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The New EU Competence over Foreign Direct Investment and its Impact on the EU´s Role as a Global Player

Kevin Kazimirek

Jean Monnet Centre for Europeanisation and Transnational Regulations Oldenburg
Fakultät I • Carl-von-Ossietzky-Universität Oldenburg • 26111 Oldenburg

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Carl von Ossietzky universität Oldenburg

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List of Abbreviations

AETR	Accord Européen sur les Transports Routiers
BIT	Bilateral Investment Treaty
CCP	Common Commercial Policy
CJEC	Court of Justice of the European Communities
CJEU	Court of Justice of the European Union
EC	European Community
EEC	European Economic Community
EU	European Union
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Service
IIA	International Investment Agreements
IMF	International Monetary Fund
MAI	Multilateral Agreement on Investment
MS	Member State
OECD	Organization for Economic Cooperation and Development
RTA	Regional Trade Agreement
TEC	Treaty establishing the European Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
ToL	Treaty of Lisbon
TRIMS	Agreement on Trade-Related Investment Measures
TRIPS	Agreement on Trade-Related Intellectual Property Rights
UNCTAD	United Nations Conference on Trade and Development
US	United States
VCLT	Vienna Convention of the Law of Treaties
WTO	World Trade Organization

A Introduction

I FDI in the global context

Owing to the gradual liberalization of most of the nations' financial markets, we are today faced with a global economic system that more than ever before allows single economies to interconnect and interfere with one another. The facilitation of market access, the loosening of internal exchange controls combined with new technological possibilities in data operations and communications have thereby given rise to a number of different financial instruments that expedited transnational financial actions to a yet unknown degree.[1]

With a calculated worldwide volume of 1.4 -1.6 trillion US Dollars in 2011, foreign direct investment (FDI) hereby represents such an instrument in today's world economy and has meanwhile become an essential component and driving force in the world's financial markets.[2]
Being a significant source of capital, FDI can boost development in both the host and investing economy, as it can vitalize inter alia the exchange of know how and technology between economies.[3] In spite of the current financial crisis and a setback in the volume of money invested, global FDI are expected to further grow in the future, thus underlining the maintained and yet prospective expanding importance of FDI.[4]

Its impact on world economics notwithstanding, politicians and experts have to this day not come up with a multilateral legal framework regulating foreign investment. Indeed, besides a minimum standard of protection guaranteed by international customary law, the world is confronted with a multitude of international investment agreements (IIA)[5] negotiated between two or more actors. As a result we can today count as much as 6.000

[1] OECD Benchmark Definition of Foreign Direct Investment, Section 1.1, p. 14; Communication from the Commission, Towards a comprehensive European international investment policy, p. 9.
[2] UNCTAD World Investment Report 2011, pp. 1 ff.
[3] Hjämroth and Westerberg, The contribution of trade to a new EU growth strategy, p. 2;
OECD Benchmark Definition of Foreign Direct Investment, Section 1.1, p. 14.
[4] UNCTAD World Investment Report 2011, p.1.
[5] Annotation: IIA shall be understood in a broad sense as to comprise various forms of investment related agreements such as FTAs or RTAs and BITs. It should further be noted, that the principal difference between FTAs/RTAs and BITs most often embrace a range of various policy domains whereas the latter concentrate more specifically on investment issues only. See Eilmansberger, Bilateral Investment Treaties and EU Law, pp. 383-385.

different IIAs, leaving the world in a complex and apparently inscrutable tangle of differing settlements, the so called “spaghetti bowl”.[6]

This situation clearly highlights the sensitivity of the topic, apparently too important as that the various governments would be willing to let go of this powerful device for economic development.

Corresponding to the principles of state sovereignty it is hence every single state’s responsibility to conduct negotiations with partner states about the specific regulations that shall apply for reciprocal investment flows.[7]

Likewise, this situation is the case for the 27 Member States of the European Union;[8] the fact of each Member State (MS) carrying out its own negotiations for bilateral investment agreements (BITs) has consequently resulted in a “nontransparent patchwork” of agreements and “different levels of protection for EU investors abroad”.[9]

II FDI in the European context

The entering into force of the Treaty of Lisbon (ToL) on December 1st 2009 and the consequent integration of FDI into the European Union’s Common Commercial Policy (CCP) offer a range of interesting questions in this context.

As the authors of the Treaty of Lisbon did not provide any exact definition of what exactly is meant by foreign direct investment, the precise extent of the newly acquired exclusive competence of the EU consequently remains blurry, leaving further room for controversy and debate.

