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THE TREATY OF LISBON AND FOREIGN INVESTMENT:
CROWNING A NEW KING?

An Early Assessment of the Treaty of Lisbon's Impact on the Distribution of Foreign Investment Policy Powers Between the EU and its Member States

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ABSTRACT

When the much-debated Treaty of Lisbon finally came into force on the 1st of December 2009, it introduced "foreign direct investment" as a new explicit competence within the European Union's ("EU") Common Commercial Policy ("CCP"). Albeit heartily welcomed by, inter alia, the European Commission, this extension of the EU's exclusive external powers is not unproblematic. The most fundamental issue is that Article 207(1) of the Treaty on the Functioning of the European Union ("TFEU") leaves considerable leeway for different interpretations on the scope of the Union's new foreign investment policy powers. Another issue that the expansion of the CCP brings to the fore is the fate of the Member States' network of existing investment commitments: will the Member State be able to uphold the vast amount of bilateral investment agreements ("BITs") that they have concluded individually before the coming into force of the Treaty of Lisbon without contravening their duties under EU law or are they under an obligation to amend or terminate these agreements to "make room" for the exercise of the EU's newly-introduced treaty-making power?

The main conclusion of this paper, which deals with both of the aforementioned issues, is that the Members States will retain key powers in the field of international investment despite the widening of the CCP. In more detail, it is submitted that Article 207(1) TFEU does not cover foreign portfolio investment. Further, there are arguments that suggest that policies on investment protection will not fall within the ambits of the amended CCP. The validity of these arguments, however, is subject to debate and it might ultimately be a matter for the European Court of Justice to decide whether Article 207(1) TFEU covers investment protection or not.

When it comes to the Member States' existing BITs, I argue that the coming into force of the Treaty of Lisbon does not render the agreements in question invalid, nor impose a general obligation on the part of the Member States to terminate or amend them. Indeed, it is incumbent upon the Member States to take necessary steps to remove any incompatibilities that might arise between their BITs and EU law, but this more specific amendment obligation was applicable already under the Treaty of Nice. Moreover, there is nothing that suggests that the risk of conflicts between the Member States' existing BITs and EU law would be greater under the Treaty of Lisbon than before its entry into force.

LIST OF ABBREVIATIONS

ASEAN	Association of South-East Asian Nations
BIT	Bilateral Investment Treaty
CCP	Common Commercial Policy
ECJ	European Court of Justice
EC	European Community
EU	European Union
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Service
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
IIA	International Investment Agreement
IMF	International Monetary Fund
MAI	Multilateral Agreement on Investment
NAFTA	North American Free Trade Agreement
NGO	Non-Governmental Organization
OECD	Organization for Economic Co-operation and Development
RTA	Regional Trade Agreement
SCC	Arbitration Institute of the Stockholm Chamber of Commerce
TEC	European Community Treaty
TFEU	Treaty on the Functioning of the European Union
TRIMS	Agreement on Trade-Related Investment Measures
TRIPS	Agreement on Trade-Related Intellectual Property Rights
UNCITRAL-RoA	United Nations Commission on International Trade Law Rules of Arbitration
UNCTAD	United Nations Conference on Trade and Development
US	United States of America
WTO	World Trade Organization

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1. INTRODUCTION

1.1 BACKGROUND

Throughout the last century, there has been a significant increase of transnational and -regional investment activities.[1] This development has not only made foreign investment[2] a key component in the functioning of the modern global economy – generally believed to promote international trade and to foster economic growth – but also instigated demands for a coherent legal framework governing and affording protection for international investments worldwide. All the attempts to fashion a multilateral instrument of such kind – from the Havana Charter of 1948[3] to the Organization for Economic Co-operation and Development's ("OECD") Multilateral Agreement on Investment ("MAI")[4] – have, however, resulted in failure; there is neither any coherent, encompassing set of binding multilateral investment rules in force today[5], nor any realistic prospect that such an instrument will see daylight in the foreseeable future.[6]

[1] See e.g. Froot 1993, p. 27; Hjälmroth and Westerberg 2009, p. 5; OECD 1998, pp. 1-11.

[2] Regarding the term "foreign investment", see infra, pp. 10-11; Sornarajah 2004, pp. 7-18; Graham and Krugman 1991, p. 7.

[3] The Havana Charter of 1948, which contemplated the establishment of an International Trade Organization, included provisions on foreign investment. These provisions were subject to heavy criticism from business groups and never came into force. See infra, p. 12; Fawcett 1949; Sornarajah 2004, p. 269.

[4] The MAI, which was negotiated within the OECD during 1995-1998, failed for a variety of reasons, including strong protests from NGOs, opposition from developing countries, as well as insufficient agreement amongst developed nations on the norms of investment protection. See infra, pp. 12-13; Sornarajah 2004, pp. 296-297.

[5] This does not mean that there is a complete shortage of multilateral investment-related rules. Certain WTO agreements – in particular the GATS, but to some extent also the TRIMs and the TRIPs – contain provisions relating to specific aspects of foreign investment. Moreover, there are certain multilateral disciplines in place dealing with liberalization of capital movements, such as the OECD's Code of Liberalisation. Due to their limited scopes, none of these instruments can however be claimed to constitute an overall multilateral framework specifically dedicated to foreign investment. See infra, pp. 12-14; Sornarajah 2004, pp. 269-314; Eilmansberger 2009, p. 383 note 1; Hjälmroth and Westerberg 2009, p. 15.

[6] The possibility of such an instrument being concluded within the WTO are second to none, since foreign investment – one of four "Singapore issues" that were agreed upon at the Second Ministerial Conference of 1996 – was dropped from the agenda of the Doha round in 2004. See the General Council's post-Cancún decision, available at:

In the absence of a multilateral legal framework for foreign investment, capital exporting and capital importing countries have afforded protection for their respective interests by entering into bilateral, regional and multilateral international investment agreements (”IIAs”)[7].[8] The number of such agreements has increased dramatically over the past 20 years, leading to ”… an exceedingly complex landscape for transnational investment activities”[9] with more than 5200 IIAs in force worldwide and numerous additional agreements in the melting pot.[10]

The European Union (”EU”) and its Member States have played a considerable role both in the more recent attempts at forging a comprehensive legal framework for foreign investment at the multilateral level, and in the proliferation of IIAs.[11] This does not mean, however, that they have conducted a common foreign investment policy at the international stage. Despite the gradual widening of the EU’s external powers through treaty-amendments and the European Court of Justice’s (”ECJ”) expansive interpretation of the Common Commercial Policy (”CCP”), competences to conclude international agreements on foreign investment with third countries have – at least up until the entry into force of the Treaty of Lisbon – predominantly been left in the hands of the Member States.[12] In pursuit of their respective national interests, these nations have exercised their powers to conclude a substantial

http://www.wto.org/english/tratop_e/dda_e/ddadraft_30jul04_e.pdf (retrieved 2010-03-01). Also see infra, p. 13.

[7] In this paper, IIAs refers to international agreements that contain provisions on different aspects of foreign investment. Such investment-related agreements may be (1) FTAs, RTAs as well as various multilateral agreements, that inter alia includes provisions for the promotion, liberalization and/or protection of investment, and (2) BITs, i.e. bilateral treaties for the promotion, protection and, in some cases, liberalization of investment. The main difference between the first and the second category of IIAs is that the agreements in the first category typically cover a broad range of policy areas, whereas BITs exclusively or at least predominantly regulate investment issues. See UNCTAD 2006, p. 1 note 1; Eilmansberger 2009, p. 384.

[8] It should be noted that certain aspects of foreign investment, such as the right to compensation for expropriation, also might be subject to protection under customary international law. See infra, p. 11 and e.g. Sornarajah 2004; Kishoiyian 1994. For an opposing view, see e.g. Al Faruque 2004; Porterfield 2006.

[9] Eilmansberger 2009, p. 385.

[10] UNCTAD 2006, p. 1; Eilmansberger 2009, p. 384 note 9; Sornarajah 2004, p. 204; Ceyssens 2005, p. 259.

[11] Ceyssens 2005, pp. 262-268.

[12] Eilmansberger 2009, pp. 389-394; Ceyssens 2005, pp. 260-262.

amount of bilateral investment treaties ("BITs")[13], provide domestic companies with overseas investment insurance schemes[14], and, to a lesser extent, enter into binding and non-binding IIAs.[15]

The EU, in contrast, has not concluded any international agreements that exclusively or predominantly deal with foreign investment.[16] Due to its relatively circumscribed external powers and negotiating mandates in the field of foreign investment under the Treaty of Nice, the Union has not even been able to negotiate and conclude any multilateral or regional IIAs that include provisions on post-entry protection of investments without the participation of its Member States.[17]

1.2 PROBLEM DEFINITION

The regime for foreign investment policies under the Treaty of Nice – according to which the Member States were largely free to conduct their own diverse foreign investment schemes and the EU did not have sufficient competences to unify or even coordinate them effectively – was subject to severe criticism from, in particular, the European Commission. This institution, which made the case for an exclusive EU competence of foreign investment already at the Intergovernmental Conferences leading to the Treaty of Amsterdam[18], has stated that the procedures under the Treaty of Nice for conclusion of IIAs at the regional level are excessively burdensome and, consequently, detrimental to the capability of the EU to compete with e.g. the member countries of the North American Free Trade Agreement ("NAFTA"). In contrast to the EU, the NAFTA countries have been able to include far-reaching investment provisions in most of their recent trade agreements:

> *"In comparison to NAFTA countries' agreements, EU agreements and achievements in the area of investment lag behind because of their*

[13] Germany is the leader of the pack with more than 140 BITs, whereas most Member States are party to approximately 20-40 BITs each. See infra, p. 31; Radu 2008, p. 238; Ceyssens 2005, p. 263.
[14] Ceyssens 2005, p. 264.
[15] The member states' historical conduct of foreign investment policies is described in more detail below, see infra pp. 31-32.
[16] Eilmansberger 2009, p. 387.
[17] Mola 2008, p. 16; Ceyssens 2005, pp. 265-268.
[18] Krajewski 2005, p. 111.

> *narrow content. As a result, European investors are discriminated vis-à-vis their foreign competitors and the EU is losing market shares."*[19]

In addition to improving the EU's abilities in a context of "competitive regionalism"[20], the European Commission has argued that an exclusive competence to deal with foreign investment matters would strengthen the EU as an actor in multilateral negotiations on foreign investment by clarifying that the European Commission is the sole represent of the Member States internationally, while coordination with national governments is dealt with internally, i.e. within the Council of Ministers.[21] Finally, the European Commission – not only in words, but also in deeds – has pointed at the potential for conflicts between EU law and Member States' obligations under BITs that the distribution of competences under the Treaty of Nice entailed. When it comes to deeds, the European Commission has, inter alia, forced a number of accession countries from Central Eastern Europe to re-negotiate certain BITs that they had concluded with the United States as these agreements contained non-discrimination guarantees that were in violation of preferential treatment obligations under EU law.[22] More recently, the European Commission initiated infringement proceedings against Finland, Denmark, Sweden and Austria, claiming that some of their pre-accession BITs with third countries include capital transfer clauses that are incompatible with Articles 57(2), 59 and 60(1) Treaty establishing the European Community ("TEC").[23]

To the delight of the European Commission, the drafters of the European Constitution shared its views on the merits of the Treaty of Nice's distribution of foreign investment policy competences and proposed a transfer of powers to the EU.

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[19] European Commission, *Issues Paper: Upgrading the EU Investment* Policy, 30 May 2006, available at: http://www.iisd.org/pdf/2006/tas_upgrading_eu.pdf (retrieved 2010-03-03), p. 1.

[20] Mola 2008, p. 2.

[21] Ceyssens 2005, p. 269.

[22] See *Understanding Concerning Certain US-BITs*, signed by the US, the European Commission, and acceding and candidate countries for accession to the EU, 22 September 2003, available at http://www.state.gov/s/l/2003/44366.htm (retrieved 2010-03-03).

[23] The ECJ subsequently found that Sweden, Austria and Finland all had violated Article 307(2) TEC by not taking appropriate action to renegotiate the BITs to make them compatible with their obligations under EU law. See Cases C-205/06 and C-249/06 *Commission v. Austria and Sweden* [2009] ECR I-0000, and Case C-118/07 *Commission v. Finland* [2009] nyr. The case against Denmark was closed following a notification that Denmark would terminate the BIT that included provisions that violated its obligations under EU law.

This proposal was upheld at the Intergovernmental Conference in Lisbon 2007 and made its way – in unaltered shape – into to the Treaty of Lisbon. When this much-debated treaty finally came into force on the 1st of December 2009, it thus introduced ”foreign direct investment” as a new explicit competence within the CCP defined in Article 207 Treaty on the Functioning of the European Union (”TFEU”).

Albeit heartily welcomed by the European Commission and many other influential actors within the EU, the addition of ”foreign direct investment” as a new explicit competence under the umbrella of the Union’s CCP is not unproblematic. The most fundamental issue is that the Treaty of Lisbon fails to explain how the term ”foreign direct investment” in Article 207 TFEU are to be understood, leaving considerable leeway for different interpretations on the scope of the Union’s new foreign investment policy powers. While it is clear that this novelty among the Union’s express treaty-making powers is of exclusive nature, at least three principal questions are left unanswered[24]:

I. Does the CCP under the Treaty of Lisbon cover both international investment according to the traditional definition of foreign direct investment, and foreign portfolio investment?

