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FOREIGN DIRECT INVESTMENT — A "COINCIDENTAL" COMPETENCE OF THE EU?

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Abstract

This article gives an overview of the current status of EU foreign investment policy and outlines the direction in which it is headed. It is also testimony to the fact that when the competence for foreign direct investment was conferred upon the EU, deliberations on what this should entail were not really made. To begin with, the powers of the EU with respect to

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FDI before and after the Treaty of Lisbon entered into force are presented. As the EU has been empowered to regulate FDI matters for its Member States since the Treaty of Lisbon entered into force, there is potential for conflict. Therefore, the second part of this paper analyses the current legal status of intra- and extra-EU BITs and presents the BITs Regulation, a first attempt of the EU to define its competence and bring clarity with respect to the legal status of extra-EU BITs. Additionally, the special status of the Energy Charter Treaty is addressed. The third part of the paper will concentrate on the shape the common European investment policy might take in the future, with express reference to the new role of the instutions in regulating FDI and their positions towards FDI as a new competence. It seems from the EU-Canada trade agreement, which may be the first agreement to be concluded under the new competence, that the EU is opting for a rather broad competence including pre- and post-establishment of investments as well as portfolio investments. The European citizens, however, are not in favour of concluding any agreement. It will be concluded that the transfer of the competence was sudden, but the foundation for a solid European policy has been laid in the past five years.

Keywords: EU Foreign Investment Law, Foreign Direct Investment, Treaty of Lisbon, Bilateral Investment Treaties, EU Competence for Foreign Direct Investment, Energy Charter Treaty, Investment, Extra-EU BITs, Intra-EU BITs, CETA, TTIP, Portfolio Investment, Pre-Establishment, Post-Establishment

I. *Introduction*

Coincidental is commonly understood as something which was not planned – an event which happened by accident. The Treaty of Lisbon ('ToL') entered into force in 2009 and was certainly not an accident or a coincidence. Based on the Constitutional Treaty, the Treaty of Lisbon constitues a well-phrased and elaborate legal text forming the basis of the European Union ('EU') of today. An investment and more precisely a foreign direct investment[1] is by definition not accidental. It is carefully planned with a view to making a profit and establishing a long-term economic relationship. Ergo, an investment is not coincidental. What about a competence? A competence implies that, based on a certain level of knowledge and skills, someone has the ability to act effectively and reasonably in a given situation. In the legal framework of the EU, a competence to act in a given policy field is conferred upon the EU by the Member States. Hence, it is the Member States who decide when they deem the EU fit to act for them. They can add to the competences of the EU by way of Treaty revision or amendment, as was the case with foreign direct investment, which became an exclusive EU competence with the entry into force of the Treaty of Lisbon. One would imagine that the transfer of a competence to the EU by the Member States is carefully examined and well-

[1] *"Foreign direct investment (FDI) is a category of investment that reflects the objective of establishing a lasting interest by a resident enterprise in one economy (direct investor) in an enterprise (direct investment enterprise) that 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. The direct or indirect ownership of 10% or more of the voting power of an enterprise resident in one economy by an investor resident in another economy is evidence of such a relationship."* see Secretary-General OECD, 'OECD Benchmark Definition of Foreign Direct Investment', OECD (4th edition, 2008), para. 117.

organized in order to avoid any legal uncertainties which might occur after the transfer. It also seems that an EU competence is not coincidental in nature. However, the transfer of competence for FDI to the EU may tell a different story.

The present article attempts to give an overview of the existing European Foreign Investment Policy, as it was (pre-Lisbon), as it stands (post-Lisbon) and in which direction it is headed.

II. *The Development of European Foreign Investment Law - A Historical Overview*

The Treaty of Lisbon conferred new competences to the EU, especially in the field of the Common Commercial Policy ('CCP'). Amongst these, the inclusion of foreign direct investment ('FDI') in the CCP seemed to mark a breakthrough in the regulation of the external economic relations of the EU. Nonetheless, its roots can be traced back to the time before the Treaty of Lisbon, even though the first ambitions of the EU in the field of FDI were rather piecemeal in nature, leading to a fragmented regulation of FDI with Member States still being in the driving seat. Therefore, to say FDI is a coincidental competence is not entirely correct, but given that five years have passed since the Treaty of Lisbon entered into force and the scope of the new EU competence still remains far from clear, it seems at least that it was not very well thought through. The fact that neither transitional provisions for the Member States nor any statements on the scope of the competence as well as the powers of the Commission were made before the ToL became a reality further supports this view.[2] Some insiders even say that the decision to transfer the competence for FDI to the EU was made within five minutes. In addition, the inclusion of FDI was already a rather controversial issue in the discussions on the Constitutional Treaty.[3] Thus, it is not surprising that after five years a clear demarcation of the new power is yet to be achieved.

Nevertheless, to shed some light on what the future of European Foreign Investment Law will be and what has been achieved so far, the following passages will outline the pre- and post-Lisbon state of play of FDI regulation by the EU.

1. Foreign Direct Investment - Pre-Lisbon

First incidental powers relating to investments can be traced back to the very beginnings of the European Union, namely the Treaty of Rome[4] signed in 1957. The Treaty provisions on the freedom of establishment[5] allowed for investments between the Member States ('intra-EU investments'), while Member States were exclusively responsible for admitting or rejecting FDI from third States into their territories.[6] Back then it was completely up to the Member States

[2] Investment Group of the Seattle to Brussels Network, 'Reclaiming Public Interest in Europe's International Investment Policy-EU Investment Agreements in the Lisbon Treaty Era: A Reader', The Transitional Institute (2010), p. 12.

[3] M. Krajewski, 'External Trade Law and the Constitutional Treaty: Towards a Federal and more Democratic Common Commercial Policy?, 42 *Common Market Law Review* 1 (2005), p. 111 et seq.

[4] Treaty Establishing the European Economic Community (Consolidated Version), 25.02.1957.

[5] Ibid., Chapter 2-Right of Establishment.

to conclude Bilateral Investment Treaties ('BITs') with third States and to determine their content.

While in the early days of the European Union only a few if any BITs at all were concluded by the Member States such as the BIT between Germany and Pakistan[7], the situation changed dramatically in the 1990s with the rise of free, yet still developing market economies striving for investments from developed countries such as the Member States of the European Union.[8] Up until now, the Member States have concluded around 1300 BITs with third countries ('extra-EU BITs'), constituting nearly half of the BITs concluded worldwide.[9]

Obviously, the EU could not ignore these developments for long and hence tried to acquire more powers in the field of investment itself. In the negotiations leading up to the Treaty of Amsterdam as well as Nice efforts were made by the Commission - even though unsuccessfully due to fierce resistance by the Member States - to transfer the competence for investment to the EU.[10] At least, some very limited competences relating to investments within the field of the freedom of establishment as well as the free movement of capital were conferred upon the EU.

On the basis of Articles 57-60 of the Treaty on the European Community ('TEC')[11] (now Articles 63-66 TFEU) the European Community ('EC', as it was called back then) could adopt measures to prevent restrictions on capital movements between Member States and third countries.[12] Based on the case law of the European Court of Justice ('ECJ', now Court of Justice of the European Union, 'CJEU') in support of Directive 88/361,[13] direct investments were regarded as a sub-category of capital movements.[14] Hence, the EC had, at least to a certain extent, the capacity to regulate the entry and operation of foreign investment into the Union in e.g. its trade agreements with third States.[15] This power was constrained by the grandfather clause contained in Article 57(1) TEC,[16] allowing Member States to keep those

[6] J. Karl, 'The Competence for Foreign Direct Investment: New Powers for the European Union?', 5 *Journal of World Investment & Trade* 3 (2004), p. 414.

