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The Treaty of Lisbon: Half Way toward a Common Investment Policy

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Abstract

As a follow-up study on the external investment policy of the EU, this article attempts to analyse the relevant provisions in the Lisbon Treaty and assesses their legal implications on the international investment treaty practice of the Union and its Member States. It first briefly reviews the EU's foreign investment competence before the Treaty of Lisbon, followed by an assessment of the different views concerning the interpretation of the Lisbon Treaty provision including 'foreign direct investment' under the common commercial policy. The practical legal implications of the change are discussed in the third part, including intra- and extra-EU investment treaty practices. It is concluded that while the change is significant and will greatly enhance the treaty-making competence of the EU in external investment areas, it is only a half way success toward a full common investment policy (CIP). Potential paths to achieve the ultimate goal are also briefly explored.

The Treaty of Lisbon finally entered into force on 1 December 2009, marking a fortunate turn for European integration from an institutional crisis and effectuating a number of significant changes in the constitutional structure of the EU. Among them the inclusion of foreign direct investment (FDI) in the Common Commercial Policy (CCP) is perhaps 'the largest but still the least discussed'[1] change. In a 300-page impact assessment on the treaty provided by the House of Lords, for instance, this change received only a passing comment.[2] Indeed, when preparing the

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[1] Bungenberg, 'Going Global? The EU Common Commercial Policy After Lisbon', in C. Herrmann and J.P. Terhechte (eds), *European Yearbook of International Economic Law 2010* (2010) 123, at 151.

[2] 'The Treaty of Lisbon: an Impact Assessment', available at: www.publications.parliament.uk/pa/ld200708/ldselect/ldeucom/62/62.pdf (accessed on 26 May 2010).

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European Constitution, the predecessor of the Lisbon Treaty, no discussion had been held on the extension of the CCP to investment.[3]

As a follow-up study[4] on the external investment policy of the EU, this article attempts to analyse the relevant provisions in the Lisbon Treaty and assesses their legal implication on the international investment treaty practice of the Union and its Member States. It first briefly reviews the EU's foreign investment competence before the Treaty of the Lisbon. Then it assesses the different views concerning the interpretation of the Lisbon Treaty provisions with regard to the inclusion of FDI in the CCP. The practical legal implications of the change are discussed in the third part, including intra- and extra-EU investment treaty practice. It is concluded that whilst the change is significant and will greatly enhance the treaty-making competence of the EU in the external investment area, it is only half way toward a full common investment policy (CIP). Potential paths to achieve this goal are explored in the end.

1 The EC's International Investment Competence Before Lisbon: Recent Practices

As has been written before, the EC did not have exclusive, but shared, competence in international investment matters.[5] This is because the Community had not established either express or implied exclusive competence in this area, as none of the express treaty provisions or the measures adopted under such provisions covered the entire field of international investment.[6] In *Opinion 2/92*, for instance, the Court held that the national treatment rule, which was basically a rule on FDI activities, related only partially to international trade with non-member countries, and therefore Article 113 TEC (on CCP) could not be used as the legal basis for the exclusive Community competence thereon.[7] It also observed that 'although the Community has adopted measures capable of serving as basis for an exclusive external competence in accordance with the aforesaid case-law and falling in particular within the scope of Articles 57(2), 75, 84 and 100a of the EC Treaty, it is undisputed that those measures do not cover all the

3 Though the Treaty of Lisbon made some modifications compared with the European Constitution, the stipulation concerning the CCP remained intact. It was pointed out that in the first stage of the Constitution deliberations this issue was not raised, nor did the Working Group on External Action suggest such an expansion: see Krajewiki, 'External Trade Law and the Constitution Treaty: Towards a Federal and More Democratic Common Commercial Policy?', 42 *CML Rev* (2005) 91, at 100–102.

4 See Shan, 'Towards a Common European Community Policy on Investment Issues', 2 *J World Investment* (2001) 603.

5 *Ibid.*

6 Exclusive competence might also be established on the basis of the nature of the measure to be adopted, as established in *Opinion 1/76* [1977] ECR 741 . However, as confirmed by the ECJ in its *Opinions 1/94* and *2/92*, this principle does not apply to international investment treaty-making: see *Opinion 1/94, WTO* [1994] ECR I–5267, at paras 84–86; *Opinion 2/92, OECD-National Treatment Investment* [1995] ECR I–521, at para. 32.

7 Opinion 2/92, *supra* note 6, at paras 18–28.

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fields of activity to which the Third Decision relates'.[8]

This shared competence has witnessed some notable practices in recent years,[9] including the 2006 Minimum Platform on Investment for EU Free Trade Agreements (MPoI), and a few cases before the European Courts (regarding BITs between EU Member States and third states (extra-EU BITs)) and investment arbitration tribunals (relating to BITs between different EU Member States (intra-EU BITs)).

A *The MPoI and Recent Treaty Practice*

The Minimum Platform on Investment for EU FTAs[10] was adopted by the Council of the EU on 27 November 2006. As a standardized negotiation proposal for current and future free trade agreement negotiations with third countries, it intends to satisfy the need of the EC to agree on an investment chapter when a potential FTA is under negotiation.[11] The Platform's scope of application is confined to 'measures by the Parties affecting establishment'. It is therefore targeted at foreign direct investment, and does not include measures relating to expropriation and settlement of investor–state disputes.

The MPoI was intended to be the basis on which 'an ambitious investment policy' was to be built.[12] It represented the first formalized and systematic EC approach towards international investment treaty making, and was the most significant proof of the EC's recent willingness to intervene in an external economic policy field so far predominantly left to the Member States.[13] The Platform, however, is unlikely to have a direct impact on the competence division between the Community and the Member States, as some have suggested.[14] Legally it is only a negotiation template which has not been formally published, not a formal EU regulation. It therefore does not have the effect of increasing or decreasing the competence of the Union *vis-à-vis* its Member States. Its symbolic implications may be much more significant than its actual legal impact. Indeed, as the Commission has stressed, any EU-negotiated FTA including BIT-like investor protection would require approval by all Member States.[15] Clearly foreign investment remains an area of shared competence between the Union and its Member States.

8 *Ibid.*, at para. 34.

9 For an analysis of the law and practice up to 2000 see Shan, *supra* note 4.

10 Council of the European Union, 15375/06, 27 Nov. 2006.

11 Maydell, 'The European Community's Minimum Platform on Investment or the Trojan Horse of Investment Competence', in A. Reinisch and C. Knahr (eds), *International Investment Law in Context* (2007) 73, at 75.

12 See 'Remarks' in the draft 'Minimum Platform on Investment for EU Free Trade Agreements', by the Commission for the discussion of the 133 Committee, 28 July 2006, available at: www.iisd.org/pdf/2006/itn_ecom.pdf (accessed on 26 May 2010).

13 Maydell, *supra* note 11, at 73.

14 Niklas Maydell, e.g., considers that the MPoI would have serious consequences for the Member States' competence to enter into international investment agreements, particularly in the area of admission for investment. See *ibid.*, at 91.

15 Vis-Dunbar, 'European Governments remain split over extent of investor provisions in EU FTAs', *Investment Treaty News*, 16 Mar. 2007, available at: www.iisd.org/pdf/2007/itn_mar16_2007.pdf (accessed on 26 May 2010).

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In this connection, it is noted that the EU has already started to negotiate relatively ambitious investment agreements (or chapters within comprehensive agreements) in recent years. The EC–Chile Association Agreement, for example, grants full national treatment at the pre- and post-entry stage for both natural and legal persons from the other contracting party, together with consent to state-to-state dispute settlement by arbitration.[16] The EU–CARIFORUM EPA signed in 2008 includes a chapter on liberalization of investment based on a positive listing of coverage, protection for current payments and capital movements related to FDI, and some provisions on investor behaviour.[17] In February 2009, the EU and Canada published a joint report concerning the economic and trade relationship, in which investment rules might 'cover pre- and post-establishment in all sectors in order to improve market access and provide for the non-discriminatory treatment of investors and investments, and to improve transparency.'[18] The EU–MERCOSUR Bi-regional Agreement is also intended to include obligations on investment.[19] The same is to be seen in the EC's new neighbourhood policy aiming to create a Pan-Euro-Mediterranean market[20] and the current EU–India FTA negotiations, which plan to include an entire chapter on investment.[21] All this treaty practice further confirms the EU's competence in foreign investment matters, though such competence is not complete or comprehensive enough for it to sign BIT-style investment treaties on its own.