II. May policies based on the new foreign investment competence only address market access issues related to new investments, or also non-discrimination standards of treatment and protection for established investments?

III. Must all measures based on the new foreign investment competence be aimed at liberalization or may the EU also use its new express external powers under Article 207 TFEU to regulate foreign investment in the public interest?

The answers to the questions posed above are of fundamental importance for the understanding of the future of foreign investment policy within the EU. The reason for this is that the delimitation of the scope of the EU’s new exclusive competence in the foreign investment sphere will determine both the extent to which the EU will be able to negotiate and conclude IIAs without the participation of the Member States,

[24] Some commentators have indeed swiftly concluded that the Treaty of Lisbon grants the EU an explicit and exclusive competence to conclude international agreements covering all aspects of international investment, creating a solid foundation for the creation of a common EU policy on foreign investment. Other observers, however, have rejected such far-reaching conclusions regarding the allocation of foreign investment powers under the Treaty of Lisbon and argues in favor of a much more narrow reading of the EU’s CCP. For an overview of diverse interpretations of the reach of the EU’s new foreign investment competence, see Mola 2008, pp. 14-15; Ceyssens 2005, pp. 273-281.

and, inversely, the EU's possibility of hindering the Member States from entering into new agreements of such kind on their own.

Another issue that the expansion of the CCP brings to the fore is the future of the Member States' network of existing investment commitments. As was briefly touched upon in the preceding section, the Member States have concluded numerous BITs with third countries, without the part-taking of the Union. In case the expansion of the CCP indeed grants the EU an exclusive external power to govern policies that are normally covered in such agreements, it is not entirely clear what impact this will have on the Member States' BITs that were concluded before the entry into force of the Treaty of Lisbon. While there is nothing to support that the BITs in question would become invalid under international law as a result of the mere extension of the EU's exclusive external powers, it is not far-fetched to question whether the Member States will be able to uphold these agreements without contravening their duties under EU law or if they, conversely, are under an obligation to amend or terminate the BITs to "make room" for the exercise of the EU's newly-introduced treaty-making power.

As will be further developed in the following section, this paper is concerned with both the issue of delimiting the scope of the Union's new foreign investment policy powers and assessing the impact of the Treaty of Lisbon on the Member States' existing investment commitments vis-à-vis third countries.

1.3 PURPOSE

The primary aim of this paper is to assess the impact of the Treaty of Lisbon on the distribution of foreign investment policy powers between the EU and its Member States. In essence, the paper tries to answer the following question:

> *Will the Treaty of Lisbon dethrone the Member States and crown the EU as the new supreme sovereign in the foreign investment field?*

To this end, the paper is focused on determining whether the Treaty of Lisbon's extension of the EU's CCP amounts to *either* a complete *or* a partial transfer of foreign investment powers from the Member States to the Union. In this context, a complete transfer of foreign investment competences implies that the Treaty of Lisbon grants the EU an exclusive competence to promote and regulate all types of investments in relation to third countries by entering into bilateral and multilateral

agreements that covers all aspects – from market access issues to post-entry standards of treatment and investment protection – of foreign investment. A partial transfer of foreign investment policy powers, in turn, would be the case if the Member States retain any foreign investment competence, which would effectively hinder the EU from entering into investment agreements vis-à-vis third countries without the participation of the Member States.

A secondary purpose that the paper attempts to fulfill is to provide a broad analysis of the practical implications of the introduction of "foreign direct investment" as a new policy area in the Union's CCP. In more detail, the paper seeks to explain how the coming into force of the Treaty of Lisbon will affect the Member States' possibility of continuing their individual foreign investment policy schemes and, conversely, the EU's future chances of uniting these schemes into a common EU foreign investment policy. The paper will also look into the effects that the Treaty of Lisbon will have on the great number of BITs that the Member States individually have negotiated and signed before this treaty became effective on the 1st of December 2009.

Finally, an overall aim of this paper is to shed light on an issue regarding the interpretation and practical implications of the Treaty of Lisbon that has received comparatively little attention both in the media and among scholars.

1.4 METHODOLOGY AND MATERIAL

This paper is primarily based on a legal positivist study of the traditional sources of law for the EU. The material that constitutes the foundation for the analysis and conclusions presented below thus includes primary law, secondary law – including international agreements – and supplementary law. The latter category of legal instruments includes general principles of law, international law and, perhaps most importantly, the dynamic case law of the ECJ.

To achieve the aim of assessing the impact of the Treaty of Lisbon on the distribution of foreign investment policy powers between the EU and its Member States, I have not been able to limit my study to the traditional sources of EU law. Thus, in addition to these sources, I have consulted legal doctrine within the areas of EU law and international investment law, as well as international instruments within the field of foreign investment, such as BITs. To some extent, I have also made use of notices and issue papers from the European Commission.

1.5 LIMITATIONS

The scope of this paper is limited to assessing the impact of the Treaty of Lisbon on the division of competences between the EU and to predict its practical implications for the conduct of foreign investment policy within the EU, as well as for the status of the Member States' existing BITs. To provide the reader with a solid theoretical foundation for the analysis and conclusions presented in Chapters 3 and 4 respectively, however, the paper begins with a general introduction to the concept of foreign investment and to the treaty rules and case law that governs the external identity and powers of the Union. Since these sections only are instrumental for the understanding of the paper's analysis and conclusion, they have intentionally been formulated in a comprehensive fashion and should not be regarded as an in-depth account for any of the subject-matters that they concern.

The last enlargement round of the EU transformed a number of existing BITs between EU-15 countries and Central and Eastern European Countries ("CEECs") from extra-EU BITs to intra-EU BITs. This has created tension between, on the one hand, the Member States' obligations under those agreements, and, on the other hand, their duty to comply with internal EU law. The risk of this tension between intra-EU BITs and internal EU law turning into actual conflict is not purely theoretical; in a number of recent investment disputes under intra-EU BITs, the arbitral tribunals have had to face "… jurisdictional challenges based on EC law, or had to deal with the argument that EC law needs to be taken into account when applying and interpreting certain BIT provisions."[25] As was touched upon in section 1.2 above, the ECJ has even taken the stance that some provisions in Member States' existing BITs with third countries are incompatible with internal EU law. Although both interesting and of current interest, these issues concern internal EU law, rather than the reach of the EU's external powers, and are thus, at least in principle, outside the scope of this paper.

A limitation that concerns the reliability of the conclusions drawn in this paper, rather than the scope of the study, is that the Treaty of Lisbon, at the current, only

[25] Eilmansberger 2009, p. 388. Among the arbitral awards that highlight the potential for conflicts between internal EU law and intra-EU BITs are ICSID Case No. ARB/03/16, *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, October 2006; ICSID Case No. ARB/04/15, *Telenor Mobile Communications A.S. v. Republic of Hungary*, September 2006. Also see Söderlund 2007, pp. 455, 466.

has been in force for a few months. As a consequence, there is yet no relevant jurisprudence from the ECJ that directly relates to the distribution of foreign investment powers under the Treaty of Lisbon, nor to the interpretation of the term ”foreign direct investment” in Article 207 TFEU. Furthermore, there are presently not many legal books or articles available that deal exclusively or even predominantly with the issue of understanding the reach of the EU’s foreign investment policy powers under the Treaty of Lisbon. All in all, this means that the analysis and conclusions presented further below in this paper are based on a comparatively meager collection of legal sources and should, accordingly, be regarded as preliminary, rather than definitive.

1.6 DISPOSITION

The rest of this paper is structured as follows: In the next chapter, *2. Theoretical Foundation*, I will first describe the general concept of foreign investment and explain the distinction that is made between, on the one hand, foreign direct investment, and, on the other hand, foreign portfolio investment. Moreover, I will give an overview of the multitude of IIAs that make up the core of international investment law, i.e. multilateral investment instruments, regional investment-related agreements and BITs.

In the ensuing chapter, *3. Analysis*, I first explore the division of external competences between the EU and its Member States with regard to foreign investment before the coming into force of the Treaty of Lisbon. I also look into the EU’s and the Member States’ conduct of foreign investment policy pre-Lisbon. Thereafter, I will attempt to interpret and establish the reach of the express external power on foreign investment that is granted the Union by the inclusion of ”foreign direct investment” as a new area in the CCP under the Treaty of Lisbon. Finally, I analyze and discuss the practical implications of the transfer of foreign investment powers from the Member States to the Union as regards both the future conduct of foreign investment policy and Member States’ BITs that were concluded before the day that the Treaty of Lisbon became effective.

In the final chapter, *4. Conclusion*, I will present my final conclusions regarding the scope of the EU’s enhanced powers on foreign investment under the Treaty of Lisbon.

2. THEORETICAL FOUNDATION

2.1 FOREIGN INVESTMENT

2.1.1 Terminology

The notion ”foreign investment” generally refers to all transfers of tangible or intangible assets from the economy of one country (”the exporting country”) to another country’s economy (”the host country”) for the purpose of their use in the latter country to generate wealth for the owner of the assets (”the investor”).[26] In both international investment law and international economics, it is common to categorize such transfers of property across frontiers as either ”foreign direct investment” or ”foreign portfolio investment”.[27] Since this distinction is of great importance for the assessment of the scope of the EU’s new foreign investment policy powers under the treaty of Lisbon, I will introduce it in a general and brief fashion below and explain its significance for the interpretation of the CCP under the Treaty of Lisbon further in section 3.2.2.1.

2.1.1.1 Foreign Direct Investment

Foreign direct investment is commonly explained as an investment made by a natural person or legal entity that is the resident of one country (”the direct investor”) with the aim of acquiring a long-term interest in an unincorporated or incorporated enterprise (”direct investment enterprise”) – a branch or subsidiary, respectively – that operates in another country than that of the direct investor.[28] Since the objective is to acquire a lasting interest in the direct investment enterprise, the direct investor ensures a certain amount of control over that enterprise.[29] The control does not need to be absolute for the investment to be regarded as a foreign direct investment; according to most definitions of foreign direct investment, it is sufficient that the direct investor has an effective voice in the choice of management

[26] Sornarajah 2004, p. 7. In this paper, ”foreign investment” refers to both foreign direct investment and foreign portfolio investment, unless otherwise specified. Moreover, foreign investment is treated as synonymous with ”international investment” and ”cross-border investment”.

[27] Sornarajah 2004, p. 7.

[28] OECD 2008, p. 48.

[29] OECD 2008, p. 48.

of the direct investment enterprise.[30] As a rule of thumb, this control criteria is fulfilled when the investor either owns ten percent or more of the ordinary shares or voting power of the direct investment enterprise or exercises a de facto influence over the management of the enterprise that is equivalent to such a possession.[31]

2.1.1.2 Foreign Portfolio Investment

Foreign portfolio investment, in turn, is often defined in negative terms, as any cross-border investment that is not undertaken with the intention of exercising control over the investment enterprise.[32] The distinguishing element, thus, is the control criteria:

> *"... in portfolio investment, there is a divorce between management and control of the company and the share of ownership in it".*[33]

In practice, foreign portfolio investment often take the form of short-term investments in shares and other securities at a foreign market, which are carried out with objective of realizing a financial return, rather than to control or influence the management of the assets underlying these investments.[34]

2.1.2 International Investment Agreements

International customary law includes certain rules that provide a minimum standard of protection for foreign investors' property rights, including the right to compensation for expropriations.[35] The vast majority of rules that make up the international legal framework governing the promotion and protection of cross-border investment, however, are contained in a complex network of multilateral, regional and bilateral agreements concluded by export and host countries in pursuit of their respective interests.[36]

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[30] This is true for the two most influential definitions of foreign direct investment, which are set out in the IMF's *Balance of Payments Manual* and the OECD's *Benchmark Definition of Foreign Direct Investment* respectively. See IMF 1993; OECD 2008, pp. 48-49.

[31] IMF 1993; OECD 2008, pp. 48-49.

[32] Sornarajah 2004, p. 7; OECD 2008, pp. 22-23.

[33] Sornarajah 2004, p. 7.

[34] OECD 2008, p. 23.

[35] Eilmansberger 2009, p. 384. On the so-called customary minimum standard of treatment for foreign investment, see Sornarajah 2004; Kishoiyian 1994. For an opposing view, see e.g. Al Faruque 2004; Porterfield 2006.

[36] Newcombe & Paradell 2009, p. 1.

2.1.2.1 In pursuit of a Multilateral Investment Code

As was mentioned in section 1.1, there is currently neither an IIA among a large number of states which provides a coherent and all-encompassing code of law on foreign investment, nor any realistic prospect of such an instrument being introduced in the foreseeable future.[37] The first attempt to create such a multilateral instrument was the Havana Charter of 1948 for the ITO, which included provisions on the standard of treatment of international investment.[38] As is well-know, the charter was abandoned in 1950 after it became clear that the United States ("US") Senate would not approve US ratification.[39]

A later endeavor was the Abs-Shawcross Draft Convention on Investment Abroad of 1959. This convention, which essentially was a private initiative backed by the ICC, sought to establish a set of internationally recognizable rules to govern cross-border investment.[40] These rules included, inter alia, a minimum standard of treatment, protection for foreign investors against unreasonable and discriminatory measures by the host state and the right to just and effective compensation for expropriation.[41] The draft convention was espoused by Germany and submitted to the OECD, but the efforts proved to be vain as it never was adopted by its member states.[42]

A more recent attempt – that eventually met the same fate as the Havana Charter and the Abs-Shawcross Convention – is the OECD's MAI. The aim of the MAI's drafters was not a novelty per se; they wanted to establish a broad multilateral framework for international investment, encompassing both foreign direct investment and foreign portfolio investment, with high standards for the liberalization of investment regimes and investment protection and with effective

[37] Supra, p 1.

