The development of EU trade and investment policies

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The development of EU trade and investment policies: Drawing lessons from past experiences

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Introduction

Regulation of foreign investment presents one of the most topical and controversial subjects in EU external relations. The adoption of the Lisbon Treaty and the introduction of EU competence over foreign direct investment (FDI) in Article 207 of the Treaty on the Functioning of the European Union (TFEU) has generated broad discussions regarding the scope of the "new" EU competence and how it affects Member States' foreign investment policies and in particular their Bilateral Investment Treaties (BITs). However, the foundations for an active EU role in the field of foreign investment were already laid by the European Court of Justice (ECJ). In 2009 the Court declared that certain provisions of Member States BITs are incompatible with EU law, indicating that the existing legal framework has to be amended.[1] Following these developments, the European Commission recently announced its intentions to establish a new EU investment policy.[2] Without elaborating on its views on the specific scope of the EU investment policy and how it interacts with existing Member States' investment policies, the Commission has rendered clear its aim to transform the EU into the main player in the field of foreign investment.

The emergence of EU investment policy meets a number of legal, political and practical challenges, which the involved political actors will have to tackle within the following years. As discussed in previous chapters, the very existence of an EU investment policy depends on the specific delineation of the scope of EU competence over foreign investment, not only under Article 207 TFEU, but also under other provisions of the EU Treaties. Its successful materialization rests on the careful determination of the specific objectives and content of future investment agreements as well as on the clear demarcation of the roles of the EU and its Member States in policy-making in the field of foreign investment. Thus, it is claimed that EU institutions and Member States have to set up an investment policy that guarantees in the long-term the integration and interaction of Member States' national investment policies with EU policy both in substantive and in institutional terms. In addition, the smooth transition from Member States' investment policies to EU investment policy is necessary to preserve European investors' interests and rights and to sooth the

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[1] Case C-205/06, Commission of the European Communities v. Republic of Austria, 2009 E.C.R. I-1301; Case C-249/06, Commission of the European Communities v. Kingdom of Sweden, 2009 E.C.R. I-1335; Case C-118/07, Commission of the European Communities v. Republic of Finland, 2009 E.C.R. I-10889.

2 EU Commission, Communication from the Commission to the European Parliament, The Council, the European Economic and Social Committee and the Committee of the Regions, Towards a comprehensive European international investment policy, COM(2010)343 final (available as annex to this volume) (hereinafter Investment Policy Communication), available at: http://trade.ec.europa.eu/doclib/docs/2010/july/tradoc_146307.pdf (last visited November 21, 2010); Proposal for a Regulation of the European Parliament and of the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries, COM(2010)344 final (available as annex to this volume (hereinafter Regulation Proposal), available at: http://trade.ec.europa.eu/doclib/docs/2010/july/tradoc_146308.pdf (last visited November 21, 2010).

concerns of third countries.[3] Legal certainty is a key element of the Commission's planned action,[4] focusing in particular on the compatibility of the existing Member States BITs with EU Law.

Although foreign investment presents a new field for EU external action, it is not the first time the EU is faced with such challenges. The introduction of express EU competences to act externally, such as in the areas of development policy, environment and monetary policy, as well the expansion of the scope of EU implied powers, such as in the areas of air transport and freedom, security and justice raised concerns in the past regarding the transition from a national to an EU policy framework.[5] However, the most prominent example of transition constitutes the area of trade policy,[6] which also bears the most similarities with investment policy. Similar to foreign direct investment, EU competence in the field of external trade has been a priori exclusive rather than complementary, thus prohibiting Member States' external action, even in cases where the EU had not yet acted. In addition, considering the number and content of international agreements concluded, external action has been widespread and necessary within trade and foreign investment policy in order to fulfill their objectives, rather than being incidental and sporadic covering the external aspects on an internal policy. Last but not least, EU action in the field of trade, just like in investment, is based on the same constitutional and institutional foundations, as both areas are covered by the Common Commercial Policy. As the scope of the Common Commercial Policy has expanded from trade in goods to other areas, including recently FDI, the analysis of the earlier stages of the Common Commercial Policy helps identifying the main characteristics of the Common Commercial Policy which are still pertinent today.

The evolution of the Common Commercial Policy as regards external trade in goods can provide useful guidance for the development of EU investment policy. The historical process of the formation of EU trade policy and the transition from Member States trade policy to EU trade policy presents a unique example, which when read within its historical context, can highlight the possible handicaps facing the proposed EU investment policy and contribute to the avoidance of discrepancies in its formation. For these reasons, this chapter offers an analysis of the historical development of EU external trade policy and how that experience can assist in designing a better EU investment policy.

Within this framework, the doctrinal foundations of EU trade policy are identified, focusing on the evolution of the scope and nature of EU powers and the purposes it served. Afterwards, the materialization of EU trade policy is examined, looking at the transition from Member States to EU trade policy in practice. When

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[3] Stephen Woolcock and Jan Kleinheisterkamp, "The EU approach to international investment policy after the Lisbon Treaty," Study Directorate General for External Policies of the Union (October 2010), p. 6, available at http://www.lse.ac.uk/collections/law/news/2010-11-03%20EU.pdf (last visited November 21, 2010).

[4] Regulation Proposal, supra note 2, Explanatory Memorandum, Policy Options and Consultations with Interested Parties.

[5] For an overview on the transition from national to EU policy in the fields of air transport and freedom, security and justice see Marise Cremona, "Member States as trustees of the Community interest: Participating in international agreements on behalf of the European Community", EUI Working Paper LAW 2009/17, p. 16-18, available at: http://cadmus.eui.eu/handle/1814/12881 (last visited March 28, 2011).

[6] Although trade policy covers today trade in goods and services under WTO rules, the term EU trade policy is used in this chapter referring only to the traditional core of trade policy, namely trade in goods.

considering the formation and evolution of EU trade policy over time, the legal and policy choices that contributed to the transition from national to EU trade policy are explored. Finally, this chapter explores the lessons that the development of EU trade policy can offer for a better planning of EU investment policy. Reading the historical development of the EU Common Commercial Policy in light of the "different" context of the current EU Common Commercial Policy, conclusions are drawn as to whether and to what extent the transition from Member States to EU investment policy should be based on a similar approach to the transition from Member States to EU trade policy.

A. The foundations of EU trade policy

Since the establishment of the European Economic Community (EEC),[7] the Common Commercial Policy has been a major field of EU external relations. Alongside association agreements, external trade was the only substantive field where the EEC was granted express external competence in the Treaty of Rome.[8] Affirming the EU's international legal personality, the evolution of the Common Commercial Policy reflects the gradual development of the constitutional foundations of EU law in the area of external relations.

The development of the Common Commercial Policy was primarily linked with the completion of the internal market and the need for external representation of the EEC as a customs union. Community external powers were initially born as the necessary corollary to internal integration, given that the proper functioning of internal policies requires in certain circumstances external action.[9] In that respect, the degree and nature of internal integration in the field of trade in goods affected significantly the determination of the scope and nature of the Common Commercial Policy.

The imperative of the completion of the internal market was the main factor driving the EEC to take action in the field of the Common Commercial Policy. The implementation of the customs union, which was one of the first policies that the EEC focused on the 1960s,[10] resulted in the creation of the common external tariff. The creation of a common, uniform tariff for all products originating in third countries and the administration of tariff policy at a centralized level was a necessary step for the proper functioning of the customs union.[11] As internal integration in the field of trade

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[7] Although the European Economic Community is replaced by the European Union after the entry into force of the Treaty of Lisbon, for purposes of historical accuracy the terms "EEC" and "Community" are used in this article in order to define the internationally acting legal person.

[8] Articles 110-116 of the Treaty establishing the European Economic Community (EEC Treaty).

[9] The link between EEC external powers and internal integration was directly established under the doctrine of EU implied powers in the AETR case, Case 22/70, Commission of the European Communities v. Council of the European Communities, 1971 E.C.R. 263). However, EU express powers were also linked to the degree of internal integration, obeying to the same rules which determined the scope of Community competence in the field of external relations. See A. Dashwood, "The attribution of external relations competence," in Alan Dashwood and Christophe Hillion, eds., The general law of E.C. external relations (London: Sweet & Maxwell, 2000), chapter 8.

