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# THE LISBON TREATY THE FINAL INSTALMENT OF THE UNION'S 'CREEPING COMPETENCE OR A SOURCE OF LEGAL UNCERTAINTY?

*With the coming into force of the Lisbon Treaty, the European Union has tact fully shifted the vertical alignment of competence to regulate foreign direct invest ment away from EU Member States, thereby reserving all prerogatives in this field for itself. The new Treaty purports to dislove the existing bilateral treaty regime that has been regulating the field of foreign investment for the past fifty years and replace it with a common 'European' investment policy. The central question is: whether or not the legal mechanisms enshrined in the Lisbon Treaty are suitable and sufficient for facilitating and upholding the EU's bold objectives and whether or not the EU will have enough political leverage to lead Member States down a new 'European' investment path.*

Key words: *Foreign Direct Investment. Lisbon Treaty. Competence.*

## 1. INTRODUCTION

Mindful of the importance of Foreign Direct Investment (hereinafter FDI) in general and the necessity to have increased influence in the future determination of investment policies in particular, the European Union (hereinafter the EU) has decided to tighten its legislative reins with regard to FDI.

With the coming into force of the Lisbon Treaty,[1] the EU has included FDI within its area of exclusive competence. Needless to say, a

[1] Treaty of Lisbon amending the Treaty on European Union and the Treaty estab lishing the European Community, Official Journal of the European Union 2007/C 306/01,

new investment order is upon us and, apart from representing a new era and chapter in the sphere of international investment regulation, the new legal order marks a radical departure from the traditional allocation of FDI competences. In other words – the traditional sovereign right to regulate the entry of FDI – whether and to what extent a sovereign state will admit investors into its national economy and market[2] – no longer exists.

First, this paper will provide a brief illustration of the importance of FDI in general and the relevance of EU Member States as actors in this field in particular. Secondly, an elaboration on the past and present European investment regime will endeavour to provide insight on the significance of the Lisbon regime and its implications on the competences of Member States henceforward. Furthermore, Chapter III will dwell on certain contentious issues that have arisen from provisions of the Lisbon Treaty. Chapter VI will attempt to merge points raised in preceding chapters into what will hopefully be a modest contribution to the critical assessment of what the Lisbon Treaty has offered and outlook on how the EU could improve its investment policy in the future.

## 2. THE EU'S CREEPING COMPETENCE

The area of FDI has traditionally been within the competence of sovereign states. The admission of investments and the right of establishment concern a state's traditional prerogative to regulate and control.

Up until now, the legal framework of modern international investment law has primarily been established through investment treaties.[3] Naturally, as a consequence of the increasing importance and expansion of FDI, the need to sustain and efficiently protect it has developed in parallel. This has led to the conclusion of International Investment Agreements (hereinafter ILAs) and, in particular, Bilateral Investment Treaties (hereinafter BITs).[4] Although, as authors have noted, in spite of the prox-

*http://eur ex.europa.eu/JOHtml.do?uri OJ:C:2007:306:SOM:EN:HTML*, last visited 1 October 2012.

[2] I. Gomez Palacio, P. Muchlinski, "Admission and Establishment", *Oxford Handbook of International Investment Law*, Oxford University Press, 2008, 228.

[3] S. Greenberg, C. Kee, J.R. Weeramantry, *International Commercial Arbitration, an Asia Pacific Perspective*, Cambridge University Press, 2011, 478.

[4] S. D. Amarasinha, J. Kokott, "Multilateral Investment Rules Revisited", *Oxford Handbook of International Investment Law*, Oxford University Press 2008, 124: "[*I*]t *would be wrong to conclude that there is no multilateral regime for foreign investment. Rather, it is a fragmented regime with a variety of contracting parties, some being bilat eral, others regional or multilateral, as in the case of WTO Agreements. The result is that for each pair or group of international investment agreements (IILs), creating incentives*

imity between international trade and investment, there has been a disproportion in the extent and intensity of their regulation and liberalization at the multilateral level.[5] In other words, at least for now, BITs have been dominating the scene of international investment.[6]

Within the borders of the EU, Member States have together concluded more than 1,100 BITs.[7] Furthermore, the EU accounts for more inward and outwad FDI than any other trading entity. According to a review conducted by Copenhagen Economics, over the past decades, EU firms have increased their investments outside EU borders by a factor of five.[8] By 2008, the EU27 stock of outward FDI in non-EU countries amounted to €3.3 trillion,[9] whilst the stock of FDI into the EU by non-EU investors amounted to €2.4 trillion in 2008.[10] The conclusion of the study was, *inter alia*, that outward FDI has led to an increase in EU GDP of more than €20 billion over the period between 2001–2006.

