

Course title	<i>EU Investment policy: Shaping Global Policies and Priorities</i>
Duration	4 hours
Dates& Time	July 25, 14:20-18:30
Instructors	Dr. Angelos Dimopoulos, Queen Mary University of London

Course Description

Regulation of foreign investment presents one of the most topical and controversial subjects in EU and international investment law. The adoption of the Lisbon Treaty and the introduction of EU competence over foreign direct investment (FDI) in Article 207 TFEU has generated broad discussions regarding the scope of the “new” EU competence and how it affects Member States’ foreign investment policies and in particular their Bilateral Investment Treaties (BITs). Although all EU institutions have rendered clear their aim to transform the EU into the main player in the field of foreign investment, the emergence of EU investment policy meets a number of legal, political and practical challenges, which the involved political actors will have to tackle in the following years. Considering that Member States have been the primary international actors in the field of foreign investment, having concluded so far more than 1,200 BITs with third countries, this course discusses the framework of the proper role of EU investment policy and its impact on the global investment regime.

The very existence of an EU investment policy depends on the specific delineation of the scope of **EU competence over foreign investment**, not only under Article 207 TFEU but also under other provisions of the EU Treaties. In that context, the successful materialization of a common EU investment policy rests on the careful determination of the specific **objectives** and content of future investment agreements and the **roles** of the EU and its Member States. Future **EU International Investment Agreements (IIAs)** with third countries will indicate whether the EU will promote the insertion of more traditional BIT-oriented provisions, which focus on the protection of foreign investment against expropriation and investor-state arbitration or not. Moreover, assuming that Member States retain certain (shared) powers in the field of foreign investment, close cooperation between Member States and EU institutions is necessary in order to ensure compatibility of EU IIAs with international responsibility rules and investment arbitration.

Course Outline

This course consists of 3 hourly lectures and 1 hourly seminar. The lectures will cover:

- a) Introducing EU investment policy: competences*

The entry into force of the Lisbon Treaty presented the key factor that triggered the renowned interest in EU investment policy, as it established for the first time an express exclusive competence over FDI by including it in the scope of the Common Commercial Policy (CCP).

Recognizing the key role of the Lisbon Treaty in the field, EU institutions aim to build an EU investment policy on the foundations provided in Article 207 TFEU. As the Commission clearly points out, “an

international investment policy geared towards supporting the competitiveness of European enterprises will be best served by cooperation and by negotiations at the level of the Union”.

However, the inclusion of FDI as part of the CCP does not mean that the EU can conclude an international agreement based on 207 TFEU with regard to all matters concerning foreign investment regulation. In order to delimitate the EU from Member States competence on foreign investment as well as to clarify and identify the scope of the specific legal bases on foreign investment, it is necessary to examine the different forms of foreign investment separately, examining whether and to what extent the different regulatory aspects of each form of foreign investment fall under EU competence.

Questions for consideration:

- What do we mean by FDI? Which other forms of investment are protected under BITs and IIAs?
- What is the scope and nature of EU competence under Articles 207 and 63 TFEU?
- Are Articles 63 and 207 TFEU sufficient for concluding an EU IIA? Or should they be concluded as mixed agreements? What are the implications?

b) Concluding EU international Agreements

The creation of a broad common investment policy raises a number of questions regarding its substance. The development of an EU investment policy has sparked a broad debate within EU institutions and Member States regarding the future orientation of EU IIAs. According to all EU institutions, comprehensive EU IIAs will aim to integrate traditional, BIT-based investment protection norms with investment liberalization provisions, similar to the ones found already under a number of bilateral EU association and free trade agreements (FTAs). The comprehensive nature of future EU IIAs has been affirmed by the Council, which has authorized the Commission to negotiate the investment chapters of the FTAs with India, Singapore and Canada following “the Member States’ experience and best practice regarding their bilateral investment agreements”.

Within this framework, the conclusion of future EU Investment Agreements raises a number of questions concerning the substantive content of future EU IIAs, the participation of the EU and its Member States in their conclusion and management. In particular, the question of participation of the EU and its Member States in investor-state arbitration under future EU IIAs has attracted considerable attention, given the EU law, international law and financial aspects that are raised. In that regard the pending EU Regulation proposal on financial responsibility raises a number of interesting questions

Questions for consideration:

- What should be included in future EU IIAs? Should they follow the approach of its Member State BITs, follow recent trends in international investment arbitration (e.g. NAFTA), or take an autonomous approach?
- How do EU investment agreements fit within EU external relations objectives?
- What limits does the autonomy of EU law impose regarding the conclusion of EU IIAs?
- What should be the role of Member States under IIAs and in particular in investor-state arbitration? Should they participate?

c) Case study: Transatlantic Trade and Investment Partnership

TTIP presents a milestone in international economic law. This is so, not only due to its coverage that includes the world's most important economies, but also due to the influence that it can exert on future trade and investment negotiations. TTIP has drawn the widespread attention of traders, investors, NGOs and the civil society alike. Considering its vast impact, its negotiations have been the subject of much debate, in particular those relating to investment law. The inclusion of Investor-State Dispute Settlement has been particularly controversial.

In that context, we'll discuss why TTIP has attracted attention, and discuss how the EU's proposals aim to address them.

Basic Bibliography

- 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", Brussels 7.7.2010, COM (2010)
- Regulation 912/2014 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 agreements to which the European Union is a party
- Commission Staff Working Document, 'Report on Public Consultation on ISDS in TTIP', 14.
- TTIP proposal on ISDS available at: http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf
- W. Shan and S. Zhang, 'The Treaty of Lisbon: Half way toward a Common Investment Policy', 21(4) *European Journal of International Law* (2011) 1
- Reinisch, "The EU on the Investment Path – *Quo Vadis* Europe? The Future of EU BITs and other Investment Agreements", SSRN paper available online at <http://ssrn.com/abstract=22361>
- Angelos Dimopoulos, 'The involvement of the EU in investor-state dispute settlement: A question of responsibilities' (2014) 51 *Common Market Law Review*, Issue 6, pp. 1671-1720

More information and public documents are available at:
http://ec.europa.eu/trade/policy/accessing-markets/investment/index_en.htm

Teaching methodology	Frontal lecture 3 hours Active participation 1 hours
Language	English
Location	EPLO Headquarters, Sounion
General note	N/A