[7] Treaty between the Federal Republic of Germany and Pakistan for the Promotion and the Protection of Investments, 25 November 1959, 457 U.N.T.S. 24.

[8] A. Dimopoulos, *EU Foreign Investment Law* (1st edition, Oxford University Press, Oxford, 2011), p. 14; A. N. Diehl, 'Tracing a Success Story or "The Baby Boom of BITs"', in A. Reinisch & C. Knahr, *International Investment Law in Context* (1st edition, Eleven International Publishing, Utrecht, 2008), p. 8.

[9] UNCTAD, 'World Investment Report 2011: Non-Equity Modes of International Production and Development', *United Nations* (2011), p. xvi.

[10] M. Burgstaller, 'Vertical Allocation of Competence for Investment Treaties in the EU', *Asian International Economic Law Network (AIELN) Inaugural Conference* (2009), http://aieln1.web.fc2.com/Burgstaller_panel3.pdf (last visited 13th October 2014), p. 3.

[11] TEC, [2002] OJ L 325/1, Article 56 et seq.

[12] C. Hjälmroth & S. Westerberg, 'A Common Investment Policy for the EU', *Kommerskollegium-Swedish National Board of Trade* (2010), p. 11.

[13] Directive 88/361 for the Implementation of Article 67 of the Treaty, [1988] OJ L 158/77, Annex I-Explanatory Notes.

[14] Case C-203/80 *Casati* [1981] ECR 2595, para. 4; Joined Cases 286/82 & 26/83 *Luisi and Carbone* [1984] ECR 377, paras 19 et seq.; see also A. de Luca, 'New Developments on the Scope of the EU Common Commercial Policy under the Treaty of Lisbon', in K. P. Sauvant, *Yearbook On International Investment Law and Policy 2010-2011* (Oxford University Press, Oxford, 2012), p. 182 et seq.

[15] see S. Hindelang, *The Free Movement of Capital and Foreign Direct Investment: The Scope of Protection in EU Law* (1st edition, Oxford University Press, Oxford, 2009).; Opinion 2/92 *Re Third Revised Decision of the OECD on National Treatment* [1993] ECR I-521, paras 6 & 7.

[16] TEC, [2002] OJ L 325/1, Article 57.

restrictions in respect of capital movements towards third States existing as of 31 December 1993 including among others restrictions on market access and establishment.[17] In summary, while the Member States regulated issues such as expropriation and discrimination of established investments in their BITs, the EU took care of issues such as market access and non-discrimination in its trade agreements with third States.[18] Even though the predominant role in FDI rested with the Member States, at least a few international agreements could be concluded as mixed agreements of the EC and the Member States, the most important being the Energy Charter Treaty ('ECT').[19]

The freedom of establishment is a prerequisite for making an investment, because in order to make it one needs to acquire the right of establishment in the host State. Article 43 TEC established this freedom, but only for intra-Community investments. Therefore, the EC did not have the competence to act externally in this sphere. Based on Opinion 1/94[20], which refers to the principle of parallelism[21], the ECJ found that the Union had no external competence based on the freedom of establishment,[22] which is why, pre-Lisbon, the EC could not act upon it.

Another means of the EU to exert some influence on investments was the Minimum Platform on Investment ('MPoI'), established in 2006[23]. Serving as a template for free trade negotiations with third States, it was mainly concerned with the establishment of investments, but not their protection (e.g. expropriation and investor-state disputes).[24] It offers standardised negotiations to third States wanting to conclude a free trade agreement ('FTA') with the EU thereby trying to circumvent negotiations on an investment chapter each time an FTA is negotiated with a third State. The practical relevance of the MPoI remained rather limited, since no official document such as a regulation was ever published; as such, it had little legal value beyond its function as a negotiation template.[25] Therefore, any fear that Member States would lose their competence to conclude BITs or rather FTAs including provisions covered by the MPoI such as market access were also unfounded.[26]

Even though the EC had acquired some limited powers in FDI, it did not take the crown from the Member States pursuing their BIT policies. That did not, however, mean the EU was

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[17] A. de Luca, in K. P. Sauvant, *Yearbook On International Investment Law and Policy 2010-2011*, p. 182 et seq.

[18] Investment Group of the Seattle to Brussels Network, 'Reclaiming Public Interest in Europe's International Investment Policy-EU Investment Agreements in the Lisbon Treaty Era: A Reader', *The Transitional Institute* (2010), p. 19.

[19] see Council and Commission Decision 98/181 on the Conclusion, by the European Communities, of the Energy Charter Treaty and the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects, [1998] OJ L 69/1; The Energy Charter Treaty, 16 April 1998, 2080 U.N.T.S. 95.

[20] Opinion 1/94 *RE World Tarde Organization Agreement* [1994] ECR I-5267.

[21] The EC may act externally where it has previously adopted an internal act. see Ibid., para. 77.

[22] Opinion 1/94 *RE World Tarde Organization Agreement*, para. 81.

[23] Commission Note Minimum Platform on Investment for EU FTAs-Provisions on Establishment in Template for a Title on "Establishment, Trade in Services and E-Commerce", D (2006) 9219.

[24] N. Maydell, 'The European Community's Minimum Platform on Investment or the Trojan Horse of Investment Competence', in A. Reinisch & C. Knahr, *International Investment Law in Context* (1st edition, Eleven International Publishing, Utrecht, 2008), p. 75 f.

[25] W. Shan & S. Zhang, 'The Treaty of Lisbon: Half Way Toward a Common Investment Policy', 21 *The European Journal of International Law* 4 (2011), p. 1051.

[26] M. Burgstaller, 'Vertical Allocation of Competence for Investment Treaties in the EU', *Asian International Economic Law Network (AIELN) Inaugural Conference* (2009), http://aieln1.web.fc2.com/Burgstaller_panel3.pdf (last visited 13th October 2014), p. 2.

inactive: in fact, it concluded a number of FTAs containing investment chapters, or at least provisions relating to the promotion of investments (e.g. market access, non-discrimination) such as the EU-Chile Association Agreement.[27] Another important agreement was concluded with Mexico.[28] The latter also contained provisions on market access for investment in order to boost cooperation between the EU and Mexico. In spite of these agreements, the only real BIT-like agreement of the EU remained the Energy Charter Treaty, which contains provisions on investor protection and investor-state dispute settlement.[29]

2. Foreign Direct Investment - Post-Lisbon

The Lisbon Treaty offered the possibility of changing the fragmented situation of some limited EU powers in the field of FDI as opposed to the strong Member State control and regulation of BITs, resulting in more uniformity within the EU but, what's more, also outside the EU. It could set an end to what the Commission referred to as the *"BITs and pieces"*[30] of the previous EU and Member State action.

The Treaty introduced an exclusive competence for foreign direct investment within the framework of the Common Commercial Policy in Articles 206 and 207 of the Treaty on the Functioning of the European Union ('TFEU'), reflecting the increasingly integrated international approach to trade and investment negotiations.[31] Article 206 TFEU sets out the general objectives of the CCP, including among other things the *"progressive abolition of restrictions [...] on foreign direct investment"*.[32] FDI is part of the CCP pursuant to the list of subject matters covered by the CCP in Article 207 (1) TFEU, whereas the exclusive nature of the CCP competence of the EU is laid down in Article 3(1)(e) TFEU.[33] The EU is now in a position to conclude international agreements and adopt autonomous regulations with respect to FDI. However, it should be pointed out that the provisions of the TFEU only refer to foreign as well as direct investment, which means that in principle indirect forms of investment as well as *portfolio* investments may fall outside the scope of the competence.[34]

Nevertheless, the EU still has to further define and shape this competence, as the Treaty of Lisbon remains silent on the most important issues regarding FDI such as whether it covers only pre- or also post-establishment standards of treatment. This virtually leaves the EU Commission with nothing and everything at the same time: it is no secret that where it sees the possibility it will try to extend the powers of the EU as far as possible, whereas Member States will try to oppose such an extension if they fear any negative effects for their own national

[27] 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, 2003, Articles 21, 55, 97.