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*for 'treaty shopping' by foreign investors who seek to enhance their protection even in cases where their own country has not concluded agreements that offer the same level of protection as those used by other countries. Thus there may be significant reasons for moving to a new multilateral investment regime*."

[5] *Ibid.*, 120.

[6] BITs, as instruments of international law, are signed between two states, pursu ant to which each offers substantive standards of treatment to private investors that origi nate from the other contracting state. Since the conclusion of the first BIT between the Federal Republic of Germany and the Islamic Republic of Pakistan in 1959, the past fifty years have seen a momentous increase in the number of BITs, resulting in a colossal and complex network of international agreements, amounting to more than 2600 agreements. *See* UNCTAD, "Recent Developments in International Investment Agreements (2008 June 2009)", *ILA Monitor, International Investment Agreements*, United Nations, 3/2009, http://unctad.org/en/docs/webdiaeia20098 en.pdf, last visited 1 October 2012. With the aim of ensuring the protection and promotion of foreign investments as well as develop ing the economies of states in which investments are made, BITs are infused with provi sions covering reciprocal conditions for access of FDI between the parties. These provi sions contain guarantees for national treatment, fair and equitable treatment, full protection and security, prohibition of expropriation and transparency. Importantly, a vast number of BITs contain specific dispute settlement provisions which enable investors to pursue claims they have against host states in breach of their treaty obligations. The plethora of BITs has created a universal system of substantive and procedural investment protection, a fundamental part of the contemporary international economic order. *See* K. Bökstiegle, "An Arbitrator's Perspective of BITs and their Relation to Other International Law Obli gations", *Paper given at the Conference 50 Years of Bilateral Investment Treaties Tak ing Stock and Look to the Future*, Frankfurt 1 3 December 2009, 3.

[7] See UNCTAD, "Recent Developments in International Investment Agreements (2008 June 2009)", *ILA Monitor, International Investment Agreements*, United Nations, 3/2009, *http://unctad.org/en/docs/webdiaeia20098 en.pdf*, last visited 1 October 2012.

[8] Copenhagen Economics, Impacts of EU Outward FDI, Final Report, 20 May 2010, 6, *http://trade.ec.europa.eu/doclib/docs/2010/june/tradoc 146270.pdf*, last visited 1 October 2012.

[9] *Ibid.*, 6.

[10] *Ibid.*, 13.

However, given the current economic downturn, authorities have observed that investment protectionism has gained the upper hand in various quarters of the world.[11] In the midst of an economic crisis, investment may prove to be a godsend to both potential investors and states eager to force their economies out of turmoil: whilst investors aim to gain an advantage and expand their ventures, weak economies, in attracting foreign investors, aim to bring in long-lasting and stable capital flows, generate higher employment levels, increase productivity by the transfer of technology and specialized knowledge, and, ultimately, achieve growth in the country's overall economy.

It is in the aforementioned context, and in view of the increased criticism aimed at the bilateral investment treaty regime, that calls for a global investment regime have been renewed.[12] Indeed, one should be mindful that a multilateral proposal has been tried, but failed, in both the Organisation for Economic Cooperation and Development (hereinafter the OECD) and the World Trade Organization.[13]

However, the position of EU Member States has always been somewhat specific. On the one hand, this is due to the fact that the Union is founded upon, and has stood behind, the 'four freedoms', which inherently entail and openness of the EU internal market. On the other hand, the importance and positive effects of FDI have not gone unnoticed by the EU, which has steadily, but surely, been adjusting its grasp on the regulation of FDI.

