The Lisbon Treaty and the Expansion of EU Competence over Foreign Direct Investment

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I. Introduction

Governments are eager to attract foreign direct investment (FDI). It brings additional resources, technology and knowhow to the domestic economy and is a powerful motor for economic development. But FDI is often a politically sensitive topic. Governments are eager to encourage its entry into their territory, but are also eager not to appear to have abandoned control over its entry or its effects. For this reason, international efforts to promote the adoption of a multilateral agreement on investment have so far failed. However, there is a significant body of treaty law designed to encourage and protect the flow of foreign investments. The United Nations UNCTAD calculates that there exist over 2500 bilateral investment treaties (BIT) in force today. The majority of these BITs have been concluded with the encouragement of the World Bank in the years since 1990. Recently, chapters very similar to BITs, protecting and promoting FDI, have been included in regional trade agreements such as NAFTA or ASEAN. Typically, a BIT contains provisions on the right of entry and establishment of foreign capital; BITs also usually contain provisions on the standard of treatment that will be guaranteed to foreign investors and investments once established in the host country. The standards include most favoured nation (MFN) treatment, national treatment (NT), fair and equitable treatment and a commitment not to expropriate without prompt, effective and full compensation. Some BITs also include provisions banning performance requirements and many contain exceptions to the generality of the terms of the agreement. Finally many BITs provide for dispute settlement in the form of arbitration, in which the foreign investor is empowered to make a claim directly against the host state alleging violations of the treaty.
The majority of these BITs have been concluded between developed and developing countries but a number of developed or emerging countries have seen fit to conclude BITs with potential capital exporting countries. This was true of the countries of Eastern and Central Europe which have subsequently joined the EU. Most major EU Member States have been prolific negotiators of BITs: Germany has concluded 130 BITs and France and the UK have not been far behind. The twelve states which joined the EU in recent years all had concluded BITs with countries already Members of the EU. The question of EU jurisdiction over foreign investment has been in process of rapid change during the same time period. The adhesion of twelve new Members has hastened the process of re-examination of the nature and extent of EU jurisdiction over foreign investment. While jurisdiction over foreign investment was not envisaged at the time of the establishment of the EEC in 1957, increased regulation of capital movements and vastly increased monetary cooperation after the Treaty of Amsterdam 1997 (ToA) has led the Commission and many commentators to suggest that EU jurisdiction over foreign investment matters should be clarified and greatly expanded and possibly made exclusive.

This paper therefore presents yet another example of the gradual expansion of EU jurisdiction in response to complex pressures resulting from the development of EU regulatory activities in many spheres.¹

Amongst the innovations found in the Treaty of Lisbon (ToL) amending the Treaty on European Union (TEU) and the Treaty Establishing the European Community (ECT)² are

¹ A very close analogy is to be found in the expansion of EU jurisdiction over air transport services. First initiated in 1989, with the adoption of a series of legislative measures, EU jurisdiction has expanded within the Union and consequently it has also been projected outwards to the point that the EU is the primary regulator of air transportation and safety within the Union and now has authority to negotiate air transport agreements on behalf of Member States with foreign states. Decisions of the ECJ have served to consolidate the position of the Commission. See generally P. Dempsey, European Aviation Law, (The Hague: Kluwer law International, 2004).
explicit references to an EU competence over FDI. However, it remains unclear to what extent this new language will empower the European Commission to make agreements with third countries on FDI and will preclude such action by the EU Member States. In light of the Irish referendum decision of 2008, it also remains unclear when and if the ToL will become law, and so the Commission’s present powers under the treaties in force need to be analyzed. Finally, the future of hundreds of Member State BITs already in place requires examination, as the EU continues to promote a common foreign economic policy with or without Lisbon. This paper sequentially addresses these three issues and demonstrates that by and large, while the Commission must play a much more active role in the conclusion of new BITs, cooperation in the conclusion of future BITs between Member States and the Commission continues to be essential.

II. Implications of Lisbon

A. New Treaty Articles

Like the unimplemented Treaty Establishing a Constitution for Europe (TCE), the ToL explicitly brings competence over FDI into the ambit of the Union under the Common Commercial Policy (CCP) at Title II of Part Five on External Action of the Treaty on the Functioning of the European Union (TFEU, which replaces the ECT). Having sought this

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3 Throughout the amended Treaties, the words ‘Community’ and ‘European Community’ are replaced by ‘Union’, and ‘European Communities’ by ‘European Union’, see ToL, Ibid., Art. 2(2)(a).
objective since the ToA’s Intergovernmental Conference in 1996, the Commission will acquire authority to negotiate investment agreements, with the aim of strengthening the EU’s negotiating position in the world while preventing disparate Member States’ policies from undermining the uniformity of the internal market.6

