Hobe, *op.cit.*, p. 1606; Gaffney & Akçay, *op.cit.*, p. 193; Lenk, *op.cit.*, p. 10; A. Ziegler, "The New Competence of the European Union in the Area of Foreign Direct Investment (FDI): A Third Country Perspective", in M. Bungenberg & C. Herrmann (eds.), *Common Commercial Policy after Lisbon*, Berlin and Heidelberg, Springer, 2013, p. 238.
[97] Dimopoulos, *EU Foreign Investment Law*, *op.cit.*, p. 335.
[98] Strik, *op.cit.*, p. 249; Woolcock, *op.cit.*, p. 10.
[99] Bungenberg & Hobe, *op.cit.*, p. 1606; Gaffney & Akçay, *op.cit.*, p. 194; Strik, *op.cit.*, pp. 249, 258.
[100] Bungenberg & Hobe, *op.cit.*, pp. 1606, 1622.
[101] Gaffney & Akçay, *op.cit.*, p. 196.
[102] Burgstaller, *op.cit.*, p. 75; Gaffney & Akçay, *op.cit.*, p. 196.
[103] Burgstaller, *op.cit.*, p. 72; Lenk, *op.cit.*, p. 15.
[104] Gaffney & Akçay, *op.cit.*, p. 199; Lenk, *op.cit.*, p. 16; United Nations, "United Nations Convention on the Law of Treaties", Vienna, United Nations, 23 May 1969, art. 30(4)(b).

sovereign states, are not automatically superseded by the Treaty of Lisbon but remain valid until their formal termination, although the Treaty does divest member states of the competence to conclude new intra-EU BITs.[105] Indeed, different arbitral tribunals, for instance in *Eastern Sugar*, *Binder*, *EUREKO*, or *AES*, have rejected the notion that EU law automatically invalidates BITs between EU member states as well as the CJEU's interpretative monopoly over EU law.[106]

Overall, the Commission's support for the inclusion of ISDS provisions in EU IIAs and opposition to such provisions in intra-EU BITs testifies to an approach which centres mostly on intra-EU policy issues to the expense of investors which currently profit from intra-EU BITs.[107] For instance, arbitration in intra-EU BITs, while disallowed by EU law, may be a useful tool to prevent unequal treatment of EU citizens on the grounds of their nationality by different member state judiciaries.[108] Furthermore, a termination of intra-EU BITs would disadvantage EU investors *vis-à-vis* third-country investors, who benefit from higher levels of protection under member state and EU IIAs than those afforded to EU investors under internal market law.

Consequently, the problems which arise in the interaction between EU primary and secondary law and established international investment law and frameworks imply that, even if the EU were able to solve the problems related to the internal distribution of competences, its actorness in international investment politics would still be subject to structural constraints in what might be termed a *systemic* incoherence within existing international frameworks. This not only limits the modalities of EU participation in the latter but also undermines the EU's attractiveness as a partner with which to conclude IIAs.

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[105] Gaffney & Akçay, *op.cit.*, p. 199; N. Lavranos, "New Developments in the Interaction between International Investment Law and EU Law", *The Law and Practice of International Courts and Tribunals*, vol. 9, 2010, p. 435; 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*, vol. 12, no. 1, p. 131; W. Shan & S. Zhang, "The Treaty of Lisbon: Half Way toward a Common Investment Policy", *The European Journal of International Law*, vol. 21, no. 4, 2011, p. 1068.
[106] M. Bungenberg & C. Titi, "Developments in International Investment Law", in C. Herrmann, M. Krajewski & J. Terhechte (eds.), *European Yearbook of International Economic Law 2013*, Heidelberg, Springer, 2013, p. 454; Gaffney & Akçay, *op.cit.*, pp. 195-196; United Nations Commission on International Trade Law, judgement in *Eureko B.V. v. the Slovak Republic*, PCA Case 2008-13, 1976, Award on Jurisdiction, Arbitrability and Suspension, paras. 276, 282.
[107] Lenk, *op.cit.*, p. 7.
[108] Rovetta, *op.cit.*, p. 225.