In other words, there have long been provisions in EU legislation which are located in the crossfire between FDI regulation and the Union's four freedoms. By way of example, Article 56 of the Treaty establishing the European Community (hereinafter the TEC) already addressed an important aspect of foreign direct investment, which is the free movement of capital.[14] Also, the provisions on freedom of establishment, one of the

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[11] W. Shan, S. Zhang, "The Treaty of Lisbon: Half Way Towards a Common Investment Policy", *European Journal of International Law*, 21/2011, 1072.

[12] *Ibid.*

[13] Albeit, the OECD has been successful, although with regard to a slightly different subject matter, with its Model Tax Convention which serves as the basis for more than 3,000 bilateral tax treaties in force today in the world. For more on the history of negotiations of 'multilateral' investment treaties *see* S. D. Amarasinha, J. Kokott, 119 153. It is precisely against this backdrop that the idea of a common investment policy within the EU has emerged. The fragmentation and legitimacy crisis of bilateral and regional investment treaties have put the 'spaghetti bowl' of investment treaties under severe criticism. This milieu renders the prospect of a multilateral investment treaty both tempting and necessary. Despite the previous failures of such endeavours, one might say, that having the EU at the negotiating table would certainly help in facilitating the negotiation process preventing the 'multilateral investment agreement' debacle from occurring again.

[14] This provision, unchanged, is incorporated in the Lisbon Treaty in Article 63: "*Within the framework of the provisions set out in this Chapter, all restrictions on the*

four prongs of the 'four freedoms' and the Common Commercial Policy (hereinafter the CCP) arguably grant some competence to the Community concerning the entry and operation of foreign investment in the internal market. However, these provisions, to the extent one can connect them to the regulation of FDI, pertain solely to the entry into market phase.[15]

Also, the EC has been incorporating elements of foreign investment in Association Agreements it has concluded with third countries,[16] thereby connecting investment regulation with market integration and development principles. By linking these two aspects, the EC has attempted to reflect its policy orientation in its external economic relations to promote a regulatory framework on foreign investment, placing emphasis equally on economic and social policy considerations.[17]

However, up until the Lisbon Treaty, the regulation of foreign investment had been, at the most, within the shared competence of the EU and its Member States.[18] The Community had not established either express or implied exclusive competence in this field of law, as the European Court of Justice, in its Opinion 2/92, averred with regard to the principle of national treatment, one of the most fundamental standards of foreign direct investment.[19] contained in virtually all BITs:

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*movement of capital between Member States and between Member States and third countries shall be prohibited... Within the framework of the provisions set out in this Chapter, all restrictions on payments between Member States and between Member States and third countries shall be prohibited.*"

[15] Another contentious issue has been the question of expropriation and whether the Community had the power to take positive action and determine the conditions under which expropriation of foreign investors' property is legal and whether and to what extent the foreign investor is entitled to compensation. This predicament has, at least up until the Lisbon Treaty, was settled in favour of the Member States.

[16] Foreign investment provisions are found in agreements with countries aiming for future accession to the EU, such as the Stabilization and Association Agreements (SAAs) with Balkan countries. The EU has concluded Stability and Association Agreements with Croatia, the Former Yugoslav Republic of Macedonia and Albania. The EU is still negotiating an agreement with Bosnia and Herzegovina and is in negotiations with Serbia and Montenegro with regard to their accession to the Union. The EU has concluded Euro Mediterranean Association Agreements with Algeria, Egypt, Israel, Jordan, Palestine, Morocco, Tunisia and has recently concluded the negotiations with Syria. The EU has concluded Partnership and Co operation Agreements with Armenia, Azerbaijan, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russia, Ukraine and Uzbekistan. See A. Dimopoulos, "Shifting the emphasis from investment protection to liberalization and development: The EU as a new global actor in the field of foreign investment policy", *Journal of World Investment and Trade,* 11/2012, 2.

[17] *Ibid.*

[18] W. Shan, S. Zhang, 1050.

[19] Opinion 2/92 of the European Court of Justice, 24. March 1995, *http://eur lex.europa.eu/smartapi/cgi/sga doc?smartapi!celexplus!prod!CELEXnumdoc&lg en&numdoc 61992V0002*, last visited 1 October 2012, *"Although it is apparent from the foregoing*

On the other hand, bearing in mind the importance of FDI for world economic relations, it would be erroneous to assume that the Union has been sitting idly, watching FDI gather momentum. Quite the contrary, the Community had shown evident suggestions that it would be intervening in FDI. Deciding otherwise would lead to a situation in which EU's power to regulate the CCP, the cornerstone and arguably the strongest pillar of the European integration, would become in fact curtailed as a result of being shared with the Member States.