**TFEU: The Common Commercial Policy and External Action by the Union**

The CCP starts off at Article 206 **TFEU** stating that “...the Union shall contribute...to...the progressive abolition of restrictions on...foreign direct investment...” Article 207(1) then specifies that the CCP “shall be based on uniform principles, particularly with regard to...foreign direct investment...” It shall also “be conducted in the context of the principles and objectives of the Union's external action.” According to Article 205, which begins Part Five **TFEU** on External Action by the Union, these principles and objectives are to be found in Chapter 1 of Title V of the **TEU**.7

**TEU Title V, Chapter 1: General Provisions on the Union’s External Action**

Opening the Chapter, Article 21(1) **TEU** states that “The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world...” It “shall seek to develop relations and build partnerships with third countries...” It shall also “define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of

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6 Ibid. at 269.

international relations, in order to...(e) encourage the integration of all countries into the world economy...” and “(h) promote an international system based on stronger multilateral cooperation and good global governance.” To the extent that they are legally enforceable, with these strengthened provisions on external action, the EU would not be able to conclude FDI agreements that openly contradict the interests of developing countries, or fail to require investors to respect human rights and environmental and social policies.  

Qualified Majority Voting versus Unanimity

Less veto power for individual Member States under a unanimous voting regime in the Council translates into more effective control for the Commission to implement policies over which it has competence. Article 207(4) TFEU states generally that the Council shall vote by qualified majority in the negotiation and conclusion of CCP agreements with third countries, but specifies that for FDI (among others) “the Council shall act unanimously where such agreements include provisions for which unanimity is required for the adoption of internal rules.” However, the Freedoms of Establishment and of Capital and Payments, the two most important internal policies regarding investment, do not require unanimity aside from those exceptional measures “which constitute a step backwards in Union law as regards the liberalisation of the movement of capital to or from third countries” to the extent that these are ‘internal’ measures at all.

Agreements involving trade in cultural and audiovisual services required a unanimous Council vote pre-Lisbon, but the new Article 207(4)(a) only restricts recourse to a qualified
majority “where these agreements risk prejudicing the Union's cultural and linguistic diversity.” Similarly for trade in social, educational and health services, instead of the previous blanket restriction, an agreement must “risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them”¹¹ to require unanimity. Arguably, this amendment could allow the Commission to open up FDI in fields heretofore untouchable by a foreign investor, should it choose to do so.

Public Reaction

It is interesting to note that the Irish Referendum campaign gave rise to a wide spectrum of viewpoints regarding the prospective effects of the ToL and its new provisions on FDI. One website states that a Member State “for the first time gives up the right to legislate on inflows of foreign direct investment from outside the EU”¹² while another insists that “all EU Member States remain free to determine their own policies regarding...foreign direct investment.”¹³ Still another finds that the new reference to FDI “simply gives formal recognition to the current status quo.”¹⁴ The following discussion attempts to present a less political assessment.

B. Limits to an Exclusive EU Competence

Treaty Provisions

Article 5 of the new TEU recapitulates the overriding Union principles found at Article 5 ECT of conferral, subsidiarity, and proportionality, which must govern all Union activity. Article

¹¹ Art. 207(4)(b) TFEU compared with Art. 133(6)(2) ECT.
218 **TFEU** replaces Article 300 **ECT** outlining the procedure for the negotiation and conclusion of international agreements, but among other changes adds “Without prejudice to the specific provisions laid down in Article 207”. This directs us most importantly to Article 207(6) **TFEU** under the CCP, the so-called ‘Parallelism-Clause’:

> The exercise of the competences conferred by this Article in the field of the common commercial policy shall not affect the delimitation of competences between the Union and the Member States, and shall not lead to harmonisation of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonisation.

The latter half of this sentence is not new to Lisbon,¹⁵ and since harmonization is excluded in such fields as social policy, health, and culture, it may not be particularly relevant to FDI beyond the service sector.¹⁶ Even Article 345 **TFEU**¹⁷ that immunizes Member States’ rules on property ownership may not necessarily exclude eventual harmonization.¹⁸ The first half, though “all but clear”,¹⁹ arguably means that the Union could take action on capital movement rights for foreign investors,²⁰ but perhaps not on rights to establishment, fair and equitable treatment or non-expropriation.²¹ I will now elaborate on each of these.

*Rights Granted to Foreign Investors*

BITs are the most common vehicle for regulating FDI today, and typically include a number or core provisions for this task. The EU needs exclusive competence over each of these in order to conclude BITs without Member States’ approval that are complete with all the

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¹⁵ It is only slightly altered from Art. 133(6)(1) **ECT**.

