

Competence Review: Trade and Investment

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Introduction

1. The European Union (EU) has had competence over trade in goods since its inception in 1957.² The EU has exercised this external competence through its Common Commercial Policy (CCP). As one of the most dynamic fields of EU external relations, the scope and the nature of the CCP has evolved through decisions of the European Court of Justice (ECJ) and treaty revisions.
2. This Report surveys how EU competence in areas of trade and investment has developed over time, with particular reference to the most important substantive and institutional changes introduced by the Treaty of Lisbon. It sheds light on the issues with respect to which the division of competences between the EU and the Member States is most contested. This is a vast and complex area of law. The further reading list at the end of this text provides more detail.¹ EU Competence before the Treaty of Lisbon

1. EU Competence before the Treaty of Lisbon

1.1 The Development of the Common Commercial Policy

3. At the outset, the express competence of the European Community (EC) in the field of the CCP was limited to trade in goods pursuant to Article 113 EEC (later Article 133 TEC, now Article 207 TFEU).³ This competence included the common customs tariff and common import and export regimes for goods. The development of a uniform external trade regime beyond the customs union, however, was not straightforward. In particular, the scope of the CCP and the nature of EC competences were unclear. The first major ruling in which the ECJ acknowledged the shift of trade policy competence from the Member States to the EC was *Opinion 1/75*.⁴ The Commission asked the Court two questions: first, whether the EC could conclude the 'Understanding on Local Cost Standard' which concerned export credits, and, second, whether that competence was exclusive. With respect to the scope of the Community's competence, the Court argued that the CCP had the same content as the commercial policy of a State. As Article 113 EEC referred to export policy, it necessarily covered systems of aid for exports, among others export credits. The Court thus confirmed the exclusive nature of the Community's competence to conclude international agreements on commercial policy. It gave three reasons: first, exclusivity was essential for the defence of the Community's common interests; second, the absence of the uniform external trade policy could distort competition and deflect trade in the internal market; and third, Member States owed a duty of loyalty towards the Community and its institutions.
4. The ECJ further extended the scope of exclusive Community competences in *Opinion 1/78* which addressed the question of the Community's competence to negotiate and conclude the International Agreement on Natural Rubber.⁵ The aim of

² Including its predecessors the European Economic Community and the European Community.

³ Treaty Establishing the European Economic Community, 25 March 1957.

⁴ *Opinion 1/75 re Understanding on a Local Cost Standard* [1975] ECR 1355.

⁵ *Opinion 1/78 re International Agreement on Natural Rubber* [1979] ECR 2871.

the Agreement on Natural Rubber was to smooth price fluctuations through the use of a buffer stock. Accordingly, natural rubber was released onto the market when prices hit a ceiling and purchased when prices hit a floor. The Court took a broad view of the CCP's scope, arguing that the CCP should be interpreted dynamically in keeping with the changing character of international trade. To restrict the CCP to traditional measures of commercial policy would render the CCP useless in the course of time. Nevertheless, the Court held on account of the financial contribution by member states to the buffer stock that the participation of Member States was necessary, with the result that it had to be concluded as a mixed agreement.

5. With the conclusion of the Uruguay Round of negotiations, the scope of the multilateral trade system in the mid 1990s expanded to include services and intellectual property rights. The result of the Uruguay Round was the 1994 Agreement Establishing the World Trade Organisation, which established an institutional framework for trade relations among its Member Countries. Annexed to the framework WTO Agreement were several further multilateral agreements laying down substantive rights and duties, notably the General Agreements on Trade in Goods (GATT) of 1947, the 1994 General Agreement on Trade in Services (GATS) and the 1994 Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). As both the EC and the Member States individually became WTO members, the question arose whether the EC's competence to join the WTO was exclusive.
6. The Court analysed the question in its well known ruling, *Opinion 1/94*.⁶ The Court first concluded that all the WTO agreements on trade in goods came within the CCP, confirming the broad conception of 'trade' of its previous case law. It then considered the question of competences in the field of services and intellectual property rights. Having regard to the open nature of commercial policy, the Court did not see any reason in principle to exclude trade in services from the CCP's scope. However, examining different modes of supply as defined in Article I GATS,⁷ it found that only cross-border supply of services was sufficiently similar to trade in goods. The three other modes involving the entry or movement of persons, and similarly transport services, did not fall within the scope of the CCP. As regards the TRIPS Agreement, the Court held that Article 113 EC only covered the provisions on the release into free circulation of counterfeit goods, while the rest of the TRIPS was outside the CCP's scope. The reason was that the primary purpose of TRIPS was not to regulate trade but to harmonise the protection of intellectual property rights. In rejecting the Commission's argument on implied competences, the Court found that the Community and Member States shared competence to conclude both GATS and TRIPS.

⁶ *Opinion 1/94 re WTO Agreement* [1994] ECR I-5267.

⁷ Article 1(2) GATS defines trade in services as comprising four modes of supply: 1) cross-frontier supplies not involving any movement of persons; 2) consumption abroad, which entails the movement of the consumers into the territory of the WTO member country in which the supplier is established; 3) commercial presence, i.e. the presence of a subsidiary or a branch in the territory of the WTO member country in which the service is to be rendered; 4) the presence of natural persons from a WTO member country, enabling a supplier from one member country to supply services within the territory of any other country.

7. In reaction to the *Opinion 1/94*, the Treaties of Amsterdam (1997) and Nice (2001) expanded the CCP to include trade in services and trade-related aspects of intellectual property. The Treaty of Amsterdam enabled the Council to extend the CCP to other areas by unanimous decision on a proposal of the Commission and after consulting the European Parliament, without the need for further treaty amendment. This option, however, has not been used. The Nice Treaty added further scope to Article 133 TEC, bringing trade in services and the commercial aspects of intellectual property under the auspices of the CCP. At the same time, it also included several exceptions to the scope of the EC's exclusive competence (e.g. agreements on trade in educational, cultural and audio visual services), with the result that these were required to be mixed agreements. The amendments have been criticised on, among other grounds, the lack of clarity regarding the meaning of 'trade in services' and 'commercial aspects of intellectual property', the limitation of the shared competence to certain services, and the exclusion of autonomous measures by Member States in these area due to the explicit reference to international agreements.⁸

1.2 Implied External Competence

8. An important milestone in the development of the EU's external competences was the recognition that the EU does not only enjoy external competences if and insofar as the treaties explicitly confer such competences, but can also enjoy implicit competences. These follow from other Treaty provisions and measures adopted based on them. The ECJ established the doctrine of implied competences in the groundbreaking *AETR* case,⁹ in which the Court recognised the Community's competence to conclude an international agreement even in the absence of express recognition of such competence in the Treaties. The case concerned the question whether the Commission or the Member States had the competence to negotiate and conclude the European Agreement Concerning the Work of Crews of Vehicles Engaged in International Road Transport (*AETR*).¹⁰ The Court argued that the authority of the Community to enter into agreements follows not only from express attribution of competences, but may flow from other Treaty provisions and from measures adopted by the EC institutions. The ECJ explained that when the EC adopted common rules with a view to adopting a common policy, the Member States were barred from adopting their own conflicting measures. The Court thus articulated the principle of pre-emption in respect of external relations (the *AETR*-principle). As the relevant Treaty provisions on transport and Regulation no. 543/69¹¹ covered the same subject matter as *AETR* agreement, Member State action was pre-empted and the *AETR* fell within the scope of common transport policy. Three decades later in *Open Skies*, the Court clarified that the *AETR* principle applies even in the absence of a conflict between the provision of an

⁸ M Cremona, 'A Policy of Bits and Pieces? The Common Commercial Policy after Nice' (2001) 4 CYELS 69; C Herrmann, 'Common Commercial Policy after Nice: Sisyphus Would Have Done a Better Job' (2002) 39 CMLR 26.

⁹ Case 22/70 *Commission v. Council (AETR)* [1971] ECR 263, 275.

¹⁰ P Mengozzi, 'The EC External Competences: From the ERTA Case to the Opinion in the Lugano Convention', in M Poirares Maduro and L Azoulai (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart, 2010) 213-17.

¹¹ Regulation no. 543/69 on the Harmonization of Certain Social Legislation Relating to Road Transport.

international agreement and internal EU legislation.¹² The Court stated that the EU had exclusive competence where the international commitments fell within the scope of common rules or the area covered by such rules. In such a case the Member State could not enter into international commitments even if there was no contradiction between those commitments and the common rules.

9. In the *AETR* case the community exercised its internal (transport) competence. By contrast, if the internal competences have yet to be exercised at the time of negotiating or concluding the agreement, the EC's external competence to conclude an agreement may still exist in so far as the Community's participation in the international agreement is necessary for the attainment of one of the objectives laid down by the Treaty. The Court so concluded in *Opinion 1/76*, based on the idea that the Community's internal and external competences run in parallel.¹³ Aside from concluding that implied competences were not limited to common policies but covered all Treaty objectives and did not necessarily depend on the prior exercise of internal competences, the Court also held that once the EC had exercised its competence by way of concluding an international agreement, Member States could participate only in those parts of agreement which were not covered by the community competence at all.
10. In *Opinion 1/76*, the Court addressed the issue of mixed agreements, i.e. international agreements requiring signature and conclusion by the EU and by each Member State, for the first time. It held that when agreements fall entirely within the EU's shared competence (e.g. in common transport policy), mixity needs to be legally justified and is not simply optional. In areas of shared competence the EU may decide not to participate in the negotiation or conclusion of international agreements. However, where the EU becomes a party and the agreement comes entirely within its exclusive or shared competence, it becomes difficult to justify mixity.¹⁴ The EU may then decide to exercise its competence for only one part of the agreement.¹⁵ The Court viewed mixity more favourably in *Opinion 1/78* (see paragraph 3). As Member States financed the buffer stock - the essential element of the agreement - the participation of Member States in the mixed agreement was justified. The Court stressed that mixity was required in so far as certain Member States represented 'dependent territories' not belonging to the Community. Mixed agreements have played an important role in the field of CCP as both the Commission and the Member States concluded trade and investment agreements. The literature explains the need for mixity by, among others, the desire of Member States to appear as visible actors on the international scene, the Commission's attempts to avoid inter-institutional tension and the need to delimit competences in specific cases.¹⁶ The downside of mixed agreements is that they considerably

¹² Case C-466/98 *Commission v. United Kingdom* [2002] ECR-9427.