A striking example of such indication was the Commission's Note on the Minimum Platform on Investment for EU FTA's – Provisions on establishment in template for a Title on "Establishment, trade in services and e-commerce (hereinafter the Minimum Platform).[20]

Given that this document is the Union's first formalized and comprehensive approach towards generating a common international investment policy, it represents significant proof of the Commission's contemporaneous willingness to intervene in an external economic policy field so far predominantly left to the Member States.[21] Commentators had named the Minimum Platform as a 'negotiation template'. Although a document possessing no legal sway, neither increasing nor decreasing the competence of the Union vis-à-vis its Member States, it was meant to be the foundation upon which an ambitious investment policy was to be built.[22]

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*that the national treatment rule concerns mainly the conditions for the participation of foreign controlled undertakings in the internal economic life of the Member States in which they operate, the fact remains that it also applies to the conditions for their par ticipation in trade between the Member States and non member countries, conditions which are the subject of the common commercial policy of the Community...[s]o far as the participation of foreign controlled undertakings in intra Community trade is concerned, such trade is governed by the Community's internal market rules and* ***not by the rules of its common commercial policy****... It follows from the foregoing that Article 113* ***does not*** *confer* ***exclusive competence*** *on the Commission to participate in the Third Decision."* (emphasis added).

[20] The European Commission's Note for the attention of the 133 Committee on the Minimum Platform on Investment for EU FTA's Provisions on establishment in template for a Title on "Establishment, trade in services and e commerce", 28. July 2006, *http://www.iisd.org/pdf/2006/itn ecom.pdf*, last visited 1 October 2012.

[21] W. Shan, S..Zhang, 1051.

[22] M. Burgstaller, "European Law and Investment Treaties", *Journal of Interna tional Arbitration Law* 26/2009, 204; Commission, 'Remarks' in the draft 'Minimum Plat form on Investment for EU Free Trade Agreements', 28. July 2006, *www.iisd.org/pdf/2006/ itn ecom.pdf*, last visited 1 October 2012. Furthermore, gradual re allocations of compe tence amongst the EC and its Member States are far from an uncommon phenomenon. By way of example, the shift in competence with regard to the CCP. Today, the CCP is one of the EU's most important and dynamic fields of external relations. *See*, A. Dimopoulos, "The Common Commercial Policy after Lisbon: Establishing Parallelism Between Inter nal and External Economic Relations?", *Croatian Yearbook of European Law and Policy*,

In any event, with regard to foreign investment, the aforementioned parallelism between international investment law and Community law has gradually been changing into an increasing interaction and the EU's 'creeping exclusive competence', concluding with the Lisbon Treaty which finally confers upon the Union the exclusive power to regulate FDI with the Union.

## 3. POST-LISBON & RE-ALLOCATION OF COMPETENCE

On 1 December 2009, the Lisbon Treaty finally came into force. As noted in the Commission's 2010 Communication, investment presents itself as a new frontier for the CCP.[23] The Lisbon Treaty provides for the Union to contribute to the progressive abolition of restrictions on FDI. The EU's task is to develop an international investment policy that increases EU competitiveness and thus contributes to the objectives of smart, sustainable and inclusive growth.

Articles 206[24] and 207[25] of the Lisbon Treaty set the deck to what constitutes a shift in the vertical alignment of competences between Member States and the EU.

The Commission has also advanced that a common investment policy will benefit not only the EU, but the rest of the world. The EU,

4/2008, 110. However, since its inception in 1957, it has significantly changed in order to adapt to the new realities of international trade and economic relations. In fact, the idea of giving the EC exclusive competence in the field of commercial policy developed through the case law of the European Court of Justice (hereinafter the ECJ) and can be tracked down by examining systematic changes introduced by the Amsterdam Treaty, followed by the Nice Treaty. For an elaborate discussion on the evolution of the Common Commercial Policy, *see* R. Leal Arcas, "Exclusive or Shared Competence in the Common Commercial Policy: From Amsterdam to Nice", *Kluwer International Law* 2003, 3 14.