¹⁶ *Ceyssens, supra* note 5 at 279.

¹⁷ ex Art. 295 **ECT**.

¹⁸ *Ceyssens, supra* note 5 at 280.


protections investors have come to expect. Some might argue that the ToL’s new references to FDI must imply this much to be meaningful. But because the reference is (perhaps purposefully) vague, because of the first half of Article 207(6) TFEU, and because of resistance from Member States, a more nuanced analysis will more likely prevail.

**Capital Movement.** Even before the ToL, restrictions on the movement of capital and payments between Member States and third countries were prohibited in principle, albeit with a number of exceptions. Two slight changes in the ToL found at Article 64(2) TFEU may be noteworthy however: the European Parliament (EP) is now explicitly involved, and the replacement of term “may” with “shall” now directs the Council and EP to adopt measures on FDI. The EP’s role has been widened considerably throughout the ToL, which may well contribute to more centralizing policies as the EP appears to be quite Europhilic.

**Establishment.** The EU can only bestow rights of establishment upon Member State nationals, whereas only a Member State can bestow nationality upon a natural or legal person. A company national of a Member State must further have “their registered office, central administration or principal place of business within the Union” before gaining establishment rights. Jan Ceyssens argues that the Union should thus be able to confer these rights on foreign nationals by virtue of its complete internal authority and its new CCP competence on FDI. But

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22 Art. 63 TFEU, Art. 56 ECT.
23 Including permitting restrictions that existed prior to certain dates at Art. 64(1) TFEU, Art. 57(1) ECT, allowing for steps backward in liberalization at Art. 64(3) TFEU, Art. 57(2) ECT, plus other restrictive measures relating to taxation, public policy and public security at Arts. 65-66 TFEU, Arts. 58-60 ECT.
24 For just a few examples in the TFEU where previously the EP was not mentioned, see Arts. 50 on establishment, 63 on capital and payments, and 218 on international agreements.
26 Art. 49 TFEU, Art. 43 ECT.
27 Art. 54 TFEU, Art. 48 ECT.
the version of Article III 315(6) TCE he quotes\(^\text{28}\) differs from the final TCE Article, identical with Article 207(6) TFEU, which does not qualify “competences” with “internal”. The Union may not be able to grant establishment rights to foreigners since this would appear to affect the delimitation of competences overall, if not that of internal competences.

*Non-Expropriation and Fair and Equitable Treatment.* There is still force in the argument that the new FDI competence ought not be restricted to market access policies and extend to treatment standards as well.\(^\text{29}\) The latter help create a stable investment climate, thereby eliminating *de facto* restrictions on FDI; the two cannot be neatly divided and indeed are generally found together in BITs.\(^\text{30}\) However, the EU has not been granted powers over the rules of property ownership,\(^\text{31}\) which makes it difficult to legitimize measures that offer protection against unfair treatment or expropriation without affecting any delimitation of competences.

Other issues include the fact that BITs commonly cover all types of investment, including short-term and minority participations in an enterprise and other assets like real property and intellectual property rights, in addition to FDI which EU external competence is explicitly limited to.\(^\text{32}\) A foreign corporate investor possibly has legal recourse to remedies if registered in a Member State,\(^\text{33}\) but has none to international arbitral tribunals typically provided in BITs. Ultimately, it remains unclear whether the new FDI provisions extend exclusive EU competence

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\(^{28}\) “...shall not affect the delimitation of internal competences between the Union and the Member States... [my italics]”, *Ceyssens, supra* note 5 at 279.

\(^{29}\) *Ibid.* at 277.

\(^{30}\) *Ibid.*


\(^{32}\) *Ceyssens, supra* note 5 at 275; *Mola, supra* note 31 at Section 5.

to liberalization, promotion and protection to the extent Member States’ exclusive competence is not compromised (if ‘extension’ is at all a possibility with this restriction), to investment liberalization alone, or to anything at all.  But the ambiguous language suggests that there was not necessarily meant to be a ‘solution’ just yet.

C. More Mixed Agreements Expected

The European Commission complains that ‘mixed’ agreements are too burdensome, and hinder clarity, uniformity and efficiency both internationally and in the internal market. In response to worries of a democratic deficit should more exclusive competence be transferred to the EU (considering BITs do increasingly affect a range of domestic regulatory policy), one might point to the continued Member State control through the Council, if increasingly by QMV, to the ever-growing role of the EP, and to the newly enhanced role given to Member State parliaments in the ToL to ensure draft EU legislative acts adhere to the principle of subsidiarity.