While there is no doubt about the exclusivity of the FDI competence for the EU,[10] one is confronted with at least three not unproblematic questions:[11]

[6] Homepage of the United Nations Conference on Trade and Development and UNCTAD, World Investment Report 2011, p. xvi.
[7] Hjämroth and Westerberg, The contribution of trade to a new EU growth strategy, p. 3.
[8] Ceyssens, Towards a Common Foreign Policy in Investment?, pp. 262 ff.
[9] Hjämroth and Westerberg, The contribution of trade to a new EU growth strategy, p. 3.
[10] Article 3 I (e) TFEU in connection with Article 207 TFEU (Ex-Article 133 TEC).
[11] Ceyssens, Towards a Common Foreign Policy in Investment?, pp. 273 ff.

I) Does the new competence cover both regulations on market access (pre-establishment) as well as ones on protection and non-discrimination standards (post-establishment)?

II) Will the new competence include decision making powers over portfolio investments likewise?

III) Do all measures taken by the EU which are based on the new competence need to be necessarily targeted at a gradual liberalization of the markets or can the EU as well make use of its power for various non-economical reasons, e.g. in the public interest?

Answering these questions does indeed bear a detrimental interest for the better understanding of the EU's new powers. The correct assessment of these issues will help us evaluate to what extent the EU really will be able to negotiate investment agreements independently in the future, without the involvement of the single Member States.

In equal measure, this will as well provide us with possible answers as to what extent and which of the already existing bilaterally negotiated agreements of the Member States with third countries have (or will) become invalid or, in a different perspective, whether the MS are able to uphold BITs without contradicting their responsibilities towards the EU and whether they are under a duty to amend or terminate their existing BITs.

Even if one were to conclude and ascribe an extensive competence to the EU in the end, the involvement of the Member States via the Council of Ministers (and thus their remaining power to influence the results of negotiations) remains important and will have to be taken into account. Interesting to evaluate in this context, is whether the EU indeed has been equipped with the needed powers to face the global challenges as a powerful and unified entity.

The same applies for the yet to evaluate influence of the European Parliament, now having become a key player in the conclusion of agreements relating to foreign direct investment. The question whether a possible politicization with regards to questions on FDI is to be expected and whether a genuine investment strategy will be thrown off course due to the multitude of players will as well merit a brief discussion in this paper.

III Purpose of this work

More than just a simple elaboration of the scope of the new competence and the question as to what extent the multitude of Bilateral Trade Agreements have become obsolete or may remain valid with the entering into force of the Lisbon Treaty, this paper intends to assess the real surplus the EU has gained with it and to give possible answers as to what degree the competence is most likely to be expanded to. Far from exclusively being a matter of legal interpretation, it shall as well be reflected upon its political importance that a vast exclusive autonomy over FDI might have for the EU, given the latter's importance in today's economics.

Ultimately, this paper shall close with a short outlook on the EU's prospective investment relations, uncovering whether the aggrandized competence will back the European Union with sufficient power to face the upcoming challenges of tomorrow, or whether the assignment of a new competence is merely a new wrapping for a situation that will to a greater or lesser extent remain the same.

IV Methodology and Structure

In light of the above mentioned imprecision of the TFEU as regards the newly included FDI competence, it is indispensable to revert to other sources. These can consequently serve as a base to find answers to the multitude of uncertainties raised by the Treaty of Lisbon. In order to do so, a broad use of different sources appear to be the most genuine manner to establish a solid founding for an in depth analysis.

As a result, this paper has not been restricted solely to the use of primary and secondary law established by the European Union, but equally draws on various materials of non-European origin. In this respect, special attention was paid to historical and contemporary developments in the international arena in the domain of foreign investment, relating to which the consultation of IMF and OECD papers and documents proved extremely valuable.
However, considering the dynamic nature inherent in the EU's development, the CJEU's case law crystallized to be the most pertinent benchmark for the assessment of a competence that is yet to be shaped.

In addition, various pieces of literature dedicated to the topic of foreign investments as well as more recent and up to date online publications have helped constructing a coherent picture of the prospective situation on FDI in the EU. Moreover, this picture was complemented by official European Commission documents as well as numerous conversations and discussions I enjoyed with officials of the European Union as well as other economists during my work as an intern in the EU Office in Hong Kong. All of these shed a much clearer light onto a possible track of the competence's development and enhanced the often merely theoretical approach offered by written literature with a much more tangible assessment of experienced practitioners.