¹³ *Opinion 1/76 re Inland Waterways* [1977] ECR 741.

¹⁴ P Eeckhout, *EU External Relations Law* (OUP, 2012), 217.

¹⁵ *Ibid.*

¹⁶ Eeckhout (n 14) 221; CD Ehlermann, 'Mixed Agreements - A List of Problems' in D O'Keeffe and HG Schermers (eds), *Mixed Agreements* (Kluwer, 1983) 6; A Rosas, 'The European Union and Mixed Agreements' in A Dashwood and C Hillion (eds), *The General Law of EC External Relations* (Sweet & Maxwell, 2000) 202.

increase the complexity of the agreements, and may deter third states from entering trade and investment agreements with the EU and its Member States.

11. In the 1990s, the ECJ issued three opinions which limited the broad principles spelled out by the Court in the 1970s. In *Opinion 2/91*, the Court clarified the nature of implied competences by pointing out that the Community's exclusive competence may flow from either treaty provisions granting the EC express external competences, e.g. Article 113 EC, or it may be based on the principle of pre-emption (the *AETR* principle).¹⁷ The Court stressed that pre-emption did not only apply within the framework of the common policies listed in the Treaty, but extended to any area corresponding to the objectives of the Treaty. Member States are thus required to abstain from those measures which could jeopardize the attainment of the Treaty objectives. The Court also concluded that agreements could be negotiated in areas of shared competence, provided the Community and the Member States acted jointly with respect to the negotiation and implementation of the agreement. The Court thus reiterated the duty to co-operate as central to mixed agreements, a principle it had already articulated in *Opinion 1/78*.
12. In *Opinion 1/94* the Court set further limits on the exclusivity of implied competences (see paragraph 6 above). The Commission argued that it had exclusive competence to conclude the 1994 WTO Agreement, based among others on the doctrine of implied competences. The Court held that the EC lacked exclusive external competence in the areas covered by the GATS and the TRIPS. It limited its holding in *Opinion 1/76* that the exercise of external competences could turn them into exclusive competences if such exercise was necessary for the attainment of a Community objective to situations in which achievement of a Community objective was inextricably linked to external action (see paragraphs 9-10).
13. The Court also considered whether exclusivity could be based on the *AETR* pre-emption principle. It argued that the EC could achieve exclusive external competence when internal legislation either 1) contained provisions on the subject matter (i.e. where the international commitments fell within the scope of common rules, or within an area which was already largely covered by such rules); 2) expressly granted the EC competence to negotiate with non-member countries in this area, or 3) in completely harmonised areas. In *Opinion 1/94*, the Court held that the harmonisation achieved was not sufficient to rule out Member States' competence and that external action was not a precondition for successful harmonization in those areas. The Court found that the competence to conclude GATS and TRIPS was shared between the Community and the Member States. The literature criticised the Court's greater judicial restraint to confirm external competences, compared to its previous decisions.¹⁸
14. In *Opinion 2/92* concerning the OECD Decision on national treatment of foreign undertakings, the Court considered whether implied internal competences could

¹⁷ *Opinion 2/91 re ILO Convention No 170* [1993] ECR I-1061.

¹⁸ See e.g. JHJ Bourgeois, 'The EC in the WTO and Advisory Opinion 1/94: An Echter Nach Procession', 32 CML Rev. (1995), 763-787; M Hilf, 'The ECJ's Opinion 1/94 on the WTO - No Surprise, but Wise?', 6 EJIL (1995), 245 and 258.

have vested exclusive external competence in the Community.¹⁹ It established that Article 113 EC could not grant the Community exclusive external competence in the areas of the Decision. Member States are only excluded from acting in the presence of common rules. It found that even though the EC had adopted measures in the areas covered by the Decision which could pre-empt Member States participation, it did not cover the Decision's field as a whole. The Court thus concluded that the Community and the Member States shared competence to adopt the OECD National Treatment Decision. The Opinion is important because the Court indirectly recognised implied competences with respect to the establishment of foreign investors (see paragraph 32 below).

15. In *Opinion 1/03*, the last major ruling concerning implied competences, the Court considered whether the conclusion of the Lugano Convention²⁰ fell entirely within the exclusive competence of the Community, or within the shared competence of the Community and Member States.²¹ In its analysis, the Court recalled the three (illustrative) scenarios in which it had recognised exclusive competence in *Opinion 1/94*. The Court reaffirmed an open-ended approach when examining 'areas which are already covered to a large extent by Community rules'. It explained that it was not necessary for the areas covered by the international agreement and Community legislation to coincide fully. Furthermore, not only to take the current state of Community law in the area in question but also its future development needed to be considered, in so far as that was foreseeable at the time of the analysis. The Court also highlighted the overall rationale behind the *AETR* principle by stressing the importance of ensuring a uniform and consistent application of the Community rules and the proper functioning of the system which was established in order to preserve the full effectiveness of the Community law. The Court concluded that the Lugano Convention came within the Community's exclusive competence.

2. EU Competence after the Treaty of Lisbon

16. The Treaty of Lisbon constitutes an important step in the CCP's evolution. It changed both the nature and the scope of EU competence on trade and investment.

17. The entire CCP came under the same external action heading as other aspects of EU external policy and is therefore to be conducted within the context of the framework of the general principles and objectives of the EU's external action. Article 205 TFEU explicitly states that the EU's international action 'shall be guided by principles, pursue objectives and be conducted in accordance with the general provisions' laid down in Chapter 1 of Title V of the TEU (Articles 21 and 22 TEU). These principles include the support for democracy, the rule of law, human rights and environmental protection. These objectives correspond to demands made of

¹⁹ *Opinion 2/92 re Third Revised Decision of the OECD on national treatment* [1995] ECR I-521.

²⁰ Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters, 16 September 1988.

²¹ *Opinion 1/03 re Lugano Convention* [2006] ECR I-1145.

the CCP by the European Parliament in the negotiation of the Lisbon Treaty. The European Parliament, whose powers the Lisbon Treaty increased, is likely to use the CCP's new normative orientation to insist that FTAs and BITs reflect these principles and objectives.²²

2.1 The Nature of EU Competence

18. The Lisbon Treaty codified the principles developed by the ECJ regarding the nature of EU Competence. Thus, Article 3(1)(e) TFEU expressly stipulates that the CCP falls within the exclusive competence of the EU. This is in line with the ECJ's case law (*Opinion 1/75*) which held that Member States lack the competence to enter into international agreements or legislate on matters covered by the CCP. According to Article 2(1) TFEU, exclusive competence means that only the EU may legislate and adopt legally binding acts. Exclusivity is not limited to trade in goods, but also includes trade in services, trade-related aspects of intellectual property and foreign direct investment (FDI). Article 207 TFEU does not distinguish between different aspects of the CCP and Article 3 TFEU is not limited to trade in goods.

19. Furthermore, the Lisbon Treaty has further codified the principles developed by the ECJ on implied external competences. Pursuant to Article 3(2) TFEU, 'the Union shall have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the EU to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.' Similarly, Article 216(1) TFEU (which does not distinguish between exclusive and shared competences) states that the EU may conclude international agreements 'where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.'

20. Article 207(6) TFEU sets out the limitations to EU competences under the CCP. Article 207(6) TFEU aims to prevent the exercise of the EU external competence from affecting the balance of competence between the EU and its Member States within the Union's internal order.²³ First, it states that the exercise of the competences conferred on the EU by Article 207 in the field of the CCP does not affect the delimitation of competences between the EU and the Member States. This reflects the general principle of limited and specific conferral of competences in Articles 4(1), 5(1) and 5(2) TFEU. This element is unrelated to the principle of parallelism between external and internal competences which involves the determination of implicit external competence, not express external competence.²⁴

²² M Krajewski, 'New Functions and New Powers for the European Parliament: Assessing the Changes of the Common Commercial Policy from the Perspective of Democratic Legitimacy' in M Bungenberg and C Herrmann, 'Common Commercial Policy after Lisbon', Special Issue EYIEL (2013) 67, 83.

²³ W. Shan, and S. Zhang, 'The Treaty of Lisbon: Half Way toward a Common Investment Policy' Eur J Int Law (2010) 21 (4): 1049-1073

²⁴ Eeckhout (n 14) 61.

Article 207(1) TFEU grants an explicit exclusive external competence, even in the absence of existing internal measures.