But nevertheless, it seems the ToL is more likely to increase EU – Member State cooperation rather than full centralization. Given the new Union competence, Member States should no longer be able to conclude BITs on their own, while the Union appears unable to conclude full BITs without the imprimatur of the Member States. Regulating FDI involves such

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34 Mola, supra note 31 at Section 3.2.
35 Ceyssens, supra note 5 at 269.
37 Ceyssens, supra note 5 at 260, 289 (these comments pertain to the TCE, but equally apply to the ToL given the identical new provisions regarding FDI; also see Mola, supra note 31 at Section 5.
38 Ceyssens, ibid. at 287.
a wide diversity of policy areas and is simply too complex to be perfectly parcelled to the satisfaction of all involved, at least for the moment.\footnote{Ibid. at 290.}

\section*{III. Without Lisbon}

\subsection*{A. Implied External Competence}

The EU is not completely barred from acting even without the \textit{ToL}’s new explicit external competence on FDI because the Treaties in force already provide for a number of significant related internal and external powers which touch FDI. Internal competence can itself be a source of external competence if necessary to attain its objective.\footnote{Case 22/70, \textit{Commission v. Council (European Agreement on Road Transport)}, [1971] ECR 263. See Paul Craig and Gráinne de Búrca, \textit{EU Law: Text, Cases, and Materials}, 4th ed. (Oxford: Oxford University Press, 2008) at 97 [Craig].} It could even potentially be deemed exclusive if this is necessary to “preserve the effectiveness of Community law”, and more likely if internal powers have been exercised.\footnote{Opinion 1/03 (Lugano Convention) [2006] ECR I-1145 at paras. 114-117, 121; \textit{Opinion 1/94 (WTO Agreement: GATS and TRIPS)}, [1994] ECR I-5267 at para. 85 [Opinion 1/94]; See Craig, \textit{ibid.} at 97-99, 180-181.} The EU also has the competence to conclude international agreements covering the entire scope of its internal policies.\footnote{Art. 310 \textit{ECT}; Case 12/86, \textit{Meryem Demiret v. Stadt Schwabisch Gmund}, [1987] ECR 3719 at para. 9; this has been used to conclude many Association Agreements.} Arguably, the widest possible interpretation, especially of the term “effectiveness”, could grant the EU full competence over FDI, while the narrowest could grant it none.

\subsection*{B. The Common Commercial Policy}

Even without a specific reference, the CCP is still the major source of EU competence over FDI: it “shall be based on uniform principles, particularly in regard to...the conclusion
of...trade agreements, [and] the achievement of uniformity in measures of liberalisation...”⁴³ In the 1970s, the European Court of Justice (ECJ) ruled that jurisdiction over the CCP is exclusive and needs a wide interpretation to allow for a coherent and effective defence of EU commercial interests abroad and to prevent the distortion of competition within the single market.⁴⁴ It pointed to the CCP’s non-exhaustive enumeration and said its scope goes beyond the liberalization of trade,⁴⁵ reflecting the intimate link between trade and investment despite their traditional separation in treaty-making. The EU can conclude foreign trade deals that affect FDI, for example by limiting market access to foreigners in certain sensitive sectors. But the aims of the CCP would benefit if all Member States could be made equally attractive to outside investment and outside investment opportunities equally attractive to the nationals of all Member States.

Two decades later however, Opinion 1/94 “marked the end of the expansion of EC competence under the CCP, as well as the end of the period of judicial activism with regard to the EC’s exclusive competence.”⁴⁶ It said the CCP only covers those aspects of trade in services that are similar to trade in goods,⁴⁷ thereby excluding the free movement of persons and their rights of establishment, important features of an investment venture.⁴⁸ It reasoned that the movement of people and the CCP were listed as separate ‘activities of the Community’ at Article 3 ECT,⁴⁹ though did not consider the EU’s mandate at Article 62 ECT for establishing uniform

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⁴³ Art. 133 ECT.
⁴⁵ Opinion 1/78, ibid. at paras. 43-53.
⁴⁶ Craig, supra note 40 at 185.
⁴⁷ Opinion 1/94, supra note 41 at paras. 41-47.
⁴⁸ Ceyssens, supra note 5 at 260.
⁴⁹ Opinion 1/94, supra note 41 at para. 46.
standards and procedures for crossing external borders. Intellectual property rights and transport services were also declared outside the scope of the CCP’s exclusivity.\(^{50}\)

*Opinion 2/92* and the *ToA* both confirmed *Opinion 1/94*,\(^{51}\) the former adding that the CCP does not grant the EU exclusive competence to offer national treatment (NT) to foreign investors, while the latter opened the possibility for the inclusion of intellectual property rights.\(^{52}\) *Opinion 2/00* then reiterated that other sections of the Treaty must not be made nugatory by the extension of the CCP’s scope, and a measure’s primary aim must come within this scope in order to benefit from exclusivity.\(^{53}\) Finally, the *Treaty of Nice*, in force since 2003, added trade in services and in the commercial aspects of intellectual property to the CCP, becoming perhaps the only explicit external competence covering issues that fall within the notion of investment.\(^{54}\) However, exclusivity was ruled out for these, as well as for any agreements relating to trade in cultural, audiovisual, educational, social and human health services, as discussed in Part I.