In view of allowing a better comprehension of the overall context the most important terms related to this topic shall be presented and explained first in the following chapter B. Not intending to offer an in depth definition, this first section shall however provide for a greater familiarity with the pursuing sections.

In the following analysis (chapter C), a wholesome appreciation of the newly introduced FDI competence shall be given. In an attempt to define the scope of the EU's new mandate, section I is dedicated to the general consideration of the EU competences, as well as a comparison of the situation before and after the Treaty of Lisbon with regards to FDI.

Consequently, attention shall be drawn to the conflicting coexistence of already conducted Member States BITs and prospective investment agreements by the EU. Section II will provide answers to the questions, whether the existing BITs have become obsolete with the entering of the Treaty of Lisbon and what responsibilities the single Member States succumb, in case of differing contents of the agreements.

A more practical evaluation of the new power shall be provided in section III. The practical limitations to exerting the new investment competence will be assessed in the light of possibly existing thematic restrictions as well as the interference of other key players such as the European Parliament.

Section IV will subsequently evaluate the real surplus of the investment competence for the EU, paying special consideration to changing economic circumstances.

Lastly, chapter D will provide an overall conclusion on the compiled insights and offer an outlook on the question, whether the measures taken have been broad enough to equip the EU with the necessary powers to meet its proper exigencies of becoming a global player.

B Theoretical Background

Owing to the above mentioned lack of an internationally valid regulation, there is to this day no uniform and universally accepted definition of what foreign investment actually means.

As a consequence, we are faced with a multitude of differing explanations; a successful and clearly outlined elaboration of the topic thus demands to restrict ourselves to one single definition of what is to be meant by foreign direct investment in this paper.

I Foreign Investment

According to the *Encyclopedia of Public International Law*, a foreign investment includes a

> *"transfer of funds or materials from one country (called capital-exporting country) to another country (called host country) in return for a direct or indirect participation in the earnings of that enterprise"*.[12]

This definition of foreign investment is broad enough, however, to comprise both "foreign direct investment" as well as "portfolio investment", two different concepts between which a considerable disparity consists. For the purpose of a better comprehension of the entire subject, it is recommendable to further dissect this term and to give a brief depiction of the major differences between these two different economic maneuvering possibilities of foreign investment.

1) Foreign Direct Investment and Portfolio Investment

The most pertinent distinguishing features between FDI and portfolio investment can be subsumed as to be the factors *durability* and *influence* in decision making processes.
Whereas portfolio investments are considered to primarily focus on establishing rather short term relationships between investor and enterprise, being aimed at earnings

[12] Encyclopedia of Public International Law, p. 246.

emanating from the "acquisition and sales of shares and other securities",[13] direct investments usually create durable economic ties and are directed on long term profits.[14]

In general, this stable bond of FDI most often goes along with the complement of technology exchange or the transfer of physical property, both of which underline the investor's intention of constructing a lasting relationship with the enterprise and which stand in stark contrast to the merely flexible financial injections realized by portfolio investments.[15]

The second differentiation to be made is the possibility of gaining a say in decision making processes in an enterprise. Owing to its rather short term directed commitment, portfolio investments do not target at gaining control over the firm, which is why a clear separation can be drawn between "share and ownership" in a company and "management and control" on the other hand.[16]

In contrast to the beforehand stated, the main motivation for FDI, through its long term commitment, is to obtain significant influence or control over an enterprise.[17]

Understandably, it indeed proves rather difficult to differentiate between these two sets of investment in practical terms. It moreover appears to be generally accepted that solely the acquisition of at least 10% of an enterprise's share serves as the main criterion to determine the investor's lasting interest as well as the capability of exerting influence on a management sphere.[18]

2) Common Legal Reference

Despite (or maybe due to) its importance for world's economies today, no unique treaty framework with respect to foreign investment has made its way to the legal stage up to date. Far from this, current foreign investment is governed by a patchwork of multiple

[13] OECD Benchmark Definition of Foreign Direct Investment, p. 22.
[14] IMF, Balance of Payments and International Investment Position Manual, p. 86.
[15] Sornarajah , The International Law on Foreign Investment, p. 8.
[16] Ibid.
[17] OECD Benchmark Definition of Foreign Direct Investment, pp. 22 f.
[18] IMF, Balance of Payments and International Investment Position Manual, p. 86 and OECD Benchmark Definition of Foreign Direct Investment, pp. 17 and 23.

multilateral, regional and bilateral agreements, determining the investor's and host countries' respective interests.[19]

All hitherto attempts to negotiate such a multilateral agreement, accepted by a large number of states, have to this day always ended in failure, though.