B *Extra-EU BITs and the ECJ Cases*

Another important recent development in the Commission's effort to assert investment competence is the cases it brought against Sweden, Austria, and Finland before the European Court of Justice (ECJ). In 2004, the Commission notified Austria, Finland, Sweden, and Denmark that some of their pre-accession BITs with non-EU countries (extra-EU BITs) might be in conflict with

[16] Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:352:0003:1439:EN:PDF (accessed on 26 May 2010).

[17] Woolcock, 'The Treaty of Lisbon and the European Union as an Actor in International Trade', ECIPE Working Paper no. 1/2010, at 10, available at: www.ecipe.org/the-treaty-of-lisbon-and-the-european-union-as-an-actor-in-international-trade (accessed on 26 May 2010).

[18] Joint Report on the EU–Canada Scoping Exercise, 5 Mar. 2009, at 5–6, available at: http://trade.ec.europa.eu/doclib/docs/2009/march/tradoc_142470.pdf (accessed on 26 May 2010).

[19] The agenda of investment is discussed in the 12th and the 13th negotiations. The EU–Mercosur FTA negotiations were launched in 1999 but were suspended in October 2004 due to important divergences relating to the trade pillar of the agreement. The negotiations re-launched when the EU–LAC Summit took place on 18 May 2010 in Madrid. More details are available at: http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/regions/mercosur/ (accessed on 26 May 2010).

[20] Gavin, 'Trade and Investment in the Wider Europe: EU Neighbourhood Policy for Enhanced Regional Integration', 4 *J World Investment* (2003) 893, 902.

[21] Bungenberg, *supra* note 1, at 140. More information on this FTA can be found at: http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/countries/india/ and http://trade.ec.europa.eu/doclib/docs/2007/june/tradoc_135101.pdf (accessed on 26 May 2010).

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certain powers reserved to the EU.[22] The EC Treaty permits wide-ranging freedom for movement of capital and payments but allows the Council of Ministers, in exceptional circumstances, to take certain restrictive measures in relation to movements of capital to or from non-EU countries. The EC considered that the BITs in question, particularly the free transfer provisions, might hinder the application of these restrictive measures. According to Article 307 of the EC Treaty, Community law does not automatically prevail over international agreements concluded by Member States prior to their accession.[23] Member States are, however, obliged to take all appropriate steps to eliminate possible incompatibilities contained in such prior international agreements.[24]

The EC's request for BIT modification was rejected by the Member States concerned. The Commission therefore took Sweden and Austria to the ECJ in 2006 and began a similar case against Finland later.[25] The case against Denmark was dropped following Denmark's notification that it would terminate the BIT in question. [26]

For their part, Sweden and Austria argued that until measures to restrict capital flows were enacted, there was no incompatibility between their bilateral investment treaties and the EC Treaty.[27] The ECJ sided with the Commission in its 3 March 2009 ruling, in which it argued that, should the European Community decide to restrict capital flows, it would be impractical for Sweden and Austria quickly to resolve the conflict that would arise with respect to the commitments made to foreign investors under their bilateral investment treaties.[28] Accordingly, the ECJ ruled that Austria and Sweden had not fulfilled their obligations under Article 307 TEC.[29] Importantly, the ECJ explicitly held that its findings were 'not limited to the Member State which is the defendant in the present case'.[30] This appears to be a suggestion

22 Vis-Dunbar, 'European Governments defend BITs in lawsuit brought by EU executive branch', *Investment Treaty News*, 16 Mar. 2007, available at: www.iisd.org/pdf/2007/itn_mar16_2007.pdf (accessed on 26 May 2010).

23 Art. 307 TEC, OJ (2006) C 321E/1, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:321E:0001:0331:EN:PDF (accessed on 26 May 2010).

24 *Ibid.*

25 Vis-Dunbar, 'European Court of Justice rules that certain Swedish and Austrian BITs are incompatible with the EC Treaty', *Investment Treaty News*, 4 Mar. 2009, available at: www.investmenttreatynews.org/cms/news/archive/2009/03/04/european-court-of-justice-rules-that-certain-swedish-and-austrian-bits-are-incompatible-with-the-ec-treaty.aspx (accessed on 26 May 2010).

26 Antell, Carlson, and McCandless, 'The European Commission and Investment Treaties', *The European & Middle Eastern Arbitration Review 2010*, available at: www.globalarbitrationreview.com/reviews/22/sections/81/chapters/829/the-european-commission-investment-treaties/ (accessed on 26 May 2010).

27 Vis-Dunbar, *supra* note 25.

28 *Ibid.*

29 *Ibid.*

30 Case C–249/06, *EC Commission v. Sweden*, judgment of 3 Mar. 2009, at para. 43, available at: http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=Rechercher$docrequire=alldocs&numaff=C-249/06&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100 (accessed on 26 May 2010); Case C–205/06, *EC Commission v. Austria*, judgment of 3 Mar. 2009, at para. 43, available at: http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=Rechercher$docrequire=alldocs&numaff=C-205/06-&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100 (accessed on 26 May 2010).

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by the ECJ that the more than 1,300 EU Member State BITs may also be deemed to be in violation of the EC Treaty to the extent that they contain similar free transfer provisions.

On 19 November 2009, a similar ruling was delivered in *Commission v. Finland*.[31] The ECJ again rejected Finland's assertion that the BIT provisions were not incompatible with Article 307 TEC because they were stated to be subject to the limits authorized by the laws of the contracting parties, of which Community law was a part.[32]The Court considered that the scope, interpretation, and effects of those provisions were too uncertain, and therefore they were not sufficient to ensure compatibility with Article 307 TEC.[33] Accordingly, Finland should have renegotiated the treaties to bring them into line with the EC Treaty. [34]

The success of the Union in these extra-EU BIT cases has confirmed a basic principle of EC law, namely the supremacy of EC law over national law (BITs of Member States can be considered as part of the national legal order). It also demonstrates that the Union does possess competence in foreign investment matters, which may not be violated even where such competence has not been exercised by the Union.

To avoid conflicts, some non-EU states took more deliberate steps before the problem arose. The US, for example, engaged in extensive negotiations with the Commission, aimed at amending its BITs with the acceding states and adjusting them to the requirement of the EU before the 2004 enlargement. The negotiations ended with a Memorandum of Understanding (MOU) signed by the US, the Commission, and the acceding states regarding the revision of the BITs. Subsequently, the US entered into protocols with some of the acceding states and modified relevant BITs. Canada followed suit and reached an agreement with the EU soon after the 2004 enlargement to develop amendments to its investment treaties with new Member States.[35] In 2007, Hungary terminated its BIT with Israel.[36] In 2008, the Czech Republic concluded five protocols on the amendments to original BITs signed with other third countries.[37]

C *Intra-EU BITs and Recent Arbitration Cases*

While the above-mentioned ECJ rulings concern BITs between EU Member States and non-EU states, the Commission has also raised concerns over BITs between EU Member States (intra-EU BITs) on the grounds that they overlap with EC law. It is estimated that there are nearly 200 such BITs between pairs of EU Member

31 Case C–118/07, *C Commission v. Finland*. See PLC Arbitration, 'ECJ finds Finland's BITs breach article 307 of the EC Treaty', available at: http://arbitration.practicallaw.com/1-500-8076 (accessed on 26 May 2010).

32 *Ibid*.

33 *Ibid*.

34 *Ibid*.

35 See 'Canada–Europe Union Reach Deal to Amend Six Investment Treaties', *INVEST-SD: Investment Law and Policy Weekly News Bull*, 13 Oct. 2004, available at: www.iisd.org/pdf/2004/investment_investsd_oct13_2004.pdf (accessed on 26 May 2010).

36 See 'Recent Developments in International Investment Agreements (2008–June 2009)', *IIA Monitor* No. 3 (2009), at 5, available at: www.unctad.org/en/docs/webdiaeia20098_en.pdf (accessed on 26 May 2010).

37 *Ibid*.

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States, many of which pre-date at least one state's EU accession.[38] As noted below, some of these BITs have been invoked by investors in recent years in investment treaty arbitration cases.