21. Second, Article 207(6) TFEU states that the exercise of the Article 207 competence shall not lead to the harmonisation of legislative or regulatory provisions of the Member States in so far as the Treaties exclude this. The TFEU contains several provisions which exclude harmonisation of the laws and regulations of the Member States, such as immigration (Article 19(2) TFEU), health (Article 168(5) TFEU) and education and vocational training (Articles 165(4) and 166(4) TFEU). EU measures under the CCP cannot have the effect of harmonising laws and regulations in such areas.

2.2 EU Competence in the Areas of Trade in Services and Intellectual Property

22. The scope of the EU competences in areas of trade in services and intellectual property has been one of the most contested fields of EU external competence. The Lisbon Treaty brought an end to one part of this longstanding debate by establishing that the EU is exclusively competent for all services and trade related aspects of intellectual property. Although the Treaty does not define 'services', 'commercial aspects' and 'intellectual property', the context of the various Treaty amendments and ECJ's opinions suggest that these terms refer to trade in services as defined in GATS (covering all four modes of supply of services) and to trade-related aspects of intellectual property rights as regulated in TRIPS.²⁵

23. According to Article 207 TFEU, the CCP covers trade in services. The EU is therefore exclusively competent to negotiate and implement trade agreements in so far as they contain provisions on services. The TFEU has abandoned the shared competence concerning agreements relating to trade in cultural and audiovisual services, educational services, and social and human health services previously found in Article 133 TEC. However, Article 207(4) TFEU requires unanimity in the Council for the conclusion of trade agreements concerning services in these sectors, when there is a risk that the agreements will affect these sectors in certain ways.

24. The sole exception, in Article 207(5) TFEU, concerns the negotiation and conclusion of international agreements in the field of transport which is subject to Title VI of Part Three of TFEU (common transport policy), and is hence an area of shared competence. This means that WTO negotiations and agreements concerning transport services are not within the EU's exclusive competences unless the EU's implied powers in this field are exclusive.²⁶ The provisions of Title VI only apply to transport by rail, road and inland waterways (Article 100(1) TFEU). However, under Article 100(2) TFEU, the European Parliament and the Council,

²⁵ Case C-414/11 *Daiichi Sankyo Co. Ltd and Sanofi-Aventis Deutschland GmbH v DEMO Anonimos Viomikhaniki kai Emporiki Etairia Farmakon*, Judgment of the Court, 18 July 2013 (not yet reported) (Article 207 TFEU covers all the subject matter of TRIPS).

²⁶ Eeckhout (n 14) 59.

acting in accordance with the ordinary legislative procedure, may decide to lay down appropriate provisions for sea and air transport. The EU has exercised its competence in the field of maritime transport by concluding external maritime agreements with third countries (or included maritime elements in wider external agreements), aiming to improve market access for EU shipping in third countries. These include e.g. the EU-China Maritime Transport Agreement.²⁷ This is a mixed agreement falling within shared competence. It aims at improving the conditions under which maritime cargo transport operations are carried out and deals with broader maritime transport cooperation. The European Commission generally negotiates for the EU and its Member States in the WTO, including in negotiations on maritime trade in services. The EU is an observer at the International Maritime Organisation (IMO). However, as the EU is not a member, it cannot conclude maritime conventions elaborated within IMO. This situation has led to difficulties, which the ECJ addressed in several rulings.²⁸

25. Even though there is no formal agreement between Member States, the EU or the European Commission about how to work together at the IMO, the Member States and the European Commission work at Shipping Working Party level to co-ordinate an EU position for each IMO Committee and Sub-Committee meeting, irrespective of whether the EU has competence. Where an issue on the agenda affects an area governed by EU legislation, or where an IMO agreement affect EU rules, the European Commission coordinates a position. The duty of co-operation established by Article 4(3) TEU governs action by the Member States in so far as the IMO deals with matters coming within EU competence or matters governed by EU law or which could affect the attainment of EU objectives. The Commission has recently updated its strategic goals and recommendations for the EU Maritime Transport Policy until 2018 in which it pointed out the importance of the liberalisation of trade in maritime services and the Commission's role in facilitating dialogue and negotiations within WTO.²⁹
26. Even though it is generally accepted that the term 'commercial aspects of intellectual property' should be construed by reference to the WTO agreements including the TRIPS Agreement, the character of this reference is disputed. Pursuant to the TRIPS Agreement, trade-related aspects of intellectual property include copyright and related rights, trademarks, geographic indications, industrial designs, patents, layout-designs (topographies) of integrated circuits and undisclosed information (trade secrets). The question is whether 'trade related aspects of intellectual property' has a static or a dynamic meaning. While some scholars have held that the reference is dynamic and includes also subsequent

²⁷ Agreement on Maritime Transport between the European Community and its Member States, of the one part, and the Government of the People's Republic of China, of the other part, signed 6 December 2012, entered into force 1 March 2008.

²⁸ Case C-308/06 *Intertanko and Others* [2008] ECR I-4057; Case C-188/07 *Commune de Mesquer v. Total France* [2008] ECR I-4501; Case C-45/07 *Commission v. Greece* [2009] ECR I-701.

²⁹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Strategic Goals and Recommendations for the EU's Maritime Transport Policy until 2018, COM(2009) 8 final, p. 3.

changes in the TRIPS Agreement,³⁰ others have argued that the term reflects TRIPS as it stood at the time of the conclusion of the Treaty.³¹ In the absence of provision similar to Article 133(7) TEC which enabled the Council to extend the application of the CCP to international agreements on intellectual property not yet covered by the CCP, adopting a static interpretation would deprive the EU of the possibility to negotiate and conclude changes in the TRIPS Agreement. Thus, some authors have argued that Article 207 TFEU contains a dynamic reference, covering all issues that may be included in the TRIPS Agreement after a future WTO round.³²

27. In the *Sanofi-Avantis* case,³³ the Court in July 2013 addressed the question of whether Article 27 of TRIPS on patentability fell within the competence of Member States. The Commission argued that the whole TRIPS relates to 'commercial aspects of intellectual property' within the meaning of Article 207(1) TFEU and thus fell within the EU's exclusive competence. By contrast, EU Member States maintained that the majority of the rules in the TRIPS, such as those on patentability in Article 27, concern international trade only indirectly, and did not therefore fall within the CCP. They argued that patentability is covered by shared competence in the field of the internal market.
28. Having examined the relevant legislation and case law, the Court recognised that of the rules adopted by the European Union in the field of intellectual property, only those with a specific link to international trade are capable of falling within the CCP. The Court established that rules of the TRIPS have such a special link to international trade since the TRIPS is one of the principal WTO agreements. It emphasised that one of the objectives of the TRIPS was to reduce distortions of international trade by ensuring, in the territory of each member of the WTO, the effective protection of intellectual property rights. Since rules on patentability are intended to standardise certain key aspects of patents globally and thereby facilitate international trade, the Court concluded that Article 27 of the TRIPS fell within the field of the CCP and thus within EU exclusive competence. The question arises whether the Court would reach the same conclusion with respect to the provisions regulating criminal penalties for infringement of intellectual property rights. When explaining the special link to international trade, the Court based its analysis on the objectives of TRIPS in general and Part II in particular, but it did not mention Part III which regulates enforcement. However, the Court indicated that every provision in TRIPS which was adopted with an intention to foster world trade by standardising

³⁰ H Krenzler and C Pitschas, 'Progress or Stagnation? The Common Commercial Policy after Nice', 6 EFARev (2001) 291, 302; M Krajewski, 'The Reform of the Common Commercial Policy' in A Biondi and P Eeckhout (eds). *European Union Law after the Treaty of Lisbon* (2012) 301; A. Dimopoulos, *EU Foreign Investment Law* (Oxford University Press, 2011), 109.

³¹ Herrmann (n 8) 18-9; Cremona (n 7) 71-2; [P Koutrakos, EU International Relations Law \(Hart Publishing, 2006\)](#) 63.

³² Dimopoulos (n 30) 109; Krajewski (n 30) 301.

³³ Case C-414/11 *Daiichi Sankyo Co. Ltd and Sanofi-Aventis Deutschland GmbH v DEMO Anonimos Viomikhaniki kai Emporiki Etairia Farmakon*, Judgment of the Court, 18 July 2013 (not yet reported).

certain rules on intellectual property (arguably, this includes rules on enforcement), fall within the CCP and thus within EU's exclusive competence.

29. The Commission's competence in the field of criminal sanctions for the infringement of intellectual property rights has been controversial for some time. In 2005, the European Commission proposed a directive on criminal measures aimed at ensuring the enforcement of intellectual property rights. It justified its action by referring to an ECJ judgment in which the court held that although generally criminal law does not fall within the EU competence, the EU can still take measures that relate to criminal law that are essential for combating serious environmental offences, provided that such criminal law measures are effective, proportionate and dissuasive.³⁴ Many Member States, including the UK, voiced strong opposition. They argued that the proposal fell outside the Commission's competence and did not comply with the principle of subsidiary and proportionality. The Commission eventually withdrew its proposal.
30. Similarly, the Commission's competence has been contested with respect to negotiating the Anti-Counterfeiting Trade Agreement (ACTA), in particular the part on enforcement of intellectual property rights through criminal sanctions. The Commission has claimed that it has exclusive competence pursuant to Article 207 TFEU and that the only limit to EU competence is the rule that limits its competence in respect of internal EU legislation (Article 207(6) TFEU). The EU competence to adopt such criminal measures is based on Article 83(2) TFEU which requires that such measures must be essential. The Council authorised the Commission to negotiate ACTA, but agreed that the Presidency of the EU, on behalf of the Member States, would fully participate in the negotiations on matters falling within Member States competence, such as criminal penalties.