[23] Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, To wards a comprehensive European international investment policy, 2010, *http://trade.ec.europa.eu/doclib/docs/2011/may/tradoc 147884.pdf*, last visited 1 October 2012.

[24] Article 206 of the Lisbon Treaty, "*By establishing a customs union in accordance with Articles 28 to 32, t**he 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*." (emphasis added)

[25] Article 207(1) of the Lisbon Treaty, *"**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*." (emphasis added).

now with greater political leverage, might be able to push for a global investment policy – succeeding where international organizations have failed previously. What is more, a complete European investment policy might help in the development of a more balanced investment treaty regime.[26] The Lisbon Treaty is purporting to create a stable, sound and predicable environment for investors where investors are able to operate in an open, properly and fairly regulated business environment, both within the EU's borders and beyond.[27]

The inclusion of FDI in EU competence is undoubtedly an important step towards the creation of a comprehensive EU approach to trade and investment that reflects the nature of international economy in which trade and investment are inextricably linked.[28]

The Lisbon Treaty should therefore streamline trade policy by bringing all key policy issues within EU competence. However, the changes that the Lisbon Treaty will bring about in EU trade policy must be seen in the light of past practice and the broader economic and political factors shaping EU policy.

## 4. THE LISBON TREATY A SOURCE OF LEGAL UNCERTAINTY?

Notwithstanding the legitimate forces behind, and undeniable benefits of, a common investment policy, one must be cautiously optimistic when it comes to the possibilities of implementation of the Lisbon Treaty and its contribution to the further development of FDI within the EU.

The Union, equipped with new clouts, will be able to "simplify and streamline EU external trade policy" with the aim of "increasing EU competitiveness"[29] and "contributing to the progressive abolition of restrictions on foreign direct investment".[30] The integration of European law into international investment law mirrors the steadily increasing claim of competence by the EU in this field.[31]

Despite the fact that the EU's competences may not have come as a surprise and although the new allocation of competences may have been

[26] See W. Shan, S. Zhang, "From 'South North Contradiction' to 'Public Private Conflict': Revival of the Calvo Doctrine and New View of International Investment Law", Northwest Journal of International Law and Business, 27/2007, 631.

[27] Commission Communication, 2.

[28] S. Woolcock, "The potential impact of the Lisbon Treaty on European Union Trade Policy", *Swedish Institute for European Policy Studies*, 8/2008, 5.

[29] Commission Communication, 1.

[30] *Ibid.*

[31] M. Burgstaller, "European Law Challenges to Investment Arbitration", *The Backlash against Investment Arbitration,* 2010, 456.

well received by some, the central question is: whether or not the legal mechanisms enshrined in the Lisbon Treaty are suitable and sufficient for facilitating and upholding the EU's bold objectives. After this question is answered, the next logically presents itself: whether or not the EU will have enough political leverage to lead Member States down a new 'European' investment path.

Even though authorities have received news of the EU's increased competence with a positive outlook, others have called the transfer of powers the "latest episode in the European Commission's struggle to obtain a larger role in investment policy" and an "overhaul"[32] of the traditional BIT practice. As commentators have aptly purveyed: the Treaty provisions have the appeal of an outright earthquake, concealing more than they reveal,[33]generating as many questions as they do answers.[34]

Unfortunately, practitioners and scholars will struggle to find solace in the broad terms of the Treaty. As will be elaborated below, Articles 206 and 207 of the Lisbon Treaty leave considerable room for diverging interpretations and therefore legal uncertainty.

In other words, the inclusion of FDI within the scope of the CCP raises a number of questions: First, what is the extent of the Union's exclusive competence over FDI, i.e. what does the Treaty recognize as elements of FDI? Second, given the re-allocation of competence, what is the role of Member States henceforward? Have the EU Member States lost all their prerogatives when it comes to regulating the inward and outward flows of FDI? Third, what is the legal status of existing agreements concluded by the Member States?