[38] During the negotiations, articles were proposed that provided for national treatment and most-favored nation treatment in the post-establishment phase of foreign investment, as well as for just compensation for expropriation. As the negotiating states were unable to agree on the standards of treatment, however, the final draft of the Havana Charter only included a general prohibition on unreasonable or unjustifiable actions injurious to foreign investments. See Brewer & Young 1998, pp. 66-68; Newcombe & Paradell 2009, pp. 19-20.

[39] Newcombe & Paradell 2009, p. 20; Sornarajah 2004, p. 269.

[40] Newcombe & Paradell 2009, pp. 21-22.

[41] Newcombe & Paradell 2009, p. 22.

[42] Sornarajah 2004, pp. 87-88.

dispute-settlement procedures.[43] Their strategy, however, was unique: the MAI was to be adopted by the developed states of the OECD first, and then opened for accession by developing states:

> *"Given the ascendancy of neo-liberal tenets in the mid-1990s, it was thought that a code which emphasised those investment protection rules supported by the developed states could easily be drafted among the developed states first and it could then be presented as fait accompli to the developing world."*[44]

The MAI's emphasis on protecting the interests of developed states and multinational corporations proved to be self-destructive. After the provisions of the MAI became publicly available in 1997, the MAI was subject to widespread criticism from non-governmental groups as well as developing states.[45] Dissent also grew among the OECD member states over a range of subjects, such as the protection of the cultural industries of France and Canada from US influence.[46] In the fall of 1998, when France announced its decision to withdraw from the negotiations, it became clear that the MAI would not be adopted by the OECD.[47]

The burial of the MAI did not end the pursuit for a multilateral, comprehensive code on foreign investment. At the Second Ministerial Conference of the World Trade Organization ("WTO"), held in Singapore during 1996, the meeting decided to set up a Working Group to assess, inter alia, the pros and cons of negotiating a multilateral framework of investment rules in the WTO.

Subsequently, at the 2001 Doha Ministerial Conference, the participating ministers emphasized the need to construct "... a multilateral framework to secure transparent, stable and predictable conditions for long-term cross-border investment, particularly facing foreign direct investment".[48] The ministers thus agreed that negotiations regarding such a framework should commence after the

[43] Newcombe & Paradell 2009, p. 55; Sornarajah 2004, p. 291.
[44] Sornarajah 2004, p. 291.
[45] Newcombe & Paradell 2009, p. 55; Sornarajah 2004, p. 296.
[46] Sornarajah 2004, p. 292.
[47] Sornarajah 2004, p. 297.
[48] Cancún Ministerial Meeting 2003, Briefing Notes, available electronically at: http://www.wto.org/english/thewto_e/minist_e/min03_e/brief_e/brief07_e.htm (retrieved 2010-03-01).

next Ministerial Conference, given that an ”explicit consensus” on the modalities of negotiations could be reached.

However, in between the Doha and Cancún meetings, it became increasingly clear that it would be difficult – not to say impossible – to achieve such a consensus. Due to strong conflicts of interests between, on the one hand, the developed countries – a group that strongly argued in favor of starting WTO negotiations – and, on the other hand, most developing countries – a group that generally opposed the idea of bringing foreign investment into the WTO regime – the necessary consensus could not be reached during the talks at Cancún in 2003, and hence the question was subsequently dropped from the Doha agenda.[49]

2.1.2.2 Multilateral Investment Instruments

The fact that all attempts to fashion a comprehensive multilateral code governing foreign investment have been unsuccessful does not mean that there is a complete shortage of multilateral investment instruments.

A. OECD Investment Instruments

To begin with, the OECD has two multilateral investment instruments that in conjunction deals with many facets of both the pre- and post-establishment phase of foreign investment: the Code of Liberalisation of Capital Movements of 1961[50] and the Declaration on International Investment and Multinational Enterprises of 1976[51]. The first-mentioned instrument stipulates legally binding rules for the gradual, non-discriminatory abolition of restrictions to cross-border capital transfers and establishment for non-resident investors, while the Declaration on International Investment prescribes a ”politically binding” commitment for the signatories to accord a treatment no less favorable to established foreign-controlled

[49] The General Council’s post-Cancún decision, available electronically at: http://www.wto.org/english/tratop_e/dda_e/ddadraft_30jul04_e.pdf (retrieved 2010-03-01).

[50] The updated, full text of the OECD Code of Liberalisation of Capital Movements is available electronically at: http://www.oecd.org/dataoecd/10/62/39664826.pdf (retrieved 2010-03-01).

[51] All four elements of the OECD Declaration on International Investment and Multinational Enterprises, i.e. the Guideline for Multinational Enterprises, the National Treatment Instrument, the Instrument on Conflicting Requirements Imposed on Multinational Enterprises and the Instrument on International Investment Incentives and Disincentives, are available at: http://www.olis.oecd.org/olis/2000doc.nsf/LinkTo/daffe-ime%282000%2920 (retrieved 2010-03-01).

enterprises than that accorded in like situations to domestic enterprises.[52] None of the instruments, however, are enforceable to the degree that should be expected of a ”genuine” multilateral investment code; they do not include any binding settlement mechanisms for disputes arising between the contracting parties, nor for investor-State investment disputes. Instead, the OECD instruments rely on consensus building, peer reviews and consultation procedures.[53]

B. GATS, TRIMS and TRIPS

Further, a number of currently effective WTO agreements include provisions that relate foreign investment, namely the General Agreement on Trade in Services (”GATS”), the Agreement on Trade-Related Intellectual Property Rights (”TRIPS”) and the Agreement on Trade-Related Investment Measures (”TRIMS”).[54]

In comparison with TRIPS and TRIMS, GATS is the most important instrument for international investment.[55] GATS covers four modes of supply of services. The third of these modes is defined as the supply of services ”… through commercial presence in the territory of any other Member.”[56] Such commercial presence is ”… in essence an investment activity”[57]; it can e.g. consist of the establishment of a juridical person or branch for the supply of services within the territory of a member state.[58] Accordingly, the GATS could be said to cover foreign direct investment in the services sector.[59] When it comes to substantial provisions, GATS obliges every member of the WTO to accord most-favored-nation treatment to all forms of services and service suppliers of any other member state.[60] In addition to this general requirement, GATS provides for national treatment of services and service suppliers.[61] However, the principle of national treatment does not apply generally across all service sectors; it only applies to those service sectors that are

[52] Houde & Yannaca-Small 2004, p. 5.

[53] Houde & Yannaca-Small 2004, p. 5.

[54] Sornarajah 2004, p. 299; Houde & Yannaca-Small 2004, p. 6; Eilmansberger 2009, p. 383.

[55] Sornarajah 2004, p. 299; Eilmansberger 2009, p. 383 note 1.

[56] Article I GATS.

[57] Houde & Yannaca-Small 2004, p. 6.

[58] Sornarajah 2004, p. 300.

[59] Sornarajah 2004, pp. 299-300.

[60] Article II GATS. It should be noted that GATS permits members to list exemptions to the most-favored-nation obligation upon entry into force of the agreement. Such exemptions shall, in principle, only be valid for no longer than ten years. See Sornarajah 2004, p. 301.

[61] Article XVII GATS.

listed in each member's individual schedule and to the extent that no specific exemptions therein apply.[62]

Like GATS, TRIMS deals directly with foreign investment.[63] Its scope, however, is very narrow, as it only applies to certain investment measures that affect trade in goods (often referred to as "TRIMs").[64] In more detail, TRIMS prohibits all investment measures that are inconsistent with Articles III (national treatment) and XI (quantitative restrictions) of the General Agreement on Tariffs and Trade ("GATT"), such as measures which require particular levels of local procurement by an enterprise ("local content requirements") or which restrict the volume or value of imports such an enterprise can purchase or use to an amount related to the level of products it exports ("trade balancing requirements").[65]

TRIPS is an agreement on standards of protection of intellectual property. The purpose of TRIPS is to ensure that adequate standards of protection of intellectual property exist in all member countries.[66] The core principles of TRIPS are, as in GATT and GATS, national treatment and most-favored-nation treatment. With its foundation in existing treaties on intellectual property,[67] TRIPS also defines minimum levels of protection that each government has to give to different forms of intellectual property of fellow WTO members. These standards of treatment are not directly aimed at providing investment protection. Since intellectual property play an important part in modern cross-border investment, however, TRIPS improves the general conditions for foreign investment.[68]

C. The Energy Charter Treaty

Finally, the Energy Charter of 1994 – a multilateral agreement signed or acceded by 51 states as well as the EU – establishes a legal framework for the protection of foreign investment in the energy sector and means for the settlement of disputes between participating states, and – in the case of investments – between host states

[62] Sornarajah 2004, p. 300; Houde & Yannaca-Small 2004, p. 6; Van den Bossche 2008, p. 391.
[63] Houde & Yannaca-Small 2004, p. 6; Sornarajah 2004, p. 303.
[64] Article 1 TRIMS.
[65] Article 2 TRIMS. Also see the Annex to TRIMS, which contains an illustrative list of TRIMs agreed to be inconsistent with Articles III and XI GATT.
[66] Sornarajah 2004, pp. 301-302.
[67] Primarily the Berne Convention for the Protection of Literary and Artistic Works of 1971, and Paris Convention for the Protection of Industrial Property of 1967.
[68] Sornarajah 2004, p. 301; Houde & Yannaca-Small 2004, p. 7.

and private investors. Although comprehensive in nature and of great importance for many actors in the international investment field, the Energy Charter is sector-specific and thus cannot be labeled as a multilateral code on foreign investment.[69]

2.1.2.3 Regional Investment-Related Agreements

At the current, there are a vast number of regional investment-related agreements, i.e. regional free trade agreements, closer economic partnership agreements, regional economic integration agreements and framework agreements on economic cooperation that include at least one commitment regarding cross-border investment. The most well-known agreement belonging to this category of IIAs – perhaps besides the EU with its far-reaching obligations with regard to, inter alia, freedom of establishment and free capital movements – is NAFTA.[70] The 11th chapter of this comprehensive treaty between the US, Canada and Mexico provides high-level standards for investment liberalization and protection based on the provisions of the earlier US-Canada FTA.[71] The broad range of investments and investors covered by NAFTA's Chapter 11 are entitled to the better of national treatment and most-favored-nation treatment.[72] It also asserts an international minimum standard of treatment of foreign investment, guarantees protection against expropriation without compensation and the right to repatriation of transfers of funds related to investment (including profits, dividends, interest and royalty payments) freely and without delay, and prohibits a wide range of performance requirements in addition to those already banned by TRIMS.[73] NAFTA is also the first treaty with at least two developed states as parties that provides for unilateral dispute resolution at the instance of the foreign investor against the host state.[74]

Another example of a far-reaching regional investment-related agreement is the Association of South-East Asian Nation's ("ASEAN") newly signed ASEAN Comprehensive Investment Agreement, which will supersede the earlier Agreement for the Promotion and Protection of Investments of 1987 when – or rather if – it

[69] Newcombe & Paradell 2009, pp. 53-54.
[70] Sornarajah 2004, p. 288.
[71] Houde & Yannaca-Small 2004, p. 5; Sornarajah 2004, p. 289.
[72] Articles 1102-1104 NAFTA.
[73] Articles 1105-1106 and 1109-1110 NAFTA.
[74] Articles 1115-1120 NAFTA. Also see Sornarajah 2004, p. 289.

enters into force.[75] Like NAFTA, this regional agreement includes both pre-establishment national treatment and most-favored-nation standards, substantive investment protection provisions and an investor-state dispute settlement mechanism.[76]

Most of the approximately 175 regional investment-related agreements currently in force worldwide do not fashion a set of investment rules as encompassing and strong as those of NAFTA and ASEAN Comprehensive Investment Agreement.[77] A large group of regional investment-related agreements only include investment rules – of varying character, strength and enforceability – that are aimed at liberalizing investment flows. There is, however, an ongoing trend of concluding regional investment-related agreements that goes beyond liberalization of capital flows and provides for e.g. national treatment and most-favored-nation treatment in the post-establishment phase of foreign investment. It could thus be said that although NAFTA and ASEAN Comprehensive Investment Agreement in terms of scope are not representative for the collective of regional investment-related agreement currently in force, they might very well be models for future regional investment-related agreements.[78]

2.1.2.4 Bilateral Investment Agreements

Despite the existence of multilateral investment instruments and regional investment-related agreements, BITs remain the preferred legal instrument in the field of international investment. According to the United Nations Conference on Trade and Development ("UNCTAD"), there are more than 2600 BITs in force worldwide today.[79] Traditionally, these agreements have been agreed by unequal parties, namely between a developed country seeking to export capital and a developing state keen to attract capital.[80] Although a growing number of BITs have

[75] The ASEAN Comprehensive Investment Agreement is seen as a step towards realizing the vision of an ASEAN Economic community. It was signed by the ASEAN ministers on the 26th of February 2009 and will come into force as soon as it has been ratified by all members of ASEAN. An electronic copy of the agreement is available at: http://www.asean.org/documents/FINAL-SIGNED-ACIA.pdf (retrieved 2010-03-01).

