

2019

Lisbon's Legacy: Increased Democratic Accountability and Centralized Governance in EU International Investment Policy

Julia Johnson

Recommended Citation

Julia Johnson, *Lisbon's Legacy: Increased Democratic Accountability and Centralized Governance in EU International Investment Policy*, 52 INT'L L. 81 (2019)
<https://scholar.smu.edu/til/vol52/iss1/4>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in The International Lawyer by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

Lisbon's Legacy: Increased Democratic Accountability and Centralized Governance in EU International Investment Policy

JULIA JOHNSON*

"We need a structure that can accommodate the diversity of its members – North, South, East, West, large, small, old and new. Some of whom are contemplating much closer economic and political integration [But] with courage and conviction I believe we can deliver a more flexible, adaptable and open European Union in which the interests and ambitions of all its members can be met."

-David Cameron¹

I. Introduction

The Lisbon Treaty (Lisbon),² which entered into force on December 1, 2009,³ has already changed international investment law and policy in the European Union (EU). Tellingly, EU and non-EU nations are beginning to enter into different forms of investment relationships. Such alterations in investment relationships will extend to bilateral investment treaties (BITs).⁴ Albeit slowly and inconsistently, Lisbon has begun to alter global investment patterns both inside and outside the EU by consolidating the EU's governance structure and leading to the implementation of shared policy goals.⁵

Lisbon has bolstered the governance structure of the EU—overseen and operated by the European Council (EC) and European Parliament (EP)—and has begun paving the way for a common European investment policy. A

* J.D., Duke University School of Law.

1. *David Cameron's EU speech - full text*, THE GUARDIAN (Jan. 23, 2013), <https://www.theguardian.com/politics/2013/jan/23/david-cameron-eu-speech-referendum>.

2. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1 [hereinafter Treaty of Lisbon].

3. European Commission Press Release IP/09/1855, European Commission Welcomes the Entry Into Force of the Treaty of Lisbon (Dec. 1, 2009) ("The Treaty of Lisbon amends the current EU and EC treaties, without replacing them. It will provide the Union with the legal framework and tools necessary to meet future challenges and to respond to citizens' demands.")

4. Sean Cumberlege & Bryan Neihart, *Section 23:28 Bilateral Investment Treaty—Defining Investment and Investor*, 3 TRANSNAT'L BUS. TRANSACTIONS § 23:28 (last updated Aug. 2018) [hereinafter *Defining Investment and Investor*] (explaining that a BIT "protect[s] the investment of an investor in the territory of a host country").

5. Carrie E. Anderer, *Bilateral Investment Treaties and the EU Legal Order: Implications of the Lisbon Treaty*, 35 BROOK. J. INT'L L. 851, 876 (2010).

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

common European investment policy, however, threatens BITs entered into by individual EU Member States with third nations.⁶

Some non-EU nations may not perceive the consolidation of EU investment policy favorably, believing that their investors run a greater risk of expropriation or otherwise limited returns.⁷ These nations fear their investors may not reap the intended benefits of their investments, leaving them less likely to invest in the future.⁸ Time will tell whether a unified European investment policy under Lisbon will increase investment flows through Europe and will improve the EU foreign direct investment (FDI). But perhaps Lisbon's most important function will be to enable European nations to come together to reach common economic and social goals.⁹

It is not yet clear how the EC and the EP will delegate the exclusive competence granted by Lisbon.¹⁰ Post-Lisbon, the EU must share competence with Member States: *i.e.*, Member States may pursue binding acts only when the EU does not act on a particular issue.¹¹ Shared competence restricts the capacities of Member States,¹² altering the balance of power from a fragmented national system to a centralized continental framework.¹³

This shift to a centralized framework is likely to shape Europe's international investment policies. For example, the EP must consider a host of factors, including a bevy of non-economic factors, in its policy decisions. Such non-economic considerations are already beginning to materialize in international investment policies.¹⁴ Political, moral, and social issues—such as human rights and environmental concerns, including climate change and sustainable development—are likely to be featured more prominently in future extra-EU BITs and in other more generalized investment policies.¹⁵ Given the heightened stature of the EC and the EP, Member States are more likely to accept and implement these non-economic policies, which will in turn positively reform extra-EU BITs and develop a more

6. *Id.* at 875; Thomas Daemen, *Why the European Union's Lisbon Treaty Matters to In-House Counsel*, 28 No. 5 ACC DOCKET 88, 90 (2010).

7. Anderer, *supra* note 5, at 875.

8. *Id.*

9. *Id.* at 873.

10. See *e.g.*, John R. Schmertz & Mike Meier, *EU Publishes the Text of the Treaty of Lisbon and Charter of Fundamental Rights on the European Union*, 13 INT'L L. UPDATE 220 (2007).

11. *FAQ on the EU competences and the European Commission powers*, THE EUR. CITIZENS' INITIATIVE, <http://ec.europa.eu/citizens-initiative/public/competences/faq#q1> (last updated Oct. 16, 2018) [hereinafter *FAQ on the EU*].

12. *Id.*

13. *Id.*

14. Erika Szyszczak, *Building a Socioeconomic Constitution: A Fantastic Object?*, 35 FORDHAM INT'L L.J. 1364, 1366, 1369 (2012) ("The new emphasis upon social values and the role of solidarity is significant in a global economy increasingly leaning towards neoliberal values and in a European economy heavily shaken by economic recession.").

15. *Id.* at 1367, 1388.

transparent, efficient, and sustainable EU investment policy.¹⁶ The reformed investment structure is also likely to improve relationships between EU and non-EU nations.¹⁷ These improved relationships may increase investment flows in some ways.¹⁸ Finally, due to the rise of non-economic and other exogenous concerns in investment policy, tensions inherent in extra-EU BITs that are often biased in favor of host state investors are likely to be relaxed. If implemented correctly, policy can be intertwined with investor protection. But the positive effects of a common EU investment regime will not be realized unless certain steps are taken to break potential deadlocks and reduce internal policy disputes—political differences between the EC and the EP may lead to internal squabbles that reduce the effectiveness of standardized policies. To mitigate this risk, mechanisms to break potential deadlocks and to ensure consistency in multinational trade policy decisions are needed.

This article reviews the current state of Europe's international investment policy. First, this article will analyze the tensions that may arise after the exclusive competence to regulate investment is conferred upon the EC and the EP and ceded from Member States. Second, this article will discuss the relationship between the EC and the EP after Lisbon, reviewing overlaps and inconsistencies in power, and how the two bodies may jointly alter the European investment regime. Third, this article will consider the future of FDI in a central investment policy. Theoretically, enabling EU exclusive competence is likely to improve investment policy overall, although the increased prominence of non-economic considerations may increase trade transactions costs and other negative indicators that might simultaneously reduce investment flows. Finally, this article will consider public policy considerations, including how the EU's international investment policy will affect its relationship with the United States (US) and other nations.

II. Background

A. INTERNATIONAL INVESTMENT POLICY BEFORE LISBON'S ENACTMENT

A general understanding of the Lisbon Treaty and international investment vehicles is necessary to know how recent changes affect European investment policy. Signed on December 13, 2007, the Lisbon Treaty supersedes the Treaty on the European Union and the Treaty Establishing the European Community.¹⁹ Broadly, the Lisbon Treaty expands the EP, makes the Fundamental Rights Charter legally binding, and recognizes the EU as a single legal personality.²⁰ Prior to Lisbon, it was

16. *Id.* at 1369.

17. *Id.*

18. *Id.*

19. Treaty of Lisbon, *supra* note 2, at 10, 43; Schmertz & Meier, *supra* note 10.

20. Treaty of Lisbon, *supra* note 2, at 10, 43; Schmertz & Meier, *supra* note 10, at 220.

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

unclear whether the EU had legal personality, and thus could enter into international agreements.²¹ Article 47 rectifies this ambiguity and makes clear that the EU acts as a single “legal personality.”²² Lisbon encompasses other broad topics affecting the EU, such as structural cooperation, that will largely not be discussed here.²³

1. *BITs*

BITs are often the favored method to govern the relationship between governments and foreign investors, especially in developing countries where investor protections are unclear.²⁴ A BIT requires an investment and investor.²⁵ An investor may be a private person or company who is a “national” of the country under the BIT.²⁶ Usually, citizenship laws of the contracting party dictate whether a party is a national.²⁷ If the investor is a corporate entity, citizenship will usually depend on the place of incorporation, the principal place of business, or the place of ownership and control.²⁸ An investment may include every type of asset invested by the investor in the host nation.²⁹ These assets may include (1) property, (2) company shares and stocks, (3) contract claims, (4) intellectual property rights, and (5) “rights to manufacture, use and sell products.”³⁰ Investments must comply with the host state’s laws and regulations.³¹ Disputes arising in the context of a BIT are typically resolved by an arbitral tribunal such as the

21. Daniele Gallo & Fernanda G. Nicola, *The External Dimension of Eu Investment Law: Jurisdictional Clashes and Transformative Adjudication*, 39 FORDHAM INT’L L.J. 1081, 1105 (2016).

22. Consolidated version of the Treaty on European Union art. 47, June 7, 2016, 2016 OJ (C 202) 1 [hereinafter TEU].

23. Treaty of Lisbon, *supra* note 2, at 153; Schmertz & Meier, *supra* note 10, at 220.

24. Andrew Y. Guzman, *Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT’L L. 639, 641–42 (1998).

25. Sean Cumberlege & Bryan Neihart, *Section 23:27 Bilateral Investment Treaty—Typical Structure of a BIT*, 3 TRANSNAT’L BUS. TRANSACTIONS § 23:27 (LAST UPDATED AUG. 2018).