2.3 EU Competence in the Area of Foreign Direct Investment

31. The most important extension of EU competence in the Lisbon Treaty is the inclusion of foreign direct investment (FDI) within the scope of the EU's competence. Competence over FDI became part of the CCP. This extension led to extensive debate about the scope of the EU's new competence in the area. Three EU institutions and the Member States have adopted different positions on the controversial issues: the Commission in its Communication of July 2010,³⁵ the Council in its Conclusions of October 2010,³⁶ and the European Parliament in its resolution of April 2011.³⁷

³⁴ Case C-176/03 *Commission of the European Communities v Council of the European Union*, Judgment of the Court, 13 September 2005.

³⁵ Commission Communication of 7 July 2010: Towards a Comprehensive European International Investment Policy, COM(2010) 343 Final.

³⁶ Council of the European Union, Conclusions on a Comprehensive European International Investment Policy, 25 October 2010.

³⁷ European Parliament resolution of 6 April 2011 on the Future European International Investment Policy.

i) Investment before Lisbon Treaty

32. The EU's common commercial policy already encompassed aspects of foreign investment before the entry into force of the Treaty of Lisbon. Thus in *Opinion 2/92*, the ECJ confirmed the EU's *shared* competence to conclude the OECD National Treatment Instrument dealing with foreign investors from other OECD countries. Only the Treaty of Nice, however, expanded the CCP to the trade in services, including the GATS 3 mode of service, i.e. the supply of services through commercial presence.³⁸ Hence, the CCP covered GATS commitments with respect to market access and national treatment of certain forms of investment in the services sector. One day before the Treaty of Lisbon came into force, the ECJ rendered *Opinion 1/08* in which it confirmed that the EC had competence for all services areas, thus also for mode 3 (including investments in the services sector).³⁹
33. Apart from services, investment prior to the entry into force of the Lisbon Treaty was considered to be an area of shared competence. The protection of investment fell within the competence of the Member States who concluded almost 1,200 bilateral investment treaties (BITs) with third states. These BITs contain several features to protect investors, such as investor-state dispute settlement clauses and broadly formulated fair and equitable treatment guarantees. However, they cover only investment protection, and not market access.
34. Alongside the BIT programmes of its Member States, the EU negotiated market access for non-services investment in bilateral agreements on the basis of the 'minimum platform on investment'⁴⁰ – a standardised text prepared in 2006 for the use in future EU agreements. In the same year, the Commission urged that new EU free trade agreements should seek comprehensive liberalisation in particular in the areas of services and investment.⁴¹ The Minimum Platform for EU FTAs pursued two objectives: first, the EU sought additional market access commitments in a number of priority services in GATS modes 1, 3, and 4 (cross-border service, commercial presence, temporary entry of the service provider); and second, it sought to ensure some post-establishment standards, namely national treatment and most favoured nation treatment for service suppliers, commercial presences

³⁸ Article 1(2)(c) and Article XXVIII(d) of GATS.

³⁹ *Opinion 1/08 re GATS Schedules* [2009] ECR I-11129.

⁴⁰ N. Maydell, 'The European Community's Minimum Platform on Investment or the Trojan Horse of Investment Competence' in A. Reinisch, C Knahr (eds), *International Investment Law in Context* (Eleven International Publishing, 2008).

⁴¹ European Commission, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, *Global Europe: competing in the world - A contribution to the EU's Growth and Jobs Strategy* (October 4, 2006) (COM (2006) 567 final) 11.

and investors.⁴² The platform influenced the Economic Partnership Agreement with the CARIFORUM states⁴³ and the Free Trade Agreement with Korea.⁴⁴

ii) Definition of FDI

35. The wording of Articles 206 and 207 TFEU suggests that the new exclusive competence is limited to foreign 'direct investment' (and so does not cover foreign portfolio investment). Arguably, the notion of 'direct investment' should be interpreted by reference to the Community rules on direct investment and in accordance with the notion of FDI in international law. The term direct investment is mentioned in Articles 64(1) and 64(2) TFEU which provide for the free movement of capital and payments between Member States, and between Member States and third countries. According to the ECJ, direct investment means 'investments of any kind undertaken by natural or legal persons and which serve to establish or maintain lasting and direct links between the persons providing the capital and the undertakings to which that capital is made available in order to carry out an economic activity'.⁴⁵ This definition reflects the widely accepted definitions of the IMF and the OECD. The Court further distinguished between 'direct investment' which includes '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 'portfolio investment' involving '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'.⁴⁶

36. As most MS BITs cover both FDI and portfolio investment, the question arises whether the EU competence under the CCP encompasses portfolio investments as well. In its Communication *Towards a comprehensive European international investment policy*, the Commission argued that the Treaty provisions on capital and payments complement the EU's exclusive competence under the CCP and provide for an implied exclusive competence.⁴⁷ The Commission referred to Article 3(2) TFEU and suggested that the EU had implied exclusive competence to regulate portfolio investment of EU investors in third countries to the extent that international agreements on investment affect common rules set under the chapter on capital and payments (Articles 63-66 TFEU). The Council later supported the Commission's comprehensive approach, and noted that the EU's international investment policy should "be further elaborated in full respect of the respective

⁴² See e.g. Articles 68 and 70 of the Free Trade Agreement between the EU and the CARIFORUM States.

⁴³ Free Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part, OJ L 289/I/4 (November 30, 2008) 1.

⁴⁴ Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, OJ L 127 (May 14, 2011) 6.

⁴⁵ Case C-446/04 *Test Claimants in the FII Group Litigation* [2006] ECR I-11753, para 181.

⁴⁶ See e.g. *Case C-171/08 Commission v. Portugal*, Judgement, 8 July 2010, para 49; *Joined Cases C-282/04 and C-283/04, European Commission v. Netherlands*, Judgement, 28 September 2006, para 19.

⁴⁷ Commission's Communication (n 35) 8.

competences of the Union and its Member States as defined by the Treaties”⁴⁸. Similarly, the European Parliament asked the Commission to include both FDI and portfolio investment though excluding ‘speculative forms of investment’.⁴⁹

37. Many commentators, however, disagree with the Commission’s view on competence. Eeckhout, for example, argues that the scope of internal competence conferred on the EU by Article 64(2) or Article 66 TFEU does not extend to all aspects of portfolio investment.⁵⁰ Even though any measures adopted on the basis of the internal competence could extend to portfolio investment, the EU still lacks general competence to regulate portfolio investments. According to the *AETR* principle, exclusive external competence over portfolio investment could only be established to the extent that internal legislation may be affected, or its scope altered by the investment agreement covering portfolio investment. The EU has so far not made use of the competences under Article 64(2) or 66 TFEU.⁵¹ As a result, there is no internal legislation at present which may be affected by investment agreements covering portfolio investment.⁵² It has also been argued that the Commission’s proposal ignores the express intention of the drafters of the Lisbon Treaty to limit the EU’s competence to FDI.⁵³ Moreover, the Commission fails to explain why the inclusion of FDI in Article 207 TFEU was necessary since, according to the Commission’s analysis, the implied external competence based on the free movement of capital would also cover FDI.⁵⁴ According to these commentators, the EU’s exclusive competence is limited only to the aspects of agreements which relate to FDI, while the Member States remain competent concerning portfolio investment. From this, it is argued that investment agreements covering both forms of investment need to be concluded as mixed agreements.

iii) Scope of EU Competence to Regulate FDI

38. Another controversial question relates to the substantive scope of the competence regarding FDI. It is unclear from the wording of Article 207 whether EU competence includes investment protection (that is, provisions in BITs guaranteeing certain standards of protection in the post-investment phase such as fair and equitable treatment, full protection and security, protection from unlawful expropriation), or is limited to investment liberalisation (e.g. pre-establishment market access and national treatment). The Commission believes that the reference to FDI in Article 207 TFEU covers both investment liberalisation and investment protection, thus enabling the EU to conclude BITs and FTAs that include comprehensive investment rules. Some others, including some Member States, believe that EU competence only covers investment liberalisation and that competence for investment protection (or parts of it such as expropriation) remains with Member States. Legal commentators are similarly divided. While some argue that the negotiation history of the Treaty of Lisbon supports a narrower reading of the substantive scope of EU competence,⁵⁵ the majority view holds that Article 207 does not distinguish between

⁴⁸ Council Conclusions (n 36) para 7.

⁴⁹ European Parliament resolution (n 37) para 11.

⁵⁰ Eeckhout (n 14) 150.

⁵¹ *Ibid.*, 151.

⁵² *Ibid.*

⁵³ Krajewski (n 30) 303.