**C. Other Treaty Articles**

Both *Opinion 1/94* and *Opinion 2/92* said that in principle, the internal competence for legislating on establishment rights at Article 47(2) *ECT* could become the basis for an exclusive external competence, once complete internal harmonization was achieved. This not yet being the case, the EU can take action on the establishment of services but not industries, nor on post-establishment protections.\(^{55}\) Foreign companies incorporated in a Member State, however, enjoy

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\(^{50}\) *Ibid.* at paras. 56, 77; See *Craig, supra* note 40 at 185.

\(^{51}\) *Craig, ibid.* at 185.


\(^{53}\) *Opinion 2/00* (*re Cartagena Protocol*) [2001] ECR I-9713 at paras. 38-41 [*Opinion 2/00*]; also see *Opinion 1/78, supra* note 44 at para. 49.

\(^{54}\) *Mola, supra* note 31 at Section 3.1.

\(^{55}\) *Ibid.*
full freedom of establishment, as discussed, as well as NT pursuant to Article 12 *ECT*. They therefore have access to a form of investor-state dispute settlement mechanism through the national courts and ultimately the ECJ, by virtue of Articles 48 and 230 *ECT*.\(^{56}\)

The Articles on the free movement of capital cover transactions between Member States and third countries.\(^{57}\) For officials in the Directorate-General (DG) for the Internal Market, these provisions are sufficient for granting the EU competence to negotiate agreements with third countries on investment, both on its establishment and protection.\(^{58}\) Officials in the DG for Trade however feel that a more explicit reference is necessary.\(^{59}\)

**D. Expect Greater Shared Competence As Well**

Most of the EU’s external competence is joint or shared in nature,\(^{60}\) and the ECJ does not consider the difficulties inherent in these mixed agreements that demand close Member State – EU cooperation\(^{61}\) as grounds for exclusivity.\(^{62}\) The EU’s exclusive competence to conclude international agreements appears to extend to capital movements and trade related aspects of investment measures,\(^{63}\) but therefore not to un-truncated investment agreements.\(^{64}\) Meanwhile, Member States can probably still conclude international agreements on the protection of FDI on their own, but no longer have the competence to do so for its establishment. Even when

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\(^{56}\) *Aaken, supra* note 33 at 29.

\(^{57}\) Arts. 56-60 *ECT*.

\(^{58}\) *Mola, supra* note 31 at Section 3.

\(^{59}\) *Ibid*.

\(^{60}\) *Craig, supra* note 40 at 223.

\(^{61}\) *Opinion 1/94, supra* note 41 at para. 108; See *Craig, supra* note 40 at 223.

\(^{62}\) *Opinion 2/00, supra* note 53 at para. 41; *Opinion 1/94, ibid.* at para. 107.

\(^{63}\) *Mola, supra* note 31 at Section 3, 3.1.

\(^{64}\) Anca Radu, “Foreign Investors in the EU – Which ‘Best Treatment’? Interactions Between Bilateral Investment Treaties and EU Law” (March 2008) 14:2 Eur. L.J. 237 at 240 [Radu].
agreements fall largely outside exclusive EU competence, Member States’ treaty-making power is constrained due to their duty of loyalty and sincere cooperation with the EU, and their duty to support the Union’s external policy “actively and unreservedly in a spirit of loyalty and mutual solidarity”.

The trend has therefore been toward shared competence agreements, including the WTO Agreement, the Energy Charter Treaty, and various Association Agreements. They cover a wide variety of topics including the regulation of capital transfers, but often focus on trade in goods and provide no specific dispute settlement mechanism. The recent growth of international agreements covering investment as one among several economic sectors may also be foretelling. Mixed agreements are “a symptom of the cleavage between legal doctrine and political power which at present seems unavoidable”, and “especially when they do not specify the demarcation line between Community and Member States, diffuse at a stroke the explosive issues of the scope of Community competences (and treaty making power)...”