26. Cumberlege & Neihart, *supra* note 4.

27. *Id.*

28. *Id.* See, e.g., *Agreement between Australia and the Republic of Poland on the Reciprocal Promotion and Protection of Investments*, signed 7 May 1991, [1992] ATS 10 (entered into force 27 March 1992) art. I, ¶ 1(d) <http://investmentpolicyhub.unctad.org/Download/TreatyFile/163> (defining “national” of a Contracting Party” as a “company or a natural person who is a citizen or a permanent resident of a Contracting Party under its law”); Treaty Between the Government of the United States of America and the Government of the Republic of Lithuania for the Encouragement and Reciprocal Protection of Investment, Lith.-U.S., art. I, ¶ 1(c), Jan. 14, 1998, S. TREATY DOC. NO. 106-42 (defining “national” of a party as a “natural person who, for the [U.S.], is a national of the [U.S.] under its applicable laws, and for Lithuania, is a citizen of the Republic of Lithuania under its applicable laws”).

29. Cumberlege & Neihart, *supra* note 4.

30. *Id.*

31. *Id.*; see also M. SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* 373 (4th ed. 2017).

International Centre for the Settlement of Investment Disputes (ICSID),³² or with the assistance of the United Nations Conference on Trade and Development (UNCTAD).³³ Portfolio investments are typically short-term investments with earnings derived from the acquisition itself.³⁴ In contrast, foreign direct investment (FDI) focuses on developing long-term economic relationships between the parties.³⁵

2. *Lack of Explicit Competence Prior to Lisbon*

Before the Lisbon Treaty was enacted, the EU lacked the explicit competence in all of the areas that are incorporated in what is now the Common Commercial Policy (CCP).³⁶ For example, pre-Lisbon, the EU lacked explicit competence to oversee “commercial aspects of international property rights,” trade in services, and FDI.³⁷ The EC shared its international investment competence with Member States.³⁸ Agreements that were not solely limited to the trade of goods would be negotiated through mixed agreements of Member States and the EU.³⁹ Prior to Lisbon, the EC negotiated investment agreements for services, while the Member States negotiated investment agreements containing provisions for “investment protection and protection against unfair or uncompensated expropriation.”⁴⁰

Creating a CCP, with hopes of devising a “common external economic policy,” had been a goal of the Commission beginning with the negotiations

32. Adolfo Durañona, *Bilateral Investment Treaties*, 2005 No. 2 Rocky Mtn. Min. L. Inst. Paper No. 4 §§ 1, 4 (2005) (stating that the ICSID was created in 1965 under pressure of the World Bank).

33. U.N. Conf. on Trade and Dev., UNCTAD at a Glance 2, UNCTAD/OSG/CIO/MISC/2017 (Sept. 2017), https://unctad.org/en/PublicationsLibrary/osgciomisc2017_en.pdf?user=17 (explaining that UNCTAD is the U.N. entity entrusted with “economic and sustainable development issues with a focus on trade, finance, investment and technology”); see also U.N. Conf. on Trade and Dev., *Dispute Settlement: International Commercial Arbitration*, 5.3 *Arbitral Tribunal*, at ii, 1, UNCTAD/EDM/Misc.232/Add.34 (2003), https://unctad.org/en/Docs/edmmisc232add34_en.pdf.

34. Siegfried Fina & Gabriel M. Lentner, *The Scope of the EU's Investment Competence After Lisbon*, 14 SANTA CLARA J. INT'L L. 419, 428 (2016); see also Org. for Econ. Co-Operation and Dev. [OECD], *OECD Benchmark Definition of Foreign Direct Investment 22–23* (4th ed. 2008), <http://www.oecd.org/daf/inv/investmentstatisticsandanalysis/40193734.pdf>.

35. Fina & Lentner, *supra* note 34, at 428–29, n.76; see also Int'l Monetary Fund [IMF], *Balance of Payments and International Investment Position Manual* (6th ed. 2009).

36. Sean McClay, Note, *Can It Lead from Behind? The European Union's Struggle to Catch Up in International Investment Policy Making in the Wake of the Lisbon Treaty*, 51 TEX. INT'L L.J. 259, 260 (2016); see also Freya Baetens et al., *Determining International Responsibility Under the New Extra-EU Investment Agreements: What Foreign Investors in the EU Should Know*, 47 VAND. J. TRANSNAT'L L. 1203, 1215 (2014).

37. McClay, *supra* note 36, at 260.; see also Baetens, *supra* note 36, at 1215.

38. Fina & Lentner, *supra* note 34, at 428.

39. McClay, *supra* note 36, at 260–61; Gabriele Mazzini, *The European Union and Investor-State Arbitration: A Work in Progress*, 24 AM. REV. INT'L ARB. 611, 613 (2013).

40. Fina & Lentner, *supra* note 34, at 425–26.

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

of the Maastricht Treaty in the early 1990s.⁴¹ In 1997, the Treaty of Amsterdam increased competences entrusted to the EU, but it failed to achieve “full external competence.”⁴²

Full external competence for all aspects of international trade fell short partly because the 1957 Treaty of Rome was “signed with only six relatively similar countries in mind,”⁴³ and because it failed to account for the possible expansion of the EU to include new (and often, formerly-Communist) Member States.⁴⁴ Scholars have suggested that early treaty drafters intentionally developed an international trade framework of mixed competence, instead of exclusive competence, because they believed European nations would likely splinter and fail to reach an accord during international negotiations.⁴⁵

Competence is the right to engage in certain powers and authorities.⁴⁶ EU bodies are limited to acting in accordance with the competences granted to them by Member States.⁴⁷ In the international investment realm, it remains unclear whether the Member States retain certain, or any, competence for BITs; many Member States believe they may still enter into BITs.⁴⁸ In contrast, the EC has maintained that its investment competence is absolute and exclusive.⁴⁹ Nevertheless, under the doctrine of implied powers, certain competences given to the EU are implied because they further the intent of EU treaties.⁵⁰

B. LISBON’S CHANGES TO TRADE

Lisbon changed Europe’s trade structure significantly. Perhaps the most important part of the Lisbon Treaty lies in Article 207, which “transferred trade in services, certain intellectual property issues, and FDI into the

41. McClay, *supra* note 36, at 261; Rafael Leal-Arcas, *Is EC Trade Policy up to Par?: A Legal Analysis Over Time—Rome, Marrakesh, Amsterdam, Nice, and the Constitutional Treaty*, 13 COLUM. J. EUR. L. 305, 347 (2007).

42. McClay, *supra* note 36, at 261; Leal-Arcas, *supra* note 41, at 359–60.

43. McClay, *supra* note 36, at 261; Leal-Arcas, *supra* note 41, at 349.

44. Leal-Arcas, *supra* note 41, at 323.

45. McClay, *supra* note 36, at 261 (“Additionally, a lack of any meaningful role for the European Parliament in external trade matters pre-Lisbon created glaring ‘democratic deficit’ issues, which would have only been exacerbated if the EU had even more power to conclude trade and investment agreements.”); *see also* Leal-Arcas, *supra* note 41, at 349.

46. Consolidated Version of the Treaty on European Union, art. 5(1)–(2), Oct. 26, 2012, 2012 O.J. (C 326) 1, 18.

47. *Id.* at 5(2).

48. Fina & Lentner, *supra* note 34, at 429; *see also* Council of the European Union Press Release, Conclusions on a Comprehensive European International Investment Policy § 2, 9 (Oct. 25, 2010).

49. Fina & Lentner, *supra* note 34, at 430–31.

50. *Id.* at 431.

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2019]

LISBON'S LEGACY 87

CCP.”⁵¹ For the first time, “the CCP [has been] explicitly embedded into a broader framework of EU external relations law” under Lisbon.⁵² Accordingly, Lisbon entrusted the EU with negotiating treaties pertaining to FDI.⁵³

The Lisbon Treaty explicitly expands upon existing policy objectives in areas of climate change and the environment, energy and sustainable development, health care, labor laws, and privacy.⁵⁴ Although previous European treaties attempted similar policy objectives, Lisbon has granted the EU more concrete and specific mechanisms to achieve diverse policy goals.⁵⁵ Nevertheless, Member States did not relinquish all governance authority under Lisbon. Indeed, many prominent aspects of governance, such as taxation, remain exclusively under the control of Member States.⁵⁶ This shift in competence for foreign investment to the EU gives proof of a growing trend to increase investment protections with the hope that these efforts will increase cross-border investments.⁵⁷

C. THE TRANSFER OF EXCLUSIVE COMPETENCE TO THE EC AND THE EP

By transferring competence to the EC and the EP, the drafters of the Lisbon Treaty intended for the EU investment policy to operate as a regional unit, thereby diminishing fragmentation between investment policies between individual Member States.⁵⁸ Such intent is expressed in the EU's governance structure.⁵⁹

Many of the Lisbon Treaty's policies pertaining to investment and trade policy are found in the amended Treaty on the Functioning of the European Union (TFEU). Articles 3 and 207(1) of the TFEU give the EC and the EP the exclusive competence to oversee the CCP,⁶⁰ allows the EC to control the monetary policy of those Member States using the euro, and grants the EC the power to develop competition rules required for the internal market to function effectively.⁶¹ Moreover, Article 207 of the TFEU incorporates FDI

51. *Id.* at 216; McClay, *supra* note 36, at 261; *see also* Treaty of Lisbon, *supra* note 2, at 92. (This provision has been incorporated into the Treaty on the Functioning of the European Union.)

52. McClay, *supra* note 36, at 261; Boris Rigod, “Global Europe”: *The EU's New Trade Policy in its Legal Context*, 18 COLUM. J. EUR. L. 277, 297 (2012).

53. Fina & Lentner, *supra* note 34, at 421.

54. Daemen, *supra* note 6, at 93.

55. *Id.*

56. *Id.*

57. Fina & Lentner, *supra* note 34, at 421.

58. Treaty of Lisbon, *supra* note 2, at 18.

59. *See id.*

60. Youri Devuyt, *The European Union's Competence in International Trade After the Treaty of Lisbon*, 39 GA. J. INT'L & COMP. L. 639, 645 (2011).