[76] See especially articles 5-6, 13-14, 27-41 ASEAN Comprehensive Investment Agreement.

[77] Houde & Yannaca-Small 2004, p. 3; Eilmansberger 2009, p. 384 note 9.

[78] Hilaire and Yongzheng 2004, p. 603; Mola 2008, p. 8.

[79] UNCTAD 2009, p. 2.

[80] Houde & Yannaca-Small 2004, p. 4; Sornarajah 2004, p. 204.

been concluded among developing nations in recent years[81], it is still often possible to identify one of the parties to a given BIT as a capital exporter vis-à-vis the other party:

> *"Though the treaty contemplates a two-way flow of investments between the states parties to the treaty, it is usually only a one-way flow that is contemplated and feasible in reality in the context if the disparities of wealth and technology between the two parties."*[82]

The chief aim of BITs is the reciprocal encouragement, promotion and protection of investments in the contracting parties' respective territories by companies based in either country.[83] When it comes to the BITs' scope and substantive provisions, there are two basic "models" or "templates" currently in use:[84]

I. The European Model, based on the Abs-Shawcross Convention.

II. The North American Model, developed by the US in the 1980s and regularly updated thereafter.[85]

Both of these models encompass provisions within the following major areas: admission and treatment of investment; transfers; key personnel; expropriation; and dispute settlement.[86] The principal difference between the two model BITs relates to the reach of their respective treatment standards. While the European Model only includes treatment standards for established investments, i.e. investment protection, the North American Model's treatment provisions apply to investment in both the pre-establishment and the post-entry phase of foreign investment.[87] Another major distinction between the two models is that the North

[81] UNCTAD 2009, p. 4.

[82] Sornarajah 2004, p. 207.

[83] Franck 2007, p. 338; Eilmansberger 2009, p. 385; Houde & Yannaca-Small 2004, p. 4.

[84] Eilmansberger 2009, p. 386; Houde & Yannaca-Small 2004, p. 4.

[85] This model of BITs is used by, inter alia, the US, Canada and Japan. See Eilmansberger 2009, p. 386. Examples of BITs based on the North American model are available electronically at: http://www.ustr.gov/trade-agreements/bilateral-investment-treaties/bit-documents (retrieved 2010-03-01).

[86] Houde & Yannaca-Small 2004, p. 4.

[87] Eilmansberger 2009, p. 386.

American model – like NAFTA – encompass provisions to discipline the signatories use of performance requirements.[88]

When it comes to protection for established investments, the European Model and the North American Model feature more or less the same concepts: assurances that investments will receive national treatment and/or most-favored-nation treatment, guarantees of appropriate compensation for expropriation, undertakings to abstain from unreasonable or discriminatory measures, free transfer of funds related to investment (such as profits, dividends, interest and royalty payments) and commitments that investments will receive full protection and security.[89] Another central feature of BITs – regardless of whether they are founded on the European Model or North American Model – is that they include mechanisms for State-to-State and investor-State dispute settlement.[90] As regards the latter form of disputes, investors are commonly entitled to submit their claims to an arbitration institution, such as the International Centre for Settlement of Investment Disputes (”ICSID”), the Arbitration Institute of the Stockholm Chamber of Commerce (”SCC”) or the International Chamber of Commerce (”ICC”), or initiate ad hoc arbitration in accordance with the United Nations Commission on International Trade Law Rules of Arbitration (”UNCITRAL-RoA”).[91]

2.2 THE EXTERNAL IDENTITY AND POWERS OF THE EUROPEAN UNION

The EU is recognized as an international legal person with a wide array of treaty-making powers that allows the Union to enter into international relations. As will be developed below, the primary legal basis for the EU’s external powers is the existence of treaty provisions that explicitly grants the EU authority to act externally. Alongside these express treaty provisions, the ECJ has developed a complex theory of implied external powers, according to which external powers, in some cases, may flow from express powers in the internal sphere or from the adoption of internal measures.

[88] See supra, p. 17.

[89] Houde & Yannaca-Small 2004, p. 4; Franck 2007, p. 342.

[90] Franck 2007, pp. 343-344.

[91] Franck 2007, p. 344.

2.2.1 Express External Competences

The principle of conferred powers, contained in Article 5 Treaty on European Union ("TEU")[92], stipulates as follows:

> *"... the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties [TEU and TFEU] to attain the objectives set out therein."*

In accordance with this fundamental principle, the EU can only enact policies and take measures within the limits of the powers conferred upon it by the TEU and TFEU (jointly referred to as "the Treaties"). Applied to external competences, this principle suggests that the EU is competent to conclude international agreements only to the extent that the Treaties explicitly grant it such authority. Such express treaty-making powers are found in a number of provisions, of which commercial agreements within the CCP enshrined in Article 207 TFEU[93], and association agreements under Article 310 TEC, arguably are the most important.[94] Other examples of provisions that explicitly confer external powers to the EU are Article 219 TFEU[95] concerning monetary or foreign exchange regime matters, Article 186 TFEU[96] regarding international cooperation in research and technological development, Article 191(4) TFEU[97] on environmental cooperation, and Article 211 TFEU[98] that grants the EU external powers in the development cooperation field.

2.2.2 Implied External Competences

A clear lesson from the well-known AETR judgment[99], however, is that express conferment is not the only source of external EU competence; such competence

> *"... may equally flow from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the Community institutions."*[100]

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[92] Ex Article 5 TEC.
[93] Ex Article 133 TEC.
[94] See e.g. Hartley 2007, p. 159.
[95] Ex Article 111(1) to (3) and (5) TEC.
[96] Ex Article 170 TEC.
[97] Ex Article 174(4) TEC.
[98] Ex Article 181 TEC.
[99] Case 22/70 *Commission v. Council (AETR)* [1971], ECR 263.

In other words, authorization to act in the sphere of external relations can also emanate implicitly from the system of the Treaties or from provisions prima facie creating competence to act internally by way of secondary legislation in accordance with the so-called doctrine of parallelism between internal and external powers. This doctrine – established in the AETR case and developed in a number of subsequent rulings[101] – implies that external competences exist, without express conferment, in two principle cases:

I. Where the Treaties confer internal competence and the EU has made use of this competence to enact EU legislation laying down common rules (”the AETR-formula”).[102]

II. Where the Treaties confer internal powers for the purpose of achieving a certain goal and a parallel external competence is necessary in order to achieve that objective and it cannot be attained by the adoption of autonomous rules (”the necessity-formula”).[103]

2.2.3 The Nature of An External Competence: Exclusive or Shared

A given external power – explicit or implied – can either be exclusive or shared. Whereas the former means that the transfer of treaty-making powers to the EU is total, and consequently that Member States lack concurrent external competence,[104] the latter implies that both the EU and its Member States are competent to enter into international agreements.[105]

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[100] Case 22/70, para. 16.

[101] In particular Cases 3, 4 and 6/76 *Kramer* [1976] ECR 1279; Opinion 1/76 *European Laying-up Fund for Inland Waterway Vessels* [1977] ECR 741; Opinion 2/92 *OECD Decision on National Treatment* [1995] ECR I-521; Opinion 1/94 *WTO Agreement: GATS and TRIPS* [1994] ECR I-5267; Opinion 1/03 *Lugano Convention* [2006] ECR I-1145.

[102] Case 22/70, paras. 17-18.

[103] Cases 3, 4 and 6/76 and Opinion 1/94. Also see Dashwood and Heliskoski in Dashwood and Hillion (eds.) 2000, pp. 3-19.

[104] O’Keeffe in Dashwood and Hillion (eds.) 2000, pp. 183-192.

[105] This does not accord the EU and its Member States complete freedom of action. As was developed in Opinion 1/94, para. 108, they are under an obligation of acting in close cooperation due to the requirement of unity in external representation of the EU. See O’Keeffe in Dashwood and Hillion (eds.) 2000, pp. 192-198.

As far as express powers are concerned, the CCP under the TEC was deemed exclusive by the ECJ in Opinion 1/75.[106] In the Treaty of Lisbon, the exclusive nature of the CCP is instead express.[107] Other explicit external competences are shared, such as the external powers to conclude cooperation agreements regarding environmental issues.[108]

Where the EU derives its external competences from the AERTA-formula, they are, simply put, exclusive to the extent that the common rules exhaustively regulate a particular area[109] or the operation of the common rules could be adversely affected if the Member States concluded international agreements relating to the same subject-matter.[110] In contrast, external competences based on the necessity-formula are, as a general rule, shared between the EU and its Member States.[111]

[106] The exclusive nature of the CCP was established in Opinion 1/75 *Understanding on a Local Cost Standard* [1975] ECR 1355.

[107] Article 3 TEFU.

[108] Article 191 TFEU(4), ex Article 174(4) TEC. For an in-depth look at explicit shared competences under the TEC, see Craig and de Búrca 2008, p. 181.

[109] Opinion 1/94, para. 96.

[110] Case 22/70, paras. 17-18.

[111] Since the EU in these cases has the power to enact rules, but has not exercised this competence yet, Member States are competent to assume international commitments until the adoption of Union rules. See Cases 3, 4 and 6/76*;* Opinion 2/91 *ILO Convention* [1993] ECR I-1061. Also see O'Keeffe in Dashwood and Hillion (eds.) 2000, pp. 196-197.

3. ANALYSIS

3.1 THE DISTRIBUTION OF FOREIGN INVESTMENT COMPETENCES PRE-LISBON

This section is devoted to analyzing the distribution of foreign investment competences and assessing the EU's and the Member States' conduct of foreign investment policy before the coming into force of the Treaty of Lisbon. In more detail, I first deal with the limited explicit and implied foreign investment competences that the Treaty of Nice and its predecessors granted the Community. Thereafter, I make some brief remarks about association and cooperation agreements in the context of foreign investment and discuss the historical international investment policy practice of the EU and its Member States. Finally, before moving on to the Treaty of Lisbon, I present some brief conclusions regarding the distribution of foreign investment policy powers pre-Lisbon.

3.1.1 Express Foreign Investment Competences

There was no provision in the TEC that explicitly conferred a general power for the EU to enter into international agreements on foreign investment. Since there are close links and mutual influences between foreign investment and trade one might, however, argue that such a power – despite lack of immediate textual support – was enshrined in the TEC's CCP. The ECJ indeed gave the CCP a broad interpretation in Opinion 1/75, stating that the CCP is, in essence, the Community equivalent of the external trade policy of a state.[112] Moreover, in Opinion 1/78 regarding the International Agreement on Natural Rubber, the ECJ held that the CCP goes beyond traditional aspects of external trade and that the Community must be free to avail itself of more elaborate means than agreements on the removal of customs duties and quantitative restrictions, to further the development of international trade.[113] That the CCP of the TEC would extend to foreign investment in general was, however, denied implicitly in the later Opinion 1/94. In this Opinion, which concerned the Community's competence to conclude the Agreement Establishing the World Trade Organization, the ECJ, inter alia, had to judge whether trade in

[112] Opinion 1/75. Also see Craig and de Búrca 2008, p. 183.

[113] Opinion 1/78 *International Agreement on Natural Rubber* [1979] ECR 2871, para. 44.

services, as defined in the GATS, fell within the scope of the TEC's CCP. The ECJ deemed that services consisting of cross-border supplies not involving any movement of persons were covered by the CCP, as it is not unlike trade in goods. To the contrary, services that entail establishment of commercial presence in the country where the service is to be rendered were not considered to be within the scope of the TEC's CCP.[114] Since such lasting establishment in the host country constitutes a basic characteristic of international investment, it follows that the CCP of the TEC did not comprise the most fundamental aspects of foreign investment.[115] This reasoning was later confirmed in Opinion 2/92, where the ECJ held that international obligations granting national treatment to foreign investors were not within the ambits of the TEC's CCP.[116]

The notion that the EU lacked express foreign investment competences of general scope does not imply that no such competences existed at all pre-Lisbon. After Opinion 1/94 and 2/92, the reach of the CCP was extended – through the Treaties of Amsterdam and Nice – to expressly grant the EU competence to conclude international agreements on international trade in services and the commercial aspects of intellectual property.[117] This external power did indeed cover certain investment issues, such as commercial presence in third countries according to the definition hereof in the GATS.[118] However, for two main reasons its scope and implications were rather limited.[119] First, this express power was confined to the services sector. Secondly, in contrast to other policy areas under the TEC's CCP, it was not exclusive in all instances; the power to conclude international agreements that include provisions on certain investment aspects of trade in services was shared with the Member States where it concerned trade in cultural and audiovisual

[114] Opinion 1/94, paras. 45-47.

[115] Ceyssens 2005, pp. 260; Eilmansberger 2009, p. 389 note 26; Mola 2008, p. 12 note 67.

[116] Opinion 2/92, para. IV 7.

[117] Article 133(5) TEC. See Dashwood in Dashwood and Hillion 2000, pp. 279-286.

[118] Although the competences in Article 133(5) TEC extended to international agreements that cover all four modes of supplying services according to the GATS, it should be noted that the primary aim of this power was to grant the Community competences to conclude agreements designed to remove impediments to the supply of services by non-nationals, rather than to empower the Community to enter into international obligations regarding the protection of non-nationals' establishment of commercial presence in the country where the service is to be rendered. See Dashwood in Dashwood and Hillion 2000, pp. 281.