First attempts were already made in the time following the end of World War II when world's economies acknowledged the need of an aggrandized coherence between states' economies. The highly ambitious authors of the Havana Charter of 1948 thereby drafted a broad framework including inter alia provisions on a minimum standard of treatment and on compensations rights for expropriations.[20] This specific framework, however, never made its way into practice as it turned out that the US Senate would refuse its approbation.[21]

Other unsuccessful attempts include the Abs-Shawcross Draft Convention on Investment Abroad of 1957, an initiative launched by private business men,[22] as well as the more recently rejected and OECD driven Multilateral Agreement on Investment (MAI). Aiming at pronounced standards regarding the liberalization of investment schemes, investor protection and a dispute settlement mechanism, the MAI adopted a broad approach of investment, including FDI as well as portfolio investment.[23] Its ambition notwithstanding the MAI did not finish by being adopted, due to various reasons such as member states' concerns of losing detrimental parts of their sovereignty as well as wide opposition from non-governmental organizations and developing countries as potential future signatories that were left outside the negotiation rooms.[24]

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[19] International customary law in this regard supplies a minimal level of regulation, mainly on investor's property rights, though. See: Eilmansberger, Bilateral Investment Treaties and EU Law, p. 384.

[20] Refer to Havana Charter for an International Trade Organization.

[21] Newcombe and Paradell, Law and Practice of Investment Treaties, pp. 19 f. and further sources.

[22] Annotation: This convention primarily pushed for a minimum standard of treatment, a just and effective compensation for expropriation as well as protection measures for investors against unreasonable and discriminatory acts by the host state. Refer to: Newcombe and Paradell, Law and Practice of Investment Treaties, p. 22 and further sources.

[23] Newcombe and Paradell, Law and Practice of Investment Treaties, p. 55; Cremer, Tradition und Weltoffenheit des Rechts, pp. 146 ff. and further sources.

[24] Cremer, Tradition und Weltoffenheit des Rechts, pp.147-149 and further sources; Chase, Strengthening the Transatlantic Economy, p.2.

Thereafter, ministers participating in the WTO Ministerial Conference in 2001 stressed the importance of

> *"constructing a multilateral framework to secure transparent, stable and predictable conditions for long-term cross-border investment, particularly facing foreign direct investment."*[25]

in the future.

Consequently, negotiations about FDI were to be entered into on the next ministerial meeting once an "explicit consensus" on the exact modalities of negotiation had been attained.[26]

In between the meetings, though, it proved to be too ambitious a task to eventually do so; the upcoming conflicts of interests of the different parties therefore resulted in the elimination of FDI from the work programme, making it once again impossible for a valid homogeneous framework on FDI to enter the international legal floor.[27]

II Bilateral Investment Agreements

With the rebound of economic activities and the gradual opening of markets in the 1950s, an increased percentage of entrepreneurs began to expand their business on a transnational scale in search for investment and profit opportunities abroad.[28] Besides well-known entrepreneurial risks, a transnational investment venture bears the additional inconvenience of acting in a different, probably unknown legal environment. This at times may even be coupled with a lack of transparent procedures in the host country.[29] In the likely event of a legal dispute, the investor would hence wholly be incumbent upon a

[25] WTO 5th Ministerial Conference, Cancún, 2003, p. 26.
[26] Ibid.
[27] WTO Doha Work Programme, Draft General Council Decision, 2004, Point g), p. 3.
Annotation: the nonexistence of a multilateral code regulating foreign investment on the global scale may not be understood in the way that no standards related to investment whatsoever exist. For example, the OECD (Investment Instruments), the Energy Charter Treaty as well as the GATS, TRIMS and TRIPS offer a range of provisions related to investment. Specific in their respective purpose, these regulations, however, cannot be regarded as to provide a genuine framework regulating FDI wholly. For a brief overview over the different investment related agreements, including the Minimum Platform for EU FTAs, refer to Hjämroth and Westerberg, The contribution of trade to a new EU growth strategy, pp. 15-18.
[28] Kaushal, Revisiting History: How the Past Matters for the Present Backlash Against the Foreign Investment Regime, p. 496.
[29] Hjämroth and Westerberg, The contribution of trade to a new EU growth strategy, p. 22.

foreign country's jurisdiction that is potentially being influenced by political considerations in addition.[30]

For all these reasons, transborder investment ventures have usually contained aggrandized uncertainties for capital providers in comparison to intranational investments. In order to promote international investment flows and to decrease entrepreneurial risks, Bilateral Investment Treaties have served as the key components to provide for bilaterally sound legal and economic frameworks.[31]

As such, BITs normally contain promotion and protection related provisions on the free and undistorted transfer of capital as well as the guaranty of non-discrimination standards to foreign investors through the application of the principles of national treatment, the most-favored-nation principle as well as a fair and equitable treatment.