61. Consolidated Version of the Treaty on the Functioning of the European Union, art. 3, 119, Oct. 26, 2012, 2012 O.J. (C 326) 47, 51 [hereinafter TFEU] (Additionally, TFEU's Article 63 bars restrictions of all types placed on movement of capital between EU nations as between

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

into the CCP overseen by the EU.⁶² The CCP establishes uniform principles for changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalization, export policy, and measures to protect trade such as those taken in the event of dumping or subsidies.⁶³

TFEU's reference to the CCP encompasses the EU's jurisdiction over FDI, which includes extra-EU BITs.⁶⁴ Furthermore, Article 294 of the TFEU increases the EP's power, which allows for a shared decision feature with the EC—or “ordinary legislative procedure”—over the CCP.⁶⁵ Therefore, this provision effectively shifts the control center for investment regulations out of the dominion of the Member States and grants this right to the EC and the EP.⁶⁶ This renders the “shared competence” model obsolete, which had previously allowed the Member States and the EU to share control over international investment.⁶⁷

Other provisions of the TFEU also demonstrate the shift to a centralized system of shared powers for the EU. For example, Article 308 calls for the creation of a European Investment Bank—of which the Member States are participants—that finances projects for areas lacking such resources, in turn, modernizing the domestic market and funding common interest projects.⁶⁸ Furthermore, Article 28 provides for “the adoption of a common customs tariff in . . . relations with third countries,” so as to promote the free and open transfer of goods.⁶⁹ In addition, Article 127 of the TFEU provides for the European System of Central Banks (ESCB) to be given responsibility to “define and implement the monetary policy of the Union.”⁷⁰ Consequently, the groundwork for an EU-wide investment policy is effectively laid through

both EU and non-EU nations.: BITs often exist to guarantee the enforcement of this provision.).

62. *Id.* art. 207.

63. *Id.*; *see also* Treaty Establishing a Constitution for Europe, art. III-315, Dec. 16, 2004, 2004 O.J. (C 310) 1, 142 (matching the exact wording of the Constitutional Treaty's Article III-315 provision); *see also* Devuyt, *supra* note 60, at 653.

64. TFEU, *supra* note 61, art. 207.

65. *Id.* art. 289, 294; *see also* Stephanie Schacherer, *Can EU Member States Still Negotiate BITs With Third Countries?*, INV. TREATY NEWS (Aug. 10, 2016), www.iisd.org/itn/2016/08/10/can-eu-member-states-still-negotiate-bits-with-third-countries-stefanie-schacherer. Fortunately for investors, BITs entered into prior to Lisbon's ratification are likely to remain valid after the Member States reconcile any legal incompatibilities, even if some reconciliation may need to be undertaken between intra-EU BITs and extra-EU BITs, and transitional steps may need to be implicated in order to bridge any dissonance between extra-EU BITs prior to Lisbon's ratification.

66. Fina & Lentner, *supra* note 34, at 421.

67. *Id.*

68. TFEU, *supra* note 61, art. 308.

69. *Id.* art. 28.

70. *Id.* art. 28(2); *see also* Ralph H. Folsom, International Business Transactions § 28.14 (ed. 2017) (“[U]nder Lisbon, the European Central Bank was officially designated an EU institution.”).

multiple mechanisms designed to redirect the focus of EU investment control, while also providing for the creation of supplementary institutions such as the Bank to legitimize this control.⁷¹

Article 206 also fosters a liberal, open trade policy by removing “restrictions on international trade and on foreign direct investment [and] lowering customs, and limiting other investment barriers.”⁷² In the aggregate, the Lisbon Treaty liberalizes trade policies and promotes the openness of trade flows between EU and non-EU nations.⁷³ As discussed below, these factors can positively affect FDI and extra-EU BITs unless they are thwarted by internal tension between Member States and the governing bodies.

III. Analysis

A. TENSIONS BETWEEN EU MEMBER STATES MAY ARISE BASED ON DIFFERING NEEDS

Changes to European investment policy may increase tensions between EU Member States where issues affecting their populations, environments, and economies differ. Member States often disagree on a variety of provisions regarding dispute settlement, redefining the parties who may enter into an investment; what an investment encompasses; the parameters of sustainable business practices; and social and moral implications.⁷⁴ A shift to an EU-centric competence does not eradicate these issues. Moreover, drafting regional BITs means that individual nations will lose the ability to craft BITs tailored to the unique concerns affecting that nation.⁷⁵ But the core changes made to future extra-EU BITs will recognize essential human rights standards, the rights of laborers, environmental protections (from industrial waste, for example), and a political policy dimension.⁷⁶ After Lisbon, general essential rights take precedence over the idiosyncratic needs of individual nations.⁷⁷

71. Anderer, *supra* note 5, at 880.

72. TFEU, *supra* note 61, art. 206.

73. *Id.* art. 351 (explaining that extra-EU BITs concluded before January 1, 1958, are not affected by the TFEU).

74. Nikos Lavranos, *Bilateral Investment Treaties (BITs) and EU Law*, ESIL Conference 5 (Sep. 28, 2010).

75. *Id.*

76. Anne Pollet-Fort, EU Ctr. in Singapore, *Implications of the Lisbon Treaty on EU External Trade Policy*, at 2–3, 2 Background Brief (Mar. 2010), <http://aei.pitt.edu/33652/1/LisbonImpactonTrade-rev6Mar.pdf>. (“The enhanced role of the [European Parliament] will also increase the possibility of having non-economic objectives such as human rights and social standards issues being included in future trade agreements.”).

77. *Id.* at 13.

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

90 THE INTERNATIONAL LAWYER

[VOL. 52, NO. 1

1. *Lisbon May Reduce the Ability of Weaker EU Nations to Shape Their Individual Investment Policy*

Post-Lisbon, Member States are limited in their ability to draft individual investment policies.⁷⁸ The shared competence model previously allowed for substantially more policy power and a more active role by the individual nations in developing an investment policy consistent with the unique needs of the state, including human rights, workforce, and other non-economic considerations.⁷⁹ While the intended effect of Lisbon is to provide for a synthesized Europe acting as a single body, a corresponding consequence is that Member States no longer have the capacity to shape investment policies in light of their special circumstances.⁸⁰ But the interests of the EU generally and the interests of Member States specifically may be mutually exclusive in certain circumstances.⁸¹ For instance, while smaller or weaker EU states may struggle to attract FDI into their borders, larger EU nations may not encounter such difficulties.⁸² Without a compensatory mechanism, weaker EU states may not receive equal investment protections and incentives compared to a European heavyweight, thereby furthering economic equalities in Europe.⁸³

Monetary crises illustrates one harm that can befall a nation that cannot control its own policy.⁸⁴ For example, if a nation is encountering an economic slowdown, it often utilizes monetary policy to help prevent the

78. Frank Schorkopf, *Case Nos. 2 BE 2/08, 2 BVE 5/08, 2 BVR 1010/08, 2 BVR 1022/08, 2 BVR 1259/08, and 2 BVR 182/09. 123 BVERFGE 267* (2009), <http://www.bundesverfassungsgericht.de/bundesverfassungsgericht> (Federal Constitutional Court of Germany), June 30, 2009, 104 AM. J. INT'L L. 259, 262 (2010) (The German Court specified that certain rights are reserved to the individual state, and it held that “[b]eyond this specific authority already transferred to the EU, the Court defined certain domestic rights concerning ‘the political formation of economic, cultural and social circumstances’ with which European unification shall not substantially interfere . . .”).

79. *See id.*

80. *See id.*

81. Matthias Niedobitek, *The Lisbon Case of 30 June 2009—A Comment from the European Law Perspective*, 10 GERMAN L. J. 1267, 1268 (2009) (“[T]he required involvement of the German parliament in the adoption of Union acts can conflict with the necessary ‘responsiveness to the needs of European integration’ . . . of the German federal state.”); *see generally* MATTHIAS NIEDOBITEK, ZUR “EUROPATÄUGLICHKEIT” DES DEUTSCHEN BUNDESSTAATES NACH DER FÖDERALISMUSREFORM, EUROPÄISCHE FORSCHUNGSPERSPEKTIVEN: ELEMENTE EINER EUROPÄWISSENSCHAFT [On the “European Opportunity” of the German Federal State after the Federalism Reform, in European Research Perspective Elements of a European Science] 201 (Peter Jurczek & Matthias Niedobitek eds., 2008).

82. Communication from the Commission: Annual Growth Survey 2012, at 8–9, COM/2011/0815 final.

83. *See, e.g., Foreign Direct Investment—Flows: Statistics Explained*, EUROSTAT (July 9, 2018), https://ec.europa.eu/eurostat/statistics-explained/index.php/Foreign_direct_investment_-_flows.

84. *Id.*

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2019]

LISBON'S LEGACY 91

economy from contracting excessively or to buffer a recession.⁸⁵ But if a weaker EU nation is experiencing an economic slowdown, while the rest of the EU is not in a comparable situation, the EU monetary policy may not mitigate its effects upon a single smaller Member.⁸⁶ Instead, the weaker nation has fewer remedies to mitigate the effects of an economic downturn and may need outside assistance.⁸⁷ Such a scenario could occur in an international investment framework, where a smaller nation struggling to attract inward investment from foreigners will continue to lag farther behind other EU Member States.⁸⁸ Weaker nations would have fewer policy tools to attract investment more cheaply and efficiently than their competitor stronger nations.⁸⁹ Consequently, balancing the rights of the Member States and the interests of the community as a whole will require delicate balancing so as not to bypass the needs of weaker nations in favor of stronger nations.⁹⁰

Furthermore, scenarios may arise in which a Member State and the EU disagree on a particular policy matter, such as when a Member State desires investment in a non-EU nation, but the EU does not acquiesce. For example, conflict may arise when the EU does not approve an investment with a nation on an issue relating to non-economic grounds (such as genocide or violations of a disarmament pact). Though liberalization of trade and investment is a component of international law under the General Agreement on Tariffs and Trade (GATT),⁹¹ the EU may choose to curtail a BIT between a nation whose actions it does not approve out of moral or social concerns, thus escalating tensions between the EU Member States and the EU.⁹² Thus, a Member State seeking to foster relations with a non-EU state may be restrained in its capacity to act separately from the EU, and this may prevent the autonomy of Member States to secure national interests.⁹³ Conversely, as noted above, any Member State's diminished autonomy will be counter-balanced by increased transparency and efficiency. Member

85. John C. Williams, President and CEO, Fed. Reserve Bank of S.F., Speech at the World Affairs Council: Supporting Strong, Steady, and Sustainable Growth (April 6, 2018).