[119] Mola 2008, p. 12; Eilmansberger 2009, p. 389.

services, educational services, and social and human health service.[120] Consequently, the limited express foreign investment competences that did exist pre-Lisbon had "… little relevance for policies directed at investment in general."[121]

3.1.2 Implied Foreign Investment Competences

In addition to the Community's express, yet limited, external powers to conclude international agreements on investment-related aspects of international trade in services, the TEC granted the EU a number of internal competences for the adoption of measures with regard to inward investment, in particular Article 57(2) TEC on the free movement of capital and Articles 43, 47(2) and 48 TEC Treaty regarding the freedom of establishment.[122] In Opinion 2/92, the ECJ clarified that these provisions – in accordance with the doctrine of parallelism – implicitly conferred certain parallel external powers to the Community. The scope of these powers – that is, the subject-matters which the Community was implicitly empowered to regulate through international agreements – was, however, contested. The same can to some extent be said of their status as either exclusive or shared with the Member States.

3.1.2.1 Article 57(2) TEC and The Free Movement of Capital

Article 57(2) TEC, to begin with, empowered the Council of Ministers to adopt measures on the movement of capital to or from non-member countries involving direct investment, such as investment in real estate, with the aim of achieving free movement of capital with third countries to the greatest extent possible. Although there was neither any explicit reference to international agreements in the wording of this article, nor any reference to the typical procedure for adoption of such measures, it did empower the Community to act in relation to third countries. In Opinion 2/92 the ECJ thus held that the Community had enacted internal legislation falling within the scope of, inter alia, Article 57(2) TEC, which implicitly conferred certain parallel external powers to the Community.[123] Since the internal measures did not cover all relevant aspects of the OECD National Treatment Instrument – and thus not a number of important aspects of foreign investment – these implied powers were, however, not sufficiently encompassing for the Community to

[120] Article 131(6) TEC. Also see Mola 2008, p. 12.

[121] Ceyssens 2005, p. 261.

[122] In particular, see Articles 44, 47(2), 48, and 56-60 TEC. Ceyssens 2005, p. 261; Mola 2008, p. 13.

[123] Opinion 2/92, para. V 6.

conclude the international agreement without the participation of the Member States.

Opinion 2/92 confirmed that Article 57(2) TEC gave rise to external competences. It did, however, not precisely or even approximately delineate the scope of these powers. Most commentators argues that it was a power to conclude international agreements aimed at achieving gradual abolition of restrictions on capital movements within the meaning of Article 56 TEC.[124] Article 56 TEC, in turn, did not define movement of capital, but the ECJ – with reference to the non-exhaustive list of different forms of capital movements in Directive 88/361/EEC[125] – has ruled that the Article in question prohibited e.g. national prohibitions on the creation of mortgages in foreign currency[126], restrictions on the acquisition and disposal of foreign property[127] and measures aimed at hindering or dissuading nationals from obtaining loans or making investments in other countries[128]. This suggest that the implied external competences that emanated from Article 57(2) TEC encompassed issues concerning the market access and pre-establishment phase of foreign investment, whereas fundamental issues regarding post-entry protection of international investments were left outside its reach.

The nature of the external competences implicitly derived from Article 57(2) TEC as either exclusive or shared was a matter of debate. Lorenza Mola and Joakim Karl, on the one hand, stated that it was an exclusive Community power to conclude international agreements covering capital movements within the meaning of Article 57 (2) TEC.[129] Jan Ceyssens and Thomas Eilmansberger, on the other hand, argued that the link of necessity between internal and external action was "… not strong enough to remove corresponding Member State competences."[130] I adhere to the latter view, which is supported by the actual foreign investment practice of the EU

[124] Opinion 2/92, paras. V 6-7. Also see Mola 2008, p. 13.

[125] Directive 88/361/EEC *For the implementation of Article 67 of the Treaty* [1988], OJ L187/5, Annex I.

[126] Case C-464/98 *Westdeutsche Landesbank Girozentrale v. Stefan and Republik Österreich* [2001] ECR I-173.

[127] See e.g. Cases C-302/97 *Konle v. Austrian Republic* [1999] ECR I-3099; C-423/98 *Albore* [2000] ECR I-5965.

[128] See e.g. Case C-439/97 *Sandoz GmbH v. Finanzlandesdirektion für Wien, Niederösterreich und Burgensland* [1999] ECR I-7041.

[129] Mola 2008, pp. 12-15; Karl 2004, pp. 415-416.

[130] Eilmansberger 2009, p. 390; Ceyssens 2005, pp. 260-262.

and its Member States.[131] More importantly, this view was confirmed by the General Advocate's opinion in Cases C-205/06 and C-249/06, who regarding article 57(2) TEC stated:

> *"There is one instance where empowerment leads to an obligation: where the Community has exclusive competence. In that situation, Member States are obliged to refrain from legislating. However, that is not the situation here. Until the Community acts, Member States are free to regulate the movement of capital to and from third countries. In other words, competence is shared."*[132]

3.1.2.2 Articles 43, 47(2) and 48 TEC and The Freedom of Establishment

Articles 43 and 48 TEC provided that natural persons and companies based in one of the Community's Member States should enjoy full freedom of establishment in the territory of other Member States. The core of this freedom consists of the right to national treatment, but it is in no way limited to claims on equal treatment and non-discrimination; in principle, EU law on the freedom of establishment:

> *"… also entails a robust attempt to liberalize the 'single market' such that, whatever their nationality, self-employed individuals and companies can set up business in various locations within that market without encountering unnecessary obstacles."*[133]

Article 47(2) TEC, in turn, empowered the Community to enact directives for the purpose of coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking-up and pursuit of activities as self-employed persons and companies. The Community made use of this internal power to adopt directives on e.g. establishment of self-employed natural

[131] See infra, pp. 31-32.

[132] Cases C-205/06 and C-249/06, Opinion of Advocate General Poiares Maduro, para. 28. This conclusion was not restated in the actual judgment, but it was neither rejected nor is incompatible with the findings of the ECJ. To the contrary, the ECJ noted that "… the Community has still not made use of Article 57(2) EC to regulate the area." See Cases C-205/06 and C-249/06, para. 11.

[133] Craig and de Búrca 2008, p. 805.

persons[134], but did not achieve a complete legislative harmonization with regard to establishment of companies within the EU.

It is by no means self-evident that the provisions on freedom of establishment in the TEC gave rise to external powers, since the TEC specifically pointed out which internal acts (directives) that the Community could use and the procedure for their adoption (co-decision).[135] Moreover, the ECJ has emphasized that Articles 43, 47(2) and 48 TEC do not regulate or empower the Community to enact internal legislation regarding issues related to the access or the exercise of self-employed activities by third country nationals or companies, neither as regards their initial entry into the Union, nor their movement from one Member State to another.[136] Nevertheless, in Opinion 1/94 the ECJ explained that secondary legislation enacted on the basis of Article 47(2) TEC could in principle give rise to an exclusive external competence:

> *"Whenever the Community has included in its internal legislative acts provisions relating to the treatment of nationals of non-member countries or expressly conferred on its institutions powers to negotiate with non-member countries, it acquires exclusive external competence in the spheres covered by those acts. The same applies in any event, even in the absence of any express provision authorizing its institutions to negotiate with non-member countries, where the Community has achieved complete harmonization of the rules governing access to a self-employed activity."*[137]

Due to the limited scope of the internal acts under Article 47(2) TEC, as well as the lack of harmonization of the rules governing access to a self-employed activity, however, the ECJ concluded that the Community did not have exclusive competence in all the areas covered by the concept "freedom of establishment".[138] In fact, the

[134] Directive 2004/38/EEC *On the Free Movement and Residence of EU Citizens and Their Families* [2004] OJ L158/77. Also see Craig and de Búrca 2008, pp. 723-727.

[135] Mola 2008, p. 13. This can be compared with Article 57(2) TEC, which did not specify the kind of measures that the Council may use to realize the aim of free movement of capital.

[136] Opinion 1/94, para. 81.

[137] Opinion 1/94, paras. 95-96.

[138] Opinion 1/94, para. 9.

implied external powers of the Community on freedom of establishment did not even cover all aspects of the services sector.[139]

After the ECJ handed down its ruling in Opinion 1/94, establishment within the meaning of GATS was added to the corollary of external competences under the TEC's CCP.[140] There was, however, still no sound legal basis – in the form of far-reaching internal legislative acts under Article 47(2) TEC – for a corresponding Community treaty-making power in the industrial sector.[141] Neither was there any convincing support that the external competences that emanated from internal measures in the field of establishment would empower the Community to act externally with regard to issues related to investment protection.

3.1.3 Association and Cooperation Agreements

Under the TEC, the Community had explicit support for the conclusion of two special forms of bilateral and multilateral agreements.

First, the Community could create a special tie to non-member countries or international organizations by concluding bilateral or multilateral agreements that establishes an association involving reciprocal rights and obligations, common action and special procedure.[142] According to the ECJ, such association agreements could contain provisions covering the entire scope of the internal policies governed by the TEC.[143] This suggests that the Community could extend its internal policies on, inter alia, free movement of capital and freedom of establishment to third countries. It should be emphasized, however, that this did not in itself infer on the Member States' concurrent competences to conclude IIAs and BITs.

Second, Articles 181 and 181a(3) TEC stipulated that the Community and the Member States could conclude cooperation agreements with developing countries and other non-member countries. Since such cooperation agreements explicitly was to be concluded with respect for the distribution of competences between the Community and its Member States, Articles 181(1) and 181a(3) TEC did not create

[139] For this reason, the GATS could only be concluded by the Community and its Member States as a mixed agreement. See Opinion 1/94, para. 97. Also see Mola 2008, p. 13.

[140] See supra, p. 25.

[141] Mola 2008, p. 14.

[142] Article 310 TEC. ECJ has stated that association agreements establishes special, privileged links with non-member countries, allowing them to take part, at least to a certain extent, in the Communities system. See Case 12/86 *Meryem Demirel v. Stadt Schwabisch Gmund* [1987] ECR 3719, para. 9.

[143] Case 12/86, para. 9.

additional Community foreign investment competences; they merely provided for a special instrument for the achievement of increased economical, financial and technical cooperation with third countries.[144]

3.1.4 The Practice of Foreign Investment Policy

When it comes to the actual practice of foreign investment policy, there is no doubt that the Member States have played a primary role up until the coming into force of the Treaty of Lisbon. As touched upon in Chapter 1, the Member States' preferred instrument for the promotion and protection of cross-border investment has been BITs.[145] Germany is noted as the world's leading signer of BITs; it is party to more than 140 such agreements.[146] Other Member States, such as the United Kingdom and France, are also counted among the world's most active in the field of BITs with more than 100 treaties each, whereas most Member States have concluded approximately 20-40 BITs.[147] Most of these agreements are based on the so-called European Model BIT and have been concluded with developing countries.[148] In addition to concluding BITs, many Member States provide their domestic companies with overseas investment insurances against losses resulting from war, expropriation, restrictions on remittances and other political risks.[149] At the multilateral level, the Member States, but not the EU, have become parties to the legally binding OECD's Code of Liberalisation of Capital Movements, as well as the "politically binding" Declaration on International Investment and Multinational Enterprises.[150]

Due to its limited foreign investment policy powers under the TEC, the EU has neither independently concluded any BIT or other form of comprehensive IIA, nor

[144] Eeckhout 2004, p. 111; Ceyssens 2005, p. 262.

[145] See supra, pp. 2-3.

[146] Data retrieved 2010-03-01 from ICSID's Online Database of BITs, available at: http://icsid.worldbank.org/ICSID/FrontServlet.

[147] See note 146.

[148] Only the OEEC Member States of the EU have concluded BITs with other developed countries. See Ceyssens 2005, pp. 263-264.

[149] Ceyssens 2005, p. 264. Many Member States also provide investment insurance through the World Bank's Multilateral Investment Guarantee Agency. See the Convention Establishing the Multilateral Investment Guarantee Agency of 1985, available electronically at: http://www.miga.org/quickref/index_sv.cfm?stid=1583 (retrieved 2010-03-02).

[150] See supra, p. 14.

adopted any measure on overseas investment insurance schemes.[151] This does not suggest that the EU has been entirely inactive in the foreign investment field; by resorting to the mixed agreement form, the EU has been able to include investment provisions in many of its more recent association and cooperation agreements, e.g. the Euro-Mediterranean Association Agreements[152], the EU-Mexico Economic Partnership, Political Coordination and Cooperation Agreement[153], the EU-South Africa Trade, Development and Cooperation Agreement[154] and the EU-Chile Association Agreement[155]. Many of these agreements only include a basic obligation on the free transfer of capital related to foreign direct investment or stipulate a stand still for pre-entry restrictions on capital movements.[156] There are, however, also association and cooperation agreements that stipulate more ambitious obligations as regards cross-border investment, such as national treatment and most-favored-nation treatment standards for the establishment of companies incorporated in the other contracting party or parties.[157] The mixed agreement form has also been employed by the EU and its Member States to conclude investment-related agreements at the multilateral level, namely the Energy Charter Treaty, TRIMS and TRIPS.[158]

3.1.5 Summary

Although it is hard – not to say impossible – to determine the scope of the EU's foreign investment competences pre-Lisbon with a high degree of precision, it is clear that the Member States were the main actors in the foreign investment play.[159]

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[151] The EU has, however, adopted a number of binding acts governing the promotion of exports by public credits. See e.g. Directive 98/29/EC *On harmonisation of the main provisions concerning export credit insurance for transactions with medium and long-term cover* [1998] OJ L148.