[28] Economic Partnership, Political Coordination and Cooperation Agreement between the European Community and its Member States, of the One Part, and the United Mexican States, of the Other Part, [2000] OJ L 276/54.

[29] ECT, 16 April 1998, 2080 U.N.T.S. 95, Articles 10-15 & 26.

[30] Commission Communication Towards a Comprehensive European International Investment Policy, COM (2010) 343 final, p. 4

[31] Treaty on the Functioning of the European Union (Consolidated Version), [2012] OJ C 325/47, Articles 206 & 207.

[32] Ibid., Article 206.

[33] Ibid., Articles 3 & 207.

[34] A. Dimopoulos, 'The Common Commercial Policy After Lisbon: Establishing Parallelism between Internal and External Economic Relations?', 4 *Croatian Yearbook of European Law and Policy* (2008), p. 110 et seq.

regulation of FDI based on the 1300 BITs concluded by them so far.

One of the most pertinent issues in this regard is the definition of the term 'foreign direct investment', which is far from being clear. Undoubtedly, foreign in this context refers to investments made into the EU by third States and from EU States into third States and not to intra-EU investments.[35] What is meant by 'direct investment' is, however, not so clear, especially with respect to portfolio investment. For the time being, academics, the Commission[36] as well as the ECJ[37] use as a point of reference the definition of Directive 88/361[38], which sets out that direct investments are

> *"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."*[39]

This definition most certainly does not cover portfolio investment, which the ECJ held to be an

> *"acquisition of shares on the capital market solely with the intention of making a financial investment without any intention to influence the management and control of the undertaking."* [40]

One may wonder why the competence for FDI but not for portfolio investment was conferred. Some scholars may disagree, but maybe it was simply not necessary because such competence can be implied from the provisions on the free movement of capital. Based on the doctrine of implied external competences as established in the *ERTA*[41] judgment in conjunction with Article 3(2) TFEU[42] the Commission[43], the Parliament[44] as well as the Council[45] took the

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[35] R. Vidal Puig, 'The Scope of the New Exclusive Competence of the European Union with Regards to 'Foreign Direct Investment'', 40 *Legal Issues of Economic Integration* 2 (2013), p. 139.; C. Herrmann, 'Die Zukunft der mitgliedstaatlichen Investitionspolitik nach dem Vertrag von Lissabon', 4 *Europäische Zeitschrift für Wirtschaftsrecht* (2010), p. 208.

[36] Commission Communication Towards a Comprehensive European International Investment Policy, COM (2010) 343 final, p. 2.

[37] see Case C-326/2007 *COM v. Italy* [2009] ECR I-2291, para. 35.; Case C-112/05 *COM v. Germany* [2007] ECR I-8995, para. 18; Case C-446/04 *Test Claimants in the FII Group Litigation* [2006] ECR I-11753, para. 175 et seq.; Case C-157/05 *Holböck* [2007] ECR I-4051, para. 33 et seq.; Joined Cases C-282/04 & 283/04 *COM v. Netherlands* [2004] ECR I-9141, para. 19.

[38] Directive 88/361 for the Implementation of Article 67 of the Treaty, [1988] OJ L 158/77.

[39] Ibid., Annex I-Explanatory Notes.

[40] Joined Cases C-282/04 & 283/04 *COM v. Netherlands*, para. 19.

[41] The ECJ came in this case to the conclusion that where the EU has internal powers on a specific subject matter and internal rules on such matter have been adopted, the EU also enjoys external competence for the subject matter in its relations with third States. see Case C-22/*70 COM v. COU (ERTA)* [1971] ECR 263, paras 6 et seq.

[42] TFEU, [2012] OJ C 325/47, Article 3(2).

[43] Commission Communication Towards a Comprehensive European International Investment Policy, COM (2010) 343 final, p. 8.

[44] European Parliament Resolution on the Future European International Investment Policy, 6th April 2011, 2010/2203 INI, para. 11.

[45] The Council states in its "Conclusion on A Comprehensive European International Investment Policy" that *"it supports the definition of a broad scope for the new EU policy [...] as suggested by the Commission, to be further elaborated in full respect of the respective competences of the Union and its Member States as defined by the Treaties"*. Even though, the Council makes no explicit mention of portfolio investments in its Conclusions, at least one

view that *“to the extent that international agreements on investment affect the scope of the common rules set by the Treaty’s Chapter on capitals and payments, the exclusive Union competence to conclude agreements in this area would be implied.”* [46] Obviously, the Council stressed that Member States' competences and interests have to be respected and valued in this process.[47] Since the three institutions agree that portfolio investments are covered, there is little sense in continuing an academic debate on whether portfolio investments should be included or not. In fact, the exclusion of portfolio investment from the EU's exclusive competence would have more negative effects than positive effects for all parties involved: the EU, its Member States and its third country trading partners. Trade and investment agreements would almost always have to be concluded as mixed agreements, which makes the negotiation process much more complicated and might lead to no result at all. Most BITs include FDI and portfolio investment. So why not make it a full exclusive competence instead of going back to a policy of BITs and pieces which considerably impairs the effectiveness of the CCP?[48]

Another difficult issue with respect to the new competence is its exact scope, more specifically whether it extends from the pre- (investment liberalization and market access) to the post-establishment (investment protection through most-favoured-nation and national treatment, fair and equitable treatment, full security and protection, protection from unlawful expropriation and investor-state dispute settlement) phase. If one takes the Member States' BITs argument again, it would seem that for an effective and coherent investment policy both will have to be covered. A restrictive interpretation of the new competence would considerably affect the position of the EU in its future trade and investment negotiations, since economic actors seek agreements in which not only access to the market but also the protection of their investment on the market is guaranteed.[49]

The majority view in the literature and also of the institutions is to understand the new competence as broad and comprehensive as possible. Even though Articles 206 and 207 speak of the abolition of restrictions and therefore do not explicitly refer to protection standards, it cannot be ignored that market access and investment protection go hand in hand. You cannot really have the one without the other.[50] Some Member States are still reluctant to support such a broad scope of the competence, as they fear that standards will be lowered, wherefore there is

can assume from this statement that it is rather in support of including portfolio investment in the scope of the competence than against it.; see Council Conclusion on a Comprehensive International Investment Policy, 3041st Foreign Affairs Council Meeting, Luxembourg, 25th October 2010, para. 7.

46 European Parliament Report on the Impact of the Treaty of Lisbon on the Common Commercial Policy of the European Union, (forthcoming at the end of the year 2014), p. 27.

47 Council Conclusions on a Comprehensive European International Investment Policy, 3041st Foreign Affairs Council Meeting, Luxembourg, 25th October 2010, para. 7.

48 see M. Bungenberg, 'Towards a more Balanced International Investment Law 2.0?', in Herrmann, Simma & Streinz (eds.), *Trade Policy between Law, Diplomacy and Scholarship, Liber amicorum in memoriam Horst G. Krenzler,* EYIEL Special Issue (forthcoming 2015).

49 F. Ortino & P. Eeckhout, 'Towards an EU Policy on Foreign Direct Investment', in A. Biondi, P. Eeckhout & S. Ripely, *EU Law After Lisbon* (1st edition, Oxford University Press, Oxford, 2012), p. 318.