In 2006, the Commission submitted an informal note to the Economic and Financial Committee of the Council (EFC) of the EU regarding the continued existence of intra-EU BITs. The Commission suggested in that note that '[t]here appears to be no need for agreements of this kind in the single market and their legal character after accession is not entirely clear. It would appear that most of their content is superseded by Community law upon accession of the respective Member State.'[39] Commission officials also warned that 'investors could try to practice forum shopping by submitting claims to BIT arbitration instead of – or in addition to – national courts. This could lead to BIT arbitration taking place without relevant questions of EC law being submitted to the ECJ, with unequal treatment of investors among Member States a possible outcome.'[40] However, this note seems to have had little effect in persuading the EU Member States. After receiving comments from Member States regarding the Commission's proposal, the EFC wrote a letter in February 2009 to the President of the Council of the European Union and noted that '[m]ost member states did not share the Commission's concern regarding arbitration risks and discriminatory treatment of investors and a clear majority of member states preferred to maintain the existing agreements'.[41]

In the few investment arbitration cases involving this issue, arbitral tribunals have determined that intra-EU BITs were not implicitly terminated when those countries acceded to the EU. The *Eastern Sugar v. Czech Republic* tribunal, for instance, recently rejected the Czech Republic's argument that all of its BITs with other EU Member States were implicitly terminated when it acceded to the EU.[42] A similar conclusion has reportedly been reached by another tribunal.[43] The Czech Republic has appealed at least one of these decisions to local courts.[44] Such arbitration decisions confirmed what the EC had worried and warned in the informal note – BIT arbitration did take place 'without relevant questions of EC law being submitted to the ECJ'.

Several EU Member States have announced their plans to terminate their intra-EU BITs. The Czech Republic is understandably leading this effort,

38 Antell, Carlson, and McCandless, *supra* note 26.

39 Vis-Dunbar, 'EU Members review intra-European BITs in light of potential overlap with EU law', *Investment Treaty News*, 30 June 2007, available at: www.iisd.org/pdf/2007/itn_june30_2007.pdf (accessed on 26 May 2010).

40 Vis-Dunbar, 'EU member states reject the call to terminate intra-EU bilateral investment treaties', *Investment Treaty News*, 10 Feb. 2009, available at: www.investmenttreatynews.org/cms/news/archive/2009/02/10/eu-member-states-reject-the-call-to-terminate-intra-eu-bilateral-investment-treaties.aspx (accessed on 26 May 2010).

41 *Ibid.*

42 *Eastern Sugar BV (Netherlands) v. The Czech Republic*, SCC No. 088/2004, available at: http://ita.law.uvic.ca/documents/EasternSugar.pdf (accessed on 26 May 2010).

43 Vis-Dunbar, 'Czech Republic quietly pursues challenge to jurisdictional ruling in Prague Court', *Investment Treaty News*, 17 Jan. 2008, available at: www.iisd.org/pdf/2008/itn_jan17_2008.pdf (accessed on 26 May 2010).

44 *Ibid.*

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and announced in 2005 its intention to terminate all of its BITs with other EU Member States.[45] The Italy–Czech Republic BIT has already been terminated, while the termination of Denmark–Czech Republic BIT is on the way.[46] Recently Slovenia and Malta announced that they intended to terminate their own BITs.[47] Italy has also evinced the same intention.[48] However, some EU Member States do not agree with the Czech Republic's approach. They reportedly include Belgium, Germany, the Netherlands, and the United Kingdom.[49] It is noted that many of the recent disputes brought against the Czech Republic arose under BITs with some of those countries.

Recently, the Commission successfully applied to intervene in two investment treaty arbitration cases, both relating to power generation in Hungary.[50] The claims were targeted at Hungarian government requirements that the Hungarian purchasers of electricity make changes to long-term contracts ('power purchase agreements') entered into before Hungarian accession to the EU. Part of the Hungarian defence was that it had to make the changes required under EU law, since the Commission had determined that such agreements were illegal under EU law.[51] In both cases, the Commission was granted permission to file non-party submissions.[52] While the submissions have not yet been made public, it is generally understood that the Commission intervened to defend Hungary's actions as being required by EU law.[53] The Commission also reportedly sought to challenge the jurisdiction of the tribunal on the ground that some aspects of the dispute and the underlying contract from which the dispute arose were subject to EU law, and therefore within the jurisdiction of the Commission.[54]

D *Summary and Comments*

The preceding paragraphs reveal that there have been notable practices relating

45 Vis-Dunbar, 'Czech Republic pursues shake-up of its bilateral investment treaties', *Investment Treaty News*, 21 Nov. 2005, available at: www.iisd.org/pdf/2005/investment_investsd_nov21_2005.pdf (accessed on 26 May 2010).

46 See 'Italy, Slovenia and Malta concur with Czech Republic on lack of necessity for intra-EU BITs; Italy–Czech treaty has been terminated' and 'Denmark and Czech Republic working to terminate investment treaty; not all EU member-states agree with the Czech view that intra-EU treaties are unnecessary', *Investment Arbitration Reporter*, 6 Aug. 2009 and 17 July 2009.

47 'Italy, Slovenia and Malta concur with Czech Republic on lack of necessity for intra-EU BITs; Italy-Czech treaty has been terminated', *Investment Arbitration Reporter*, 6 Aug. 2009.

48 *Ibid.*

49 See the articles, *supra* note 46.

50 *AES Summit Generation Limited and AES-Tisza Erömü Kft v. Republic of Hungary* (ICSID Case No. ARB/07/22), award of 23 Sept. 2010, available at: http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1730_En&caseId=C114 (accessed on 10 Oct. 2010); and *Electrabel SA v. Republic of Hungary* (ICSID Case No. ARB/07/19) (pending).

51 This is because they 'constitute[d] unlawful and incompatible state aid to the power generators', and because they unduly restricted competition by preventing new entrants: see 'European Commission seeks to intervene as amicus curiae in ICSID arbitrations to argue that long-term power purchase agreements between Hungary and foreign investors are contrary to European Community Law', *Investment Treaty News*, 17 Sept. 2008.

52 See 'ICSID tribunal will permit European Commission to file legal brief in Energy Charter Treaty arbitration', *Investment Treaty News*, 11 Dec. 2008; 'European Commission moves to intervene in another ICSID arbitration', *Investment Arbitration Reporter*, 11 May 2009.

53 *Ibid.*

54 *Ibid.*

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to the international investment competence of the EU in recent years. While it is not surprising to see that the Commission has been making continuous efforts to assert and expand its foreign investment competence, it appears to be dramatic to find out that the European Courts and the international arbitration tribunals seem to have adopted opposite views with regard to the relationship between EC law and international law. In the ECJ cases the decisions were based on EC law, upholding the Commission's power to intervene into at least some provisions of the BITs which the Member States have entered into. In contrast, the arbitration tribunals ruled that the BITs should be interpreted in accordance with principles of international law, and thus accession to the EU of one Member State did not implicitly terminate the BITs which that Member State had entered into with other Member States.

While the two sets of cases certainly have exposed the tension between the two different legal orders, EU law and international law, a closer look at them demonstrates that they are not as contradictory as they appear. In the ECJ cases the Court was dealing with essentially a question of EC law, i.e., whether the EU Member States had violated the EC Treaty by refusing to take measures to bring certain BITs provisions into conformity with EC law. It was not directly dealing with any question of international law, e.g, whether EC law was superior to international law (BITs). It is therefore only natural that it applied EC law principles and arrived at a decision which happened to be favourable to the Commission. In contrast, the investment arbitration tribunals were dealing with an essentially international law question whether the effective application of the EC Treaty to an EU Member State effectuated the implicit termination of the BITs entered into by the Member State with other Member States. Such a question can be answered only by applying international law principles, rather than EC law principles. Even though EC law, particularly the EC Treaty, is relevant, it is relevant as a matter of legal fact, not as the primary governing law. The same applies to the BIT provisions in the ECJ cases – they were relevant only as matter of fact, not as directly applicable law to the dispute, since the dispute was not a BIT dispute but an EC law dispute.

The two sets of cases can not only be reconciled with each other, but can jointly serve to strengthen the call for a common investment policy (CIP).[55] The ECJ cases serve as a positive confirmation of the power the EU already had in foreign investment matters; the arbitration decisions demonstrate from a negative perspective what kind of troubles and complications the EU and its Member State had to confront without a common investment policy at the Union level. It is therefore a great achievement for the Union to include 'foreign direct investment' in its common commercial policy, even though it may not be a ideal solution, as discussed below.