[10] Panos Koutrakos, EU international relations law (Oxford and Portland: Hart Publishing, 2006), p. 12-14.

[11] Marise Cremona, "The external dimension of the internal market" in Catherine Barnard and Joanne Scott, eds., The law of the single European market (Oxford: Hart Publishing, 2002), p. 354-355; Piet Eeckhout, External relations of the European Union. Legal and constitutional foundations (Oxford, New York: Oxford University Press, 2004), pp. 349-350.

in goods went beyond the creation of a customs union, the Common Commercial Policy was used to formulate common rules with regard to all aspects of external trade in goods. The need to avoid "distortion of free internal circulation or of competitive conditions"[12] was an imperative for extending the Common Commercial Policy to all regulatory aspects of trade in goods with third countries, such as customs valuation and charges of equivalent effect. As the Court recognized in Opinion 1/78, the Common Commercial Policy had to be dynamically interpreted, so as not to "cause disturbances in intra-Community trade".[13]

The need for uniform rules regarding trade in goods with third countries affected not only the scope but also the nature of EEC powers. In Opinion 1/75[14] and in Donckerwolke[15] the Court recognized the a priori exclusive character of EEC competence in the field of the Common Commercial Policy. The Member States could not legislate in an area which would affect the operation of the Common Commercial Policy, even if the Community had not yet taken any action in the field. The a priori pre-emption of the Member States' powers was justified by the need to protect the unity of the internal market, with the aim of avoiding distortions in competition and risks of trade deflection that could arise if Member States pursued their individual external trade policies.[16] Besides the internal market imperative, the Court considered that exclusivity was necessary to preserve the unity of the Community's position with respect to third countries and to defend the "common interests" of the Community.[17] Developing the notion of a common Community interest in the field of trade in goods, the Court reaffirmed in a different way the importance of internal integration, which required common rules for imports and exports and harmonizing standards throughout the Community.

In addition to the link with the internal market, the development of the Common Commercial Policy was influenced by the international realities after World War II and the General Agreement on Tariffs and Trade (GATT). The EEC was created after the establishment of multilateral rules on trade, reflecting the belief that regional economic integration would advance the general objective of trade liberalization, as long as it took the form of a free trade agreement or a customs union and complied with the requirements of Article XXIV GATT.[18] Hence, the Common Commercial Policy was necessary for the functioning of the EEC as a customs union operating within the framework of GATT 1947. The influence exerted by the GATT on the Common Commercial Policy is further reflected at the objectives pursued by EU trade policy. Taking into account the pre-existing commitments, which were

[12] Joined Cases C-37/73 and C-38/73, Sociaal Fonds voor de Diamantarbeiders v. NV Indiamex and Association de fait De Belder, 1973 E.C.R. 1609, para 9.

[13] ECJ Opinion 1/78, Opinion pursuant to Article 228 of the EEC Treaty (October 4, 1979), 1979 E.C.R. 2871, para. 45.

[14] ECJ Opinion 1/75, Opinion given pursuant to Article 228 of the EEC Treaty (November 11, 1975), 1975 E.C.R. 1355.

[15] Case 41/76 Donckerwolke and Shou / Procureur de la République au Tribunal de grande instance, Lille, and the Director General of Customs, 1976 E.C.R. 1921.

[16] Cremona, "The external dimension of the internal market",supra note 11, p. 357-358; Gracia Marin Duran, Development-based differentiation in the European Community's external trade policy: Selected issues under Community and international trade law, Doctoral thesis (European University Institute 2008), p. 25-26.

[17] For an analysis of the a priori exclusive character of Community competence in the field of the Common Commercial Policy see: Koutrakos, EU international relations law, supra note 10, p. 13-17.

[18] Eeckhout, External relations of the European Union. Legal and constitutional foundations, supra note 11, p. 9-10.

undertaken individually by Member States under GATT 1947, the drafters of the EEC Treaty incorporated into the Common Commercial Policy the principle of liberalization expressing their obligation to comply with the requirement of GATT that the formation of a customs union shall not lead on the whole to further restrictions on trade with third countries.[19]

In that respect, the pronouncement of the broad scope and exclusive competence of the Common Commercial Policy were directly linked with the constitutional evolution of EU law. The creation of an internal market and the realities of international trade at the time necessitated initially the creation of a common customs policy and subsequently a complete Common Commercial Policy.

B. The gradual development of EU external trade policy in practice

The pragmatic development of the external representation of the EEC was also reflected in the gradual implementation of the Common Commercial Policy. An EU common external trade policy was completed much later after the end of the transitional period that was provided in the Treaty of Rome. Although Article 111 EEC presented the cornerstone for the transition from Member States to Community external trade policy, the end of the transition period did not mark the end of the presence of Member States as autonomous international trade actors. The historical evolution of the Common Commercial Policy shows the pragmatic terms along which it was developed.

The development of EU external trade policy has been marked by distinct phases. During the twelve-year transitional period which was provided in Article 8 of the EEC Treaty,[20] the foundations of Community trade policy were set out, providing the main mechanisms for the transition from Member States' trade policy to a uniform Common Commercial Policy. However, the Common Commercial Policy was not completed after the end of the transitional period. Until after the conclusion of the World Trade Organization (WTO) Agreement, Member States retained sparse powers in the field of external trade and concluded trade agreements, basing their action on the limits and exceptions to the uniform Common Commercial Policy. After the completion of the internal market in 1992 and the conclusion of the WTO Agreement, trade policy became the exclusive domain of the Common Commercial Policy. This is particularly reflected in the transition from national to EU external trade policy of Member States that acceded to the EU in 2004 and 2007.

1. Building the Community trade policy during the transitional period (1957-1969)

[19] Cremona, "The external dimension of the internal market", supra note 11, p.381. However, liberalization was only an aspirational aim, unlike the legally binding obligation of creating uniform rules. Article 110 EEC did not in itself impose an obligation on the Community either to liberalize trade unilaterally, or to mirror internal trade liberalization at the external level, see Case C-51/75, EMI Records Ltd v. CBS United Kingdom Ltd, 1976 E.C.R. 811.

[20] Article 8 of the EEC Treaty provided : "1. The Common Market shall be progressively established in the course of a transitional period of twelve years.
The transitional period shall be divided into three stages of four years each; the length of each stage may be modified in accordance with the provisions set out below.
2. To each stage there shall be allotted a group of actions which shall be undertaken and pursued concurrently."

The drafters of the EEC Treaty had recognized the difficulties deriving from the passage from Member States to the EU of trade policy and included in Article 111 EEC specific provisions guiding the action of Community institutions and Member States in the field of the Common Commercial Policy during the transitional period. Article 111 EEC provided the framework within which the Common Commercial Policy should have been developed, placing emphasis on the cooperation and coordination of Community and Member States' trade policies.[21]

More specifically, the first paragraph of Article 111 EEC established the general obligation of Member States to coordinate their trade policies, assigning to the Commission the responsibility to guide coordination. This provision presented the main principle guiding the implementation of the Common Commercial Policy during the transitional period, indicating the supervisory role of EU institutions and the need for active involvement by the Member States.[22] Article 111 EEC provided also express powers to the Community to conclude trade agreements with third countries during the transitional period. These provisions indicated that Community action was necessary from the beginning in order to achieve a uniform Common Commercial Policy. Nevertheless, Article 111(2) and (3) EEC did not preclude Member States' action during the transitional period, recognizing that Member States' external action was necessary in order to ensure continuity in their trade policies.[23] However, Article 111 EEC included limitations to the exercise of Member States' powers. Paragraph 5 required that before concluding international agreements with third countries, Member States had to coordinate their action and secure uniformity in their action, while the Commission was entrusted with the task of coordinating Member States' external action.