### 4.1. The Treaty's Definition of FDI

If one were to glance at the provisions of the Lisbon Treaty that give the Union the power to regulate and determine the course of a new investment policy by granting the EU coveted exclusive competence, one might be surprised to find that the Treaty fails to define the scope of such

[32] Seattle to Brussels Network, Reclaiming Public Interest in Europe's International Investment Policy, EU Investmet Agreements in the Lisbon Era: A Reader, 2010, 7, *http://www.corporateeurope.org/sites/default/files/S2b%20investment%20reader%20%2050%20pages!.pdf*, last visited 1 October 2012.

[33] P. Nacimiento, "Who's A Respondent in Light of Art. 207 of the Lisbon Treaty?", *Kluwer Arbitration Blog*, *http://kluwerarbitrationblog.com/blog/2010/04/30/who%E2%80%99s a respondent in light of art 207 of the lisbon treaty/*, last visited 1 October 2012.

[34] K. Lalore, "EU Proposal: who will investors face off in future investment treaty claims?", *Kluwer Arbitration Blog*, *http://kluwerarbitrationblog.com/blog/2012/07/23/eu proposal who will investors face off against in future investment treaty claims*, last visited 1 October 2012.

competence.[35] Namely, the Treaty does not provide for a definition of what constitutes a 'foreign direct investment', thereby being mute on the scope of its competence thereto.

Nonetheless, whether a deliberate or accidental omission, it is highly unlikely that the Lisbon Treaty's failure to precisely determine and define the term 'foreign direct investment' will cause any meaningful commotion in practice – this merely means that the term will be defined in accordance with international and community law.

Thankfully, at an international level, both the International Monetary Fund and the OECD have defined FDI, and have characterized it as a lasting interest with a long-term relationship and influence.[36] Also, 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.[37] Conveniently, the Commission in 2010 has come forth with its Communication clarifying what it considers to fall within the ambit of FDI.[38]

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[35] J. Kleinheisterkamp, "The Dawn of a New BIT Generation? The New European Investment Policy", Kluwer Arbitration Blog, *http://kluwerarbitrationblog.com/blog/2010/12/23/the dawn of a new bit generation %E2%80%93 the new european investment policy/*, last visited 1 October 2012.

[36] For example, see the OECD Benchmark Definition of Foreign Direct Investment, Fourth Edition 2008, 17, "Direct investment is a category of cross border investment made by a resident in one economy (the direct investor) with the objective of establishing a lasting interest in an enterprise (the direct investment enterprise) that is resident in an economy other than that of the direct investor. The motivation of the direct investor is a strategic long term relationship with the direct investment enterprise to ensure a significant degree of influence by the direct investor in the management of the direct investment enterprise. The "lasting interest" is evidenced when the direct investor owns at least 10% of the voting power of the direct investment enterprise. Direct investment may also allow the direct investor to gain access to the economy of the direct investment enterprise which it might otherwise be unable to do. The objectives of direct investment are different from those of portfolio investment whereby investors do not generally expect to influence the management of the enterprise."

[37] Council Directive 88/361/EEC, 24 June 1988 for the implementation of Article 67 of the Treaty, Official Journal L 178, "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"; *see* Maffezini v. the Kingdom of Spain, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000.

[38] Commission Communication, "*Foreign direct investment (FDI) is generally considered to include any foreign investment which serves to establish lasting and direct links with the undertaking to which capital is made available in order to carry out an economic activity. When the investment takes the form of a shareholding this object presupposes that the shares enable the shareholder to participate effectively in the management of that company or in its control. This contrasts with foreign investments where there*

In conclusion, despite the obvious omission of the drafters of the Lisbon Treaty, it is doubtful that the definition of FDI will create problems in practice.[39]

### 4.2. Member States' Competence

Given the re-allocation of competences, policy-making in the realm of international investment has seeped through the fingers of the EU sovereign states into the grasp of the Union. Even though this transfer of powers has dramatic consequences, it is, as noted by authorities, fairly uncontroversial by now, even accepted by Member States,[40] that in future all agreements on investment will be negotiated and concluded by the EU.[41]