⁵⁴ *Ibid.*

⁵⁵ Krajewski (n 30) 302-3.

investment liberalisation and protection. A related concern is that limiting EU competence to investment liberalisation would seriously impair the effectiveness of EU policy on FDI.⁵⁶ In support of its position, the Commission referred to *Opinion 1/94*, according to which the Union's competence for the CCP includes obligations applying post entry (i.e. after a good has been imported or a service supplier has established) even where Member States retain the possibility to adopt internal rules.⁵⁷

39. It is well established that the Union's competence in the field of trade in goods and services is not confined to issues of market access (such as tariffs or import quotas) but covers also post-importation matters, such as the granting of national treatment and most favoured nation treatment in respect of taxes and other internal laws and regulations. Following this reasoning, the Union's competence for FDI also covers at least some of the standards applying post-establishment.
40. There is also a disagreement on whether EU competence for standards of post investment treatment, if indeed it exists, should cover all such standards, including measures regarding expropriation, or whether it should be limited to performance standards (e.g. non-discrimination, fair and equitable treatment, full protection and security), while Member States remain competent to conclude agreements in respect of expropriation. Some commentators have argued that protection against expropriation should be excluded from the scope of the new FDI competence due to Article 345 TFEU which states that the Treaties shall in no way prejudice the rules of Member States governing the system of property ownership. In a similar vein, it has further been argued that Article 207(6) TFEU excludes expropriation from EU competence.⁵⁸ The Commission rejected these suggestions in its Communication.⁵⁹ First, it argued that Article 345 TFEU does not exclude harmonisation of legislative or regulatory provisions regarding property issues. The Commission pointed out that the ECJ, for example, has expressly confirmed that Article 345 TFEU does not bar the EU from adopting measures to harmonise certain aspects of intellectual property rights.⁶⁰ The Court has interpreted Article 345 TFEU narrowly so that Member States only have the competence to decide whether and when expropriation occurs and not to define the conditions under which expropriation takes place.⁶¹ Treaties providing for investment protection do not affect the system of property ownership – rather they require that expropriation be subject to certain conditions, including the payment of compensation. Second, the inclusion of expropriation clauses in EU agreements does not affect the

⁵⁶ Eeckhout (n 14) 65; Bungenberg, 'Going Global? The EU Common Commercial Policy After Lisbon', in C. Herrmann and J.P. Terhechte (eds), *European Yearbook of International Economic Law*, (2010) 123,135; J Ceysens, 'Towards a Common Foreign Investment Policy? Foreign Investment in the European Constitution' (2005) 32 LIEI 277; Dimopoulos (n 25) 115.

⁵⁷ *Opinion 1/94*, [1994] ECR I-5267, especially paragraphs, 29, 32-33.

⁵⁸ Ceysens (n 56) 280-1.

⁵⁹ Commission Communication (n 35) 8-9.

⁶⁰ Case C-350/92, *Kingdom of Spain v. Council of the European Union*, Judgement, 13 July 1995, paras 14-9.

⁶¹ Eg. in *Costa v ENEL* (Case 6/64 [1964] ECR 1251) and in *Fearon* (Case 182/83 [1984] ECR 3677) the Court emphasised that Article 295 TEC (now Article 345 TFEU) does not preclude the application of community rules in the field of the expropriation of property.

delimitation of competences, as required by Article 207(6) TFEU. Such clauses only reflect existing EU primary law. For example, protection from unlawful expropriation by providing adequate compensation is in conformity with the general principle of EU law as embedded in Article 17 of the EU Charter of Fundamental Rights. However, despite the Council's view that future EU investment policy should include portfolio investment and post-establishment investment protection standards, including expropriation, some subsequent negotiation mandates for EU FTA negotiations have suggested that agreements dealing with portfolio investment, dispute settlement, property and expropriation should be mixed rather than EU-only.

iv) EU Practice after the Treaty of Lisbon

41. Subject to the controversies discussed above, many academic commentators and the Commission agree that most of the matters traditionally contained in BITs concluded by EU Member States now fall within the EU's exclusive competence under Article 207 TFEU. This begs the question of what will happen with more than 1000 BITs which Member States concluded prior to the entry into force of the Lisbon Treaty. In 2010, the Commission proposed a regulation establishing transitional arrangements for bilateral investment treaties between Member States and third countries (the "grandfathering" regulation).⁶² It entered into force in January 2013.⁶³ Under Article 5, the Commission examines the compatibility of a BIT with the *acquis* and assesses whether it could present an obstacle to developing the EU's trade and investment policy. This provision empowers the Commission to assess the Member States' existing BITs as notified to the Commission, and evaluate whether they represent a serious obstacle to the negotiation or conclusion of EU BITs with the third countries in question, "with a view to [their] progressive replacement".
42. According to the Regulation, Member State BITs signed prior to 1 December 2009 and notified to the Commission may remain in force until they are replaced by new treaties between the EU and relevant third countries. However this is subject to the Commission's right to evaluate them under Article 5 (discussed above) and, under Article 6, to require the Member State concerned to remove any "obstacle" so identified. In theory this could require termination of a BIT. Article 6 requires the Commission and a Member State to enter into consultations if one or more provision(s) of an existing BIT constitutes a serious obstacle to the EU's negotiation of a future treaty with a third country. Following such consultations the Commission may indicate whether the relevant Member State must renegotiate or terminate the BIT. The aim of this provision is to remove potential obstacles for future EU agreements through dialogue and cooperation without prejudice to the Commission's powers to bring infringement cases in situations of severe disagreement

⁶² Commission Proposal of 7 July 2010 for a Regulation of the European Parliament and the Council Establishing Transitional Arrangements for Bilateral Investment Treaties between Member States and Third Countries, COM (2010) 344.

⁶³ Regulation (EU) No. 1219/2012 of the European Parliament and of the Council of 12 December 2012, OJ 2012, L 315/40.

43. The Commission will also review Member State BITs signed after 1 December 2009, and negotiations for proposed future BITs. Under Article 9 it will also evaluate these BITs, and any proposed negotiations, on several grounds: whether they conflict with EU law, are superfluous, conflict with the EU's principles for external action, or represent a "serious obstacle" as discussed above... A Member State wishing to open negotiations to amend an existing BIT, negotiate a new BIT, or conclude a new BIT must obtain an authorisation from the Commission, which may itself ask to participate in any negotiations (Article 10).
44. The obligation of the Member States to bring BITs into line with EU law was recognised by the ECJ already before the Lisbon Treaty. In 2006, the Commission brought infringement procedures against Austria, Sweden and Finland for failing to renegotiate their BITs in order to bring them in line with the EC Treaty with respect to the restriction of capital movements to third states. In 2009 the Court decided that the stated countries breached their obligation to cooperate because they refused to renegotiate their BITs.⁶⁴
45. The Grandfathering Regulation refers broadly to 'investment protection', and its terms are not limited to FDI. This might be seen as supporting the Commission's view that the CCP covers portfolio investment too. However, Article 1 states that the Regulation is 'without prejudice to the division of competences established by the TFEU'. The Regulation also states that future EU investment agreements shall provide 'for high standards of investment protection'. Consistently with this, the Council has insisted that future FTAs covering investment protection 'shall provide for the highest possible level of legal protection and certainty for European investors' and that they should 'be built upon the Member States' experience and best practices regarding their bilateral investment agreements'.⁶⁵ A similar approach has been followed in ongoing negotiations.
46. In 2012 the Commission prepared a proposal for a regulation on managing financial responsibility arising from investor-state arbitration awards brought under investment protection agreements to which the EU is a party. The proposed regulation addresses the issues of defence and financial responsibility in cases where the EU is sued under the provisions on investor-state dispute settlement (ISDS) included in EU-third country agreements.⁶⁶ The draft regulation sets out who bears financial responsibility, who is the respondent, who defend the measures of the EU or its Member States, and who is liable to pay any award for compensation. The Regulation is based on the following principles: financial responsibility lies with the actor responsible for the action; the operation of the Regulation must be budget

⁶⁴ ECJ, Cases C-205/06 *Commission v Austria* (2009) ECR I-1301; C-249/06 *Commission v Sweden* (2009) ECR I-1335; C-118/07 *Commission v Finland* (2009) ECR I-10889. On these decision in detail see N Lavranos, 'New Developments in the Interaction between International Investment Law and EU Law', 9 *The Law & Practice of International Courts & Tribunals* 409 (2010), 417-23.

⁶⁵ European Parliament Resolution (n 37).

⁶⁶ Commission Proposal of 21 July for a Regulation of the European Parliament and of the Council Establishing a Framework for Managing Financial Responsibility Linked to Investor-State Dispute Settlement Tribunals Established by International Agreement to which the European Union is Party, COM (2012) 335.

neutral as regards the impact of Member States' actions on the budget of the EU with the result that the Union only bears those costs which are triggered by acts of Union institutions; an investor from the third country should not be disadvantaged by the functioning of the Regulation (i.e. potential disagreements between the EU and Member States as to the allocation of financial responsibility).

47. The EU and Member States can agree internal rules apportioning financial responsibility between them in ISDS cases. The EU is competent to adopt rules to apportion liability as between itself and the member states, and such competence likely extends to breaches of obligations concerning portfolio investment owed by member states. Even though the proposed Regulation establishes EU internal rules as to who has the power to decide over the defendant status and financial responsibility, it does not (and it cannot) provide that the Commission's decisions on these matters are binding, vis-à-vis a third country, with respect to an ISDS claim brought against a Member State by an investor from that country. Only the applicable investment agreement concluded by the EU (and possibly also the Member States) can provide that the Commission's decision on these matters is binding on the arbitral tribunal. For the sake of legal certainty and to avoid frustrating investors' expectations, the Commission could refer to its internal rules on financial responsibility in every future investment agreement to which it is a party, so that they will in effect bind tribunals in claims brought under those agreements.⁶⁷
48. The Commission is currently negotiating investment protection chapters, as part of the Free Trade Agreement talks, with Canada, India and Singapore. In 2011, the Council authorised the Commission to negotiate FTAs containing investment protection chapters with four southern Mediterranean countries (Egypt, Tunisia, Morocco and Jordan) as well as with Japan. In June 2013, the Council authorised the Commission to enter into formal bilateral trade and investment negotiations with the United States of America. Negotiation of a BIT with China is on the horizon. Notwithstanding, since the entry into force of the Lisbon Treaty, the EU has yet to conclude a single investment agreement. There is likely to be a transition period of several decades before BITs are widely concluded by the EU rather than its Member States alone.