86. *Foreign Direct Investment—Flows: Statistics Explained*, *supra* note 83.

87. *Id.* (Greece has experienced instability due to an unsustainable monetary policy instigated in order to join the European currency.); *see generally* Recommendation for a Council Recommendation on Greece's 2012 National Reform Programme, COM/2012/307 final.

88. Catching Up Regions, EUR. COMM., http://ec.europa.eu/regional_policy/en/policy/how/improving-investment/lagging_regions/ (last visited Oct. 9, 2018); *see also* Thomas Farole & Soraya Goga, *5 Things You (Probably) Didn't Know About the EU's "Lagging Regions"*, WORLD BANK: EURASIAN PERSPECTIVES (Dec. 12, 2017), <http://blogs.worldbank.org/europeandcentralasia/print/5-things-you-probably-didn-t-know-about-eu-s-lagging-regions>.

89. *See* Caroline Galvan, *The Top 10 Most Competitive Economies in Europe*, WORLD ECON. F. (Sept. 30, 2015), www.weforum.org/agenda/2015/09/the-top-10-most-competitive-economies-in-europe.

90. *Foreign Direct Investment—Flows: Statistics Explained*, *supra* note 83.

91. *Id.*

92. Vincent Depaigne, *Protecting fundamental rights in trade agreements between the EU and third countries*, 42 E.L. REV. 562, 575 (2017).

93. *Id.*

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

States will have additional diplomatic channels through which to foster relations with non-EU nations.⁹⁴

In addition, investment policies that are most effective for one nation's enterprises may not correspondingly be best for another nation, making it difficult for the EC and the EP to balance the demands of all Member States when making investment policy decisions.⁹⁵ Instead, the overall EU investment policies may be skewed in favor of the stronger EU nations, which often dominate the political agenda.⁹⁶ Because stronger EU nations also often possess the greater FDI flows, it makes economic sense for the EU to develop its policies addressing the concerns of its stronger nations.⁹⁷ Unfortunately, in diminishing the needs of its smaller or weaker states, the EU may hinder the economic development of these nations.⁹⁸ This becomes especially relevant as Eastern European nations increasingly seek to enter the EU.⁹⁹ These nations, many of them former members of the Soviet Union, may need special provisions or policies to spur re-development.¹⁰⁰ On the other hand, though weaker Member States may be restricted from conducting BITs on their own, it is possible that any detriment is offset by the EC's ability to provide a stable investment platform, increasing overall investment opportunities for these nations, which independently may have fostered an unattractive investment climate.¹⁰¹ Thus, efforts to promote cooperation between the EU and its Member States should be made so considerations peculiar to weaker nations may be acknowledged and implemented.¹⁰²

Developing accommodations for weaker nations is also in line with the General Agreement on Trade in Services (GATS).¹⁰³ For example, Article IV(3) provides that “[p]articular account shall be taken of the serious

94. *Id.*

95. See generally Wenhua Shan & Sheng Zhang, *The Treaty of Lisbon: Half Way toward a Common Investment Policy*, 21 E.J. OF INT'L L. 1049 (2010), <https://doi.org/10.1093/ejil/chq071>.

96. See generally Sophie Meunier, *Integration by Stealth: How the European Union Gained Competence over Foreign Direct Investment*, 55 J. OF COMMON MKT. STUD. 593 (2017), <https://doi.org/10.1111/jcms.12528>.

97. *Id.*

98. See Single Market Integration and Competitiveness in the EU and its Member States 2016, EUR. COMM'N (Nov. 21, 2016), http://ec.europa.eu/growth/content/single-market-integration-and-competitiveness-eu-and-its-member-states-2016_en [hereinafter Competitiveness in the EU and its Member States]; *Foreign Direct Investment—Flows: Statistics Explained*, *supra* note 83.

99. See generally Countries, EUR. UNION, https://europa.eu/european-union/about-eu/countries_en (last visited Oct. 10, 2018).

100. See Mark Rice-Oxley et al., *End of the USSR: Visualizing How the Former Soviet Countries Are Doing, 20 Years On*, THE GUARDIAN, Aug. 17, 2011, www.theguardian.com/news/datablog/2011/aug/17/ussr-soviet-countries-data.

101. See Competitiveness in the EU and its Member States, *supra* note 98.

102. *See id.*

103. General Agreement on Trade in Services, art. 4–5, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994) [hereinafter GATS].

difficulty of the least-developed countries in accepting negotiated specific commitments in view of their special economic situation and their development, trade and financial needs.”¹⁰⁴ Such a provision suggests that concerted action to consider the needs of under-developed nations is vital to increase the EU's economic prosperity and to prevent stronger EU nations from dominating international investment.¹⁰⁵

Though the loss of powers by the Member States necessarily leads to the relinquishment of certain rights, Lisbon also enables the EU, albeit exclusively, to develop an international investment policy in, a consistent and cohesive manner.¹⁰⁶ Such a cohesive investment platform benefits not only EU investors, but also non-EU investors. Instead of dealing with haphazard and confusing obligations to invest in neighboring nations,¹⁰⁷ now, the non-investors can count on “legal certainty . . . [for] investors operating under the terms of these agreements.”¹⁰⁸ This shift in power to the EU's “control nucleus” is likely to promote a stable and fair trading network, even if the EU must still ensure that its international investment policy represents the needs of individual Member States *and* the region as a whole.¹⁰⁹

2. *Will Tensions Between the EC and the EP after Lisbon Lead to Increased Democratic Accountability?*

Secondly, while Lisbon shifts the investment regime from a system of shared competence between the individual Member States to the co-decision powers of the EC and the EP,¹¹⁰ the scope of these rights is ambiguous and could lead to confusion or divergence from core EU interests.¹¹¹ Conversely, allowing the EP a role in investment negotiations, by effectively instilling the EP with a veto capacity, is likely to result, in the aggregate, in the EU investment regime becoming more democratic and more accountable to the EU people.¹¹² Nonetheless, the environment is ripe for tensions to develop between the EC and the EP as they attempt to define the scope of the rights and responsibilities conferred upon them under Lisbon.¹¹³ The next section will discuss the potential tensions that may arise.

104. *Id.* art. IV(3).

105. *See id.*

106. Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions Towards a Comprehensive European International Investment Policy, at 2, 4 COM/2010/343 final [hereinafter Towards a Comprehensive European International Investment Policy].

107. *Id.*

108. *Id.*

109. *Id.* at 4, 11.

110. *Id.* at 9.

111. Anderer, *supra* note 5, at 864.

112. *Id.* at 854.

113. *Id.*

3. *A Dispute Settlement Mechanism is Necessary to Break Conflicts*

In addition to conflicts between the Member States, conflicts may also arise between the EC and the EP. An effective dispute settlement mechanism is lacking.¹¹⁴ Moreover, the EP, imbued with new authorities under Lisbon, may be influenced by the Member States to a greater extent than previously; for example, by soliciting recommendations or other inputs from the Member States.¹¹⁵ By giving Member States a greater role in the EP, key decisions could better reflect the needs of the Member States.¹¹⁶

As described previously, prior to Lisbon, the EP possessed only a very limited role in EU investment policy and was effectively excluded from negotiations regarding BITs and other trade negotiations with non-EU nations.¹¹⁷ Instead, the Member States, along with the EC, possessed this role and the EC was formally in charge of instigating trade negotiations and proposing such endeavors to the Council of Ministers.¹¹⁸ The EC would then enter into negotiations with third nations and the Member States.¹¹⁹ Upon agreement and formal signature, the EC would then authorize the document.¹²⁰ The EP's opinion was rarely sought or considered.¹²¹

At times, the EP played a vital role in deciding key issues, such as in the event of a substantial budget consideration and the creation of new institutional arrangements affecting the EP.¹²² But for the most part, prior to Lisbon, the EP retained little voice on trade and investment matters, even if it was not completely barred from influencing trade decisions.¹²³ But even when the EP had input, the EP's approval was rarely compulsory, leaving the EP with little power to shape the EU investment policy with non-EU nations.¹²⁴ Thus, the EC and the Member States maintained responsibility for creating BITs and otherwise forging the future of EU international investment.¹²⁵

The Lisbon Treaty shifted this balance of power. Post-Lisbon, the EC and the EP have become co-decision-makers on issues pertaining to CCP.¹²⁶ Article 207 of the TFEU provides that “the European Parliament and the Council . . . in accordance with the ordinary legislative procedure . . . shall adopt the measures . . . for implementing the common commercial

114. *Id.* at 855.

115. *Id.* at 881.

116. *See id.*

117. *Id.* at 854.

118. *Id.* at 855.

119. *Id.*

120. *Id.* at 863.

121. *Id.*

122. *See* Ronnie Downes et al., *Budgeting and Performance in the European Union: A review in the context of EU Budget Focused on Results*, 2017 OECD J. ON BUDGETING 1, 33 (2017).

123. Eur. Comm'n Press Release, *Explaining the Treaty of Lisbon*, Brussels (Dec. 1, 2009).

124. *See id.*

125. Anderer, *supra* note 5, at 857.

126. *Id.* at 873.

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2019]

LISBON'S LEGACY 95

policy.”¹²⁷ The EC and the EP must also keep each other regularly informed. In addition to instilling effective legislative and veto power, the EC President must “present a report to the [EP] after the meetings of the [EC].”¹²⁸ Moreover, the EC High Representative must “regularly consult” with the EP regarding its “basic choices” in order to “ensure that the views of the European Parliament are duly taken into consideration.”¹²⁹ Finally, the EP has been granted the right to supervise the implementation of trade measures, thus ensuring that the EP’s opinions are actually heeded.¹³⁰

Although the TFEU broadly shifts the control nucleus away from Member States,¹³¹ that is unlikely to be the most controversial and turmoil-ridden provision. It may instead take a backseat to the effects of a potential conflict between the EC and the EP.¹³² Post-Lisbon, before any extra-EU investment agreement may come into existence, it must first be approved by the EP.¹³³ Consequently, the EP’s approval now becomes mandatory for an investment agreement to become effective.¹³⁴ On the other hand, the EC retains the power to enter into trade negotiations because, while the EP must approve investment agreements, it defers to the EC to enter into negotiations.¹³⁵ As a result, the EP must agree with the terms of the agreement early in the process to avoid a delay.¹³⁶ In regards to how the change to qualified majority voting will shift decisions, the individual personalities of the EC and the EP may come to take a larger role in the decision-making process, thus politicizing the process in a way that Lisbon’s drafters never intended.¹³⁷

127. TFEU, *supra* note 61, art. 207.

128. 2012 TEU *supra* note 46, art. 15(6)(d).