Conclusion: the birth of a (Pastis) power

The creation of the CIP is the latest step in a historical process extending EU competences under the CCP in line with the evolving trade agenda and the deepening EU integration process. With the Treaty of Lisbon, the EU's competence to regulate investment *internally*, principally via the TFEU's provisions on capital movement and establishment in the internal market, was complemented by an explicit *external* competence which has been understood to be comprehensive but not always exclusive.[109] With the Europeanisation of the last broad category of economic policy-making which remained under national competence, the Treaty aimed to streamline the multiplicity of EU primary law provisions which previously touched upon the regulation of international investment, reducing ambiguity as to the distribution of competences and allowing for a number of benefits which would increase its ability to conclude favourable IIAs and act efficiently in the international investment arena.[110]

The political economy perspective adopted in this paper paints a more nuanced picture of the competence transfer. Ultimately, the distribution of competences enshrined in the Treaty of Lisbon does not suffice to create an efficient, coherent CIP which would enable the EU to be an independent player in the international investment regime.[111] The ambiguous wording of the Treaty itself fundamentally circumscribes the EU's legal competence and implies that the main problem of the pre-Lisbon distribution of investment policy competences within the EU, the fragmentation which implied that neither the Union nor its member states were competent to negotiate IIAs as comprehensive as other actors' unilaterally, has not been eliminated.

By imposing mixity in international negotiations, the post-Lisbon set-up increases the number of veto players in the decision-making process for EU international agreements comprising investment provisions. This renders the development of a truly autonomous EU international investment policy very complicated, as is evident by the many disputes which remain among EU institutions and member states as to the scope and

[109] Basedow, *op.cit.,* p. 58.
[110] Dimopoulos, *EU Foreign Investment Law*, *op.cit.*, p. 122.
[111] Bungenberg, "The Division of Competences", *op.cit.*, pp. 29, 35, 42.

configuration of the CIP.[112] Questions arise as to the EU's capacity to negotiate favourable IIAs in a context in which it has not even decided how to structure its own competence internally.

Moreover, despite the prolific policy and academic debates on the substantive design of the CIP, the CJEU's position as 'constitutional' EU court has already defined many of the parameters of the new policy.[113] In this context, the CJEU's pending Opinion on competence distribution in the conclusion of the EU-Singapore FTA may have trailblazing consequences for the understanding of the EU's competence.[114] It is important to mention in this respect, however, that the Commission and the co-legislators seem to be paying little heed to limits established by the CJEU in the negotiation of EU IIAs and the adoption of secondary legislation.

Overall, intra-EU quarrels over competence and competing tactics and visions for the CIP give rise to legal uncertainty, lessen the EU's attractiveness for investors and third countries, and ultimately imply that the EU's actorness is not only limited by EU law provisions and by their interpretation by the CJEU but also by the EU's own implementation of its new competence. Furthermore, the creation of new frameworks in which member state policies interact with EU policies, far from simplifying procedures and clarifying the transition to the CIP, adds yet another layer of complexity and overlapping rights and obligations, increasing legal uncertainty. This also implies that regulatory competition is an issue not only internationally but likely to subsist within the EU itself. Indeed, the EU's procrastination of definite decisions on many normative concerns and structural issues lengthens the uncertain transitional phase to the CIP and seems to be actively hampering the development of a cohesive policy.[115]

Finally, the fact that the EU is only partially recognised as an international actor within the international investment regime implies that its actorness would be circumscribed even if it were able to deal with its internal problems, in what one might term *systemic*

[112] *Ibid.*, p. 29; Strik, *op.cit.*, p. 108.
[113] *Ibid.*, pp. 229, 231-232.
[114] European Commission, "Request for an opinion submitted by the European Commission pursuant to Article 218(11) TFEU, 2015/C 363/22", *Official Journal of the European Union*, C 363, 3 November 2015, pp. 18-19; European Union, "Consolidated Versions 2007", *op.cit.*, art. 19(1) TEU; Lenk, *op.cit.*, p. 12.
[115] Calamita, *op.cit.*, p. 327; Götz, *op.cit.*, p. 300.

incoherence of the EU within the existing institutional frameworks and legal structures of the international investment regime. Particularly the fact that the CIP is not being constructed in a vacuum, but on the basis of hundreds of member state IIAs which will serve as an attractive alternative to potential EU IIAs, decreases the EU's leverage over third countries. It also implies that EU IIAs shall only be acceptable to third countries and each and every member state, if they include more favourable provisions than any of their respective BITs, a condition which in practice seems extremely difficult to achieve.