[152] See e.g. EU-Algeria, Association Agreement, OJ L265, 10 October 2005; EU-Egypt, Association Agreement, OJ L304, 30 September 2004; EU-Jordan, Association Agreement, OJ L129, 15 May 2002.

[153] EU-Mexico, Economic Partnership, Political Coordination and Cooperation Agreement, OJ L276, 28 October 2000.

[154] EU-South Africa, Trade Development and Cooperation Agreement, OJ L311/3, 4 December 1999.

[155] EU-Chile, Association Agreement, OJ L352/3, 30 December 2002.

[156] See e.g. EU-Egypt, Association Agreement, Articles 31-32; EU-South Africa, Trade Development and Cooperation Agreement, Article 33.

[157] See e.g. EU- Ukraine, Partnership and Cooperation Agreement, OJ L49/1, 19 February 1998, Article 35; EU-Jordan, Association Agreement, Article 30; EU-Chile, Association Agreement, Articles 130-134, 181-189.

[158] Ceyssens 2005, p. 268.

[159] Eilmansberger 2009, pp. 391-392.

The Community indeed had express external powers regarding investments in the services sector, implied external powers regarding certain aspects of the market access and pre-establishment phase of foreign investment, and authority to include provisions on freedom of establishment and free movement of capital in association agreements. However, these treaty-making competences were not sufficiently encompassing for the EU to be able to conclude comprehensive IIAs on its own. The Member States, on the other hand, were widely free to conclude international agreements on foreign investment without the joint participation of the Community.[160]

In practice, the Member States made use of their foreign investment policy powers primarily to conclude BITs, provide overseas investment insurances for domestic companies against political risks and enter into certain multilateral investments without the joint participation of the EU. With its limited foreign investment policy powers, the EU was not capable of concluding any BITs or comprehensive IIAs. By joining up with the Member States, however, the EU managed to include investment provisions of varying scope and strength in a number of association and cooperation agreements, as well as concluding a small number of multilateral investment-related instruments.

3.2 THE TREATY OF LISBON AND THE NEW FOREIGN INVESTMENT POWERS OF THE EUROPEAN UNION

3.2.1 Introducing A Novelty Into The Common Commercial Policy: Foreign Direct Investment

When the Treaty of Lisbon came into force on the 1st of December 2009, it equipped the EU with its first express external power on foreign investment that, at least prima facie, is of a general nature. To be more precise, Article 206 TFEU[161] provides that the CCP of the Union shall not only be aimed at achieving a gradual liberalization of international trade, but also the gradual abolition of restrictions on foreign direct investment. To this end, Article 207(1) TFEU[162] extends the range of external competences within the ambits of the CCP to include ”foreign direct

[160] In doing so, however, the Member States had to assure that they did not enter into obligations that could interfere with their duties under EU law. Compare Cases C-205/06 and C-249/06. Also see Ceyssens 2005, p. 262; Eilmansberger 2009, p. 392.

[161] Ex Article 131 TEC.

[162] Ex Article 133(1) TEC.

investment". To illustrate the exact textual amendments of the CCP in this regard, I quote relevant parts of the mentioned provisions and their predecessors below (emphasis added):

Article 131 TEC	***Article 206 TFEU***
By establishing a customs union between themselves Member States aim to contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and the lowering of customs barriers.	*By establishing a customs union ... the Union shall contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and on* ***foreign direct investment****, and the lowering of customs and other barriers.*
Article 133(1) TEC	***Article 207(1) TFEU***
The common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies.	*The common commercial policy shall be based on uniform principles, particularly with regard to 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 liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies.*

Pursuant to Article 207(2-3) TFEU, the EU is competent to enact internal legislation as well as conclude international agreements to implement the CCP, and thus to pursue the aim of achieving a gradual abolition of restrictions on foreign direct investment. The decision-making procedure for such measures differs from that of the TEC in two important respects:

I. The consent of the European Parliament is needed for the adoption of international acts and the ratification of international agreements.[163]

II. While qualified majority remains the principal voting rule, unanimity within the Council of Ministers will be needed for the conclusion of international agreements in the field of foreign direct investment, where such agreements include provisions for which unanimity is required for the adoption of internal legislation.[164]

3.2.2 Interpreting the New Competence

In Opinion 1/75, the ECJ stated that the exercise of concurrent powers by the Member States and the Community is impossible in matters that fall within the scope of the CCP.[165] This notion has been codified in the Treaty of Lisbon. Accordingly, Article 3 TFEU explicitly states that the EU shall have exclusive competence in the area of the CCP. It is thus beyond dispute that all matters that falls within the scope of the EU's external competence on foreign direct investment are reserved for the Union. Unfortunately, the same degree of clarity has not been exercised by the makers of the Treaty of Lisbon as regards the actual content of the new competence. Although the Treaty of Lisbon undoubtedly includes foreign direct investment among the policy areas that are part of the Union's CCP, it fails to provide a definition of the term "foreign direct investment". Consequently, the precise scope of the Union's new competence – very much like the reach of the implied foreign investment powers under the TEC[166] – is difficult to appoint. In fact, it is possible to adhere to a number of different interpretations of the Treaty of Lisbon's attribution of external foreign investment competences:

> *"... much leeway may remain to allow different interpretations on the scope of this provision and on the kind of policy measures the EU will be able to put in place vis-à-vis foreign investors."*[167]

For instance, on the one hand, one can commit to a narrow interpretation of the amended CCP, and argue that it only empowers the Union exclusive authority to

[163] Articles 207(3) and 218(6) TFEU.
[164] Article 207(4) TFEU.
[165] Opinion 1/75.
[166] See supra, pp. 26-30.
[167] Mola 2008, p. 14.

conclude international agreements regarding market access.[168] A wide interpretation, on the other hand, implies that the treaty-amendment as regard the CCP gives the Union an exclusive competence that covers not only the market access aspect of foreign investment, but also the promotion, regulation and protection of international investment.[169] As will be shown in the following, I do not entirely confess to either of these contrasting views.

Below, I will first address the task of providing a definition of the term ”foreign direct investment” in Article 207(1) TFEU and investigating the extent to which this definition cover the most important instruments of foreign investment policy. In the ensuing section, I will attempt to determine if the EU’s new competence on foreign direct investment under the Treaty of Lisbon is limited to market access policies on international investment or if it also encompasses policies on standards of treatment for established investments. Thereafter, I examine whether the extension of the CCP is far-reaching enough to encompass investment protection. I also attempt to determine if all measures based on the new foreign investment competence under the Treaty of Lisbon must be aimed at investment liberalization or if the EU just as well may use its new competence to regulate foreign investment in the public interest. Following a brief summary of my inferences regarding the transfer of EU’s foreign investment policy powers under the Treaty of Lisbon, I analyze how the transfer of foreign investment policy powers from the Member States to the EU will affect the future conduct of foreign investment policy, as well as the multitude of BITs concluded by the Member States before the coming into force of the Treaty of Lisbon.

3.2.2.1 Definition of ”Foreign Direct Investment”

Neither the Treaty of Lisbon, nor the original proposal for the extension of the CCP, contains a definition of the term ”foreign direct investment” in Article 207(1). The term ”direct investment”[170] that occurred in Article 57 TEC, however, was

[168] Mola 2008, p. 14; Krajewski 2005, pp. 112-114; Griller 2008, pp. 171-173.

[169] Mola 2008, p. 14.

[170] The terms ”foreign direct investment” and ”direct investment”, in all essentials, refer to the same concept, with the exception that the former explicitly allude to investments that are made in an economy other than that of the investor. For this reason, it is not only possible, but also advisable (or even necessary), to seek guidance in the ECJ’s jurisprudence regarding the term ”direct investment” in

interpreted by the ECJ in compliance with the aforementioned Directive 88/361/EEC.[171] According to this internal act, which is based on the internationally acknowledged definitions provided by the OECD and the International Monetary Fund ("IMF")[172], the term "direct investment" refers to:

> *"Investments of all kinds by natural persons or commercial, industrial or financial undertakings, and which serve to establish or to maintain lasting and direct links between the person providing the capital and the entrepreneur to whom or the undertaking to which the capital is made available in order to carry on an economic activity."*[173]

The IMF's Balance of Payments Manual – one of the international instruments that constitutes a foundation for the definition of direct investment in Directive 88/361/EEC – provides a perhaps more intelligible explanation; it defines foreign direct investment as an:

> *"... investment that is made to acquire a lasting interest in an enterprise operating in an economy other than that of an investor, the investor's purpose being to have an effective choice in the management of the enterprise."*[174]

The definitions quoted above show that the concept "foreign direct investment" in the CCP of the Treaty of Lisbon likely refers to the transfer of tangible or intangible assets from an investor in one country to a natural person or legal entity in another country for the purposes of generating wealth and creating a long-term relationship between the investor and the investment-receiving entity.[175] Moreover, they suggest that foreign direct investment only exist where the investor exercises full or partial control over the investment-receiving entity, and thus, the assets which are transferred into the host country. These characteristics of foreign direct

article 57 TEC when attempting to understand the scope of the amended CCP under the Treaty of Lisbon.

[171] Case C-463/00 *Commission v. Spain and UK* [2003] ECR I-4581; Directive 88/361/EEC, Annex I.

[172] See e.g. IMF 1993; OECD 2008.

[173] Directive 88/361/EEC, Annex I.

[174] OECD, *Balance of Payments Manual* [1980], para. 408.

[175] Ceyssens 2005, p. 274; Eilmansberger 2009, p. 394; Sornarajah 2004, pp. 7-9. The objective of establishing a lasting relationship is emphasized in all internationally acknowledged definitions of foreign direct investment. See supra, pp. 10-11; Eilmansberger 2009, p. 394.

investment – the transfer of capital, the establishment of a long-term relationship and the retaining of control on the part of the investor – indicate that Article 207(1) TFEU encompass, inter alia, long-term ownership of an wholly-owned undertaking, subsidiary or branch in a foreign country, as well as lasting participation in foreign enterprises by, inter alia, the entitlement to at least 10 percent of the ordinary shares or by a long term loan.[176] To the contrary, the CCP does not encompass issues related to investments in financial assets without the expectation of significant management control of the real assets on which the financial assets are based, interests in concessions agreements, contractual rights (such as rights embodied in intellectual property interests), debt interests in business enterprises, ownership interests in tangible and intangible property, such as leases, mortgages, and liens, or any other form of portfolio investment.[177]

To assess the reach of the new foreign investment competences conferred upon the Union by the Treaty of Lisbon, it is expedient to attempt to answer the question: To what extent does the proposed definition of ”foreign direct investment” in Article 207(1) TFEU cover the most important instruments of foreign investment policy?

At the multilateral level, it is noteworthy that the most recent attempt at creating a multilateral framework for regulation foreign investment within the WTO was based on a negotiating mandate that expressly referred to ”foreign direct investment”. This indicates that the – now buried – multilateral negotiations of the Doha round on trade and investment would have fallen squarely under the CCP of the Treaty of Lisbon. It should, however, be noted that some Members of the WTO, most notably the US, advocated a multilateral instrument with a ”… broad, open-ended definition that includes all types of investment, including portfolio investment.”[178] Such an instrument would definitely fall outside the new CCP of the EU as it has been defined above.[179] The same conclusion can be drawn concerning the OECD’s MAI, as it was intended to regulate both foreign direct investment and portfolio investment.[180]

At the bilateral level, the Member States of the EU often conclude BITs that ”… cover every kind of asset having an economic value regardless of whether it allows

[176] Sornarajah 2004, pp. 7-9; Ceyssens 2005, p. 274.

[177] Ceyssens 2005, p. 274; Sornarajah 2004, pp. 7-9.

[178] WTO, *Communication from the United States*, WT/WGTI/W/142, 16 September 2002, para. 1.

[179] Krajewski 2005, p. 112.

[180] Article II(2) MAI.

the investor to participate in the managerial control of an undertaking."[181] Their scope of application thus includes foreign direct investment, but often also interests in concessions agreements, contractual rights, debt interests in business enterprise and a range of other forms of portfolio investment. It can thus be concluded that Article 207(1) TFEU only partially covers the scope of these agreements. The Member States' overseas investment schemes, on the contrary, seem to fall squarely under the amended CCP, as their scope of application often is confined to foreign direct investment.[182]

3.2.2.2 Is The New Competence Limited To Market Access Policies?

Article 206 TFEU states that the primary aim of the CCP – as far as international investment is concerned – is to promote the gradual reduction of barriers to foreign direct investment. This goal statement could be seen as a limiting the reach of Article 207(1) TFEU beyond the exclusion of portfolio investment that follows from the very use of the term "foreign direct investment"; it has been argued that "… the new competence is limited to policies dealing with market access and non-discrimination at the pre-entry stage, while other polices are excluded from its scope."[183] This suggests, inter alia, that the new foreign direct investment competence of the EU would not empower the Union to conclude IIAs that are intended to improve the conditions for foreign investors at the post-entry stage by granting them certain standards of treatment, such as national treatment and most-favored-nation treatment. I do not share this view. Indeed, Article 206 TFEU indicates that the Union's external powers as regards international investment are intended to be used to tear down restrictions on foreign direct investment, but it is wrongful to assume that such restrictions are equal to regulatory barriers to market access and discrimination of foreign investors at the pre-entry stage only. In practice, the lack of predictability of the host state's regulatory environment and the risk of being subject to discriminatory practice in the post-entry stage and other

[181] This is, inter alia, the case with the model BITs of the EU's most active BIT signers, i.e. Germany, France and the United Kingdom. See Federal Republic of Germany, *Model Agreement on the Promotion and Protection of Investments,* Article 3; France, *Draft Agreement on the Reciprocal Promotion and Protection of Investments,* Article 1; United Kingdom, *Model Agreement on the Promotion and Protection of Investments,* Article 2. Also see UNCTAD 1999, pp. 18-23; Ceyssens 2005, p. 275.