50 European Parliament Report on the Impact of the Treaty of Lisbon on the Common Commercial Policy of the European Union, (forthcoming at the end of the year 2014), p. 24.; In analogy it has been argued that as the lack of IPR protection has been considered an obstacle to trade, a lack of investment *protection* may be seen as an obstacle to make investments in the first place, thus linking market access for investments with investment protection, see C. Herrmann, 4 *Europäische Zeitschrift für Wirtschaftsrecht* (2010), p. 210.

still a good chance, despite a broad interpretation of the competence, that FTAs might end up being mixed agreements at least with respect to certain aspects of them.

Clauses on expropriation and investor-state-dispute settlement ('ISDS') are further particularly sensitive issues for Member States. Yet with respect to expropriation the issue appears bigger than it really is. Article 345 TFEU provides that *"the Treaties shall in no way prejudice the rules in Member States governing the system of property ownership."* [51] Of course the EU is not going to do that, it simply wants to provide the same standards for everyone where an expropriation is carried out, but the how and when is something the EU will not touch.[52] The systems of property ownership of the Member States will not be affected as such, only the conditions under which the expropriation of foreign investments may take place (which is a very small aspect of the system of property ownership as a whole) are defined[53].

The last aspect relevant to a coherent and comprehensive European investment policy is investor-state dispute settlement. In previous discussions between the institutions and the Member States the latter were reluctant to give up this area. They feared that the enforcement systems for their BITs would be distorted. But if the EU is to replace existing Member State BITs then it does not make much sense to try to keep ISDS as a field of exclusive Member State regulation. The negotiated trade and investment agreement between the EU and Canada ('CETA') as well as the current negotiations about a Transatlantic Trade and Investment Partnership Agreement ('TTIP') include ISDS provisions with the goal of protecting EU investors.[54] However, the Member States are divided on whether this approach should be upheld.

3. Conclusion

Before the Treaty of Lisbon, the system on FDI regulation within the European Union was rather chaotic, due to different competences existing in parallel. On the one hand, the Member States conducted their own BITs policy while on the other hand, the EU tried to creep into the competence of the Member States by conducting its own investment policy with respect to FTAs. Chaotic or not, the system still worked quite well, otherwise the EU would not be the biggest im- and exporter of FDI today. The Treaty of Lisbon, however, may elevate this strength of the EU to an entirely new level. Despite the unclear scope of the new exclusive competence on FDI, it seems that finally after five years some more concrete ideas have materialized, making the coincidental competence a proper competence. With the recently concluded FTA between the EU and Canada (see below) and other agreements still in the

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[51] TFEU, [2012] OJ C 325/47, Article 345.

[52] K. Kazimirek, 'The New Competence over Foreign Direct Investment and its Impact on the EU's Role as a Global Player', *Jean Monnet Centre for Europeanisation and Transitional Regulation Oldenburg* (2012), http://www.cetro.uni-oldenburg.de/download/CETRO_Selected_Theses-_Kazimirek.pdf (last visited 13th October 2014), p. 29.

[53] European Parliament Report on the Impact of the Treaty of Lisbon on the Common Commercial Policy of the European Union, (forthcoming at the end of the year 2014), p. 25.

[54] see European Commission, 'Questions and Answers: Why Is the EU Including Investor to State Dispute Settlement in the TTIP?', *DG Trade* (2014), http://ec.europa.eu/trade/policy/in-focus/ttip/questions-and-answers/ (last updated 30th July 2014).; DG Trade, 'Online Public Consultation on Investment Protection and Investor-to-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)', *DG Trade* (2014), http://trade.ec.europa.eu/consultations/index.cfm?consul_id=179 (last updated 14th October 2014).

pipeline such as TTIP, it seems feasible that a common European investment policy may be developed in the near future. Its exact scope will be determined by the results of the FTA negotiations and the conclusion of the final agreements. Whether they are concluded as mixed agreements or EU-only agreements will have an impact on the scope of the competence and hence, it is still the Member States which at least partially may impact the scope of the EU FDI competence, from covering all aspects which may be found in a BIT to only covering some.

III. *The Competence Balance between the EU and its Member States with Respect to Bilateral Investment Treaties*

In a field of regulation, such as investment, more or less exclusively shaped by Member State action through BITs and with only marginal influence by the EU through investment related Treaty provisions (establishment and capital), it is only natural that the transfer of competence for FDI to the EU does not happen within a day. FDI has been and still is a sensitive field of regulation for Member States - their first and foremost interest being the protection of their own investments and investors.

Nonetheless, with the newly acquired competence for FDI the EU is now in a position to conclude international investment agreements ('IIAs') instead of its Member States. Hence, the question arises what will happen to the existing BITs: will they be void, will they continue to exist, can Member States still conclude investment treaties on their own? These are all questions, which were not solved before the entry into force of the Lisbon Treaty, thus jeopardizing a successful story of promoting and protecting investments all over the world resulting from the BITs concluded by the EU Member States in the past. Again, this looks more like a coincidental than a thought-through situation. However, as will be seen below, the EU seems to be on the right track to solve at least some of the existing competence confusion.

1. The Fate of EU Member State BITs with Third States (Extra-EU BITs)

Even though the EU is now in charge of regulating FDI for its Member States, this does not mean that existing BITs of the Member States with third States will be void. A Member State obligation to immediately terminate all BITs is unimaginable[55], let alone the consequences this would have on the internal market, since the EU as one of the biggest exporters as well as importers of FDI[56] profits a great deal from these agreements.

Apart from these obvious economic reasons, from an international law perspective these agreements cannot simply be rendered void. The principle of *pacta sunt servanda*[57] as well as

[55] According to a memo issued by the Economic and Financial Committee ('EFC') of the EU most Member States clearly rejected the possibility of terminating their intra-EU BITs despite any overlap between European law and the BITs in question. Therefore, it is clear that Member States will not take any other position regarding their extra-EU Bits. see D. Vis-Dunbar, 'EU Member States Reject the Call to Terminate Intra-EU Bilateral Investment Treaties', *Investment Treaty News* (2009), http://www.iisd.org/itn/2009/02/10/eu-member-states-reject-the-call-to-terminate-intra-eu-bilateral-investment-treaties/ (last visited 13th October 2014).

[56] European Commission, 'European Union: Trade and Investment 2014', *DG Trade* (2014), http://trade.ec.europa.eu/doclib/docs/2014/january/tradoc_152062.pdf (last visited 13th October 2014), pp. 1&9.

[57] *"The rule that agreements and stipulations, esp. those contained in treaties, must be observed."* in B. Garner,

Article 30 IV (b) of the Vienna Convention on the Law of Treaties ('VCLT')[58] make it clear that a subsequent treaty with a third party does not replace the existing agreement nor can the obligations entered into be disrespected, despite a possible contradiction between these treaties.[59] Hence, the EU now being in charge of FDI does not change the fact that the existing Member States' BITs with third States are perfectly valid, at least pursuant to public international law.

Even though Member States can keep their extra-EU BITs, they are not free to negotiate whatsoever in these agreements, i.e. they are under an obligation to bring those agreements in line with EU law. Article 351 TFEU sets out that Member States' agreements entered into with third States are not prejudiced by the EU Treaties if they are concluded before 1 January 1958 or before accession of the respective Member State.[60] If applied by analogy to the entry into force of the Lisbon Treaty or more specifically to the conferral of the FDI competence to the EU[61], this means extra-EU BITs concluded before the entry into force of the Treaty of Lisbon remain perfectly valid also from an EU law point of view. Pursuant to the text of Article 351 and the case-law of the CJEU ('the BITs cases' [62]) Member States are however under an obligation to eliminate incompatibilities of their BITs with EU law.[63] More generally and irrespective of when their BITs were concluded the duty of loyal cooperation as enshrined in Article 4(3) TFEU requires Member States *"to take any appropriate measure, [...]* to *ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union."* [64]

The first and foremost example of incompatibilities of BIT provisions with EU law are free capital transfer clauses, which were at issue in the previously mentioned BITs cases.[65] The transfer of capital guarantees found in most BITs are unqualified in nature, causing them to conflict with Union law; specifically, with the power of the Council to restrict the free transfer of capital from third States in exceptional circumstances pursuant to Article 66 TFEU.[66]

For the time being, it seems that at least existing BITs with third States are safe from being challenged by the EU institutions. Yet, the obligation of compatibility of BITs with EU

Black's Law Dictionary (8th edition, Thomson West Publishing, 2004), p. 1140.