On the other hand, increased legal security is most often provided for in equal measure with regards to property rights and dispute settlements; generally included in a BIT is the obligation not to expropriate without immediate, effective and full compensation as well as the provision of dispute settlement mechanisms in the form of arbitration which provide the foreign investor with the possibility to immediately file a claim against the host state, thus circumventing domestic courts.[32]

Especially the latter proved to be a key element for the promotion and protection of transnational investments considering the numbers of conflicts:[33] establishing an arbitrational form of dispute settlement immensely enhances the legal security for an investor by creating a public international law instrument. This instrument allows the investor to act without the need to rely on diplomatic protection from the home country and to additionally eliminate the risk of being the subject to local, possibly influenced courts.[34]

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[30] Bishop, Crawford, Reisman, Foreign Investment Disputes, p. 19.

[31] Kaushal, Revisiting History: How the Past Matters for the Present Backlash Against the Foreign Investment Regime, p. 491.

Annotation: Indeed, Germany and Pakistan have been the first countries to conclude a BIT in order to smoothen future investment flows, with the former being particularly eager given the conclusion of 17 more BITs in only five more years. Refer to: Homepage of the World Bank, International Centre for Settlement of Investment Disputes.

[32] Hjämroth and Westerberg, The contribution of trade to a new EU growth strategy, pp. 18 ff., Bishop, Crawford, Reisman, Foreign Investment Disputes, pp. 19 f.

[33] Kaushal, Revisiting History: How the Past Matters for the Present Backlash Against the Foreign Investment Regime, p. 496.

[34] Refer to further indications in: Kaushal, Revisiting History: How the Past Matters for the Present Backlash Against the Foreign Investment Regime, p. 498.

As such, BIT have played a considerable role in regulating and establishing transnational capital flows by creating clear and settled standards procedures. The importance of such an agreement and its specific, successful elaboration on the proper economy reflects the countries' hesitations to agree upon one single, fixed investment standard, resulting in a plentitude of different standards applied.

C Analysis

I EU Competences

1) General Overview

With the coming into effect of the Treaty of Lisbon, the EU acquired exclusive competence over FDI within its Common Commercial Policy.[35] The new wording and now existing explicit language of Article 207 TFEU may not lead to the precipitate assumption, though, that the EU was entirely restrained from acting on topics related to investment before.

It is therefore of great importance to first shed some light on the question as to what extent the EU might have had a say on investment related questions even before the entering into force of the Treaty of Lisbon. A brief overview of the express and implied external competences European decision makers did possess already beforehand on matters that relate to FDI will thus allow a better evaluation of what has really changed.

a) Express External Powers

Being the primary legal basis for any acting of the European Union, the various Treaties sharply delimit the competences of the European Union.

In this context, Article 5 TEU clearly states that the European Union

> *"shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein",*

thereby confirming the prevailing and legally restricting principle of conferred powers.

Referring to external powers, the former European Community consequently only had several competences at its disposal, most notably those comprised by its Common

[35] Article 207 TFEU.

Commercial Policy[36] enabling the EC to conduct its external trade relations. On a different note, several other provisions include the competence over association agreements[37], international cooperation in research and technological development[38], environmental cooperation[39], monetary or foreign exchange regime matters[40] as well as in the field of development cooperation[41].

As a consequence, one might suggest that an intervention in any resort not covered by the Treaties would hence be considered a trespassing of the European Union's proper powers.

b) Implied External Powers

This evident conclusion notwithstanding, the European Union, by means of the jurisdiction of the Court of Justice of the European Union (CJEU)[42], developed a complex system of implied powers, allowing it a broader scope of action than initially expected.

i) AETR ruling

The most important conclusion drawn from the European Agreement on Road Transport (AETR) ruling[43] is that the EU's authority to enter into international agreements

> *"may equally flow from other provisions of the Treaty and from measures adopted, within the framework of these provisions, by the Community institutions."*[44]