129. *Id.* art. 36.

130. *Id.* at 860-61, 868-69 (there is often little to no relationship between a nation’s investment policies and its national policies as a whole—this “interconnect” is missing); Pollet-Fort, *supra* note 76, at 11, 15 (the current international investment regime is comprised of thousands of individual treaties; a central aim as government policies merge with investment should be to restore this connection); Anderer, *supra* note 5, at 856 (leading to complexity, gaps, and ambiguity in coverage); *see generally* Schacherer, *supra* note 65 (arbitration awards are often found to be unpredictable).

131. Schorkopf, *supra* note 78, at 262 (“The Court held that to avoid imminent unconstitutionality the EU must cautiously exercise any new or expanded power brought by the Lisbon Treaty ratification. The Court asserted that [M]ember [S]tates must maintain their right to control the legal and practical ‘precondition of a living democracy.’”).

132. *See* TFEU, *supra* note 61, art. 294. A wrestling for power may result from the co-decision making between the EC and the EP (art. 294(2)) and from the qualified voting mechanism of the “ordinary legislative procedure” (art. 294(8)). It is unclear how these two provisions will shift the outcome of key investment decisions and, thus, pave the way for a potential conflict between these entities; *see also* Anderer, *supra* note 5, at 875.

133. Anderer, *supra* note 5, at 879.

134. *Id.*

135. Pollet-Fort, *supra* note 76, at 5 (“This means that the opinion of the EP becomes essential and this even before the initiation of any future trade negotiations if one wants to avoid the risk of having the entirety of the agreement blocked by the EP.”).

136. *Id.* at 3.

137. *Id.* at 2.

Under Article 207 of the TFEU, the EP has been imbued with a steadfast veto power. If the EP does not agree with an investment agreement, it may effectively block its passage.¹³⁸ But the EP may only make the decision as to whether to approve or deny an investment agreement wholesale, and therefore the EP still cannot mandate changes to the agreement unless it provides its recommendations. Practically, this means the EC continues to hold greater power than the EP. Further, it is conceivable that EP will presuppose that the investment is generally a beneficial endeavor, and therefore the EP may be inclined to accept the provision on balance, even though the EP does not agree with all facets of the proposal.¹³⁹ The EP may be especially likely to wield its veto power when certain key non-economic provisions of an investment agreement are at issue.¹⁴⁰ Consequently, it may be difficult to predict in advance when the EP may block an agreement, thereby increasing investor uncertainty.¹⁴¹

4. *Enactment of a Line-by-Line Veto EP Power Would Reduce Delays*

Due to the conflicts described above, the rights conferred to the EP by Article 207 would have been more effective if the EP had been granted a line-by-line or otherwise nuanced veto power, thus equalizing the EP's role with the EC. Unnecessary delays in the execution of trade and investment agreements may harm relationships with third nations and diminish extra-EU trade.¹⁴² Without changes to this structure, all investment negotiations may come to a halt due to a deadlock based on a particular political or economic issue.¹⁴³ In turn, investment flows would be reduced. If the EC and the EP are unable to reach an agreement, then progress toward an investment agreement may be stalled or halted altogether.

Even so, potential disputes between the EC and the EP are not entirely negative. Because the EP is elected directly by the EU people through universal suffrage, key decisions may be more equitable and democratically accountable.¹⁴⁴ Thus, affording the EP a co-decision-making authority may result in decisions that better reflect the interests of the EU people and not just heads-of-state.¹⁴⁵

138. *Id.* at 11.

139. See Anderer, *supra* note 5.

140. See *id.*

141. See *id.*

142. See *id.*

143. TFEU, *supra* note 61, at arts. 44, 50, 64. Article 64 of the TFEU effectively provides power for a qualified majority to govern measures pertaining to capital investments, although Article 44 states that any such restrictions may not discriminate based on nationality. Moreover, Article 50 imbues the EC and the EP with substantial authority to carry out such duties, including competence over investment policy.

144. See Anderer, *supra* note 5.

145. See Sebastian Kurpas, *The Treaty of Lisbon—How Much “Constitution” is Left?*, Ctr. for European Pol’y Stud., 147 CEPS POLICY BRIEF, at 9 (Dec. 2007), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1334072.

Conversely, the EC may be in a better position to make such decisions due to better institutional and governance capacity, whereas members of the EP may not have such knowledge.¹⁴⁶ Because Article 207 effectively barred Member States from possessing a veto power in EU investment decisions,¹⁴⁷ it is unclear whether the EP's decisions will adequately reflect Member States' needs or meet Member States' best interests. As a result, Member States may act outside the centralized EU framework when their interests are not represented. If Member States choose to take individual actions instead of relying on a central EU authority, the EC and the EP would lose legitimacy, and Lisbon's efficacy in standardizing EU investment would be reduced.¹⁴⁸

Adding to this complexity, EU international treaty-making, in practice, is often very disparate and covers a wide variety of issues spanning the EU.¹⁴⁹ Prior to Lisbon, international investment was generally considered on a national—and therefore smaller—scale.¹⁵⁰ In taking competence away from the Member States, the EC and the EP have been given a large responsibility to standardize a series of non-standard investment agreements.¹⁵¹ Yet, the EP's decisions may be politicized,¹⁵² and non-economic considerations may be emphasized during the investment process, even where it does not make sense to do so.¹⁵³ This increasing politicization

146. *See id.* at 11.

147. Treaty of Lisbon, *supra* note 2, art. 9(D)(5), 20. This provision does not automatically go into effect; rather, it requires a unanimous vote by the Council; Pollet-Fort, *supra* note 76, at 12 (“This meant that any national parliament of a Member State discontent with the provisions of a chapter could veto the agreement in its entirety.”).

148. Pollet-Fort, *supra* note 76, at 3. (“The increased role given to the EP in the EU trade policy may therefore contribute to increased politicization of future trade negotiations leading to uncertainties and possible delays in getting a trade agreement through.”).

149. Lorenza Mola, *Which Role for the EU in the Development of International Investment Law?* (Society of International Economic Law, Working Paper No. 26/08, 2008), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=115458.

150. Towards a Comprehensive European International Investment Policy, *supra* note 106, at 8.

151. *Id.* at 7–8 (There is evidence that the EU is moving towards operating as a regional unit. For instance, on September 12, 2011, an EU-wide investment doctrine was entered into with Singapore, India, and Canada. Though these collective EU BITs generally resembled BITs entered into by individual nations, many scholars have suggested that the EU-wide BITs will include “preamble references to corporate social responsibility (CSR), environmental and social issues.”); U.N. Conf. on Trade and Dev., Investment Policy Monitor No.6, A Periodic Report by the UNCTAD Secretariat, 8 (Oct. 11, 2011), https://unctad.org/en/Docs/webdiaeia2011d12_en.pdf.

152. Pollet-Fort, *supra* note 76, at 15 (“The increased role of the European Parliament may lead to a ‘politicization’ of the Common Commercial Policy and the use of conditionality in trade policy made be reinforced.”).

153. U.N. CONF. ON TRADE AND DEV., WORLD INVESTMENT REPORT 2012: TOWARDS A NEW GENERATION OF INVESTMENT POLICIES, U.N. Sales No. E.12.II.D.3 (2012) [hereinafter REPORT 2012]. Moreover, increased transparency and absolute standards should be applied to investor-state dispute settlement mechanisms and unifying the EU investment regime makes this increasingly possible.

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

may detract from the future progression of the EU investment regime, especially the aim of “liberalization” of trade flows.¹⁵⁴

A key consideration for the future will be to develop a mechanism in which to break deadlocks, or at the very least, increase harmonization between the EC and the EP so they are able to adequately represent the needs of the Member States and EU as a whole.¹⁵⁵ Additionally, allowing for EP input may lead to significant delays in coming to a decision, and thus impose a temporal deadline in which a decision must be made may likewise be beneficial.¹⁵⁶ Though not a panacea, such implementations will help buffer the transition to an exclusive competence framework.¹⁵⁷

In sum, shifting from a shared competence model to an exclusive competence regime will likely increase uncertainties and result in a struggle for control between the EC and the EP, especially if the two entities are dissimilar in thought.¹⁵⁸ On the one hand, this shift may lead to an increased chance for deadlock, as the EP may continually block an investment negotiation it does not agree with wholesale; on the other hand, the transition to a co-decision-making function may result in the EU investment regime becoming more democratic and representative of EU investors.¹⁵⁹ While only time will bring forth the practical effects of this change, much will rest upon the personalities and egos in the EP, as well as its similarities in thought and policy aims with the EC.¹⁶⁰

Although the CCP should be “guided by the principles and objectives of the Union’s external action more generally, including the promotion of the rule of law, human rights and sustainable development” as delineated under Article 205 of the TFEU, the EC and the EP must ensure that acting to achieve these objectives does not lead to political deadlock.¹⁶¹ Despite attempts to reach a common goal, the EC and the EP may fail to reach an

154. See, e.g., Roger Goebel, *Supranational? Federal? Intergovernmental? The Governmental Structure of the European Union After the Treaty of Lisbon*, 20 COLUM. J. EUR. L. 77, 138 (2013) (discussing opposition by smaller nations to the creation of an EU President, the author notes) (“Presumably the smaller State political leaders were concerned that a longer Presidential term [influence by the President] would give greater weight to the views of the larger States.”).

155. Towards a Comprehensive European International Investment Policy, *supra* note 106, at 10. This is consistent with the EU’s policies in following the provisions set forth by the WTO, which is looking to promote a policy of openness and transparency.