2 The EC's International Investment Competence under the Lisbon Treaty: Different Interpretations

A *The Relevant Articles*

The Lisbon Treaty has managed to include 'foreign direct investment' in the

[55] For an earlier call for a common investment policy of the EU see Shan, *supra* note 4, at 623–625.

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'common commercial policy' of the EC Treaty, which is now named the Treaty on the Functioning of the European Union (TFEU). The most directly related provisions are contained in Articles 206 and 207 TFEU. They are as follows:

> Article 206
> By establishing a customs union in accordance with Articles 28 to 32, 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 207
> 1. 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. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.
> . . .
> 6. 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 Member States in so far as the Treaties exclude such harmonisation [emphasis added].

Clearly Article 206 TFEU sets out the objectives of the common commercial policy. It follows the former Article 131 TEC but adds 'foreign direct investment' in parallel to 'international trade' as the areas in which the Union intends progressively to prohibit restrictions. As discussed below, this parallel phrasing has implications in the interpretation of Article 207 TFEU, particularly with regard to the question whether the FDI mentioned in Article 207(1) TFEU should be interpreted to cover the entire area of FDI or only 'trade-related aspects' of FDI.

Article 207 TFEU is the body Article of the common commercial policy and deserves close examination. It generally follows the former Article 133 TEC (with some modifications, e.g., in the last paragraph), but again adds 'foreign direct investment' to the coverage of the CCP. Paragraph 1 is the most important as it sets out the scope of the policy. While it is clear that FDI is included in the CCP, there is no definition of the term 'foreign direct investment', nor is there any clarification of the exact scope of FDI under the CCP. It is therefore desirable to discuss how the term 'FDI' should be defined and how the entire provision should be interpreted.

B *The Meaning of 'Foreign Direct Investment'*

The Treaty of Lisbon, however, included FDI under the CCP, but did not define it.[56] In contrast, most BITs, including those signed by EU Member States, contain a definition clause on 'investment', which usually refers to every kind of asset having an economic value, regardless of whether the investor has taken managerial control of an undertaking. The concept of FDI

[56] When discussing amendment to the CCP, some commissioner pointed out that the term Foreign Direct Investment requires more precise formulation, see http://european-convention.eu.int/Docs/Treaty/pdf/866/Art24Hain.pdf (accessed on 26 May 2010).

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under the Lisbon Treaty must therefore be interpreted in accordance with international law and Community law.

At international level, both the International Monetary Fund (IMF)[57] and the Organization for Economic Co-operation and Development (OECD)[58] have attempted to define FDI, and have characterized FDI as a lasting interest with a long-term relationship and influence. Such definition has been reflected in the ECJ's interpretation of the term 'direct investment' (used in former Article 57(2) TEC, now Article 64(2) TFEU) in accordance with Directive 88/361/EEC.[59] The definition goes as follows:

> 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. This concept must therefore be understood in its widest sense.

This provides for a Community law definition which may be used when defining the same term included in the CCP. Like the IMF and OECD definitions, it stresses a 'lasting and direct link' between the investor and the investment. Although there has been no further clarification on the definition, it is understood that indirect or portfolio investment, such as short-term loans, contractual claims, and intellectual property rights, is not covered as FDI under the CCP.[60] Accordingly, while this new competence covers current EU investment activities such as the WTO Doha Round mandate, the EU bilateral agreements, and potentially an EU investment insurance scheme, it only partially covers conventional BITs and other comprehensive bilateral or multilateral investment instruments protecting and promoting both direct and indirect foreign investments.

However, this does not mean that the EU is prohibited from concluding comprehensive investment treaties such as BITs. It just has to do so with the participation of its Member States, since regulation of indirect or portfolio investment is still a competence shared with the Member States. The EU's competence on portfolio investment is founded on Article 64 TFEU (ex Article 57 TEC). Indeed, this

57 The International Monetary Fund (IMF) defines 'direct investment' as reflecting the objective of obtaining a lasting interest by an entity resident in one country in an enterprise resident in another economy. The lasting interest implies the existence of a long-term relationship between the direct investor and the enterprise and a significant degree of influence by the investor on the management of the enterprise: IMF, *Balance of Payment Manual* (5th edn, 1993), available at: www.imf.org/external/pubs/ft/bopman/bopman.pdf (accessed on 10 Oct. 2010).

58 According to the definition of the OECD, foreign direct investment reflects the objective of establishing a lasting interest by a resident enterprise in one economy (direct investor) in an enterprise (direct investment enterprise) which is resident in an economy other than that of the direct investor. The lasting interest implies the existence of a long-term relationship between the direct investor and the direct investment enterprise and a significant degree of influence on the management of the enterprise. See OECD, *Benchmark Definition of Foreign Direct Investment* (4th edn, 2008), at 48.

59 Council Dir. 88/361/EEC of 24 June 1988 for the implementation of Art. 67 of the Treaty, OJ (1988) L178/11, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31988L0361:EN:HTML (accessed on 26 May 2010).

60 Ceyssens, 'Towards a Common Foreign Investment Policy? Foreign Investment in the European Commission', 32 *Legal Issues of Economic Integration* (2005) 259, at 274.

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provision has been used, as confirmed by the ECJ, as the legal basis for the EC to participate in the negotiation of comprehensive investment instruments such as OECD National Treatment and the MAI of the OECD, which cover almost every category of foreign investment.

C *The Scope of the New FDI Competence: Varied Interpretations*

The inclusion of FDI in the CCP has attracted great interest among European and international scholars. As a result, five main interpretations have been given to the scope of the new FDI competence, some narrower, some broader. They are discussed below.

1 The 'Trade-related Aspects of' Interpretation

This is perhaps the narrowest interpretation on the CCP coverage of investment matter under the Lisbon Treaty. Krajewiki, for example, considers that only those aspects of FDI which are directly linked to international trade agreements would fall within the EU's exclusive competence, on the basis of the context, object, and purpose as well as negotiating history of the Treaty.[61] He noted that no discussion was held on the extension of CCP to FDI during the deliberations which prepared for the European Constitution, which suggested that it was not meant to go beyond trade-related aspects of FDI.[62] This interpretation, however, is probably too restrictive. First, although in the immediate context the CCP is termed 'commercial', which traditionally means 'trade' (or indeed 'trade in goods'), its coverage has been significantly expanded to embrace all kinds of economic activities, including the so-called 'trade in services' aspects of intellectual property rights, and foreign investment. A clear demonstration is the attempt by the WTO (a 'trade' organization) to negotiate a multilateral agreement on investment.[63] Although the initiative was dropped in the Doha round negotiations, it is not disputed that a proper investment agreement could be included under the umbrella of a 'trade' organization, the WTO.[64] Indeed should the Member States wish to confine it to trade related aspects of FDI, the Lisbon Treaty should have stated this explicitly by using the 'trade related aspects' qualification, as it did with regard to intellectual property rights. Secondly, the object and purpose of the CCP under the Lisbon Treaty, as noted above, listed the prohibition of restriction on both 'international trade' and 'foreign direct investment' in parallel, suggesting that the latter must go beyond the traditional boundary of

[61] Krajewiki, *supra* note 3, at 112–114.

[62] *Ibid.*, at 114.

[63] Wouters, Coppens, and De Meester, 'The European Union's External Relations after the Lisbon Treaty', in S. Griller and J. Ziller (eds), *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?* (2008) 143, at 172, n. 130. The multilateral framework of investment was first proposed in the Singapore Ministerial Declaration in 1996: Singapore Ministerial Declaration, WT/MIN(96)/DEC/W, 13 Dec. 1996, at para. 20. The Doha WTO Ministerial Declaration argued that the multilateral negotiations of investment would take place after the Fifth Session: Doha WTO Ministerial 2001: Ministerial Declaration, WT/MIN(01)/DEC/1, 20 Nov. 2001. This proposal, nevertheless, was suspended in the General Council Decision of 31 July 2004: General Council Decision, WT/GC/W/535, at para.3.

[64] Wouters, Coppens and De Meester, *supra* note 63.