58 United Nations Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, Article 30.

59 K. Kazimirek, 'The New Competence over Foreign Direct Investment and its Impact on the EU's Role as a Global Player', *Jean Monnet Centre for Europeanisation and Transitional Regulation Oldenburg* (2012), http://www.cetro.uni-oldenburg.de/download/CETRO_Selected_Theses-_Kazimirek.pdf (last visited 13th October 2014), p. 35 f.

60 TFEU, [2012] OJ C 325/47, Article 351.

61 L. Pantaleo, 'Member States Prior Agreements and Newly EU Attributed Competence: What Lesson From Foreign Investment', 19 *European Foreign Affairs Review* 2 (2014), p. 308 f.,

62 see L. Schicho, 'Member States BITs After the Treaty of Lisbon: Solid Foundation or First Victims of EU Investment Policy?', *College of Europe Research Paper in Law* No. 2 (2012), http://aei.pitt.edu/39283/ (last visited 13th October 2014).

63 The CJEU established in the BITs cases that pursuant to Article 351 TFEU Member States have an obligation to eliminate any incompatibilities of existing BITs with third States and EU law, while acknowledging that the obligations and rights entered into by the Member States with third States are not affected by the Treaties. see Case C-205/06 *COM v. Austria* [2009] ECR I-1301, paras 33 & 34.; Case C-249/06 *COM v. Sweden* [2009] ECR I-1335, paras 34 & 35.; Case C-118/97 *COM v. Finland* [2009] ECR I-10889, paras 27 & 28.

64 TFEU, [2012] OJ C 325/47, Article 4.

65 Case C-205/06 *COM v. Austria* [2009] ECR I-1301, para. 26 et seq.; Case C-249/06 *COM v. Sweden* [2009] ECR I-1335, para. 27 et seq.; Case C-118/07 *COM v. Finland* [2009] ECR I-10889, para. 20 et seq.

66 TFEU, [2012] OJ C 325/47, Article 66.

law means that if incompatibilities exist Member States will have to renegotiate the respective BIT(s) or provisions thereof with the respective third state(s). However, this does not solve the question what will happen if they are amended or Member States wish to conclude new ones, yet again constituting proof of the missing deliberations on the scope of the FDI competence before the entry into force of the Treaty of Lisbon. The Commission being the Commission saw its possibility to gain more powers and made a proposal for a Regulation on the status of extra-EU BITs[67] leaving it completely to the Union's discretion to decide on existing, future and amended Member State BITs. Of course, the Member States being the Member States did not accept such drastic change. The result of this conflict - the BITs Regulation - will be described below.

2. The BITs Regulation

After strong opposition by the Council,[68] the Regulation establishing transitional arrangements for BITs of the Member States and third countries[69] finally entered into force in 2013. While not as extensive in scope for the Union as the Commission would have wished, at least some of the existing problems with extra-EU BITs could be tackled, still leaving enough leeway for the Commission to decide over the fate of Member State BITs. It remains a highly controversial issue whether from a legal point of view this was necessary or whether it was just another move of the Commission to extend its powers as mentioned above.[70]

In practice, the regulation has two main purposes: firstly, it grandfathers, i.e. authorises, the continued application of existing Member States BITs and secondly, it delegates the competence for FDI to some extent back to the Member States.[71] In specific, it sets out that all extra-EU BITs that have been signed before the entry into force of the Regulation or before the accession of a Member State to the EU shall be notified to and reviewed by the Commission.[72] Approval is granted automatically unless the Commission raises objections, e.g. with regard to the compatibility with EU law.[73] Thus, these agreements can in principle remain in force until the EU replaces them with equally effective EU agreements with the respective third States.[74]

In case an existing agreement is not compatible with EU law, the Commission in

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[67] Commission Proposal for a Regulation Establishing Transitional Arrangements for Bilateral Investment Agreements between Member States and Third Countries, COM (2010) 344 final.

[68] A. de Luca, 'The EU Regulation Establishing Transitional Arrangements for Bilateral Investment Agreements between Member States and Third Countries: The Destiny of Member States' BITs', *Dritti Comparati* (2012), http://www.diritticomparati.it/2012/11/the-eu-regulation-establishing-transitional-arrangements-for-bilateral-investment-agreements-between.html (last visited 13th October 2014).

[69] Regulation 1219/2012 Establishing Transitional Arrangements for Bilateral Investment Agreements between Member States and Third Countries, [2012] OJ L 351/40.

[70] see N. Lavranos, 'In Defence of Member States' BITs Gold Standard: The Regulation 1219/2012 Establishing a Transitional Regime for Existing Extra-EU BITs-A Member States Perspective', 10 *Transnational Dispute Management* 2 (2013).

[71] Investment Group of the Seattle to Brussels Network, 'Reclaiming Public Interest in Europe's International Investment Policy-EU Investment Agreements in the Lisbon Treaty Era: A Reader', *The Transitional Institute* (2010), p. 12.

[72] Regulation 1219/2012, Article 2.

[73] Ibid., Articles 3, 5 & 6.

[74] S. Seelmann-Eggebert et al., 'New European Regulation Clarifies the Status of Extra-European Bilateral Investment Treaties', *Latham & Walkins Client Alert* Number 1463 (2013), p. 1.

cooperation with the Member States may ask them to renegotiate, suspend or terminate the BIT.[75] The Regulation also allows Member States to amend their existing BITs and even conclude new ones, but again not without the Commission being involved.[76]

Last but not least, the Commission may also intervene in dispute resolution procedures. Member States must inform the Commission of any proceedings against them or which they wish to initiate. Again, the Commission gives its consent and can also work on a common strategy with the Member States.[77]

In summary, the regulation keeps existing extra-EU BITs in place for a transitional period and given that it will probably take a long time until the EU will have succeeded in negotiating similar agreements with the respective third States, EU investors and investors abroad will benefit from this legal situation. It remains to be seen how effective the notification system will be in practice. Due to the large number of existing extra-EU BITs[78] it is very likely that the Commission will not be able to review all agreements, possibly leading to a backlog. This could but does not have to put the legal status of the extra-EU BITs in danger again. Overall, while the regulation has clarified the status of extra-EU BITs, it remains silent on intra-EU BITs, an issue which has still not been resolved, leaving a lot of room for discussion as will be seen in the following.

3. The Special Case of Intra-EU BITs

Intra-EU BITs *per se* do not fall within the competence of the EU for FDI, since FDI is concerned with investment relations between Member States and third States not intra-Member States. Currently, around 190 intra-EU BITs exist between the Member States of the EU, many of which were concluded by the old EU-15 with the newly acceded Central and Eastern European States ('CEE'; in 2004 and 2007) prior to their accession. After accession of the CEE, concerns about the compatibility of such intra-EU BITs with EU law were raised. Technically, they were extra-EU BITs before becoming intra-EU BITs,[79] a circumstance described by the Commission as *"an anomaly within the EU internal market."*[80]

Already after the accession of the CEE, concerns about the compatibility of such intra-EU BITs with EU law were raised. In fact, these agreements are superseded by EU law, while they continue to apply, leaving room for legal uncertainty. Additionally, other issues such as forum

[75] A. de Luca, 'The EU Regulation Establishing Transitional Arrangements for Bilateral Investment Agreements between Member States and Third Countries: The Destiny of Member States' BITs', *Dritti Comparati* (2012), http://www.diritticomparati.it/2012/11/the-eu-regulation-establishing-transitional-arrangements-for-bilateral-investment-agreements-between.html (last visited 13th October 2014); Regulation 1219/2012, Article 6.