156. *Id.* (The EU Energy Charter is a good example of present negotiations.); Jean-Francois Brakeland & Colin Brown, Presentation at the European Comm’n Civ. Soc’y Dialogue Meeting, The impact of the Lisbon Treaty on trade policy, 2-7 (Jan. 27, 2010), http://trade.ec.europa.eu/doclib/docs/2010/february/tradoc_145757.pdf.

157. Anderer, *supra* note 5, at 875.

158. *See id.*

159. *See id.*

160. *See id.*

161. Towards a Comprehensive European International Investment Policy, *supra* note 106, at 9. Because the Lisbon Treaty aims to create an overarching treaty that governs numerous facets of European legalities, the invocation of these issues also suggests that its drafters sought to increase the consideration given to these issues in its BITs. Thus, this suggests that extra-EU BITs will be more likely to contain provisions expressly forbidding, for example, pressing

agreement based solely upon the technicalities of achieving this aim, to the detriment of the EU investment regime, and consequently, a dispute resolution mechanism should be created to resolve impasses and prevent political agendas from dominating the EU investment regime.¹⁶²

5. *Lisbon Will Likely Increase FDI Flows and Promote Efficiency, but May Lead to Negative Externalities*

Centralization of EU investment policies is likely to cause a regionalization of FDI flows both in the EU and globally. These regional investment blocks are likely to further foster cross-border investments.¹⁶³

Despite the conflicts that may arise due to the shift in power among the EC and the EP, as well as loss of authority of the Member States, Lisbon's standardization of EU investment policy may increase FDI.¹⁶⁴ Given that the EP may also be actively considering numerous other political, moral, and social objectives, infusing investment policy with the EP's overarching agenda could decrease efficiency, transparency, and predictability because new concerns the EP must grapple with arise without predictability and without knowing their effects upon investment.¹⁶⁵ Accordingly, the shift to exclusive competence may simultaneously increase negative externalities as the EU CCP aims to synthesize EU investment policy with overarching issues pertinent to the European community as a whole.¹⁶⁶

Because FDI constitutes a major component of European GDP, bringing FDI into the domain of the exclusive EU competence, through Article 207 of the TFEU,¹⁶⁷ may increase ease of market access.¹⁶⁸ Given its sheer magnitude and the financial implications, FDI is most effectively regulated at the EU level, especially given that the EU may pool resources from the

environmental concerns, such as dumping in certain areas or to prevent investment in an area out of political aims.

162. *THE TREATY OF LISBON AND THE FUTURE OF EUROPEAN LAW AND POLICY*, 277–78 (eds. Martin Trybus & Luca Rubini, 2012). By allowing the consideration of non-economic factors, the EU will bring in its investment policy to align with its overarching goals. Additionally, by allowing for greater access of dispute settlement proceedings, the EU will promote transparency and improve perceptions of legitimacy of the dispute resolution system.

163. Anderer, *supra* note 5, at 875 (“While the transfer of competence over FDI from the individual EU Member States to the EU creates a number of problems, if these problems are adequately dealt with, then the changes to FDI embodied in the Lisbon Treaty will represent an improvement over the EU’s prior international investment regime.”).

164. *See id.* at 875 (“All these changes to bring trade in goods and services and FDI under the exclusive competence of the EU are expected to contribute to a streamlining of the trade policy.”); *see also* Pollet-Fort, *supra* note 76, at 3.

165. *See id.* at 854.

166. *See* Anderer, *supra* note 5, at 874.

167. Treaty of Lisbon, *supra* note 2, art. 207.

168. *Impacts of EU Outward FDI on EU Economy*, EUROPEAN COMM’N. (last visited Aug. 10, 2017). http://trade.ec.europa.eu/doclib/docs/2010/june/tradoc_146273.pdf. From 2001 to 2006, outward FDI alone has increased the GDP of the EU by over _20 billion.

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

100 THE INTERNATIONAL LAWYER

[VOL. 52, NO. 1

Member States.¹⁶⁹ Moreover, though the development of a centralized, stable investment policy is not the exclusive determinant of FDI flows both into and out of the EU, it does serve to increase transparency, efficiency, and mitigate instability.¹⁷⁰ But while FDI flows will most likely increase as a result of the foregoing, FDI flows may also face downward pressures due to the rise of a host of exogenous and non-economic considerations.¹⁷¹ Thus, these increased regulations will likely increase the costs of investing internationally.¹⁷²

While the EU is currently a strong force in global FDI flows, comprising nearly half of all FDI worldwide, European FDI flows has recently been steadily losing ground per relative standing in the world market.¹⁷³ It is unclear whether the changes brought by Lisbon will halt the backward slide of the European market.¹⁷⁴ During Europe's retreat, third-world nations, such as China, India, and Brazil, have been profoundly altering the global investment commonplace, demanding renewed consideration of both the investment opportunities within their borders, as well as these nations' strengthened capacities to invest in Europe.¹⁷⁵ Such third-world nations, often referred to as "emerging market" economies, have been steadily

169. *See id.*

170. Towards a Comprehensive European International Investment Policy, *supra* note 106, at 6–7 (The value and role of outward FDI has been hotly debated by EU and non-EU nations alike, though most nations generally cede that inward FDI is worth attracting. But outward FDI will likely provide value to the EU as well. For instance, Copenhagen Economics states that the number of jobs going abroad generally represents only between zero point five percent and two percent of the total number of jobs leaving the nation. Moreover, for every one-hundred jobs that move overseas, about fifty of the jobs were newly created altogether. Panel economists undertook a study in which they analyzed the effects of outward FDI on the EU economy, and determined that outward FDI leads to increases in productivity and efficiency of EU companies—thus increasing their competitiveness on the global marketplace. While the US and EU continue to promote outward FDI, many other nations have undertaken measures to curtail such investment in the belief that these resources should instead be developed domestically.); *see also* Eva R. Sunesen, Svend T. Jespersen & Martin H. Thelle *Impacts of EU Outward FDI*, COPENHAGEN ECON., at 5 (May 20, 2010) http://trade.ec.europa.eu/doclib/docs/2010/june/tradoc_146270.pdf.

171. *Id.*

172. REPORT 2012, *supra* note 153, at 81.

173. *Id.* at 169.

174. *See id.*

175. Victor Mosoti, *Bilateral Investment Treaties and the Possibility of a Multilateral Framework on Investment at the World Trade Organization: Are Poor Economies Caught in Between?*, 26 Nw. J. INT'L & BUS., 95, 113–15 (2005) ("Most African countries now do everything in their power to create an environment that is conducive to FDI, which represents a tectonic shift from prevailing autarchic thinking of the 1970s. The vast majority of these countries now universally welcome foreign investment almost unreservedly, have signed many BITs and have heavily engaged in negotiations, especially those sponsored by UNCTAD.").

increasing in global FDI.¹⁷⁶ Foreign investors may be reticent to invest when they view EU's investment regime to be unstable.¹⁷⁷

Regarding EU outward FDI flows, EU investors may be wary of investing in developing nations that may not have the capacities or infrastructure to deal with the externalities associated with development, such as environmental waste or human displacement.¹⁷⁸ Accordingly, investment agreements should incorporate mechanisms to help these nations address industrial externalities by including, for example, provisions where the investor will assist with environmental mitigation.¹⁷⁹ By incorporating environmental and other "soft" considerations in investment agreements, weaker nations may enjoy increased investments while reducing exposure to harmful externalities.¹⁸⁰ Of course, the EU may likewise want to include environmental and human rights provisions for outside investors investing within its borders.¹⁸¹

Moreover, the centralized EU investment control may also change the way investment agreements are drafted. Most-favoured nation (MFN) clauses are frequently featured in investment agreements such as BITs.¹⁸² In a BIT, a MFN clause "means that investments or investors of one contracting party are entitled to treatment by the other contracting party that is no less favourable than the treatment the latter grants to investments or investors of any other third party."¹⁸³ In particular, the MFN and

176. *See id.*; Towards a Comprehensive European International Investment Policy, *supra* note 106, at 3.

177. Anderer, *supra* note 5, at 875 ("If foreign investors believe that the EU's system does not provide adequate protection, they may choose to retract their investments. This will make it difficult for the EU to attract new foreign investors who will likely forego opportunities in the EU to avoid the problems associated with an unstable investment regime.").

178. REPORT 2012, *supra* note 153, at 82.

179. *See* U.N. Env't. Programme, The Montreal Protocol on Substances that Deplete the Ozone Layer, art. 5, 25 (2000) <https://unep.ch/ozone/pdf/Montreal-Protocol2000.pdf> (Montreal Protocol instilled time-adjusted regulations for meeting Protocol provisions based upon the unique needs of developing nations.).

180. Goebel, *supra* note 154, at 86 ("As successive Treaty amendments have authorized social and employment policy, environmental protection, consumer rights and other fields of action, the [EC] has promoted each with equal vigor on a Community[-]wide basis through action programs and initiatives for legislation."); *see also* Philippa Watson, EU SOCIAL AND EMPLOYMENT LAW: POLICY AND PRACTICE IN AN ENLARGED EUROPE, 66-68 (Oxford University Press, 2009).

181. Goebel, *supra* note 154, at 86.

182. *See* UNCTAD, BILATERAL INVESTMENT TREATIES 1995-2006: TRENDS IN INVESTMENT RULEMAKING, at 93, U.N. Doc. UNCTAD/ITE/IIA/2006/5, U.N. Sales No. E.06.II.D.16 (2007). Consequently, the MFN clauses for each individual BIT should be drafted with particularity, while the EC should perhaps formulate a 'model' MFN clause as a default provision. Moreover, the 'model' MFN clause should be drafted with the weaker nations' specific needs in mind. For example, an MFN clause may propose that standards of treatment are to be considered from the view of the weaker nation, or that a particular dispute (in some instances, and admittedly not all) be resolved as against the nation most capable of dealing with the consequences.