2.4 The Exercise of Competences

49. There are two types of policy instruments in the field of the CCP – first, bilateral and multilateral treaties or agreements between the EU and third countries (e.g. the WTO Agreements and Free Trade Agreements); and second, internal autonomous trade policy measures such as trade defence instruments and export and import controls. While there is little controversy as to *de jure* competence of the EU in relation to these internal measures, the exercise of competence by the EU has at times been contested.

⁶⁷ Ibid, 16.

i) Trade Defence

50. Trade defence measures are used to re-establish a level playing field when an EU industry has been harmed by dumped or subsidised goods or a rapid increase in imports. There are three types of trade defence instruments which aim at protecting the EU market from imports: (i) anti-dumping duties, applied when a company is exporting a product to the EU at prices lower than the normal value of the product on its own domestic market; (ii) anti-subsidies measures, designed to neutralise the benefit of a subsidy paid by the government of a third country, applied to imported goods when the subsidy is limited to a specific industry or group of industries; and (iii) safeguards dealing with situations in which an EU industry is affected by an unforeseen, sharp and sudden increase of imports. These measures, which usually take the form of increased duties on products imported into the EU from other countries, may be imposed only after a formal investigation.⁶⁸
51. The Commission is responsible for examining the evidence provided by complainants and deciding whether there is sufficient evidence to justify launching investigations. After consulting the advisory committee composed of Member States, the Commission can open an investigation and hear evidence from affected parties. The Commission can also take provisional measures after consultation or, in cases of extreme urgency, after informing the Member States. The Council ratifies provisional duties by adopting the Commission's proposals.
52. Member States are represented in trade defence advisory committees. They advise the Commission on dumping and subsidies, in particular on whether or not to initiate proceedings, whether or not to impose provisional or definitive measures and on any amendments to existing measures. However, the committee's advice is not binding on the Commission. As a result, the Commission may levy duties without obtaining the collective agreement of Member States. This has been the case with the biggest trade investigation to date in respect to solar panels imported into the EU from China. In May 2013, the Commission decided to impose provisional tariffs on solar panels imported from China in order to counter the alleged dumping of these products on the EU market. It did so despite the opposition of 18 Member States, led by Germany and the UK. The voice of the Member States, however, ultimately had an important impact. First, their resistance against the duties was reflected in substantially lower anti-dumping duties (11.8 percent as compared to the original proposal of 47 percent). More importantly, the Member States' opposition left the Commission little choice than ultimately to settle the dispute in July 2013. In the absence of a settlement, the Member States could have blocked the Commission's proposal for final duties.
53. In another case which has threatened to impair EU-Chinese trade relations, the Commission has alleged leading Chinese telecommunications network equipment companies of violating the EU antidumping and subsidies laws. Chinese firms are

⁶⁸ Council Regulation (EC) No 1225/2009 of 30 November 2009 on Protection against Dumped Imports from Countries not Members of the European Community; Council Regulation (EC) No 597/2009 of 11 June 2009 on Protection against Subsidised Imports from Countries not Members of the European Community.

said to have received subsidies, allowing them to flood markets with cheap equipment. Member States and the key EU telecom companies who feared Chinese retaliation strongly resisted the Commission's announcement of *ex officio* investigation.⁶⁹ Only four of the 28 Member States and none of the major industry players (e.g. Ericsson, Alcatel-Lucent and Nokia Siemens) have supported the telecommunications investigation. The situation has led to calls for a negotiated settlement before any further escalation into a trade war. In light of the solar panel settlement it is unlikely that the case will proceed to the investigation stage.⁷⁰ Both cases demonstrate that despite the Commission's increased formal competences in the field of trade defence measures, in practice, Member States have retained an important voice.

ii) Export Controls

54. The EU policy on export with third countries is regulated by Council Regulation 1016/2009 establishing common rules for export. The regulation is based on the principle of freedom of export which is subject to certain limits. First, pursuant to Article 6, the Commission, acting at the request of the Member State concerned or on its own initiative, can make the export of a product subject to the production of an export authorisation in order to prevent a critical situation from arising on account of a shortage of essential products, or to remedy such a situation. Second, Article 9 establishes a special transitional regime for petroleum products listed in Annex II of the Regulation. Third, Article 10 permits Member States to introduce quantitative restrictions on exports on the grounds laid down in Article 36 TFEU (public morality; public policy or public security; the protection of health and life of human rights; animals or plants; the protection of national treasures possessing artistic, historic or archaeological value, or the protection of industrial and commercial property).

55. The question of the permissible scope of national economic measures applied under Article 10 affecting trade in light of the exclusive EU competence under the CCP arises. In principle, where a Member State seeks to adopt export restrictions, it must comply with EU trade legislation. This was confirmed in *Werner and Leifer*,⁷¹ where the ECJ held that measures whose effect is to prevent or restrict the export of certain goods cannot be treated as falling outside the scope of the CCP on the ground that they have foreign policy and security objections. In both judgments, the Court, however, accepted that a Member State has a right to limit an export for public security reasons pursuant to Article 10 of the Regulation and Article 36

⁶⁹ Statement by EU Trade Commissioner Karel De Gucht on mobile telecommunications networks from China European Commission, MEMO/13/439, 15 May 2013.

⁷⁰ Statement by EU Trade Commissioner Karel De Gucht, We found an amicable solution in the EU-China solar panels case that will lead to a new market equilibrium at sustainable prices, MEMO/13/729, 26 July, 2013.

⁷¹ Case C-70/94 *Werner* [1995] ECR I-3189; and Case C-83/94 *Criminal Proceedings against Peter Leifer and others* [1995] ECR I-3231.

TFEU. In *Werner*, which concerned a decision by the German authority to refuse to issue a German company with a license⁷² to export dual-use goods to Libya, the Court said that Article 36 TFEU and Article 10 of the Regulation have to be interpreted consistently (so that export restrictions within the internal market are not stricter than restrictions of movement of goods between Member States and third countries). The Court thus interpreted the term ‘public security’ flexibly so as to include the peaceful co-existence of nations and Germany’s external relations. In *Leifer*, which concerned a German national prosecuted for having delivered plant and chemical products to Iraq without obtaining necessary export licenses, the Court similarly confirmed the right of Member States to exceptionally restrict export of dual-use goods to non-member countries when this is required for public security reasons. In *Centro-Com*, the Court, however, rejected the UK’s recourse to the exception in Article 10 of the Regulation since the EU rules already provided necessary measures to ensure protection of the interests listed in that Article.⁷³ The Court thus held that once the EU has adopted measures harmonising the conditions of export, then Member States must respect the relevant Union rules.

56. The above views are reinforced by adoption of Regulation 1334/2000,⁷⁴ now replaced by Regulation 428/2009⁷⁵ (“the Exports Regulation”) which establish an EU regime for the control of exports of dual-use items and technology which aims at ensuring free movement of dual-use items inside the EU. The Exports Regulation contains a list of controlled dual-use items which are subjected to four types of export authorisation. It does not replace national export control systems, but only requires or, in some cases permits, Member States to impose an authorisation requirement for exporting dual-use goods.

57. A special regime for restricting exports exists with respect to military goods. Although strategic control on military goods primarily falls within Member State competence,⁷⁶ the EU has played an important role in harmonising national arms export control policies. In 1998 the Council adopted the European Union Code of Conduct on Arms Exports which established a notification and consultation mechanism for export licence denials and laid down criteria that Member States should apply when considering whether to grant or to deny an arms export license. The Code of Conduct was replaced in 2008 by the Council’s Common Position 2008/844/CFSP which deepens and widens its application in order to further harmonise Member States’ export policies. In 2012, the Council also adopted a Common Military List of the European Union, listing equipment that should be subject to control. Like the Common Position, the Military List is only a political commitment, which means that it acts as a reference point for Member States’ national military technology and equipment lists. It neither directly replaces them nor is it binding.

⁷² Dual-use goods are goods which can have both military and civilian uses.

⁷³ Case C-124/95 *R. v. HM Treasury and Bank of England, ex p. Centro-Com Srl* [1997] ECR I-81.

⁷⁴ Council Regulation (EC) No 1334/2000 of 22 June 2000 Setting up a Community Regime for the Control of Exports of Dual-Use Items and Technology [2000] OJ L159/1.

⁷⁵ Council Regulation (EC) No 428/2009 of 5 May 2009 Setting up a Community Regime for the Control of Exports, Transfer, Brokering and Transit of Dual-Use Items [2009] OJ L134/1.