With the aim of clearing the ambiguity concerning Member States' obligations arising from existing BITs and with regard to Member States' position regarding the modification or conclusion of future (short-term) investment agreements, the European Commission has presented a Proposal for a Regulation of the European Parliament and of the Council Establishing Transnational Arrangements for Bilateral Investment Agreements Between Member States and Third Countries (hereinafter the Proposal), the text of which was adopted (finally) on 10 May 2011.[42]

The Proposal, in Article 7, stipulates that subject to further conditions, a Member State shall be authorized to enter into negotiations to amend an existing or to conclude new agreements relating to investment with a third country. Furthermore, where a State intends to enter into negotiations in order to amend an existing bilateral investment agreement with a third country or to conclude a new agreement with a third country relating to investment, it shall notify the Commission of its intentions in

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*is no intention to influence the management and control of an undertaking. Such invest ments, which are more often of a more short term and sometimes speculative nature, are commonly referred to as [portfolio investments]*."

[39] FDI will be associated with establishment and/or participation in new or exist ing undertakings via equity or security holdings which are characterized by the existence of a lasting link and managerial control of their activity. On the other hand, portfolio in vestments, and other categories of foreign investment (intellectual property rights, mone tary claims, etc.) are excluded from the EU's competence. *See*, Dimopoulos, (2008).

[40] J. Kleinheisterkamp, "The Next 10 Year ECT Investment Arbitration: A Vision for the Future From a European law perspective, Report for the SCC / ECT / ICSID Conference on "10 Years of Energy Charter Treaty Arbitration" 9 10 June 2011", Foreign Affairs Council meeting Luxembourg 2010, *http://www.consilium.europa.eu/uedocs/cms data/docs/pressdata/EN/foraff/117328.pdf*, last visited 1 October 2012.

[41] *Ibid*.

[42] Proposal for a Regulation of the European Parliament and of the Council estab lishing transitional arrangements for bilateral investment agreements between Member States and third countries, 2010, *http://trade.ec.europa.eu/doclib/docs/2010/july/ tradoc 146308.pdf*, last visited 1 October 2012.

writing.[43] Where a Member State intends to conclude a new agreement with a third country relating to investment, the Commission shall consult the other Member States within thirty days to determine whether there would be added value in having an agreement of the Union.[44]

Also, the Commission shall be kept informed of the progress and results throughout the different stages of negotiations and may request to participate in the negotiations between the Member State and the third country concerning investment. The Commission may participate as an observer in the negotiations between the Member State and the third country as far as the exclusive competence of the Union is concerned.[45]

In a nutshell, the EU offers Member States a transitional regime. Without stripping Member States of their competences entirely, the EU will keep a watchful eye on the activities in which Member States partake with regard to FDI.

However, in contrast with the fervour with which the EU usurped competence over FDI with the Lisbon Treaty, the manner in which the Commission's Proposal aims to slowly tackle Member States' authority in this domain seems somewhat insipid.

### 4.3. The Legal Fate of Existing BITs

As previously articulated, EU Member States have together concluded more than 1,100 BITs and account for more inward and outward FDI than any other trading entity. Therefore, in the context of the Lisbon Treaty – the question concerning the legal fate of existing BITs naturally poses itself.

The aforementioned Commission's Proposal addresses this issue by asserting that the existing agreements remain binding on the Member States, as a matter of public international law. However, the Commission goes on to state that in view of the entry into force of the Lisbon Treaty, Member States' international agreements concerning investment should be addressed from the perspective of the Union's exclusive competence on FDI.[46]

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[43] Proposal, Article 8(1).

[44] Proposal, Article 8(3). In addition, the Commission may authorize the opening of formal negotiations unless it concludes that the opening of negotiations would be in conflict with the law of the Union other than the incompatibilities arising from the allocation of competence between the Union and its Member States on foreign direct investment, or negotiations would not be in line with policies of the Union relating to investments; they undermine the objectives of negotiations already underway between the Union and the third country concerned; constitute a serious obstacle to the conclusion of future Union agreements with that third country relating to investment, Proposal Article 9.

[45] Proposal, Article 10.