This paper's findings suggest that the transfer of competence over FDI to the EU is unlikely to give rise in the international investment landscape to a situation which resembles the configuration in the international trading system. Far from increasing the international competitiveness of the EU's economy and regulatory system, the inclusion of investment provisions may jeopardise the ratification of the broader trade and international agreements in which they are usually incorporated. Consequently, the EU's attempt to include investment concerns in its external economic policy-making may not only lack a positive impact on the EU's position in international investment but perversely even decrease its influence in the broader international economic arena.

In this context, the EU's decision to countenance the conclusion of new extra-EU member state BITs might be regarded as testament to its recognition that such agreements are the most feasible form for the EU to conclude IIAs and maintain the competitiveness of its firms. A probable result of the post-Lisbon *status quo* for international investment policy is thus one in which the EU focusses on negotiating IIAs with strategic countries while permitting its member states to continue to bargain with the 'small fish'. This approach is consistent with the Commission's explicit prioritisation of negotiations with such economies since its 2006 Communication on the EU's trade strategy and with individual policy initiatives, such as its 2012 development, together with the USA, of a 'blueprint' establishing standards to guide 21st century international investment politics, which can be read as an attempt to increase their joint influence in the international investment architecture.[116]

The EU's present unenviable position in international investment politics belies conceptualisations which describe it as a 'market power' and serves as yet another confirmation of the oft-cited maxim that there is no 'free lunch' in economics.[117] In these early stages of the CIP, the EU seems to be something of a conflicted, 'diluted' 'Pastis power' which is unsure of what to do with a competence which the Commission spent decades trying to achieve. Although the transfer of competence over FDI to the world's largest economic bloc will doubtless give rise to systemic shifts not only internally within the EU but also but also in the international investment regime more generally, uncertainties surrounding the final configuration of the CIP denote that it is too early to say whether they shall be to the benefit of the EU.[118] Many open questions remain and offer rich soil for research: how shall the EU address inward investment by state-owned bodies such as state-owned enterprises or sovereign wealth funds? How shall it prevent unequal treatment for EU and international investors who wish to place capital within the EU? How to balance the roles of different EU institutions, the imperative to guarantee not only 'free' but also 'fair' trade, and the interests of capital importing and capital exporting member states? In any event, the complex decision-making dynamics which characterise the Union and the Herculean task with which it is faced in the replacement of existing regulatory frameworks imply that the scope and configuration of the CIP are not likely to be settled any time soon and that the transitional period to a common policy is likely to be a very lengthy one.

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116 Bungenberg, "Investment Protection at Crossroads", *op.cit.*, p. 129; Bungenberg & Titi, *op.cit.*, p. 446; Commission of the European Communities, Directorate-General Trade, *Communication from the Commission: Global Europe: Competing in the World*, COM(2006) 567 final, Brussels, 4 October 2006; European Commission, *Towards a comprehensive European international investment policy*, *op.cit.*; "EU and US adopt blueprint for open and stable investment climates", European Commission, Directorate-General Trade, 10 April 2012.
117 Damro, *op.cit.*, p. 682.
118 Basedow, *op.cit.*, p. 339; Calamita, *op.cit.*, p. 329.

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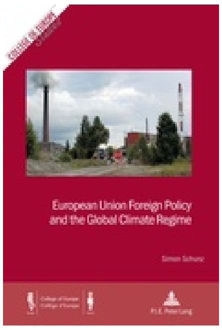

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