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the former and should not be confined to just 'trade-related aspects' of FDI issues. Finally, although the inclusion of FDI may not have been specifically debated in the course of preparation of the Constitution which formed the basis of the Lisbon Treaty, it was extensively discussed and debated during the inter-governmental conferences leading to the Treaties of Amsterdam and Nice.[65] In the Laeken Declaration of December 2001 the European Council argued that the EU was 'confronted with a fast-changing, globalised world'.[66] A better division and definition of competence was therefore needed to achieve a more democratic, transparent, and efficient European Union.[67] In the 2006 Commission Communication entitled 'Global Europe, Competing in the World', the European Commission proposed a suggestion that it develop a new, ambitious model EU investment agreement.[68] It may be that by the time the Constitution was under deliberation a general consensus had been reached on this, and hence no need was felt for further discussion. The narrow interpretation of the inclusion of FDI confining it to only 'trade-related aspects of FDI' must therefore be rejected.

2 The 'Investment Liberalization' Interpretation

A second interpretation is that the inclusion of FDI brings under the CCP only measures and instruments of 'investment liberalization' or 'market access', and does not cover those of 'investment protection'. Leczykiewicz seems to be of this view. Relying on the object of the CCP under Article 206 TFEU, she argued that 'foreign investment is only part of the common commercial policy as far as restrictions on foreign direct investment are concerned, but not where investment protection against expropriation is concerned'. [69] This interpretation, again, is too narrow to be accepted. There are three main reasons supporting the rejection. First, as UNCTAD research has revealed, the lack of predictability of *the* host state regulatory environment is among the major factors restricting international investment flows.[70] Non-liberalization measures (such as expropriation and compensation rules), just like liberalization rules, are therefore part and parcel of the entire investment regime which helps to reduce restrictions on FDI. Secondly, it is difficult to draw a fine line between foreign investment policies which deal with mark access and those dealing with post-access conditions.[71] A significant increase in company income tax, for example, may be considered a

[65] See European Commission, 'Report on the operation of the Treaty on European Union', SEC(95)731, at 57–60, and European Commission, 'Commission Opinion in accordance with Article 48 EU', COM(2000)34, at 27.

[66] Laken Declaration on The Future of The Europe Union, at 2, available at: http://european-convention.eu.int/pdf/LKNEN.pdf (accessed on 26 May 2010).

[67] *Ibid.*

[68] European Commission Staff Working Document, SEC(2006)1230, at 18, available at: http://trade.ec.europa.eu/doclib/html/130370.htm (accessed on 26 May 2010).

[69] See Krajewiki, *supra* note 3, at 114. See also Leczykiewicz, 'Common Commercial Policy: The Expanding Competence of the European Union in the Area of International Trade', 6 *German LJ* (2005) 1673, at 1678.

[70] Ceyssens, *supra* note 60, at 277. See also United Nations, *World Investment Report 2003, FDI Policies for Development: National and International Perspective* (2003), at 85.

[71] Ceyssens, *supra* note 60, at 277.

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post-admission investment measure, yet it certainly has important implications on potential investors in the process of deciding whether or not to invest in the state taking that measure. Finally, as demonstrated in its *Opinion 1/78*, the ECJ has held that the objective of the CCP was not confined to trade liberalization, but also covered trade regulation.[72] By analogy, now that FDI is included under the CCP, it should be interpreted as covering not only investment liberalization measures, i.e., market access measures, but also investment protection and regulation measures.[73]

3 The 'Substantially Limited Comprehensive Competence' Interpretation

The third interpretation is provided by Ceyssens who supports a broad reading of the new FDI competence to cover both investment liberalization and regulation, but excludes two important areas: investment protection against expropriation and a general standard of fair and equitable treatment.[74] Ceyssens's interpretation largely relies on Article 207(6) TFEU.[75] Based on the principle of 'parallelism' alluded to by the ECJ in *Opinion 1/94*, he argues that 'where the EU does not even have internal competences, there is no need to protect the uniformity of EU rules by conducting a common commercial policy'.[76] And because the above-mentioned two policies 'do not exist within the internal market',[77] these two areas should be excluded from the new competence on FDI.

This restrictive interpretation, however, also has to be rejected. In the first place, as Wouters, Coppens, and De Meester have pointed out, the principle of parallelism could not be supported by Article 207(6) TFEU because the principle involves the determination of implicit external competence, not express external competence.[78] Article 207(1) TFEU grants 'an explicit exclusive external competence, even in the absent of existing internal measures'.[79] Therefore, the scope of the Union's competence on FDI should not be limited to those areas where the Union has already exercised its internal competence.[80] This interpretation finds support in the fact that the

[72] *Ibid.* See also *Opinion 1/78, Nature Rubber Agreement* [1979] ECR 2871, at paras 39–49. In this opinion, the ECJ stated: '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 EC treaty was drafted liberalization of trade was the dominant idea, it 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.'

[73] Indeed, since FDI is more closely linked to public interest regulations for labour, environmental, and human rights consideration than trade, it makes more sense to treat both investment liberalization and regulation together. See Ceyssens, *supra* note 60, at 282.

[74] *Ibid.*, at 279–281.

[75] Art. 207(6) states: '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 Member States in so far as the Treaties exclude such harmonisation.'

[76] Ceyssens, *supra* note 60, at 281.

[77] *Ibid.*

[78] See Wouters, Coppens, and De Meester, *supra* note 63, at 173.

[79] *Ibid.*

[80] *Ibid.*

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requirement of unanimity for the adoption of commercial policy measures in cases where no internal measures have been adopted has not been incorporated in Article 207(4) TFEU, which proves that the lack of internal rules is no impediment to the adoption of external action, even at a procedural level. Indeed, Article 207(6) TFEU is better read as a principle of 'reverse parallelism', since 'parallelism' usually refers to an implicit conferment of external power in areas where internal power has been exercised. Here it is the other way round. The purpose of this provision seems to be to prevent a situation where the exercise of the Union's CCP including FDI competence affects the fine balance of competence division between the Union and the Member States within the Union's internal order.

Secondly, as noted by Dimopoulos, Article 345 TFEU (ex Article 295 TEC) has been interpreted narrowly to reserve for the Member States only the power to decide whether and when expropriation occurs, not the conditions under which such expropriation takes place.[81] It can therefore be argued that the EU has the right to determine the conditions of indirect expropriation of foreign investment resulting from Union measures, and to harmonize Member States' laws on conditions of expropriation resulting from national measures.[82] Finally, fair and equitable treatment (FET) has already become a rule of international law and is not determined by the laws of the host state. Tribunals have repeatedly emphasized that this treatment standard is independent of the national treatment standard.[83] Notes and comments on the OECD Draft Convention on the Protection of Foreign Property of 1967[84] indicate that the FET treatment standard is set by customary international law. The Free Trade Commission (FTC) of NAFTA also points out that the FET standard in Article 1105(1) reflects the customary international law minimum standard and does not require treatment in addition to or beyond that which is required by customary international law.[85] As part of customary international law, the FET treatment shall be upheld within and beyond the EU regardless of the division of competence between it and its Member States. The exclusion of the FET standard therefore does not make sense in practical terms. For the above considerations, the exception of expropriation and FET from the coverage of the EU's FDI competence should be rejected.

4 The 'Negotiation Competence' Interpretation

A fourth view argued that the inclusion of FDI enables the EU competence only to negotiate and conclude agreements in this area, not to enter into substantive rights and obligations. In other words, the EU has only 'negotiation competence', but no 'substantive competence'.

[81] Dimopoulos, 'The Common Commercial Policy After the Lisbon Treaty: Establishing Parallelism Between Internal and External Economic Relations?', 4 *Croatian Yrbk European L and Policy* (2008) 101. See also Bungenberg, *supra* note 1, at 144.

[82] Dimopoulos, *supra* note 81.

[83] R. Dolzer and C. Schreuer, *Principles of International Investment Law* (2008), at 123.

[84] OECD, 'Fair and Equitable Treatment Standard in International Investment Law', Sept. 2004, available at: www.oecd.org/dataoecd/22/53/33776498.pdf (accessed on 10 Oct. 2010).

[85] Dolzer and Schreuer, *supra* note 83, at 124–125.