[76] Member States are under an obligation to notify the Commission about any intentions to negotiate with third States. The Commission then may or may not give its authorization. see Regulation 1219/2012, Articles 7 et seq.

[77] Regulation 1219/2012, Article 13.

[78] See the List of the bilateral investment agreements referred to in Article 4(1) of Regulation 1219/2012.

[79] European Commission, 'Monitoring Activities and Analysis: Bilateral Investment Treaties between EU Member States (Intra-EU BITs)', *European Commission* (2012), http://ec.europa.eu/internal_market/capital/analysis/monitoring_activities_and_analysis/index_en.htm#maincontentSec5 (last updated 3rd October 2014).; S. Hindelang, 'Member State BITs-There's Still (Some) Life in the Old Dog Yet: Incompatibility of Existing Member States Bits with EU Law and Possible Remedies-A Position Paper', in K. P. Sauvant, *Yearbook On International Investment Law and Policy 2010-2011* (Oxford University Press, Oxford, 2012), p. 220.

[80] E-SR, Award on Jurisdiction, *Eureko v. Czech Republic*, (2012), PCA Case No. 2008-13, para. 205.

shopping by investors for the best investment arbitration clauses, instead of submission of their disputes to the national courts of the Member States and the subsequent problem that questions concerning the EU are not submitted to the CJEU, emerged.[81] Furthermore, non-discrimination among EU citizens might become an issue, where nationals of one Member State are granted specific rights based on a BIT, which are not available to EU citizens from other Member States. Still, the essential question is whether intra-EU BITs are automatically inapplicable due to their incompatibility with EU law and need to be terminated by the Member States or whether they have to be amended in order to not distort the internal market.[82]

Since the above-mentioned issues on termination and incompatibility have not been referred to the CJEU yet, it is the arbitration tribunals, which give some insights on how to handle the issue. In *Eastern Sugar* as well as *Eureco*[83] the arbitration tribunals came to the conclusion that accession to the EU does not automatically terminate a BIT existing between Member States.[84] As unsatisfactory as it may seem that this question was not referred to the CJEU, many Member States afterwards made an effort to terminate their BITs themselves and are continuously pressured to do so by the Commission.[85]

In summary, for the time being Member States may keep their intra-EU BITs, but of course they need to be in conformity with EU law, otherwise they may face an infringement procedure before the Commission and the CJEU. The fact that the EU now has the competence in FDI simply means that the moment it acts upon it, Member States will have to follow the EU's lead, but as long as it has not acted they may keep their intra-EU BITs or may terminate them.

4. The Even More Special Case of the Energy Charter Treaty

As mentioned before, the Energy Charter Treaty is the only multilateral agreement concluded for the promotion and protection of investments in the field of energy. The ECT is a kind of hybrid which sits in between intra-EU BITs and extra-EU BITs with the special feature of its multilateral character. Member States of the EU and non-Member States are parties as well as the European Union itself.

Due to the membership of the EU Member States, issues of incompatibility with EU law

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[81] D. Vis-Dunbar, 'EU Member States Reject the Call to Terminate Intra-EU Bilateral Investment Treaties', *Investment Treaty New*s (2009), http://www.iisd.org/itn/2009/02/10/eu-member-states-reject-the-call-to-terminate-intra-eu-bilateral-investment-treaties/ (last visited 13th October 2014).

[82] A. Reinisch, 'The EU on the Investment Path-Quo Vadis Europe?: The Future of EU BITs and other Investment Agreements', 12 *Santa Clara Journal of International Law* 1, p. 148 et seq.

[83] The first question with respect to the compatibility of BITs with EU law, specifically with respect to arbitration clauses contained therein, could have been referred to the CJEU in the *Eureco* case, since the arbitral award was presented to the Higher Regional Court in Frankfurt in an action for annulment. In its decision the Higher Regional court came to the conclusion that the disputed arbitration clause in fact did not contradict EU law, wherefore there was no need to refer the questions to the CJEU. see Decision, Higher Regional Court Frankfurt, 12th May 2012, 26 SchH 11/10.

[84] The Tribunal citied a Commission letter in which the Commission supported the view that after accession *"the effective prevalence of the EU acquis does not entail, at the same time, the automatic termination of the concerned BITs."* see SCC, Partial Award, *Eastern Sugar B.V. (Netherlands) v. The Czech Republic*, (2007) No. 088/2004, paras 119, 128 & 172.; E-SR, Award on Jurisdiction, *Eureko v. Czech Republic*, (2012), PCA Case No. 2008-13, para. 96.

[85] W. Shan & S. Zhang, 21 *The European Journal of International Law* 4 (2011), p. 1055.

also arise with respect to the ECT, since it does not only bind Member States *vis-à-vis* each other but also *vis-à-vis* third States. An example of such incompatibility is the unconditional transfer of capital under the ECT (as outlined above), which under EU law may be subject to restrictions not foreseen in the Treaty. Hence, a parallel regime is created where third State investors have unconditional rights and Member States are subjected to EU law, which at least potentially may be more restrictive, and at the same time the EU has to ensure that the ECT is compatible with EU law due to its membership, while the ECT itself is perfectly valid under public international law.[86]

In order to eliminate such overlap and the resulting potential for conflict, at least some kind of limitation with respect to intra-EU situations would need to be established under the ECT, meaning that the ECT would have to be renegotiated. Irrespective of the fact that certain provisions of it might be in conflict with EU law, when brought before an international arbitration tribunal, the CJEU would again be excluded from answering questions with respect to EU law. Moreover, if an award of a tribunal contradicts EU law, how will or can it be enforced within the EU? This underlines the need for the EU to take action and solve some of the problems with the ECT in an EU context. This view is further supported by the fact that Member States are required to terminate their intra-EU BITs and ensure the compliance of their extra-EU BITs with Union law, which means that the ECT cannot simply be left as it is.[87]

Under the Treaty of Lisbon, a possible renegotiation of the ECT would be led by the EU itself, not its Member States. Hence, the Member States will have to accept the Union's position with respect to the intra-EU element as well as with respect to the extra-EU element of the ECT due to its competence for FDI. Yet, they may still have some influence on possible renegotiations: since the ECT was concluded as a mixed agreement, the Member States' consent is a prerequisite for any such renegotiation.

5. Conclusion

For the time being, it seems that the competence shift for FDI to the EU will have a limited impact on the existing BITs of the Member States. In principle, they may keep them as long as they are not in conflict with EU law, which was already clear even before the ToL. However, the situation may and will change as soon as the EU acts upon its new competence. Depending on the scope the competence will have, the Member States will simply have to do what the EU regulator decides and follow up on his decision unless - like in the case of the ECT - competence is shared. Then, to a certain extent, Member States can influence decision-making through the Council as qualified majority will be required in order to e.g. negotiate a new IIA, giving opposing Member States an opportunity to form a blocking minority.

A first step towards untangling some of the problems with extra-EU BITs is the BITs Regulation. It provides for legal certainty with respect to the status of extra-EU BITs in this uncertain phase of competence demarcation, at least for a transitional period. It is true though that already in the process of enacting the Regulation, the Commission has given some

[86] J. Kleinheisterkamp, 'The Next 10 Year ECT Investment Arbitration: A Vision for the Future-From a European Law Perspective', *LSE Law, Society and Economy Working Papers* No. 7 (2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1888201 (last visited 18th October 2014), p. 14 f.