[182] See e.g. the United Kingdom's overseas investment insurance scheme, contained in the *Export and Guarantees Act* (United Kingdom, 1991). Also see Ceyssens 2005, p. 275.

[183] Ceyssens 2005, p. 277.

forms of de facto restrictions constitutes barriers to foreign direct investment flows that are equally important as adverse conditions for the admission and establishment of foreign investors.[184] This is evident from the fact that most host states' foreign direct investment policies nowadays are focused on creating a stable regulatory environment for investment and improving standards of treatment of foreign investors, rather than just upholding an "open door" policy, as well as from the ever-growing number of BITs worldwide which, to a high degree, are intended to combat de facto restrictions on foreign direct investment.

It follows from the foregoing that the aim of achieving a gradual dismantling of restrictions on foreign direct investment pursuant to Article 206 TFEU hardly can be pursued if the competence granted for this aim is interpreted in a narrow fashion that excludes policies that relate to the post-entry treatment of foreign investor, such as non-discrimination guarantees, aimed at improving the general investment climate in the host state. Moreover, reading Article 206 TFEU as a limitation on the reach of the EU's new foreign investment competence is not in line with the jurisprudence of the ECJ, as the Court has been rather reluctant to interpret the objectives of the CCP as a limitation on the reach of the Unions explicit competences in the sectors covered by the CCP.[185] For these reasons, I reject the view that the foreign investment competences of the EU pursuant to article 207(1) TFEU are limited to market access and non-discrimination at the pre-entry stage, and argue that the new competence also covers policies regarding non-discrimination at the post-entry stage. As will be explained below, this does not necessarily mean that the CCP of the Treaty of Lisbon covers all policies that are intended to afford protection for foreign investors.

3.2.2.3 Does The New Competence Encompass Investment Protection?

The proponents of a wide interpretation of Article 207(1) TFEU argue that the amended CCP – in addition to policies regarding market access and non-discrimination – will cover investment protection, i.e. the protection of existing investment against expropriation and demands for fair and equitable treatment. Although there is no explicit provision in the Treaty of Lisbon that excludes such policies from the scope of Article 207(1) TFEU, I consider it questionable – maybe

[184] UNCTAD 2003, pp. 85-88; Ceyssens 2005, p. 277.

[185] See e.g. Opinion 1/94, para. 31; Opinion 1/78, paras. 39-49. Also see Ceyssens 2005, p. 278.

even improbable – that the new competence can be stretched to policies on post-entry protection of investments abroad. The two principal reasons for this standpoint are to be found in (1) the trade policy context of Article 207 TFEU, and (2) in the parallelism clause and the lack of parallel internal powers. These two reasons will be elaborated below.

A. The Trade Policy Context Infers Limitations on The Reach of Article 207 TFEU

Firstly, it should be noticed that the new competence is placed in a trade policy context; foreign direct investment is added to the CCP – a term which itself refers to the exchange of goods[186] – alongside a number of external competences on trade or trade-related issues. This could very well be seen as a limitation of the scope of the Union's express foreign investment powers so that it only covers measures to combat barriers to foreign direct investment that are not unlike barriers to trade in goods.[187] Accordingly, Article 207(1) TFEU would cover regular instruments of trade liberalization, in particular international agreements on market access and non-discrimination, whereas measures that serve to protect existing investments would fall outside its reach.[188] Such a distinction is in line with the ECJ's reasoning in Opinion 1/94, where a line was drawn between the dismantling of trade restrictions covered by the CCP and the protection of intellectual property rights:

> *"… the connection between intellectual property and trade in goods, whereby intellectual property rights enable those holding them to prevent third parties from carrying out certain acts having effects on such trade, is not enough to bring those rights within the scope of Article 113 [currently Article 207 TFEU] of the Treaty."*[189]

It is possible to question this argument with reference to the later widening of the CCP to include the commercial aspects of intellectual property and, indeed, foreign direct investment itself. Both these amendments could be deemed as part of a gradual broadening of the concept of the Union's CCP, namely a "… move from the focus on cross-border exchange of economic values to more complex, lasting

[186] Ceyssens 2005, p. 278.

[187] Krajewski 2005, pp. 113-114; Ceyssens 2005, pp. 278-279; Mola 2008, p. 14.

[188] Ceyssens 2005, p. 278.

[189] Opinion 1/94, para. XIII.

relationships in investment and intellectual property".[190] Against the background of this development, it can be argued that the CCP no longer has a strong focus on trade and trade-related issues, which limits the reach of the external competences that it confers upon the Union.[191] I do not reject this view entirely, but I still believe that the inclusion of foreign direct investment in the CCP of the Treaty of Lisbon should be understood in a trade policy context. This is not only evident from the incontestable fact that Article 207(1) TFEU still mainly consist of express external powers on trade-related issues, but also from the preparatory work that lies behind the inclusion of foreign direct investment in the CCP.

When the drafters of the European Constitution suggested the inclusion of foreign direct investment in the CCP – a proposal that was transferred to the Treaty of Lisbon in unaltered shape – they stated that the extension was necessary since "… financial flows supplement trade in goods and represent a significant share of commercial exchanges"[192]. In my opinion, this statement shows that foreign direct investment was made an exclusive Union competence as it is closely linked to trade and, likewise, that the CCP still is centered on cross-border exchange of economic values, rather than lasting transnational economic relationships. Moreover, the reference to "financial flows" indicates that the drafters predominantly were concerned with the liberalization and, possibly, promotion of foreign direct investment, and not with the post-entry protection of existing investments.

B. The Parallelism Clause and The Lack of Parallel Internal Powers

Secondly, a limitation on the scope of the Unions express foreign investment competences pursuant to Article 207(1) TFEU to exclude policies on investment protection could stem from Article 207(6), which provides:

> *"The exercise of the competences conferred by this Article in the field of the common commercial policy shall not affect the delimitation of competences between the Union and the Member States, and shall not lead to harmonisation of legislative or regulatory provisions of the*

[190] Ceyssens 2005, p. 278.

[191] Ceyssens 2005, pp. 278-279.

[192] European Convention, *Draft Articles on External Action in the Constitution (April Draft)*, 23 April 2003, CONV 685/03, p. 43.

> *Member States in so far as the Treaties exclude such harmonisation."*[193]

This paragraph – sometimes referred to as the parallelism clause[194] – has been interpreted as a limitation on the exercise of external competences under the CCP. To be more precise, it has been argued that Article 207(6) TFEU establishes an overarching principle of parallelism between internal market and external trade competences, according to which "… measures based on the CCP may not lead to a higher degree of intrusion into Member States' competences than measures adopted on the basis of internal competences".[195] In other words, this suggests that the CCP does not encompass powers to which there is no corresponding internal competence. When it comes to foreign direct investment, there are indeed internal powers that correspond with an external competence on, inter alia, market access and non-discrimination policies, namely the rules on free movement of capital and freedom of establishment. There are, however, no internal powers that could serve as a foundation for extending the reach of the new CCP to the protection of foreign investment against expropriation and the establishment of a fair and equitable treatment standard.[196]

The foregoing suggests that the parallelism clause infers limitations on the reach of the new competence on foreign direct investment in Article 207(1) TFEU which render investment protection policies out of the CCP's reach. It should be emphasized, though, that the meaning of Article 207(6) TFEU has been subject to debate and it is by no means obvious that it should be understood as proposed above.[197]

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[193] Article 207(6) TFEU. This paragraph is based on Article 133(6)(1) TEC. See European Convention, *Draft Articles on External Action in the Constitution (April Draft),* p. 54.

[194] Ceyssens 2005, pp. 279-281.

[195] Ceyssens 2005, p. 280.

[196] Ceyssens 2005, p. 281. Indeed, The Charter of Fundamental Rights of the Union recognizes a right to protection against expropriation, but this can hardly be seen as an internal power on protection against expropriation. See *Charter of Fundamental Rights of the European Union* [2007] OJ 303/01, Article 17.

[197] Krajewski, for example, interprets Article 207(6) TFEU as a "… a limitation of the Union's internal competences: the Union can only implement international agreements insofar as it enjoys internal legislative competence." See Krajewski 2005, p. 117.

3.2.2.4 Can The New Competence Be Used to Regulate Investment?

Article 206 TFEU explains that the chief objective of the amended CCP, as regards cross-border investment, is to promote the gradual dismantling of barriers to foreign direct investment. According to the proponents of a narrow interpretation, the stated objective should be seen as limiting the coverage of the new international investment policy powers of EU to measures intended to liberalize investment, whereas measures aimed at regulating cross-border investment in the interest of environmental protection, fair labor standards and other public policy issues inevitably falls outside the scope of the amended CCP. Although there is textual support for such an interpretation of Articles 206 and 207(1) TFEU, I do not share the view that the new competence of the EU in the foreign investment field only can be used to liberalize investment. As previously mentioned, the ECJ has generally been reluctant to regard the objectives of the CCP as a limitation on the coverage of the EU's express external powers in the sectors covered by the CCP.[198] Furthermore, in the context of international trade in goods, the ECJ has explicitly rejected the notion that all measures taken under the CCP must be aimed at economic liberalization. In more detail, the ECJ held in Opinion 1/78 that the EU was competent to enter into an agreement that included provisions on, inter alia, fair labor standards, technical assistance to developing countries and consultation on national tax policies and that was aimed at regulating the world market for a certain product.[199] The ECJ argued that a CCP confined to the use of instruments intended to have an effect only on the traditional aspects of external trade, in particular trade liberalization, would be detrimental to the furtherance of the Union's interests:

> *"A 'commercial policy' understood in that sense would be destined to become nugatory in the course of time. Although it may be thought that at the time when the Treaty was drafted liberalization of trade was the dominant idea, the Treaty nevertheless does not form a barrier to the possibility of the Community's developing a commercial policy aiming at a regulation of the world market for certain products rather than at a mere liberalization of trade."*[200]

[198] See e.g. Opinion 1/94, para. 31; Opinion 1/78, paras. 39-49. Also see Ceyssens 2005, p. 278.
[199] Opinion 1/78.
[200] Opinion 1/78, para. 44.

In line with the reasoning of Jan Ceyssens, I contend that the arguments against a CCP confined to a mere liberalization of trade put forward in Opinion 1/78 also apply to foreign direct investment:

> *"Even more than trade, foreign investment is closely linked to the regulation of public policy issues like labour, taxation and environment. It seems therefore sensible to treat both aspects jointly."*[201]

It is thus submitted that Article 207(1) TFEU covers not only measures intended to liberalize foreign direct investment, but also measures that seek to regulate foreign direct investment in the public interest. This does not suggest that all international instruments that have a bearing on regulation of foreign direct investment are covered by the amended CCP. In accordance with the ECJ's reasoning in Opinion 2/00, it is essential to establish whether a given international agreement – with regard to both its aim and content – constitutes an agreement principally concerned with the regulation of foreign direct investment or an agreement principally concerned with the regulation of a certain public interest that has incidental effects for foreign direct investment.[202] Whereas the former category of international instruments are covered by the amended CCP, the latter category of instruments probably exceed its coverage. In practical terms, this suggest that the amended CCP under the Treaty of Lisbon covers provisions in IIAs dealing with, inter alia, labor standards, environmental protection and technical cooperation in the field of cross-border investment. Double taxation agreements, on the other hand, are most likely not covered by the amended CCP – despite their importance for cross-border investment – as they have as their chief objective to mitigate double taxation issues and not to regulate foreign direct investment.[203]

3.2.2.5 Summary

The Treaty of Lisbon will add an express external power on foreign direct investment to the Union's CCP. While it is indisputable that this new competence is exclusive, it is at the present unclear which aspects of foreign investment policy that

[201] Ceyssens 2005, p. 282.
[202] Opinion 2/00 *Cartagena Protocol on Biosafety* [2001] ECR-I-9713, paras. 35-42.
[203] UNCTAD 2000, p. 14; Ceyssens 2005, p. 282.

are covered by Article 207(1) TFEU. Although the scope might be perceived as broad prima facie, I argue that there are noteworthy and practically important limitations to the reach of the Union's foreign investment competences under the Treaty of Lisbon. First, the very use of the term "foreign direct investment", as opposed to the more general "foreign investment" or "international investment", indicates that the new competence does not cover foreign portfolio investment. Second, there are good arguments that support the exclusion of investment protection, such as the protection of existing investment against expropriation and demands for fair and equitable treatment, from the ambits of Article 207(1) TFEU.