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According to Mola, for instance, Article 207 TFEU means that the Member States retain competence in FDI and act by unanimity, and the Commission has the right only to speak on behalf of the Member States.[86] If agreement cannot be found among Member States, the Commission should negotiate a commitment which allows for national differentiation.[87] However, this approach cannot be supported. Clearly, Article 207 (particularly Article 207(3)–(4)) TFEU covers both internal acts such as legislation and external acts including the negotiation and conclusion of treaties. Accordingly, the Article confers on the Union not only procedural rights such as treaty negotiation, but also substantive rights such as investment regulation. When negotiating an investment treaty, the Union can not only represent the Union and its Member States as a 'speaker' on their behalf, but can also decide on the substantive terms of the treaties as far they fall within the Union's competence. Otherwise the inclusion of FDI would do little, if anything, to enhance the efficiency of the EU, which is one of the major purposes of the Lisbon Treaty.

5 *The 'Comprehensive FDI Competence' Interpretation*

Some commentators have argued for a comprehensive EU competence in FDI, enabling the Union to enter into international obligation similar to those included in the US free-trade agreements.[88] Dimopoulos, for example, is of the view that the new EU FDI competence should cover admission, capital movement (transfer), post-admission treatment including FET treatment, performance requirements and free movement of key personnel, expropriation, and investor–state dispute settlement.[89] This effectively covers all major aspects covered by a typical BIT.

Given that the term 'foreign direct investment' was not unqualified under the CCP, and taking into account the need for the Union to be able to act effectively in the entire area of international investment law-making, this broad interpretation should be preferred. This, however, does not mean that the Union could, on its own, enter into investment treaties in exactly the same way as ordinary BITs.

One must note that the Union's exclusive competence on investment has been confined to 'foreign direct investment', while BITs typically cover both direct and indirect investment. The latter, which is also termed 'portfolio investment', lies beyond the exclusive competence of the Union. Indirect (as well as direct) investment may, arguably, be covered by Article 64 TFEU (ex Article 57 TEC) concerning free movement of capital. However, as noted by the ECJ, it does not confer express exclusive competence on the EU, nor does it provide sufficient legal basis for an implicit exclusive competence of the EU in this area.[90] It therefore follows that to sign a BIT in its conventional sense the

[86] Mola, 'Which Role for the EU in the Development of International Investment Law?', Society of International Economic Law Inaugural Conference, Geneva, 15–17 July 2008, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1154583 (accessed on 10 Oct. 2010).

[87] *Ibid.*

[88] Bungenberg, *supra* note 1, at 143.

[89] Dimopoulos, *supra* note 81, at 23–25.

[90] *Opinion 2/92*, *supra* note 6, at para. 34.

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Union would have to act jointly with the Member States. It might nevertheless be possible for the Union to choose to sign a BIT to cover only FDI, leaving portfolio investment aside. This however does not seems to be a very appealing choice, given the increasing importance of portfolio investment, particularly in an economy as developed as that of the EU. It is therefore more likely that the Union will have to team up with its Member States to enter into comprehensive investment treaties anyway. The Union has gone a long way toward achieving this competence on FDI, yet it is still only half way toward a full 'common investment competence'.

D *Summary: Half Way toward a Common Investment Policy of the EU*

The inclusion of FDI in the CCP has conferred on the EU exclusive competence on FDI. This competence should be interpreted as a comprehensive competence on all FDI matters, rather than being restrictively interpreted to cover only trade-related aspects of FDI, or matters relating to investment liberalization, or the negotiation of FDI agreements, or an FDI competence excluding essential components such as expropriation and fair and equitable treatment. Such a comprehensive competence, however, does not cover foreign indirect or portfolio investments, which remain a shared competence between the Union and its Member States. The new competence is therefore only half way toward a complete 'common investment policy'. The legal implications of the new competence on the BIT practices within the EU are further explored below.

3 The EC's International Investment Competence after Lisbon: The Legal Implications for Intra and Extra-EU BITs

As noted above, there were notable practices relating to both BITs between EU Member States (intra-EU BITs) and BITs between EU Member States and third states (extra-EU BITs) in the years preceding the entry into force of the Lisbon Treaty. Whether and to what extent the new FDI competence under the CCP may change the legal landscapes in the two areas merits further discussion.

A *Intra-EU BITs after Lisbon*

Bilateral investment treaties between Member States of the EU have long been all but non-existent.[91] Before the 2004 enlargement, there were only two intra-EU BITs.[92] However, the number dramatically increased to about 150 after the accession of 10 new Member States in 2004.[93] Most of these BITs were signed in the 1990s when the Eastern European countries began to transform into market economies. In 2007, the total number reached 191 following the accessions of Bulgaria and Romania. Apart from Ireland and Portugal, all the old EU Member

91 Wehland, 'Intra-EU Investment Agreements and Arbitration: Is European Community Law an Obstacle?', 58 *ICLQ* (2009) 297.

92 These two BITs were signed separately by Germany with Greece and Portugal. Actually, both of them were concluded before Greece and Portugal became Member States of the EC in 1981 and 1986 respectively.

93 The 10 countries, which are mainly from Eastern Europe, are Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia.

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States had entered into BITs with all these new EU Member States, and most of these BITs have already entered into force.[94]

The dramatic increase of the intra-EU BITs has elevated the conflict between intra-EU BITs and EU law from fiction to reality. As noted above, the Commission was of the view that the intra-EU BITs were no longer needed and hence implicitly terminated after the accession of the Eastern European States to the EU, a suggestion which was rejected by the Member States. In *Eastern Sugar BV (Netherlands) v. The Czech Republic*, the tribunal refused the Czech Republic's argument that its BITs with other EU Members had become inapplicable following its accession.[95] Other cases such as *R.J. Binder v. The Czech Republic,*[96] *Saluka v. The Czech Republic,*[97] and *Micula v. Romania*[98] have also touched upon similar issues.

Whether the EU's new FDI competence under the CCP could change the answer given by the tribunal in the *Eastern Sugar* case, in other words, whether the intra-EU BITs would become automatically and implicitly terminated or suspended after Lisbon, is a new question which needs to be answered here. As pointed out by the *Eastern Sugar* tribunal, this question must be assessed in accordance with general principles of international law as expressed in the Vienna Convention on the Law of Treaties (VCLT), particularly Article 59.[99] The Article reads:

> Article 59
> Termination or suspension of the operation of a treaty implied by conclusion of a later treaty
>
> 1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the *same subject-matter* and:
> a. It appears from the later treaty or is otherwise established that the parties *intended* that the matter should be governed by that treaty; or
> b. The provisions of the later treaty are so far *incompatible* with those of the earlier one that the two treaties are not capable of being applied at the same time.
> 2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties [emphasis added].

[94] Ireland has only one BIT with the Czech Republic and Portugal does not have one with Estonia. As of July 2009, all these intra-EU BITs had entered into force except the Cyprus–Italy BIT, which was signed on 27 April 2004: see Wehland, *supra* note 90, at 298.

[95] *Supra* note 42, at paras 95–181.

[96] See Vis-Dunbar, *supra* note 43. There appears to be no public information available with regard to the progress of the court proceedings in Prague, so it can only be inferred from the relative report.

[97] See Permanent Court of Arbitration, *Saluka Investments BV v. Czech Republic*, available at: www.pca-cpa.org/showpage.asp?pag_id=1149 (accessed on 26 May 2010). The case was finally settled and resolved following issue of the Partial Award.

[98] *Ioan Micula, Viorel Micula and others v. Romania* (ICSID Case No. ARB/05/20). This case is pending. The Tribunal issued a procedural order concerning confidentiality on 3 Mar. 2010, available at: http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListPending (accessed on 26 May 2010).

[99] Vienna Convention on the Law of Treaties 1969, available at: http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf (accessed on 10 Oct. 2010).

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It appears that the VCLT applies three tests for this issue. First, as a precondition, the two treaties must cover the 'same subject matter'; secondly, a common 'intention' of termination can be established; or, thirdly, the two treaties are clearly 'incompatible'. The *Eastern Sugar* tribunal looked at and answered in the negative all the three tests. Below is a discussion of any changes which may have resulted from the inclusion of FDI in the CCP by the Lisbon Treaty by using the three tests.