⁷⁶ Article 346 TFEU. However, the ECJ confirmed that certain aspects of trade in arms can be covered by the CCP, Case C-91, *ECOWAS*, [2008], ECR I-3651, para 71.

iii) Import Controls

58. Imports in the EU from non-Member States are regulated by the Regulation 260/2009 on Common Rules for Imports (“the Imports Regulation”) which, similarly to the Exports Regulation, is based on the principle that imports are free, i.e. that they are not subject to any quantitative restrictions.⁷⁷ There are two types of import controls: import licensing and import bans. In general, import licensing is not required for products entering an EU country, except for products governed by quantitative restrictions (i.e. quotas) and surveillance (monitoring of the imports by the EU in order to increase transparency in trade, but without the purpose of imposing limits on access to the EU market). This includes some agricultural products, textile and iron and steel products from certain countries. Bans or prohibitions, on the other hand, apply when no import is allowed (e.g. torture equipment, certain products from Iran, Syria and North Korea etc). The EU import controls apply directly to a Member State, reflecting a measure agreed within the EU or internationally (e.g. a UN Security Council resolution).
59. The Imports Regulation contains provisions on safeguards measures and, like the Exports Regulation, permits Member States to derogate from the freedom to import on the same grounds as those laid down in Article 36 TFEU (e.g. to protect public morality, security, the health and life of humans, animals or plants, property and others). Member States must inform the Commission about the measures they intend to introduce. In the event of extreme urgency, however, the national measures can be communicated to the Commission immediately after their adoption. The UK has introduced only few national import controls, e.g. import licensing on firearms which underpins domestic legislation on the possession of firearms so that only those with authority to possess firearms can import them.⁷⁸
60. Import controls may not necessarily take the form of quantitative restrictions but may be also introduced as measures having equivalent effect (e.g. national pricing system). A good illustration is the recent proposal for the introduction of minimum alcohol pricing by the Scottish Government.⁷⁹ The proposal aims at reducing alcohol consumption in Scotland to improve public health. According to the proposal, an alcohol product must not be sold to consumers below a minimum price. The proposal is alleged to constitute a measure having an equivalent effect to a quantitative restriction on imports, inasmuch as that it leads to the price of products being fixed as a function of a series of national objectives. Indeed, in *Werner*, the ECJ, relying on both a contextual interpretation and Article XI of GATT, said that a regulation based on Article 207 TFEU, whose objective was to implement the principle of free exportation at the Union level, could not exclude

⁷⁷ Council Regulation (EC) No 260/2009 of 26 February 2009 on the Common Rules for Imports [2009] OJ L84/1. This Regulation does not apply to textile products covered by Re. 517/94 and to products originating in certain third countries listed in Article 1(1) of Reg. 519/94.

⁷⁸ UK Import, Export and Customs Power (Defence) Act 1939.

⁷⁹ Alcohol (Minimum Pricing) (Scotland) Bill, Act 2012, asp 4; cf. the unsuccessful challenge in *Scotch Whisky Association et al* (per Lord Doherty), [2013] CSOH 70, 3 May 2013.

from its scope measures adopted by the Member States whose effect was equivalent to a quantitative restriction where their application could lead to an export prohibition. Given the similarities between the objectives and the structure of the export and import regimes, the ECJ is likely to apply the same reasoning with respect to quantitative restrictions on imports.

61. A practical problem with respect to import controls (and trade restrictions in general) imposed by the Member States is reflected in the potentially contradictory roles that the Commission may assume by acting in two different capacities. The Commission has voiced opposition to the Scottish proposal arguing that it may create obstacles to the free movement of goods within the internal market contrary to Article 34 TFEU and that it appears to be disproportionate under Article 36 TFEU. In addition, Article III. 4 GATT 1947 may prohibit minimum prices.⁸⁰ In the case of a GATT dispute initiated by a WTO member that is not a member of the EU, the European Commission would be responsible for defending the policy under the WTO. The Commission could therefore theoretically find itself in a contradictory dual role - as a prosecutor arguing against the Scottish proposal before the ECJ in its function as the guardian of the single market, as well as a defender of the same proposal in a potential WTO dispute.

iv) Export Credits

62. The exclusive nature of EU competence over export credits was already apparent in 1970, when the transitional period for the implementation of the CCP ended. The EU at that time adopted specific legislation harmonizing national laws concerning state-sponsored credit insurance of exports.⁸¹ Moreover, in *Opinion 1/75* the Court recognised that the EU has exclusive competence in the field of the CCP, which covers export policy, and thus systems of aids for exports, including export credits. Although Member States have their own export credit agencies (ECAs) which are regulated by national rules, the Commission has played an active role in the harmonization of ECAs and the co-ordination of policy statements and negotiation positions. It exercised its competence in the CCP by negotiating the Arrangement on Export Credits (1978) at the OECD. The arrangement is a voluntary agreement which aims at creating a level playing-field at international level by regulating the financial terms and conditions that export credit agencies may offer. Traditionally, the OECD's work on export credits has been largely trade policy-oriented, however recently, it has expanded to accommodate corporate social responsibility (CSR). While the Commission's competence over financial, trade-related aspects of export

⁸⁰ In *Canada - Provincial Liquor Boards*, Panel Report, 18 February 1992, DS17/R - 39S/27, a GATT panel found minimum price requirements to be inconsistent with Article III GATT, paras. 5.28-5.32; cf. also European Community Programme of Minimum Import Prices, Licenses and Surety Deposits for Certain Processed Fruits and Vegetables, Panel Report, 18 October 1978, L/4687 - 25S/68. The leading case on de facto discrimination under GATT Article III is *Japan - Taxes on Alcoholic Beverages*, AB Report, 1 November 1996, DSR 1996:I, 97.

⁸¹ Council Directive 70/509/EEC on the Adoption of a Common Credit Insurance Policy for Medium- and Long-term Transactions with Public Buyers OJ L254/1, 23.11.1970; Council Directive 70/510/EEC on the Adoption of a Common Credit Insurance Policy for Medium- and Long-term Transactions with Private Buyers, OJ L254/26, 23.11.1970. See also A Dimopoulos, 'Foreign Investment Insurance and EU Law', TILEC Discussion Paper, 2012, no. 2012-028, p. 27.

credits is undisputed, the question arises whether it is also competent to negotiate the non-financial aspects of export credits which are not covered by the CCP. Article 205 TFEU, according to which the Commission must pursue its external trade action in accordance to principles and objectives laid down in Article 21 EU Treaty, may provide a basis for the EU to negotiate also non-trade related aspects of export credits.

63. In order to ensure the application of the OECD Arrangement, the EU has adopted Regulation No. 1233/2011 which provides for the Commission to adopt delegated acts in order to incorporate future changes to the OECD guidelines into EU law.⁸² The Regulation sets reporting requirements for Member States who have to make available to the Commission an annual activity report and, among others, report on how environmental risks are taken into account in the ECA's activities. Furthermore, the Regulation includes a recital stating that Member States should comply with the Union's general provisions on external action, such as consolidating democracy, respect for human rights and policy coherence for development, and the fight against climate change, when establishing, developing and implementing their national export credit systems and when carrying out their supervision of officially supported ECAs. The EU has therefore incorporated broader non-financial issues into its export credit policy, notwithstanding that the legal basis for the regulation is Article 21 of the TFEU. It remains to be seen how the Commission will monitor ECAs' compliance with the Regulation.

v) Trade and Investment Promotion

64. Member States have competence for carrying out trade and investment promotion activities and they mostly do so through their public trade and investment agencies. While investment promotion aims mainly at facilitating inward FDI (and in some cases opportunities for outward FDI), trade promotion refers to the promotion and facilitation of exports. Activities related to promotion include providing relevant information for national exporters and foreign investors (e.g. on suitable business partners, sites, taxes, products regulations, environmental standards and other legislation), providing practical advice on setting up business, marketing of the country (i.e. making the country known among foreign investors and importers) and country's companies (i.e. matchmaking of foreign companies with local business partners and the marketing of individual companies' products in overseas markets), creating linkages between business and different stakeholders, facilitating business opportunities through networking events etc. Investment and trade promotion activities are often combined in one agency (e.g. UK Trade and Investment) which can create synergies, such as better policy coherence, cost savings or sharing of office support activities.

65. Even though trade and investment promotion is organised largely at the national level, the Commission has been carrying out its own activities promoting the

⁸² Regulation (EU) No 1233/2011 of the European Parliament and of the Council on the Application of Certain Guidelines in the Field of Officially Supported Export Credits and Repealing Council Decisions 2001/76/EC and 2001/77/EC.

attractiveness of the EU internal market in third countries. This includes the Commission's "Missions for Growth" initiative, within which the Commission, as part of its external relations competence, has to date sent its delegations to 12 countries. More than 400 EU companies have participated in this programme.⁸³ Missions involve high-level political and business meetings and discussions in the fields of enterprise and industry policy, facilitation of networking with political representatives and matchmaking with local business in third countries. Even though promotional activities at the EU-level may have some advantages, particularly for the smaller Member States, there is at least a question mark whether either Article 207 actually provides a legal basis for such trade and investment promotion by the Commission.

66. From a practical point of view, the missions aim at supporting all 28 Member States. They may thus offer particular benefits to Member States who are less known in third countries and whose budget for promotional activities is limited. The companies from all Member States can participate in the missions and meet relevant stakeholders. The participation of the EU Trade Commissioner guarantees the high level of the meetings, which many EU Member States cannot achieve at the national level. Further, the EU missions promote industry sectors across the whole EU, and inform potential investors and importers in third countries about beneficial EU programmes and incentives of which national agencies may not be aware. On the other hand, and apart from the main legal question of competence, disadvantages relate mainly to the lack of coherence and co-ordination between national and EU promotional policies. For example, the selected sectors being promoted through the missions may be more relevant for certain Member States than other thus missions' benefits may be allocated disproportionately across the EU. Further, although the missions are open for companies from all Member States, so far only 17 Member States have participated in them. An important question is how to achieve more balanced representation of all the Member States. It seems that in order for the EU missions to become truly complementary to national promotional activities, it will be important to ensure closer co-operation and co-ordination (e.g. through regular information exchanges) with the work of Member States.