[87] Ibid.

indications in which direction it wants to go with the new competence, namely as extensive as possible. Even though existing extra-EU BITs automatically remain in force without authorization they still need to be notified and they still can be reviewed and rejected by the Commission, hence the EU. So in their interactions with third States Member States are after all not that independent anymore and will need the empowerment of the EU in order to act themselves.

The same is true for intra-EU BITs: it may be the case that Member States can keep them for the time being, even though it does not sit comfortably with the Commission. Still, it is to be expected that the Commission will in that case push for their termination in order to guarantee that only the EU regime is applicable to investments made within the internal market. This would make the CJEU the only one to decide on issues arising with regard to these investments and effectively eliminate recourse to international arbitration in an intra-EU context. Consequently, Member States which decide to keep their intra-EU BITs instead of terminating them, may face infringement proceedings before the CJEU for a violation of the duty of loyal cooperation.

IV. *A European International Investment Policy*

After having seen the potentials for developing a coherent and common investment policy for the EU in the previous sections, one factor still requires some attention - the role of the different actors in such development, because as always in European politics ideas rise and fall with the commitment of the institutions and especially the Member States. This is so especially in the case of a coincidental competence. While the Commission is seizing its opportunity and is very proactive, the Member States are still rather reluctant to completely give up on their FDI competence. But these are not the only two actors involved. The European Parliament, too, now has a say in the decision making process.

1. Commission Communication Towards a Comprehensive European International Investment Policy

The Commission Communication “Towards a Comprehensive European International Investment Policy” [88] can be regarded as the manifesto of the Commission on the new FDI competence. Like the BITs Regulation, which was envisaged by the Communication as one of the first steps towards a common investment policy[89], the Communication remains silent on the existing intra-EU BITs and what should happen to them, though technically intra-EU BITs do not fall within the competence for FDI.

The perspective of the Communication is rather ‘EU-friendly’, meaning that since FDI was inserted into the Treaty without any further comments on its scope, the Communication supports an extended scope including not only FDI but also portfolio investments which are implied in FDI on the basis of the provisions on capital movements.[90] It goes even further by

[88] Commission Communication Towards a Comprehensive European International Investment Policy, COM (2010) 343 final.

[89] Ibid., p. 2

aiming at the highest standard possible with respect to investment protection ("gold standard"), thereby making it clear that not only the pre-establishment phase, but also the post-establishment phase of investment is covered by the exclusive competence.[91] While this may seem to be a very extensive take on the EU's competence for FDI, the Commission has rightly noted that achieving a common EU investment policy *"will require more, rather than less, cooperation and coordination among the Union and the Member States."* [92]

From what we have seen above, it was not wrong of the Commission to aim as high as it did in its Communication. It seems that there is an overall consensus among the institutions that the only way forward and the only way to solve the whole competence discussion is to promote a comprehensive and coherent FDI policy. Still, that does not mean that there is no potential at all for conflicts between the institutions, as will be seen below.

2. A New Competence - A New Role for the Institutions

The Treaty of Lisbon had quite an impact on the institutional balance of the Union. Above, it has already been implied that the Commission is eager to use the very unspecific attribution of FDI competence as an opportunity to gain more powers for itself, facing a lot of opposition from the Member States through the Council. Therefore, Member States availed themselves of one last resort to exercise some control over FDI: unanimity. In the decision-making process of the Council, unanimity is required for the negotiation and conclusion of international investment agreements where internal legislation with the same content as an agreement envisaged has been adopted based on unanimity.[93] Obviously, where qualified majority voting ('QMV') is used, it will also apply to a vote on an IIA. But even QMV does not exclude the possibility of Member States to form a blocking minority.

The requirement of unanimity allows for some conclusions to be drawn on the positions of the Council on FDI, namely to allow Member States to act for themselves where it is still possible and to base the common investment policy on the best practices of the Member States, the so-called "gold standard".[94] In many other fields it has proven useful to base EU legislation on a common denominator derived from the best practices of the Member States. The best practices of the Member States could also form the basis for a common EU Model BIT.

The most important institution to mention here is probably the European Parliament ('EP'), which went from nearly no involvement in the decision-making process to having a proper say or rather vote in it. For future IIAs, this means that at least regarding their implementation and internal trade measures the EP, as co-legislator, may veto them. Even though the EP is not formally involved in the negotiations of IIAs it has to be informed and kept up to date on any progress made in such negotiations.[95] The EP is also required to give its consent to all trade

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[90] Ibid., p. 8

[91] Ibid., p. 5

[92] Ibid., p. 11.

[93] TFEU, [2012] OJ C 325/47, Article 207(4).; M. Krajewski, 'The Reform of the Common Commercial Policy', in A. Biondi, P. Eeckhout & S. Ripely, *EU Law After Lisbon* (1st edition, Oxford University Press, Oxford, 2012), p. 306 f.

[94] Council Conclusions on a Comprehensive European International Investment Policy, 3041st Foreign Affairs Council Meeting, Luxembourg, 25th October 2010.

[95] TFEU, [2012] OJ C 325/47, Article 218(10).

agreements concluded within the CCP as well as agreements such as for example association agreements.[96] This makes the process more democratic, since *"the European Parliament, as the only directly elected body of the European Union, is privy to sensitivities and civic concerns which are not always fully considered within the state centric pragmatism of the Council."* [97] Such civic concerns also mean that the European Parliament will make it one of its priorities to open up future IIAs to social and environmental standards such as[98] the promotion of social/working standards, sustainable development and human rights. In the FTAs currently under negotiation, the EP already makes efforts to include such standards, for example in the Resolution on the EU-China BIT.[99]

Noteworthy are the negotiations on a free trade agreement between Japan and the EU. It is testimony of the will of the EP to influence negotiations where it deems it fit. The EP does not formally initiate trade negotiations nor is it involved in the adoption of a negotiation mandate by the Council and the Commission. Still, the EP may adopt resolutions in which it can make recommendations to the Council and the Commission. Before the Japan and EU trade negotiations, the EP did not make use of this soft power, but in this case it did. The EP asked the Council to wait with the negotiations until it had expressed its opinion.[100] Since the so-called "Japan Resolution" [101] it seems that the adoption of resolutions at an early stage of any trade negotiations with prospective partners might become a common practice of the Parliament, since it also did so for TTIP.[102]

3. First Clues From EU FTAs Under Negotiation

The Comprehensive Economic and Trade Agreement between Canada and the European Union is on the verge of becoming a reality, after the EU and Canada finalized the text of the agreement in September 2014, which is now subject to review and pending approval by the Council.

The agreed text of CETA provides with respect to the protection and promotion of investment for a rather broad and complete investment chapter, extending from pre- to post-establishment. Also, the scope of investments included extends to portfolio investments.[103] This supports the view that the EU institutions are aiming at providing for a complete and Member State BIT-like EU investment agenda. The CETA text is the first evidence of such a tendency.

Broad in scope or not, the views on whether the agreement will be concluded as a mixed

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[96] Ibid., Articles 207(2) & 218(6).

[97] European Parliament Report on the Impact of the Treaty of Lisbon on the Common Commercial Policy of the European Union, (forthcoming at the end of the year 2014).

[98] M. Bungenberg, *European Yearbook of International Economic Law*, (forthcoming 2015), p. 17.

[99] European Parliament Resolution on the EU-China Bilateral Negotiations for a Bilateral Investment Treaty, 9th October 2013, 2013/2674 RSP.