First, a precondition for the implicit termination of a treaty (e.g., an intra-EU BIT) by the conclusion of a later treaty (the EC Treaty) is that both the earlier and later treaties cover the 'same subject matter'. The *Eastern Sugar* tribunal examined this issue and concluded in the negative on the basis that the applicable BIT and EC law (Article 57 TEC (Article 64 TFEU)) did not cover the 'same precise subject-matter' even though both dealt with intra-EC investment.[100] Most importantly, the tribunal noted that EC law did not provide the investor–state dispute resolution mechanism found in BITs, which it considered 'the best guarantee that the investment will be protected against potential undue infringements by the host state'.[101] As argued above, the new EU competence on FDI is comprehensively capable of offering guarantees provided by BITs including the investor–state dispute resolution mechanism. It is therefore tempting to argue that after Lisbon the EU Treaty now covers or is able to cover the same subject matter as that under traditional intra-EU BITs. However, since the EU's exclusive FDI competence does not cover indirect investment, BIT protection over indirect investments remains out of the exclusive competence of the EU. It is therefore difficult to argue that EU law and BITs are now covering the 'same precise subject-matter'. Accordingly it remains difficult to argue that intra-EU BITs should be superseded by the new EU competence on FDI.

Secondly, the EU Member States remain divided in their approach to this question. In the *Eastern Sugar* case, the tribunal held that a common intention of the Czech Republic and the Netherlands to terminate the BIT or to supersede it by EC law could not be established.[102] This is still the case today, as noted above.[103] Although FDI has been included in the CCP, EU Member States are yet to reach a consensus (or a common *intention*) to terminate existing intra-EU BITs and to replace them with Community law. This certainly does not help in establishing a case for the explicit termination of existing intra-EU BITs.

Thirdly, it is important to examine whether the two treaties are 'incompatible'. In *Eastern Sugar*, the tribunal found that the BIT and the EC Treaty are not *incompatible*, because free movement of capital and protection of investment are 'different but complementary things'.[104] Now that FDI is included in the CCP, the bases of comparison have been changed. Again, as argued above, the new extension of EU exclusive competence on FDI is a comprehensive competence capable of covering all BITs' aspects including

100 *Eastern Sugar BV (Netherlands) v. The Czech Republic, supra* note 42, at paras 95–181.

101 *Ibid.*, at para. 165.

102 *Ibid.*, at para. 167.

103 See sect. 1C above.

104 *Eastern Sugar, supra* note 42, at paras 168–169.

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admission, treatment, expropriation, and dispute settlement. Since it is an exclusive competence of the Union, it excludes its Member States from interfering in FDI activities, including the conclusion of BITs protecting FDI. In other words, this means that the EU Member States are no longer able to conclude BITs protecting FDI with either EU or non-EU states. The power to enter into BITs protecting FDI has been transferred to the Union from the Member States. This does not mean, nevertheless, that the EU Member States will have no role to play in future BIT negotiations. As noted above, foreign indirect investment remains a shared competence between the Union and its Member States. If the Union is to conclude conventional BITs covering both direct and indirect investments Member States' participation will be essential.

However, the transfer of power to conclude BITs on FDI from the Member States to the EU does not necessarily mean that existing intra-EU BITs are incompatible with the new EU Treaty. The Lisbon Treaty confers on the EU only a general (albeit exclusive) competence on FDI but does not offer any further details as to how the EU should treat and regulate FDI. Since the EU has not yet taken action to enter into BITs covering the same content as traditional BITs by Member States, one cannot claim that existing intra-EU BITs are incompatible with the new EU Treaty. FDI competence and FDI regulation are two different things. Until the competence is exercised, and in a way which conflicts in an irreconcilable manner with the existing intra-EU BITs, such incompatibility may not be established.

For the above reasons, it can be concluded that the new FDI competence of the EU does not require the automatic or implicit termination of existing intra-EU BITs, even though it does deprive the EU Member States of their power to enter into new intra-EU BITs covering FDI.

B *Extra-EU BITs after Lisbon*

Old EU Member States are among the pioneer states in BIT practice. The very first BIT was signed by Germany with Pakistan in 1959. According to UNCTAD, seven of the top ten signatories of BITs are from the EU including Germany, the UK, Italy, France, the Netherlands, Belgium, and Luxembourg, with Germany leading the world league table.[105] The total number of BITs between EU Member States and a non-EU state (extra-EU BITs) is believed to have exceeded 1,300, nearly half of the total number of BITs in the world. This background highlights the role EU Member States have played in international investment treaty-making practice in the past. But the question here is: is this going to be changed by the new FDI competence of the EU? The question can be assessed from two angles: existing and future extra-EU BITs.

1 Existing Extra-EU BITs

A short answer to the question of the impact of the EU's FDI competence on existing extra-EU BITs is that they will not be required to be terminated or superseded under either international or EU law. However, they may have to be modified in accordance with the requirements of EU law, as confirmed by the recent ECJ cases mentioned above.

The legal basis for the continued validity of extra-EU BITs can be found in general international law as expressed

[105] *Supra* note 36, at 3.

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in Article 30(4) of the VCLT,[106] which essentially establishes that 'a treaty between two parties will not be superseded by a subsequent treaty that one of the parties enters into with a third party'.[107] It is also supported by Article 351 TFEU (ex Article 307 TEC), which expressly states that the rights and obligations arising from agreements between a Member State and a third state concluded before the entry into force of the present treaty 'shall not be affected by the provisions of the Treaties'.[108] However, the Member States may be required by the European Commission to 'take appropriate steps to eliminate the incompatibilities established' between EC law and the BITs with non-EU states.[109] In this regard, it is noted that the EU has taken Sweden, Denmark, and Finland to the ECJ for the inconsistency of their BITs with EC law requirements particularly relating to possible restrictions on monetary transfers.[110]

If such extra-EU BITs are amended to 'eliminate the incompatibilities established', one has to note that most of the BITs stipulate that the treaty will remain in effect for a period, even though it has been terminated.[111] For instance, foreign investment established in the territory of EU Member States may be affected by the provisions in the amended BITs, especially when new exceptions are added to the investment treatment, such as most favoured nation treatment and national treatment. In this case, the US MOU with the European Commission and eight EU Member States may serve as a reference. It stipulates that any exception set by the Member State to MFN and NT in accordance with the new laws and regulations shall not apply to investments of nationals or companies in the relevant sector for a period of ten years from the effective date of the relevant law or regulation, or twenty years from the date of entry into force of the BIT, whichever date is later. [112] In no case may an exception apply to an

[106] Art. 30(4) VCLT states: '4. When the parties to the later treaty do not include all the parties to the earlier one: (a) as between States Parties to both treaties the same rule applies as in paragraph 3; (b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.'

[107] Alexandrov, Carlson, and Robbins, 'The Future of Investment Treaty Protection in Eastern Europe', available at: www.globalarbitrationreview.com/reviews/14/sections/53/chapters/511/www.sidley.com (accessed on 26 May 2010). See also Eilmansberger, 'Bilateral Investment Treaties and EU Law', 46 *CMLRev* (2009) 383, at 398.

[108] The Art. states: '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. To the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.'

[109] *Ibid.*

[110] See sect 1B above.

[111] See, e.g., Art. 15(3) of the China–Finland BIT which states '[i]n respect of investment made prior to the date of termination of this Agreement the provisions of Articles 1 through 14 shall remain in force for a further period of twenty (20) years from the date of termination of this Agreement'. The treaty is available at: http://tfs.mofcom.gov.cn/aarticle/h/au/201001/20100106725240.html (accessed on 26 May 2010).

[112] See Radu, 'Foreign Investors in the EU – Which "Best Treatment"? Interactions Between Bilateral Investment Treaties and EU Law', 14 *European LJ* (2008) 237, at 258.

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existing investment to the extent that it would require divestment, in whole or part, of such an existing investment.[113]

2 Future Extra-EU BITs

As mentioned above, since the EU has acquired exclusive competence on FDI since the entry into force of the Treaty of Lisbon, EU Member States no longer possess the power to enter into new BITs covering FDI with either fellow EU Member States or third states. EU Member States nevertheless have shared competence on foreign indirect investment matters, which means that they still have an essential role to play when the EU is to enter into a conventional BIT covering both foreign direct and indirect investment.

However, while it is clear that the EU now has exclusive competence on FDI treaty-making, it is unclear how this new competence may be exercised, particularly when it comes to the question of investment dispute resolution. Most important questions include: whether the EU as a regional community could negotiate investor–state dispute resolution provisions? In the event of a dispute which one, the Union or any Member State, will be the respondent?