IV. Existing BITs

A. Potential for Conflict

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65 Examples that include provisions on investment are the mandates the Council gave the Commission to negotiate FTAs and EPAs with third states.
66 Art. 10 TEU; Case C-487/98 Commission v. Denmark [2002] ECR I-9519, paras. 122-139; See Craig, supra note 40 at 223;
67 Art. 11(2) TEU.
68 Ceyssens, supra note 5 at 268; Mola, supra note 31 at Section 2.1.
69 Mola, ibid.
70 Ceyssens, supra note 5 at 268.
With or without the Lisbon Treaty, there exists the potential for conflict between EU law and the hundreds of Member States’ BITs between themselves and with third countries. Despite already providing a highly investor-friendly climate, EU law may impose restrictions on, or exclude benefits from foreign investors that BITs guarantee them. According to Article 307(1) ECT or Article 351(1) TFEU, EU law does not affect international obligations entered into before acceding to the EU, and the addition of new policy areas like FDI may well be treated as analogous since Member States could not have been expected to take these into account. The EU further has a duty not to impede the performance of such agreements.

Nevertheless, the second paragraph of the same Article, along with Article 6(10) of the Central and Eastern European (CEE) countries’ Acts of Accession, obliges Member States to renegotiate their earlier agreements to eliminate any incompatibilities with EU law. The third paragraph provides the rationale for the second, reminding that EU law privileges ought to apply equally to all Member States. The trend toward mixed agreements should work to prevent incompatibilities with future bilateral treaties that otherwise prevail in international law.

B. Intra-EU BITs

72 Aaken, supra note 33 at 29.
73 See Radu, supra note 64 at 240; Aaken, ibid. at 29.
74 Ceyssens, supra note 5 at 287.
77 Vienna Convention on the Law of Treaties, (UN Doc, A/CONF, 39/1 I/Add. 2 287), Art. 30(3); See Ceyssens, supra note 5 at 288.
There exist 191 BITs between EU Member States, mostly between the 12 new CEE countries and the old EU-15. Despite certain Member State claims to the contrary, they are still operative, and international arbitral tribunals continue to grant investors jurisdiction under their terms. This is in spite of an ECJ interpretation of Article 10 ECT that Member States are not to give effect to bilateral agreements between themselves, insofar as this would impede the application of a right conferred by EU law." Private investors and arbitrators are not party to the ECT, so the Article 292 ECT principle that all Member State disputes with regard to EU law must go to the ECJ also does not apply.

The continued appeal of BITs for an EU investor may be precisely the access to arbitration, because EU law is already extremely encouraging of internal investment: even non-discriminatory restrictive measures on the free movement of capital and establishment are prohibited, and Member States are held directly liable for breaches of BITs. Indeed, arbitrators’ reasons for taking jurisdiction include a finding that the various protections offered by the BITs do not conflict with EU law. However, desiring an end to treaty shopping and the unfair advantage certain EU investors consequently hold over others, a consultative body subordinate to the Council known as the Economic and Financial Committee advised the EU to

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78 Aaken, supra note 33 at 28; Radu, supra note 64 at 238; The Germany-Portugal and Germany-Greece BITs are the only exceptions, concluded prior to Portugal and Greece’s accession, but no investment claim has ever been invoked under them, see Christer Söderlund, “Intra-EU BIT Investment Protection and the EC Treaty” (2007) 24:5 J. Int’l Arb. 455 at 455 [Söderlund], and Aaken, supra note 33 at 29 (footnote 148).

79 Söderlund, ibid. at 457, 465 (and see 455, 458), though also see Aaken, ibid. at 30.

80 Case 235/87, Matteucci v. Communauté française de Belgique et al. [1998] ECR 5589, at 19; See Craig, supra note 40 at 222-223.

81 Söderlund, supra note 78 at 459. Arguably, this can happen because one of the Parties to the dispute, the investor, is not a state.

82 Mola, supra note 31 at Section 1.2.

83 Mola, ibid. at Section 1.5.

84 Söderlund, supra note 78 at 467.
invite the Member States to “review the need for such BIT agreements” in its 2006 Report.\textsuperscript{85} This appears to be the extent of EU action to address the matter, and the Member States have shown little intention to conform, perhaps because reneging on BITs always looks bad to investors.\textsuperscript{86}

C. \textbf{Acceding States – US/Canada BITs}

Many of the states planning to accede to the EU in 2003 had previously concluded BITs with the US and/or Canada.\textsuperscript{87} Prior to accession, the Commission and the United States signed a non-binding Memorandum of Understanding (MoU) over incompatibilities between the 8 US-CEE BITs and EU law.\textsuperscript{88} Not every issue was resolved, and there is little information on the entry into force of the necessary amendments,\textsuperscript{89} but the EU was sufficiently satisfied not to force these countries to pull out of the treaties. Those with Canada, however, continue to remain in force without any specific agreement on how to resolve potential disputes.\textsuperscript{90} The MoU outlined key areas that presented a potential for conflict, as follows.