[100] The EP required that it should be reviewed whether Japan in fact did eliminate all non-tariff barriers to trade on a regular basis. European Parliament Resolution on EU Trade Negotiations with Japan, 25th October 2012, 2012/2711 RSP, para. 13.

[101] European Parliament Resolution on EU Trade Negotiations with Japan, 25th October 2012, 2012/2711 RSP.

[102] European Parliament Report on the Impact of the Treaty of Lisbon on the Common Commercial Policy of the European Union, (forthcoming at the end of the year 2014).

[103] Comprehensive Economic and Trade Agreement (Consolidated Text), 26th September 2014, available at http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf.

agreement or an EU-only agreement diverge greatly between the EU institutions and the Member States. While the Commission wants to conclude an EU-only agreement, many Member States, including Germany, want it to be concluded as a mixed agreement, so beside ratification at EU-level it would have to pass through all 28 Member State parliaments, prolonging the ratification process considerably. Germany, amongst others, has the view that Member States would have to be involved since portfolio investments are covered, existing Member State BITs with Canada would have to be terminated and because the two other problem children expropriation and ISDS are also included.[104] As seen above, these aspects of investments are indeed contentious issues in the competence delineation of the EU for FDI, but such a broad extent of the competence is justifiable on the basis of the Treaties.

Apart from questions such as whether future FTA agreements will be concluded as mixed or EU-only agreements, the negotiations of agreements of this kind do not go unnoticed by the public at large. The EU, always being criticized for lacking democratic legitimacy and being intransparent in its decision-making, is yet again under the careful surveillance of the public. Discussions such as chlorinated chicken being imported into the EU based on TTIP have been in the media for months and an end is yet to come.[105] Based on this provocative public debate incited by the media some European citizens launched the European citizens' initiative "STOP TTIP" - an initiative to not only repeal negotiations with respect to TTIP but also to prevent the conclusion of CETA. This initiative was brought before the Commission for formal registration pursuant to Articles 11(4) Treaty on the European Union ('TEU') and Article 24(1) TFEU and as set out in the European Citizens' Initiative Regulation.[106] In this case, the Commission rejected the proposal of the EU citizens, since neither TTIP nor CETA are yet concluded. Therefore, the Commission argues that it does not fall within its competence, since these negotiations do not constitute a legal act, which would be part of Union law.[107] The citizens' initative now plans on taking their case to the CJEU. It will be interesting to find out which status the CJEU will e.g. accord to a negotiation mandate. Arguably, it may be regarded as pre-act forming the basis for a legal act (an agreement) to be concluded. Therefore, in a wide sense such a pre-act is an act to implement the CCP. Apart from that, a judgment of the CJEU can hopefully calm down the media.

4. Conclusion

[104] see F. C. Mayer, 'Stellt das geplante Freihandelsabkommen der EU mit Kanada (Comprehensive Economic and Trade Agreement, CETA) ein gemischtes Abkommen dar?', *Legal Opinion for the German Federal Ministry for Economic Affairs and Energy* (2014), http://www.bmwi.de/BMWi/Redaktion/PDF/C-D/ceta-gutachten-einstufung-als-gemischtes-abkommen,property=pdf,bereich=bmwi2012,sprache=de,rwb=true.pdf (last visited 20th October 2014).

[105] see EurActiv, 'Nothing Wrong with Chlorine-Washed Chicken, Say German Backers of TTIP', *EurActiv* (2014), http://www.euractiv.com/sections/trade-industry/nothing-wrong-chlorine-washed-chicken-say-german-backers-ttip-308564 (last updated 23rd September 2014).

[106] Treaty on the European Union (Consolidated Version), [2012] OJ 326/13, Article 11(4).; TFEU, [2012] OJ C 325/47, Article 24(1).; Regulation 211/2011 on the Citizens' Initiative, [2011] OJ L65/1.; An initiative may only be brought before the Commission, where one million citizens of the European Union from at least one quarter of the Member States. With such initiative the EU citizens may ask the Commission to bring a legal act for adoption before the EU institutions.

[107] H. Rathke, 'Mehr Partizipation wagen!', *Junge Wissenschaft im Öffentlich Recht Blog* (2014), http://www.juwiss.de/114-2014/ (last visited 28th October 2014).

The Communication from the Commission pushes very strongly in the direction and interpretation of the EU FDI competence as a coherent and complete competence, i.e. the EU institutions should be able to negotiate and regulate for the Member States all aspects of investments, which are also included in BITs. It is clear though that every institution will take its own stance on it, which has the potential for conflicts in the negotiation of future IIAs. All three institutions accept that foreign direct investment is a very sensitive issue for the Member States, wherefore at least in their statements they assure to take the Member States' needs into consideration. Still, it is an important step that the institutions have aligned their interests in order to move forward and finally give the competence a shape.

A first tendency with regard to the shape of the competence may be drawn from the text of CETA. As mentioned above, in a BIT-like manner it covers all aspects of investments extending from market access to non-discrimination over expropriation to ISDS. The Commission wishes to conclude the agreement as an EU-only agreement which supports the view that FDI is, from the perspective of the institutions, regarded as covering all aspects of investments and that other issues such as portfolio investments for example are covered by other Treaty provisions. Yet, Member State disagree and want to make the agreement a mixed agreement, which will possibly prolong and complicate the ratification process and might bring it to a halt if a Member States does not ratify. This shows yet again that Member States are still reluctant to give up their sphere of influence in the regulation of investment relations with third States. The decision on whether CETA will be concluded as a mixed or an EU-only agreement has not been taken yet, still the competence struggle between Member States and the EU has not been solved and might have negative effects on any future agreements to be concluded, because of the legal uncertainty such constant conflicts provide for possible trading partners. This is yet again proof of the coincidental transfer of FDI to the EU, which does not mean that it cannot turn into a success. European policy-making is *per se* not made within a day as the past 60 years have shown. The EU evolved solely from a Community of six Member States with purely economic interests to a Union of 28 Member States with a social dimension, constantly growing to include more Member States, hence also more opinions. And it is not only the Member States' opinions as a whole which have to be taken into account. The interests of each and every European citizen, too, need to be accounted for. At least the European citizens' initiative gives European citizens a voice and allows them to exert some influence on negotiations on IIAs, even if such influence is only exerted via the media.

V. *Summary: A Coincidental Competence, but yet a Step Forward Towards a Common European Investment Policy*

The new competence of the EU in FDI may be a coincidental and an insufficiently thought-through competence, yet it is a great opportunity for the EU to further strengthen the economic integration of its Member States. In a newspaper article this competence has very accurately been described as *"hardware without software"*.[108] And this is in fact the crux of

[108] R. Torrent, 'The EU' International Investment Policy: Hardware Without the Software', *Investment Treaty News* (2010), http://www.iisd.org/itn/2010/09/23/the-eu-s-international-investment-policy-hardware-without-the-software/ (last visited 13th October 2014).

the competence discussion. The institutional framework is set, the experience has been acquired in over 60 years of European integration and the competence has been conferred, merely the details are still lacking, because the competence slipped into the Treaty of Lisbon and there was no time to adopt specific provisions on how it works.

Developing a software on how the FDI competence will work in the future and aligning the policies of the Member States will be a long and cumbersome process. Still, in the long run not only the Union but every single Member State and its trading partners will benefit. Yes, it is true that the Union already is the biggest importer and exporter of FDI without there being a common policy on it. And it is likewise true that legal uncertainties (e.g. with regard to extra-EU BITs) have arisen in the process of shaping the EU FDI competence and further uncertainties may arise in the future, but the EU appearing as one actor with one common investment policy will make it an even stronger partner in trade negotiations with third States and most likely attract even more FDI.

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