With regard to the first question, some have argued that the EU could not negotiate an investor–state dispute settlement mechanism clause because it is not a 'state', whereas only a state can participate in the ICSID Convention.[114] However, this does not appear to be a real problem. The EU may, for instance, agree with the other contracting party that the foreign investor can submit a dispute to *ad hoc* arbitration under the UNCITRAL rules. Alternatively, the EU can also seek revision of the ICSID Convention to allow it to become a party.

The question about the respondent party in a dispute brought by an investor under an EU BIT appears more complex. In this regard, the practice of the EU with the Energy Charter Treaty (ECT) may be helpful. Both the European Communities and the Member States are members of the ECT. In order to solve the respondent problem, the Communities submitted a Statement to the Secretariat of the Energy Charter in 1998 which included the following:

> The Communities and the Member States will, if necessary, determine among them who is the respondent party to arbitration proceedings initiated by an Investor of another Contracting Party. In such case, upon the request of the Investor, the Communities and the Member States concerned will make such determination within a period of 30 days.[115]

In the current negotiation of the FTA between the EU and Canada, the text concerning the investment proposed by Canada has proved to consist essentially of its Model BIT language for investor and investment protection, including investor-to-state arbitration.[116] It is therefore interesting to see how such provisions will finally turn out. What can be ascertained

[113] *Ibid.*

[114] See, e.g., Bungenberg, *supra* note 1, at 149.

[115] Statement submitted by the European Communities to the Secretariat of the Energy Charter pursuant to Art. 26(3)(b)(ii) of the Energy Charter Treaty, OJ (1994) L 380/115. In this statement, a footnote goes on to state 'this is without prejudice to the right of the investor to indicate proceedings against both the Communities and their Member States'.

[116] Dispute Settlement, draft text of the Canada–EU FTA (12 Jan. 2010), published on 20 Apr. 2010 by Transnational Dispute Management.

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now is that the EU could sign BITs protecting FDI, even though it needs cooperation from its Member States if it wants to enter into conventional BITs covering both direct and indirect foreign investments.

C Summary

The new FDI competence of the EU does not legally require the automatic and implicit termination of existing intra-EU BITs, because the new competence does not cover exactly the same subject matter as existing intra-EU BITs; because a consensus is yet to be established among EU Member States on this; and because the incompatibility of the existing intra-EU BITs with the new competence is yet to be established.

In a similar vein, the new FDI competence of the EU does not require the termination of existing extra-EU BITs either, in accordance with both national and Community law. However, after Lisbon, EU Member States have lost their power to conclude (both intra- and extra-EU) BITs protecting FDI, given that that now falls within the exclusive competence of the EU. Member States nevertheless still have an essential role to play when the EU intends to conclude conventional BITs covering both direct and indirect foreign investments. It is possible for the EU to enter into BITs including investor–state dispute resolution provisions. The EU's experience with the ECT offers a good example of how the respondent issue may be solved.

4 Conclusion: Towards a Complete Common Investment Policy of the EU

The Lisbon Treaty has achieved only half a success for a common investment policy (CIP). Foreign direct investment (FDI) is now covered by the CCP, enabling the EU to take a uniform policy on FDI in the international arena. However, foreign indirect investment is still outside the reach of the EU's exclusive competence. The EU therefore has to seek cooperation from its Member States when entering into conventional BITs covering both direct and indirect investment.

This is a significant step forward, but is not an ideal solution. As mentioned above, the EU is more likely to enter into comprehensive investment treaties (bilateral or multilateral) covering both direct and indirect investments, which means that the EU has to seek cooperation from its Member States when concluding most investment treaties. This situation needs to change. As argued elsewhere, a common investment policy is essential for the EU to deal with an increasingly competitive world. First, a complete CIP would improve the policy coherence, thus reducing asymmetries and uncertainties with the different policies existing in the EU becoming integrated and transparent. A transparent investment environment is crucial to attracting foreign investors from third countries, and *vice versa.* And this will eventually strengthen EU trade policy as trade and investment are strong linked. Secondly, it would increase the attractiveness of the EU as an investment destination, because a harmonized investment scheme on an EU level would create a fair level playing field for foreign investors. Thirdly, it would enhance the bargaining power of the EU, as the negotiating power of the EU together would be much stronger

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than those of individual EU Member States.[117]

A CIP of the EU will benefit not only the EU, but also the rest of the world. On the one hand, with a CIP the EU is better positioned to push forward a global investment treaty. A multilateral investment treaty is not a new topic. This proposal has been tried and failed in both the OECD and the WTO, of both of which the EU and its Member States are the main supporters. It should be pointed out that a multilateral investment treaty is still needed despite these failures and the 'new regionalism'. The fragmentation and 'legitimacy crisis' of bilateral and regional investment treaties have put the 'spaghetti bowl' of investment treaties under severe criticism. In the current economic downturn, investment protectionism has gained the upper hand in some quarters of the world. As a response, there are renewed calls for a global investment regime. The OECD, for example, recently announced that it was considering the feasability of a non-binding 'Model Investment Treaty' to avoid an escalation of investment restrictions.[118] A complete CIP of the EU would certainly help in facilitating the negotiation process avoiding the MAI debacle happening again. In this respect, the great success of the OECD Model Tax Convention, which serves as the basis for the more than 3,000 bilateral tax treaties in force today in the world, may provide positive experience.[119]

A complete CIP of the EU might help in the development of a more balanced investment treaty regime.[120] Article 21 TFEU states that the Union's action shall be guided by the principles of 'democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect of human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law'. Article 205 TFEU, under the title of 'Common Commercial Policy', clearly refers to Article 21 TEU, pointing out that the Union's action 'shall be guided by the principles, pursue the objectives and be conducted in accordance with the general provisions laid down' in Article 21 TEU. This makes it clear that the Union does have not only a liberalization agenda, but also the other objectives – human rights, good governance, environmental protection, sustainable development – in the negotiation of investment agreements. It is reported that, for example, the EU in 2007 proposed a clause on human rights

[117] Shan, *supra* note 4. See also Hjalmroth and Westerberg, 'A Common Investment Policy for the EU', in *The Contribution of Trade to a New EU Growth Strategy, Ideas for a More Open European Economy*, Part 1, at 22, available at: www.kommers.se/upload/Analysarkiv/In%20English/Analyses/LS%20Investments.pdf (accessed on 26 May 2010), and Karl, 'The Competence for Foreign Direct Investment, New Powers for the European Union?', 5 *J World Investment and Trade* (2004) 413, at 424–429.

[118] Gurría, 'The Global Economy and the Global Investment Agenda – an OECD Perspective', available at: www.oecd.org/document/0/0,3343,en_2649_34529562_44775040_1_1_1_1,00.html (accessed on 26 May 2010).

[119] *Ibid.*

[120] See, e.g., Shan, 'From "South–North Contradiction" to "Public–Private Conflict": Revival of the Calvo Doctrine and New View of International Investment Law', 27 *Northwest J Int'l L and Business* (2007) 631.

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in the trade negotiations between the EU and India.[121] In April 2008 – before the second Irish plebiscite – the Parliament declared in a resolution that it would give its consent to the conclusion of a Free Trade Agreement between the EC and the Gulf Cooperation Council only if those objectives laid down in Article 21 TEU were sufficiently taken into account.[122] It is hoped that the EU's emphasis on social responsibilities will eventually help to build a more balanced global investment regime.

To achieve a complete CIP, two approaches could be used. On the one hand, it might be achieved by implication through the operation of 'parallelism' principle. In other words, the EU could adopt measures and acts to harmonize foreign investment policies within the EU aiming at establishing a uniform Union foreign investment policy. Then through the operation of the parallelism principle, the EU would acquire exclusive competence in the area. This possibility has been confirmed by the ECJ in, for example, Opinion 2/92.[123] However, it might take a series of measures and a long time to achieve the desired effect. The preferred route obviously is to confer the EU express exclusive competence in the entire area of foreign investment including both direct and indirect investments by, for example, revising the CCP provision under the TFEU replacing the current FDI with 'foreign investment'. Until this is done, the EU international investment treaty operations will remain seriously constrained.

[121] Cabrera Diaz, 'EU Trade negotiations with India stumble over human rights, proliferation issues', *Investment Treaty News*, 6 Mar. 2007.

[122] Bungenberg, *supra* note 1, at 130.

[123] *Opinion 2/92*, *supra* note 6, at para. 34.

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