183. Anderer, *supra* note 5, at 859.

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

102 THE INTERNATIONAL LAWYER

[VOL. 52, NO. 1

national treatment provisions continue to carry crucial importance in investment agreements in order to ensure that weaker nations—both EU and non-EU—receive the same protection as the stronger nations.¹⁸⁴ No longer should MFN provisions be based upon a relative standard of an individual nation. Instead, new clauses such as post-admission “fair and equitable treatment” and “full security and protection” may come to possess new significance as they become increasingly utilized to develop a threshold standard for investor protection that carries across nations.¹⁸⁵ Previous national BITs are unlikely to serve as a model for incorporating such protections. For example, the German Model Treaty, in Article 3(1) and 3(2),¹⁸⁶ does not provide for exceptions in areas where a local industry or group may need special preference in order to develop or sustain itself.¹⁸⁷ Such a need, as described above, is necessary due to the endemic inequalities between the Member States in their industrial capacities.¹⁸⁸

Despite the move toward unified investment agreements, these agreements may need to be drafted in a more flexible manner to allow its provisions to be interpreted in the interest of fairness, especially as it pertains to weaker nations.¹⁸⁹ Increased flexibility accords with GATS, Part IV, Article XIX, which provides that “[t]here shall be appropriate flexibility for individual developing country Members for opening fewer sectors,

184. Ross Eventon, *Future Forms of EU Investment Competence: The German Model BIT as a Minimum Level of Protection*, in RECLAIMING PUBLIC INTEREST IN EUROPE’S INTERNATIONAL INVESTMENT POLICY, EU INVESTMENT AGREEMENTS IN LISBON TREATY ERA: A READER, 22 (Ross Eventon ed., Kate Wilson trans., 2011), <http://corporateeurope.org/sites/default/files/S2b%20investment%20reader%20-%2050%20pages!.pdf>.

185. Towards a Comprehensive European International Investment Policy, *supra* note 106 at 8, 11. But in achieving these aims, the EU should work to ensure that investors receive, at the very least, equal treatment as to that which they received under the BITs by individual Member states. This is a tall aim—though vital to ensuring a strong reception to increased EC competence—and will require collaboration between the EC and the Member states. In order to secure increased cooperation between the EC and the Member states, binding statements should be secured to ensure the open flow of investment and the maintenance of standards of care. Such standards should be developed in accordance with the ‘best practices’ by the Member states. Moreover, in the interim, stand-alone investment negotiations should continue to be available as a transitional mechanism.

186. German Model Treaty 2008, art. 3, Federal Ministry for Economics and Technology (2008), italaw.com/documents/2008-GermanModelBIT.doc; Eventon, *supra* note 184, at 22. (“The National Treatment and Most Favoured Nation provisions restrict states from taking measures to enhance local production or enterprise for fear of breaking this provision.”).

187. Eventon, *supra* note 184, at 22. An example of an industry which may need special treatment in order to survive would be the US automobile industry, which would likely have collapsed after being unable to compete with foreign manufacturers.

188. Armand De Mestral, “*Is A Model EU BIT Possible—Or Even Desirable?*” COLUM. FDI PERSP. NO. 21 (Value Columbia Center on Sustainable Development, Mar. 24, 2010), <http://academiccommons.columbia.edu/catalog/ac%3A125914>.

189. “*Investment*,” *Trade Topics*, EUR. COMM’N, Armand De Mestral, “*Is A Model EU BIT Possible—Or Even Desirable?*” COLUM. FDI PERSP. NO. 21 (Value Columbia Center on Sustainable Development, Mar. 24, 2010), <http://academiccommons.columbia.edu/catalog/ac%3A125914> (last visited Aug. 10, 2017).

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2019]

LISBON'S LEGACY 103

liberalizing fewer types of transactions, [and] progressively extending market access in line with their development situation”¹⁹⁰

Even more, an argument may be made that the EU is not yet sufficiently unified to create a single investment agreement for all of its Member States. Some nations, fearing loss of their autonomy over international investment policy, have begun taking measures to restore their former control. The United Kingdom’s (UK) recent referendum vote to leave the EU is a recent example of backlash against further EU integration efforts by the Member States.¹⁹¹ After leaving the EU, the UK will once again assert complete control over its investment policy.¹⁹² In doing so, the UK will need to negotiate new trade agreements, including free trade agreements and bilateral trade pacts with developing nations.¹⁹³ The UK will also lose access to the single European market and will consequently seek to redraw its trade policy with the EU.¹⁹⁴

This recent backlash is but one indication that the EU is not sufficiently unified at this point in time to draft, oversee, and implement a single uniform investment policy. Tellingly, many individual Member States continue to enter into investment treaties separately, suggesting that the pace of EU investment unification has slowed or stalled.¹⁹⁵ The inconsistencies between EU individual national investment policies and EU investment policies may present to the world a confused image, as these policies may overlap or contradict others.¹⁹⁶ Increased instability in EU investment policies may reduce FDI flows if such inconsistencies are not rectified.¹⁹⁷ Moreover, the authority of the individual Member States to act on international investment issues—or even to what extent the Member States retain control over their own domestic markets—remains ambiguous after Lisbon.¹⁹⁸ This area will continue to present a tricky dichotomy as the EU considers the rights of the Member States and the Union, without depriving either of opportunities for growth.¹⁹⁹ Finally, replacing the over one-thousand individually created BITs and transforming them into a common body of European investment law is an extensive undertaking that will likely take decades to complete.²⁰⁰

It remains unclear whether Europe will be able to consolidate its investment policies into a single series of investment agreements.²⁰¹ Recent

190. GATS, *supra* note 103, Part IV art. XIX.

191. See Jean Heilman Grier, *Brexit: Trade Implications*, 16–11 BRIEFING PAPERS 1 (Oct. 2016) (discussing Brexit and future trade policy options for the UK).

192. *Id.*

193. See *id.* at 1.

194. See *id.* at 2.

195. See *id.* at 1.

196. See *id.*

197. See *id.*

198. See *id.*

199. See *id.*

200. De Mestre, *supra* note 188, at 1–2.

201. *Id.* at 1.

backlash by EU Member States suggests that such consolidation may be an elusive task.

6. *Consolidation of EU International Investment Will Promote Public Policy Goals*

Public policy initiatives in Europe strongly favor consolidation of its international investment framework. Trade and investment consolidation is likely to improve business relations with non-EU nations and promote regional unification and economic modernization within Europe.²⁰² Moreover, Lisbon's effects on the EU's investment policy will likely benefit its relationship with key partners, including the US, with which its investment flows are most substantial.²⁰³

European policymakers have stated the EU seeks to transition into a "smart, sustainable, and inclusive economy."²⁰⁴ Though at the outset it appears the shift toward an EU-centric model will unjustifiably promote EU investment interests, this shift in power is unlikely to be Lisbon's legacy.²⁰⁵ Instead, the implementation of exogenous and non-economic considerations in international investment law may ease tensions between the EU and foreign investors, and place increasing importance on social issues that previously did not take precedence in investment agreements.²⁰⁶ While the transaction costs associated with investments may increase in the near term, over time, the move to a common investment framework and standardization of key human rights, social, and environmental issues will likely promote investment stability.²⁰⁷

Moreover, an EU central investment framework is likely to solidify the EU's relationships with key nations, including the US, its largest investment partner.²⁰⁸ To date, the EU and US have repeatedly affirmed their commitment to an open investment policy between each other, and the move toward a centralized EU investment policy will facilitate increased trade between the two regions, especially as non-discriminatory policies that

202. Towards a Comprehensive European International Investment Policy, *supra* note 106, at 3.

203. *Id.* at 9.

204. Communication from the Commission, Europe 2020 A Strategy for Smart, Sustainable and Inclusive Growth, COM/2010/2020 final. (In so doing, the EU is looking to modernize its labor force, technologies, and infrastructure. The EU seeks to lower its unemployment rate, particularly among older workers. Increasing FDI flows will have the ramifications of increasing employment rates, at least, this is the hope of the EU. Additionally, increased investment will force the EU to modernize its economic and physical infrastructure – as increasing investment, both inward and outward, will hopefully cause EU companies to become both more competitive and more efficient.).

205. Towards a Comprehensive European International Investment Policy, *supra* note 106, at 9.

206. *Id.* at 11.

207. *Id.* at 9.

208. USA-EU – *International Trade in Goods Statistics*, EUROSTAT, http://ec.europa.eu/eurostat/statistics-explained/index.php/USA-EU_-_international_trade_in_goods_statistics (last visited May 4, 2017).

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2019]

LISBON'S LEGACY 105

“provide investors clear guidance” on investment restrictions are increasingly employed.²⁰⁹

Cultivating stronger investment relationships with longstanding investment partners provides a straightforward avenue for bolstering existing investment.²¹⁰ In particular, the EU and US are each other's biggest investor.²¹¹ Specifically, in 2007, the EU stock of FDI in the US totaled €1043 billion, while the US FDI stock in the EU was €1030 billion, representing roughly one-half of each other's total FDI.²¹² EU investment policies generally align with those of the US, perhaps more so than nearly all nations. The EU and US's shared investment goals were demonstrated in April 2012, when the EU and US jointly issued their “Shared Principles for International Investment,” describing their goal of providing a “level playing field” and creating “open and non-discriminatory investment climates” for investors between the two nations.²¹³ Buoyed by support from EU and US international investment policies, the rise of interjecting non-economic factors, such as human and laborer rights, climate change, and workforce issues, are likely to play a greater role than ever before in international agreements.²¹⁴ Demonstrating the rise of “soft” factors, there are already numerous current non-binding guidelines on point suggesting non-economic considerations will be increasingly taken into account.²¹⁵ Interjecting “soft” factors into investment agreements also fits generally into the aims under Article 205 of the TFEU, which provides for the creation of general policies for “human rights and sustainable development.”²¹⁶

It is unclear whether a consolidated EU investment policy will promote investment flows to and from the EU and third-world nations, especially emerging countries that lack a longstanding relationship with the EU.²¹⁷

209. *EU-US Open Investment Statement, Trade*, EUROPEAN COMM'N (May 13, 2008), http://trade.ec.europa.eu/doclib/docs/2008/may/tradoc_138821.pdf. Both the EU and US openly seek to avoid protectionist mechanisms, and consequently allow for the free flow of trade, with the exception of national security issues.