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[21] Article 111 of the EEC Treaty provided: "In the course of the transitional period and without prejudice to Articles 115 and 116, the following provisions shall apply:
1. Member States shall co-ordinate their commercial relations with third countries in such a way as to bring about, not later than at the expiry of the transitional period, the conditions necessary to the implementation of a common policy in the matter of external trade.
The Commission shall submit to the Council proposals regarding the procedure to be applied, in the course of the transitional period, for the establishment of common action and regarding the achievement of a uniform commercial policy.
2. The Commission shall submit to the Council recommendations with a view to tariff negotiations with third countries concerning the common customs tariff.
The Council shall authorise the Commission to open such negotiations.
The Commission shall conduct these negotiations in consultation with a special Committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it.
3. The Council shall, when exercising the powers conferred upon it under this Article, act during the first two stages by means of a unanimous vote and subsequently by means of a qualified majority vote.
4. Member States shall, in consultation with the Commission, take all necessary measures with the object, in particular, of adjusting their tariff agreements in force with third countries in order that the entry into force of the common customs tariff may not be delayed.
5. Member States shall aim at securing uniformity between themselves at as high a level as possible of their lists of liberalisation in regard to third countries or groups of third countries. For this purpose the Commission shall make any appropriate recommendations to Member States.
If Member States abolish or reduce quantitative restrictions in regard to third countries, they shall inform the Commission beforehand and shall accord identical treatment to the other Member States."

[22] Robert Kovar, "La mise en place d'une politique commerciale commune et les compétences des Etats membres de la Communauté économique européenne en matière de relations internationales et de conclusion des traités", 16 Annuaire français de droit international 783 (1970), p. 786.

[23] Rafael Leal-Arcas, "Is EC trade policy up to par? A legal analysis over time – Rome, Marrakesh, Amsterdam, Nice and the Constitutional Treaty," 13 Columbia Journal of European Law 305 (2007), p. 313-315.

Hence, the drafters of the Treaty of Rome had identified that the establishment of a Common Commercial Policy required close coordination between Member States and Community institutions. Although the Community was deemed to become the principal actor in this field after 1970, during the transitional period Member States action was still required in order to ensure continuity in their trade policy. However Member State action was subject to close scrutiny by the Commission which had the responsibility to promote the approximation of Member States' national trade policies.

a. The conclusion of trade agreements by Member States

Within this framework, Community institutions took initiatives towards the coordination of Member States trade policies very early. In 1960 the Council adopted a decision introducing the so-called "EEC clause",[24] which required that Member States had to incorporate in all their existing agreements as well as in their future trade agreements a clause that provided that after the expiration of the trade agreement, the renewal or renegotiation of the trade agreement was going to be conducted in a way that ensured compatibility with Community law, hence implying the substitution of Members States by the Community as a contracting party.[25] Requiring from Member States to introduce this provision in their trade agreements, the Community in fact prepared the international community to recognize gradually the role of the EEC as the future international trade actor, while accepting the reality that Member States were still the main contracting parties.[26]

Complementing the framework on the conclusion of trade agreements by Member States, the Council adopted in 1961 another decision, setting an expiry date for Member States trade agreements and identifying the coordination role of the Commission.[27] More specifically, Articles 1 and 2 of the 1961 Decision required that the duration of trade agreements signed between Member States and third countries should not have extended beyond the end of the transitional period, subject to exceptions authorized by the Council. In addition, Article 3 required that until 1966 the Commission would examine with Member States all existing Member States' trade agreements, in order to ensure that they did not and would not obstruct the formation of uniform rules under the Common Commercial Policy. Hence, the 1961 Council decision presented a roadmap regarding the transition from Member States to a Community trade policy, limiting the duration of future Member States agreements, requiring the insertion of an "EEC clause" in existing and future agreements and assigning to the Commission the task to scrutinize Member States agreements in order

[24] Note concerning the text of the EEC clause, Council Decision of July 20, 1960, 4th General Report on the Activities of the Community, Chapter V, para. 192.

[25] The EEC clause read „Lorsque les obligations découlant du Traité instituant la Communauté Economique Européenne et relatives a l'instauration progressive d'une politique commerciale commune le rendront nécessaire, des négociations seront ouvertes dans le plus bref délais possible, afin d'apporter au présent accord toutes modifications utiles". (Wenn die sich aus dem Vertrag zur Gründung der EWG ergebenden Verpflichtungen über die schrittweise Einführung einer gemeinsamen Handelspolitik es erfordern, werden so kurzfristig wie möglich Verhandlungen eingeleitet, mit dem Ziel, alle zweckdienlichen Änderungen in diese Abkommen aufzunehmen).

[26] Kovar, "La mise en place d'une politique commerciale commune et les compétences des Etats membres de la Communauté économique européenne en matière de relations internationales et de conclusion des traités", supra note 22, p.788.

[27] Council Decision, On standardisation of the duration of trade agreements with third countries (October 9 1961), OJ (1961) 71, p.1273.

to ensure their compatibility with Community law. These provisions created a procedural framework for cooperation between Member States and Community institutions, which played also an important role in the approximation of the substantive content of the trade agreements concluded by different Member States with specific third countries.[28]

Despite the broad pronouncements regarding the coordination of Member States trade agreement, little progress was made until the end of the transitional period. In 1962, the Commission announced its working program regarding the implementation of the Common Commercial Policy, which provided, among others, consultations between the Commission and Member States in order to harmonize their existing trade policies and examine Member States' existing bilateral trade agreements.[29] Nevertheless, the stagnation of European political integration during the mid-1960s and the secondary importance attributed to the Common Commercial Policy in the end of the transitional period, resulted in minimal results by the end of 1969.[30]

b. The Community as an international actor

The establishment of the Common Commercial Policy required not only the imposition of limitations on Member States external powers, but also the active engagement of the EU in the field of international trade. Indeed, the EEC had been active since its inception, taking part in important negotiations and trade agreements that were concluded during the 1960s.

Making use of the potential inscribed in Article 111(2) EEC, the Community concluded during the initial period a significant number of trade agreements with third countries.[31] This exercise of Community powers was in parallel to the development of the scope of the Common Commercial Policy. Bearing in mind that the first field of the Common Commercial Policy where uniformity was established was the Common Customs Tariff,[32] the Community began concluding customs tariff agreements with third countries.[33] But even in cases where the Community concluded "trade" agreements with third countries,[34] they were essentially tariff agreements, which contained only minimal elements of commercial policy.[35]

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[28] Klaus Michael Sachs, EG-Handelspolitik und zwischenstaatliche Kooperationsabkommen, (Baden Baden: Nomos, 1976), p. 42.

[29] EEC Bulletin, 1964, No 4, pp. 9, 13, 17.

[30] Hans von der Groeben and Ernst-Joachim Mestmacker, Zielen und Methoden der Europaischen Integration, (Frankfurt: Athenäum, 1972), p. 91.

[31] For a detailed description see Jacques Megret, "Conclusions, formes et effets des accords internationaux passés par la C.E.E." 76 Revue du Marché Commun 19 (1965), p. 21.

[32] Eeckhout, External relations of the European Union. Legal and constitutional foundations, supra note 11, p. 10-11.

[33] In the period between 1960-1962 the Community held negotiations with a number of third countries and concluded bilateral customs tariff agreements with 22 third countries. Sachs, EG-Handelspolitik und zwischenstaatliche Kooperationsabkommen, supra note 28, p. 46.

[34] For example the EEC-Iran trade agreement of October 14, 1963 ((1963) OJ 2554) and the EEC-Israel trade agreement of May 8, 1964 ((1964) OJ 1517).

[35] Kovar, "La mise en place d'une politique commerciale commune et les compétences des Etats membres de la Communauté économique européenne en matière de relations internationales et de conclusion des traités", supra note 22, p. 793; Leal Arcas, "Is EC trade policy up to par? A legal analysis over time – Rome, Marrakesh, Amsterdam, Nice and the Constitutional Treaty", supra note 23,, p. 317.

In addition to bilateral trade agreements, the Community exercised its external trade competences by substituting gradually Member States in the framework of the GATT. As was mentioned above, the creation of the EEC was inspired by the GATT, as it constituted a customs union under Article XXIV GATT. Nevertheless, the Community started gradually taking over the role of the Member States as GATT Contracting Parties, without ever formally substituting them.

The gradual replacement of Member States in the GATT was achieved by different methods. Initially, the Community aimed to strengthen common action through its Member States, which was achieved via the use of common spokespersons. This method was further enhanced by common action taken by the representatives of the Member States together with the Commission representative.[36] This method of common representation was particularly used during the negotiations for the Dillon Round and more importantly, the Kennedy round, affirming the common presence of the EEC and its Member States as a single unitary bloc. Common action was also adopted for the conclusion of tariff agreements after these rounds. The Kennedy round agreements were concluded as mixed agreements, which on the one hand gave continuity to the action of Member States and on the other hand introduced the EEC as the new international actor in the field of the Common Commercial Policy.[37]

The joint representation of the EEC and its Member States and the conclusion of mixed agreements in the framework of the GATT during the transitional period presented a smooth and legally sound model for the complete substitution of Member States by the Community. Although the Community had never substituted the Member States as a GATT Contracting Party, it assumed progressively the role of Member States.[38] Soon after the expiry of the transitional period, the Court of Justice confirmed the de facto substitution of Member States under the GATT in International Fruit Company.[39] The Court recognized that by assuming the functions inherent in tariff and trade policy, the Community "has been put into concrete form in different ways within the framework of the GATT and has been recognized by the other contracting parties."[40] The substitution of Member States by the Community became clearer during the 1970s and the 1980s, where the EEC assumed the role of the main negotiator and coordinator of Member States' representation under the GATT, in particular in the field of dispute settlement.[41]

Summing up, the Community set out during the transitional period the main foundations for the establishment of the Community trade policy. Following the development of uniform rules on external trade, the Community started gradually to

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[36] Ernst-Ulrich Petersmann, "The EEC as a GATT Member – Legal conflicts between GATT law and Community law" in Meinhard Hilf, Francis G. Jacobs and Ernst-Ulrich Petersmann, eds., The European Community and the GATT (The Hague: Kluwer, 1986), p. 35-36; Kovar, "La mise en place d'une politique commerciale commune et les compétences des Etats membres de la Communauté économique européenne en matière de relations internationales et de conclusion des traités", supra note 22, p. 793.

[37] G. Testa, "Le Kennedy Round. Quelques aspects juridiques", 14 Annuaire français de droit international 605 (1968), p. 638.

[38] Petersmann, "The EEC as a GATT member – Legal conflicts between GATT law and Community law", supra note 36, p. 37-38.

[39] Cases C-21-24/72, International Fruit Company NV and others v. Produktschap voor Groenten en Fruit., 1972 E.C.R. 1219.

[40] Id., paras. 15-16.

[41] Petersmann, "The EEC as a GATT member – Legal conflicts between GATT law and Community law", supra note 36, p.45-49.

conclude agreements on tariff policy, opting for close coordination and common action with the Member States. At the same time, the EEC put Member States trade agreements under scrutiny, aiming to ensure continuity in Member States trade policy and at the same time safeguard the gradual development of the Common Commercial Policy. Although the Community was not very successful in controlling Member States autonomous bilateral action, it achieved to establish itself as the main negotiator in the framework of the GATT, which presented the most important international framework for trade relations.

2. Completing the Community trade policy (1970-1995)

After the expiry of the transitional period, Article 113 EEC required the completion of the Common Commercial Policy and the substitution of Member States international trade agreements by Community agreements. Nevertheless, the common external representation of the Community and its Member States was not completed for a long time afterwards. Taking into account the vast number of Member States bilateral trade agreements, the unwillingness of certain third countries to renegotiate their agreements with the EEC and the gradual development of uniform trade rules by the Community, the EEC dealt with these problems in a pragmatic way, allowing some scope for Member States external action under the supervision of Community institutions.

a. The renewal of existing Member States bilateral trade agreements

By the end of the transitional period, there was a significant number of bilateral Member States trade agreements with third countries.[42] In order to avoid their termination, the Council adopted Decision 69/494/EEC in 1969 regarding existing and future Member States' trade agreements with third countries.[43] While establishing a procedural framework for the negotiation of Community agreements under Article 113 EEC, the first title of Decision 69/494/EEC introduced a mechanism for the renewal of existing Member States trade agreements, which had been successfully used in the following decades. Aiming to protect Member States trade interests, this mechanism allowed Member States to ensure continuity in their trade policies until the Community exercised its powers.

More specifically, Article 1 reaffirmed the obligation of Member States to notify Community institutions of their existing trade agreements whose duration was going to expire and Member States intended to prolong.[44] In cases where their renegotiation or renewal by the Community was not possible, Article 3 of Decision 69/494/EEC gave the opportunity to Member States to prolong the duration of these agreements for a maximum period of one year, in the hope of their replacement by

[42] The Commission estimated in 1969 that there were 128 Friendship, Commerce and Navigation (FCN) agreements as well as 196 trade agreements between Member States and third countries, see Commission Document (69) 1175 of March 28, 1969.

[43] Council Decision 69/494/EEC, On the progressive standardisation of agreements concerning commercial relations between Member States and third countries and on the negotiation of Community agreements (December 16, 1969), OJ L 326 (December 29, 1969), p.39-42.

[44] Article 1 provided that "Member States shall notify the Commission of all bilateral treaties, agreements or arrangements concerning commercial relations with third countries within the meaning of Article 113 the extension of which, whether express or tacit, is proposed ; the Commission shall notify the other Member States."

Community agreements.[45] The renewal of Member States agreements was not automatic. Member States could only renew their existing agreements without being able to renegotiate or amend their substantive provisions. In addition, renewal was subject to authorization by the Commission, which was dependent on the compatibility of Member States' agreements with the Common Commercial Policy.[46] Article 2 of Decision 69/494/EEC provided for consultations with the Commission, which aimed at identifying "whether the bilateral agreements to be extended expressly or tacitly contain provisions relating to the common commercial policy within the meaning of Article 113 and, if such be the case, whether such provisions could constitute an obstacle to that policy".

The authorization mechanism established in Articles 1-3 of Decision 69/494/EEC reflects the pragmatic approach towards the development of the Common Commercial Policy that was adopted by EU institutions. Realizing that the substitution of all Member States bilateral trade agreements within a short time period was impossible, the Council gave the right to Member States to prolong the duration of their existing trade agreements with third countries. Nevertheless, the Community placed severe limitations on the external trade competences of Member States, so that they would not affect the development of the Common Commercial Policy. In fact, this mechanism was proved very helpful in materializing the gradual implementation of the Common Commercial Policy. It took into account the practical difficulties which the renegotiation of all Member States bilateral trade agreements entailed, which would be time and money consuming. In addition, it avoided political confrontations between Member States which had different trading bonds with different countries across the world and the conclusion of uniform Community wide agreements would be met with resistance.[47] On the other hand, the inability of Member States to amend the substantive provisions of their trade agreement and their yearly scrutiny regarding their compatibility with the Common Commercial Policy predicated their eventual termination. As Member States were unable to adapt the content of their trade agreements to changing international trade conditions and as Community action in the field of external trade was gradually expanding, Member States agreements were eventually going to be terminated.

Nevertheless, until 2001 the Council issued regulations that authorized Member States to renew certain bilateral trade agreements with third countries. Recognizing the benefits arising from the substantive scope of such agreements, the Commission was eager to propose their renewal as long as there were not similar or conflicting rules established at the EU or at the international level. A good example is the Friendship, Commerce and Navigation (FCN) agreements which several Member States had concluded with the U.S.. These agreements included provisions on public

[45] Article 3 provided that "If, after consultation, it is established that even though certain provisions in the instruments to be extended expressly or tacitly come within the scope of the common commercial policy within the meaning of Article 113 those provisions would not, during the period of extension envisaged, constitute an obstacle to implementation of the common commercial policy, the Commission may propose to the Council that the Member State or States concerned be authorised, by way of derogation from Article 1 of the Council Decision of 9 October 1961 (1) on standardisation of the duration of trade agreements with third countries, to extend, expressly or tacitly, for a period to be specified, the provisions in question of the instruments which were the subject of the consultation. This period shall not exceed one year."

[46] Sachs, EG-Handelspolitik und zwischenstaatliche Kooperationsabkommen, supra note 28, p.48.

[47] U. Eveling, 'The law of the external economic relations of the European Community', in Hilf, Jacobs and Petersmann, supra note 36, p. 85-90.

procurement which were not covered under multilateral trade rules.[48] Although the Community had eventually taken external action regarding public procurement by concluding the GATT Public procurement Agreement during the Tokyo round, the FCN agreements provided rights to EU and U.S. traders that were not covered under the GATT framework. After the introduction at the Community level of the Utilities Directive in 1990,[49] the Commission considered that Member States FCN agreements were conflicting with the rules provided in the utilities directive and thus they should not have been renewed. Considering however that the subject matter of the FCN agreements was not covered under other international rules at that time, the Member States managed to obtain the renewal of their FCN agreements with the U.S., subject to the general condition that their application would not contravene EC law. Nevertheless, with the conclusion of the WTO agreements and in particular the agreement on Public Procurement, the content of the FCN agreements became obsolete and they were not subsequently renewed.[50]

Hence, the renewal of Member States agreements was conditional on the development of the Common Commercial Policy and international trade rules. However, since the last authorization of Member States agreements expired in 2005, the mechanism provided under Decision 69/494/EEC has been rendered defunct.[51]

b. The conclusion of new trade agreements by Member States

In addition to the renewal of existing Member States agreements, Decision 69/464 EEC also provided the opportunity to Member States to conclude new trade agreements with third countries under specific circumstances. Article 9 provided that in exceptional circumstances Member States could negotiate and conclude trade agreements with third countries, in particular where negotiations by the EEC were not still possible. To that effect, Member States had to enter into consultations with other Member States and the Commission and obtain an explicit authorization from the Council in order to negotiate a trade agreement.[52]

Despite the broad enunciation of the exceptional circumstances which could justify external action taken by Member States, the mechanism provided in Article 9 of Decision 69/464/EEC arose as a result of the need to continue and establish vital bilateral trade relations with state trading countries of Eastern Europe. The refusal by those countries to recognize the international legal personality of the EEC affected directly the form of trade relations between Eastern and Western Europe, as Eastern European countries were willing to conclude trade agreements only with Member

[48] On the substantive content of these agreements and their importance for Member States trade policy see Frederick M. Abbott, "Crosscurrents in European Union external relations: The controversy over the German-United States Treaty of Friendship", 54 Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht 756 (1994); Piet Eeckhout, The European internal market and international trade (Oxford: Clarendon Press, 1994), p. 317-319.

[49] Council Directive 90/531/EEC, On the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (September 17, 1990), OJ L 297 (October 29, 1990),1-4890.

[50] Abott, "Crosscurrents in European Union external relations: The controversy over the German-United States Treaty of Friendship," supra note 48, p. 783.

[51] Cremona, "Member States as trustees of the Community interest: Participating in international agreements on behalf of the European Community," supra note 5, p. 15-16.

[52] Sachs, EG-Handelspolitik und zwischenstaatliche Kooperationsabkommen, supra note 28, p. 48.

States.[53] In order to avoid unwanted political and trade consequences that would result from the termination of trade relations with Eastern European countries after 1969, Decision 69/494/EEC provided a temporary solution. Adapting the Common Commercial Policy to the existing realities, the Community chose to conduct its trade policy with Eastern Europe via its Member States for a limited period hoping to have achieved the EEC's political recognition by that time.

However, as from January 1 1973 onwards, Member States were no longer allowed to negotiate bilateral agreements with Eastern European countries and existing bilateral agreements expired on December 31 1974 leaving full competence in the hands of the Community. Nevertheless, when the transitional period expired in 1974, there were no trade agreements concluded with Eastern European countries. As most of them rejected the Community's suggested model agreement,[54] the EEC subsequently resorted to an autonomous trade regime governing relations with state trading countries.[55] The need for uniform external representation of the Community, alongside political considerations, resulted in the refusal to prolong Member States agreements with Eastern European states and their substitution by EEC internal measures.

The exception mechanism illustrates the limited scope for exceptions to the exercise of the Community's exclusive competence in the field of trade in goods. Adjusting its trade policy to political realities of that time, the Community established a specific framework for the conclusion of trade agreements by Member States which was subject to coordination by the Commission. However, the nature of this mechanism was only provisional, as it did not aim to authorize Member States to act on behalf of the EEC, but only to provide much needed space to prepare for a Community wide agreement. The exceptional nature of this mechanism was confirmed when the conclusion of trade agreements between the EEC and Eastern European countries failed, as the Community opted to regulate trade with these countries unilaterally in order to create uniformity at the expense of any advantages that would be additionally accrued to European traders under a potential bilateral agreement.

c. The conclusion of trade agreements as mixed agreements

In addition to the explicit mechanisms authorizing Member States to take external action in the field of trade policy, Member States affirmed their international standing by participating in trade agreements that were concluded as mixed agreements. Despite the pronouncement of the exclusive nature of EU competence in the field of

[53] John Pinder, "How active will the Community be in East-West economic relations?," in Ieuan John, ed., EEC policy towards Eastern Europe (Westmead : Saxon House, 1975), p. 71; Françoise de la Serre, 'La CEE et l'Europe de l'Est', 24 Revue française de science politique 1237 (1974), p. 1238-1242.

[54] In 1974 the Community offered state-trading countries a model agreement incorporating a most favoured nation clause and covering all fields of trade. Only China and later Romania responded. John Maslen, "The European Community's relations with State-trading countries 1981-83", 3 Yearbook of European Law 323 (1983).

[55] Council Regulation (EEC) No 1765/82, On common rules for imports from State-trading countries (June 30, 1982), OJ L 195 (July 5, 1982), p. 1; Council Regulation (EEC) No 3420/83, On import arrangements for products originating in State-trading countries, not liberalised at Community level (November 14, 1983), OJ L 346 (December 8, 1983), p. 6. See Göran Lysen, "EEC-CMEA/Eastern Europe, legal aspects on trade and co-operation", 1 Legal Issues of European Integration 98 (1987).

external trade in goods,[56] the determination of the specific scope of the Common Commercial Policy was utilized under specific circumstances in order to justify the participation of Member States in trade agreements. The wide range of agreements regulating patterns of trade that went beyond traditional trade policy and which concerned areas where there were not yet uniform rules established, allowed for the participation of Member States alongside the Community in international trade arrangements.

Illustrating how political realities affected the degree of interference of Member States in Community external trade action, the conclusion of the International Natural Rubber Agreement under auspices of the United Nations Conference on Trade and Development (UNCTAD) in 1979 as well as the GATT plurilateral Agreement on Technical Barriers to Trade (TBT) can serve as examples. Questioning the scope of Community powers in the field of the Common Commercial Policy, especially in areas where there were not any uniform rules, Member States managed to retain a role for themselves as international actors alongside the Community.

More specifically, the determination of the scope of the Common Commercial Policy and subsequently the patterns of international trade with respect to which Member States had competence to conclude agreements with third countries was the subject matter of Opinion 1/78.[57] This case, which concerned the conclusion of a commodity agreement on natural rubber that was negotiated under the framework of UNCTAD, exemplified the pragmatic and compromising approach adopted by the Court of Justice regarding the conclusion of international agreements relating to international trade. On the one hand, the Court recognized the dynamic nature of the Common Commercial Policy, which covered all matters affecting international trade. Acknowledging that a viable Common Commercial Policy had to cover different types of trade agreements, such as commodities agreements, which were very popular in the 1970s and 1980s, the Court confirmed the exclusive nature and broad scope of the Community's trade policy.[58] On the other hand, the Court took into account the non-trade aspects of the agreement, concerning the financing of the buffer stock on natural rubber, a key element of the agreement, which was going to be undertaken by the Member States. Although the Court had ruled in Opinion 1/75 that financial considerations do not affect the exclusive nature of EC competence over matters of trade policy, in Opinion 1/78 it ruled in favor of the conclusion of the UNCTAD agreement as a mixed one, thus safeguarding the viability of the Community's trade policy, while accommodating the concerns of Member States.[59]

Another example where trade agreements were concluded as mixed agreements present the plurilateral agreements that were concluded at the end of the Tokyo round in the framework of the GATT. Although most of these agreements were solely concluded by the Community, certain agreements, such as the Agreement on Technical Barriers to Trade and the Agreement on Trade in Civil Aircraft, were concluded as mixed agreements. Member States considered their participation in these agreements necessary, given that they were considered to go beyond the outer limits

[56] ECJ Opinion 1/75, supra note 14.
[57] ECJ Opinion 1/78, supra note 13.
[58] Eeckhout, External relations of the European Union. Legal and constitutional foundations, supra note 11, pp.16-19.
[59] Koutrakos, EU international relations law, supra note 10, pp. 34-39.

of the Common Commercial Policy.[60] Nevertheless, this argument was struck down by the Court fifteen years later, which ruled in Opinion 1/94 that the TBT agreement fell under exclusive Community competence.[61]

However, it is necessary to point out that the lack of uniformity did not always present an impediment in the common representation of the Community towards third countries. This was particularly obvious as regards the quantitative restrictions on imports and exports of certain products, where Member States retained their national quotas and had the opportunity to adopt safeguard measures under Article 115 EEC.[62] Member States could adopt only unilateral measures, as the Community was the sole international actor, representing the Member States' divergent trade interests towards third countries. For example, the import of Japanese cars in Europe, which was the subject of divergent regulation in different Member States during the 1980s, was dealt with within a trade arrangement that was negotiated and concluded between the Community and Japan, where the Community incorporated in its commitments the different individuals quotas set by Member States.[63]

The procedural mechanism established under Part II of Decision 69/494/EEC concerning the negotiation of Community trade agreements contributed significantly towards succeeding in incorporating Member States trade interests in the Common Commercial Policy. The establishment of the "113 Committee", which assisted the Commission in the negotiation of trade agreements, played a crucial role in the amalgamation of Member States trade interests and the formation of common action even in areas where uniform rules were not yet established.[64]

3. The transition from national to EU trade policy of newly acceded Member States

The gradual completion of the Common Commercial Policy during the 1990s rendered the Community the sole international actor in the field of external trade in goods. The recognition in Opinion 1/94 of exclusive Community competence to conclude the WTO multilateral agreements in trade in goods signified the main step towards the completion of Community trade policy. The firm international position of the Community in the field of external trade was affirmed during the recent enlargement of the EU, as the transition from national to Community trade policy of newly acceded Member States demonstrates. Coping successfully with the challenges raised by the great number and diverse content of the trade agreements concluded by

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[60] Council Decision 80/271/EEC, Concerning the conclusion of the Multilateral Agreements resulting from the 1973 to 1979 trade negotiations (December 10, 1979), OJ L 71 (March 17, 1980), pp. 1–2. Jacques Bourgeois, 'The Tokyo Round agreements on Technical Barriers to Trade and on Government Procurement in international and EEC perspective" 19 Common Market Law Review 5 (1982), p. 21; Meinhard Hilf, "The application of GATT within the Member States of the European Community" in Hilf, Jacobs and Petersmann, The European Community and the GATT supra note 36, p. 153. Petersmann, "The EEC as a GATT Member – Legal conflicts between GATT law and community law," supra note 36, pp. 37-38.

[61] ECJ Opinion 1/94, Opinion pursuant to Article 228(6) of the EC Treaty (November 15, 1994), 1994 E.C.R. I-5267, para. 33.

[62] For an analysis of the scope and application of Article 115 EEC see Eeckhout, The European internal market and international trade, supra note 48, p.170-179.

[63] Id., pp. 197-202.

[64] On the role of the 113 Committee towards the development of Community trade policy see Michael Johnson, European Community Trade Policy and the Article 113 Committee (RIIA Special Paper)(London: Royal Institute of International Affairs,1998).

twelve new Member States, the Community managed to integrate them in its trade policy.

The adoption of the EU acquis in the field of the Common Commercial Policy required acceding Member States not only to align their external trade legislation with Community legislation, but also to undertake the same international commitments as the other EU Member States. In order to achieve this goal, the Commission had placed foremost emphasis on the alignment of new Member States commitments under the WTO agreements with EC commitments. During the accession negotiations the EU had established a framework for cooperation with new Member States at ministerial and departmental level, ensuring the alignment of new Member States trade policy with EU trade policy before their accession to the EU.[65]

In addition, the proper implementation of the Community acquis in the field of the Common Commercial Policy demanded that new Member States undertook the same international commitments under bilateral trade agreements. In that respect, Article 6 of the Act concerning the conditions of accession[66] obliged new Member States to accede to all international agreements concluded by the Community, setting out specific obligations for different groups of agreements. For example, paragraphs 6 and 7 concerned trade agreements in the sensitive sectors of textiles and steel, indicating the need for their substantive amendments. Following accession, the EU and new Member States concluded a number of protocols and renegotiated a number of agreements in order to ensure the uniform application of EU trade agreements in new Member States.[67]

Last but not least, the accession of new Member States did not leave any room for the survival of new Member States bilateral trade agreements. Article 6(10) of the Act concerning the conditions of Accession explicitly provided that "new Member States shall withdraw from any free trade agreements with third countries". Moreover, new Member States were not offered the possibility to retain existing bilateral trade agreements to the extent that they were compatible with the Common Commercial Policy. The proposal by the Commission to subject new Member States agreements to the regime of Article 1 of Decision 69/464/EEC was not accepted by the Council, thus terminating definitively any trade agreements concluded by acceding Member States.[68] The importance of a uniform trade policy since accession was further enhanced by the fact that no transitional period was offered, or in fact requested by most new Member States, regarding their obligations to conform with the acquis in the field of the Common Commercial Policy.

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[65] European Commission, Enlargement Archives, Negotiations Chapter 26, available at http://ec.europa.eu/enlargement/archives/enlargement_process/future_prospects/negotiations/eu10_bulgaria_romania/chapters/chap_26_en.htm (last visited March 28, 2011).

[66] Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded (OJ L 236/46 (September 23, 2009), p.33).

[67] Marise Cremona, "The impact of enlargement: External policy and external relations" in Marise Cremona, ed., The enlargement of the European Union (Oxford, New York: Oxford University Press, 2003), p. 176-181.

[68] Commission of the European Communities, Proposal for a Council Decision amending Council Decision 2001/855/EC of 15 November 2001 in order to take account of certain treaties and trade agreements concluded with third countries by new Member States prior to their accession to the European Union (October 22, 2004), COM (2004) 697.

As a result, the accessions of 2004 and 2007 illustrate a departure from the pragmatic and gradual transition from Member States to EU trade policy. Considering that by the time of the accession the EU had become the sole international actor in the field of trade policy, the integration of twelve national trade policies did not justify a step back in the single representation of the Community in the field of trade in goods. On the contrary, close cooperation between the Commission and the new Member States and the proper administration of the implementation of the Community acquis guaranteed a fast and efficient transition from national to EU trade policy.

C. Lessons to be learnt from the development of Community trade policy

The development of EU trade policy can provide valuable lessons for the development of EU investment policy. The mechanisms and procedures that contributed to the transition from national to EU trade policy can provide guidance for designing a complete EU investment policy and ensuring smooth transition.

1. A gradual development of EU investment policy?

The development of a complete EU trade policy was a long process that required more than thirty years to be completed. In addition to the twelve year transitional period that was identified in the Treaty of Rome, it took thirty more years in order for the EU to substitute Member States as the single international actor in the field of external trade in goods. However, the development of a common, complete EU investment policy could and arguably should be completed in a much shorter period.

Firstly, the slow and gradual evolution of EU trade policy was linked directly with the progress of internal integration. The effort of the EEC to affirm its international legal personality and to identify the main characteristics of EU external action affected the determination of the scope and exclusive nature of Community competence. As a result, it was only fifteen and eighteen years after the introduction of the Common Commercial Policy that the Court recognized the exclusive nature and dynamic scope of Community powers in this field.

Following the main rationale behind the development of EU trade policy, namely that it followed the degree of internal integration, would suggest that a shorter transition period of EU investment policy is feasible and desirable. The introduction of EU investment policy comes at a different historical period, when the foundations of EU integration and the general characteristics of the role of the EU as an international actor are well established. The rules on the scope and nature of express and implied powers are now explicitly provided in Articles 3-5 and 216 TFEU, expressing a long-standing jurisprudence of the Court of Justice on the determination of EU external competences.[69] Within this framework, a clear determination of the scope and nature of EU competences in the field of foreign investment can be easier determined, allowing EU investment policy to be developed faster so as reflect the degree of internal integration.

Indeed, the promotion of the same economic interests that required a gradual development of EU trade policy indicates that the development of EU investment policy is necessary to be completed faster. The pragmatism that dictated the gradual

[69] For an overview of the principles determining EU external competences see Marise Cremona, "External relations of the EU and the Member States: Competence, mixed agreements, international responsibility, and effects of international law", FIDE 2006 National Reports, EUI Law Working Paper 2006/22, pp. 2-9, available at: http://cadmus.eui.eu/handle/1814/6249 (last visited March 28, 2011).

development of Community trade policy was successful in promoting the trade interests of the Community, its Member states and Community traders, as there were still different national interests that required a departure from uniform rules and to some extent common external representation. The implementation of a complete and uniform Community trade policy shortly after the end of the transitional period would only lead to inefficiencies and controversies, given that internal integration had not yet reached the level that would ensure common competitive conditions between traders across the Community. On the other hand, it is questionable whether the gradual development of EU investment policy in the course of the next twenty or thirty years would be beneficial for EU investors and EU Member States as investment exporting or importing countries. The development of an EU investment policy within a short time period can firstly contribute significantly to the attainment of the objectives of the internal market, ensuring equal opportunities for all European investors that wish to invest in third countries and enhancing competitiveness in the internal market, eradicating the influence that the existence of a BIT between a Member State and a third country may exert on the choice of third country investors to establish themselves in that specific Member State instead of another one. More importantly, the determination of a complete EU investment policy would contribute significantly to legal certainty, which is a central regulatory concern of Member States, third countries and in particular foreign investors. The clear determination of the role of the EU and its Member States in the field of foreign investment can ensure the rights of foreign investors and avoid multiple and conflicting obligations of Member States and third countries.[70]

Secondly, the gradual development of Community trade policy was driven by the development of international trade regulation. The scope and orientation of the Common Commercial Policy were linked with the evolution of trade rules under the GATT and later under the auspices of the WTO. As the GATT presented the main international regulatory framework on trade in goods, the effective participation of the Community in the GATT constituted the most important element of the Community's external action in the field of trade in goods. Besides, the constant evolution of GATT rules, which resulted in the conclusion of the WTO agreements covering disciplines that were not included in the original GATT 1947, contributed to the gradual development of Community trade policy. Linking the scope of its action to international developments, the Community let elements of Member States trade policies that were expressed in their bilateral agreements to survive much longer than expected, as the example of the FCN treaties with the U.S. illustrates.

In contrast with the development of EU trade policy, the development of EU investment policy should not rely on the progress of the relevant international rules. Although the scope and content of international rules on foreign investment should play a key role in determining the substantive content of EU investment policy, as was the case in the field of trade, the creation of a uniform investment policy should not depend on the development of international investment rules. Considering the lack of a multilateral regulatory framework on foreign investment,[71] it would be futile to

[70] See also Woolcock and Kleinheisterkamp, "The EU approach to international investment policy after the Lisbon Treaty,"supra note 3, p. 13-15.

[71] The most significant efforts for the establishment of a multilateral regime on foreign investment were the negotiation of a Multilateral Agreement on Investment (MAI) under the auspices of UNCTAD and the proposal for a WTO discipline on investment, during the late 1990s, which however failed. Rainer Geiger, "The multilateral agreement on investment", 31 Cornell Journal of International Law 467(1998); Kevin C. Kennedy, "A WTO agreement on investment: A solution in search of a

wait until its development in order to determine EU investment policy and confine its scope to the subject matters that will be addressed in it. Instead of merely following the development of international investment rules, the EU should be a frontrunner, identifying not only the common subject matters that are regulated in BITs, but also any other aspects of foreign investment regulation which the EU considers necessary to introduce in future investment agreements; this would entail a thorough ex ante planning of EU investment policy.

Thirdly, the substitution of Member States BITs by new investment agreements, be it EU agreements or mixed agreements, would necessarily imply a tremendous coordination and resources in order to be completed. Nevertheless, drawing inspiration from the recent enlargement experience, the accomplishment of this task by the Commission and the Member States is not insurmountable. The recording and grouping of Member States investment agreements as well as the prioritization of their renegotiation could be well planned and executed by the EU and its Member States. During the past enlargement the completion of this task within such short time was achieved because there was already an existing Community trade framework, which new Member States simply had to implement. In that respect, the successful substitution of Member States BITs by EU/mixed agreements within a short time period depends on the prior determination of the key elements and characteristics of EU investment policy. In that respect, the prioritization of EU negotiating partners which the Commission proposes[72] can boost the proper implementation of EU investment policy, as it is based on clear criteria that reflect the objectives of EU investment policy.[73]

Consequently, the EU is today better equipped to plan and implement its investment policy. On the basis of clear principles, the EU can identify from the outset the scope of EU powers and determine accordingly the content and objectives of EU investment policy. Of course, the demarcation of the scope of EU powers may probably lead to the conclusion that not all aspects of foreign investment regulation fall under exclusive EU competence. Nevertheless, it will indicate the way forward, pinpointing the areas where close cooperation between the EU and its Member States is not only desirable but also necessary and creating the conditions for the establishment of common rules and guiding principles.

As a result, the Investment Policy Communication seems to avoid the crucial question of determining the exact scope of EU powers and suggest ways of coordination with Member States on issues falling under their competences. The vague language used and the indirect hints on the aspects of foreign investment regulation which fall under EU competence undermine the foundations of EU investment policy.[74] Although the Commission rightly places emphasis on the principles that guide the development of the substantive content of EU investment

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problem?", 24 University of Pennsylvania Journal of International Law 77 (2003); Jeswald Salacuse, "Towards a global treaty on foreign investment: The search for a grand bargain" in Norbert Horn, ed., Arbitrating foreign investment disputes (The Hague: Kluwer Law International, 2004), p. 80f.

[72] Investment Policy Communication, supra note 2, pp. 6-7.

[73] For an analysis of the relevant criteria for prioritizing negotiating partners see Woolcock and Kleinheisterkamp, "The EU approach to international investment policy after the Lisbon treaty,"supra note 3, p. 20-30.

[74] For example, the Investment Policy Communication , does not analyze the exact scope of EU competence over investment protection, the exact scope of EU competence regarding other forms of foreign investment beyond FDI, or the effects of EU competence on EU and Member States international responsibility (supra note 2, pp. 2, 8, 10).

policy,[75] it fails to recognize that the establishment of a framework for cooperation with the Member States based on the distribution of competences in the field of foreign investment, is a necessary precondition for the smooth, proper and undisrupted development of a complete EU investment policy.

2. The transition from national to EU investment policy

The historical evolution of Community trade policy can be particularly helpful in the devise of specific mechanisms that can ensure smooth transition from national to supranational investment policy. Drawing from past experiences, the EU and its Member States can use similar methods in order to replace existing Member States agreements by new agreements, promoting legal certainty and guaranteeing the advantages accrued to EU and third country investors under the existing network of BITs.

Despite promoting a short period for the transition from Member States BITs to EU-wide investment agreements, the EU should avoid authorizing the conclusion of new investment agreements by its Member States. In 1969, when the Community trade policy was not yet complete, the EEC had explicitly refused to authorize the conclusion of trade agreements by Member States. The exception provided in Article 9 of Decision 69/464/EEC was limited in scope and time, serving the need of concluding trade agreements which were impossible to be concluded by the EEC for political reasons. Considering the failure of this mechanism to achieve the envisaged results, namely the conclusion of an agreement between the Community and Eastern European countries, and the subsequent achievement of the benefits envisaged via the adoption of autonomous measures, it is questionable whether the EU should allow the conclusion of Member States BITs in the future.

In that respect, the proposal of the Commission to authorize the conclusion of new BITs by Member States,[76] even under close supervision by the Commission and based on common guidelines should be viewed with skepticism. The authorization of Member States to conclude new trade agreements on behalf of the EU was used very scarcely, mainly in order to substitute for the lack of international stand of the EU under specific international legal frameworks. The same stance has also been followed in other areas of EU law, so that Member States were authorized to conclude international agreements in areas of EU exclusive competence only where it was impossible for the EU to participate.[77] However, there is no legal or external political impediment for the conclusion of investment agreements by the EU. On the contrary, the conclusion of new BITs by Member States could impact negatively on the establishment of EU investment policy, as it would deprive a major incentive for Member States to cooperate with the Commission and conclude jointly new agreements. More importantly, the conclusion of new investment agreements, would

[75] For an analysis of the Commission's intentions regarding the substantive content of EU investment policy and the questions posed see Woolcock and Kleinheisterkamp, "The EU approach to international investment policy after the Lisbon treaty,"supra note 3, p. 31-52.

[76] Proposed Regulation, supra note 2, Chapter 3.

[77] For example agreements concluded under the aegis of the United Nations, such as the International Labour Organization (ILO) or the International Maritime Organization (IMO), where only States are entitled to participate in agreements. See Cremona, "Member States as trustees of the Community interest: Participating in international agreements on behalf of the European Community," supra note 5, pp.1-3.

not add to legal certainty as proposed,[78] but it would rather prolong uncertainty, given that Member States BITs would constantly be under revision by the Commission, which could withdraw authorization, if it found incompatibilities with EU law or that the BIT obstructs the development of EU investment policy.[79]

On the other hand, legal certainty and continuity in Member States investment policy necessitates a different policy regarding existing BITs. The mechanism established in Articles 1-3 of Decision 69/464/EEC can provide a useful model for the renewal of existing BITs. Subjecting the renewal of Member States BITs to authorization by EU institutions, which is dependent on the compatibility of Member States BITs with EU law can achieve continuity in Member States' action, preserving investors' interests. In that regard, the mechanism proposed in Chapter II of the Proposed Regulation on authorization of Member States BITs[80] is based on a model that was successfully used in the past, guaranteeing Member States' interests that were not yet integrated in Community external action.

More specifically, the notification mechanism established in Article 2 of the proposed Regulation enables the proper screening of existing Member States BITs, ensuring legal certainty. Similar to Regulation 69/494/EEC, the Proposed Regulation conditions authorization upon compatibility with substantive EU law as well as upon the development of EU investment policy, thus preserving the autonomy and supremacy of EU law, whilst preserving Member States' agreements. Nevertheless, the proposed regulation differs from Regulation 69/494/EEC in that it allows the amendment and renegotiation of Member States BITs. Subjecting the amendment of existing Member States BITs to authorization and close scrutiny by the Commission, this mechanism enables Member States to adapt their BITs in cases where their authorization is withdrawn because of incompatibilities with EU law.[81] Hence this additional mechanism addresses the need for continuity of Member States BITs, as their duration can be prolonged until their replacement by EU agreements, without leaving a gap in case they had to be terminated.

Of course, the authorization of existing Member States BITs and the potential for their amendment need not result in a thirty year long transitional period as in the field of trade. In that respect, the granting of review and authorization powers to the Commission instead of the Council, as well as the recognition of the delay in the Council to authorize the opening of EU negotiations on investment with a specific third country as a valid ground for withdrawal of authorization of Member States

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[78] Proposed Regulation, supra note 2, p.2.

[79] See Woolcock and Kleinheisterkamp, "The EU approach to international investment policy after the Lisbon treaty,"supra note 3, p. 67, who argues that the mechanism proposed "does not really contribute to enhancing legal certainty but could be seen as an instrument to give the Commission more leverage in its relation with Member States that are reluctant to change or give up their BITs". Although this mechanism is probably the most efficient solution so as to eliminate incompatibilities and maintain legal protection arising from existing BITs, it is questionable whether additional uncertainty should be created regarding new Member States' BITs.

[80] Proposed Regulation, supra note 2.

[81] "In recognition of the fact that Member States may be required or may find necessary to amend or modify investment agreements, in particular to bring them in compliance with Treaty obligations, this proposal also establishes a framework and conditions to empower Member States to enter into negotiations with a third country with a view to modifying an existing bilateral agreement relating to investment". Proposed Regulation, supra note 2, Explanatory Memorandum, p.1.

BITs are innovative elements that can contribute to the speedier and more efficient implementation of EU investment policy.[82]

Addressing the main handicap of the authorization mechanism provided in Decision 69/464/EEC, the EU can also draw insights from the mechanisms used during the transitional period in the field of trade. The Commission could insist on the inclusion of an "EU clause" in existing Member States BITs, whenever they are renewed. A clause that would provide that any future renegotiation of the BIT would be undertaken by the EU (in addition to the contracting Member State) could assist in the faster recognition of the EU as an international actor in the field of foreign investment and, consequently, contribute to the efficient implementation of a complete EU investment policy.

Conclusions

The historical evolution of Community trade policy and the transition from national to Community trade policy provides valuable lessons for designing EU investment policy. The successful creation and implementation of a uniform trade policy was based on the close cooperation of all relevant stakeholders, taking into account EU constitutional and international realities. The development of Community trade policy was successful, as it reflected the development of internal integration and contributed to the strengthening of international trade rules. Within that framework, Community trade policy developed gradually not only during the transitional period identified in the EEC Treaty, but also for a significant period afterwards. It was based on innovative but realistic mechanisms that were established in EU secondary law, in particular Decision 69/494/EEC, which allowed for the continuation of Member States trade agreements until their substitution by EU agreements under the supervision of Community institutions, thus exemplifying the obligation of Community organs and Member States to cooperate harmoniously.[83]

Drawing inspiration from Community trade policy, the success of EU investment policy depends on the willingness of all institutional actors to cooperate closely, taking into account the developments of EU law and the realities of international investment law. In that respect, EU investment policy should be based on clear and strong foundations, identifying both the orientation and substantive content of EU investment policy and also the proper method of cooperation with Member States. The development of EU investment policy should avoid a long transitional period, as it would only prolong legal uncertainty. Considering the boost to EU competitiveness that a complete EU investment policy will bring in light of EU internal economic integration, EU investment policy can be successful only if it is well planned and properly implemented. Moreover, the international presence of the EU today allows it to lead rather than follow the gradual evolution of international investment rules.

More importantly, the transition from national to EU investment policy can be based on mechanisms similar to those devised in the field of trade. Allowing the continuation of existing Member States investment agreements under close scrutiny by EU institutions has proved very helpful in the past and can contribute significantly to a smooth transition in the field of foreign investment. Building upon trade

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[82] See Woolcock and Kleinheisterkamp, "The EU approach to international investment policy after the Lisbon treaty," supra note 3, pp. 64-65.

[83] Article 4(3) TEU (ex Article 5 EEC Treaty).

experience and enhancing the robustness of mechanisms used in the past, the Proposed Regulation provides overall appropriate tools for easing transition towards a complete EU investment policy. Nevertheless, the success of the transitional regime and the introduction of the EU investment policy depends ultimately on the political will of the involved stakeholders and their harmonious cooperation.