[46] Proposal, 2. Also, the Proposal stipulates, "*In the absence of an explicit transitional regime in the TFEU clarifying the status of Member States' agreements, the present*

Therefore, if one were to follow the text of the Proposal, the EU would authorize the continued existence of investment treaties. However, the Commission's Proposal also purports to review all agreements in force between Member States and third countries, thereby assessing their compatibility with EU law.[47] Furthermore, the Proposal also states that the Commission will have to present the European Parliament and the Council with a report on the review of all the BITs concluded by Member States and their compatibility with EU legislation, within five years from the entry into force of the proposed Regulation.[48]

The Commission's pitch has already been attacked by authorities, with respect to the technical challenge of reviewing over a thousand BITs.[49] However, in light of the circumstances, maintaining the status quo in relation to existing BITs until the Union offers its own comprehensive investment policy, the Commission's proposition does not seem too wide of the mark.

However if, during the review of existing BITs, the Commission finds that existing BITs are incompatible with certain mandatory rules of EU law, then this presents itself as a slightly more delicate problem. [50]

## 5. CONCLUSION

Needless to say, in the era of globalisation and expansion of industry and trade, the Union's move to take the regulation of FDI in its own hands, *prima facia*, seems like a wise strategic decision. However, given the significance of the field of law it purports to regulate and the stakes (and stakeholders) involved with FDI, the Lisbon Treaty does not have seemed to have risen to the challenge.

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*proposal for a Council and Parliament Regulation will authorise the continued existence of all investment agreements currently in force between Member States and third countries*."

[47] Article 5 of the Proposal reads, "*The Commission shall review the agreements notified pursuant to Article 2, including by assessing, in particular, whether the agreements: (a) conflict with the law of the Union other than the incompatibilities arising from the allocation of competences between the Union and its Member States, or (b) overlap, in part or in full, with an agreement of the Union in force with that third country and this specific overlap is not addressed in the latter agreement, or (c) constitute an obstacle to the development and the implementation of the Union's policies relating to investment, including in particular the common commercial policy.*"

[48] Proposal, Article 5(3).

[49] J. Kleinheisterkamp, (2010).

[50] For a discussion on the infringement proceedings brought against these Member States, see K. Scholz, "The Long Goodbye The Commission's Infringement Proceedings against Austria, Denmark, Finland and Sweden for Incompatibilities in their BITs with the EC Treaty", Policy Papers on Transnational Economic Law 14/2005.

The current 'transitional' regime is unsatisfactory on a number of levels. For example, whilst on one hand, the Union, with the Lisbon Treaty, boldly strips Member States of their right to regulate FDI within their territory, it backtracks with its 2010 Communication and 2011 Regulation purporting to grant them the 'authority' to maintain the *status quo*.

Also if, as the ECJ has advanced in the infringement proceedings brought against Austria,[51] Finland[52] and Sweden,[53] the existing extra-EU BIT regime has been superseded by EU, the Union will have to prepare to endure an uproar from the international community (along with the displeasure of its own Member States). Of course, this could have been mitigated had the EU come up with a plausible transitional solution, but it seems to have lacked political leverage to do so. This is perhaps also a reason why the Commissions Proposal had only been adopted in 2011 or why an outline of the future common investment policy is still not on the horizon.

In conclusion, the Union's ambitions in the field of investment have been lost in the broad stipulations of Articles 206 and 207 of the Lisbon Treaty and the Commission's ex post efforts to find feasible solutions thereto. The global investment community will therefore have to wait patiently for their European partner to efficiently utilize its new competence and articulate its position. Unfortunately, one can't help but think that the Union has pulled the trigger on a common investment policy, reserving for itself exclusive competences, without being mindful of the strong throwback this would cause.

[51] Case C 205/06, EC Commission v. Austria of 3 March 2009*, http://eur lex.europa.eu/LexUriServ/LexUriServ.do?uri CELEX:62006J0205:EN:HTML*, last visited 1 October 2012.

[52] Case C 118/07. EC Commission v. Finland of 19 November 2009, *http://eur lex.europa.eu/LexUriServ/LexUriServ.do?uri CELEX:62007J0118:EN:HTML*, last visited 1 October 2012.

[53] Case C 249/06, EC Commission v. Sweden of 3 March 2009, *http://eur lex.europa.eu/LexUriServ/LexUriServ.do?uri CELEX:62006J0249:EN:HTML*, last visited 1 October 2012.