\textit{Capital Movement.} Articles 57(2), 59, and 60 \textit{ECT}\textsuperscript{91} enable the EU to put limits on the movement of capital between Member States and third countries in special circumstances, contrary to stipulations in the BITs. The MoU settled the first and third of these Articles but

\begin{itemize}
\item \textsuperscript{85} \textit{Ibid.} at 456.
\item \textsuperscript{86} \textit{Aaken, supra} note 33 at 31.
\item \textsuperscript{87} \textit{Radu, supra} note 64 at 239.
\item \textsuperscript{89} \textit{Radu, supra} note 64 at 259.
\item \textsuperscript{90} \textit{Ibid.} at 238: a similar approach to the MoU with the US was only proposed with Canada.
\item \textsuperscript{91} Arts 64(3), 66, and 60 \textit{TFEU} respectively.
\end{itemize}
decided to count on “continuing consultations” to solve an apparent impasse over the “largely theoretical” eventuality of the use of the Article 59 ECT safeguard measures.\(^{92}\)

*Establishment*. Under EU law, Member States can discriminate against foreign companies when it comes to establishment rights\(^{93}\) as well as free movement of services rights\(^{94}\) for reasons of public policy, security, and health. These exceptions to NT are not common in BITs,\(^{95}\) but are typically covered by a Regional Economic Integration Organization (REIO) clause that allows for exceptions to certain BIT privileges due to membership in an organization like the EU.\(^{96}\) Treaty shopping is nevertheless a concern. In addition to any BIT already in effect (and its attractive rights to arbitration\(^{97}\)), a foreign company immediately benefits from EU law upon being registered in a Member State because the EU Treaties lack the corporate ownership or control requirements typical of BITs.\(^{98}\)

*Non-Discrimination*. Non-discrimination against foreign investors is a primary requirement of BITs, but the EU – United States MoU allows for derogations in the highly sensitive (and discriminatory) audiovisual and agriculture sectors.\(^{99}\) But there are examples of discrimination in other fields of EU law such as fisheries, investment and financial services, as well as air and water transport.\(^{100}\) There are also post-MoU regulations on chemicals and on

\(^{92}\) Press Statement: Bilateral Investment Treaties with European Union Accession States (5 September, 2003), U.S. Department of State, online: <http://www.state.gov/r/pa/prs/ps/2003/23841.htm>; Radu, supra note 64 at 254 agrees that in the case of an issue arising here, there is a very low probability of an investor-state dispute.

\(^{93}\) Art. 46(1) *ECT*, Art. 52(2) *TFEU*.

\(^{94}\) Art. 55 *ECT*, Art. 62 *TFEU*.

\(^{95}\) Radu, *supra* note 64 at 246.

\(^{96}\) *Ibid.* at 251.

\(^{97}\) *Ibid.* at 243; See also Söderlund, *supra* note 78 at 463, 459 (footnote 7).

\(^{98}\) Radu, *ibid.* at 245; Aaken, *supra* note 33 at 30; Mola, *supra* note 31 at Section 1.1.

\(^{99}\) Consider a directive enacted pursuant to Art. 57(2) *ECT* promoting a majority proportion of European content for television broadcasting. See Mola, *ibid.* at Section 1.2.

\(^{100}\) Radu, *supra* note 64 at 253; Ceyssens, *supra* note 5 at 271.
participation in certain procurement procedures that may clash with BITs, showing how
exceptions in negative lists may not be sufficient.\textsuperscript{101}

Even though the 8 BITs’ REIO exceptions were clarified by the MoU to include all EU
membership obligations,\textsuperscript{102} this may still only restrict MFN treatment and not NT, thereby
leaving open the problem of procurement contracts for which a Member State’s national can
benefit to the exclusion of the Member State’s BIT partners, pursuant to EU law.\textsuperscript{103} Problems
should be rare since the EU and Member States do not often discriminate overtly,\textsuperscript{104} but \textit{de
facto} discrimination could still be problematic, for example when indistinctly applicable
regulatory burdens unwittingly make it harder for third country nationals to enter the market.\textsuperscript{105}
Other issues include fair and equitable treatment clauses interpreted to include both NT and
MFN treatment,\textsuperscript{106} and arbitral tribunals finding that the violation of a BIT’s non-expropriation
provision is still possible even when in full compliance with EU law.\textsuperscript{107}

D. EU-15 – Third Country BITs

None of the EU-15 Model BITs contain exceptions to the free movement of capital in
relation to investment,\textsuperscript{108} and some of their REIO clauses appear deficient or are lacking