What does the new express competence on foreign direct investment entail, then? In essence, it grants the Union an exclusive competence on all policies that are immediately relevant for the gradual dismantling of restrictions on foreign direct investment. This includes market access policies, but also policies that relate to de facto restrictions, such as non-discrimination guarantees at the post-entry stage. There is also strong support for the notion that the amended CCP covers international instruments that have as their principal objective to regulate foreign direct investment in the public interest.

3.2.3 Practical Implications of the Transfer of Foreign Investment Powers

Although the transfer of foreign investment competences brought about by the Treaty of Lisbon seems to be partial rather than complete, the extension of the EU's powers will without a doubt have practical implications both for the EU's and the Member States' future conduct of foreign investment policy and for the multitude of BITs concluded by the Member States pre-Lisbon. These implications will be subject to scrutiny in the final two sections of this chapter.

3.2.3.1 The Future Conduct of Foreign Investment Policy

Contrary to what some early commentators have argued, the exclusive external powers under the CCP of the Treaty of Lisbon will not cover all aspects of foreign investment. As summarized in section 3.2.2.5, the amended CCP will not empower the EU to independently negotiate and conclude IIAs insofar as they cover foreign portfolio investment. Moreover, I deem it unlikely that the scope Article 207(1) TFEU can be stretched to policies on investment protection, such as the protection of existing investment against expropriation and demands for fair and equitable

treatment. Nevertheless, the Treaty of Lisbon will implications for the future conduct of foreign investment policy of the EU and its Member States.

To begin with, at the multilateral level, the EU will be able to bring a wider range of exclusive foreign investment powers to the negotiating table. In more detail, the EU will henceforth be exclusively competent to conclude any agreement which lays down multilateral rules on market access for new foreign direct investment and standards of treatment for established foreign direct investment, whereas a multilateral agreement as comprehensive as the buried MIA[204] only can be negotiated and concluded by the EU and its Member States jointly.

Moreover, the extension of the Union's foreign investment policy powers can be expected to strengthen the ongoing trend of including provisions on investment in the EU's association and cooperation agreements. In more detail, the EU will be able to include provisions on foreign direct investment regarding market access and non-discrimination of established investment in their association and cooperation agreements without the participation of its Member States. Should the EU want to make such agreements as comprehensive as the more recent IIAs concluded by NAFTA countries[205] – and thus make them applicable to portfolio investment and/or include provisions on investment protection – recourse to the mixed agreement form might, however, still be a legal necessity rather than a matter of political convenience.

The perhaps most significant change in the conduct of foreign investment policy post-Lisbon will take place in the area of BITs. Pre-Lisbon, the Member States were widely free to negotiate and conclude such comprehensive IIAs independently and, as already explained, made well use of that capability. The EU, in turn, did not possess sufficient external powers to neither conclude any BITs of its own, nor hinder the Member States from creating their own networks of such agreements. Post-Lisbon, this order will inevitably be subject to change. Since certain policies that are commonly dealt with in BITs, such as market access for new foreign direct investment and non-discrimination treatment standards for established foreign direct investment, now have become part of the exclusive domains of the EU's CCP, the Member States will henceforth be pre-empted from concluding new BITs. However, as most modern BITs both are based on definitions of "investment" that

[204] See supra, p. 38.

[205] See supra, pp. 3-4.

encompass foreign portfolio investment and includes provisions on investment protection, the reverse also apply: the Treaty of Lisbon does not empower the EU to adopt any BITs on its own. Should the EU want to conclude EU-BITs of a standard that is comparable to that reached by, inter alia, the German Model BIT, it will have to do so together with the Member States as mixed agreements.

On the whole, the conclusions drawn above suggests that the Treaty of Lisbon will dethrone the Member States; they will no longer be able to pursue individual, diverse foreign investment schemes, as the transfer of foreign investment powers to the EU leaves them incapable of entering into comprehensive IIAs without the EU. The Union, in turn, will no doubt play a much more central role in the conduct of foreign investment policy in the future than it did pre-Lisbon. Since the Member States retain treaty-making powers that are necessary to conclude comprehensive and competitive BITs, however, the EU will not be able to create a common EU foreign investment policy without making use of the mixed agreement form.

3.2.3.2 The Fate of the Member States' Existing BITs

Under the pre-Lisbon regime, the Member States were widely free to enter into IIAs and made well use of this capability to conclude, in particular, a multitude of BITs. These comprehensive investment agreements cover certain policies that have become part of the EU's CCP under the Treaty of Lisbon, and thus now are subject to exclusive Union competence. This is, for example, the case with provisions in existing Member States BIT's that relate to market access and non-discrimination for foreign direct investment at the pre-entry stage, as well as provisions that stipulate national treatment and most-favored-nation treatment standards for such investments at the post-entry stage. While there is nothing that suggests that the BITs in question would, on the one hand, become invalid under international law simply because the exclusive external powers of the Union have been extended to cover part of their content[206], it is, on the other hand, questionable whether the Member States will be able to uphold these BITs without contravening their duties under EU law. Hence, the Member States may well find themselves in a legal catch-22 situation; would the Member States, by fulfilling their obligations under international law, violate EU law and vice versa?

[206] Eilmansberger 2009, p. 398; Hartley 2007, p. 180.

A natural starting point when attempting to answer the question posed above is to consider Article 351(1) TEFU, which stipulates as follows:

> *"1. The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties."*

The wording of this Article indeed suggests that it is only applicable to agreements with non-EU countries that the Member States have concluded either before the entry force of the Treaty of Rome or the day of their accession to the Union. However, I argue that the so-called pacta sunt servanda principle contained in Article 351(1) TFEU also should apply by analogy to all BITs that were entered into before the CCP was extended to foreign direct investment.[207] The reason for this is that there is in essence no difference between the situation where an agreement that covers certain policies that are subject to Union competence has been entered into by a Member State before it acceded to the Union and the situation where an agreement has been concluded by a Member State after its accession to the EU, but before the relevant Union competences were introduced by a treaty-amendment. Indeed, the ECJ has rejected the applicability of Article 351(1)TFEU ex analogia to a treaty that a Member State had concluded before the EU had exercised its competence within the field that the agreement concerned.[208] However, there is a much stronger case for analogous application of Article 351(1) TFEU to the Member States' existing BITs; while Member States can be expected to take into account Union competences that exist at the time of conclusion but have not yet been exercised, it is hardly reasonable to demand that the Member States also should take into account possible future extensions of the Union's exclusive external powers by

[207] Hartley states that the law on treaties concluded by Member States after the entry into force of the EC Treaty indeed is less clear than on those international agreements that have been concluded before the Treaty of Rome or before the Member State in question acceded to the Union, but "… [i]n principle, the position should be analogous to that under Article 307 TEC [351 TFEU], provided the subject matter of the agreement was not, under Community law, within the exclusive competence of the Community." Hartley 2007, p. 180. The same inferences are made by Eilmansberger and Ceyssens, see Eilmansberger 2009, pp. 397-398; Ceyssens 2005, pp. 287-288.

[208] Case 181/80 *Procureur général près la Cour d'Appel de Pau and others v. José Arbelaiz-Emazabel* [1981] ECR 2961.

means of treaty-amendments. Thus, I maintain that the fate of existing BITs should be determined by Article 351(1) TFEU. This suggests that these agreements, in principle, may be upheld and that the Member States continue to be bound by them.[209] As regards the EU, the analogous application of Article 351(1) means that the Union institutions may not impede the fulfillment of existing Member States BITs.[210]

Given that the pacta sunt servanda principle should be applied ex analogia as suggested above, it is necessary to also consider the second paragraph of Article 351 TFEU. Applied to the issue at hand, this paragraph implies that the Member States are under an obligation to take all appropriate steps to eliminate inconsistencies between their existing BITs and EU law. How, then, could such inconsistencies arise?

In essence, there are two conceivable scenarios. The first, and arguably least likely[211], scenario is that the EU would make use of its extended CCP to conclude new IIAs that contains provisions which are inconsistent with the content of existing Member States' BITs. In case the new EU-IIAs do not address their relationship with the BITs in question, Article 351(2) TFEU obliges the Member States to amend or terminate the BITs to remove the inconsistencies at hand. A second scenario is that inconsistencies arise between a Member State BIT and other parts of the Treaty of Lisbon than the CCP, such as its provisions on free movement of capital, or in relation to secondary EU legislation. Although the risk for conflicts of such nature is not purely theoretical, as proven by the previously mentioned infringement proceedings against Sweden, Austria and Finland concerning certain capital transfer provisions in some of their BITs with third countries[212], the addition of foreign direct investment to the CCP of the Union in itself does not make such conflicts more likely.

All-in-all, the foregoing suggests that the Member States' existing BITs will remain valid despite the widening of the EU's exclusive powers under the CCP

[209] See Cases 812/79 *Burgoa* [1980] ECR I-2787, para. 8; C-84/98 *Commission v Portugal* [2000] ECR I-5215, para. 53; C-216/01 *Budějovický Budvar* [2003] ECR I-13617, paras. 144-145. Also see Hartley 2007, p. 180; Eilmansberger 2009, p. 287.

[210] Case 812/79, *Attorney General v. Burgoa* [1980] ECR I-2782, paras. 9-10. Also see Hartley 2007, pp. 179-180; Eilmansberger 2009, pp. 287-288.

[211] As Eilmansberger puts it, it is indeed "… difficult to imagine acts adopted under the CCP, which are in open contrast to Member States' bilateral investment treaties." Eilmansberger 2009, p. 288.

[212] Cases C-205/06 and C-249/06; C-118/0. Also see Ceyssens 2005, p. 288.

umbrella to foreign direct investment. The Member States are not under a general obligation to terminate the BITs to ”make room” for the exercise of the EU’s newly-introduced treaty-making power. As was the case already before the entry into force of the Treaty of Lisbon, however, the Member States are bound by the amendment obligation in Article 351(2) TFEU and thus must take appropriate measures to remove any conflicts that might arise between individual provisions of their BITs and the ever-evolving bulk of EU law.

4. CONCLUSION

4.1 A PARTIAL OR COMPLETE TRANSFER OF FOREIGN INVESTMENT POWERS?

As was touched upon in the introduction of this paper, it has been claimed that the entry into force of the Treaty of Lisbon would result in a complete transfer of treaty-making powers on foreign investment from the Member States to the Union. Due to the exclusive nature of the CCP, this radical change in the allocation of foreign investment competences would in practice nullify the Member States' independent role in the conclusion of IIAs. In this paper, however, I have come to a somewhat different conclusion: the transfer of foreign investment competences is partial, rather than total and the Members States will retain key powers in the field of foreign investment. In more detail, I have found that the new exclusive competence contained in Article 207(1) TFEU does not cover foreign portfolio investment; it only applies to such long-term investments that serve to establish or to maintain direct links between the person providing the capital and the entrepreneur to whom or the undertaking to which the capital is made available in order to carry on an economic activity, i.e. foreign direct investment. Moreover, there are arguments that suggest that policies on investment protection will not fall within the ambits of the amended CCP. The validity of these arguments, however, are subject to debate and it might ultimately be a matter for the ECJ to decide whether Article 207(1) TFEU covers investment protection or not.

4.2 PRACTICAL CONSEQUENCES

The notion that the transfer of competences on international investment that the Treaty of Lisbon entails is partial does not suggest that it will lack practical consequences. At the multilateral level, the EU will be able to bring a wider range of foreign investment powers to the negotiating table. In more concrete terms, the Union will be exclusively competent to conclude multilateral investment agreements regarding market access for new foreign direct investments and non-discrimination treatment standards for established foreign direct investments. Moreover, the extension of the CCP will make it possible for the EU to include provisions on market access for new foreign direct investments and non-discrimination treatment

standards for established foreign direct investments in their association and cooperation agreements without the participation of its Member States. However, should the EU want to conclude a multilateral investment agreement as far-reaching as the now buried MAI or address foreign portfolio investment and/or investment protection issues in their association and cooperation agreements, the mixed agreement form will have to be employed.

The most significant practical consequence of the extension of the CCP to include foreign direct investment relates to BITs. Post-Lisbon, the Member States are no longer competent to enter into BITs on their own, and will thus be effectively hindered from pursuing their own separate foreign investment policy schemes. However, since the CCP of the Treaty of Lisbon neither covers foreign portfolio investment, nor enables the EU to conclude international agreements on investment protection, the EU will not either have sufficient policy powers to adopt any BITs without the Member States. Future EU-BITs will thus have to be concluded as mixed agreements.

As regards the Member States' existing BITs, finally, it can be concluded that the widening of the EU's exclusive powers under the CCP does not render the agreements invalid, nor impose a *general* obligation on the part of the Member States to terminate or amend them. Indeed, it is incumbent upon the Member States to take necessary steps to remove any incompatibilities that might arise between their BITs and EU law, but this more *specific* amendment obligation was applicable already under the TEC. Moreover, there is nothing that suggests that the risk of conflicts between the Member States' existing BITs and EU law would be greater under the Treaty of Lisbon than before its entry into force.

4.3 CROWNING A NEW KING?

Under the pre-Lisbon regime, one could arguably regard the Member States as the kings in the foreign investment field, as they were competent to enter into all forms of IIAs, including comprehensive BITs, without the participation of the EU. The coming into force of the Treaty of Lisbon will indeed dethrone the Member States – they will no longer be able to conclude comprehensive agreements with third countries on cross-border investment independently – but it will not necessarily crown the EU as a new sovereign.

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