3. Inter-Institutional Dynamics

67. The Treaty of Lisbon confirmed the Commission's significant role in the field of the CCP. Under Article 218 TFEU, the Commission is entitled to submit proposals to the Council for the adoption of autonomous measures and making recommendations for the negotiation and conclusion of international agreements. For EU-only agreements, upon receiving a mandate by the Council, the Commission carries out negotiations with third countries. It regularly reports to the Council and the European Parliament on its progress. Together with the Council, the Commission is also responsible for ensuring the compatibility of agreements negotiated under Article 207 TFEU with internal EU policies and rules. Moreover,

⁸³ See: http://ec.europa.eu/enterprise/initiatives/mission-growth/missions-for-growth/guidelines/index_en.htm (25 July 2013).

Article 21 TEU explicitly provides that the Commission and the Council, assisted by the High Representative of the Union for Foreign Affairs and Security Policy, are also responsible for ensuring consistency between the different areas of EU external action and between the CCP and other policies.

68. The role of the High Representative of the Union for Foreign and Security Policy in shaping the balance between trade and other objectives remains an open question. If the actions by the Council in the field of common foreign and security policy (CFSP) and by the Commission in the field of the CCP conflict, Article 18 (4) TEU calls on the High Representative to support both institutions in coordinating the policies. The High Representative is assisted by the European External Action Service (EEAS) which supports the High Representative in her function as the representative of the CFSP. The EEAS is called upon to support the Commission in the field of the CCP and to co-operate with the services of the Commission.⁸⁴ The EEAS sends EU delegations to third countries and international organisations. However, the Commission has the power to issue instructions to the delegations in the area of the CCP.⁸⁵ The Commission, rather than the EEAS, is likely to be the decisive actor shaping the nature and content of future trade and investment agreements, as most of the technical expertise on the CCP remains with the Commission.⁸⁶

3.1 Decision-making in the Council

69. The Lisbon Treaty introduced two sets of institutional changes regarding the CCP. First, it amended the voting requirements in the Council, and second, it significantly increased the powers of the European Parliament. Pursuant to Article 207(4) TFEU the Council shall decide by qualified majority voting regarding the negotiation and conclusion of international agreements. Similarly, the adoption of autonomous measures is also subject to qualified majority rule.⁸⁷ There are two exceptions to this rule, however.

70. First, Article 207(4) subparagraph 2 TFEU requires unanimity for the negotiation and conclusion of agreements regarding trade in services, commercial aspects of intellectual property and FDI where 'such agreements include provision for which unanimity is required for the adoption of internal rules.' This provision establishes parallelism between internal and external competences at the decision-making level: the negotiation and conclusion of international agreements is governed by the same majority requirements as internal legislation covering the same subject matter.

⁸⁴ Article 2(2), 3(1) Decision 2010/427/EU, Council Decision of 26 July Establishing the Organisation and Functioning of the European External Action Service (2010/427/EU) (OJ EU L201/30).

⁸⁵ Article 5(3)(2) Decision 2010/427/EU.

⁸⁶ H Dederer, 'The Common Commercial Policy Under the Influence of Commission, Council, High representative and European External Action Service' in M Bungenberg and C Herrmann, Common Commercial Policy after Lisbon, Special Issue EYIEL (2013) 87, 105.

⁸⁷ Article 207(2) TFEU states that the European Parliament and the Council shall adopt the measures defining the framework for implementing the CCP in accordance with the ordinary legislative procedure.

71. In addition, Article 207(4) subparagraph 3 TFEU requires unanimity for the negotiation and conclusion of international agreements ‘in the field of trade in cultural and audiovisual services where these agreements risk prejudicing the Union’s cultural and linguistic diversity’ and ‘in the field of trade in social, education and health services where these agreements risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them.’ This provision raises some interpretive uncertainties. First, the meaning of the ambiguous term ‘cultural and linguistic diversity’, which has not been used in the context of the CCP before, is unclear.⁸⁸ Second, the provision requires an assessment of the risk posed by an international agreement in these services sectors. The Treaty, however, fails to explain how such risk assessment should be conducted and what the minimum levels of risk are that could trigger the unanimity voting.⁸⁹

3.2 An Enhanced Role of the European Parliament

72. The Lisbon Treaty enhanced the role of the European Parliament in the field of the CCP in three important ways. First, Article 207(2) TFEU clearly stipulates that the European Parliament and the Council define the framework for the implementation of the CCP in accordance with the ordinary legislative procedure. In other words, the European Parliament has become a co-legislator with respect to the implementation of international agreements and the adoption of internal autonomous measures on topics such as anti-dumping, safeguards, the Trade Barriers Regulation and EU's Generalised System of Preferences schemes.⁹⁰ These powers, however, do not comprise the detailed application or implementation of trade policy which falls within the remit of the Commission pursuant to Article 218(9) TFEU.

73. Second, Article 207(3) grants the European Parliament a right to be informed with respect to negotiations of international agreements. Unlike pre-Lisbon, the Commission is now legally obliged to provide the special International Trade Committee (INTA) of the European Parliament with information on the conduct of negotiations as it does to the special committee appointed by the Council. Against this background, what is the Parliament’s role in determining the objective of negotiations? The Treaty states that the Council on a proposal from the Commission is competent to authorise the opening of the negotiations. One way for the Parliament to have some influence in setting the EU’s objectives as part of the negotiations would be through a Framework Agreement between the European Parliament and the Commission.

74. Third, the European Parliament has an enhanced role in ratifying trade agreements. With respect to the conclusion of trade agreements, Article 207(3) refers to the

⁸⁸ Krajewski (n 30) 306.

⁸⁹ Dimopoulos (n 30) 125; Krajewski (n 30) 307.

⁹⁰ S Woolcock, ‘The Potential Impact of the Lisbon Treaty on European Union External Trade Policy’, (2008) 8 European Policy Analysis 4; Krajewski (n 30) 308.

general rules on the conclusion of international agreements in Article 218 TFEU. Accordingly, the Council must consult the European Parliament before it concludes the agreement.⁹¹ This is in contrast with the TEC which excluded trade agreements from parliamentary consultation. Furthermore, Article 218(6)(a) TFEU requires parliamentary consent in five specific categories of cases, among others to 'agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the Parliament is required.' Since Article 207(2) TFEU requires the establishment of the framework for implementing the CCP in accordance with the ordinary legislative procedure, it can be assumed that the European Parliament's consent is required for the conclusion of all agreements in the field of CCP.⁹² The requirement of parliamentary consent strengthens the European Parliament's influence in the negotiation process of international agreements and arguably improves the democratic legitimacy of external trade and investment policy. Such legitimacy is particularly important in light of the reduced influence of national parliaments of the Member States who are no longer required (and also unable) to ratify trade agreements as long as they come within exclusive EU competence.

75. The expansion of parliamentary powers will undoubtedly affect EU trade and investment policymaking, due to the Parliament's stronger responsiveness to environmental and social demands voiced by civil society organisations, in particular contemplating the far-reaching policy objectives of EU external action which now govern the conduct of the CCP. Already in 2006, the Parliament emphasised that it would give consent to trade and investment agreements only if the non-economic principles and objectives laid down in Article 21 TEU are sufficiently taken into account.⁹³ Parliament could withhold its consent for bilateral or multilateral trade agreements which fail to take account of human rights or environmental concerns. The Parliament has already demonstrated how it intends to use its leverage generated from the consent requirement to shape the implementation of new international agreements. The result of intensive discussions between the Parliament and the Commission during the process of approval of the EU-Korea FTA was a Commission statement and Joint Declaration of the Parliament and the Commission on the EU-Korea FTA. The Commission committed, among others, to report, at the request of the responsible committee, on Korea's implementation of the sustainable commitments contained in the EU-Korea FTA.⁹⁴

76. The future of the CCP will depend to a considerable extent on the future development of inter-institutional relations at the EU level. With the Treaty of Lisbon, the European Parliament has become an important actor whose priorities the Council and Commission will be unable to ignore in all cases.

⁹¹ Article 218(6) 2(b) TFEU.

⁹² Woolcock (n 90) 3; Krajewski (n 30) 310; C Brown, 'Changes in the Common Commercial Policy of the European Union After the Entry into Force of the Treaty of Lisbon: A Practitioner's Perspective' in M Bungenberg and C Herrmann, *Common Commercial Policy after Lisbon*, Special Issue EYIEL (2013) 163.

⁹³ Resolution of the European Parliament of 14 December 2006, EP-Doc. A 6-4/2006.

⁹⁴ Brown (n 92) 168.

Conclusion

77. This report has presented the treaty provisions and case law that set out the balance of competences between the EU and its Member States regarding trade and investment. It has outlined the nature and the scope of post-Lisbon EU competence in the fields of trade and investment. The Lisbon Treaty gave the EU exclusive external competence over trade in goods, services, commercial aspects of intellectual property and foreign direct investment. The most important current controversy concerns the question whether the EU is competent to regulate portfolio investment, which has significant implications for existing and future FTAs with investment chapters and BITs. The report also showed that *de jure* competence and *de facto* exercise of competence can diverge, in particular on trade defences and trade and investment promotion. With the emergence of the European Parliament as an important actor in respect of the CCP, inter-institutional dynamics, alongside the formal division of competence, are likely to significantly shape EU policymaking on trade and investment.

Further Reading

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