\textsuperscript{101} Radu, ibid. at 252.
\textsuperscript{102} Ibid. at 247.
\textsuperscript{103} Ibid. at 249.
\textsuperscript{104} Ibid. at 249.
\textsuperscript{105} Ibid. at 249-250 points to arbitral tribunals going both ways with respect to the legality of \textit{de facto}
discrimination: \textit{SD Myers v. Canada} contrasted with \textit{Methanex v. United States}.
\textsuperscript{106} Ibid. at 255 refers to \textit{SD Myers v Canada}.
\textsuperscript{107} Ibid. at 256-257 refers to \textit{ADC&ADMC v Hungary} where Hungary had to pay more than $75 million to the
investor. This is despite certain prohibitions on discriminatory expropriation within EU law, Member States’
constitutions, and the European Convention for the Protection of Human Rights and Fundamental Freedoms, see
\textit{Mola, supra} note 31 at Section 1.4; \textit{Aaken, supra} note 33 at 29.
\textsuperscript{108} Ceyssens, supra note 5 at 271.
altogether.\textsuperscript{109} In contrast to the situation described above, the Commission chose more aggressive remedial action and between 2006 and 2007 referred Austria, Sweden and Finland to the ECJ for not having eliminated incompatibilities between pre-accession BITs and EU law.\textsuperscript{110} The usual capital movement Articles\textsuperscript{111} are at issue and the Member States argue that there is no incompatibility, pointing to the fact that the \textit{Energy Charter Treaty}, to which the EU itself is also a signatory, has similarly worded freedoms for capital transfers.\textsuperscript{112}

In his recent Opinion concerning the Austrian and Swedish cases delivered this past July,\textsuperscript{113} Advocate General Maduro found that there is indeed an incompatibility:\textsuperscript{114} “the exercise of Community competence...under Articles 57(2), 59, and 60(1) EC...might be jeopardized by allowing Austria and Sweden to maintain international obligations which would compromise the effectiveness of the legislation which the Community can adopt under those articles.”\textsuperscript{115} He rejected the alternative approaches of interpreting the BITs in accordance with EU law, relying on the application of \textit{rebus sic stantibus} principle of treaty interpretation, and simple default.

However, he did not address the great difficulty these countries will likely face when negotiating...

\textsuperscript{109} Radu, supra note 64 at 247.
\textsuperscript{111} Arts. 57(2), 59, and 60(1) ECT.
\textsuperscript{112} Söderlund, supra note 78 at 458 (footnote 4) who agrees with the Member States’ argument at 463.
\textsuperscript{113} Opinion of AG Poiares Maduro delivered on 10 July 2008, Case C-205/06 Commission v. Austria and Case C-249/06 Commission v. Sweden, online: <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&Submit=Rechercher&alldocs=all&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=C-205/06&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100> [Maduro].
\textsuperscript{114} \textit{Ibid.} at para. 54.
\textsuperscript{115} \textit{Ibid.} at para. 51.
comprehensive REIO clauses without granting significant concessions with countries like Russia and China.

Intra-EU BITs might be allowed to run their course before being terminated because they are largely compatible with EU law, while extra-EU BITs might be successfully hunted down by the Commission. But even if terminated, most BITs extend their protection for an additional 10-20 years, so fragmentation in the EU FDI regime is expected to remain for quite some time. If, however, BITs are negotiated and concluded as mixed agreements in the future, then it is still only a matter of time before the playing field is evened.

V. Conclusions

There can be no doubt that the EU is in process of expanding its domestic and its international authority over FDI. Even if the ToL does not enter into force, the logic of the need for the coherent exercise of existing EU competences is very strong. Similarly, the danger of allowing each Member State to pursue its own narrow advantage disregarding the consequences for others is too obvious to ignore. Equally, the Commission is increasingly concerned that the EU should speak with one voice on FDI matters in the world; consequently pressure is increasing to allow the Commission to be the primary actor in the negotiation of new BITs and trade agreements including FDI protection chapters. For all these reasons, the EU is becoming a force to be reckoned with in the field of FDI and a new competence is gradually being asserted.

116 Radu, supra note 64 at 240.
117 Aaken, supra note 33 at 32.
But if EU authority is expanding, this will not happen without continued pressure for restraint and caution. EU competence over FDI puts in doubt the fundamental bargain under which private property is essentially a Member State competence. Equally, expanded EU authority in this field tends to challenge the fundamental assumption that Member States alone can determine who may enter as an EU citizen and hence become the beneficiary of EU law rights. These are very basic issues which go to the heart of some very sensitive questions. On top of this are the very real practical problems associated with the EU purporting to present itself as a party of BITs and hence become open to investor-state arbitration claims to which it may not be well equipped to respond.

For all these reasons, while much has happened in respect of FDI and the EU, many difficult issues remain unresolved.
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