210. *Id.*

211. European Commission Press Release MEMO/09/118, *Global Partners: EU-US Trade and Investment* (Mar. 18, 2009), http://europa.eu/rapid/press-release_MEMO-09-118_en.htm?locale=en.

212. *Id.*

213. *Statement of the European Union and the United States on Shared Principles for International Investment, Trade*, EUROPEAN COMM'N, http://trade.ec.europa.eu/doclib/docs/2012/april/tradoc_149331.pdf. Notably, some of these exogenous considerations are invoked in the statement, including the promotion of ethically responsible behavior by businesses.

214. *See id.*

215. REPORT 2012, *supra* note 153, at 91.

216. *Towards a Comprehensive European International Investment Policy*, *supra* note 106, at 9.

217. *Consultation on the Future Investment Relationship Between the EU and China, Trade*, EUROPEAN COMM'N (May 2, 2001), http://trade.ec.europa.eu/doclib/docs/2011/may/tradoc_147866.pdf. In fact, it is quite difficult to see how the EU's relationship with China will develop in the future, given that China does not share the same penchant for exceedingly liberal trade flows, nor is it a democratic society. Other nations, in crafting their future relations with the EU will likely fall somewhere on this continuum, with those nations sharing the most political,

Perhaps the best strategy for the EU is to keep investment flows between the EU and third-world nations as open and transparent as possible.²¹⁸ Nonetheless, once the EU exits the field of common-market adherents, whose ideological and political views may differ from those of the EU, providing for a more effective and efficient dispute settlement mechanism in the event of investor disputes will most likely be the best method to maintain relations and continue investment.²¹⁹

Consequently, after the Lisbon Treaty, the European investment landscape has fundamentally changed. Instead of the over one-thousand individual BITs entered into by the EU Member States,²²⁰ non-EU investors may perhaps look to a single, overarching EU Model BIT and EU-wide international investment policy decisions. Investment agreements will be more transparent and efficient.²²¹ After consolidating its investment framework, if the EU can afford protection for the autonomy and particularized needs of its Member States, investment to and from Europe could be facilitated to a greater extent than ever before.²²² If implemented correctly, economic and trade relations with third world nations will only be improved.²²³ Shifting the control center of the European investment regime to the EC and the EP aligns with the EU's political goals and aptly demonstrates the continent's capacity to unify to promote welfare for all Europeans, regardless of the Member State to which they owe allegiance.

IV. Conclusion

In conclusion, Lisbon is likely to change EU international investment policy significantly. Non-economic considerations, including human rights, climate change, and sustainable development are likely to be featured more prominently in investment policy decisions. The shift to a centralized framework will likely affect EU international trade flows positively and may increase FDI. Moreover, public policy factors suggest that changes brought about by Lisbon are likely to improve investment relations with the US and other third nations, while simultaneously promoting market access and investment stability in cross-border transactions. The Lisbon Treaty aims to increase the transparency, efficiency, and unity of the EU political and economic system. By initiating the steady decline of BITs conducted by the Member States in favor of a common investment regime, Lisbon is slowly fulfilling its goals.

economic, and social commonalities with the EU most likely to benefit from Lisbon's changes to the EU's investment regime.

218. "Investment," *Trade Topics*, *supra* note 189.

219. REPORT 2012, *supra* note 153, at 97.

220. "Investment," *Trade Topics*, *supra* note 189.

221. *Id.*

222. *See id.*

223. *See id.*

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2019]

LISBON'S LEGACY 107

Appendix A

PROPOSED CHANGES TO THE LISBON FRAMEWORK

1. CREATE A DEADLOCK MECHANISM IN ORDER TO RESOLVE DISPUTES BETWEEN THE EC AND THE EP
2. DEVELOP FAIRNESS CONSIDERATIONS FOR WEAKER NATIONS WHICH MAY BE PASSED OVER DURING KEY INTERNATIONAL INVESTMENT DECISIONS
3. STANDARDIZE REQUIREMENTS FOR HUMAN RIGHTS, ENVIRONMENTAL, AND SOCIAL GOALS IN INVESTMENT AGREEMENTS
4. CLARIFY INVESTOR PROTECTIONS AND DISPUTE RESOLUTION MECHANISMS
5. LIMIT THE SCOPE OF LISBON'S AUTHORITY OVER OTHER AREAS OF GOVERNANCE, AND CLARIFY THE RIGHTS AFFORDED TO THE MEMBER STATES TO GOVERN THEIR ECONOMIC, INVESTMENT, AND TRADE POLICIES

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

108 THE INTERNATIONAL LAWYER

[VOL. 52, NO. 1

Appendix B

LIST OF REFERENCES (SELECTED)

Andrew Y. Guzman, *Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639, 642 (1998).

Consultation on the Future Investment Relationship Between the EU and China, European Commission Directorate-General for Trade (May 2, 2011), http://trade.ec.europa.eu/doclib/docs/2011/may/tradoc_147866.pdf.

Armand De Mestral, "Is a Model EU BIT Possible—or Even Desirable?," COLUMBIA FDI PERSPECTIVES NO. 21 (Vale Columbia Center on Sustainable Development, Mar. 24, 2010), <http://academiccommons.columbia.edu/catalog/ac%3A125914>.

THE TREATY OF LISBON AND THE FUTURE OF EUROPEAN LAW AND POLICY, 278 (eds. Martin Trybus & Luca Rubini, 2012).

"Europe 2020." EUROPEAN COMM'N, 21 Nov. 2012, http://ec.europa.eu/europe2020/index_en.htm.

EU-US Open Investment Statement, EUROPEAN TRADE COMM'N (May, 13 2008), http://trade.ec.europa.eu/doclib/docs/2008/may/tradoc_138822.pdf.

Freya Baetens et al., *Determining International Responsibility Under the New Extra-EU Investment Agreements: What Foreign Investors in the EU Should Know*, 47 VAND. J. TRANSNAT'L L. 1203, 1215 (2014).

Gabriele Mazzini, *The European Union and Investor-State Arbitration: A Work in Progress*, 24 AM. REV. INT'L ARB. 611, 613 (2013).

German Model Treaty 2008, Federal Ministry for Economics and Technology (2008), italaw.com/documents/2008-GermanModelBIT.doc.

European Comm'n Press Release MEMO/09/119, Global Partners: EU-US Trade and Investment (Mar. 18, 2009), http://europa.eu/rapid/press-release_MEMO-09-118_en.htm?locale=en.

Impact of International Investment Rules on Current National Policies, Communication from the European Community and its Member States, Working Group on the Relationship between Trade and Investment, WTO Doc. WT/WGTI/W/84 (June 16, 2000), <http://trade.ec.europa.eu/doclib/html/118060.htm>.

Investment, Trade Topics, EUROPEAN COMM'N, <http://ec.europa.eu/trade/creating-opportunities/trade-topics/investment>.

Sebastian Kurpas, *The Treaty of Lisbon – How Much ‘Constitution’ is Left?*, CENTRE FOR EUROPEAN POLICY STUDIES POLICY BRIEF NO. 147, 1 (Dec. 2007), <https://www.ceps.eu/system/files/book/1568.pdf>.

**PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW**

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

2019]

LISBON'S LEGACY 109

DG Trade G.I, *Establishment, Trade in Services and E-Commerce*, Council Of the EU General Secretariat 133 Committee, 1, 3 (July 28, 2006), http://www.iisd.org/pdf/2006/itn_ecom.pdf.

OECD Code of Liberalization of Capital Movements, OECD (2018), <https://www.oecd.org/daf/inv/investment-policy/Code-capital-movements-EN.pdf>.

“Other Tools for Growth and Jobs.” Europe 2020. European Commission. 22 May 2012, http://ec.europa.eu/europe2020/europe-2020-in-a-nutshell/eu-tools-for-growth-and-jobs/index_en.htm.

Rafael Leal-Arcas, *Is EC Trade Policy up to Par?: A Legal Analysis Over Time—Rome, Marrakesh, Amsterdam, Nice, and the Constitutional Treaty*, 13 COLUM. J. EUR. L. 305, 347 (2007).

Sean McClay, Note, *Can It Lead from Behind? The European Union's Struggle to Catch Up in International Investment Policy Making in the Wake of the Lisbon Treaty*, 51 TEX. INT'L L.J. 259, 260 (2016).

Statement of the European Union and the United States on Shared Principles for International Investment, Trade, EUROPEAN COMM'N (Apr. 10, 2012), http://trade.ec.europa.eu/doclib/docs/2012/april/tradoc_149331.pdf.

“The Impact of the Lisbon Treaty on Trade Policy.” Report of the DG Trade Civil Society Meeting. 27 January 2010. pg. 2 http://trade.ec.europa.eu/doclib/docs/2010/february/tradoc_145757.pdf.

The Montreal Protocol on Substances that Deplete the Ozone Layer, Art. 5., OZONE SECRETARIAT UNITED NATIONS ENVIRONMENT PROGRAMME (2000), <https://unep.ch/ozone/pdf/Montreal-Protocol2000.pdf>.

Towards a Comprehensive European International Investment Policy, EUROPEAN COMM'N, 7 (July 7, 2010) http://trade.ec.europa.eu/doclib/docs/2011/may/tradoc_147884.pdf.

Consolidated Version of the Treaty on the Functioning of the European Union art. 3, 207, June 7, 2016, 2016 O.J. (C 202) 59, https://eur-lex.europa.eu/legalcontent/EN/TXT/?uri=uriserv:OJ.C_.2016.202.01.0001.01.ENG&toc=OJ:C:2016:202:TOC#C_2016202EN.01001301.

Ross Eventon, *Future Forms of EU Investment Competence: The German Model BIT as a Minimum Level of Protection*, RECLAIMING PUBLIC INTEREST IN EUROPE'S INTERNATIONAL INVESTMENT POLICY. EU INVESTMENT AGREEMENTS IN THE LISBON TREATY ERA: A READER, 22 (2001) <http://corporateeurope.org/sites/default/files/S2b%20investment%20reader%20-%2050%20pages!.pdf>.

PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW

THE INTERNATIONAL LAWYER
A TRIANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW