DECLARATORIA SULLA TESI DI DOTTORATO

Il sottoscritto

COGNOME	BARRA
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Titolo della tesi :	INVESTMENT PROTECTION BETWEEN INTERNATIONAL LAW AND EU LAW
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DICHIARA

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7) che la tesi di Dottorato rientra in una delle ipotesi di embargo previste nell'apposita dichiarazione "**RICHIESTA DI EMBARGO DELLA TESI DI DOTTORATO**" sottoscritta a parte.

Data 3 / 2 / 2010

F.to MATTEO BARRA

INVESTMENT PROTECTION BETWEEN INTERNATIONAL LAW AND EU LAW

INDEX

ABSTRACT

Investment Protection Between International Law And EU Law : Justification and Objectives

The research topic acknowledges the recurrence of a number of varied international Bilateral Investment Treaties (BITs) as a means to economic integration between States and investigates on possible conflicts between international legal instruments for the protection of foreign investment and in particular between BITs concluded by Member States and the EU law.

In general terms, the research concerns the relation between international law and the EU legal system in the field of investment protection and aims at verifying the hypothesis whether: EU law incorporates international law (principle of integration); EU law defines validity and effects of international law (principle of coexistence); EU law prevails over international agreements concluded by Member States in case of conflict (principle of prevalence) (Chapter 1.).

The research question then focuses on possible conflicts between concurring binding international legal instruments for the promotion of foreign investment such as BITs concluded by Member States on one side and EU law on the other side, as well as on EU external competence to conclude international agreements for the protection of foreign investment with third countries.

The research is then articulated in three sections: the first on BITs concluded by Member States *inter se* (Chapter 2.); the second on BITs concluded by Member

States with third countries (Chapter 3.); and the third on international investment agreements concluded by the EU with third countries (Chapter 4.).

Research Method and Research Plan

Part I - Foundations

Chapter 1. International Law and EU Law

Analysis of the classic literature on the foundations of the European legal system under international law as a legal system distinct from it.

Special attention will be devoted to the emphasis placed on the supremacy of EU law with respect to international law, in terms of its validity and legal effects within the scope of the EU treaties.

The exercise of treaty-making powers by the UE and international agreements concluded by Member States add an additional level of complexity to the relationship between international law and EU law.

Part II - BITs and EU Law

Chapter 2. BITs concluded inter-se by Member States – The Alternative: Is International or EU Law Applicable?

The overlap between the protection of investment under BITs concluded between Member States *inter se* on one side and on the other side EU law requires an initial definition of investment protection among Member States under BITs as well as under EU law.

Conflicts between the two applicable legal instruments are evaluated according to compatibility rules regarding validity, jurisdiction and substantive rules.

Chapter 3. BITs Concluded by Member States with Third Countries – Compatibility: Are BITs Compatible with EU Law?

The overlap between BITs concluded by Member States with third countries and EU law requires an analysis of the applicable rules under EU law on the protection of investment from and to third countries.

Relevant cases have been discussed before the ECJ and infringements proceedings have been initiated by the Commission in an attempt to level out conflicts between EU law and BITs concluded by Member States with third countries.

PART III – Constitutional Outlook : The Treaty of Lisbon towards Greater Coherence?

Chapter 4. - International Investment Agreements Concluded by the EU with Third Countries - Expansion and Co-operation

Foreign investment is a central feature of the amended EU external competence on common commercial policy introduced by the Treaty of Lisbon.

Nevertheless, the analysis of EU law and practice before the entry into force of the Treaty of Lisbon suggests that certain areas concerning the protection of foreign investment which are usually covered by BITs still fall under the shared competence of Member States.

Final considerations are spent on form and content of possible international investment agreements to be concluded by and between the EU and Member States on one side and third countries on the other.

[Abbreviations and Numbering for the EU Treaties:

The following abbreviations are used in the text after the relevant Article number:

EC : Treaty establishing the European Community, as last amended by the 1997 Treaty of Amsterdam;

EU : Treaty on European Union, as last amended by the 1997 Treaty of Amsterdam;

TEU : Treaty on European Union, as last amended by the 2007 Treaty of Lisbon.

TFEU : Treaty on the Functioning of the European Union, amending and replacing the Treaty establishing the European Community as provided under the 2007 Treaty of Lisbon.]

PART I –FOUNDATIONS

CHAPTER 1. INTERNATIONAL LAW AND EU LAW

SUMMARY: 1.1. Foundations - Between International Law and EU Law; 1.2. Integration - The International Treaty-Making Power of the EU; 1.3. Coexistence - Europeanization of International Law; *1.3.1. Validity; 1.3.2. Primacy; 1.3.3. Direct Effect;* 1.4. Prevalence - Agreements Concluded by Member States; *1.4.1. Agreements Concluded Before the EU Treaties; 1.4.2. Agreements Concluded After the EU Treaties; 1.4.3. A Loophole under EU Law;* 1.5. Provisional Comments.

It has been often recalled that the relationship between EU law and international law is a difficult one and that such difficulty has multiple dimensions[1]. In the first place, it relates to the Treaty-making activity of the EU institutions contributing to the formation of international law. In the second place, it concerns the position of international law within the normative hierarchy of the EU legal system. Finally – as it is clear that European institutions do not exhaust the international relations between

[1] Timmermans, Christiaan. "The EU and Public International Law." European Foreign Affairs Review 4 (1999): 181-194.

Member States nor between the latter and third countries - agreements concluded by Member States add another layer of complexity.

1.1. Foundations - Between International Law and EU Law

Although the 1957 Rome Treaty establishing the European Economic Community is commonly regarded as a treaty establishing an international organization, the ECJ hastened to declare that the EEC "*constitutes a new legal order of international law*"[2].

The novelty and the different character predicated by the ECJ referred to the direct application of the Treaty within national law so that nationals of Member States are entitled to claim rights which the national courts must protect[3]. The distinguishing

[2] ECJ judgment of 5 February 1963 in case 26-62, NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration: *"The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community."*.

[3] ECJ judgment of 5 February 1963 in case 26-62, NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration: "*The objective of the EEC Treaty, which is to establish a common market, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting states. This view is confirmed by the preamble to the Treaty which refers not only to governments but to peoples. It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens. Furthermore, it must be noted that the nationals of the States brought*

character was emphasized in comparison to "*ordinary international treaties"* because the EC Treaty created *"its own legal system which* […] *became an integral part of the legal systems of the Member States and which their courts are bound to apply"*[4].

Nonetheless, it was clear from the beginning that central to architecture of the EU were the international treaties establishing the European communities as international organizations between Member States, whereby the latter freely limit their sovereign rights and pool and confer them to European institutions according to their respective national Constitutions[5].

Over the time, the EU legal system has become a 'process' by means of primary and secondary legislation and by means of the judgements of the ECJ drifting the classical model of international cooperation to a system closer to municipal law[6].

In the external sphere, this process has lead to the progressive affirmation of a growing competence for the EU to act in international relations and to enter into international agreements with third countries (1.2.), as well as to the definition of legal effects between international and EU law (to the so-called Europeanization of international law) (1.3.) [7], which have shaped the relationship between national, EU

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together in the Community are called upon to cooperate in the functioning of this community through the intermediary of the European Parliament and the Economic and Social Committee.".

[4] ECJ judgement of 15 July 1964 in case 6/64, Flaminio Costa v E.N.E.L..

[5] A comprehensive justification as to the inclusion of the EU among international organizations in Pellet, Alain. Les fondements juridiques internationaux du droit communautaire. 2 vols. Collected Courses of the Academy of European Law. Dordrecht: Nijhoff, 1994. From 221 to 244; and in Dupuy, Pierre-Marie. L'unité De L'ordre Juridique International: Cours Général De Droit International Public (2000). Leiden: M. Nijhoff, 2003. From 438 to 450.

[6] Higgins, Rosalyn. Problems & Processes : International Law and How We use It. Clarendon Oxford. 1994.

[7] See Wouters, Jan, André Nollkaemper, and Erika De Wet. "Introduction : The Europeanization of International Law." In Wouters, Jan, and André Nollkaemper. The Europeanization of International Law: The Status of International Law in the EU and Its Member States. The Hague: TMC Asser Press,

and international law according to a triangular model, where constant interaction and cooperation rather than linear hierarchies are the rule[8].

1.2. Integration – The International Treaty-Making Power of the EU

Article 47 TEU, as previously Article 281 EC, attributes international legal personality to the EU. This is generally considered to be one of the starting points for any discussion on the Union's treaty-making powers.

2008. At 3: "*To the extent that it is binding upon the EU institutions, international law becomes a part of the EU legal order and is therefore 'Europeanized'. Thus, it follows that the application and interpretation of such international norms by EU Member States are no longer solely a matter for the constitutional order of the latter, but in the very first place for EU law, notably with a view to its uniform application and interpretation. Thus we see the emergence of a complicated triangular relationship between international law, EU law and domestic law. International law continues to bind Member States directly. However, the EU is increasingly placed in between international law and domestic law.*".

[8] Bethlehem, Daniel. "International Law, European Community Law, National Law : Three Systems in a Search for a Framework." In Koskenniemi, Martti. International Law Aspects of the European Union. The Hague: Kluwer Law International, 1998, 169-196. At 195: "*Equally, however, to characterize the relationship between international law, Community law and national law, or even between any two of them, in monist terms, with its emphasis on a hierarchical relationship in which the rules and principles of one or other system prevail over those of the others, is to mis-describe the reality of the practice. In practice, the relationship between the systems is characterized by constant interaction such that to focus only on the manner of the reception of obligations derived from one system into the* corpus *of rules of another is to focus only on one small element of that interaction. A characterization which hinges on a linear conception of the interaction between various systems of law seems also to mis-perceive the complex, multi-directional interaction that must perforce apply in circumstances in which rules and principles from more than one system address, even if only indirectly or in a complementary manner, the same subjects and subject manner. Just as a web, or net, is made up of numerous strands criss-crossing at various points while, at the same time, going in different directions, so is the relationship between international law, Community law and national law; interacting constantly even thought the focus may be slightly different.*".

It shall be incidentally recalled that the capacity of international organizations to enter into international agreements has long not been recognized under international law[9]. Only after the entry into operation of the United Nations, the capacity of international organizations to sign international treaties has been accepted[10].

The second starting point is the attribution to the EU of Treaty-making power, initially only in the area of common commercial policy (Article 133 EC) and of association agreements (Article 310 EC). In this respect, the scope of the external dimension of the EU as opposed to that of Member States has undergone dramatic changes, which are now contained in the amendments brought by the Treaty of Lisbon. Article 3(1) TFEU lists EU exclusive competences and Article 3(2) tentatively

[9] The Permanent Court of International Justice had denied autonomous external relations for international organizations in the case of Serbian and Brazilian Loans [Publications of the Permanent Court of International Justice, Case Concerning the Payment in Gold of Brazilian Federal Loans Issued in France, Judgement No. 15, Series A, No. 20/21 (1929)]. Brolmann observes that "*even when the autonomy of the organization vis-à-vis the member states at the institutional level was conceded, […] this autonomy for a long time had no external dimension: organizations did not yet conduct 'external relations', and where they did, it was interpreted in terms of agency on behalf of the member states*", see Brölmann, Catherine. The Institutional Veil in Public International Law: International Organisations and the Law of Treaties. Hart monographs in transnational and international law. Oxford: Hart Publishing, 2007. At 95.

[10] See ICJ advisory opinion of 11 April 1949 in case *Reparation for Injuries Suffered in the Service of the UN*, at 179: "*Accordingly the Court has come to the conclusion that the Organization is an international person. That is not the same thing as saying that it is a State, which is certainly is not, or that its legal personality and rights and duties are the same as those of a State. Still less is it the same thing as saying that it is "a super-State", whatever that expression may mean. It does not even imply that all its rights and duties must be upon the international plane, any more than all the rights and duties of a State must be upon that plane. What it does mean is that it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims.*".

codifies implied exclusive competence to conclude international agreements[11]. In addition, ECJ doctrine of implied powers (so-called 'EART doctrine') has given a crucial contribution fixing criteria for the allocation of external competences between European institutions and Member States[12].

Under an international law point of view, treaty-making powers of international organizations have not been exempt from scrutiny by the contracting counterparties.

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[11] Article 3 TFEU: "*1. The Union shall have exclusive competence in the following areas: (a) customs union; (b) the establishing of the competition rules necessary for the functioning of the internal market; (c) monetary policy for the Member States whose currency is the euro; (d) the conservation of marine biological resources under the common fisheries policy; (e) common commercial policy. 2. The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope*.".

[12] The doctrine of implied powers was first stated by the European Court of Justice in the EART decision. The 1971 judgement in the EART case suggested the existence of a parallelism between internal and external powers. ECJ judgement of 31 March 1971, Case 22/70, *Commission v. Council* [European Agreements on Road Transport, EART]. The doctrine of implied powers has been further developed by the ECJ so as to grant the EU implied exclusive competence to conclude international agreements: (i) where the common policy or otherwise the unity of the common market would be jeopardized by national measures adopted by Member States, either in fields of common policies or in areas where there are harmonising measures (ECJ, 19 March 1993, Opinion 2/91, *Convention Nº 170 of the International Labour Organization concerning Safety in the use of Chemicals at Work*,); (ii) when external powers are necessary to exercise at the same time internal powers (ECJ, 26 April 1977, Opinion 1/76, *Draft Agreement establishing a European laying-up fund for inland waterway vessels*); and (iii) when Community legislation contains clauses relating to the treatment of national of non-Member States (ECJ, 15 November 1994, Opinion 1/94, *Competence of the Community to conclude international agreements concerning services and the protection of intellectual property*). Whether Article 3(2) codifies exhaustively the EART doctrine is a much discussed issue: under a critical point of view see Schütze, Robert. "Lisbon and the Federal Order of Competences: A Prospective Analysis." European Law Review 33, no. 5 (2008): 709-722.

In the first place, the latter are concerned that internal rules on the external competence exercised by international organizations cannot be invoked as a justification for a breach of international obligations nor as a cause to invalidate the conclusion of an international treaty[13]. In the second place, the same counterparts are worried and interested that in case on non-compliance they can enforce the breach of the international obligation against a responsible entity[14].

The starting point though, remains so far unchanged: the EU – as any other international organization - enjoys no 'plenary powers' in external relations. On the contrary, the EU can exercise only those competences conferred directly or indirectly by the EU Treaties. The momentous consequence are the loss for Member States of their respective competence to enter into international agreements and the affirmation of the practice of 'mixed' agreements – that is international agreements falling within both EU and Member States' competence and involving the activity of both – together with the duty of close cooperation.

[13] Article 27 (Internal law of States, rules of international organizations and observance of treaties) and 46 (Provisions of internal law of a State and rules of an international organization regarding competence to conclude treaties) of the 1986 VCLT between States and International Organizations or between International Organizations reformulate with reference to international organizations the principles set out under Articles 27 and 46 of the 1969 VCLT.

[14] In general, on the responsibility of international organizations, see Brölmann, Catherine. The Institutional Veil in Public International Law: International Organisations and the Law of Treaties. Hart monographs in transnational and international law. Oxford: Hart Publishing, 2007. More in details see the more recent contribution Brölmann, Catherine. "International Organizations and Treaties." In J. Klabbers (ed.), Research Handbook on International Organizations (Edward Elgar Publishing, 2009); and Nollkaemper, André. "Constitutionalization and the Unity of the Law of International Responsibility." Indiana Journal of Global Legal Studies 16, no. 2 (2009).

1.3. Coexistence - Europeanization of International Law

International commitments subscribed by the EC 'forms an integral part of the Community legal system' and are binding on the EU as well as on Member States[15]. Building upon this, the ECJ has early on acknowledged the binding force of customary international law[16].

In a number of cases, the European courts have applied substantial norms of general international law: in relation to the lawfulness of the exercise by European

[15] See 300(7) EC "*Agreements concluded under the conditions set out in this Article shall be binding on the institutions of the Community and on Member States*" and ECJ judgment of 30 April 1974 in case 181-73, R. & V. Haegeman v Belgian State concerning the interpretation of a Community import regulation consistently with the International Dairy Arrangement concluded by the EC Council in the framework of the 1973-1979 GATT trade negotiations an arrangement on minimum import prices for dairy products. See in particular at para. 5: "*5. The provisions of the agreement, from the coming into force thereof, form an integral part of Community law.*". In addition, see other international agreements mentioned in the Treaties Such as the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties, mentioned under Article [63(1) EC 78 TFEU].

[16] ECJ, judgement of 16 June 1998 in case C-162/96, A. Racke GmbH & Co. and Hauptzollamt Mainz, on the application of Article 62 VCLT codifying the existing customary law on suspension of an international agreement on account of a fundamental change in circumstances – as declared by the ICJ judgement of 2 February 1973, *Fisheries Jurisdiction* (*United Kingdom* v *Iceland*), ICJ Reports 1973, p. 3, paragraph 36, in particular at para. 46: "*46. It follows that the rules of customary international law concerning the termination and the suspension of treaty relations by reason of a fundamental change of circumstances are binding upon the Community institutions and form part of the Community legal order.*". The Court rejected the challenge brought by Racke against the validity of a EC Regulation suspending trade preferences granted under the Cooperation Agreement between the European Economic Community and the Socialist Federal Republic of Yugoslavia and declared that the regulation met the conditions laid down under Article 62 VCLT (i) that the existence of the changed circumstances constitute an essential basis of the consent of the parties to be bound by the treaty; and (ii) that the change have the effect of radically transforming the extent of the obligations still to be performed under the treaty.

institutions of their powers in the field of the protection of competition against companies established in non-Member States[17], as well as in relation to effective nationality requirements under national laws and diplomatic protection[18]. In particular, reference to the customary international law of the treaties as codified by the 1969 Vienna Convention has been invoked in relation to the definition of 'international treaties' and of the applicable substantive rules on their interpretation, validity and termination[19] and to the interpretation of the EC treaties themselves[20].

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[17] ECJ judgement of 27 September 1988 in joined cases 89, 104, 114, 116-117, 125-129/85, Ahlstrom Osakeythio (Wood Pulp). The Court applied the 'implementation principle', where the enforcement of Article 81 EC was justified as long as the anti-competitive agreement was implemented in the territory of the EC. Later the Court of First Instance applied an 'effect principle' requiring that the anti-competitive agreement had an immediate and substantial effect in the territory of the EC. See CFI judgement of 25 March 1999 in case T-102/96, Gencor Ltd, v Commission of the European Communities, at para. 90: "*Application of the Regulation is justified under public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the Community.*".

[18] ECJ judgement of 7 July 1992 in case C-369/90, Mario Vicente Micheletti and others v Delegación del Gobierno en Cantabria.

[19] On the notion of international treaty, see for instance, Opinion 1/75 of the Court of 11 November 1975 (local cost standard), Opinion of the 2/92 Court of 24 March 1995 (Third Revised Decision of the OECD on national treatment); ECJ judgement of 23 March 2004 in case C-233/02, France v Commission and ECJ judgement of 10 September 1996 in case C-277/94, Z. Taflan-Met et al. v Bestuur van de Sociale Verzekeringsbank et al.. On the obligation not to defeat the object and purpose of a treaty before its entry into force (Art. 18 VCLT) see Court of First Instance judgement of 22 January 1997 in case T-115/94, Opel Austria GmbH v Council of the European Union. On the application of successive treaties relating to the same subject matter, see ECJ judgment of 14 October 1980 in case 812/79, Attorney General v Juan C. Burgoa.

[20] Verwey, Delano R. The European Community, the European Union and the International Law of Treaties: A Comparative Legal Analysis of the Community and Union's External Treaty-Making Practice. The Hague: T.M.C. Asser Press, 2004. Especially at Chapter 5 (Treaty Interpretation and Dispute Settlement).

In respect to customary international law, a detailed analysis of references to it has evidenced an 'EU-oriented' reference to customary norms of international law. The result has been an 'automatic' adjustment of international law with a view to the conservation of internal EU law. Besides, the same approach is apparently followed commonly by other national courts and which is rather conservative of their respective legal order[21].

Turning it to practice, the acknowledgement of the binding force of international law – be it conventional or customary – as a source of EU law means that both the EU and Member States are bound to its *bona fide* implementation, which brings three corollaries.

A first corollary regards validity: *i.e.* the source and the mechanisms through which international law becomes binding on the EU. This has been referred to as the 'Europeanization' of international law, since the interpretation of international law binding on the EU is as much a matter for constitutional courts of Member States as it is a matter of uniform application and interpretation by the ECJ (1.3.1.)[22].

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[21] Casolari, Federico. L'incorporazione Del Diritto Internazionale Nell'ordinamento dell'Unione Europea. Collana del Dipartimento di scienze giuridiche e della Facoltà di giurisprudenza dell'Università di Modena e Reggio Emilia 80. Milano: Giuffrè, 2008., at 163-165: "[l]*a prassi presa in esame […] consente di formulare alcune considerazioni di carattere interlocutorio sulla posizione assunta dal giudice comunitario rispetto al diritto internazionale. Tale prassi, infatti, oltre ad indicare quale sia la definizione delle principali fonti del diritto internazionale accolta dalla Corte di giustizia e dal Tribunale di primo grado, mette in luce uno spiccato e diffuso* judicial activism *che si traduce nella ricerca di una sorta di 'adattamento* a priori' *della norma internazionale oggetto di cognizione rispetto alle esigenze di conservazione del diritto interno. Più precisamente tale 'adattamento' risulta finalizzato ad evitare il possibile sorgere di conflitti tra i due sistemi normativi e, in particolare, a scongiurare il pericolo di privare d'effettività il diritto dell'UE*".

[22] Bethlehem, Daniel. "International Law, European Community Law, National Law : Three Systems in a Search for a Framework." In Koskenniemi, Martti. International Law Aspects of the European Union. The Hague: Kluwer Law International, 1998. 169-196. See also Wouters, Jan, André Nollkaemper, and

The second corollary concerns the distinctive qualities of international law binding on the EU, *i.e.* its legal effects in the EU legal order and the hierarchy in case of conflict (1.3.2.), which in some cases may reach the level of direct effect (1.3.3.).

1.3.1. Validity

The declaration that international agreements are binding on the EU and Member States is a statement on the validity of international law within the EU legal order which, as the ECJ puts it, '*form*[s] *an integral part of the Community legal system'*.

In the 1982 Kupferberg case, the Court declared that implementation of international agreements concluded by the EU is a remit for the EU institutions as well for Member States and that the latter bear an obligation towards third countries as well as towards the EU[23].

Erika De Wet. "Introduction : The Europeanization of International Law." In Wouters, Jan, and André Nollkaemper. The Europeanization of International Law: The Status of International Law in the EU and Its Member States. The Hague: TMC Asser Press, 2008. elaborating on the concept of Europeanization on the level of international relations theory (practical influence of EU on the formation of international law, normative power, standard setting) as well as on a strict legal level (validity, primacy, direct effect).

[23] ECJ judgment of 26 October 1982 in Case 104/81, *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A.*, at 12-13: "*12 The measures needed to implement the provisions of an agreement concluded by the Community are to be adopted, according to the state of Community law for the time being in the areas affected by the provisions of the agreement, either by the Community institutions or by the Member States. That is particularly true of agreements such as those concerning free trade where the obligations entered into extend to many areas of a very diverse nature. 13 In ensuring respect for commitments arising from an agreement concluded by the Community institutions the Member States fulfil an obligation not only in relation to the non-Member country concerned but also and above all in relation to the Community which has assumed responsibility for the due performance of the agreement. That is why the provisions of such an agreement, as the Court has already stated in its judgment of 30 April 1974 in case 181/73 Haegeman (1974) ECR 449, form an integral part of the*

While it is not difficult to figure out obligations for the EU as well as for Member States towards third countries arising directly from international agreements, what are in fact the obligations of Member States towards the EU?

It shall be recalled that, under the general international law principle of *pacta sunt servanda*, contracting parties are called to abide by and perform their international commitments according to *bona fide*. As a consequence, the implementation in their respective internal legal order bears any relevance neither on validity nor on responsibility[24].

On the contrary, internal rules create obligation in the internal legal order. The same principle applies to the implementation of international agreements concluded by the EU in the exercise of its external competences. While rules on internal competences have no relevance *vis-à-vis* contracting parties, the question as to whether it is the EU or a Member State to adopt implementing provisions falls under EU law.

As a consequence, Member States are not free to determine the effects of international agreements concluded by the EU into their national legal order: the ECJ will be sole competent to declare the effects of international agreements within the EU legal order as well as in within the legal order of Member States[25]. This phenomenon is often referred to as 'Europeanization' of international law.

Community legal system.".

[24] See Articles 27 (*Internal law and observance of treaties*) and 46 (*Provisions of internal law regarding competence to conclude treaties*) of the 1969 VCLT, as repeated by the respective Article 27 (*Internal law of States, rules of international organizations and observance of treaties*) and 46 (*Provisions of internal law of a State and rules of an international organization regarding competence to conclude treaties*) of the 1986 VCLT between states and international organizations or between international organizations.

[25] ECJ judgment of 26 October 1982 in Case 104/81, *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A.*, at 14: "*14 It follows from the Community nature of such provisions that their effect in the Community may not be allowed to vary according to whether their application is in practice the*

1.3.2. Primacy

By the same token, international law does not regulate the hierarchy of international norms in the internal legal orders, neither of the EU nor of Member States. The exposure of a legal order to international law, again, is a matter to be answered at the constitutional level of internal legal orders.

As anticipated, early on the ECJ stated that international agreements concluded by the EU are to be interpreted uniformly within Member States' legal orders and that therefore it is a task for the Court to determine terms and conditions for international law to have effect within EU law, *i.e.* its hierarchy in the EU legal order[26].

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responsibility of the Community institutions or of the Member States and, in the latter case, according to the effects in the internal legal order of each Member State which the law of that State assigns to international agreements concluded by it. Therefore it is for the Court, within the framework of its jurisdiction in interpreting the provisions of agreements, to ensure their uniform application throughout the Community.".

[26] ECJ judgment of 26 October 1982 in Case 104/81, *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A.*, at 17: "*17 It is true that the effects within the Community of provisions of an agreement concluded by the Community with a non-Member country may not be determined without taking account of the international origin of the provisions in question. In conformity with the principles of public international law Community institutions which have power to negotiate and conclude an agreement with a non-Member country are free to agree with that country what effect the provisions of the agreement are to have in the internal legal order of the contracting parties. Only if that question has not been settled by the agreement does it fall for decision by the Courts having jurisdiction in the matter, and in particular by the Court of Justice within the framework of its jurisdiction under the Treaty, in the same manner as any question of interpretation relating to the application of the agreement in the Community.*". The principle has been consistently adhered to in subsequent judgements, see among others ECJ judgement of 23 November 1999 in Case C-149/96, Portuguese Republic v Council of the European Union, at 34 and 35: "*34. It should be noted at the outset that in conformity with the principles of public international law Community institutions which have power to negotiate and conclude an agreement with a non-member country are free to agree*

Where international agreements do not provide otherwise, the ECJ declared that *bona fide* implementation placed international treaty provisions over secondary EU law and required interpretation of EU law in a manner which is consistent with the international commitments undertaken by the EU[27]. As a consequence, international agreements concluded by the EU enjoy the normative power to prevail over conflicting secondary EU law as well as over conflicting national legislation. As lately as in the 2008 Intertanko judgement, the Court recalled that international treaties rank between primary and secondary EU law[28].

The principle that international agreements have to be performed according to *bona*

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with that country what effect the provisions of the agreement are to have in the internal legal order of the contracting parties. Only if that question has not been settled by the agreement does it fall to be decided by the courts having jurisdiction in the matter, and in particular by the Court of Justice within the framework of its jurisdiction under the EC Treaty, in the same manner as any question of interpretation relating to the application of the agreement in the Community (see Case 104/81 Hauptzollamt Mainz v Kupferberg [1982] ECR 3641, paragraph 17).".

[27] ECJ judgment of 10 September 1996 in case C-61/94, *Commission of the European Communities v Federal Republic of Germany*: "*52 When the wording of secondary Community legislation is open to more than one interpretation, preference should be given as far as possible to the interpretation which renders the provision consistent with the Treaty. Likewise, an implementing regulation must, if possible, be given an interpretation consistent with the basic regulation (see Case C-90/92 Dr Tretter v Hauptzollamt Stuttgart-Ost [1993] ECR I-3569, paragraph 11). Similarly, the primacy of international agreements concluded by the Community over provisions of secondary Community legislation means that such provisions must, so far as is possible, be interpreted in a manner that is consistent with those agreements.*".

[28] ECJ judgement of 3 June 2008 in case C-308/06, The Queen on the Application of International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport, at 42: "*42 It is clear from Article 300(7) EC that the Community institutions are bound by agreements concluded by the Community and, consequently, that those agreements have primacy over secondary Community legislation (see, to this effect, Case C-61/94 Commission v Germany [1996] ECR I-3989, paragraph 52, and Case C-311/04 Algemene Scheeps Agentuur Dordrecht [2006] ECR I-609, paragraph 25).*".

fide also implies that EU law is subject to consistent interpretation according to international commitments[29]. As a consequence, EU secondary legislation must be interpreted, and possibly its scope limited, '*in the light of the relevant rules of international law*'[30].

1.3.3. Direct Effect

While the Court has adopted an open approach as to the validity of international norms, which are generally acknowledged in their capacity to create rights and obligations upon the EU as well as upon Member States, the same Court has expressed a more cautious attitude on the so-called 'direct' effects of international norms on individuals, which allows the latter to enforce international obligations before national courts.

Obviously, the international agreement itself may provide terms and conditions for its legal effects in the internal legal order of contracting parties. When the treaty does

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[29] ECJ judgment of 24 November 1992 in Case C-286/90, Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp., at 11: "*9 As a preliminary point, it must be observed, first, that the European Community must respect international law in the exercise of its powers and that, consequently, Article 6 abovementioned must be interpreted, and its scope limited, in the light of the relevant rules of the international law of the sea.*".

[30] ECJ judgement of 9 October 2001 in Case C-377/98, Kingdom of the Netherlands, at 52 and 53: "*52. It is common ground that, as a rule, the lawfulness of a Community instrument does not depend on its conformity with an international agreement to which the Community is not a party, such as the EPC. Nor can its lawfulness be assessed in the light of instruments of international law which, like the WTO agreement and the TRIPS and TBT agreements which are part of it, are not in principle, having regard to their nature and structure, among the rules in the light of which the Court is to review the lawfulness of measures adopted by the Community institutions (Case C-149/96 Portugal v Council [1999] ECR I-8395, paragraph 47). 53. However, such an exclusion cannot be applied to the CBD, which, unlike the WTO agreement, is not strictly based on reciprocal and mutually advantageous arrangements (see Portugal v Council, cited above, paragraphs 42 to 46).*".

not provide otherwise, the Court has elaborated a two-tier test to verify the direct effect of international obligations.

[First Level Test : the Agreement as a Whole]

On the first level, the Court examines whether the object and purpose of the international agreement *as a whole* allows directly effective provisions which can be invoked by individuals before national/EU Courts. In the 1972 International Fruit Case, the Court declared that obligations under the 1947 GATT are of a flexible nature – because they are based on negotiations of reciprocal and mutual advantages which can be modified according by contracting parties and because in case of infringement the offended party cannot but suspend the application of the 1947 GATT – and therefore lack the legal certainty to be invoked by individuals before courts[31].

On the contrary, treaty provisions providing judicial mechanisms (even if along alternative institutional dispute settlement mechanisms) and limiting the power of the parties to derogate from treaty provisions bring evidence that the object and purpose of an international agreement are conducive to the directly effective nature of its own provisions, as it was the case in the 1982 Kupferberg judgement[32].

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[31] ECJ judgment of 12 December 1972 in joined Cases 21/72, 22/72, 23/72 and 24/72, International Fruit Company and Others v Produktschap voor Groenten en Fruit [1972] ECR 1219), especially at para. 23: "*21 This agreement which, according to its preamble, is based on the principle of negotiations undertaken on the basis of "reciprocal and mutually advantageous arrangements" is characterized by the great flexibility of its provisions, in particular those conferring the possibility of derogation, the measures to be taken when confronted with exceptional difficulties and the settlement of conflicts between the contracting parties.*"

[32] ECJ in case Kupferberg (1982) concerning the free trade agreement between the EC ad Portugal, at para.s 20 to 22: "[…] *20 The mere fact that the contracting parties have established a special institutional framework for consultations and negotiations inter se in relation to the implementation of the agreement is not in itself sufficient to exclude all judicial application of that agreement. […] 21 As regards the safeguard clauses which enable the parties to derogate from certain provisions of the agreement it should be observed that they apply only in specific circumstances and as a general rule*

In his respect, the Court examines wording, object and purpose of the whole international agreement under examination as it has been negotiated and concluded. Directly effective provisions impact enormously on the EU and Member States' legal order because they prevail over secondary EU legislation as well as over national law. In a sense, the Court pays a sort of 'political' attention at every stage of the conclusion of the international agreement. Reciprocity between contracting parties and a balance of mutual obligations do not instead have a bearing on this test, as the Court declared in the 1995 Chiquita case on the EEC-ACP Conventions[33].

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after consideration within the joint committee in the presence of both parties. […] the existence of such clauses […] is not sufficient in itself to affect the direct applicability which may attach to certain stipulations in the agreement. 22 It follows from all the foregoing considerations that neither the nature nor the structure of the agreement concluded with Portugal may prevent a trader from relying on the provisions of the said agreement before a court in the community. […]".

[33] ECJ judgment of 12 December 1995 in Case C-469/93, Amministrazione delle Finanze dello Stato v Chiquita Italia SpA, at 31: "*31 In that regard, it should be noted that the Fourth ACP-EEC Convention, like the ACP-EEC Conventions which preceded it or the Conventions of Association between the European Economic Community and the African States and Madagascar, is not of the same nature as the GATT, as follows from paragraphs 26 to 29 above. 32 Those conventions are characterized by a quite appreciable imbalance in the level of obligations undertaken by the contracting parties. Their general aim is to promote the economic and social development of the non-member countries participating in them, in particular through an improvement in the conditions of access for their products to the Community market. In that regard, the question arises as to whether that imbalance precludes certain of their provisions from having direct effect. 33 The conventions represent, in fact, an extension of the association arrangements which had originally been established unilaterally by the EEC Treaty. 34 In paragraph 23 of its judgment in Case 87/75 Bresciani v Amministrazione delle Finanze [1976] ECR 129 the Court held, with regard to the Second Association Agreement between the European Economic Community and the African States and Madagascar signed at Yaoundé on 29 July 1969 (OJ, English Special Edition (Second Series, I External Relations (2)), which preceded the ACP-EEC Conventions, that that imbalance in the obligations assumed by the Community towards the Associated States, which was inherent in the special nature of the convention, did not prevent recognition by the Community that some of its provisions had direct effect.*"

[Second Level Test : the Specific Provision]

Once the preliminary test on the nature of the agreement is passed, the Court passes on to examine whether the specific provision under consideration is capable of being directly applicable. In the free trade agreement between the EC and Portugal examined in the 1982 Kupferberg case, the Court examined the wording in its contest and within the object and purpose of the agreement. Considered that the agreement aimed at liberalizing free trade among contracting parties and that the particular provision under consideration aimed at reinforcing the treaty aim in the particular field of taxation, the Court found that the wording was unconditional and therefore '*capable of conferring upon individual* […] *rights which the courts must protect*'[34]. The second test, better described in the 1987 Demirel case, aims at ascertaining the normative content of the provision at hand whether it '*contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure*'[35].

The 1995 Chiquita judgement summarized the second test so that when – without

[34] ECJ judgment of 26 October 1982 in Case 104/81, *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A.*, at 26-27: "*26 It appears from the foregoing that the first paragraph of article 21 of the agreement imposes on the contracting parties an unconditional rule against discrimination in matters of taxation , which is dependent only on a finding that the products affected by a particular system of taxation are of like nature, and the limits of which are the direct consequence of the purpose of the agreement as such this provision may be applied by a court and thus produce direct effects throughout the community. 27 The first part of the first question should therefore be answered to the effect that the first paragraph of article 21 of the agreement between the community and Portugal is directly applicable and capable of conferring upon individual traders rights which the courts must protect.*"

[35] ECJ judgment of 30 September 1987 in case 12/86, Meryem Demirel v Stadt Schwäbisch Gmünd, at para. 14: "*14 A provision in an agreement concluded by the Community with non-member countries must be regarded as being directly applicable when, regard being had to its wording and the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure.*".

prejudice for the contest, object and purpose of the agreement as a whole – a provision under an international agreement is worded in clear, precise and unconditional terms, individuals may rely directly on it and enforce it before tribunals[36]. The rule was restated in the 2005 Simuntenkov judgement where the treaty provision lays down in clear, precise and unconditional language a prohibition of results which does not require any further implementation – by its nature can be relied upon by individuals before courts in order to eliminate behaviours to the contrary[37].

[36] ECJ judgment of 12 December 1995 in Case C-469/93, Amministrazione delle Finanze dello Stato v Chiquita Italia SpA, at 57: "*57 It should first be observed that, unlike the other provisions of Protocol No 5 on bananas, Article 1 is worded in clear, precise and unconditional terms and consequently individuals can rely directly on it.*"

[37] ECJ Judgement of 12 April 2005 in Case C-265/03, Igor Simutenkov v Ministerio de Educación y Cultura, Real Federación Española de Fútbol, at 21-23: "*21. In this regard, according to well-established case-law, a provision in an agreement concluded by the Communities with a non-member country must be regarded as being directly applicable when, regard being had to its wording and to the purpose and nature of the agreement, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure (judgments in Case C-63/99 Gloszczuk [2001] ECR I-6369, paragraph 30, and in Case C-171/01 Wählergruppe Gemeinsam [2003] ECR I-4301, paragraph 54). 22 It follows from the wording of Article 23(1) of the Communities-Russia Partnership Agreement that that provision lays down, in clear, precise and unconditional terms, a prohibition precluding any Member State from discriminating, on grounds of nationality, against Russian workers, vis-à-vis their own nationals, so far as their conditions of employment, remuneration and dismissal are concerned. Workers who are entitled to the benefit of that provision are those who hold Russian nationality and who are lawfully employed in the territory of a Member State. 23 Such a rule of equal treatment lays down a precise obligation as to results and, by its nature, can be relied on by an individual before a national court as a basis for requesting that court to disapply discriminatory provisions without any further implementing measures being required to that end (judgments in Case C-162/00 Pokrzeptowicz-Meyer [2002] ECR I-1049, paragraph 22, and in Wählergruppe Gemeinsam, cited above, paragraph 58).*".

[Absence of Direct Effect in the WTO Agreements]

The political nature of the 'first-layer' test becomes evident in relation to the WTO agreements[38].

The ECJ had already declared that the 1947 GATT was an international agreement whose flexibility, in the formulation of rights and obligations because of relevant exemptions as well as in the dispute settlement mechanisms, impeded the direct applicability of its provisions[39]. The examination was confirmed in relation to the 1994 WTO agreements under the 1995 Chiquita judgement[40].

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[38] See Klabbers, Jan. "International Law in Community Law : The Law and Politics of Direct Effect." In Yearbook of European Law. Oxford University Press. Oxford, 2001.

[39] ECJ judgment of the Court of 5 October 1994 in case 280/93, Federal Republic of Germany v Council of the European Union, at para. 109-110: "*109 Those features of GATT, from which the Court concluded that an individual within the Community cannot invoke it in a court to challenge the lawfulness of a Community act, also preclude the Court from taking provisions of GATT into consideration to assess the lawfulness of a regulation in an action brought by a Member State under the first paragraph of Article 173 of the Treaty.*

110 The special features noted above show that the GATT rules are not unconditional and that an obligation to recognize them as rules of international law which are directly applicable in the domestic legal systems of the contracting parties cannot be based on the spirit, general scheme or terms of GATT.".

[40] ECJ judgment of 12 December 1995 in Case C-469/93, Amministrazione delle Finanze dello Stato v Chiquita Italia SpA., at 26 and 29: "*26 As regards the GATT, the Court has consistently held, most recently in Case C-280/93 Germany v Council [1994] ECR I-4973, paragraph 106, that the GATT, which according to its preamble is based on the principle of negotiations undertaken on "the basis of reciprocal and mutually advantageous arrangements", is characterized by the great flexibility of its provisions, in particular those conferring the possibility of derogation, the measures to be taken when confronted with exceptional difficulties and the settlement of conflicts between the contracting parties.27 The Court stated (at paragraph 107) that those measures included, for the settlement of conflicts, depending on the case, written recommendations or proposals which are to be "given sympathetic consideration", investigations possibly followed by recommendations, consultations between or decisions of the contracting parties, including that of authorizing certain contracting*

In the 1999 Portugal judgement, the Court restated and clarified reasons for refusal of direct effect to WTO agreements based on the distinction between the political and the legal dimension of the agreements, whereby the former is predominant and reserved to the manoeuvres of the executive or of the legislative powers on the modulations of the effects to be given to WTO provisions and their impact on the EU and the national legal order of Member States[41].

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parties to suspend the application to any others of any obligations or concessions under the GATT, and, finally, in the event of such suspension, the power of the party concerned to withdraw from that agreement. […] 29 Consequently, those features preclude an individual from invoking provisions of the GATT before the national courts of a Member State in order to challenge the application of national provisions.".

[41] ECJ judgement of 23 November 1999 in case C-149/96, Portuguese Republic v Council of the European Union, at 43-46: "*43. It is common ground, moreover, that some of the contracting parties, which are among the most important commercial partners of the Community, have concluded from the subject-matter and purpose of the WTO agreements that they are not among the rules applicable by their judicial organs when reviewing the legality of their rules of domestic law. 44. Admittedly, the fact that the courts of one of the parties consider that some of the provisions of the agreement concluded by the Community are of direct application whereas the courts of the other party do not recognise such direct application is not in itself such as to constitute a lack of reciprocity in the implementation of the agreement (Kupferberg, paragraph 18). 45. However, the lack of reciprocity in that regard on the part of the Community's trading partners, in relation to the WTO agreements which are based on 'reciprocal and mutually advantageous arrangements' and which must ipso facto be distinguished from agreements concluded by the Community, referred to in paragraph 42 of the present judgment, may lead to disuniform application of the WTO rules. 46. To accept that the role of ensuring that those rules comply with Community law devolves directly on the Community judicature would deprive the legislative or executive organs of the Community of the scope for manoeuvre enjoyed by their counterparts in the Community's trading partners.*".

1.4. Prevalence - Agreements Concluded by Member States

The autonomy and ensuing supremacy of the EU legal order early predicated by the ECJ is a useful normative tool to regulate the validity and legal effects of international agreements concluded by the EU uniformly across Member States. The same principle usefully addresses the validity of subsequent international agreements concluded by Member States within the scope of the EU treaties. Though, the legal effect of the principl of supremacy and of EU law in general is limited to the relations between Member States and the EU.

From the perspective of international law instead – *i.e.* in the relations between Member States and third countries, the conflict between international agreements concluded by Member States and EU law is regulated under Article 30 VCLT, so that subsequent treaties relating to the same matter prevail over earlier incompatible agreements. Therefore, in case of international agreements concluded by Member States with third countries, international law does not automatically acknowledge an effect similar to supremacy of EU law, not even in areas within the scope of the EU treaties.

1.4.1. International Agreements Concluded by Member States Before the Entry into Force of the EU Treaties

[From the Perspective of EU Law]

From the perspective of EU law, Article 351 TFEU adapts the international law principle of 'subsequent incompatible' treaties to agreements concluded by Member States with third countries before the entry into force of the EU treaties (*breviter* earlier agreements), so as to ensure that the EU Treaties do not affect the validity of earlier agreements and that incompatibilities are gradually accommodated according to the duty of close cooperation between the EU and Member States.

As an immediate consequence, EU law does not automatically prevail over nor terminate earlier agreements concluded by Member States with third countries[42].

By a strict application of paragraph (1) of Article 351 TFEU, earlier agreements concluded by Member States with third countries are legal systems limiting the application of EU law. The ECJ has pointed out that this restriction is limited to the performance of obligations under the earlier agreement; that it should not affect rights and obligations arising to third countries; and that the EU institutions shall not impede Member States from complying with earlier agreements [43].

In order to further limit such a practical restriction to the application of EU law, paragraph (2) of Article 351 TFEU requires Member States to take all appropriate measures to eliminate incompatibilities between the earlier international agreement and the EC Treaty. Choice of the means by which incompatibilities shall be eliminated (from amendment to termination of the earlier agreement) is left to the evaluation of the Member State concerned, in compliance with international law. The ECJ confirmed that termination is not required – unless where the amendment of the

[42] For an analysis of Article 307 EC in Klabbers, Jan, *Treaty Conflict and the European Union*. Cambridge University Press. Cambridge, UK. Article 30 of the VCLT codifies the principle of *lex posterior* in relation to subsequent treaties between the same parties in the same subject matter. It therefore applies to the case discussed here under Article 307, in so far as a subsequent EC Treaty may not affect earlier agreements between Member States and third countries (which are not parties to the EC Treaty).

[43] ECJ, judgement of 14 October 1980 in case 812/79, *Attorney General v Burgoa*, where the Court stated two corollaries to Article 307(1) that the EC is bound to the interested Member State not to impede the performance of the earlier agreement, and that subordination of EU law does not alter the rights and obligations arising under the earlier agreement.

earlier treaty is impossible – and in any event shall occur according to international law[44].

The last paragraph (3) of Article 351 TFEU provides criteria to strike a balance between the principle of paragraph (1) and the partial derogation under paragraph (2). When performing the earlier agreement with third countries, Member States shall take into account that the advantages granted to them by the EC Treaty '*form an integral part of the establishment of the Community and are thereby inseparatedly linked with the creation of common institution, the conferring of powers upon them and the granting of the same advantages by all the other Member States'*.

In this sense, paragraph (3) of Article 351 TFEU invites Member States to balance compliance with earlier agreements and disregard of EU law on one side with the protection of the rights and obligation granted by and to Member States under the institutional legal framework of the EC Treaty[45].

[From the Perspective of International Law]

As anticipated, Article 351 TFEU applies 'from the perspective of EU law', *i.e.* as to the relation between Member States and the EU. Under international law, Article 351 TFEU has no effect between Member States and third countries, *i.e.* it does not

[44] ECJ judgements of 4 July 2000 in case C-62/98, *Commission v Portugal*, at para. 34; and in case 84/98, *Commission v Portugal*, at para. 40; see also ECJ judgement of 14 September 1999 in Case C-170/98, *Commission* v *Belgium*.

[45] The paragraph (3) may be therefore be read as an invitation to amend earlier treaties as to include a REIO clause which would leave unprejudiced the rights and obligations arising to Member States under the EC Treaty, as discussed below under paragraph 3.4.1 – especially so to limit possible MFN and NT clauses granted to third countries by Member States before their accession. See in this sense: Manzini, Pietro. "The Priority of Pre-Existing Treaties of EC Member States Within the Framework of International Law." European Journal of International Law 12 (2001): 781-792.

affect rights and obligations arising from any international agreements concluded between Member States and third countries[46].

From the perspective of international law, conflicts between earlier international agreements concluded by Member States with third countries and EU law have no relevance in so far as EU law has no effect on third countries (*res inter alios acta*)[47].

On a final note, Article 351 TFEU applies limitedly to earlier international agreements concluded by Member States with third countries, not on earlier agreements concluded between Member States *inter se*. Earlier agreements concluded between Member States *inter se* before entry into force of the EU treaties, are subject to the international law principle of 'subsequent incompatible' treaties under Article 30 VCLT.

1.4.2. International Agreements Concluded by Member States After the Entry into Force of the EU Treaties

[From the Perspective of EU Law]

The international law principle of 'subsequent incompatible' agreements codified under Article 30 VCLT, applied in the contest of agreements concluded by Member

[46] ECJ judgements of 3 March 2009 in case C-249/06, *Commission v. Sweden*, at 34: "*Under the first paragraph of Article 307 EC, the rights and obligation arising from an agreements concluded before the date of accession of a Member State between it and a third country are not affected by the provisions of the [EC] Treaty. The purpose of that provision is to make it clear, in accordance with the principles of international law, that application of the Treaty is not to affect the duty of the Member States concerned to respect the rights of third countries under a prior agreements and to perform its obligations*".

[47] Volterra, Robert. Le point de vue des états tiers. In Kessedjian, Catherine, and Charles Leben, eds. Le droit européen et l'investissement. Editions Panthéon-Assas. Paris, 2009. At 49: "*Any implication that may exist for Member States under the EU legal order for having entered into such treaties fall to those Member States and not to the third States*".

States *inter se* or with third countries after the entry into force of the EU treaties (*breviter* subsequent agreements) carries with itself the risk of invalidating the integrity of the EU legal order. In fact, its application allows Member States to derogate EU law by means of subsequent international agreements concluded *inter se* or with third countries, whereby the same derogation is prohibited when carried out by means of national measures.

[Between All Member States]

An initial distinction regards agreements concluded between *all* Member States. The question refers in particular to the possibility for *all* Member States to take decisions outside the Council in the form of an international agreement in a field covered by the EU treaties. The recourse to such agreements would in fact circumvent institutional procedures of the EU legal order. In this respect, the ECJ has defended the prerogatives of the Commission and of the European Parliament in the conclusion of international agreements[48].

The same is all the more true with reference to Treaty amendments and indeed the Court has declared that Article 48 TEU provides an exclusive amendment procedure to the EU Treaties which rules out other forms of cooperation between *all* Member States to the effect of modifying the EU treaties[49].

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[48] ECJ judgement of 31 March 1971, Case 22/70, *Commission v. Council* [European Agreements on Road Transport, EART]. At 70-71: "*70 Although the Council may, by virtue of these provisions, decide in each case whether it is expedient to enter into an agreement with third countries, it does not enjoy a discretion to decide whether to proceed through inter-governmental or Community channels. 71 By deciding to proceed through inter-governmental channels it made it impossible for the Commission to perform the task which the Treaty entrusted to it in the sphere of negotiations with third countries.*"

[49] ECJ judgement of 8 April 1976 in case 43/75, Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena, at 58: "Apart from specific provisions, the Treaty can only be modified by means of the amendment procedure carried out in accordance with [Article 48 TEU]".

Other forms of cooperation between *all* Member States would equally not be outlawed in the field of the EU treaties, in so far as it does not impinge on exclusive EU competence. For instance in the field of emergency aid – a matter of complementary competence where the EU and Member States can conclude agreements at the same time - the ECJ maintained that 'Member States are not precluded from exercising their competence […] collectively in the Council or outside it'[50].

[By Member States inter se *and with Third Countries]*

In relation to subsequent agreements concluded by Member States *inter se* as well as with third countries, the EU treaties do not eliminate the treaty-making power of Member States[51].

In the field of the EU treaties, the hierarchy of the EU legal order ranks international agreements not concluded by the EU at the same level of national legislation, and therefore requires consistency of subsequent agreements with EU primary and secondary legislation. As a consequence, from an EU point of view, international

[50] ECJ judgment of 30 June 1993 in joined cases C-181/91 and C-248/91, European Parliament v Council of the European Communities and Commission of the European Communities (Emergency aid), at 15.

[51] A complete review of the international agreements concluded by Member States *inter se* has been carried out by Rossi, Lucia Serena. Le Convenzioni Fra Gli Stati Membri dell'Unione Europea. Milano: Giuffrè, 2000. The Author distiguishes between international agreements concluded: (i) according the EC treaties such as under Article 293 EC (now repealed); (ii) in connection to the EC treaties, such as the 1980 Rome EC Convention on the Law Applicable to Contractual Obligations or the 1985 Schengen Agreement; (iii) on the basis of the 'third pillar' international conventions; (iv) on the basis of the 1997 Treaty of Amsterdam.

agreements are allowed within the limits of the EU exclusive competence, and in compliance with the duty of loyal cooperation[52].

Similar cases were discussed before the ECJ which has constantly maintained the supremacy of EU law which is not affected by subsequent treaties concluded by Member States *inter se*[53], or with third countries[54].

[From the Perspective of International Law]

From the perspective of international law, the conflict between EU law and subsequent agreements concluded by Member States *inter se* is evaluated according to the international law principle of 'subsequent incompatible' treaties under Article 30 VCLT.

Once again, under international law EU law does no effect rights and obligations arising from any (subsequent) international agreements concluded between Member States and third countries. From the perspective of international law, conflicts between subsequent international agreements concluded by Member States with third countries and EU law have no relevance.

Moreover, according to Article 27 VCLT Member States cannot invoke EU law as a justification for failure to perform their international obligations *vis-à-vis* third

[52] Rossi also acknowledges that under EU law Article 307 EC (now 351 TFEU) does not apply to conflicts between EU treaties and subsequent international agreements concluded by Member States *inter se* and that the principle of loyal cooperation under Article 10 EC applies instead. See Rossi, Lucia Serena. Le Convenzioni Fra Gli Stati Membri dell'Unione Europea. Milano: Giuffrè, 2000. At 257 to 271.

[53] ECJ judgement of 14 July 1976 in joined cases 3, 4 and 6-76, *Cornelis Kramer and others*, at para. 39, 44 and 45.

[54] ECJ judgment of 8 December 1981in case 181/80. Procureur général près la Cour d'Appel de Pau and others v José Arbelaiz-Emazabel. At para.s 13, 29 and 31. Se also, Judgement of 11 June 1998 in joined cases C-176/97 and C-177/97, Commission v Belgium and Luxembourg.

countries, nor according to Article 46 VCLT as invalidating its consent – unless the violation of EU law is objectively manifest and concerns a rule of 'fundamental importance'[55].

1.4.3. A Loophole under EU Law

Neither the 'subsequent incompatible' rule, nor the supremacy rule, does explain satisfactorily one more situation, which is rightly considered a loophole in the construction of the relationship between EU law and international treaties concluded by Member States.

It concerns the case where treaties concluded by Member State *after* the entry into force of the EU treaties and *before* the EU has developed an exclusive external competence in the same subject matter. The problem may find a political solution, in that the interested Member State may use the institutional leverage at its disposal in order to prevent formation of an exclusive EU external competence, which is nevertheless not conclusive.

It has therefore been suggested an application by analogy of Article 351 TFEU, to the effect of suspending the relevant provision of EU law and allowing Member States to fulfil its international obligations. Such analogy protects the treaty-making power of Member States against the risk of running counter a future conflict with EU law, and has been criticized for not being limited to unforeseeable subsequent development EU legislations. The question so far has never arrived before the ECJ[56].

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[55] Article 27 (Internal law and observance of treaties) and 46 (Provisions of internal law regarding competence to conclude treaties) of the 1969 VCLT.

[56] Schütze, Robert. From Dual to Cooperative Federalism: The Changing Structure of European Law. Oxford: Oxford University Press, 2009. At 329: "*None of these proposals […] have yet been mirrored in the jurisprudence of the European Court of Justice. The Court has come to unconditionally uphold the supremacy of European law against international agreements concluded by the Member States*

1.5. Provisional Comments

The EU Treaties regulate the complex relationship between EU and international law based on the general, *quasi*-constitutional, rule whereby international agreements are 'integral part of the EU legal order'. Accordingly, the multi-layered relation between the two legal orders – and in particular the relation between EU law and treaties concluded by Member States - is organized according to the supremacy of EU law within the scope of EU competence.

On the other hand - under international law, conflicts between EU treaties and international agreements concluded by Member States with third countries have little relevance because EU law does not create rights or obligations on third countries and because the principle of *bona fide* implementation provides that internal legislation (such as EU law in Member States' legal orders) does not justify breaches or termination of internation agreements. The principle of 'subsequent incompatible' treaties finds limited application in conflicts between EU law and earlier or subsequent agreements concluded by Member States *inter se*.

In real life, when an agreements concluded with a thid country conflicts with EU law, Member States may face the alternative responsibility deriving from a breach of an obligation under EU law or from an obligation under the international agreement.

From the EU point of view, the question is of constitutional nature - *i.e.* should be resolved at the constitutional level - and has excited reflections on the allocation of

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after 1958. In the light of the potential international responsibility of the Member States, is this a fair constitutional solution? Should it make a difference whether a rule is adopted by means of a unilateral measure or by means of an international agreement with a third State? Instead of 'suspending' the supremacy of European law in the latter scenario better solutions need to be found to solve the Member State' dilemma of having to choose between the Scylla of liability under the EC Treaty and the Charybdis of responsibility under international law.".

external powers in federal terms. In particular, it has been remarked that the principle of supremacy and of EU exclusive competence in the external sphere is not consistent with the cooperative principle of subsidiarity in the internal sphere, and that the allocation of external competences requires a constitutional reorientation towards cooperative models in order to avoid conflicting international obligations and the occurrence of conflicting obligations *vis-à-vis* third countries [57].

In addition, EU supremacy rules and the curtailment of Member States' external competence in favour of the EU - have suggested that Member States are 'uncommon' or 'strange' subjects of international law enjoying a limited sovereignty, and called for the introduction of further constitutional balances of powers between Member States and the EU[58].

With this last respect, some observations may explain the 'uncommon' or 'strange' situation of Member States' external sovereignty in the EU legal order. In the first place, the EU institutional structure allows Member States to play a role in the EU external action, so that the curtailment of national sovereignty is functional to the pooling of sovereignty into EU institutions where it is exercised jointly in as a sort of

[57] Schütze, Robert. From Dual to Cooperative Federalism: The Changing Structure of European Law. Oxford: Oxford University Press, 2009. At 304: "[The ECJ] *conceptualizes the exclusion of the Member States on the international level through the lens of-subsequently-exclusive competences. This vision implies a dual federalist philosophy of mutually exclusive spheres and contrasts with the cooperative federalist structure of the Community's internal sphere* [based on the principle of subsidiarity]".

[58] De Witte B. The Emergence of a European System of Public International Law: The EU and Its Member States as Strange Subjects. In Wouters, Jan, and André Nollkaemper. The Europeanization of International Law: The Status of International Law in the EU and Its Member States. The Hague: TMC Asser Press, 2008. Especially at 49: "*Could the Member States of the EU also be fitted within this category of not entirely sovereign States, given the legal constraints on their external activities? After all, the capacity to enter into the full range of international relations continues to be listed among the main legal characteristics of a State, and therefore States whose range of international relations is seriously curtailed could be considered to be not fully sovereign*".

'mixed sovereignty'. In the second place, the curtailment of Member States' sovereignty is effective only within the scope of EU law, without prejudice for a full exercise of treaty-making power, between *all* Member States, *inter se* or with third countries, outside the scope of EU law[59]. Finally and on purely speculative level, the curtailment of national sovereignty is nor definitive nor irrevocable: were a Member State unwilling to share its sovereignty anymore, it could withdraw from the EU and regain its 'full' sovereignty.

[59] DE WITTE B. The Emergence of a European System of Public International Law: The EU and Its Member States as Strange Subjects. In Wouters, Jan, and André Nollkaemper. The Europeanization of International Law: The Status of International Law in the EU and Its Member States. The Hague: TMC Asser Press, 2008. The same Author minimize the circumstance, especially at 48: "*In current practice, though, partial agreements between Member States are principally used for more mondane matters. They deal with subjects not yet absorbed within the scope of activities of the European Community or European Union, either because they are of concern only to two or three countries and not to the European Union as a whole (this is typically the case for agreements dealing with the protection of rivers or mountain rangers) or because their subject matter lies outside Community law-making competence, as is the case with culture and education, and (more controversially) with bilateral tax treaties. These agreements may still be rather numerous, but they do not deal with vital matters of foreign policy*".

PART II – BITS AND EU LAW

CHAPTER 2. BITS CONCLUDED BY MEMBER STATES *INTER SE* – THE ALTERNATIVE: IS INTERNATIONAL OR EU LAW APPLICABLE?

SUMMARY: 2.1. Premise on the Potential for Disputes; 2.2. Definitions: Starting Point and Directions; *2.2.1. Definition of Investment; 2.2.2. Protection of Foreign Investment under BITs; 2.2.3. Freedom of Investment under EU Law;* 2.3. Scope for Conflicts Between intra-EU BITs and EU law; *2.3.1. Conflict of Validity; 2.3.2. Conflict of Jurisdiction; 2.3.3. Conflict of Applicable Rules;* 2.4. Perspectives.

2.1. Premise on the Potential for Disputes

A recent initiative by the British Institute for International and Comparative Law has called grey the area lying between European law and bilateral investment treaties. The question echoed in several other venues of scholarly debate[60]. Is it really grey?

60 British Institute for International and Comparative Law, "European Law and Bilateral Investment Treaties: Exploring the Grey Areas", London 4 December 2008. The issue was again discussed at the 12th Investment Treaty Forum Public Conference "Investment Treaty at 50: Host State Perspectives", London 15 May 2009. See in particular the paper presented by Yves Fortier 'Investment Protection and the Rule of Law : Change or Decline'. Other initiatives in European universities include: Université

The following chapter researches into the shadows of EU and international law in the field of investment protection among Member States of the European Union.

The recurrence of bilateral investments treaties by and between Member States (so called *intra*-EU BITs) proves a large potential for conflict between relevant bilateral investment agreements and the EU Treaties.

Do subsequent treaties terminate previous ones? Which is the competent jurisdiction? What is the applicable law? Those questions deserve investigation and shall be put in context with the broader issue of the relation between legal instruments of international and EU law.

With historical hindsight, bilateral investment treaties have been signed until 2002 between Central and Eastern European Countries and Member States as an instrument for the promotion and protection of foreign investment at a time of economic reforms and of transition from State to market economies. After accession of those countries to the EU, the respective agreements – originally concluded between Member States and third countries - happened to lie within the boundaries of the European Union as *intra*-EU agreements. As a matter of fact, no investment agreement has ever been concluded by two countries at a time when both were EU Member States[61].

Pantheon Assas, "Le droit européen et les investissement", Paris 27 April 2009; Università La Sapienza, "Il diritto internazionale nell'ordinamento dell'Unione europea", Rome, 22-23 May 2009.

[61] Some factual points are often recalled by commentators, that: (i) more than 190 BITs are currently in force between Member States; (ii) before the 2004 and 2007 enlargement only two *intra*-EU BITs existed (Germany-Greece and Germany-Portugal) which were concluded before Greece and Portugal respective accession; (iii) no *intra*-EU BIT was concluded after 2007 accession to the EU. See Poulain, Bruno, "Quelques interrogations sur le statut des traités bilatéraux des promotion et de protection des investissements au sein de l'Unione Européenne." Revue Generale de Droit International Public, no. 4 (2007): 803-828; Söderlund, Christer, "Intra-EU Investment Protection and the EC Treaty" Journal of International Arbitration 24, no. 5 (2007): 445-468; Burgstaller, Markus, "European Law and

The 2004 and 2007 accessions were the result of lengthy negotiations, pre-accession agreements and reviews processes conducted by the EU in order to ensure that candidate countries would adopt reforms and adjustments with a view to compliance with the EU legal system[62].

The so called Europe Agreements were one of the legal steps aimed at paving the way to negotiation for EU membership and provided *inter alia* a cooperation framework intended to favour foreign investment, including the 'extension […] of agreements for the promotion and protection of investment' (*i.e.* BITs, among others)[63]. At the time of the conclusion of the Europe Agreements, no rule was

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Investment Treaties" Journal of International Arbitration 26, no. 2 (2009): 181-216; Pierre Bic intervention at the BIICL conference "European Law and Bilateral Investment Treaties: Exploring the Grey Areas", London 4 December 2008.

[62] According to the Europe Agreements and other pre-accession commitments signed between 1991 and 1996, central Eastern European countries committed *vis-à-vis* the EC for structured dialogue, approximation of laws and opening of EC programmes and agencies before start of negotiations on EC accession. See: Marc Maresceau, Pre-Accession, in Marise Cremona (ed), The Enlargement of the European Union, (Oxford: Oxford University Press, 2003); more in detail Peter-Christian Müller-Graff, East Central Europe and the European Union: From Europe Agreements to a Member Status – General Report, in Peter-Christian Müller-Graff (ed), East Central Europe and the European Union: From Europe Agreements to a Member Status, ECSA-series, 1. Aufl edn (Baden-Baden: Nomos Verlagsgesellschaft, 1997) *idem*, Legal Frameworks for Relations Between the European Union and Central and Eastern Union: General Aspects, in Marc Maresceau (ed), Enlarging the European Union: Relations Between the EU and Central and Eastern Europe, (London: Longman, 1997); Marc Maresceau and E. Montaguti, The Relations Between the European Union and Central and Eastern Europe : A Legal Appraisal, CMLRec 32, 1327 et seq. (1995).

[63] Besides political dialogue and a developed free trade area. See for instance Article 74 of the 1993 Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Czech Republic, of the other part, Official Journal L 360 , 31/12/1994 P. 0002 -0210: "*1. Cooperation shall aim to establish a favourable climate for private investment, both domestic and foreign, which is essential to economic and industrial reconstruction in the Czech Republic. 2. The particular aims of cooperation shall be: - to improve the institutional framework for*

discussed nor provided on the termination or suspension of the international investment agreements existing between Member States and candidate countries. The Commission expected candidate countries to adjust their earlier international commitments before accession in order to minimize recourse to article 307 EC [now, Article 351 TFEU] and invited them to keep the Commission itself '*fully informed about existing trade agreements or negotiations aimed at the conclusion of any new trade agreements with a third country*'[64]. In the Accession Agreements on the other hand, no provision referred to existing international obligations with Member States[65].

Interestingly enough, notwithstanding the high number of existing *intra*-EU BITs the potential conflict between those and the European treaties has not often been litigated[66]. This has partially been due to the fact that the events giving raise to the

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investments in the Czech Republic, - the extension by the Member States and the Czech Republic of agreements for the promotion and protection of investment […]".

[64] 2001 Commission Regular Reports from the Commission on Progress towards Accession by each of the candidate countries'. On the external dimension of the enlargement and specifically on adaptation of new Member State's existing agreements, see Marise Cremona, The Impact of Enlargement: External Policy and External Relations, in Cremona, Marise, and Academy of European Law. The Enlargement of the European Union. Oxford: Oxford University Press, 2003. 162-172, at 172.

[65] See for instance the Act Concerning the Conditions of Accession annexed to the 2003 Accession Agreement signed in Athens on 16 April 2003, Article 6(10): "[…] *new Member States shall withdraw from any free trade agreements with third countries* […]*. To the extent that agreements between one or more of the new Member States on the one hand, and one or more third countries on the other, are not compatible with the obligations arising from this Act, the new Member State shall take all appropriate steps to eliminate the incompatibilities established.*".

[66] Christer Söderlund, Eastern Sugar and Other Intra-EU Arbitrations, paper presented at the BIICL conference "European Law and Bilateral Investment Treaties: Exploring the Grey Areas", London 4 December 2008, who reported that notwithstanding the number of potential conflicts between intra-EU BITs and EC Treaties, in at least fourteen other arbitration proceedings on BITs concluded by Member States the conflict between the BIT and EU law was never on the agenda.

alleged responsibilities of the host State took place before the respective accession to the EU and therefore fell *ratione temporis* outside the scope of the EU treaties. Only few recent cases before arbitral tribunals were faced with challenges based on the interpretation of EU law, some of which are not concluded and are still pending[67].

The first record of an objection to the validity of an *intra*-EU BIT (and of the arbitral clause included therein) based on a conflict with EU law was reported in the challenge to arbitral jurisdiction submitted by the Czech Republic against the claim filed by the Dutch company Eastern Sugar BV before an *ad hoc* UNCITRAL arbitral tribunal based on a breach of the BIT between the Kingdom of Netherlands and the Czech Republic occurred between 2000 and 2003. The Czech Republic argued that the BIT was not applicable between the Netherlands and the Czech Republic after the latter's accession to the EU on 1st May 2004, being superseded by the EU treaties. According to the Czech Republic's Plea of Lack of Jurisdiction, the EU treaties allegedly relate to the same subject matter ('i.e. *the faculty of a party to invest assets on the territory of another state, and to freely dispose of the revenues*[68]) as competing legal frameworks both informed to the principle of non discrimination, and therefore the BIT – as earlier incompatible treaty providing a

[67] Reference is made to the following cases (in reverse date order) which will be discussed more in detail *infra*: Decision on Jurisdiction and Admissibility of 24 September 2008, ICSID Case No. ARB/05/20, Ioan Micula et al. v. Romania; Partial Award, 27 March 2007, UNCITRAL *ad hoc* arbitral tribunal, Eastern Sugar BV v The Czech Republic (and the case of Binder v the Czech Republic, as reported in the newspaper article *Details surface of jurisdictional holdings in Binder v. Czech Republic; ad hoc tribunal saw no conflict between BITs and European Law; More recently, majority of EU member-states have taken similar view*, in 2 (2009) Investment Arbitration Reporter 4 of 28 February 2009); Award of 2 October 2006, ICSID Case No. ARB/03/16, ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary; Decision on Jurisdiction, 13 September 2006, ICSID Case No. ARB/04/15, Telenor Mobile Communications A.S. v. Republic of Hungary; Partial Award, 17 March 2006, UNCITRAL *ad hoc* tribunal, Saluka Investments BV v The Czech Republic.

[68] Paragraphs 100 and 101 of the partial award.

discriminatory protection to nationals of the States signatories to it - should be considered as terminated according Article 59 VCLT.

The arbitral tribunal disagreed that the EU treaties cover the same subject matter as the BIT on cross border investment. Distinction was made between the EU treaties granting free cross-border capital movements and prohibiting restrictions at the admission stage (entitling the Dutch company to invest in the Czech Republic at the same conditions granted to Czechs investor, and to move revenues abroad) on one side, and the BIT dealing with standard treatment granted to the investor during the investment (fair and equitable treatment, full protection and security, prohibition of expropriation and - most essentially - investor-State arbitration) on the other side[69]. The tribunal concluded that '*Free movement of capital and protection of investment are different, but complementary thing*' and concluded that '[i]*f the EU Treaty gives more rights than does the BIT, then all UE parties, including the Netherlands and the Dutch investors, may claim those rights. If the BIT gives more rights to the Netherlands and to Dutch investors than it does not give other EU countries and investors, it will be for those other countries and investors to claim their* equal rights*. But the fact that these rights are unequal does not make them incompatible* [emphasis added]'[70].

The arbitral proceedings and finally the arbitral decision are indeed helpful to draft a conceptual frame applicable to the conflict between *intra*-EU BITs and EU law. The award, which was bound to limit its enquiry on the validity of the *intra*-EU BIT and on its own jurisdiction, did not expand on conflicting substantial rules under the *intra*-EU BIT and under EU law – the latter not applicable *ratione temporis* to the facts of the case.

[69] Paragraphs from 159 to 166 of the partial award.

[70] Paragraph 170 of the partial award.

In relation to its reasoning on the validity of the Dutch-Czech BIT under international law, the arbitral tribunal examined the absence of any incompatibility under the profile of non-discrimination under EU law. The tribunal held that non discrimination with respect to Member States not signatories to the BIT does not affect obligations under the BIT and is not a concern for Member States signatories to the BIT: "*it will be for those other countries and investors to claim their* equal rights".

Here the arbitral tribunal does not distinguish between validity and applicable law, as it draws very hasty conclusions on applicable law under the BIT. In particular, the tribunal overlooks that - after the Czech's Republic accession to the EU - EU law is applicable and create rights and obligations between the Czech Republic and the Netherlands, either through Article 8, paragraph 6 of the Dutch-Czech BIT which recalls the applicable law in force in the contracting party concerned (the Czech Republic in this case) as well as "*other relevant Agreements between the Contracting Parties*"[71], or through Article 31 of the Vienna Convention on the Law of the Treaties ("VCLT") as a "*relevant rule* […] *of international law applicable in the relations between the parties*"[72]. The principle of non discrimination is indeed an obligation deriving from one international agreement – at the time the EC treaty – to which

[71] Article 8, paragraph 6 of the Agreement on the encouragement and protection of investments between the Kingdom of the Netherlands and the Czech Republic signed 29 April 1991: "*The arbitral tribunal shall decide on the basis of the law, taking into account in particular though not exclusively:*

- the law in force of the Contracting Party concerned:

- the provisions of this Agreement, and other relevant Agreements between the Contracting Parties:

- the general principles of international law

- the provisions of special agreements relating to the investment".

[72] Article 31 (General Rules of Interpretation) of the 1969 Vienna Convention on the Law of the Treaties: "*A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2.The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:* […] *(c) any relevant rules of international law applicable in the relations between the parties.*"

both the Czech Republic and the Kingdom of the Netherlands are bound and for which carry responsibility within the EC legal system.

As far as jurisdiction is concerned, the tribunal found that the arbitration clause is not incompatible with a "principle of *mutual trust* between EU countries" which is probably to be read as a reference to the principle of loyal co-operation under Article 10 EC, taking into account that the EU legal system acknowledges arbitration as one dispute settlement mechanism among others[73]. No reference is made to the exclusive competence of the European Court of Justice under Article 292 EC. The essential nature of the investor-State arbitration clause under the BIT is the eyes of the arbitral tribunal a strong argument in support of the different subject matter covered by the BIT in comparison to the EU treaties: "*the fact that the European Union does not provide for a possibility for an investor* to sue a host State directly*, and that* in international BIT arbitration *this is an essential feature of most bilateral investment treaties*"[74].

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[73] In the ECJ Judgement of 30 May 2006 in case 459/03 *Commission v Ireland (Sellafield Mox Plant)*, the Court did not contend the legitimacy of the dispute settlement clause under the UNCLOS - concluded by the EC and Member States as a mixed agreement - providing the jurisdiction of the ITLOS, of the ICJ or of special arbitral tribunals. See in particular, para.s 118-129.

[74] Paragraph 165 of the partial award: "*From the point of view of the promotion and protection of investments, the arbitration clause in practice the most essential provision of Bilateral Investment Treaties. Whereas general principles such as fair and equitable treatment or full security and protection of the investment are found in many international, regional or national legal systems, the investor's right arising from the BIT's dispute settlement clause to address an international arbitral tribunal independent from the host state is the best guarantee that the investment will be protected against potential undue infringements by the host state. EU Law does not provide such a guarantee*"; and paragraph 180: "[...] *the fact that the European Union does not provide for a possibility for an investor to* sue a host state directly*, and that* in international BIT arbitration *this is an essential feature of most bilateral investment treaties, is in itself sufficient to reject the Czech Republic's equivalence argument*".

In the course of the arbitral proceedings, the tribunal examined official documents published by European institutions which had been submitted by the parties with a view to support their arguments on the validity of *intra*-EU BITs (with the contrary effect of highlighting how controversial the validity issue is even among European institutions). In the communication addressed in 2006 to the Economic and Financial Committee, the European Commission recommends that Member States terminate *intra*-EU BITs because they have been superseded by EU law and because, if not terminated, they could leave room to '*forum shopping*' and to discrimination of investors from different Member States[75].

The arguments on the termination of *intra*-EU BITs and on the integrity of the European legal system appeared undemonstrated and unconvincing even to the Economic and Financial Committee ("EFC") - addressee of the communication and in charge under Article 134(2) TFEU [114(2) EC] to give yearly reports on capital movements and on freedom of payments. The EFC limited itself to invite Member States "*to review the need for such BITs agreements* [in force between Member States], *while part of their content has been superseded by Community law upon accession* [emphasis added]" in order to "*avoid legal uncertainties and unnecessary*

[75] 2006 Communication of the Commission to the Economic and Financial Committee, not published and partially reproduced in paragraph 126 of the partial award: "[...] *There are still around 150 BITs between Member States in force (Annex IV). There appears to be no need for agreements of this kind in the single market and their legal character after accession is not entirely clear. It would appear that most of their content is superseded by Community law upon accession of the respective Member State. However the risk remain that arbitration instances, possibly located outside the EU, proceed with investor-to-state dispute settlement procedures without taking into account that most of the provisions of such BITs have been replaced by provisions of Community law. Investors could try to practice "forum shopping" by submitting claims to BIT arbitration instead of - or additionally to - national courts. This could lead to arbitration taking place without relevant questions of EC law being submitted to the ECJ, with unequal treatment of investor among Member States as a possible outcome.* […]".

risks for Member States in the unclear situation"[76]. Besides that, the legal uncertainties denounced by the Commission had already been backed by the EFC with hesitation: until 2004, the EFC had noted that "[w]*ith respect to BITs, the EFC, however, re-states that differences of treatment among EU investors between the BITs of Member States should not be overestimated, and are, in normal circumstances, unlikely to be of macroeconomic significance*"[77].

Also Member States do not appear to endorse the arguments proposed by the Commission if the EFC takes note in 2007 and 2008 that most of them "*do not share the Commission's concern about arbitration risks and discriminatory treatment of investors. A clear majority of Member States prefers to maintain the existing agreements, in particular with view to the provisions on expropriation, compensation, protection of investments and investor-to-state dispute settlement. Still, a few Member States are seeking a solution for this issue*"[78].

On a speculative note, reluctance by Member States to terminate *intra*-EU BITs may be ascribed to the conviction that BITs afford an higher level of protection (broad formulation of the standard treatment amounting to fair and equitable and full protection and security, protection against expropriation) and investor-State

[76] 2006 Economic and Financial Committee Report to the Commission and the Council on the Movement of Capital and the Freedom of Payments, Brussels 4 January 2007, 5044/07 ECOFIN 1 MDC 1, at Part III.2.

[77] In the 2003 Economic and Financial Committee Report to the Commission and the Council on the Movement of Capital and the Freedom of Payments, Brussels 17 November 2003, 14940/03 ECOFIN 345 MDC 2, the EFC took note of "*the assessment of the Commission services with respect to the ECJ 'Open Skies' rulings in November 2002 related to intra-EU investment in airlines, and specific bilateral agreements between the US and certain Member States*".

[78] 2008 Annual EFC Report to the Commission and the Council on the Movement of Capital and the Freedom of Payments Brussels, 17 December 2008, 17363/08 ECOFIN 629 MDC 2, and 2007 Annual EFC Report to the Commission and the Council on the Movement of Capital and the Freedom of Payments Brussels, 8 January 2008, 5123/08 ECOFIN 6 MDC 1.

arbitration and that in default, investors may find an incentive to structure *intra*-EU investments through third States in order to be covered by the relevant bilateral investment treaty[79].

Quite on another hand, the Czech Republic is reportedly said to be willing to terminate all existing bilateral investment treaties in force with Member States and to have signed, last 1 June, an agreement with the Republic of Italy on the termination of their mutual Agreement on the Promotion and Protection of Investments concluded 22 January 1996. Rumours also circulate on possible termination of the BIT concluded in 1990 between Italy and Romania.

2.2. Definitions: Starting Point and Directions

Further investigation on the relationship between *intra*-EU BITs and the EC treaties is required besides what was discussed in the Eastern Sugar case. Early commentators have apparently written in the wake of judicial decisions – to which moreover they had participated as legal counsels - and have therefore especially emphasized the arguments litigated by the parties[80]. It will be therefore more fruitful to follow the

[79] See comments by Sergey Ripinsky in the discussion in the OGEMID mailing list "Intra-EU Bilateral Investment Treaties" of 19 February 2009. Söderlund, Christer, "Intra-EU Investment Protection and the EC Treaty" Journal of International Arbitration 24, no. 5 (2007) at 464 also suggest the 'reputation' that "*there is hardly any doubt that a state's (intra or extra-EU) occasional involvement in investment disputes and, even more so, a state's voluntary compliance with arbitral awards, has greatly contributed to the perception by the international investment community of that state as an increasingly reliable area for investment. This has attracted significant foreign direct investment to the benefit of such states*". In fact, there is lack of consistent evidence in the economic literature on the effects of international agreements on foreign investment flows. See recently: Sauvant, Karl P, and Lisa E Sachs. The Effect of Treaties on Foreign Direct Investment. Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows. New York: Oxford University Press, 2009.

[80] Poulain, Bruno, "Quelques interrogations sur le statut des traités bilatéraux des promotion et de protection des investissements au sein de l'Unione Européenne" Revue Generale de Droit

steps of more recent scholarly contributions which have carried out a thorough examination on compatibility between obligations under BITs for the to promotion and protection of direct foreign investments and those under EU law[81].

Starting point is the definition for foreign investment, elaborated from the common features of State practice on bilateral and multilateral investment treaties[82]. A brief

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International Public, no. 4 (2007): 803-828, acted as Counsel to the Czech Republic and makes a case for the fragmentation of the international investment law *vis-à-vis* the complexity of EU law (as defended by the ECJ) which would amount to primacy according to ECJ judgement in case 10/61 and to incompatibility according to Article 59 VCLT, which anyway concludes that the ECJ would not be deprived of its saying in preliminary ruling and infringement proceedings and suggest 'appropriation' of investor-state arbitration within the EC legal system; and Söderlund, Christer, "Intra-EU Investment Protection and the EC Treaty" Journal of International Arbitration 24, no. 5 (2007): 445-468, acted as Counsel to Eastern Sugar and focuses on the validity of the investor-State arbitral clause (duly distinguishing the case from the ECJ judgement in the Mox Plant case) and on applicability of the intra-EU BIT provision, without paying regard to any strict distinction as to validity and applicability of the BIT as a result of accession to the EU.

[81] See especially: Wehland, Hanno, "Intra-EU Investment Agreements and Arbitration: Is European Community Law an Obstacle?" International and Comparative Law Quarterly 58: 297-320; and Eilmansberger, Thomas, "Bilateral Investment Treaties and EU Law." Common Market Law Review 46 (2009): 383-429.

[82] See Campbell McLachlan, Laurence Shore and Matthew Weiniger, International Investment Arbitration: Substantive Principles. Oxford international arbitration series (Oxford: Oxford University Press, 2007) at 5, on the possibility and opportunity of an exposition of common principles of investment protection: "[…] *this patchwork quilt of interlocking but separate bilateral treaties – each the product of its own negotiation – in fact betrays a surprising pattern of common features. No doubt part of the ready success of the investment treaty phenomenon has been the willingness of negotiators to confine their texts, for the most part, to a limited number of rather generical guarantees, each expressed in conventional form. The form of the modern BIT may be traced to a series of initiatives shortly after World War II, which produced draft conventions* [the Abs-Shawcross drat convention]. *In turn, State practice in this area has been characterized by an ongoing sharing and borrowing of concepts, which one of the authors* [McLachlan] *has described elsewhere as 'akin to a continuous dialogue within an open-plan office'. Moreover, the inclusion of most favoured nation*

indication of substantive rights applicable respectively under the BITs and under the EU treaties completes the preliminary picture, and address the discourse on the possible overlap between them.

2.2.1. Definition of Investment

As there is only little reference to the notion of investment under the EU treaties[83], a definition for foreign investment may be inferred from the fifty-year practice of bilateral and multilateral investment treaties, whose consistency allows a certain degree of generalization[84]. In particular, though the 1965 ICSID Convention does not provide a definition of 'investment', the case law developed by the ICSID upon the early 1997 award in the case *Fedax NV v Republic of Venezuela* has declared that

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(MFN) clause in most BITs drives convergence in treaty drafting, as each State strives to ensure that the benefits which it is extending to the nationals of one State are consistent with obligations already undertaken in prior treaties […]. *This means that it is possible to speak of a common lexicon of investment treaty law* [emphasis added]".

[83] Sole reference to investment is Article 64 TFEU *[57 EC]*, providing an exception to the freedom of capital movement under Article 63 TFEU *[56 EC]*: "*1. The provisions of Article 56 shall be without prejudice to the application to third countries of any restrictions which exist on 31 December 1993 under national or Community law adopted in respect of the movement of capital to or from third countries involving direct investment — including in real estate — establishment, the provision of financial services or the admission of securities to capital markets.*"

[84] A review of definition of investment under multilateral and model bilateral investment agreement in Schlemmer, Engela C. Investment, Investor, Nationality, and Shareholders. In Muchlinski, Peter, Federico Ortino, and Christoph Schreuer. The Oxford Handbook of International Investment Law. Oxford: Oxford University Press, 2008. At 51-62. Multilateral investment treaties are namely: the 1992 North American Free Trade Agreement (NAFTA), the 1987 Association of South-East Asian Nations (ASEAN) Agreement for the Promotion and Protection of Investment and the 1994 Energy Charter Treaty (ECT); and the 1965 Washington International Centre for the Settlement of Investment Disputes Between States and Nationals of other States Convention (ICSID Convention).

'*the basic features of an investment have been described as invoking a certain duration, a certain regularity of profit and return, assumption of risk, a substantial commitment and a significance for the host State's development*'[85].

The IMF and the OECD have proposed benchmark definition for foreign direct investment. According to the OECD, foreign direct investment shall cover "*cross-border investments with the objective of establishing a lasting interest in an enterprise located in a foreign country*"[86]. The IMF acknowledges as foreign direct investment "*the investments of any kind undertaken by natural or legal persons and which serve to establish or maintain lasting and direct links between the persons providing the capital and the undertakings to which the capital is made available in order to carry out an economic activity*"[87]. Similar criteria were more recently applied in the 2003 award in the *Salini Costruttori SpA and Italstrade SpA v Kingdom of Morocco* case[88]; substantial contribution; duration; mutual participation in the risks of the operation; economic significance for host State's development.

European model BITs adopt a broad definition for investment ('*any kind of asset*') followed by a non-exhaustive ('*in particular, though not exclusively, includes*') list of five categories: real property, shares, contracts, intellectual property rights and rights conferred by law. Common features for a definition of foreign investment cover cross-border economic activities conducted by persons or companies by means of financial or contractual instruments which generates lasting returns in the territory of the host State[89].

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[85] *Fedax NV v Republic of Venezuela* (Jurisdiction) 5 ICSID Rep 183 (ICSID, 1997,

[86] OECD Benchmark Definition of Foreign Direct Investment, 4th ed. (2008) p. 10.

[87] IMF, Balance of Payments Manual (1993).

[88] *Salini Costruttori SpA and Italstrade SpA v Kingdom of Morocco* (Award) 20 ICSID Rev-FILJ 391.

[89] See model BIT drafted by Denmark, Finland, France, Germany, Greece, Netherlands and Sweden, in UNCTAD IIA Compendium available at the internet address: <http://www.unctadxi.org/templates/DocSearch____780.aspx>.

2.2.2. Protection of Foreign Investment under BITs

Bilateral treaty obligations sometimes cover admission or access of foreign investment in the host State[90], as well as certain standard of treatment including non discrimination (most favoured nation and or national treatment), fair and equitable treatment, full protection and security, protection from expropriation, free transfer of payments, and dispute resolution mechanisms (including the right for the investor to enforce the BIT and sue the host State before an arbitral tribunal)[91].

Apart from most favoured nation and national treatment standards, which are called 'contingent' standards as they extend *per relationem* a legal standard already provided under certain legal instrument (*vis-à-vis* nationals or citizens of third States), the fair and equitable treatment and the full protection and security, as 'non-contingent' standards, leave more space for discussion.

Despite the simple language, fair and equitable treatment has been denied an autonomous normative content other than the international law *minimum* standard for the treatment of aliens. The international *minimum* standard itself, as an

[90] Provisions which encourage or limit the admission of investment (so-called *pre*-entry treatment provisions) are usual in the US model BIT model. European models are commonly focused on *post*-entry treatment, except for the Netherlands model BIT which regulates admission. See McLachlan, Campbell, Laurence Shore, and Matthew Weiniger. International Investment Arbitration: Substantive Principles. Oxford international arbitration series. Oxford: Oxford University Press, 2007. At 181.

[91] Such is the structure of BITs as examined and described in Campbell McLachlan, Laurence Shore, Matthew Weiniger, and Loukas Mistelis (eds), International Investment Arbitration, 2009 at Ch. 2 The Basic Features of Investment Treaties, p. 30 *et seq.* . These are also the recurring features commented by authors such as: Todd Weiler (ed), International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties, and Customary International Law, (London: Cameron May, 2005); Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), The Oxford Handbook of International Investment Law, (Oxford: Oxford University Press, 2008).

obligation under international law binding the legal system of host States to a certain respect of the persons and property of aliens, has been strongly debated and its content uncertain.

The expression of a principle of fair and equitable treatment as a treaty obligation in BITs shifts the debate from the level of the obligation – which is conventionally accepted by and between the parties to the BIT - to the level of its normative content. In this respect, it has been convincingly suggested that a general and reciprocating standard of review for national legal systems for the treatment of aliens should be based on justice and expressed in terms of due process and rule of law – as opposed to arbitrariness. The notion of equitable would then refer to equity considerations as a balance to the different interests deriving from the legitimate expectations of the investment and the regulatory interests of the host State. As it emerges from the practice of investment arbitral awards, the principle would outlaw denial of justice, lack of transparency, improper use of powers or *excès de pouvoir*, inconsistency of treatment, coercion and harassment and bad faith[92].

The standard of full protection and security, on the other hand, covers an obligation to exercise especially police powers with due diligence in order to protect investment from damage caused either by State or private agents[93].

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[92] McLachan, *op.cit.* at 200-207, elaborating on a 1910 article by Elihu Root, The Basis of Protection to Citizen Residing Abroad, (1910) 4 AJIL 517. Especially at p. 205: "[…] *in this light, the fair and equitable standard gives modern expression to a* general principle of due process *in its application to the treatment of investors. The Foundation of this principle is that, by agreeing to extend such treatment to nationals of a reciprocating country, States have accepted that there is an objective standard of treatment by which their own legal and administrative system may be judged. The standard thus encapsulates the minimum requirements of the rule of law*.".

[93] Again, McLachan *op.cit.* At 259-262, distilling conclusions of measurable standards from the evidence of the arbitral awards which applied the standards in the modern context.

Protection against expropriation aims at providing redress to the investor against governmental taking of property in the form of compensation. The scope of the governmental action and the extent of compensation are formulated in varying terms under BITs as well as under multilateral agreements. The absence or a precise definition leaves room for reference to international standards emerging from the practice of international agreements and of international tribunals. Substantive principles which are more commonly considered by arbitral tribunals include: the degree of governmental interference, the objective impact of the measure on investment, protection for the reasonable expectations of the investors. As far as compensation is concerned, this is one very contentious area of international law torn between the doctrine of an international *minimum* standard (prompt, adequate and effective) and the restrictive approach of the national treatment. BITs often aim to provide a high standard of protection amounting to 'adequate and effective' compensation[94].

2.2.3. Freedom of Investment under EU Law

Be this the generally accepted scope for BIT, what is the scope of application of the EU treaties to investments between Member States?

No chapter in the EU treaties is specifically devoted to *intra*-EU investment, therefore coverage of cross-border economic activities between Member States shall be measured against the scope of the fundamental freedoms within the internal market, especially with reference to the right of establishment, to the right to provide services and to the free movement of capitals[95].

[94] Again, McLachan *op.cit.* At 265-313.

[95] P. Juillard, Freedom of Establishment, Freedom of Capital Movement, and Freedom of Investment, in (2000) 15 ICSID Review: Foreign Investment Law Journal 322; republished in *Liber Indecorum* Ibrahim F.I. Shihata, Kluwer 2001.

According to the well established case law of the ECJ, the right of establishment entitles nationals of Member States to do business in general and to settle economic activities in another Member State as a primary or secondary establishment, including the right to purchase and sale real estate - thus covering the 'property', 'contracts' and 'rights conferred by law' sides of investments commonly protected by BITs[96].

The freedom of capital movements grants residents in Member States the right to move capitals as well as any other financial instrument (such as shares, interests and credits) from one Member State to another - thus covering the 'shares', 'payments' and again 'contracts' aspects of investments under the BITs[97].

Central to the enforcement of the right of establishment and of the freedoms of capital movements between Member States is the prohibition of restrictions and of discriminations based on nationality which operates as a means of both liberalization and protection of investors.

Moreover and according to specific provisions under the EC treaty, the internal market is completed by a certain degree of sectoral harmonization of Member States' national legislation by means of EC regulations and directives which aim to make the fundamental freedom more effective, as well as by common policies which affect the regulatory environment where *intra*-EU investment take place.

[96] Articles 49-55 TFEU.

[97] Articles 63-66 TFEU.

2.3. Scope for Conflicts Between intra*-EU BITs and EU law*

In so far they may apply to the same economic activities taking place between Member States, *intra*-EU BITs and EU law may give raise to conflicts before arbitral tribunals and before the ECJ.

Conflicts concern in the first place the validity of *intra*-EU BITs as international agreements concluded before the accession of new Member States to the EU.

In the second place, competing legal instruments may create a conflict on the applicability of substantial rules under either the *intra*-EU BIT or EU law.

Finally there is a possible conflict between the investor-State dispute settlement system under *intra*-EU BITs and ECJ's exclusive jurisdiction between Member States as to the interpretation and application of EU law[98].

2.3.1. Conflict of Validity

The validity of *intra*-EU BITs has been challenged by the Commission as having been subsequently 'superseded' on occasion of the accession of the Member States to the EU by means of the EU Accession Agreements.

Under International Law

Under international law, such a conflict would fall under the *lex posterior* rule of Articles 59 VCLT, which provides that a treaty is tacitly terminated if all parties to it conclude a later treaty relating to the same subject matter.

[98] The distinction takes into account the international law principle of 'subsequent incompatible' international treaties, and is consistently carried out throughout its work by Eilmansberger, Thomas, "Bilateral Investment Treaties and EU Law." Common Market Law Review 46 (2009): 383-429.

Article 59 is commonly considered a codification of a customary principle of general international law, which impinges on the validity of two subsequent international treaties, as termination extinguishes the legal effect of the previous international obligations [99].

The first test for the application of Article 59 VCLT is that the later agreement covers the 'same subject matter'. In our case, the 'same subject matter' is suggested to be the protection of foreign investments under the BIT and under the relevant articles of the EU treaties on the right of establishment and on freedom of capital movement.

The ascertainment of the 'same subject matter' needs consistent interpretation (literal, systematic and teleological) of the provisions under the *intra*-EU BIT and the EU treaties. Commentators have remarked that it does not matter whether the later treaty covers the same matter in more general terms, and that it applies instead when the two treaties different in time regulate the same matter with the same or comparable degree of generality[100].

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[99] The principle was discussed in the case between the EC and Brazil before the WTO Appellate Body regarding Measures Affecting the Importation of Certain Poultry Products, WT/DS69/R, 12 March 1998, where the EC adhered to the view that the principle derives from general international law. The ECJ has evoked the same principle in, among others, the cases C-158/91 Criminal proceedings against Jean-Claude Levy; and C-812/79 Attorney General v Juan C. Burgoa.

[100] François Dubuisson, Article 59 – Convention du 1969, in Olivier Corten et Pierre Klein (eds), Les Conventions de Vienne sur le droit des traités : commentaire article par article, 2006, Volume III at 2099, reports the doctrinal opinion which recall the rule *generalia specialibus non derogant* so that when the later treaty is more special in nature, it would not affect the previous treaty; at the same time he reserves the opinion that "[…] *les termes 'portants sur la même matiére' ne doivent dés lors etre interprétés en tenant compte du degré de précision des règles énoncées, mais uniquement en prenant pour critère le fait que ces traités aient vocation à régir en même temps un même objet que ce soit pa le bias de règles générales […] ou des règles spécifiques […]*". Similarly, Felipe Paolillo, in Olivier Corten et Pierre Klein (eds), Les Conventions de Vienne sur le droit des traités : commentaire article par article, 2006, Volume II, Article 30, at 1263.

Is this not the case of the EU treaties, regulating economic relations between Member States at large and *intra*-EU bilateral investment treaties which protect a higher standard and afford a peculiar dispute settlement system? In any event, the logic of the tacit termination envisaged under Article 59 is convincing provided that the two treaties cover the same identical subject, so that the will of the parties to terminate the earlier treaty can be reasonably presumed. When the scope of two treaties coincides only partially, the presumption would not hold as strong[101].

In addition, Article 59 requires a second test that the provisions of the later treaty are "*so far incompatible with those of the earlier one that the two are not capable of being applied at the same time*". The second test is based on the objective interpretation of the treaty provisions, even though the *rationale* may be a presumption for a subjective test which misses the necessary factual indexes: when all the parties sign a later agreement which is incompatible with an earlier one concluded in the same subject matter, there is a presumption that they knew and that they intended to put an end to the earlier one. It is true that there is no strict objective neither subjective reference in the language of the article as it is codified in the VCLT and that the interpretation of the treaty provisions shall be conducted according to the ordinary literal, systematic and teleological rules[102].

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[101] François Dubuisson, *op. cit.*, at 2108 "[…] *alors que l'on peut raisonnablement présumer que la volonte d'Etats concluant un traité sur une matière qui fait l'objet entre eux d'un traité précédent est de substituer le nouvel accord à ce dernier traité, il est plus délicat de tenir le meme raisonnement pour la conclusion d'un traité n'entrant en contradiction avec un traité antérieur qu de manière incidente, par certaines dispositions particulières*."

[102] Reference is to the Permanent Court of International Justice judgement of 4 April 1939 (preliminary objections) in the case A/B77 The Electricity Company of Sofia and Bulgaria, and especially to the dissenting opinion of J. Dionisio Anzilotti according to whom the acceptation of competence of the PCIJ, although more restrictive, according to the 1931 conciliation, arbitration and judicial regulation treaty between Turkey and Bulgaria had suspended the earlier acceptation signed by the same parties. The Court had concluded instead that: "*En concluant le Traité de conciliation,*

At this stage, an examination of compatibility between earlier *intra*-EU BITs and EU Treaties requires further analysis of (i) substantial rules applicable to *intra*-EU investment; as well as of (ii) the principle of non-discrimination based on nationality.

Incompatibility : (i) Substantial Rules

Are provisions on the right of establishment and on the free circulation of capital an obstacle to the application of investment protection under the *intra*-EU BIT?

On the one hand, EU law imposes liberalization and non-discrimination for the establishment of workers and the circulation of goods, services and capitals, between Member States, as well as a certain degree of harmonization in regulated sectors. On the other hand, *intra*-EU BITs grant a standard treatment to investors and investment based on due process and on the rule of law. Both legal regimes prohibit arbitrary and discriminatory interferences to the detriment of the economic activity carried out by the investor.

Without prejudice to a more detailed analysis of the substantial rules applicable case by case, the general principles of EU law are not an obstacle to the application of the standards of 'fair and equitable treatment' and of 'full and complete protection' provided for investment under *intra*-EU BITs understood in terms of rule of law and due process[103]. Besides providing similar legal protection, *intra*-EU BITs and EU Treaties could be applied in a complementary way[104].

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d'arbitrage et de règlement judiciaire, la Belgique et la Bulgarie ont eu en vue d'adopter un système trés développé d'obligations réciproques ayant pour objet la solution pacifique des différends qui viendrait à sélever entre elles. Mais on ne serait guère justifié à penser que, par cela meme, elles aureaient voulu porter atteinte aux obligations qu'elles avaient contractées précédemment dans un bout analogue; et ceci, notamment, pour le cas où ces obligations seraient plus étendues que celles découlant du traité".

[103] Those are the conclusions of an analysis of the *intra*-EU investment model, *i.e.* of the scope for application of the EC treaty to the admission and treatment of *intra*-EU investments aimed at ascertaining an EU model in by Lorenza Mola, "Which Role for the EU in the Development of

Moreover, limits and exceptions to the right of establishment and to the movement of services and capitals provided under EU law would not conflict with the standard required under the BIT, provided they comply with fundamental principles including the rule of law.

In this respect, under international law *intra*-EU BIT and EU law may be considered complementary rather than incompatible rules.

Incompatibility: (ii) Non Discrimination

Non-discrimination according to the general principle of Article 18 TFEU [12 EC] prohibits all discriminatory treatments based on nationality.

The application of *intra*-EU BIT may lead to the situation where a host Member State grants a different protection to investors who are nationals of the other signatory

International Investment Law?.", SIEL Working Paper 26/08, (2009): "[…] *some standards of treatment, such as fair and equitable treatment* [] *and full protection and security* […]*, are met by general principles of EU law applicable throughout all fields of EU law, as far as they encompass the right to defence, the right for an individual to be heard before an administrative decision affecting him is taken, and similar procedural and substantial rights. Moreover, in the ECJ case law, legitimate expectations are also balanced with other fundamental principles of the EU legal system. Thus, the ECJ held that a national rule which does not specify further details about the threat to public security but calling upon it in order to require prior authorization for capital investments, is too imprecise and impinges on the principle of legal certainty for investors* [reference is made to the ECJ judgement of 2000, case C-54/99]".

[104] See Wehland, Hanno, "Intra-EU Investment Agreements and Arbitration: Is European Community Law an Obstacle?" International and Comparative Law Quarterly 58: 297-320, at 310. : "*However, the lack of identity of protection standards does not in itself cause a conflict with EC law. As EC law only sets minimum standards for investment protection, nothing would a priori prevent a Member State from granting a higher level of protection to investors under its own legislation or in a BIT. Conversely, where the protection standard under a BIT was lower than under EC law, this would equally not be a cause for concern. Since BITs only purport to provide additional protection to what is already granted by other legal regimes, the higher protection standard under EC law would not be called into question*".

Member State to the exclusion of nationals from third Member States. Are the latter entitled to claim the same treatment under the EU law principle of on non-discrimination based on nationality?

The ECJ has consistently denied that the EU Treaties provide a MFN clause between Member States to the effect of extending to all Member States the most favoured treatment granted to any of them in areas not governed by the Treaties[105].

The right of establishment requires Member States to extend all preferential treatment granted to their nationals pursuant to bilateral *intra*-EU als to nationals of other Member States who are established in their territory[106]. This extension does not apply to nationals of all Member States, regardless of where they are established. In this respect, it has been remarked that establishing a MFN clause

[105] The cases discussed before the Court concerned bilateral conventions for the avoidance of double taxation, where the Court found that certain tax treatments under intra-EU agreements could not be extended to residents of other Member States. See ECJ judgement of 5 July 2005 in case C-376/03, D. v Inspecteur van de Belastingdienst and judgement of 12 December 2006 in case C-374/04, Test Claimants in Class IV of the ACT Group Litigation v Commissioners of Inland Revenue.

[106] In the judgement of 27 September 1988 in case 235/87, Annunziata Matteucci v Communauté française of Belgium and Commissariat général aux relations internationales of the Communauté française of Belgium, the ECJ held that it is for Member States reciprocally to ensure that agreements contrary to EU law are applied in a manner consistent with EU law, at 23: "*The answer to the question put by the national court must therefore be that Article 7 of Regulation No 1612/68 must be interpreted as meaning that it does not allow the authorities of a Member State to refuse to award a scholarship to study in another Member State to a worker residing and pursuing an activity as an employed person in the territory of the first Member State but having the nationality of a third Member State on the ground that the worker does not have the nationality of the Member State of residence. A bilateral agreement which reserves the scholarships in question for nationals of the two Member States which are the parties to the agreement cannot prevent the application of the principle of equality of treatment between national and Community workers established in the territory of one of those two Member States .*".

between Member States would amount to an excessive restriction of Member States' external competence[107].

Under EU Law

Under EU law, the challenge to the validity of the *intra*-EU BIT concluded by Member States prior to their accession could succeed when it is proved that the EU enjoys an exclusive EU competence in the same field. The ECJ has in fact consistently declared that the EU treaties take precedence over earlier international agreements between Member States *"in matters governed by the* [at the time] *EEC Treaty"*[108].

Until the entry into force of the TFEU and of the amendments including direct investment in the common commercial policy, foreign investment was considered to be covered by the establishment, the service and the capital chapter of the EU treaties - where the competence is shared between the Council and Member States[109].

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[107] See the conclusions of Wehland, Hanno, "Intra-EU Investment Agreements and Arbitration: Is European Community Law an Obstacle?" International and Comparative Law Quarterly 58: 297-320, at 314: "*one has to stress that the consequences of such a reading would by no means be limited to intra-EU BITs or even BITs in general. By assuming a general obligation of the Member States to negotiate for an extension of benefits granted under bilateral agreements to other EC nationals (including in negotiations with non-Member States) one would considerably restrict their external competences. The ECJ's mentioning of the 'balance and reciprocity' of bilateral agreements as a possible justification for discriminatory effects in the Saint Gobain and Gottardo decisions indicates that this cannot have been the Court's intention*".

[108] ECJ, judgment of 27 February 1962 in case 10/61, *Commission v Italy*; and consistently judgement of 27 September 1988 in case 235/87, *Annunziata Matteucci v Communauté française of Belgium and Commissariat général aux relations internationales of the Communauté française of Belgium*.

[109] ECJ, judgement of 10 December 2002 in case C-491/01, *British American Tobacco (Investments)* at paragraph 179: "*It is to be noted, as a preliminary, that the principle of subsidiarity applies where the Community legislature makes use of Article 95 EC* [approximation of laws]*, inasmuch as that*

Without prejudice for further discussion on EU competence in the field of foreign investment after the entry into force of the Treaty of Lisbon under section 4.1.2. below, foreign direct investment is still a field of competence shared between Member States and the EU.

Accordingly, under EU law, investment protection under *intra*-EU BITs did and does still not fall under any EU exclusive competence and are therefore to be considered valid to the extent they do not breach other provisions of EU law.

2.3.2. Conflict of Jurisdiction

Intra-EU BITs have been also challenged because the investor-State arbitral clause would conflict with the exclusive jurisdiction of the ECJ on any '*dispute concerning the interpretation or application*' of the EC treaty under Article 344 TFEU [292 EC] [110].

In this respect, emphasis must be placed on the fact that the arbitral tribunal pronounces on a conflict between an investor and a Member State enforcing the

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provision does not give it exclusive competence to regulate economic activity on the internal market, but only a certain competence for the purpose of improving the conditions for its establishment and functioning, by eliminating barriers to the free movement of goods and the freedom to provide services or by removing distortions of competition […]".

[110] It is easily pointed out that the exclusive character of the jurisdiction exercised by the ECJ has already emerged in relation to other international tribunals, as it has been in the Mox Plant case. Nonetheless, this was a case where a Member State had submitted a matter regulated by EU law to an arbitral tribunal established according the UNCLOS, while in the case of the *intra*-EU BIT and of the protection of investment there is not a case. See ECJ Judgement of 30 May 2006 in case 459/03 *Commission v Ireland (Sellafield Mox Plant)*. The question was whether the UNCLOS provisions relied upon by Ireland were integral part of the EC legal system according to Article 300 EC, in their quality of mixed agreements concluded by the EC and Member States. This is not evidently the case for *intra*-EU BITs which so far do not fall under any EC competence.

provisions on compensation for breach of the *intra*-EU BIT. On the other hand, the ECJ can never make justiciable the protection granted under the *intra*-EU BIT.

Since the decision of the arbitral tribunal is bound to be limited to the claim of responsibility and compensation under the *intra*-EU BIT, there is not the least prejudice for parallel proceedings before the ECJ on the primacy of EU law over national legislation (preliminary rulings) or even on the responsibility of Member States *vis-à-vis* the EU (infringement proceedings).

Not relevant is also the concern, which has been raised in the communications by the Commission to the EFC in the *Eastern Sugar* case mentioned above in section 2.1. (FN 15), that the investor-State arbitral tribunal may be prone to serve as a means to investors with a view to avoid the jurisdiction of the ECJ or to or to impair the effectiveness of EU law. Under BIT rules on applicable law, the arbitral tribunal is always in a position to apply EU law (if this is applicable *ratione temporis*) as the national law of the 'host' Member State or as an agreement in force between the same parties[111].

2.3.3. Conflict of Applicable Rules

The compatibility of obligations under the BITs and under the EU treaties shall be considered under the profile of the level of investor protection.

[111] Although the arbitral tribunal would not have access to the preliminary ruling procedure, it may have to consider the efficacy of the award at the enforcement stage. The ECJ has enforced public policy exceptions against the recognition of arbitral awards interpreting EU law in an inconsistent manner, in the judgement of 1 June 1999 in case C-126/97, *Eco Swiss China Ltd. V. Benetton International NV*. The ECJ ruled that the national court to which application for annulment of an arbitration award is sent should grant annulment when the award was rendered in breach of Article 81 EC which amounts to a national provision of public policy.

As anticipated, fundamental freedoms (right of establishment, freedom to provide services, freedom of capital movements) under the EU treaty grant the circulation of investments across Member States and outlaws discriminatory and non-discriminatory obstacles which may limit such circulation. Once an investment has entered the territory of one Member State, it will be treated on equal foot with the nationals of the host Member State. Substantial rules on investment treatment are then left in part to the competence of the host Member State and in part to harmonized sectoral EU rules.

With reference to substantial rules on investment treatment applicable during its 'lifetime' in the Member State, there a number of national or EU provisions which may conflict with BIT rules which straightforward promote the profitability of foreign investment.

Eilmansberger has recognized two categories of substantial rules likely to conflict with *intra*-EU BIT, namely measures revoking the investment and adverse regulation[112].

The first category would include prohibition of investment based on competition (long term agreements, state aid or incentives which are structural to the investment) or public procurement rules. Those measure, when applicable *ratione*

[112] Eilmansberger, Thomas. "Bilateral Investment Treaties and EU Law." Common Market Law Review 46 (2009): 383-429. At 413: "*With regard to intra-EU BITs, however a third category of EC law provisions potentially conflicting with BIT safeguards is of particular relevance, namely provisions that can be viewed as compromising the value of an investment as such. Within this category, two different subcategories can be distinguished. The first subcategory would comprise EC norms which prevent a Member State from honouring specific guarantees given to the investor or made specifically in connection with a particular investment; the second category would capture Community law provisions which generally alter, possibly in a negative and unexpected way, the legal environment in which the investor operates. For both subcategories, a myriad of examples are conceivable; most however involve Community provisions pertaining to competition policy in the wider sense.*".

temporis to the investment, could well conflict with valid BIT standards granting 'fair and equitable treatment' or 'full protection' to the investment itself.

Measures falling under the second category would encompass prohibitions of State aid, prohibitions of anticompetitive behaviours and respective structural remedies, sector specific rules restricting or forbidding certain economic activities. Provided those measures are applied without discrimination based on nationality, it will be difficult to argue a breach of the relevant BIT provision. Although broadly formulated, BIT standards have not been recognized the normative power to outlaw regulatory changes.

Privatization measures, adopted with a view to compliance with applicable EU law in the aviation sector were discussed in the case ADC & ADMC v Hungary before an ICSID arbitral tribunal. In 1994 the investor, a national from Cyprus, won a tender called by the Hungarian government for a contract to build and operate the airport in Budapest. The investor established a corporate vehicle in charge of the airport and of all ground handling services. Between 1999 and 2001, Hungary introduced substantial regulatory changes to the air service sector and in 2005 proceeded to privatize the airport and to transfer the management and service activities to a new company. Before the arbitral tribunal, the investor claimed, among others, protection and compensation against the privatization measures. The court did not uphold the defence argued by Hungary that such regulatory action was needed to comply with the forthcoming accession to the EU, which based on the fact of the case was considered disproportionate and unnecessary[113].

[113] Award of 2 October 2006, ICSID Case No. ARB/03/16, ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary, see in particular para. 174 "*The Government developed a national aviation strategy, embracing the entire aviation sector, of which part of its programme was to align with and implement EU law within the aviation sector in preparation for accession to the EU.*".

National measures for the protection of competition, such as the prohibition of State aid, were discussed in arbitral proceedings initiated by an investor, a Swedish national, claiming the responsibility of the host State, Romania, for revoking certain State incentives. The host State argued that the incentives had been revoked because they amounted to State aid contrary to EU law. The case was decided limited to jurisdiction and nationality and is still pending on the merits, so the question whether the arbitral tribunal could order the host State to pay compensation or to restore the incentives, remains to be discussed[114].

2.4. Perspectives

From the international law perspective, arbitration on *intra*-EU investment is not an experiment of judicial power isolated from the EU legal environment: EU law may have an impact on the applicable rule to the protected investment and, and in any event to the rules for the enforcement of the award.

Rather on the contrary, investment arbitration amounts to a parallel judicial mechanism for the award of damages deriving from the breach of *intra*-EU BITs, which is not impaired by an incomplete supremacy of the EU legal order and by the self proclaimed exclusivity of ECJ jurisdiction.

[114] The issue has been raised in the ICSID Case No. ARB/05/20, Ioan Micula et al. v. Romania. The decision of 24 September 2008 was limited jurisdiction and admissibility.

CHAPTER 3. BITS CONCLUDED BY MEMBER STATES WITH THIRD COUNTRIES – COMPATIBILITY: ARE BITS COMPATIBLE WITH EU LAW?

SUMMARY: A Premise on Access and Treatment of Foreign Investment To and From EU; 3.1. Foreign Investment Under TFEU Chapter on Capital; *3.1.1. A Unilateral Promise?; 3.1.2. Definition and Inconsistencies; 3.1.3. Substantial Protection; 3.1.4. Exceptions and Restrictions; 3.2. EU Investment To and From Third Countries;* 3.3. A String of Conflicts; *3.3.1. The 2002 Air Service Agreements; 3.3.2. BITs Concluded by Central and Eastern European Countries With the U.S.A. Before Accession; 3.3.3. BITs concluded by Austria, Sweden and Finland With Third Countries Before Accession.*

A Premise on Access and Treatment of Foreign Investment To and From EU

Whereby *intra*-EU BIT are a sort of one kind and a rarity – as already mentioned, they have never been concluded by and between two countries at a time when they both were EU Member States – bilateral investment treaties are commonly concluded by Member States with third countries[115].

[115] According to the UNCTAD IIA Compendium available at the internet address: <http://www.unctadxi.org/templates/ DocSearch____780.aspx>, there are actually 1477 BITs concluded by Member States, of which nearly 190 concluded by Member States *inter se*, and the rest between Member States and third countries.

Nevertheless, the possible overlap between third countries' investment protection (as briefly sketched out in the previous chapter) and EU law raise once again a potential for conflict: in so far foreign investment could claim protection under international agreements as well as under EU law.

First of all, it is a conflict on compatibility between competing international legal instruments (i.e. bilateral agreements on one side and EU law on the other side) which affects their validity according to applicable rules of international and EU law. In addition and under certain conditions – provided that the validity/conflict has been resolved - it may also amount to a conflict on applicable rules, whereby the investment is covered at the same time by the investment agreement and by EU law.

The topic is made more interesting by the institutional debate on external competence for the conclusion of international agreements for the protection of investments with third countries. Such power has been contended by Member States on one side, and by the Commission and the Council on the other. While it appeared that the legal basis for EU implied external powers was somewhat blurred, the Commission mandated to the ECJ the task to define limits and conditions for Member States to exercise their external powers in this field. Finally the 2007 Lisbon Treaty has included foreign investment under the common commercial policy, thus assigning the matter to the EU exclusive external competence. Nonetheless the definition of foreign direct investment is not defined in the Treaty so that the extent of EU external competence is to be further clarified (see below section 4.2.1.).

Under EU law, Articles 63 to 66 TFEU *[56 to 60 EC]* on capital movement, provide a liberalized regime for investment to and from third countries. Freedom of capital movement is the only fundamental freedom in the EU internal market which can boast an 'external dimension' in relation to third countries (3.1). In addition to that, investment 'exported' from within the EU to third countries, is also subject to non-

discrimination concerning freedom of establishment and freedom to provide services (3.2).

Investments from and to third countries have been discussed before the Luxembourg Court, called upon to decide on infringement proceedings initiated by the Commission against certain Member States in relation to international agreements concluded with third countries. The debate accompanying and following the ECJ judgements has cast some light on possible remedies to avoid conflicts between EU law and BITs concluded by Member States (3.3).

3.1. Foreign Investment Under TFEU Chapter on Capital

Wearing the glasses of a third country investor the EU shall appear in principle one of the promised lands where access and treatment of foreign investment is highly regarded and protected as an engine for economic growth and stability[116].

Typical national restriction to foreign investment such as limits on foreign ownership, screening and approval procedures, constraints on foreign personnel and operational freedoms are exceptional and based on consideration of essential public (security, order, health) interests[117].

[116] Reference is for instance to Article 347 TFEU [297 EC]. All OECD Member States are committed to the enhancement of international investment and have established certain standards for the regulation of foreign investment such as the 1961 Code of Liberalisation of Capital Movements and the Code of Liberalisation of (Capital Movement and) Current Invisible Operations and the 1976 Declaration on International Investment and Multinational Enterprises.

[117] See March 2009 report on the "Freedom of Investment, National Security a 'Strategic Industries' " process (so called FOI Process) started in 2000 within the OECD as a multilateral *forum* to promote political dialogue. Available at http://www.oecd.org/dataoecd/18/47/42446942.pdf; last visited 6 December 2009.

In addition to that and more importantly, a regional liberal economic constitution under the EU Treaty provides for unilateral liberalization and non discrimination of capital movements to and from third countries and entitles third country investor to its enforcement before national courts and the ECJ.

The following paragraphs will examine the scope of the rights to which a foreign investor is entitled (3.1.1.), essentially within the scope of the capital movement provisions although partially overlapping with (the restriction on) freedom of establishments (3.1.2.), including substantial rules (3.1.3.) as well as relevant restriction and limitation under the EC Treaty and possibly under the national law of Member States (3.1.4.).

3.1.1. A Unilateral Promise ?

Under Article 63 TFEU [56 EC] '*All restrictions on movement of capital* […] *between Member States and third countries shall be prohibited*'. With a striking clear language, capital movement expressly applies to investment from third countries and is not limited *ratione personae* to nationals of Member States[118].

[118] The language of Article 56 EC is clear compared to the lack of reference to third countries under the other three relevant chapters of Title III: Chapter 1 (Workers), Article 39, paragraph 2: "*Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States […]*"; Chapter 2 (Right of Establishment), Article 43: "[…] *restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited.*"; Chapter 3 (Services), Article 49: "[…] *restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended*".

The provision though has been far from being uncontroversial. As it has been remarked, it started in 1957 with a 'clean sheet' and only over the years and by way of political compromise it reached the level of a full liberalization clause[119].

Turning point was indeed the enactment of Directive 88/361/EEC[120], building upon the *momentum* of the 1985 White Paper on the Internal Market[121]. The 1988 Directive listed a number of operations to be gradually liberalized between Member States and third countries – albeit the latter under a mere political commitment[122] - which was progressively expanded over the time and declared directly effective by

[119] The expression is in Bakker, Age F.P., The Liberalization of Capital Movement in Europe - The Monetary Committee and Financial Integration, 1958-1994, Dordrecht: Kluwer, 1996, at 41. The currently applicable provisions on capital movement have been amended by the 1992 Maastricht Treaty entered into force on 1 January 1994. The original provision under Article 67 of the 1957 Treaty Establishing the European Economic Community provided a standstill clause and the gradual elimination of restrictions to capital movement between Member States. In the 1981 judgement in the case 203/80 *Criminal Proceedings against Guerrino Casati* the ECJ denied any direct effect to Article 67. The pace of the liberalization was left to the 1960 First Capital Movement Directive and to Directive 63/21/EEC, which restated commitments undertaken by Member States on their own (such as liberalization of current payments) and which was followed by a certain reluctance when not inaction of the Commission to enforce provisions on capital movement against monetarist policies of certain Member States (notably Italy and France).

[120] Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty, OJ L 178 of 8 July 1988 pp 5-18.

[121] European Commission, 'Completing the Internal Market. White Paper from the Commission to the European Council (Milan, 28-29 June 1985)', COM(85)310 final, at para. 124 *et seq.* .

[122] See Article 7 of the Directive: "*In their treatment of transfers in respect of movements of capital to or from third countries, the Member States shall endeavour to attain the same degree of liberalization as that which applies to operations with residents of other Member States, subject to the other provisions of this Directive.*".

the ECJ in 1995, thus entitling individuals to enforce capital movement liberalization[123].

The amendments to Article 73 EC in the Maastricht Treaty, renumbered Article 56 EC by the Amsterdam Treaty and now Article 63 TFEU, transferred the protection of the freedom of capital movement specifically to and from third countries to the level of primary legislation[124].

As a matter of fact, the struggled history of the whole chapter on capital movement in the EC Treaty is reflected until the nineties by a scant scholarly interest on capital movement in general – and even more so on its external aspects in particular[125]. It is easily remarked that the whole capital chapter still covers a minimal part of the most popular EU law handbooks.

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[123] ECJ, judgment of 23 February 1995 in joined cases C-358/93 and 416/93 *Criminal Proceedings against Aldo Bordessa et al.*

[124] Article 56, then numbered Article 73, was first declared directly applicable by the ECJ judgement of 14 December 1995 in joint cases C-163/94, C-165/94 and C-250/94 *Criminal Proceedings against Lucas Emilio Sanz de Lera et al.* .

[125] Early reference is: Oliver, Peter, Free Movement of Capital Between Member States: Article 67(1) EEC and the implementing Directives, (1984) 9 ELRev. 401; Oliver, Peter and Baché, Jean-Pierre, Free Movement of Capital Between the Member States: Recent Developments, (1989) 26 CMLR 61. Taking into account of the developments under the Maastricht Treaty but not specifically to the external dimension of the capital movement: Usher, John A., Capital Movements and the Treaty on European Union (1992) 12 YEL 35; Bakker, Age F.P., The Liberalization of Capital Movement in Europe - The Monetary Committee and Financial Integration, 1958-1994, Dordrecht: Kluwer, 1996. A whole chapter is entitled to the 'External Aspects of the Capital Movement' in: Mohamed, Sideek. European Community Law on the Free Movement of Capital and EMU. Stockholm studies in law. The Hague: Kluwer Law International, 1999; and an entire paragraph in the extensive work on substantial EU law: Barnard, Catherine. The Substantive Law of the EU: The Four Freedoms. 2nd ed. Oxford: Oxford University Press, 2007. Most recently: Usher, John A. "The Evolution of the Free Movement of Capital." Fordham International Law Journal 31 (2008): 1533-1570.

A thorough restatement of EU law on capital movement in a third country context, adopting the perspective of a foreign investor entertaining its business activities in the EU, has been recently carried out in a work which describes a coherent whole normative regime applicable to third country investors, distinct with respect to other freedoms (establishment, services and trade), entitling to substantial non discrimination subject to certain restrictions [126].

3.1.2. Definition and Inconsistencies

The premise above leads to the crucial question: what is the scope of capital movement under the EC Treaty? Which activities are allowed to circulate freely between the EU and third countries? In what measure does it cover foreign investment? Article 63 TFEU is silent on the point and one should recall the drafting history to realize that most of the normative content of capital movement has been in fact provided by the annexes to the 1988 Directive[127].

A useful definition based on the generalization of concepts in the 1988 Directive and generally accepted by the ECJ would encompass 'unilateral financial operations

[126] Hindelang, Steffen. The Free Movement of Capital and Foreign Direct Investment: The Scope of Protection in EU Law. Oxford: Oxford University Press, 2009.

[127] Article 63 TFEU reproduces former Article 56 EC. The drafting history of the Article is analyzed in Mohamed 1999, at 111. The Directive has never been repealed and is not inconsistent with the current Treaty language, as the ECJ confirmed the validity of indicative reference to the 1988 Directive in judgement of 16 March 1999 in case C-222/97 *Trummer v Mayer*: "[…] *inasmuch as Article 73b of the EC Treaty substantially reproduces the contents of Article 1 of Directive 88/361, and even though that directive was adopted on the basis of Articles 69 and 70(1) of the EEC Treaty, which have since been replaced by Article 73b et seq. of the EC Treaty, the nomenclature in respect of movements of capital annexed to Directive 88/361 still has the same indicative value, for the purposes of defining the notion of capital movements, as it did before the entry into force of Article 73b et seq., subject to the qualification, contained in the introduction to the nomenclature, that the list set out therein is not exhaustive.*", at para. 21.

concerned with the investment of funds in question other than remuneration'[128], including all activities necessary for the realization of the financial transfer[129].

Reference to 'investment' may be understood as typifying the distinction from current payments for goods or services[130], while in the sense of the 1988 Directive, the notion of 'direct investment' is a *species* to the *genus* 'capital' covering the financial activities establishing direct and lasting links between the investor providing the capital and the enterprise to which the capital is made available[131].

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[128] ECJ, judgement of 31 January 1984 in joined cases 286/92 and 26/83, *Graziana Luisi and Giuseppe Carbone v. Ministero del Tesoro*, at para. 21: "*The general scheme of the treaty shows, and a comparison between articles 67 and 106 confirms, that current payments are transfers of foreign exchange which constitute the consideration within the context of an underlying transaction, whilst movements of capital are financial operations essentially concerned with the investment of the funds in question rather than remuneration for a service. For that reason movements of capital may themselves give rise to current payments, as is implied by articles 67 (2) and 106 (1)*".

[129] Expressly, the 1988 Directive includes: "*all the operations necessary for the purposes of capital movements: conclusion and performance of the transaction and related transfers*".

[130] Such was the understanding of the ECJ in defining Article 67 as distinct from Article 106 EEC, repealed by the Treaty of Maastricht. The distinction between capital and current payments may still have a bearing in relation to the payment of dividends which can be either considered as capital or as payment for sharing: in the first case restriction under Article 57(1) could apply – in the second case it couldn't, see Hindelang at 51.

[131] As can be inferred from the definition under Heading I, Annex I (Nomenclature of the Capital Movements Referred to in Article 1 of the Directive) of Directive 88/361/EEC: "*1. Establishment and extension of branches or new undertakings belonging solely to the person providing the capital, and the acquisition in full of existing undertakings. 2. Participation in new or existing undertaking with a view to establishing or maintaining lasting economic links. 3. Long-term loans with a view to establishing or maintaining lasting economic links. 4. Reinvestment of profits with a view to maintaining lasting economic links.*"; and the explanatory notes: "*Investments of all kinds by natural persons or commercial, industrial or financial undertakings, and which serve to establish or to maintain lasting and direct links between the person providing the capital and the entrepreneur to whom or the undertaking to which the capital is made available in order to carry on an economic*

The definition for capital movement and direct investment attempted so far causes a row of inconsistencies, especially in relation to the freedom of establishment under Article 49 TFEU *[43 EC]*. The latter expressly includes the right 'to set up and manage undertakings' and is generally understood as to cover purchase of shares in view of cross-border business activities[132]. Moreover, the chapter on the right of establishment leaves expressly without prejudice the chapter on capital movement and *vice versa*[133].

The case law by the ECJ has done little to clarify the issue and on the contrary has very early warned that in respect to other fundamental freedoms, capital movement is a 'pre-condition' for the exercise of the right of establishment[134].

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activity. This concept must therefore be understood in its widest sense.". Hindelang emphasizes that the 'lasting an direct' link must be interpreted narrowly as to a participation allowing definite control over a certain undertaking, the reason being that this particular categorization reflects on the scope of the restriction under Article 57(1); see Hindelang, *op.cit.*, at 66-74.

[132] ECJ Judgement of 13 December 2005, in case C-411/03, SEVIC Systems AG, at para 19: " *Cross-border merger operations, like other company transformation operations, respond to the needs for cooperation and consolidation between companies established in different Member States. They constitute particular methods of exercise of the freedom of establishment, important for the proper functioning of the internal market, and are therefore amongst those economic activities in respect of which Member States are required to comply with the freedom of establishment laid down by Article 43 EC.*".

[133] Article 49(2) and 65(2) TFEU *[43(2) and 58(2) EC]* which provide no prejudice for the applicability of applicable rules on establishment / capital movement each with reference to the other Art. 49(2) TFEU; freedom of establishment "*subject to the provisions of the chapter relating to capital*"; Art. 65(2) TFEU: capital movement "*shall be without prejudice to the applicability of restrictions on the right of establishment which are compatible with this Treaty*".

[134] In the 1984 *Luisi* judgement, the ECJ remarked that since capital movement is one of the fundamental freedoms subject to the liberalization principle of Article 3 EC, and in particular that "[…] *the free movement of capital constitutes, alongside that of persons and services, one of the fundamental freedoms of the community. furthermore, freedom to move certain types of capital is, in*

Subsequent case law has oscillated between apparently opposite conclusions. Certain activities such as the payment and receipt of corporate dividends have once been treated as capital movement[135], and once as establishment[136].

On the contrary and in quite clear terms, the holding of shares in so far as it allows a certain control over the target company has been declared subject to the Chapter on the freedom of establishment[137].

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practice, a pre-condition for the effective exercise of other freedoms guaranteed by the treaty, in particular the right of establishment" at para. 21.

[135] ECJ judgement of 6 June 2000 in case C-35/98, Staatssecretaris van Financiën v B.G.M. Verkooijen, dividends paid to shareholders were treated as free movement of capital: "*Article 1(1) of Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty precludes a legislative provision of a Member State which, like the one at issue in the main proceedings, makes the grant of an exemption from the income tax payable on dividends paid to natural persons who are shareholders subject to the condition that those dividends are paid by a company whose seat is in that Member State.*".

[136] ECJ judgement of 8 March 2001, in case C-397/98, Metallgesellschaft Ltd and Others v. Commissioners of Inland Revenue, the payment of dividends to a parent company was treated as a question of freedom of establishment: "*It is contrary to Article 52 of the EC Treaty (now, after amendment, Article 43 EC) for the tax legislation of a Member State, such as that in issue in the main proceedings, to afford companies resident in that Member State the possibility of benefiting from a taxation regime allowing them to pay dividends to their parent company without having to pay advance corporation tax where their parent company is also resident in that Member State but to deny them that possibility where their parent company has its seat in another Member State.*".

[137] ECJ Judgment of 7 September 2006 in case C-470/04, N v Inspecteur van de Belastingdienst Oost/kantoor Almelo: "*Where a Community national lives in one Member State and has a shareholding in the capital of a company established in another Member State which gives him substantial influence over the company's decisions and allows him to determine its activities, as is always the case where he holds 100% of the shares, that may thus fall within the freedom of establishment (see, to that effect, Baars, paragraphs 22 and 26).*", at para. 27. In the same sense, ECJ judgement of 21 December 2004, in case C-524/04, Test Claimants in the Thin Cap Group Litigation v Commissioners of Inland Revenue: "*In accordance with settled case-law, national provisions which apply to holdings*

In the string of case on 'golden shares', national measures allowing public authorities to limit the size of shareholdings or restrict the disposal of assets in privatized companies or management rights therein have been declared to be in breach of the rules on capital movement because such measures would deter investors from cross border investments[138].

The link or rather the borderline between the freedom of capital movement and the freedom to provide service has been more recently discussed in the case of banking and activities, where a Swiss investor claimed an authorization to carry out financial loan activities. The ECJ found that in principle financial services fall under both the establishment and the capital chapter, and that in the case at hand the national measures for the supervision on financial activities affected the exercise of the freedom to provide services and therefore were to be measured against the relevant provisions in the chapter on services[139].

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by nationals of the Member State concerned in the capital of a company established in another Member State, giving them definite influence on the company's decisions and allowing them to determine its activities, come within the substantive scope of the provisions of the EC Treaty on freedom of establishment (see, to that effect, Case C_251/98 Baars [2000] ECR I-2787, paragraph 22; Case C-436/00 X and Y [2002] ECR I-10829, paragraph 37; and Case C-196/04 Cadbury Schweppes and Cadbury Schweppes Overseas [2006] ECR I-0000, paragraph 31)." at para. 27.

[138] Golden Shares case: [2002] France 483/99; Portugal 367/98, Belgium 503/99; [2003] UK 98/01 and Spain 463/00; [2005] Italy 174/04, and 463-464/04; [2006] Netherlands 182/04 and 283/04; [2007] Germany 112/05; [2009] Portugal Telecom (PTC.LB).

[139] ECJ judgement of 3 October 2006 in case C-452/04, *Fidium Finanz AG v Bundesanstalt für Finanzdienstleistungsaufsicht*, especially at para.s 43 and 45: "*43 It follows that the activity of granting credit on a commercial basis concerns, in principle, both the freedom to provide services within the meaning of Article 49 EC et seq. and the free movement of capital within the meaning of Article 56 EC et seq.* […] *45 It is apparent from the documents before the Court that the rules in dispute form part of the German legislation on the supervision of undertakings which carry out banking transactions and offer financial services. The purpose of those rules is to supervise the provision of such services and to authorise such provision only for undertakings which guarantee to*

A comprehensive look at the case law on the capital and on the establishment chapters shows that certain activities – such as shareholding and financing – can fall under the capital movement as well as the under the establishment chapter. It has therefore been argued that provisions on establishment and those on capital movement shall be applied in parallelism – and that should be the case with every cross-sectoral activity[140].

Reverting back to the focus of our interest, that is which investments are protected under the capital and which fall under the establishment chapter, we suggest that investment activities such as shareholdings, loans and guarantees amounting to a definite control over undertakings are subject to the EU provisions on establishment – that is non discrimination between Member States, but also freedom for Member States to regulate the access of foreign third country investors. On the other hand, investment activities such as speculative shareholdings and short-term loans are more arguably subject to the EU provisions on capital movement – that is non discrimination between Member States as well as to and from third countries.

3.1.3. Substantial Protection

As long as they are covered by the capital chapter under the EU treaties, foreign investments (*i.e.* shareholding, contracts and credits on a short term and not involving a control over business entities) from and to third countries enjoy the

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conduct such transactions properly. Once the operator's access to the national market has been authorised, the preparation with a view to the loan made and the loan contract signed, that contract is carried out and the amount of the credit is actually transferred to the borrower."

[140] Correctly Hindelang rejects arguments on the exclusive application of one chapter or of another especially in the case of "*economic activities that cannot be detangled into single components*" where the exclusive application of one chapter "*would mean refusing to see the uniquely covered economic aspect [the object- or the personal related facet] and potentially exposing it to unjustified discrimination or hindrance*" at 110-111.

substantial protection afforded by EU law, which third country nationals can directly claim on equal grounds before European courts[141].

Article 63 TFEU *[56 EC]* prohibits 'all restrictions on the movement of capital'. Although there is no express reference to discrimination, the recognized general convergence of the liberalization model of the other three freedoms calls for the application of the direct/indirect test for discriminatory measures as well as the hindrance test for non-discriminatory measures[142].

Thus a national rule exempting nationals from an authorization to purchase real estate has been declared a 'discriminatory restriction against nationals of other member States in respect of capital movement'[143], unless other express derogations apply.

In the golden shares case, where national measure have no discriminatory character since they usually apply to both nationals and non-nationals, the ECJ adopted a restriction-based approach and declared that measures to the effect of limiting the acquisition of shareholdings have restrictive effects on the capital market and as such contrary to capital movement.

Based on the clear wording of Article 63 TFEU *[56 EC]*, the same discrimination and hindrance tests applies in a third country context[144]. The same test is applicable in

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[141] See the ECJ judgement of 3 October 2006 in case C-452/04, *Fidium Finanz AG v Bundesanstalt für Finanzdienstleistungsaufsicht*, where a Swiss company claims protection under Article 56 EC.

[142] See Barnard, Catherine. The Substantive Law of the EU: The Four Freedoms. 2nd ed. Oxford: Oxford University Press, 2007. At 536; and Hindelang, Steffen. The Free Movement of Capital and Foreign Direct Investment: The Scope of Protection in EU Law. Oxford: Oxford University Press, 2009. At 115.

[143] See ECJ Judgement of 1 June 1999 in case C-302/97, *Klaus Konle v Austria*; and ECJ Judgement of 13 July 2000 in case C-423/98, *Alfredo Albore*.

[144] Hindelang could not find no valid teleological argument against the unilateral promise of free capital movement to and from third countries, nor grounds for excluding comparability of intra- and

relation to capital from third country, so that the access, exit and transit shall be free of any restriction.

As a consequence, once a third country investment falling under the EU capital chapter (*i.e.* shareholding, contracts and credits on a short term and not involving a control over business entities) is placed within the EU (as well as an investment from a Member State has moved to a third country market) Member States are not allowed to treat them less favourably than a comparable domestic investment.

3.1.4. Exceptions and Restrictions

The non-discriminatory treatment awarded to investment under the capital movement chapter is not without exceptions, nor immune from restrictions. In particular, additional special restrictions are contemplated in relation to a third countries context.

Exceptions Applicable to Capital Movement between Member States As Well As From and To Third Countries

Exceptions to the capital movement applicable to an *intra*-EU as well as to a third country context under Article 65(1) TFEU *[58(1) EC]* expressly refer to: (i) differentiated tax regimes between national and non-nationals; (ii) national measures preventing infringement of national laws or regulations; (iii) procedures for gathering administrative and statistical information; (iv) public order exception[145]. A mitigation

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third country investment situations (*e.g.* as to level of taxation or of social security). See Hindelang, Steffen. The Free Movement of Capital and Foreign Direct Investment: The Scope of Protection in EU Law. Oxford: Oxford University Press, 2009. At 197-200.

[145] Article 8(1)(b) relating to tax provisions distinguishing residents and non-residents does not apply to a third country investor, in so far as tax treatment of foreign investments fall under exclusive competence of Member States.

to the exception is provided under Article 65(3) TFEU *[58(3) EC]* whereby they shall not constitute a means of 'arbitrary discrimination or disguised restriction' to capital movement – with a plain textual reference to the limits of the general exception to free movement of goods under Article 36 TFEU *[30 EC]*.

The similarities with the language used for exceptions to the other three fundamental freedoms, has called for a convergent interpretation of general exceptions to the fundamental freedoms and namely: strict interpretation, necessity and proportionality[146]. Accordingly the Court was inspired by the goods case when it accepted national security as a legitimate ground for 'golden' shares in foreign energy companies which entitled the government as a shareholder to oppose the

[146] The essentials of the jurisprudence on general exceptions was already applied in Casati, at para. 27. ECJ judgement of 14 March 2000 in case C-54/99, *Association Église de Scientologie de Paris et al. v The Prime Minister*, offered a more detailed list of terms and conditions for application of the general exceptions: "*17. It should be observed, first, that while Member States are still, in principle, free to determine the requirements of public policy and public security in the light of their national needs, those grounds must, in the Community context and, in particular, as derogations from the fundamental principle of free movement of capital, be interpreted strictly, so that their scope cannot be determined unilaterally by each Member State without any control by the Community institutions (see, to this effect, Case 36/75 Rutili v Minister for the Interior [1975] ECR 1219, paragraphs 26 and 27). Thus, public policy and public security may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society (see, to this effect, Rutili, cited above, paragraph 28, and Case C-348/96 Calfa [1999] ECR I-11, paragraph 21). Moreover, those derogations must not be misapplied so as, in fact, to serve purely economic ends (to this effect, see Rutili, paragraph 30). Further, any person affected by a restrictive measure based on such a derogation must have access to legal redress (see, to this effect, Case 222/86 Unectef v Heylens and Others [1987] ECR 4097, paragraphs 14 and 15). 18. Second, measures which restrict the free movement of capital may be justified on public-policy and public-security grounds only if they are necessary for the protection of the interests which they are intended to guarantee and only in so far as those objectives cannot be attained by less restrictive measures (see, to this effect, Sanz de Lera and Others, cited above, paragraph 23)*." at para.s 17 and 18.

disposal of strategic assets contrary to national energy policy requirements (such as the *minimum* levels of energy supplies)[147].

Exceptions Exclusively Applicable to Capital Movement To and From Third Countries

The exception to the free movement of capital under Article 64(1) TFEU *[57(1) EC]* are applicable in relation to activities carried out solely to or from third countries and provides grandfathering rights on restrictions adopted by the EU or by Member States before the start of the second stage of the Economic and Monetary Union.

The described exception takes into account that in certain areas of capital movement (involving namely: direct investment and real estate, establishment, financial services, securities in capital markets) Member States have exercised a certain control over foreign capital movement in and from their territory[148].

While there is no obligation to liberalize for Member States grandfathered rights, this could be done by the Parliament and the Council under Article 64(2) TFEU *[57(2) EC]*, including by means of international agreements[149]. In this respect, the latter provision is an anticipation of an external competence to negotiate market access for investment amounting to capital movement with third countries. In practice, reference to Article 57(2) has been evoked in relation to the joint conclusion of

[147] ECJ judgment of 4 June 2002 in case C-503/99, Commission of the European Communities v Kingdom of Belgium, with reference to earlier ECJ judgment of 10 July 1984 in case 72/83, Campus Oil Limited and others v Minister for Industry and Energy and others.

[148] The provision under Article 64(1) TFEU appears to mirror the provision under Article 351(1) TFEU on international agreements entered into by Member States with third countries before accession to the EU. Article 351(2) and (3) provide an obligation on Member States to eliminate incompatibilities, which has been examined in detail by the ECJ in relation to the duty of loyal cooperation under Article 4(3) TFEU *[10 EC]*. See in more detail below para. 1.4.1. above.

[149] Hindelang, Steffen. The Free Movement of Capital and Foreign Direct Investment: The Scope of Protection in EU Law. Oxford: Oxford University Press, 2009. At 276-304.

Partnership and Cooperation Agreements, WTO-related agreements as well as the Energy Charter Treaty and Protocols.

While Article 63(2) TFEU *[57(2) EC]* provides therefore a liberalization instrument, Article 66 TFEU *[59 EC]* on the other hand provides an instruments for the outright restriction of capital movement from or to third countries for the Council upon consultation with the European Central Bank to take short-term emergency measures where large flows of investment may cause serious difficulties for the Economic and Monetary Union. The provisions may find application especially in relation to highly speculative financial movements to and from third countries. Form and preconditions for the adoption of the safeguards measures are not further specified and shall be determined on a case by case basis, however they are limited to a period of six months and shall be subject to a necessity test and to the general principles of EU law[150].

Finally Article 75 TFEU *[60 EC]*, provided a political instrument to respond to political crisis when by means of urgent financial sanctions adopted under the Area of Freedom Security and Justice[151].

3.2. EU Investment To and From Third Countries

Notwithstanding the clear statement in favour of the liberalization of foreign investment falling under the TFEU chapter on capital movement, investment to and from third countries – to different degrees – are limited by non-discrimination principle under EU law[152].

[150] Hindelang, Steffen. The Free Movement of Capital and Foreign Direct Investment: The Scope of Protection in EU Law. Oxford: Oxford University Press, 2009. At 305-310.

[151] Hindelang, Steffen. The Free Movement of Capital and Foreign Direct Investment: The Scope of Protection in EU Law. Oxford: Oxford University Press, 2009. At 311-326.

[152] Article 18 TFEU *[12 EC]*.

This is true in two different directions, when one considers 'inbound' investment from third countries and 'outbound' investment to third countries.

The MFN treatment usually granted to investment from third countries under the applicable BIT has the effect to extend to third country nationals the whole treatment granted by the host Member States to EU nationals. Now, the EU legal order is based on common and reciprocal rules which make this circumstance - although lawful *per se* - undesirable as it widens without further restrictions the treatment granted to the foreign investor. This may be limited by means of a so-called REIO clause which excludes from the scope of MFN treatment the rights and obligations arising from membership to the EU as a regional economic integration organization (REIO).

From the point of view of the EU investor operating in third countries instead, the principle of non discrimination based on nationality, questions the legitimacy of nationality clauses granted under bilateral treaties, whereby the bilateral treaty regime is limited to nationals of the signatory Member State and may be refused to nationals of other Member States although established in the same Member State[153]. While it is true that the access and treatment of an EU investor in a third country fall for most part outside the territorial scope of EU law and has been so far the object of negotiations between third countries and each Member States, still Member States are under a duty to act consistently with EU law. Accordingly, Member States are under a duty to negotiate with third countries the extension of the benefits accruing

[153] See in particular ECJ judgement of 27 September 1988 in case 235/87, Annunziata Matteucci v Communauté française of Belgium and Commissariat général aux relations internationales of the Communauté française of Belgium: "*even where the agreement falls outside the field of application of the Treaty, every Member State is under a duty to facilitate the application of the provision and, to that end, to assist every other Member State which is under an obligation under Community law.*". The same point is also discussed in the Saint Gobain, Gottardo, and Open Skies cases.

to their nationals under international agreements to nationals of other Member States who are established in their territory[154].

3.3. A String of Conflicts

The protection of foreign investment under EU law and international law has been under the spotlight of the Commission for quite some time. Very early attention was drawn by the Commission to nationality clauses in the field of air services granting air rights to companies incorporated in one Member State with the exclusion of companies established in the same. Only on occasion of the 2002 enlargement, it had an opportunity to discuss with candidate countries the renegotiation of existing agreements concluded with third countries and among others, the BITs concluded with the U.S.A. and Canada. More recently, infringement proceedings against Austria, Sweden and Finland have been discussed before the ECJ.

3.3.1. The 2002 Air Service Agreements

The case of the Air Service Agreements concluded by Member States with third countries is an example of the progressive expansion of EU implied exclusive external

[154] See ECJ judgement of 5 November 2002 in case C-466/98, *Commission v United Kingdom* (Open Skies). A different reading of the judgement and a different conclusion on the non-discrimination principle is discussed in Wehland, Hanno. "Intra-EU Investment Agreements and Arbitration: Is European Community Law an Obstacle?." *International and Comparative Law Quarterly* 58: 297-320. Still the author seem to refer to an extension to all nationals of other Members States rather that to nationals of other Members States established in the Member States concerned, which extends enormously the scope for application of the non-discrimination principle.

competence over time in a specific sector of foreign investment[155].

Air transport is mentioned in the Treaty only in order to exclude it from the scope of the common transport policy under Article 100 TFEU *[Article 80 EC]* or from the scope of the freedom to provide services under Article 58 TFEU [Article 51].

Protection of sovereign rights and strategic consideration (in relation to both civil and military aviation) has traditionally led Member States to maintain international regulation of air service under strict national control by means of bilateral agreements. This notwithstanding, the Community has constantly expanded over time the application of competition rules to the air transport sector, as well as improved internal market regulation on security, safety, environmental protection, passenger rights and pricing of air services[156].

Each one of the Member States concluded a bilateral air service agreements with each one of the interested third countries, whereby the parties identified the national airline companies entitled to enjoy air traffic rights under the agreement. On the EU level, besides an early Council decision that Member Stats shall inform and consult the Commission in relation to air transport agreements concluded with third countries, the Commission had published a number of communications claiming an exclusive power to carry out negotiations on air transport with third countries[157].

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[155] The entry into force in March 2008 of the EC-US Air Transport Agreement – the so-called 'Open Sky Agreement' - represents an example of gradual conquest by the Community of external exclusive competence in an area of previously shared competence, and one which is possibly conducive to further developments in relation to competence and procedural rules of international agreements concluded by the Community.

[156] See case law: ECJ, 4 April 1974, Case 167/73, *Commission v. France*, (1974) ECR, 359, as later confirmed by ECJ, 30 April 1986, Joined Cases 209-213/84, *Ministère Public v. Lucas Asjes et al.*, in (1986) ECR, 1425. See first three air transport packages (1987, 1990 and 1992) for the liberalization of the single market for air services.

[157] Respectively Council Decision (EEC) 80/50, COM(90)17 and COM(92)434. See Article 1 of Council Decision (EEC) 80/50: "*The Member States and the Commission shall consult each other, at the*

The position of the Commission was ignored by Member States which between 1992 and 1994 separately concluded a number of bilateral air service agreements with the United States. The Commission requested the Council a negotiating mandate which was finally granted in 1996, but was of no avail. In 2000, the Commission initiated against UK, Denmark, Sweden, Finland, Belgium, Luxemburg, Austria and Germany infringement proceedings which were ripe for discussion before the European Court of Justice in 2002[158].

The judgement of the ECJ followed two arguments: the power of the Community to conclude air service agreements – which was dismissed - and the nationality clause[159].

In fact, bilateral air service agreements concluded by Member States provided a nationality clause whereby the United States granted authorizations exclusively to airlines established in one Member State which are owned by nationals of the same

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request of a Member State or the Commission, in accordance with the procedures laid down in this Decision: (a) on air transport questions dealt with in international organization ; and (b) on the various aspects of developments which have taken place in relations between Member States and third countries in air transport, and on the functioning of the significant elements of bilateral or multilateral agreements concluded in this field".

[158] The cases were discussed on the same date. ECJ, 5 November 2002, Cases C-466 to 469 and 471, 472, 475, 476/98, *Commission v. United Kingdom, Denmark, Sweden, Finland, Belgium, Luxemburg, Austria, Germany*.

[159] The Commission claimed exclusive power on the basis of the EART doctrine: common rules in the field of air services would have been affected by Member States concluding international agreements. On the other hand, the Commission claimed that nationality clauses were contrary to the freedom of establishment. The Court recognized that only a limited number of common rules would have been affected by bilateral agreements, and rejected the claim on exclusive competence while it upheld the claim that nationality clauses were discriminatory and contrary to the freedom of establishment. The Court held that the freedom of establishment shall apply in all fields governed by Community law even if in the specific area it falls under the competence of Member States, because all Member States shall exercise their power in a manner consistent with Community law.

Member State. In other words, the United States would be entitled to refuse authorizations to airlines established in one Member State owned by nationals of another Member States.

The Court found that even in areas where there is no EU legislation, Member States are bound to exercise their powers consistently with EU law and namely with the prohibition of discrimination based on nationality in relation to persons established on their territory. Accordingly, nationals of Member States who are established in the host Member State shall enjoy the same treatment granted to nationals, including in relation to international agreements concluded with third countries[160]. In this respect, the judgement declares that nationality clauses in bilateral agreement are contrary to EU law.

The Commission built upon the declaration of the ECJ and invited Member States to terminate bilateral air service agreements with the United States while at the same time requested the Council a broader negotiating mandate and proposed a regulation on negotiation of bilateral air service agreements with third countries[161].

The Council acceded the proposal of the Commission and approved Regulation 847/2004, requiring Member States to amend nationality clauses, and giving mandate to the Commission for the conclusion of so-called 'horizontal agreements'

[160] ECJ judgement in case C-466/98, Commission v UK (Open Skies), at para. 46: "*The Court has thus held that the principle of national treatment requires a Member State which is a party to a bilateral international treaty with a non-member country for the avoidance of double taxation to grant to permanent establishments of companies resident in another Member State the advantages provided for by that treaty on the same conditions as those which apply to companies resident in the Member State that is party to the treaty (see Saint-Gobain, paragraph 59, and judgment of 15 January 2002 in Case C-55/00 Gottardo v INPS [2002] ECR I-413, paragraph 32).*".

[161] See, respectively: Communication from the Commission on the consequences of the Court judgments of 5 November 2002 for European air transport policy [COM(2002) 649 final - not published in the Official Journal]; Communication from the Commission on relations between the Community and third countries in the field of air transport [COM(2003) 94 final - not published in the Official Journal].

with third countries and of an 'Open Sky' agreement with the United States[162]. By means of the horizontal agreements the Commission is meant to amend and substitute nationality with community clauses in all existing air service agreements between one third country and all Member States in a single negotiation venue[163].

The EC-US Open Sky Agreement concluded in 2007 provides a Community instead of a nationality clause, whereby Community airlines can operate air services between the European Community and the United States[164].

The Commission pushed the *momentum* gained in the with the external aviation policy with the judgement in the case Open Skies also in relation to neighbouring countries where it envisaged the creation of a so-called Common Aviation Area with southern and eastern neighbouring countries[165], and in relation to the most dynamic countries[166].

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[162] Regulation (EC) No 847/2004 of the European Parliament and of the Council of 29 April 2004 on the negotiation and implementation of air service agreements between Member States and third countries [OJ L 157 of 30.04.2004].

[163] As of December 2008, one hundred countries have accepted Community designation to negotiate horizontal agreements, and in fact 839 air service agreements have been amended and brought in conformity with the decision of 5 November 2002. See the complete list on the Commission's website: <http://ec.europa.eu/transport/air/international_aviation/doc/status_table.pdf>.

[164] Decision 2007/339/EC of the Council and the Representatives of the Governments of the Member States of the European Union meeting within the Council, of 25 April 2007, on the signature and provisional application of the Air Transport Agreement between the European Community and its Member States, on the one hand, and the United States of America, on the other hand.

[165] Communication from the Commission - Common aviation area with the Neighbouring Countries by 2010: Progress Report, COM(2008)0596 final.

[166] Communication from the Commission of 12 September 2005 - Developing a Community civil aviation policy towards New Zealand [COM(2005) 407 - not published in the Official Journal]; Communication from the Commission of 5 September 2005 - Strengthening aviation relations with Chile [COM(2005) 406 - not published in the Official Journal]; Communication from the Commission of 14 March 2005 - Developing a Community civil aviation policy towards the People's Republic of China - strengthening cooperation and opening markets [COM(2005) 78 - not published in the Official

The declaration that nationality clauses - reserving rights to companies owned by nationals - in bilateral agreement are contrary to EU law is potentially applicable in other sectoral areas of external relations, in the field of foreign investment. The subsequent initiatives by the Commission also show how infringement proceedings are a bargaining tool to receive a broader negotiating mandate by Member States *vis-à-vis* third countries, in areas where the EU has no exclusive external powers. The case is also an example of regulatory practice aimed at coordinating information on the external activity of Member States[167].

3.3.2. BITs Concluded by Central and Eastern European Countries With the U.S.A. Before Accession

In view of the 2004 accession of Central Eastern European Countries ('CEE countries', namely: Czech Republic, Estonia, Lithuania, Latvia, Poland, Slovakia, Bulgaria and Romania) to the EU, the European Commission pressed the candidate countries to either terminate or to renegotiate some of the clauses in their BITs with third countries, especially those concluded with the U.S.A. and Canada[168].

Under the 2003 Accession Agreement, the eight CEE countries were under a general obligation to harmonize earlier agreements with EU law in order to eliminate possible incompatibilities by means of negotiation of amendments, termination and

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Journal]; Communication from the Commission to the European Parliament and the Council of 14 March 2005 - A Framework for Developing Relations with the Russian Federation in the Field of Air Transport [COM(2005) 77 - not published in the Official Journal].

[167] Under Regulation 847/2004, the Community is informed of agreements entered into by Member States with third countries and is allowed to control consistency with EU law. This regulatory pattern has been strongly supported by the Commission which envisages replicating it in the field of trade in services other than transport. See Proposal for a Council Regulation on the negotiation of agreements on trade in services other than transport, COM(2005)326 final of 20 July 2007.

[168] This was not considered necessary with regard to the Friendship, Commerce and Navigation treaties the US had concluded with almost all of the pre-2004 EU Member Sates.

withdrawal. The 2003 Accession Agreement required the CEE countries to '*withdraw from any free-trade agreement with third countries'* as well as to '*take all appropriate steps to eliminate the incompatibilities*' between earlier agreements concluded with third countries and the accession agreement[169].

The amendments to the BITs concluded with the U.S.A. were negotiated by the Commission alongside the CEE countries on one side, and the U.S.A. on the other. Negotiations brought to the conclusion of a *Memorandum* of Understanding ('MoU'), which was subsequently ratified by all signatories under the form of Protocols annexed to the existing BITs[170].

Chapter for negotiation were articulated according to the specific incompatibilities between EU law and the BITs in relation to the definition of investment and foreign

[169] Reference is to the Act Concerning the Conditions of Accession annexed to the 2003 Accession Agreement signed in Athens on 16 April 2003, Article 6(10): "*10. With effect from the date of accession, the new Member States shall withdraw from any free trade agreements with third countries, including the Central European Free Trade Agreement. To the extent that agreements between one or more of the new Member States on the one hand, and one or more third countries on the other, are not compatible with the obligations arising from this Act, the new Member State shall take all appropriate steps to eliminate the incompatibilities established. If a new Member State encounters difficulties in adjusting an agreement concluded with one or more third countries before accession, it shall, according to the terms of the agreement, withdraw from that agreement*.".

[170] European Commission/US Trade Representative, Understanding concerning certain US-BITs (MOU), September 22, 2003 – *Memorandum* of Understanding (MoU) between the United States, the European Commission and Acceding and Candidate Countries for accession to the European Union. Press release by the EUROPEAN UNION - Delegation of the European Union to the USA No. 59/03 of 23 September 2003, "EU/NR 59/03: EU Commission, Eight Acceding Countries and US Sign Bilateral Investment Understanding". Burgstaller, Markus. "European Law and Investment Treaties." *Journal of International Arbitration* 26, no. 2 (2009): 181-216; Radu, Anca. "Foreign Investors in the EU—Which 'Best Treatment'? Interactions Between Bilateral Investment Treaties and EU Law." *European Law Journal* 14, no. 2 (2008): 327. Koutrakos, Panos. EU International Relations Law. Modern studies in European law v. 9. Oxford: Hart, 2006.

investor, to the scope of non-discriminatory rules, to performance requirements and to capital transfer clauses. The MoU in turn addressed specific sections on: (i) overlapping scope for application; (ii) non-discrimination; and (iii) capital movement[171]; each one proposing a consistent interpretation of, or an amendment to, the relevant clauses under the BIT.

(i) Overlapping Scope of Application

The definition of investment under the relevant BIT covers 'enterprises' owned by nationals of the signatory States. As an effect, U.S. companies which are established in the host State under Article 54 TFEU *[48 EC]* as well as those incorporated in the host State and whose shareholders are U.S. nationals, would enjoy at the same time protection under the EU Treaties as well as under the U.S.A. – CEE countries BITs[172]. The possibility to 'choose' applicable law and dispute settlement system under one or the other international legal instrument were considered by both the Commission and host countries as undesirable, because leading to circumvention of restrictions on capital movements under Article 64 TFEU *[57 EC]*.

The MoU provided a clarification on the scope of EU law whereby '*Article* [48 EC] *does not prevent the EC legislator to provide for different treatment of third country companies and firms according to their ownership in the pursuit of a common policy or when adopting measures under specific treaty provisions (*e.g.*, Article* [57.2 EC]*). The provision would however not allow the EC legislator to*

[171] For an overall analysis of the case of the U.S.A. - CEE countries case, see Radu, A., 'Foreign Investors in the EU – Which 'Best Treatment'? Interactions Between Bilateral Investment Treaties and EU Law' (2008) 14 *ELJ* 237-260.

[172] The U.S.A. model BIT usually defines nationality according to the criterion of ownership and control, leading to the same practical result that a company established under U.S. law and controlled by a national of the State signatory to the BIT is still considered an investor subject to the applicable bilateral investment agreement.

authorise individual Member States to adopt measures which are not consistent with that Article'.

(ii) Non-Discrimination

In absence of any derogation, the MFN clause under the relevant BITs would extend to U.S. investors - whether or not established in the EU and therefore also to companies incorporated under U.S. law - the entire body of EU law applicable to EC companies. The MoU made sure that a REIO clause was appropriately drafted and included in the BITs so as to exclude from the scope of MFN clauses the advantages accorded by virtue of the membership in the EU – including obligations owed to nationals of third countries[173].

In addition to that, since non-discrimination under EU law is based on national treatment [*renvoi*], also national treatment clauses under BITs – in absence of specific derogations - can lead to the conclusion that all discrimination between EC and U.S. companies, regardless whether under EC or national law or even *de facto*, are automatically forbidden[174]. As a consequence, by virtue of national treatment under the applicable BIT, U.S. companies would be entitled to access activities which would otherwise prohibited or restricted to nationals of third countries.

In this sense, the MoU made also sure that a REIO clause providewd an exception to the whole scope of the BIT agreement in the following terms: '*The Parties acknowledge that the terms of the customs union or free trade area exception found at Article [ ] apply to all obligations of a Party by virtue of its membership in an*

[173] In this way the REIO clause also excluded the regimes granted by the EU to third countries, such as for instance the ACP countries and the Euro Mediterranean partners under the respective investment chapter of the relevant FTA.

[174] Examples are usually drawn from the banking, ITC and energy regulated sectors and would include also performance requirements.

economic integration agreement that includes a free trade area or customs union (e.g., the European Union), including obligations owed to nationals or companies of any third country'.

(iii) Capital Movements

The free transfer of capitals in relation to investment protected under the relevant BITs would render more difficult the adoption by the Council of restrictive measures *vis-à-vis* third countries for the safeguard of the economic and monetary union, or for the urgency to comply with common foreign and security policy measures[175].

In this respect, most of the BITs in question provided for a national security clause, which could be interpreted to include essential security interests of the EU. Nonetheless and in order to enhance legal certainty at the international level, a clause to the effect to give express leeway for adoption of capital movements restrictions would was discussed in the MoU and left for further consultations between the parties[176].

[175] See Articles 65(1), 66 and 75 TFEU *[58(1), 59 and 60 EC]*.

[176] Annex B to the MoU included an exchange of letters to the effect of clarifying the scope for the protection of 'essential security interests'; '*I have the honour to confirm the shared understanding of the Government of [Acceding or Candidate Country] and the Government of the United States of America (collectively, the 'Parties') that paragraph [ ] of Article [ ] of this Treaty reserves the right of each Party to take measures that it considers necessary for the protection of its own essential security interests. I have the further honour to confirm the Parties' understanding that, in the case of [Acceding or Candidate Country], these interests may include interests deriving from its membership in the European Union.*'.

3.3.3. BITs Concluded by Austria, Sweden and Finland With Third Countries Before Accession

The three judgments rendered by the ECJ in 2009 have their roots in infringements proceedings initiated by the Commission in 2004 with a view that the provisions on the free transfer of payments under the BITs concluded by Austria, Sweden and Finland with third countries were contrary to Article 57(2), 59 and 60 EC [now Articles 64(2), 66 and 75 TFEU][177].

The central and distinctive feature in the decision is that the above mentioned urgent and safeguard restrictions to capital movement have never been adopted by the Council, and that therefore no incompatibility exists *in concreto* between the transfer clauses and any Council decisions.

Therefore, although the provisions at issue aimed at facilitating the movement of capital to and from third countries, the Commission maintained that the absence of any provisions reserving the right to apply the restrictions on capital movement which may be adopted by the Council under Articles 57, 59 and 60 EC '*is liable to make it more difficult, or even impossible, for that Member State to comply with its Community obligations*'.

Partially disregarding the AG opinion which had found Member States in breach of the duty of loyal cooperation under Article 10 EC in a matter of shared external competence[178], the judgement of the Court pointed out that '[i]*n order to ensure the*

[177] ECJ judgements of 3 March 2009 in case 205/06, *Commission v Austria*; in case C-249/06, *Commission v. Sweden*; and judgement of 19 November 2009 in case C-118/07, *Commission v Finland*.

[178] Opinion of Advocate General Poiares Maduro delivered on 10 July 2008 in case C-205/06, *Commission v Republic of Austria*; and in Case C-249/06, *Commission v Kingdom of Sweden*. In particular, the opinion proposes the analogy that Member States shall not jeopardize a Community objective, in the same way as they shall not compromise the result of a Directive during the time for its implementation. Accordingly BITs concluded by Austria and Sweden were found liable to seriously compromise Community action.

effectiveness of those provisions, measures restricting the free movement of capital must be capable, where adopted by the Council, of being applied immediately'[179].

In this respect, the Court found that in the first place the international agreements did not reserve for the Member States the right to apply the measures in question, and that '*there is no international law mechanism which makes that possible*".

In particular, it rejected the defence by Austria and Sweden that the expressions '*without undue delay*' and '*in accordance with national legislation*' were able to limit the free transfer clause so to allow the Member State to timely comply with the EC measures. The same was held in the Finland case, where the language more elaborately referred to '*the limits authorized by its own law and decrees and in conformity with international law*'[180].

The Court also dismissed the defence that international law mechanisms such as renegotiation, suspension or termination of international agreements would make it possible for Member States to comply with their obligation under the EC Treaty to give effect to the safeguard and urgent measures adopted by the Council. Leaving aside renegotiations, which would indeed leave compliance by Member States to the goodwill of the counterpart, the Court was of the view that the total or partial

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[179] Para 36 of the ECJ judgements of 3 March 2009 in case 205/06, *Commission v Austria*.

[180] See para. 5 of ECJ judgement of 19 November 2009 in case C-118/07, Commission v Finland describing the transfer clause occurring in most BITs concluded by Finland: '*Every Contracting Party guarantees under all circumstances, within the limits authorized by its own law and decrees and in conformity with international law, a reasonable and appropriate treatment of investments made by citizens or companies of the other contracting party.*'. The Court dismissed the point in para. 41: "*In that context, it is, to say the least, debatable whether the provision which guarantees the protection of investments within the limits authorised by the laws of the Contracting Party contained in the bilateral agreements concerned would allow either party to limit payment entitlement pursuant to decisions – whether national or otherwise – taken after the entry into force of the agreements, especially as in some agreements it is also stated that each Contracting Party is required to act 'in accordance with international law'.* ".

suspension or denunciation of the agreements '*is too uncertain in its effects to guarantee that the measure adopted by the Council be applied effectively.*'[181].

Following the suggestion by Austria to amend existing agreements by way of introduction of a REIO clause, the Court specified that such a clause '*which would reserve certain powers to regional organizations and would, therefore, make it possible to apply any measures restricting movements of capital and payments which might be adopted by the Council* […] *should, in principle, as the Commission admitted in the hearing, be considered capable of removing the established incompatibility* […]'.

The Court in fact adopted an effectiveness test (rather than a competence test as suggested by the AG) to find that the transfer clause in the BITs caused EU action for the restriction of capital movement to and from third countries to lose its exceptional, urgent and immediate effects and that therefore it amounted to a breach of the EU treaties[182].

In the language of the Court, the effectiveness, or *effect utile*, test should not extend to require action in relation to any earlier international treaty concluded by Member States. It would be to stretch too much the argument to maintain that any 'potential' conflict with EU law would require Member States to renegotiate or terminate their earlier international agreements. Instead, the effectiveness is linked to the urgent and exceptional nature of the restrictions to capital movements at issue. While this is acceptable in relation to measures under Articles 59 and 60, it appears less justified in relation to Article 57(2) where there is no express mention of the urgent character of the 'backward' measures adopted by the European Parliament and by the Council.

[181] Para. 40 of the judgement in case C-205/06; para. 41 of the judgement in case C-249/06.

[182] Para. 45 of the judgement in case C-205/06: '*It follows from the foregoing that, by not having taken appropriate steps to eliminate incompatibilities concerning the provisions on transfer of capital contained in the investment agreements entered into with the Republic of Korea, the Republic of Cape Verde, the People's Republic of China, Malaysia, the Russian Federation and the Republic of Turkey, the Republic of Austria has failed to fulfil its obligations under the second paragraph of Article 307 EC*'.

The abstract character of the incompatibility leaves space for some further discussion. As a matter of fact, when the Council decides restrictive measures, the Member State would find itself in the position to choose between complying alternatively with the BIT or with the EC measures adopted under the capital chapter. The Court decided to sanction the mere possibility of a choice, regardless that *in concreto* the Member States may decide to violate the BIT and to comply with the measures adopted by the Council[183].

As it has been observed, the reading of the judgement betrays distrust to the mechanisms of international law – especially so in relation to the suspension or termination of an international treaty based on a fundamental change of circumstances pursuant to Article 62 VCLT[184].

Such principle of general international law is not a '*controversial point of international law*', as suggested by the AG insisting on the incompatibility between any international agreement and EU law.

It is in the structure of Article 351 TFEU *[307 EC]* to find a balance between the respect of earlier agreements and the duty to eliminate incompatibilities. To dismiss international law without further ado would in this sense appear an excessive disregard of such a balance.

To this end, it is worth recalling a judgement on a preliminary ruling, where the ECJ admitted that the incompatibilities between earlier treaties and EU law could be eliminated by all available means in compliance with international and EU law, including consistent interpretation[185]. The language of the transfer clauses under the BITs examined by the Court to compliance with national legislation, including EU law,

[183] This position appears consistent with the decisions in the two judgements of 4 July 2000, C-62/98 and C-84/98, Commission v Portugal where the Court rejected the Portuguese defence that the agreements were not applied anymore.

[184] Koutrakos, Panos. "Case C-205/06, Commission v Austria." Common Market Law Review 46 (2009): 2059-2076.

[185] ECJ judgement of 2003 in Case C-216/01, Budejovicku Budvar v Rudolf Ammersin GmbH.

would have left enough space to argue before Courts that an urgent and exceptional measure by the Council would have the effect to suspend the application of the transfer clause under the BIT.

It is finally suggested that consistent interpretation and general international law remedies such as the suspension or termination based on a fundamental change in circumstances, would discharge the Commission and Member States from heavy and repetitive work, and would leave it to 'private enforcement'. The implications of the judgement, among others, are that the incompatibility between BITs and EU law are not limited to the cases at issue and that the Commission may either initiate further proceedings or take further action such as obtain a collective mandate to renegotiate transfer clauses in earlier agreements[186].

[186] Para. 12 of the C-249/06: "*It must therefore be stated that, in accordance with the second paragraph of Article 307 EC, where necessary, the Member States must assist each other with a view to eliminating the incompatibilities established and must adopt, where appropriate, a common attitude. In the context of its duty, under Article 211 EC, to ensure that the provisions of the Treaty are applied, it is for the Commission to take any steps which may facilitate mutual assistance between the Member States concerned and their adoption of a common attitude.*".

PART III – CONSTITUTIONAL OUTLOOK : THE TREATY OF LISBON

TOWARDS GREAT ER COHERENCE ?

CHAPTER 4. INTERNATIONAL INVESTMENT AGREEMENTS CONCLUDED BY THE EU WITH THIRD COUNTRIES – EXPANSION AND CO-OPERATION

SUMMARY: 4.1. External Competence in the Field of Foreign Direct Investment under the EC Treaty; *4.1.1. Intertwined : Common Commercial Policy, Capital Movement and Foreign Direct Investment under the EC Treaty; 4.1.2. The Scope of Foreign Investment Policies under the EC Treaty;* 4.2. Lisbon : Towards Greater Coherence?; *4.2.1. Common Commercial Policy under Article 207 TFEU; 4.2.2. An Exclusive Competence with a Shared Exercise; 4.2.3. Possible Real Life Scenarios.*

The extent of EU external trade relations has long been a battleground between the EU and Member States. This chapter aims at giving an account of vertical allocation of competences in the field of the protection of foreign investment under the EC Treaty as last amended by the Treaty of Nice (4.1.) as well as under the TFEU as amended by the Treaty of Lisbon and the consequences of a progressively expanding common commercial policy in relation to the competence to conclude with third

countries future international investment agreements and in relation to the existing ones (4.2.)[187].

4.1. External Competence in the Field of Foreign Direct Investment under the EC Treaty

Limited by the restraints of conferred powers, the EU was originally entrusted with exclusive external competence in the field of custom union under Articles 25-27 EC as well as in of the field of common commercial policy under Articles 131-134 EC.

The custom union is one common market policy regarding imports and exports between Member States aiming at the elimination of custom duties and quantitative restrictions between them[188]. In its external dimension and in relation to third countries, it requires the adoption of a common custom tariff applicable to products imported in the internal market[189].

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[187] The vertical axis refers to the allocation of powers between the EU and the Member States; while the horizontal axis refers to areas of external relations covered by specific rules such as the Common Foreign and Security Policy (CFSP) under Title V of the EU Treaty as amended by the Treaty of Nice, now under the Chapter 2 of Title V of the EU Treaty as amended by the Treaty of Lisbon.

[188] Title I (Free Movement of Goods) of Part III (Community Policies) of the EC Treaty, in the version before the Amsterdam Treaty still provided for a Common Custom Tariff between Member States for the gradual abolition of custom duties between Member States. Article 26 EC mentions that the Council shall fix common custom duties.

[189] The Common Customs Tariff is the external tariff applied to products imported into the Union. The Integrated Tariff of the European Communities is referred to as TARIC, which incorporates all Community measures applied to goods imported into and exported out of the Community. The legal base for the TARIC is Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature (so-called Combined Nomenclature) and on the Common Customs Tariff, as amended. The TARIC is managed by the Commission, which publishes a daily updated version on the website: <http://ec. europa.eu/taxation_customs/dds/tarhome_en.htm>.

The common commercial policy on the other hand, is eminently an external trade policy aiming to the 'harmonious development of world trade' by means of tariff and trade agreements prohibiting quantitative restrictions and lowering custom barriers *vis-à-vis* third countries[190].

In particular, the scope of the common commercial policy has been a battleground between the EU and Member States, competing for their respective role in the regulation of international trade, which has contributed to the debate on the constitutional nature of the European Union. According to the fundamental principle of conferred powers, the debate has focused and developed along subsequent evolutionary interpretations of external competence in the field of common commercial policy under Article 133 EC.

In opinion 1/78 on the *Natural Agreement on Natural Rubber*, the ECJ suggested a wide interpretation of common commercial policy so as to include commodity price stabilization mechanisms. The underlying reason was that the regulation of international trade contributes to the uniformity of *intra*-EU trade in its external dimension[191]. Parallelism between internal and external competences has been

[190] In particular Article 131 EC formulates the common commercial policy as an early external projection of the custom union between Member States and assumes the international commitments undertaken by Member States under the 1947 GATT system and the underlying tenet of international free trade. See Title IX (Common Commercial Policy) of Part III (Community Policies) of the EC Treaty. Article 131 EC reads: "*By establishing a customs union between themselves Member States aim to contribute to, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and the lowering of custom barriers*]". Besides tariff and trade agreements, Article 132 EC refers to export aid regimes and Article 133 EC refers to a range of regulatory instruments, such as liberalization measures, export policies and trade defence instruments which are common in the framework of obligation under the WTO agreements.

[191] ECJ, 4 October 1978, Opinion 1/78, *International Agreement on Natural Rubber*, in (1979) ECR, 2871, at para. 45: "*45. Article 113 empowers the Community to formulate a commercial "policy", based on "uniform principles" thus showing that the question of external trade must be governed*

thereafter consistently advocated under EU external relations law, so that the realization of a mature internal market pushed for a broader external action of the EU.

Subsequent amendments of primary legislation introduced by the Treaty of Amsterdam and by the Treaty of Nice reflected on the other hand the developments of the GATT system and the negotiations of the WTO agreements: the subsequent modifications to Article 133 in relation to the negotiation and conclusion of international agreements on trade in services as well as on commercial aspects of intellectual property have been triggered by the negotiations on the WTO 1994 Uruguay Round Agreements and have been shaped along the lines of the ECJ opinion 1/94[192].

4.1.1. Intertwined : Common Commercial Policy, Capital Movement and Foreign Direct Investment under the EC Treaty

Until the entry into force of the Treaty of Lisbon, the external dimension of foreign direct investment between the EU and third countries was not expressly regulated under the EU Treaties. Nevertheless, the power to conclude international agreements

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from a wide point of view and not only having regard to the administration of precise systems such as customs and quantitative restrictions. The same conclusion may be deduced from the fact that the enumeration in article 113 of the subjects covered by commercial policy (changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalization, export policy and measures to protect trade) is conceived as a non-exhaustive enumeration which must not, as such, close the door to the application in a Community context of any other process intended to regulate external trade. A restrictive interpretation of the concept of common commercial policy would risk causing disturbances in intra-Community trade by reason of the disparities which would then exist in certain sectors of economic relations with non-member countries.".

[192] See the Treaty of Amsterdam (1997) adding a section 5 to Article 133; as well as the Treaty of Nice (2001) amending section 5 and adding sections 6 and 7.

with third countries in the field of foreign investment was behind the debate between EU institutions and Member States in relation to international trade in services because certain aspects of foreign direct investment, where the investor establishes a commercial entity in the territory of the host country, overlap with the supply of international trade in services through commercial presence[193].

The concepts of trade in service and of foreign direct investment are ambivalent and overlap where they involve the movement of juridical and natural persons across the borders and involve the relation between foreign investors/service provider and host country regulation[194].

4.1.1.1. The Scope of Common Commercial Policy and Trade in Services

In respect to international trade in services, the external powers of the EU have undergone substantial Treaty amendments triggered by the interpretation of the WTO Agreements given by the ECJ in the opinion 1/94. Such amendments build upon the finding of the Court that the EU enjoys external powers limited to the cross-border supply of services with the exclusion of any other mode of supply involving the movement and/or establishment of the service supplier or of the service receiver[195].

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[193] Sornarajah M., The International Law of Foreign Investment, Cambridge, 2004.

[194] Krajewski, Markus. "Of Modes and Sectors External Relations, Internal Debates, and the Special Case of (Trade in) Services" in Cremona, Marise. Developments in EU External Relations Law. Oxford: Oxford University Press, 2008, at 180.

[195] ECJ, 15 November 1994, Opinion 1/94, Competence of the Community to conclude international agreements concerning services and the protection of intellectual property, in (1994) ECR, I-5267, at para. 44: "44) As regards cross-frontier supplies, the service is rendered by a supplier established in one country to a consumer residing in another. The supplier does not move to the consumer's country; nor, conversely, does the consumer move to the supplier's country. That situation is,

Article 133(5) EC

The amendments to Article 133(5) EC introduced by the Treaty of Amsterdam and by the Treaty of Nice aimed at broadening the scope of common commercial policy so as to empower the Council to negotiate and conclude international agreements on trade in services beyond the limits of Opinion 1/94 including establishment of commercial entities in a foreign country. The new formulation of Article 133(5) EC finally brought to uniformity the concept of trade in services under the GATS and under the common commercial policy[196]. As a practical result, the amended common commercial policy allowed the Council and the Commission to conduct negotiations and conclude international agreements - without the joint participation of Member States - on the admission of foreign service providers and foreign investors willing to establish a commercial presence within the EU.

In Opinion 1/08 of 30 November 2009, the ECJ declared that Article 133(5) EC shall be read in the light of opinion 1/94 so as to cover an additional external EU competence on trade in services supplied under modes 2 to 4, besides the competence provided under Article 133(1) EC[197].

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therefore, not unlike trade in goods, which is unquestionably covered by the common commercial policy within the meaning of the Treaty. There is thus no particular reason why such a supply should not fall within the concept of the common commercial policy.".

[196] Krajewski, Markus. "Of Modes and Sectors External Relations, Internal Debates, and the Special Case of (Trade in) Services" in Cremona, Marise. Developments in EU External Relations Law. Oxford: Oxford University Press, 2008, at 190. The Treaty of Amsterdam gave the Council the power to extend the scope of the CCP to those aspects of trade in services which were not covered by it on the basis of Opinion 1/94 – however the Council never used that power; the Treaty of Nice added new para. 5 entrusts the Community with the competence to negotiate and conclude agreements on trade in services not falling under para. 1 (mode 2, 3 and 4).

[197] ECJ, 30 November 2009, Opinion 1/08, General Agreement on Trade in Services (GATS), at para.s 122-124 (interim conclusion) and 151. The Opinion concerned the conclusion of certain agreements

Article 133(6) EC provides for a 'sectoral carve-out' which attributes the conclusion of international agreements on trade in services in the field of cultural and audiovisual, educational, social and human health to the shared competence of the EU and of Member States. Agreements in these sectors need to be concluded jointly by the Community and its Member States, allowing the special interest of Member States in sensitive regulatory areas to be taken into account[198].

Intrinsic Limits to the Common Commercial Policy

(i) Relevance of Internal Competences

Besides the sectoral carve-out for shared competences, Article 133(6) EC provides in the first subparagraph that '*an agreement may not be concluded by the Council if it includes provisions which would go beyond the Community's internal powers, in particular by leading to harmonization of the laws or regulations of the Member States in an area for which this Treaty rules out such harmonization*'.

AG Kokott in her opinion in case C-13/07 suggested that the provision under Article 133(5) EC is a wide reserve in favour of Member State in areas of internal competence. In order to avoid that the broadening of external competence in the field of services would impinge on the internal allocation of powers between the EU and Member States (so-called 'EART reverse effect'), Article 133(6) first subparagraph is read so as to limit the external power of the EU and to call upon

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modifying the Schedules of Specific Commitments of the Community and its Member States under the GATS as a consequence of the accession of new Member States to the EU.

[198] ECJ, 30 November 2009, Opinion 1/08, General Agreement on Trade in Services (GATS), at para. 136. On the Nice provision of Article 133, see Koutrakos, Panos. EU International Relations Law. Modern studies in European law v. 9. Oxford: Hart, 2006. At 70-74.

Member States to join for the conclusion of agreements in areas where they share competences at the internal level[199].

In the Opinion 1/08 the Court did not elaborate on the scope of the first subparagraph in Article 133(6) and limited itself to declare that the sectoral carve-out under the second subparagraph was not dependent upon the actual harmonization in the sector concerned under the first subparagraph. In the sectors of culture, audiovisual, education, social and human health, the Commission shall proceed by side with Member States[200].

Although the sectoral carve-out has been eliminated by the amendments brought by the Treaty of Lisbon, a mention of the delimitation of competences between the EU and the Member States and of the harmonization of internal legislation survives in Article 207(4) TFEU on unanimity decision voting.

(ii) Member States Agreements

The most problematic provision in the amended Article 133 is to be found in Article 133(5) fourth subparagraph.

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[199] Opinion of Advocate General Kokott delivered on 26 March 2009 in Case C 13/07, Commission of the European Communities v Council of the European Union, at para. 124 – refers to the "*The far-reaching rights of joint decision which the Member States reserved for themselves in the Treaty of Nice in relation to the Community's new areas of external trade competence would otherwise be meaningless*."

[200] The Court therefore dismissed the Commission's argument that in default the Commission was entitled to conclude agreements without the participation of Member States. In the same Opinion 1/08, the Court incidentally declared that the sectoral carve-out is not dependent on the actual harmonization of a certain sector, so that the joint participation and shared competence of Member States would be required even if the international agreement does not affect the harmonization of internal rules in the sectors concerned. The Court held that harmonization was named as a particular example for the exercise of internal competences, without further elaborating on the possible effect of international agreements in relation to the harmonization of internal rules.

Article 133(5) fourth subparagraph leaves without prejudice the right for Member States to '*maintain and conclude agreements with third countries or international organizations in so far as such agreements comply with Community law and other international agreements*'.

The language is problematic, because the consequence of understanding competence on trade in service under 133(5) as a species of the general exclusive competence on common commercial policy to conclude trade and tariff agreements would be a general prohibition for Member States to negotiate and conclude agreements in this field.

A different conclusion was reached by the AG in her opinion on the case C-13/07 March 2009, involving the Council decision expressing the approval for Vietnam's accession in the appropriate WTO body. The AG based her opinion on the assumption that exclusive competence is the exception and that as a rule the Community shares its competences with Member States, unless otherwise provided for, or implied from, the Treaty[201]. Against this background the AG rejected the extension of the exclusive competence provided under Article 133(1) EC to the sectors listed under Article 133(5) EC and suggested that Article 133(5) EC attributes instead a shared competence, because not all powers have been transferred to the EU as the fourth subparagraph of Article 133(5) makes it clear that Member States preserve their right to '*maintain and conclude agreements with third countries or international organizations* [...] *in so far as such agreements comply with community law and other relevant international agreements*'[202] The AG went further to declare that Article 133(5) creates concurrent not parallel competences, leaving Member

[201] Opinion of Advocate General Kokott delivered on 26 March 2009 in Case C 13/07, Commission of the European Communities v Council of the European Union, at para. 55.

[202] Opinion of Advocate General Kokott delivered on 26 March 2009 in Case C 13/07, Commission of the European Communities v Council of the European Union, at para. 58: "Consequently, the Treaty of Nice did *not* assign competence in that area fully and definitively to the Community".

States free to conclude international agreements (in compliance with EU as well as with international law) in so far as the Community has not exercised its competence[203].

The provision and the accompanying debate were eliminated by effect of the amendments brought under the Treaty of Lisbon.

4.1.1.2. Intertwined : Capital Movement and Foreign Direct Investment

Recalling the definition of capital movements, as it stands out from ECJ case law against the background of the right of establishment and of the freedom to provide services (see section 3.1.2. above), certain aspect of foreign investments - namely portfolio and real estate investments, short term loans and guarantees which do not entail a definitive control over the underlying economic activity – are subject to a liberalized regime of non discrimination from and to third countries which has not been amended under Article 63 TFEU[204], and which is subject to the external powers of the European Parliament and the Council under Article 64 TFEU.

[203] Opinion of Advocate General Kokott delivered on 26 March 2009 in Case C 13/07, Commission of the European Communities v Council of the European Union, at para. 76-77.

[204] As anticipated in relation to the scope of the chapter on capital movement, the only mention to foreign direct investment in the EC Treaty was to be found in the grandfathering clause under Article 57(1) EC, allowing Member States to maintain existing restrictions on capital movements involving 'direct investment' *vis-à-vis* third countries. Besides that, Article 57(2) EC empowers the Council to take action in relation to movement of capital to or from third countries.

4.1.1.3. External Competence on Foreign Direct Investment under the EC Treaty

In the light of the external EU competence in force under the EC Treaty, the competence in the field of foreign direct investment is the result of a combination of different provisions and competences.

The EU competence based in the field of international trade in services would cover access for investment to services while the competence based on the capital chapter would cover pre-establishment capital movements and current payments.

In addition, the access of investment in sectors other than services, as well as the protection of a certain standard treatment to foreign investment, on the other hand, involves the relation between the investment and the host (Member) State, that is to say an area of competence for Member States – except where harmonized at the EU level.

In this respect, the EU could only boast an implied external competence under the codified conditions of the EART doctrine[205]. Even though the EU regulation on the internal market has expanded enormously and the EU external competence should be examined on a case by case basis, nonetheless the EU enjoys no general horizontal regulatory competence which can be extended to the field for the treatment of foreign direct investment.

[205] See note 12 above. The doctrine of implied powers was first stated by the European Court of Justice in the EART decision. The 1971 judgement in the EART case suggested the existence of a parallelism between internal and external powers. ECJ judgement of 31 March 1971, Case 22/70, *Commission v. Council* [European Agreements on Road Transport, EART]. The doctrine of implied powers has been further developed by the ECJ so as to grant the EU implied exclusive competence to conclude international agreements: (i) where the common policy or otherwise the unity of the common market would be jeopardized by national measures adopted by Member States, either in fields of common policies or in areas where there are harmonising measures; (ii) when external powers are necessary to exercise at the same time internal powers; and (iii) when Community legislation contains clauses relating to the treatment of national of non-Member States.

As a consequence, international agreements governing access of investment other than services and treatment require the joint participation of Member States and the EU.

Article 133(6) would codify in this sense the legal rule that until the EU has not exercised its competence in this field, Member States are free to conclude agreements in compliance with EU law and international law – a rule which describes the delimitation of competences as it stands under the EC Treaty.

Member States are indeed competent to conclude international agreement for the protection of foreign investment, even though they have to consider the inclusion of Community clauses in order to avoid conflicts with EU law – as have been evidenced in the infringement case brought before the ECJ and by the practice in the ASA and in the CEECs case.

4.1.2. The Scope of Foreign Investment Policies under the EC Treaty

The EC alone has never concluded an international investment agreement with a third country. Because of the blurred delimitation of competences, provisions on FDI are to be found in trade agreements as well as in association and development agreements[206].

The practice of partnership and co-operation agreements is varied and covers to a different degree trade in goods, trade in services, establishment, capital movements, intellectual property. Typically these agreements include standstill and progressive liberalization provisions covering foreign direct investment, non-discrimination and sectoral commitments, nevertheless they are not to be considered 'pure' investment agreements along the lines of Member States' BITs. Provisions on establishment distinguish in some cases between trade in services and other economic sectors, and

[206] Article 181 and 310 EC, now Articles 211 and 217 TFEU.

are limited to the admission of foreign investors, without prejudice for the substantial rules on standards of treatment. Commonly, such treaties include provisions on political dialogue and development co-operation, aimed among others to promote and facilitate investment flows[207].

4.1.2.1. Association and Development Agreements

[Euro-Mediterranean Agreements]

An example of association agreements concluded jointly by the EC and by Member States under Article 310 EC are the so-called Mediterranean Agreements concluded since 1995 with third countries in the North Africa and Middle East region with a view of the establishment of a free trade area[208]. The eight agreements which have been

[207] See a review of EC Foreign Investment Policy Practice in Ceyssens, Jan. "Towards a Common Foreign Investment Policy? - Foreign Investment in the European Constitution." Legal Issues of Economic Integration 32, no. 3 (2005): 259-291, especially the Chart on EU Bilateral Agreements Affecting Investment, at p. 266. A more update Illustrative List of EC Agreement with Provisions on Establishment is to be found in European Commission, DG Trade, Note for the Attention of the 133 Committee, Minimum Platform on Investment for EU FTAs – Provisions on Establishment in Template for a Title on "Establishment, Trade in Services and E-commerce", 28 July 2006, D (2006) 9219.

[208] The network of agreements with Mediterranean countries from the Maghreb (Algeria, Morocco an Tunisia), from the Mashraq (Egypt, Israel, Jordan, Palestinian Territories, Syria and Lebanon), Cyprus, Malta and Turkey is based on the Barcelona Declaration adopted on 28th November 1995 at the Euro-Mediterranean Conference of Foreign Ministers by 15 Member States plus the 12 Mediterranean Partners situated in the Southern and Eastern Mediterranean: Morocco, Algeria, Tunisia (Maghreb); Egypt, Israel, Jordan, the Palestinian Authority, Lebanon, Syria (Mashrek); Turkey, Cyprus and Malta. The nine Euromed association agreements have been concluded between the EC and its Member States on one side and respectively Algeria (2002), Egypt (2001), Israel (2000), Jordan (2002), Lebanon (2002), Palestinian Authority (1997), Tunisia (1998). Syria is currently negotiating an association agreement, while Turkey has signed a custom union (1995) which does include neither a capital, nor a service chapter.

signed repeat a similar pattern of chapters dedicated to political and security dialogue, free movement of goods, free trade in services, capital movements and co-operation. The chapter on services is coupled with provisions on cross-border supply of services and commercial presence granting European companies with a right of establishment under national treatment conditions[209]. The substantial protection of foreign investment is included as an objective for further negotiations between the parties in the Association Council[210].

[Stabilization and Association Agreements]

The stabilization and association agreements (SAA) concluded by the EC and by Member States with most Western Balkan countries, include a chapter on trade aiming to progressively establish a free-trade area[211]. Besides the chapters on

[209] See for instance the broad (unilateral) provision under Article 32 of the Euromed Agreement establishing an Association between the European Community and its Member States, of the one part, and the People's Democratic Republic of Algeria, of the other part, in OJEU L 265/2 of 10 October 2005 (the last Euromed Association Agreement to have been concluded): "*1. (a) Algeria shall grant for the establishment of Community companies in its territory treatment no less favourable than that accorded to companies of any third country; (b) Algeria shall grant to subsidiaries and branches of Community companies, established in its territory in accordance with its legislation, in respect of their operations, treatment no less favourable than that accorded to its own companies or branches, or to Algerian subsidiaries or branches of companies of any third country, whichever is the better. 2. The treatment referred to in paragraph 1(a) and (b) shall be granted to companies, subsidiaries and branches established in Algeria on the date of entry into force of this Agreement and to companies, subsidiaries and branches established there after that date.*".

[210] Declaration by Algeria relating to Article 9, annexed to the Euromed Agreement: "*Algeria considers one of the essential objectives of the Association Agreement to be an increase in the flow of European direct investment in Algeria. It invites the Community and its Member States to support the practical realisation of this objective, in particular in the context of trade liberalisation and the dismantling of tariff barriers. The Association Council will examine the question if the need arises.*".

[211] The Western Balkan countries include: Albania, Bosnia and Herzegovina, Croatia, the Former Yugoslav Republic of Macedonia, Montenegro, Serbia and Kosovo. Two SAAs are in force: one with

political dialogue and free movement of goods on one side and approximation of laws, justice and home affairs and co-operation on the other side, the SAAs include a chapter on 'movement of workers, establishment, supply of services, capital' providing a mutual right of establishment accorded under national treatment conditions[212].

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the Former Yugoslav Republic of Macedonia (2004) and the other with Croatia (2005). The trade part of the respective SAA came into force through an Interim Agreement with Albania (2006), Montenegro, Bosnia and Herzegovina (2007). The SAA with Serbia is signed and not yet entered into force.

[212] See for instance Article 48 of the Stabilization and Association Agreement between the European Community and its Member States, of the one part, and the Former Yugoslav Republic of Macedonia, or the other part, in OJEU L 84 of 20 March 2004: "*1. The former Yugoslav Republic of Macedonia shall grant, upon entry into force of this Agreement: (i) as regards the establishment of Community companies treatment no less favourable than that accorded to its own companies or to any third country company , whichever is the better, and (ii) as regards the operation of subsidiaries and branches of Community companies in the former Yugoslav Republic of Macedonia, once established, treatment no less favourable than that accorded to its own companies and branches or to any subsidiary and branch of any third country company, whichever is the better. 2. The former Yugoslav Republic of Macedonia shall not adopt any new regulations or measures which introduce discrimination as regards the establishment of Community companies on its territory or in respect of their operation, once established, by comparison with its own companies. 3. The Community and its Member States shall grant, from the entry into force of this Agreement: (i) as regards the establishment of companies from the former Yugoslav Republic of Macedonia, treatment no less favourable than that accorded by Member States to their own companies or to any company of any third country, whichever is the better; (ii) as regards the operation of subsidiaries and branches of companies from the former Yugoslav Republic of Macedonia, established in their territory, treatment no less favourable than that accorded by Member States to their own companies and branches, or to any subsidiary and branch of any third country company, established in their territory, whichever is the better. 4. Five years after the entry into force of this Agreement, and in the light of the relevant European Court of Justice case law, and the situation of the labour market, the Stabilisation and Association Council will examine whether to extend the above provisions to the establishment of*

[Economic Partnership Agreements]

The Economic Partnership Agreement (EPA) between the EC and CARIFORUM States replacing the trade chapters of the 2000 Cotonou Agreement[213], on the other hand, addressed foreign investment from a different perspective. The structure of the EPA, ways more complex than in trade agreements concluded earlier, reflect the aim to integrate investment protection with the host country's development concerns and the EC development co-operation policy. Provisions on sustainable development, human rights, democracy and good governance introduce an important conditionality for the liberalization of the investment environment. Besides a fully liberalized capital movement, the EPA provides a positive list of sectoral services granted with access right and national treatment, with a view to a gradual liberalization. Besides, the agreement includes substantial obligations on the investor subject to labour and environment standards as well as a general exception in favour of the host State on grounds of public policy.

A more detailed analysis has evidenced that the EPA represent a significant step towards a balanced accommodation of the interests of foreign investors, home and host countries. The double nature of the agreement, linked to investment protection

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nationals of both Parties to this Agreement to take up economic activities as self-employed persons. […]".

[213] Economic Partnership Agreements between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part, in OJEU L 289/I/3 of 30 October 2008. The agreements has been signed by thirteen CARICOM Member States (Antigua and Barbuda, The Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, Montserrat, Saint Lucia, St. Kitts and Nevis, St. Vincent and the Grenadines, Suriname, Trinidad and Tobago) and by the Dominican Republic. For policy considerations on FDI in the EPA, see European Commission, Resolution on the impact of foreign direct investment (FDI) in the African, Caribbean and Pacific States, in OJ C 58, 1.3.2008, p. 26-28.

and to sustainable development at the same time, result in a legal instrument which protects foreign investment against arbitrary measures by the host State and at the same allows and encourages the host State to adopt policies for the sustainable development orientation of the investment[214].

[An interim *Conclusion]*

Upon a cursory review the practice of the EU trade agreements in relation to foreign investment under the EC Treaties before the entry into force of the Treaty of Lisbon denotes a certain variety within a repeating structure[215]. Leaving aside provisions on co-operation and investment promotion, the distinctive articulation of chapters on trade in goods, trade in services and capital movement reflects the allocation of external competences in the field of common commercial policy under the EC treaties: trade in services supplied through commercial presence ("not unlike trade in goods"), right of establishment and freedom of capital movement.

It is nonetheless remarkable that the scope of the agreements is generally wider than common commercial policy and encompasses areas where the delimitation of competences between EC and Member States is even less clear and more blurred, such as in relation to the standards of treatment. Therefore, notwithstanding the adherence of the agreements described above to the patterns of common commercial policy, all agreements considered have been concluded jointly by the EC and Member States.

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[214] A more detailed analysis, in Dimopoulos, Shifting the Emphasis from Investment Protection to Liberation and Development: The EU as a New Global Actor in the Field of Foreign Investment Policy, paper presented at the conference 2008 Biennial Interest Group Conference entitled The Politics of International Economic Law : The Next Four Years , organized by ASIL – IELIG (International Economic Law Interest Group), held Washington 13-15 November 2008.

[215] Chapter on Bilateral and Regional Trade Relations in WTO, Trade Policy Review : Report by the European Communities, WT/TPR/214 of 2 March 2009.

Without prejudice for further investigation, the practice resulting from EC investment agreements supports the evolutionary interpretation of EC common commercial policy and at the same time confirms uncertainties in the delimitation of competences between the EC and Member States so that they are so 'inextricably linked' that mixed agreements are the only viable legal instruments accepted by European institutions and Member States.

4.1.2.2. The Minimum Platform on Investment

The Minimum Platform on Investment (MPoI) adopted by the Council in November 2006 is the first expression of a systematic interest by the European institutions to exercise an external competence in the field of foreign direct investment[216]. It consists of a model negotiation proposal for the investment chapter in free trade agreements with third countries. Considered that this field of external trade relations

[216] Council of the European Union, Note to the 133 Committee, Final Consolidated Version of the Minimum Platform on Investment for EU Free Trade Agreements ("FTAs"), 27 November 2006, 15375/06, not published. On 4 June 2009, the Council has refused public access to the document pursuant to Regulation (EC) No 1049/2001, because it is usually incorporated in the mandates authorizing the Commission to negotiate with third parties and therefore its release "would enable the negotiating partners of the EU to assess the measure of its willingness to compromise". Noteworthy, Finland and Sweden disagree on the Council decision – probably as an echo of the BITs cases before the ECJ where the two Member States were parties. Nonetheless, the content of the MPoI is described and analyzed in MAYDELL N., The European Community Minimum Platform on Investment or the Trojan Horse of Investment Competence, in REINISCH A. and KNAHR C., International Investment Law in Context, Portland 2008. An extract of the provisions on establishment, before their finalization, is to be found in: European Commission, DG Trade, Note for the Attention of the 133 Committee, Minimum Platform on Investment for EU FTAs – Provisions on Establishment in Template for a Title on "Establishment, Trade in Services and E-commerce", 28 July 2006, D (2006) 9219. As a preparatory document to the MPoI see also European Commission, Note to the 133 Committee, Issues Paper : Upgrading the EU Investment Policy, 30 May 2006.

is contended by Member States, the MPoI is an indicative restatement of the Council's understanding on delimitation of external competences shared with Member States.

The MPoI applies to establishment consisting in the formation of a legal entity or of a commercial representative in any economic sectors, service or non-service. The coverage of the provisions expressly excludes sectors such as mining, manufacturing and processing of nuclear materials, production or trade in arms, audio-visual services, national maritime cabotage and certain air transport activities. Positive commitments – as well as reservations - in relation to covered activities are listed in the MPoI annexes.

Substantial provisions are articulated in market access rights, national and most-favoured nation treatment applying at the same time to activities carried in the committed sectors. Market access rights grant a liberalized access to foreign investment, while standard treatment provisions prohibit discrimination in relation to the same activities carried out by nationals of the host State or by nationals of a third country enjoying a more favourable treatment.

Since non-discrimination clauses have the effect of multilateralizing legal regimes otherwise applicable only in limited regional contests, a regional economic integration organization (REIO) clause is necessary. Most-favoured treatment therefore does not apply to treatment arising from a REIO. In order to avoid conflicts with substantial treatment provisions under existing or future BITs concluded between Member States and third countries, the MPoI provides to leave without prejudice the more favourable treatment arising to European investors from BITs to which a Member State is party.

The MPoI provisions on investment build upon and reflect the regulatory structure of WTO GATS agreement (definition of supply through commercial presence, access and non discrimination) except for the limitation to the service sector.

On the other hand, access right to horizontal cross-sectoral foreign investment under the MPoI appears to be founded partly on existing exclusive express external competence (services provided by means of commercial establishment under Article 133(5) EC) and partly on exclusive implied competence (services where internal regulation provides access and treatment standards for third country nationals[217]). So far - and notably under the EC Treaties - exclusive EC competence does not cover access of investment falling outside these categories and, in any event, the definition of an horizontal standard of treatment for foreign investment (non-discrimination).

As long as the internal sectoral regulation in relation to access and treatment of foreign investment is facilitated by the conclusion of international agreements at the EC level, it has been argued that recourse to shared competence is inevitable[218]. Even though the extension of implied shared competence is the least clear in the constellation of EC external competences, inevitable is indeed the joint participation of the EC and of Member States to the negotiation and conclusion of possible PTAs based on the MPoI as mixed agreements.

4.1.2.3. Investment Guarantees and Incentives

A common policy instruments for Member States to promote and protect foreign investment is investment guarantee as a compensation for damages occurred as a consequence of the occurrence of political risk such as expropriations, regulatory

[217] Exclusive implied external EC competence exists for certain numbers of investment matters : see access and treatment in financial sector such as credit institutions defined under Directive 2006/48/EC (Article 38 *et seq.*) – as it results from the AETR doctrine of exclusive external competence where internal EC legislation regulates the treatment of foreign nationals.

[218] According to MAYDELL N., The European Community Minimum Platform on Investment or the Trojan Horse of Investment Competence, in REINISCH A. and KNAHR C., *op. cit.* (2008), the 'necessity test' would be passed because of the facilitation effect of the mixed agreement on the internal regulation of foreign investors, at p. 91.

takings or unjustified discriminatory treatment[219], which at the multilateral level is provided by Multilateral Investment Guarantee Agency (MIGA) an agency of the World Bank Group for providing political risk insurance to the private sectors for foreign investments in developing countries[220].

In the field of foreign investment guarantees and insurances, the EC lacks any competence. Unlike harmonization of national export aids under Article 132 EC (now repealed by the Treaty of Lisbon)[221], no harmonization of aid guarantees was envisaged in relation to common commercial policy in general.

State aid rules are on the contrary a policy instruments for the regulation of foreign investments. Compliance with EC competition State aid rules is granted through the ordinary instruments of competition policy enforced by the European Commission and the national competition authorities under Article 87 EC (now 107 TFEU)[222].

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[219] In Italy, guarantees to foreign investment are granted by the governmental export credit agency SACE s.p.a., pursuant to Law No. 227 of 24 May 1977; financial incentives to foreign investment are managed by Simest S.p.a., pursuant to Law No. 100 of 24 April 1990, as modified by Article 25 of Legislative Decree No. 143 of 31 March 1998.

[220] Established by the 1985 Washington Convention Establishing the Multilateral Investment Guarantee Agency.

[221] Such as the Council Directive 98/29/EC of 7 May 1998 on harmonization of the main provisions concerning export credit insurance for transactions with medium and long-term cover as well as the European Commission communication to the Member States pursuant to Article 88(1) of the Treaty applying Articles 87 and 88 of the Treaty to short-term export-credit insurance, as amended by the European Commission communication to Member States amending the communication pursuant to Article 88(1) of the EC Treaty applying Articles 87 and 88 of the Treaty to short-term export-credit insurance.

[222] See for instance the two decisions by the European Commission Portugal: Case 36/2004 against Portugal, Commission Decision of 21 February 2007, Aid to CORDEX, Companhia Industrial Textil S.A.: the Commission prohibited the Portuguese measure because there was "*no evidence that the aid is necessary for CORDEX to carry out the investment concerned in Brazil*" and there was justification on

4.2. Lisbon : Towards Greater Coherence?

It is a positive feature of the TEU as amended by the Treaty of Lisbon to bring together EU external economic and political relations under common principles and common objectives, thus creating a single framework for EU external relations in Title V (General Provisions on the Union's External Action and Specific Provisions on the Common Foreign and Security Policy) TEU. Economic relations in particular are connected with sustainable development and liberalization of world trade.

> *Article 21 TEU*
> *1. 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: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Char ter and international law.*
> *The Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations which share the principles referred to in the first subparagraph. It shall promote multilateral solutions to common problems, in particular in the framework of the United Nations.*
> *2. The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to:*
> [..]
> *(d) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty;*
> *(e) encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade;*
> […]

Another essential feature of the Treaty of Lisbon is the restatement of principles governing the allocation of competences between the EU and Member States,

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grounds of compatibility with the common market; Case 47/2002, Commission Decision of 15 October 2003, Aid to Vila Galé - Cintra Internacional, Investimentos Turísticos S.A..

namely the principle of conferral – i.e. the EU shall only act within the limits of powers conferred in the Treaties - and the principles of subsidiarity and proportionality – limiting the exercise of the EU non exclusive competence to cases where Member States cannot sufficiently act on their own and where necessary to achieve Treaty objectives[223].

> *Title II Common Commercial Policy*
>
> *Article 206 TFEU*
>
> *By establishing a customs union in accordance with Articles 28 to 32, the Union shall contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers.*

With specific relation to common commercial policy, Article 206 TFEU restates the objective to contribute to the development of world trade, where the characterization of the development as "harmonious" suggest a hint to multilateralization and where international trade beyond pure tariff and trade includes foreign investment[224]. The new formulation of Article 207 TFEU in fact, widens the scope of common commercial policy to include foreign direct investment.

> *Article 207 TFEU*
>
> *1. The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.*

[223] Title I (Categories and Areas of Union Competence), Part One (Principles) TFEU.

[224] Article 21 TEU aligns political and economic external relations with a single framework commitment to multilateralism. See KOUTRAKOS, P.. "Primary Law and Policy in EU External Relations: Moving Away from the Big Picture." European Law Review 33, no. 5 (2008): 666-686.

4.2.1. Common Commercial Policy under Article 207 TFEU

4.2.1.1. Drafting History

The provision under now Article 207 TFEU remained the same from the 2004 Constitutional Treaty through the amendments by the Intergovernmental Conference (IGC) in charge of the Reform Treaty until the 2007 Treaty of Lisbon. The provision therefore finds its roots directly in the Laeken Declaration calling for clarification of competences and simplification of the treaties in order to enhance democratic accountability and Europe's role in the world[225].

Common commercial policy remained an unnoticed sector of the European Convention until the 2003 Draft Articles: the proposal broadened its notion so as to include trade in services, intellectual property and foreign direct investment under the EU exclusive external competence and so as to eliminate any reference to a sectoral carve-out of shared competence. Decision making in the Council was subject to unanimity and to the consent of European Parliament[226].

The broadened scope for Article 207 TFEU with respect to Article 133 EC is a further step in its evolutionary character between a policy instrument of EU giving an external projection to a 'mature' internal market and an instrument for the multilateralization of international trade. Principles and objectives under Articles 21 TEU and 206 TFEU moreover establish a close link to co-operation and sustainable

[225] Laeken Declaration on the Future of the European Union of 15 December 2001. See CREMONA M., 'The Draft Constitutional Treaty: External Relations and External Action' (2003) 40 Common Market Law Review 1347, 1366.

[226] European Convention, Drat Articles on External Action in the Constitution (April Draft), 23 April 2003. CONV 685/03.

development, so that Commission and Council will be required to justify their action also in relation to 'new' non-trade policy objectives of development co-operation.

As a result of the reformulation under the Treaty of Lisbon, common commercial policy covers virtually the extent of the GATS and TRIPs agreements and to some extent, indeed in a much more straightforward manner, certain aspects of international investment agreements.

Article 3(1)(e) TFEU expressly attributes common commercial policy to the exclusive competence of the EU, meaning that only the EU can adopt binding acts unless it calls upon the Member States to do so or to adopt implementing measures. Article 207(2) recalls that the European Parliament and the Council have the power to adopt implementing measures.

4.2.1.2. Trade in Services

Under Article 207 TFEU common commercial policy expressly includes *i.a.* tariff and trade agreements relating to trade in goods and services. The new formulation ends the double competence rule of Article 133(1) EC for trade in goods and or trade in services not unlike goods (*i.e.* cross-border services) and of Article 133(5) for trade in services (including establishment), which now come as a whole under the same expression 'trade in services', and terminates the possible ambiguity on the exclusive nature of EU competence in this field[227].

[227] See discussion Opinion of Advocate General Kokott delivered on 26 March 2009 in Case C 13/07, Commission of the European Communities v Council of the European Union, at para. 55, that Article 133(5) attributes to the EU a shared competence. To the contrary see, ECJ, 30 November 2009, Opinion 1/08, General Agreement on Trade in Services (GATS). In addition, Article 207 eliminates the sectoral carve-out which rebounced the field of audiovisual services, educational services, and social and human health services under the shared competence of the EU and Member States, previously provided under Article 133(6).

The TFEU does not provide a definition of 'trade in services', nor does it clarify the discussed reference to EU chapter on services or to the GATS. While the definition in the EU Treaties used to and still covers remunerated economic (industrial, commercial, craftsmen and professional) activities rendered on a temporary basis to the exclusion of establishment[228], the GATS covers (intangible) economic activities supplied by means of four different modes: (cross-border supply, consumption abroad, commercial presence and natural persons)[229]. The progressive alignment of the EU common commercial policy to the GATS system in line with ECJ case law[230], suggests that Article 207 TFEU refers to the broad GATS definition with the effect that EU external competence on common commercial policy extends to the establishment of EU nationals abroad and to the admission in the territory to the EU of foreign nationals involved in international trade in services.

As anticipated, Article 207 TFEU eliminates the 'sectoral carve-out' of shared competence, and protects Member States' concerns in relation to sensitive areas such as cultural and audiovisual services under a procedural rule requiring unanimity in the Council when deciding in these areas.

4.2.1.3. Foreign Direct Investment

Article 207 finally includes foreign direct investment under the heading of common commercial policy, which is now '*based on uniform principles, particularly with regard*

[228] Articles 56 to 62 TFEU.

[229] Article I (Scope and Definition) GATS. Krajewski, Markus. "Of Modes and Sectors External Relations, Internal Debates, and the Special Case of (Trade in) Services" in Cremona, Marise. Developments in EU External Relations Law. Oxford: Oxford University Press, 2008.

[230] As lately recalled by ECJ, 30 November 2009, Opinion 1/08, General Agreement on Trade in Services (GATS).

to […] *the conclusion of tariff and trade agreements relating to* […] *foreign direct investment*'.

Again, the Treaty does not give a definition for foreign direct investment[231]. Nonetheless, if one considers that EU external competence in the field to foreign direct investment has been until the entry into force of Article 207 TFEU was scattered over partly the external projection of the chapter on capital movement and partly that (limited) of the chapter on establishment, the mere formulation of foreign direct investment as a component of the common commercial policy is at least the expression of an ambition of conceptual unity.

The TFEU does not define neither the scope of international agreements relating to foreign direct investment falling under the exclusive competence of the EU. As suggested under section 2.2. above, reference for a definition of foreign direct investment may be found in bilateral and multilateral investment agreements which to some extent have come to a consistent practice where the recurring features of foreign investment involve direct and lasting economic interest spent by the investor in the territory of the host country. In addition to that, the expression foreign investment in Article 207 TFEU conveys at least a horizontal notion of the underlying economic phenomenon, regardless of sector-based (service and non-service) distinction.

The definition of foreign direct investment does not overlap with the scope of the TFEU capital chapter, in so far as the latter regulates certain aspects of foreign investment *i.e.* portfolio and real estate investment which lack the 'lasting' element of foreign 'direct' investment and therefore puts them under the heading of simple foreign investment.

[231] Apart limited scope in the reference in Article 64 TFEU on the capital movement chapter, described in section 3.1 above.

4.2.1.4. Instruments and Policies

The scope for international agreements on foreign direct investment covers a wide spectrum of regulatory aspects which range from admission/access of investment to standard of treatment (non-discrimination, fair and equitable, full protection and security), to protection against expropriation and *ad hoc* dispute settlement systems.

Article 207 TFEU is silent on the scope of the instruments (international agreements and other internal binding instruments) which the EU is competent to adopt in the field of foreign direct investment. Wording, context and purpose of the provision suggest distinguishing policy instruments covering the admission from those covering the treatment of foreign direct investment.

(i) *Admission/Access and Non-Discrimination*

Foreign direct investment is mentioned in Article 207 TFEU as a component of common commercial policy with language: '*trade agreements relating to* […] *foreign direct investment*'. The limited reference to trade-related policy instruments typically including cross-border access regulation and non-discrimination - but not usually extended to post-entry regulation - suggests at least coverage of access regulation.

In addition, the context of Article 206 TFEU, rather than the wording of Article 207 TFEU, suggests a distinction between admission (or access) and treatment of foreign direct investment. Article 206 TFEU declares that the objective of the common commercial policy shall be the progressive abolition of restrictions on foreign direct investment, which are in the first place restrictions preventing nationals of non-Member States to access the internal market[232].

[232] There is general agreements among commentators on this. See Karl, Joachim. "The Competence for Foreign Direct Investment : New Powers for the European Union?." The Journal of World Investment (2004): 413-; Krajewski, Markus. "External trade law and the Constitution Treaty:

In order not to deprive it of any useful meaning, a *minimum* reading of Article 207 TFEU covers at least regulation of admission/access of foreign direct establishment and non-discrimination, regardless of the sector where the economic activity is in place.

(ii) *Treatment*

Less clear is the coverage of Article 207 TFEU in relation to the treatment (or protection) of foreign investment against unfair treatment and expropriation, because this involves the regulation in the host Member State (by means of national or EU measures) of the economic activities underlying the investment. In this respect, a possible horizontal EU competence on the treatment of foreign direct investment would conflict with the delimitation of competences between the EU and Member States in internal market areas other than investment (such as transport, competition, environment, energy, etc.).

With this respect, the language in Article 207 TFEU allows a narrow and a broader reading, whether it includes or not policy instruments for the regulation of the treatment of foreign direct investment.

[A Broader Reading]

A broader reading moves from the context of the new formulation of the common commercial policy: the inclusion of foreign direct investment and intellectual property under the heading of common commercial policy would require a switch from traditional to new and broader policy instruments.

Towards a federal and more democratic common commercial policy?." Common Market Law Review 42 (2005): 91-127; and Ceyssens, Jan. "Towards a Common Foreign Investment Policy? - Foreign Investment in the European Constitution." Legal Issues of Economic Integration 32, no. 3 (2005): 259-291.

A useful interpretation of the Treaty amendments would therefore reject a mere codification of existing access regulation and call for the adoption of substantial treatment regulation. Such a reading would recognize the EU a broad competence to regulate treatment standards of foreign direct investment sector by sector or horizontally by means of general standard-setting.

A general standard setting approach is the one adopted in the Agreement on the Application of Sanitary and Phytosanitary Measures, and in the failed multilateral negotiations on a trade and investment chapter in the framework of the Doha Development Round of negotiations. A similar standard setting approach is also viable in relation to protection against expropriation: the EU could limit itself to set general procedural standards to be applied in expropriation proceedings (*i.a.* criteria for compensation) without prejudice for the Member States' system of property ownership protected under Article 345 TFEU[233].

A broader reading is supported by the purpose of Article 206 TFEU aiming at the harmonious development of world trade, including investment. Treatment is a crucial feature for the promotion and protection of foreign direct investment because it may effect favourably or restrictively investment flows to a considerable extent. In order to achieve consistent internationalization of foreign direct investment, Article 207 TFEU would give the EU competence to regulate treatment of 'horizontal' foreign direct investment (*i.e.* regardless of sector- or country-specific concerns).

A competence for the regulation of 'horizontal' foreign direct effect would attribute to the EU an external competence which is broader in the external relations with third countries that it is *vis-à-vis* Member States. In fact, in relation to the internal market the EU enjoys shared competence with Member States and is bound to exercise it according to the principles of subsidiarity and proportionality. A similar circumstance

[233] Article 295 EC, now 345 TFEU, protects national system of property ownership but still allows EC measures harmonizing certain aspects of IP. See case C-350/92 Spain v Council 14-15 18-19.

- that external powers are broader than internal ones - would not be unusual in federal constitutions which usually emphasize the principle of unity in external relations[234].

[A Narrow Reading]

Especially under this latter aspect, a broad reading of Article 207 has been strongly criticized because it subverts the architecture of competences enlightened in the TFEU. The extension of EU external competence along the lines of an 'external dimension' of the internal market - a field governed by shared competences – is contrary to the principle of conferred powers and results in a detrimental compression of Member States' own competences not provided under the Treaties.

The overall context of foreign direct investment as it has been regulated so far by Member States and by the EU justifies a narrow reading of Article 207 TFEU covering trade-related policy instruments strictly limited to the regulation of access and non-discrimination of foreign investors in the territory of the EU. As briefly reported under section 4.1.2.1. above[235], the EC alone has never concluded with a third country an international agreement regulating treatment or protection of foreign investment – which have instead been covered by BITs concluded by Member States. To accept that Article 207 TFEU reverses the arrangement of competence under the EC Treaty would have remarkable heavy consequences for Member States and for the existing network of BITs in force with third countries. No reactions of Member States in this sense was registered at the Convention, very much in contrast with the fierce

[234] In order to support the 'federal' argument, the author interprets the provision under Article 207(6) as a limitation to EU competence granting implementation powers to Member States against the danger of a possible "reverse EART effect". See Krajewski, Markus. "External trade law and the Constitution Treaty: Towards a federal and more democratic common commercial policy?". Common Market Law Review 42 (2005): 91-127, at p. 113-114.

[235] Article 181 and 310 EC, now Articles 211 and 217 TFEU.

defences spent by Member States against the infringement and judicial proceedings brought by the Commission against BITs.

Consistently with its drafting history, Article 207 TFEU covers the admission of foreign investors to establish commercial activities and or entities in the host Member States, representing a step forward when compared with the overlap of competences between trade in services and foreign direct investment under Article 133 EC[236]. This is by no means a negligible amendment as the delimitation of competence under that provision has been debated for at least a decade before some clarification came from the ECJ in Opinion 1/08 released a day before the entry into force of the Treaty of Lisbon[237].

In addition, the purpose of common commercial policy set out in Article 206 TFEU aiming to the 'progressive abolition of restrictions' supports a narrow reading of the 'trade agreements relating to foreign direct investment', as it suggests that foreign direct investments are covered by the common commercial policy as far as trade restrictions (access/entry) are concerned. This was the perspective discussed by the Convention in relation to the 2003 April Draft, which considered that 'financial flows supplemented trade in goods and represent a significant share of commercial exchanges' and maintained that access regulation of foreign investment was a complement to the access regulation of international trade. [238].

[Parallelism]

A narrow reading of Article 207 TFEU is consistent and confirms a principle of parallelism in the delimitation of competences between EU and the Member States,

[236] Krajewski, Markus. "External trade law and the Constitution Treaty: Towards a federal and more democratic common commercial policy?". Common Market Law Review 42 (2005): 91-127, at 113.

[237] ECJ, 30 November 2009, Opinion 1/08, General Agreement on Trade in Services (GATS).

[238] Krajewski, Markus. "External trade law and the Constitution Treaty: Towards a federal and more democratic common commercial policy?". Common Market Law Review 42 (2005): 91-127, at 114.

which has been fundamental so far in the development of EU external relations and is now codified under Article 3(2) TFEU.

Parallelism of competences is also the key to read Article 207(6), that the 'delimitation of powers between the EU and Member States' shall not be affected by the EU common commercial policy competence[239]. The EU external competence under Article 207 does not extend to areas where Member States enjoy exclusive or shared competence, such as in the field of the internal market regulation. The clause restates a parallelism between internal and external competences so that Member States external competences are not superseded by the external common commercial policy[240]. In respect to foreign direct investment, Article 207(6) prevents that common commercial policy is exercised to the detriment of Member States enjoying an external competence, albeit shared[241].

Article 207(6) moreover prohibits that the exercise of the common commercial policy leads to harmonization contrary to the Treaties. In this sense, Article 345 TFEU has

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[239] The Article goes on to provide that delimitation of powers between the EU and Member States shall not lead to harmonization where the Treaty excludes it (that is occupation, social policy, health, industry, culture). The second part of Article 207(6) TFEU is less controversial as it extends the prohibition of harmonization to the level of the external competences.

[240] A reading otherwise that the EU external CCP competence shall not affect Member States competence in the internal market would restate the obvious because CCP and internal market do have different scope *ratione personae*: the internal market as between nationals of Member States and the CCP as between nationals of Member States and third country nationals.

[241] Ceyssens, Jan. "Towards a Common Foreign Investment Policy? - Foreign Investment in the European Constitution." Legal Issues of Economic Integration 32, no. 3 (2005): 259-291, especially para 4.2.3. At 278-281 "*There are good arguments that Art. III-315(6) should be read as establishing a general principle of parallelism between internal and external competences. This would exclude policies to protect investment against expropriation and violations of minimum standards from the scope of the CCP. But it is important to note that the wording is all but clear in that respect and that it is difficult to come to a definitive conclusion at the current stage.*".

been considered as a prohibition for harmonization of Member States' systems of property ownership and therefore an obstacle to the exercise of common commercial policy in relation to protection against expropriation[242].

(iii) EU Regulation of FDI

The liberalization of FDI in the international markets and the orientation of foreign direct investment to development co-operation aimed at under Article 206 TFEU, implies the possibility for the EU to regulate foreign direct investment from the EU to third countries on the internal level[243]. Besides acts implementing international

[242] Ceyssens, Jan. "Towards a Common Foreign Investment Policy? - Foreign Investment in the European Constitution." Legal Issues of Economic Integration 32, no. 3 (2005): 259-291, at 280.

[243] See the Ruling of the Court of 14 November 1978. N. 1/78, at para. 82; see also in relation to trade and development, ECJ judgment of 26 March 1987 in case 45/86, Commission of the European Communities v Council of the European Communities, at para.s 18-20: "*18 It was against that background that the model was evolved on which the Community system of generalized preferences, partially implemented by the regulations at issue, was based. That system reflects a new concept of international trade relations in which development aims play a major role. 19 In defining the characteristics and the instruments of the common commercial policy in Article 110 et seq., the Treaty took possible changes into account. Accordingly, Article 110 lists among the objectives of commercial policy the aim of contributing "to the harmonious development of world trade", which presupposes that commercial policy will be adjusted in order to take account of any changes of outlook in international relations. Likewise, Articles 113 to 116 provide not only for measures to be adopted by the institutions and for the conclusion of agreements with non-member countries but also for common action "within the framework of international organizations of an economic character", an expression which is sufficiently broad to encompass the international organizations which might deal with commercial problems from the point of view of a development policy. 20 The court has already acknowledged that the existence of a link with development problems does not cause a measure to be excluded from the sphere of the common commercial policy as defined by the treaty. It considered that it would no longer be possible to carry on any worthwhile common commercial policy if the Community were not in a*

investment agreements, and the enforcement of competition rules in relation to investment aids or to other incentive mechanisms, Article 207 TFEU offers a basis for a regulatory competence in relation to the protection of essential interests which also fall under the competence of the EU: such as protection of labour standards, international co-operation, environmental protection, etc[244].

(iv) Dispute Settlement

The wording of Article 207 TFEU also does not help to clarify whether it would support as a legal base an international agreement providing an investor-State arbitration clause, which is common in most international investment agreements. The point is very controversial in literature[245], as it considered an encroachment upon the exclusive jurisdiction of the ECJ – as discussed under section 2.3.2. above.

On the contrary, a strong argument in favour is supported by the EU [the EC at the time] membership to the Energy Charter Treaty, providing under Article 26 international investor state arbitration before *ad hoc* arbitral tribunal as an alternative to Member States jurisdiction. With this respect, the EC submitted to the Energy Charter Secretariat a Declaration of Transparency confirming its participation to the dispute settlement system and the joint responsibility of the Communities and

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position to avail itself also of means of action going beyond instruments intended to have an effect only on the traditional aspects of external trade. A "commercial policy" understood in that sense would be destined to become nugatory in the course of time (opinion 1/78 of 4 October 1979 ((1979)) ecr 2871).".

[244] The Treaty of Lisbon has eliminated reference in article 132 EC to the harmonization of national aid export mechanisms.

[245] Krajewski, Markus. "External trade law and the Constitution Treaty: Towards a federal and more democratic common commercial policy?". Common Market Law Review 42 (2005): 91-127.

Member States for the implementation of the agreement '*in accordance with their respective competence*'[246].

4.2.1.5. Limitations to Common Commercial Policy

According to Article 207(6), '*The exercise of 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 harmonization of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonization*'[247]. The wording of the provision suggests a set of limitations to EU common commercial policy.

The language is ambiguous and does not expressly distinguish what kind of competences (internal or external) between the EU and Member States have the effect to limit the scope of the common commercial policy, and whether this is in necessary connection with harmonization or not.

The provision can be read so that the common commercial policy does not prejudice the delimitation of the competences between the EU and Member States with regard to its implementation in the national legal systems. In this sense, the provision aims at eliminating a possible 'reverse EART effect', whereby the attribution of an external competence to the EU would create and result in a parallel competence for the EU to implement it at the internal level.

[246] Statement submitted by the European Communities to the Secretariat of the Energy Charter Treaty pursuant to Article 26. (3) (b) (ii) of the Energy Charter Treaty in *OJ L 336, 23.12.1994, p.115.*

[247] The language recalls Article 133(6) first subparagraph, whereby '*an agreement may not be concluded by the Council if it includes provisions which would go beyond the Community's internal powers, in particular by leading to harmonization of the laws or regulations of the Member States in an area for which this Treaty rules out such harmonization*'.

Such interpretation is at odds with a narrow reading of Article 207 TFEU - which so far seems to be preferred in compliance with the principle of conferred powers. In this light, Article 207(6) restates a parallelism between internal and external competences so that Member States internal competences are not restricted by the external common commercial policy. The argument that this interpretation would contradict the 'intention of the drafter' to eliminate the sectoral carve-outs from the scope of the common commercial policy[248], cannot be accepted because the elimination of the carve-out is an index of a *consensus* between Member States to allocate certain sensitive sectors under exclusive EU competence and does not exclude that other sectors are subject to shared competence rules.

4.2.1.6. Procedural Rules

As a rule the adoption of acts for the negotiation, conclusion and implementation of international agreements in the exercise of the common commercial policy competence, requires the qualified majority voting within the Council. Nonetheless, unanimity is required when the same acts refer to *i.a.* foreign direct investment or when unanimity is the rule to adopt the respective internal rule[249].

The procedure grants to a large extent the participation of the European Parliament to the common commercial policy. Besides the duty of full and complete information, the Council may act only upon consultation with the European Parliament, which

[248] Krajewski, Markus. "External trade law and the Constitution Treaty: Towards a federal and more democratic common commercial policy?". Common Market Law Review 42 (2005): 91-127, at 115; and Krajewski, Markus. "Of Modes and Sectors External Relations, Internal Debates, and the Special Case of (Trade in) Services" in Cremona, Marise. Developments in EU External Relations Law. Oxford: Oxford University Press, 2008.

[249] Article 218(8) TFEU.

gives a binding consent when the international agreements cover a field where the ordinary legislative procedure applies[250].

4.2.1.7. By Way of an Interim *Conclusion*

The new formulation of the EU exclusive competence on common commercial effectively covers admission of 'horizontal' foreign direct investment into the EU internal market, regardless of the sector involved. As a consequence of the new formulation of the common commercial policy, Member States are prevented from negotiating and signing international agreements regulating access to foreign investment[251].

Importantly, common commercial policy is limited by the constraints of shared competence in relation to rules on treatment of foreign investment. That is to say that where it comes to the sectoral regulation of foreign investment in the host states, each Member States has the power to regulate the economic activities carried out by non-nationals – either by national measures or by bilateral international treaties.

It goes without saying that national measures or international treaties concerning treatment of non-nationals in each Member State are still subject to EU law – so that they must comply with general principles such as non-discrimination or with specific Treaty provisions such as for instance Article 66 TFEU *[see infringements proceedings above]*.

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[250] Krajewski, Markus. "Of Modes and Sectors External Relations, Internal Debates, and the Special Case of (Trade in) Services" in Cremona, Marise. Developments in EU External Relations Law. Oxford: Oxford University Press, 2008.

[251] Art. 2(1) and 3 TFEU.

The picture is likely to be subject to changes, as expanding EC sectoral legislation in compliance with subsidiarity and proportionality may create implied exclusive competence according to the EART doctrine. So far, the EU has never claimed external competence in regard to foreign direct investment specifically based on internal market competences.

As a consequence of existing overlaps between EU and Member State competence in the field of foreign investment, it is unlikely that EU will be in a position to negotiate a 'pure' bilateral investment agreement with a third country along the lines of the BITs concluded by Member States in the last fifty years without the joint participation of the Member States.

It is more likely instead (i) that the EU will enter into negotiations with third countries or in multilateral arenas on specific investment chapters within FTAs – for instance along the lines of the 2006 MPoI - or otherwise (ii) that it will address guidelines to Member States to negotiate conditions and requirements for admission of foreign investment consistent with EU policies (iii) or finally that it obtains a negotiating mandate.

In this respect, the clarification and (partial) centralization of competences in the field of foreign direct investment between the EU and Member States under Article 207 TFEU can be evaluated as a further step in the evolutionary history of common commercial policy. By means of the Lisbon Treaty, Member States have transferred to the EU additional instruments to achieve a possible 'common economic policy' of the EU as a regional economic integrated area towards third countries.

On a strictly legal perspective, it is apparent that only the narrow reading of Article 207 TFEU consistent with the conferral principle under Article 4(1) TEU does not undermine the EU architecture of external competences. European institutions are not going to enjoy broader competence in external trade relations competence than

they do in the internal market. Such a reading also denies a more federal constitution which was not at the heart of the last constitutional amendments[252].

Article 207 TFEU leaves unanswered though possible real-life scenarios concerning the international regulation of foreign investment at the bilateral and multilateral level as well as for the accommodation of the existing network of BITs between Member States and third countries which will be examined under paragraph 4.2.3. below[253].

4.2.2. An Exclusive Competence with a Shared Exercise

On the basis of exclusive competence in the field of common commercial policy the EU is empowered to negotiate and conclude 'pure' international agreements concluded by the EU. Member States on the other hand are prevented to conclude competing international agreements regulating the same matters[254].

The analysis of relevant TFEU Articles conducted so far brings to the conclusion that EU exclusive competence extends to the (liberalized) access of horizontal foreign

[252] A more comprehensive external competence covering all fields of current multilateral trading system has been advocated as a more federal constitution of the EU after the Lisbon Treaty. An external competence broader that the internal one is a situation which is neither unusual nor impractical in many federal systems. The same observe that unanimity within the Council in a number of issues (*i.a.* foreign direct investment and trade in services) is functional to grant and facilitate co-ordination between Union and Member States. See Krajewski, Markus. "External trade law and the Constitution Treaty: Towards a federal and more democratic common commercial policy?." Common Market Law Review 42 (2005): 91-127, at 126.

[253] For an increased cooperation, see Ceyssens, Jan. "Towards a Common Foreign Investment Policy? - Foreign Investment in the European Constitution." Legal Issues of Economic Integration 32, no. 3 (2005): 259-291.

[254] Article 2(1) TFEU.

investment. In relation to the treatment of foreign investment, external competence is shared between the EU and Member States tracing the lines of the internal market competence.

Accordingly, the exercise by the European institutions of their external competence in the field of foreign investment gives raise to different possible real-life scenarios.

In the first place, 'pure' international treaties concluded by the EU without prejudice for the exercise of Member States competence in neighbouring fields (4.2.2.1.).

In the second place, mixed agreements combining EU and Member States competence in a single international legal instrument (4.2.2.2.).

In any event, international agreements on horizontal foreign investment at large – covering at the same time access and standard treatment – may give raise intermediate solutions. A multilateral contest may require a mandate by Member States to EU, and a bilateral contest a mandate by the EU to Member States. In any event, increased co-operation and exchange of information will be useful for an orderly and efficient representation in international relations (4.2.2.3.).

4.2.2.1. Procedural Rules for 'Pure' EU Agreements on Foreign Investment

Article 218 TFEU sets forth the general procedural rule applying to (negotiation, conclusion, implementation and termination of) international agreements concluded between the Community and third countries or international organizations.

[Negotiations]

Upon recommendations of the Commission, the European Council authorizes negotiations, appoints the EU negotiator or negotiating team, designate a special committee for consultations and address directives on the conduction of the

negotiations[255]. Central to the procedure for the authorization to negotiate an international agreement, is the vote cast within the European Council. According to Article 218(8) TFEU, the Council decision is generally taken by qualified majority vote, and is exceptionally taken by unanimity for association agreements, for co-operation agreements with countries candidate for accession and for agreements which encroach on fields where unanimity is required. This last exception is based on a parallelism between internal and external competences, and is justified because an international agreement may have on Member States as well as on individuals the same effect of internal EU legislation.

As anticipated above, the unanimity rule applies also in relation to international agreements in the field of foreign direct investment under Article 207(4) second subparagraph TFEU – thereby offering a procedural occasion of co-operation between the EU and Member States in order to accommodate their respective interests in international economic relations.

The European Parliament is immediately and fully informed at all stages of the procedure, starting from negotiations[256].

[Conclusion]

According to the 1969 Vienna Convention on the Law of the Treaties, an international agreement is concluded when the text is adopted and authenticated by means of signature (signature ad referendum or initialling) by the representatives of the contracting parties while consent to be bound by it may be expressed by a

[255] The EU Treaty did not expressly provide a negotiator, instead negotiating functions were attributed in general to the Commission acting with the assistance of a special committee.

[256] Unlike Article 300 EU, where the European Parliament as formally involved only to give an opinion on the conclusion of certain international agreements. Nonetheless, a well established inter-institutional procedure called Luns-Westertep required that the Commission was to forward to the Parliament information on all activities preliminary to the conclusion of international agreements. On the 1964-1973 Luns-Westertep procedure and its subsequent modifications, see the Framework Agreement on relations between the European Parliament and the Commission of 26 May 2005.

subsequent act (either signature, exchange of instruments or ratification)[257]. It is upon the Council to determine the extent and powers conferred upon the negotiator in order to adopt and authenticate the text and, again, it is within the powers of the Council to decide on consent to be bound by the agreement, including if necessary its provisional application "pending the entry into force of the treaty"[258].

Except in the field of the Common Foreign and Security Policy, the European Parliament is consulted on the conclusion of every international agreement. The consent of the European Parliament is binding in relation to: (i) association agreements; (ii) accession to the ECHR; (iii) agreements establishing a specific institutional framework by organizing cooperation procedures; (iv) agreements having important budgetary implications for the EU; and (v) international agreements covering fields where the ordinary legislative procedure applies or the consent of the European Parliament is otherwise involved[259].

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[257] Articles 10 (*Authentication of the text*) and 11 (*Means of expressing consent to be bound by a treaty*) of the 1969 Vienna Convention on the Law of the Treaties (VCLT).

[258] Article 18 (*Obligation not to defeat the object and purpose of a treaty prior to its entry into force*) of the VCLT: "*A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed*".

[259] Under Article 300(3) EU the European Parliament was only called upon to give an opinion to the Council before the agreement was concluded. The opinion by the Parliament was binding only in relation to association agreements, to agreements establishing institutional co-operation, to agreements having important budgetary implications, and finally to those agreements, which amend an internal act, adopted by internal procedure of co-decision. The delimitation of the fields where the consent of the European Parliament was binding was much discussed it was suggested that the issue left space for further inter-institutional agreements laying down principles and guidelines for the participation of the European Parliament to the negotiation and conclusion of international

Besides international agreements of constitutional importance, such as accession to the ECHR, the definition of the fields where the consent of the European Parliament is binding corresponds to its involvement in the internal decision making according to letter (v), including by reference Article 207(2) where the European Parliament and the Council are in charge of the implementation of the common commercial policy, so that international agreements on foreign direct investment shall always be subject to the binding consent of the European Parliament[260].

[Modifications, Suspension and Termination]

Amendments and modifications to international agreements create new international obligations, and therefore follow the same procedure applied to the conclusion of the respective international agreements (*i.e.* decision of the Council upon consultation with the European Parliament). Under Article 218(7) TFEU the Council may give its powers to the negotiator in relation to modifications of those international agreements, whose modification requires a simplified procedure, *i.e.* a procedure without ratification[261]. Suspension on the contrary requires a simplified procedure not involving the consent European Parliament[262]. The Treaty does not contain provisions

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agreements, see and EECKHOUT P., *External Relations of the European Union – Legal and Constitutional Foundation*, (2004) Oxford, at 177.

[260] In this sense, see Krajewski, Markus. "External trade law and the Constitution Treaty: Towards a federal and more democratic common commercial policy?". Common Market Law Review 42 (2005): 91-127, at 124: "*It would seem implausible if the European Parliament were to have the right to be a co-legislator on the basis of Article III-315(2)* [now, Article 207(2)] *when implementing international agreements, but would not have to give its consent to the conclusion of the agreement. It should also be remembered that it was the clear intention on the Convention to give the European Parliament a greater influence in the common commercial policy.*"

[261] See Article 218(7) TFEU: "*When concluding an agreement, the Council may, by way of derogation from paragraph 2, authorise the negotiator to approve modifications on behalf of the Community where the agreement provides for them to be adopted by a simplified procedure or by a body set up by the agreement. The Council may attach specific conditions to such authorisation*".

[262] See Article 218(9) TFEU.

on termination of international treaties. Because termination is an event affecting the validity of the international agreement, the same procedure for the conclusion applies.

[Implementation and Compliance]

Once an international agreement has been concluded by the Community in the exercise of its exclusive authority, each contracting party - the Community on one side and the third State on the other - is obliged to refrain from acts which would defeat its object and purpose[263]. As far as the relation between the Community and the Member States is concerned, Article 2(1) specifically provides that Member States abstain from adopting legally binding acts, unless empowered by the EU to do so or for the implementation of EU acts[264]. According to consistent case law formed under the EC Treaty and non incompatible with the reformulation under the Treaty of Lisbon, international agreements concluded by the Community form an integral part

[263] Article 18 (*Obligation not to defeat the object and purpose of a treaty prior to its entry into force*) of the VCLT. See in this sense, CFI, 22 January 1997, Case T-115/94, *Opel Austria v Council*.

[264] Article 300(7) EC specifically provided that international agreements concluded by the Community are binding on the institutions of the Community as well as on Member States, thereby requiring that Member States abstain from taking on international obligations which could hinder compliance with the international obligation entered into by the Community. See ECJ, 14 July 1976, Joined Cases 3, 4 and 6-76, *Cornelis Kramer and others*, in (1976) ECR, 1279, at para. 44/45: "*It follows from all these factors that Member States participating in the convention* [The North-East Atlantic Fisheries Convention] *and in other similar agreements are now not only under a duty not to enter into any commitment within the framework of those conventions which could hinder the Community in carrying out the tasks entrusted to it by article 102 of the act of accession, but also under a duty to proceed by common action within the fisheries commission. It further follows therefrom that as soon as the Community institutions have initiated the procedure for implementing the provisions of the said article 102, and at the latest within the period laid down by that article, those institutions and the Member States will be under a duty to use all the political and legal means at their disposal in order to ensure the participation of the Community in the convention and in other similar agreements*".

of the Community legal system[265], and fall under the censorship of the European Commission acting as the guardian of the Treaties as well as of the Court of Justice in its task to ensure uniform interpretation and application of EU law[266]. When international agreement concluded exclusively by the Community entails obligations on behalf of Member States[267], international commitments undertaken by the Community prevail but do not substitute obligations and burdens borne by Member States which remain in full force and effect[268].

[Representation and Decision-Making]

When international agreements concluded by the Community establish specific

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[265] ECJ, 26 October 1982, Case 104/81, *Hauptzollamt Mainz v. C.A. Kupferberg & Cie KG a.A.*, in (1982) ECR, 3641, at para.s 13 and 14.

[266] ECJ, 10 September 1996, Case C-61/94, *Commission of the European Communities v. Federal Republic of Germany [International Dairy Arrangement]*, in (1996) ECR, I-3989, at para. 16.

[267] Agreements concluded exclusively by the Community and not by Member States are: the International Olive Oil Council, the International Science and Technology Centre, the International Fusion Energy Organization, as well as a number of fisheries conventions. More recently, see the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters signed in Lugano on 30 October 2007, in Lugano by the European Community, the Kingdom of Denmark, the Republic of Iceland, the Kingdom of Norway and the Swiss Confederation. See the inventory of multilateral treaties establishing an international organization and to which the European Community is a contracting party: EUROPEAN COMMISSION – EXTERNAL RELATIONS – TREATY OFFICE, *Community Membership at International Organizations*, Bruxelles (2009).

[268] This was the case with the system of aids for export in ECJ, 11 November 1975, Opinion 1/75, in (1975) ECR, 1355, at Part B-2 of the Grounds: "*It is of little importance that the obligations and financial burdens inherent in the execution of the agreement envisaged are borne directly by the Member States. The 'internal' and 'external' measures adopted by the Community within the framework of the common commercial policy do not necessarily involve, in order to ensure their compatibility with the treaty, a transfer to the institutions of the Community of the obligations and financial burdens which they may involve: such measures are solely concerned to substitute for the unilateral action of the Member States, in the field under consideration, a common action based upon uniform principles on behalf of the whole of the Community*".

institutional frameworks, implementation includes the representation of Member States through the Community in the respective institutional bodies. Article 218(9) TFEU, extends the simplified procedure excluding the involvement of the European Parliament to the decisions aimed at defining the positions on behalf of the Community on the adoption of acts having legal effects within a body established by an international agreement[269].

4.2.2.2. Procedural Rules for 'Mixed' EU Agreements on Foreign Investment

Mixed agreements are those falling within Community and Member States treaty-making competence and involving the activity of both[270]. As a matter of fact, mixed

[269] Commonly international institutional agreements will contain some provision to the effect of regulating the participation of the Community to the institution. The WTO agreements have specifically provided for the Community membership to the organization: under Article XI the European Communities are a member alongside all Member States – which were already party to the GATT 1947. According to the ECJ, 15 November 1994, Opinion 1/94, *Competence of the Community to conclude international agreements concerning services and the protection of intellectual property*, in (1994) ECR, I-5267, it is the European Community which need to be involved in the WTO. At the time of negotiation and signature of the WTO agreements, it was unclear. See, P. VAN DEN BOSSCHE, *The Law and Policy of the World Trade Organization*, Cambridge (2008). For a history of the negotiations see P.L.H. VAN DEN BOSSCHE, *The European Community and the Uruguay Agreements*, in J.H. JACKSON, *Implementing the Uruguay Round*, Oxford (2005). Article IX establishes decision making procedures and gives the Community the same number of votes equal to the number of their member States. The joint participation reflects the division of competence as outlined by the European Court. They are both full members of the WTO and can all be held responsible for compliance. On the matter of the joint or separate international responsibility of the Community for breaches committed by Member States, see E. STEINBERGER, *The WTO Treaty as a Mixed Agreement: Problems with the EC's and the EC Member States' Membership of the WTO*, 17 EJIL (2006) 4, 837-862. The first comment in the matter is in: C. TOMUSCHAT, *Liability for Mixed Agreements*, in D. O'KEEFE - H.G. SCHERMERS (eds), *Mixed Agreements*, Deventer (1983), at 125.

[270] There is no Treaty definition of mixed agreement and scholars have diverged on the issue of classification. In fact, a classification based solely on competence is not satisfactory, as may be the

agreements are by far the most common instrument for the Community's external

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case when the competence is indeed shared between Community and Member States but it is exercised separately and not jointly. The definition has first appeared in the seminal work by EHLERMAN, *Mixed Agreements A List of Problems*, in O'KEEFE D. - SCHERMERS H.G. (eds), *Mixed Agreements*, Deventer (1983), at 4 and 5. See also: HOLDGAARD R., *External Relations Law of the European Community – Legal Reasoning and Legal Discourses*, The Netherlands (2008), at 149 has expanded on the Community law definition of mixity in the light of recent case-law and scholarship, and evidenced an 'internal' approach consistent with Community legal system. See also *ibidem*: *Mixed Agreements before the ECJ*, 147. For an extensive literature on mixed agreements: I. MACLEOD - E.D. HENDRY - S. HYETT, *The External Relations of the European Communities*, Oxford (1996); M. CREMONA, *External Relations and External Competence: The Emergence of an Integrated Policy*, in P. CRAIG - G. DE BURCA, *The Evolution of EU Law*, Oxford (1999); J. HELISKOSKI, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States*, The Hague (2001); A. ROSAS, *The European Union and Mixed Agreements*, in A. DASHWOOD - C. HILLION (eds), *The General Law of EC External Relations*, London (2000) 203-207. The formula of mixed agreements, and of mixity, was first mentioned in the context of association agreements under Article 310 – a field where negotiations were conducted jointly by the Community and Member States in the context of the North South dialogue between the Community and Member States on one side and third countries on the other side. Member States' involvement was mostly confined to finance aid mechanisms. Those agreements expanded on previous commodity agreements and were meant to provide a framework for political, economic and civil co-operation and lead to, in more recent times, the so-called stabilization and association process and to the European neighbouring policy. ECJ, 4 October 1978, Opinion 1/78, *International Agreement on Natural Rubber*, in (1979) ECR, 2871, at para: "*According to the Council the subject-matter of the agreement falls outside the framework of commercial policy and thus calls for a division of powers between the Community and the Member States so that the agreement must be concluded, following the pattern of other similar agreements, according to the technique of the so-called" mixed-type" agreement, that is to say, by the Community and the Member States jointly. The Council takes the view that that formula, well tried in the context of association agreements, negotiations entered into in the context of the "north-south dialogue" and the commodity agreements previously concluded, have made it possible to assert the unity of the Community in a fully satisfactory manner on the international scene*".

policy, while 'exclusive' agreements are more exceptional[271]. While the Treaty of Lisbon has reformulated the architecture of exclusive and shared competences between the EU and Member States, which governs the delimitation of powers also in relation to external relations, no reference is made to mixed international agreements[272].

The negotiation and conclusion of investment chapters in bilateral or regional free trade agreements with third countries has been usually conducted under the form of a mixed agreement.

Extensive scholarship has elaborated on existing case-law and legislation in order to outline the applicable framework to mixed agreements combining EC Treaty procedural rules with the duty of close co-operation for inception (negotiation, conclusion and judicial control) and life (decision-making, Community representation, implementation, responsibility in case of breach) of mixed agreements[273]. 'Mixity' calls at all stages of the conclusions of an international agreement the joint activity of the EU and of the Member States bound together by the duty of close co-operation[274] in order to reach unity in external relations[275]. The result is the research

[271] An initial examination of the agreements done in: J. FEENSTRA, *A Survey of Mixed Agreements and their Participation Clauses*, in D. O'KEEFE - H.G. SCHERMERS (eds), *Mixed Agreements*, Deventer (1983).

[272] Mixed agreements were provided under Article 133(6), as inserted by the Treaty of Nice, in relation to international agreements in the fields of the exchange of cultural and audiovisual services, of educational services, of social and human health services. The so-called sectoral carve-out has been abolished by the Treaty of Lisbon, whereby the same sectors are now subject to unanimity rule within the Council.

[273] HOLDGAARD R., *External Relations Law of the European Community – Legal Reasoning and Legal Discourses*, The Netherlands (2008), at 153 on the Gradual Acceptance of Mixity Subject to the Duty of Close Co-Operation recognizes three periods: (i) mixity is incompatible with the Treaty; (ii) cautious acceptance of a duty of close co-operation; (iii) full acceptance and reinforcement of the duty of close co-operation.

[274] ECJ, 15 November 1994, Opinion 1/94, *Competence of the Community to conclude international*

for an adequate balance between competing interests: on one side Member States' interest to fair representation in external relations; on the other side the Community's interest to preserve autonomy in terms of rights and obligations; and

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agreements concerning services and the protection of intellectual property. The foundation for the duty of close co-operation traces back to the case-law of the Court on Article 10 EC addressing on a case by case basis empirical problems arising from joint activity of EC and Member States in the field of external relations. Indeed, when it appears that the subject matter of an agreement falls in part within the competence of the EC and in part within that of the Member States, it is important to ensure that there is a close association between the institutions of the Community and Member States both in process of negotiation and conclusion, and in the fulfilment of the obligations undertaken.

[275] Where the Community shares its authority with Member States and it has no exclusive power to enter into international agreements, the possibility to proceed with separate and distinct arrangements may diminish efficacy of external action and legal certainty towards third countries. The practice of joint action by the Community and Member States in the form of mixed agreements, on the contrary, has made it possible to assert the unity of the Community on the international scene in a fully satisfactory manner. ECJ, 19 March 1993, Opinion 2/91, *Convention Nº 170 of the International Labour Organization concerning Safety in the use of Chemicals at Work*, in (1993) ECR, I-1061, at para.s 36-38: "*36. At points 34 to 36 in Ruling 1/78 [1978] ECR 2151, the Court pointed out that when it appears that the subject-matter of an agreement or contract falls in part within the competence of the Community and in part within that of the Member States, it is important to ensure that there is a close association between the institutions of the Community and the Member States both in the process of negotiation and conclusion and in the fulfilment of the obligations entered into. This duty of cooperation, to which attention was drawn in the context of the EAEC Treaty, must also apply in the context of the EEC Treaty since it results from the requirement of unity in the international representation of the Community. 37. In this case, cooperation between the Community and the Member States is all the more necessary in view of the fact that the former cannot, as international law stands at present, itself conclude an ILO convention and must do so through the medium of the Member States. 38. It is therefore for the Community institutions and the Member States to take all the measures necessary so as best to ensure such cooperation both in the procedure of submission to the competent authority and ratification of Convention No 170 and in the implementation of commitments resulting from that Convention*".

finally third States' interest to certainty of international legal relations[276]. Accordingly, procedural rules under Article 218 TFEU are to be read in conjunction with Article 4(3) TEU, replacing Article 10 EC.

[Negotiation and Conclusion]

Close co-operation is required in the first place in order to start negotiations of a mixed agreement.

The Council decides on a common position for the part of the international agreement falling under the Community competence, while Member States in principle could either negotiate with each with a different representative or agree on a separate common position. It is often the case that it is difficult to separate the respective fields of competence in the course of negotiations and that a common position is agreed upon jointly by Community and by Member States and then presented to the negotiating counterparty.

At the stage of conclusion, the Council decision under Article 218(3) TFEU shall be accompanied by the ratification process by each Member States according to their respective constitutional rules, so that the practice of mixity grants Member States a veto power on the external initiatives of the Community[277].

[Representation, Decision-making and Voting Rights]

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[276] J. HELISKOSKI, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States*, (2001) and P. EECKHOUT, *External Relations of the European Union, Legal and Constitutional Foundations*, Oxford (2004) at 198 on the causes for mixity. The latter Author recalls C.-D. EHLERMANN, *Mixed Agreements a List of Problems*, in O'KEEFE - H.G. SCHERMERS (eds), *Mixed Agreements*, Deventer (1983), 3. (i) 'Member States wishes to continue to appear as contracting parties in order to remain visible and identifiable actors in the international scene'; (ii) mixed agreement formula avoids the necessity of agreeing on the exact delimitation of Community and Member States' powers; (iii) mixed agreements formula imply mutual understanding, accommodation and peace-making; (iv) inevitably requires unanimity.

[277] National ratifications may be time-consuming and threaten the entry into force of mixed agreements, therefore the joint negotiating mandate may include the provisional application before the entry into force of the agreement.

With reference to mixed agreements establishing an international organization, such as governing a free trade area, Council decisions on EU positions to be adopted in international bodies shall in principle be accompanied by Member States declarations. Mixed agreements may expressly provide specific rules in relation to rights arising respectively to the EU and to Member States (such as representation, decision-making and voting rights), including guidelines for representation and exercise of their respective rights arising from membership or a statement of competence for implementation and responsibility[278].

[International Responsibility]

Third States may rely on the express declaration of competence when they claim the responsibility either of the Member States or of the Community[279]. When otherwise there is no declaration of competence, the Community and the Member States are deemed to be jointly responsible for the entire agreement, based on duty of co-operation rather than strict competence rules[280]. In fact, Member States could not

[278] The declaration of competence may be issued by the Community and Member States before and as a condition to accession to the mixed agreements, or may be requested by any other interested contracting party to the agreement. See a comprehensive list of declarations of competence in: EUROPEAN COMMISSION, *Agreements with a declaration of competence by the EC*, Bruxelles (2009).

[279] See G. GAJA, *The European Community's Rights and Obligations under Mixed Agreements*, in D. O'KEEFE - H.G. SCHERMERS (eds), *Mixed Agreements*, Deventer (1983), at p. 135; and C. TOMUSCHAT, *The International Responsibility of the European Union*, in E. CANNIZZARO (ed), *The European Union as an Actor in International Relations*, The Hague (2002), at 185. The latter Author had already faced the issue in C. TOMUSCHAT, *Liability for Mixed Agreements*, in D. O'KEEFE - H.G. SCHERMERS (eds), *Mixed Agreements*, Deventer (1983), at 125. As for the responsibility of the EU as an international organization, the issue in general is under the consideration of the International Law Commission Working Group on Responsibility of International Organization, which is currently chaired by Prof. Giorgio Gaja.

[280] ECJ, 2 March 1994, Case C-316/91, *European Parliament v. Council of the European Union* [Lomè Convention], in (1994) ECR, I-625, at para-s 25, 26 and 34: "*25 It is appropriate first to consider the distribution of powers between the Community and its Member States in the field of development aid.*

invoke a different attribution of power than that which was knowledgeable to the negotiating counterpart[281].

4.2.2.3. Intermediate Solutions : Exchange of Negotiating Mandates and Increased Co-operation

The negotiation and conclusion of international agreements on horizontal foreign investment at large – covering at the same time access and standard treatment – may require intermediate solutions other than 'pure' international agreements concluded by the EU and 'mixed' agreements.

The EU usually enjoys a stronger negotiating position than Member States in multilateral conventions. In case initiatives for the multilateralization of foreign

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26 The Community's competence in that field is not exclusive. The Member States are accordingly entitled to enter into commitments themselves vis-à-vis non-member States, either collectively or individually, or even jointly with the Community" and 34-35: "*34 As for the question whether it is for the Community or for its Member States to perform that obligation, it should be noted, as stated above at paragraph 26, that the competence of the Community in the field of development aid is not exclusive, so that the Member States are entitled collectively to exercise their competence in that field with a view to bearing the financial assistance to be granted to the ACP States. 35 It follows that the competence to implement the Community' s financial assistance provided for by Article 231 of the Convention and Article 1 of the Financial Protocol is shared by the Community and its Member States and that it is for them to choose the source and methods of financing*".

[281] Unless the breach consists of a negative behaviour: in this case the Community could not be called upon to perform an act because it had no duty to perform. See, EECKHOUT P., *External Relations of the European Union – Legal and Constitutional Foundation*, (2004) Oxford, at 223. Therefore often negotiating counterparts require the EU and Member States to declare their respective powers. Eeckhout notes that the concern to know the competence may be inspired by the concern to know responsibility for possible violations. Eeckhout also recalls the case of EAEC's accession to Nuclear Safety Convention discussed by the European Court, 10 December 200, in Case C-29/99, *Commission v. Council*, where the Court enforced the obligation provided by the Nuclear Safety Convention for the Council to give a complete declaration of competence.

investment are resumed, such as in the framework of the OECD or of the G8, the EU may benefit from a negotiating mandate by Member States with the aim of co-ordinating the exercise of EU competences with Member States' or even of exercising, in full or in part, Member States' competences[282].

In the light of the functionalization of the common commercial policy to development aims, an horizontal mandate by Member States to the EU concerning standard treatment for foreign investment would allow the negotiation of comprehensive economic partnership agreements making more simple and more efficient international relations between third countries and EU Member States, in line with the aims of trade development and liberalization set out in Article 206 TFEU.

Member States on the other hand have shown so far to be jealous over their sovereignty over bilateral economic relations with third countries and willing to preserve the existing network of bilateral agreements. In this respect, as long as EU law or EU international agreements on access of foreign investment are complied with, Member States retain their power to further develop their international economic relations.

As Member States may not be inclined to wait for bilateral and or regional initiatives undertaken by the EU with respect to access of foreign investment, a negotiating mandate or guidelines or even standard clauses in relation to access and non-discrimination of foreign investment addressed by the EU to Member States may be conducive to unity in external relations and to legal certainty *vis-à-vis* third countries[283].

[282] See conclusion of the G8 Ministerial Meeting held in l'Aquila from to 8 to 10 July 2009.

[283] See Commission Decision on approving the standard clauses for inclusion in bilateral air service agreements between Member States and third countries jointly laid down by the Commission and the Member States, C(2005)943 of 29 March 2005.

The overlap of competences in the field of foreign investment calls for an increased co-operation between the EU and Member States. In similar contests, such as the regulation of international air services, the Council has exercised its internal market competence in order to coordinate an exchange of information concerning the conclusion by Member States of bilateral agreements[284].

4.2.3. Possible Real-Life Scenarios

The examination of procedural rules for the exercise of external competences in the field of foreign investment by the EU and by Member States under Article 207 TFEU leaves unanswered the practical questions on remedies to be adopted respectively in agreements concluded by the EU and in those concluded by Member States in order to abide by the new delimitation of competences. Considered the extension of the network of the existing BITs concluded by Member States, it is not unlikely that new agreements will be also called upon to regulate the validity of earlier agreements on foreign investment concluded under the rule of Article 133 EC.

4.2.3.1. Standard Clauses

[Community Clause instead of Nationality Clause and BIT Clauses]

In order for international agreements concluded by Member States with third countries on foreign investment to comply with non-discrimination principle under EU law, references to treatment granted to nationals of the Member State shall be

[284] See Regulation (EC) No 847/2004 of the European Parliament and of the Council of 29 April 2004 on the negotiation and implementation of air service agreements between Member States and third countries, and in particular Article 1 (Notification to the Commission) and Article 4 (Conclusion of Agreements).

extended to non-nationals established on its territory by means of a standard reference to nationals of 'EU Member States'.

Conversely, international agreements concluded by the EU may conflicts with substantial treatment provisions under BITs concluded between Member States and third countries. The conflict may be solved by means of provisions leaving without prejudice the more favourable treatment arising to European investors from BITs to which a Member State is party.

[REIO and Disconnection Clauses]

In order to avoid that non-discrimination clauses provided under bilateral agreements between a either the EU or a Member State and a third country have the effect of multilateralizing the EU legal system to the nationals of the third country, international investment agreements shall include a regional economic integration organization (REIO) clause.

REIO clauses exclude the applicability of non-discrimination rules (national and most-favoured-nation treatment) with regard to preferential treatment that members of a REIO grant other REIO members and their investors.

REIO clauses are generally provided in international investment agreements in order to allow restrictions to be imposed on investors from a non-REIO country. This is considered a legitimate means of protection of regional investment policies, even though it undermines non-discrimination as a central principle of multilateral economic relations[285].

[285] As an alternative to REIO clauses, the EU and Member States may assess and agree on specific advantages in force within the EU which should not apply to third countries and formulate specific sectoral restrictions, or even country specific exceptions. UNCTAD supports this latter approach rather than REIO clauses. See UNCTAD, The REIO Exception in MFN Treatment Clauses, UNCTAD Series on International Investment Policies for Development, United Nations, New York and Geneva, 2004.

Disconnection clauses on the other hand prevent other normative conflicts arising from the specific international investment agreement and the EU legal system at large[286], by making EU law opposable to third countries[287].

Disconnection clauses are a means to preserve EU provisions having an external dimension from being frustrated by later international commitments entered into by the EU or Member States. From an internal point of view, disconnection clauses ensure that EU law is not hindered by international commitments. Of course, disconnection clauses in relation to specific EU law provisions may be negotiated instead of broad ones encompassing the whole EU legal system.

4.2.3.2. Existing International Agreements

Does the new formulation of Article 207 TFEU impact on existing international investment treaties concluded by Member States? Article 351 TFEU, replicating the language of Article 307 EC, provides that the TFEU does not affect rights and obligations arising from international agreements concluded or entered into force by Member States before their accession to the EU. The provision aims to preserve earlier international commitments concluded by Member States before accession in field covered by EU external competence[288]. The provision applies by analogy to a

[286] Including provisions restricting access to capital from third countries under Articles 64(3) and 66 TFEU.

[287] Disconnection clauses in multilateral agreements usually providing a general exception to the treaty regime to the extent that the same matter is covered by EU law in the mutual relations of EU Member States. See LICKOVA M., European Exceptionalism in International Law, in the European Journal of International Law, Vol. 19 no. 3, 2008, 463-490 at 484.

[288] See, in that connection, Article 30(4)(b) of the 1969 Vienna Convention on the Law of Treaties.

case of international agreements concluded before the entry into force of a Treaty amendment[289].

Article 315(2) requires Member States to eliminate incompatibilities between earlier international agreements and the EU Treaties. The obligation has been declared an expression of the duty of loyal co-operation, and the ECJ has tightened the obligation on Member States not allowing dilatory measures[290].

A careful analysis the new formulation of common commercial policy under Article 207 TFEU, evidences that possible incompatibilities between existing BITs concluded by Member States with third countries may concern *i.a.* (i) capital transfer clauses in relation to Council restrictive measures on capital movements to and from third countries; and (ii) non-discrimination principle in relation to nationality clauses.

[Remedies under International Law]

A possible accommodation of incompatibilities between earlier agreements and the EU Treaties lies in international law instruments. Consistent interpretation by the

[289] ECJ, Judgement of 14 October 1980 in case 812/79, Attorney General v. Burga, at para. 11: "*(a) to the first question : Article 234 of the Treaty must be interpreted as meaning that the application of the Treaty does not affect either the duty to observe the rights of non-member countries under an agreement concluded with a Member State prior to the entry into force of the Treaty or, as the case may be, the accession of a Member State, or the observance by that member state of its obligations under the agreement and that, consequently, the institutions of the Community are bound not to impede the performance of those obligations by the Member State concerned*".

[290] The Court has declared that difficulties relating to See ECJ, judgement of 4 July 2000 in case C-62/98, at para. 39 "*As to that, the existence of a difficult political situation in a third State which is a contracting party, as in the present case, cannot justify a continuing failure on the part of a Member State to fulfil its obligations under the Treaty (see Commission v Belgium, cited above, paragraph 42).*"; and judgement of 14 September 1999 in Case C-170/98, *Commission* v *Belgium,* at para. 42: "*The existence of a difficult political situation in a third State which is a contracting party, as in the present case, cannot justify a failure to fulfil obligations. If a Member State encounters difficulties which make it impossible to adjust an agreement, it must denounce the agreement.*".

parties themselves or by judicial authorities of earlier agreements in the light of the relevant Treaty provisions may lead to the elimination of incompatibilities[291]. Enforcement of general international law principles such as suspension or termination based on change in circumstances[292], or of renegotiation clauses under earlier agreements, as well may lead to a change in treaty obligations consistent with EU law.

In the Austria, Sweden and Finland cases, the ECJ dismissed Member States' defences based on international law mechanisms, such as suspension or denunciation of the earlier agreement, because it '*is too uncertain in its effects to guarantee that the measure adopted by the Council be applied effectively.*'[293]. As already remarked, the Court adopted a very strict effectiveness test expressing disregard and mistrust on international law mechanisms.

[Transitory Authorization Regimes]

Progressive compliance to a new international legal regime can be tackled by way of transitory specific authorizations. An example thereof has been the authorization regime applicable to Member States trade agreements concluded before the entry into force of the common commercial policy[294].

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[291] ECJ judgement of 2003 in Case C-216/01, Budejovicku Budvar v Rudolf Ammersin GmbH.

[292] Pursuant to Article 62 VCLT.

[293] Para. 40 of the judgement in case C-205/06; para. 41 of the judgement in case C-249/06.

[294] 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, OJ 1969 L326/39. The most recent decision is Council Decision 2001/855/EC authorising the automatic renewal or continuation in force of provisions governing matters covered by the common commercial policy contained in the friendship, trade and navigation treaties and trade agreements concluded between Member States and third countries OJ 2001 L 320/13. This decision expired on 30 April 2005 and has not been renewed.

Similarly, on occasion of the 2004 and 2007 enlargements, the negotiations on accession covered the renegotiation and denunciation of existing incompatible international agreements between candidate countries and third countries[295].

Horizontal EU Agreements

Finally, incompatibilities between earlier BITs and EU Treaties may be addressed by horizontal international agreements concluded by the EU with third countries, based on EU own external competence and on a negotiating mandate granted by Member States, for the regulation of foreign investment.

Such was the case for the 2007 Open Sky Agreement between the EU and the USA replacing earlier bilateral agreements concluded by Member States[296], which had been declared by the ECJ contrary to EU law[297].

[295] See Cremona, Marise, and Academy of European Law. The Enlargement of the European Union. Oxford: Oxford University Press, 2003.

[296] Decision 2007/339/EC of the Council and the Representatives of the Governments of the Member States of the European Union meeting within the Council, of 25 April 2007, on the signature and provisional application of the Air Transport Agreement between the European Community and its Member States, on the one hand, and the United States of America, on the other hand.

[297] ECJ judgements of 5 November 2002, Cases C-466 to 469 and 471, 472, 475, 476/98, *Commission v. United Kingdom, Denmark, Sweden, Finland, Belgium, Luxemburg, Austria, Germany*.

CONCLUSIONS

The examination of possible or actual conflicts between international treaties on foreign investment - whether concluded by Member States *inter se* or with third countries or whether concluded by the EU - and the EU legal order opens the floor to conclusive remarks of different nature.

[Developments in Progress]

The regulation of foreign investment has long been a field for States to control and promote the admission and protection of third country nationals pursuing economic activities in their territory according to essential national interests.

Until recently, it has been a relatively unnoticed area of EU law. On the wake of the multilateralization of the governance on economic activities - and at the same time as a result of the mature economic integration between Member States stretching over the treatment of third country nationals within the internal market – Member States' powers have come under severe pressure from the EU institutions.

Within the limits of the powers conferred so far, the latter institutions have experienced the exercise of some degree of coordination on investment to and from the EU in the framework of development policies with third countries.

[Conflicts between International Law and EU Law]

Nonetheless, international investment agreements concluded by Member States are still here to stay. In the first place, because under international law the international

agreements concluded by Member States with third countries are unaffected by conflicting EU law.

Indeed an expansion of EU external competences is in progress at the legislative level by means of Treaty amendments. This is coupled at the executive/judicial level by infringements proceeding and by ECJ case law strictly enforcing against Member States the duty of loyal cooperation under Article 351 TFEU.

In some case the combined action has brought and may bring again to renegotiation/termination by Member States of existing agreements with third countries or to the *quasi*-voluntary transfer of horizontal external competences from Member States to the EU.

[Principle of Conferral]

In this contest, the principle of conferral remains a bastion to defend the 'general' competences of Member States against 'special' EU competences. The EU enjoys limited powers - those conferred upon it by Member States under the EU treaties - and does not benefit of a general regulatory power neither in the internal nor in the external sphere enven in relation to foreign direct investment.

This same contest suggests and supports a narrow reading of the amendments introduced by the Treaty of Lisbon on EU external exclusive competence in the field of common commercial policy, so that external competences do not exceed internal ones.

[Constitutional Issue]

The allocation of external and internal competences between (central and local) authorities is a constitutional question in whatever legal order, even in the EU legal system where the originary nature of an international organization sometimes overshadows constitutional issues.

The full development of the broad perspectives on external competence (common commercial policy covering admission and treatment of foreign investors) which are apparently envisaged by EU institutions, would have a remarkable effect on the constitutional structure of the EU.

[Open Attitude to International Law]

Against this background, earlier BITs concluded by Member States *inter se* are an historical accident occurred between Member States' accessions. They are not straightforward incompatible, in terms of validity, of substantial applicable rules and of dispute settlement mechanisms, with EU law. On the contrary they appear to be - to the dismay of the EU institutions and of the ECJ – rather complementary legal instruments for the protection of cross-border investments *intra*-EU.

In any event, the jurisdiction by the competent arbitral tribunals aims at legal effects which are unlikely to affect the unity and supremacy of the EU legal order in the relation between Member States concerned (taking into account that arbitral tribunals enforce EU law where applicable to the facts of the case and in any event have to consider that EU law would eventually apply to enforcement proceedings).

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