Quite manifestly the European Union's competence to enter into an international agreement in a specific domain is therefore not absolutely restricted to explicitly mentioned Treaty provisions. To accurately determine whether the European Union has been in the position to direct or influence external FDI related matters even before the Treaty of Lisbon, it is hence not sufficient to restrict the analysis on expressly stated

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[36] Ex-Article 133 TEC (now Article 207 TFEU).
[37] Ex-Article 310 TEC (now 226 Article TFEU).
[38] Ex-Article 170 TEC (now Article 186 TFEU).
[39] Ex-Article 174 IV TEC (now Article 191 IV TFEU).
[40] Ex-Article 111 I, II, III, V TEC (now Article 219 TFEU).
[41] Ex-Article 181 TEC (now Article 211 TFEU).
[42] Annotation: respectively, its predecessor the "Court of Justice of the European Communities" (CJEC). Subsequently also referred to as the "Court".
[43] Case 22/70, Commission v. Council (AETR).
[44] Case 22/70, Commission v. Council (AETR), para 16.

competences, but to furthermore elaborate the possibility of non-explicitly conferred powers.

ii) Kramer Case

Following its decision in the AETR case, the CJEU reaffirmed that authority to act may as well

> "*flow* ***implicitly*** *from other provisions of the Treaty, from the Act of Accession and from measures adopted within the framework of those provisions, by the Community institutions*"[45]

in the so called Kramer Case.

Even though almost identical in wording, a nevertheless not negligible difference exists between these two rulings: whereas with the AETR ruling an actual adoption of internal rules was necessary to activate the EU's authority to act on the external sphere, the simple existence of an internal competence would already suffice for triggering the complementary external competence according to the Kramer Case.[46]

Being granted a specific internal power, hence, would thus be mirrored onto the external sphere likewise "on the grounds of equity and effectiveness", establishing the "principle of parallelism".[47]

Debate over whether the European Union did in fact possess authority to act in the absence of either an express conferral or the adoption of an internal rule remained even after the Kramer Case, though.[48]

iii) Opinion 1/76

Last concerns about this delicate question with regard to an implicit external competence were only allayed after the establishing of the "principle of parallelism" elaborated in the European Laying-Up Fund for Inland Waterway Vessels Case and the CJEC's following Opinion 1/79.

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[45] Cases 3, 4 and 6/76, Kramer, para 19-20.
Annotation: Bold type effected by the author.
[46] Craig and De Búrca, EU law: text, cases, and materials, p. 311.
[47] Ibid p. 310.
[48] Ibid p. 310.

At this juncture, the Court reiterated its previous Kramer Case ruling and declared that a conferral of an implied external power shall be assumed, provided that

I) the EC disposes of the complementary internal competence in that specific domain “for the purpose of attaining a specific objective”; and that
II) the Community’s participation is necessary for the realization of that objective.[49]

In other words, this opinion confirmed the ruling of the Kramer Case in the point that the simple existence of the internal competence suffices to establish an analogue external competence provided its necessity.

Therefore, a consideration of possible implicitly conferred powers derived from other Treaty provisions or secondary legislation consequently appears to be as much of importance as the taking into account of external ones.

2) Situation Pre-Lisbon

a) Express Investment Competences

Scanning the initial provisions of the European Community, we find no concrete indication that would grant the Commission an express competence over FDI related matters.

Despite of this lack of textual evidence, it is not entirely unreasonable to reflect upon the question as to what degree investment and trade may be two separate, but yet inseparably linked concepts.

In the former Article 133 I TEC, the CCP was described as to be guided by

> *"uniform principles, particularly in regard to […] the conclusion of tariff and trade agreements, [and] the achievement of uniformity in measures of liberalisation […]”.*

One might suggest that in order to accomplish the latter uniformity, it is not unreasonable, but maybe even imperative that the CCP shall cover investment as an implicitly understood and intrinsic part of trade.

[49] Opinion 1/76, points 3 and 4.

The Court's jurisdiction over the CCP in the 1970s gave rise to such a view, as it ruled that the CCP shall be interpreted broadly. In this perspective it decided that the EEC shall pursue an effective defence of EEC commercial interests and to thus anticipate any possibly arising distortion within the single market.[50]

Going even beyond this, the Court explained in a later opinion that the CCP's enumeration of competences in the Treaty should be considered non-exhaustive; in order to fully exert its functions and to promote international trade the Community shall not be restricted solely to the traditional aspects of external trade (i.e. the removal of customs duties or quantitative restrictions) but should be enabled to make use of more sophisticated means.[51]

This rather broad interpretation, most evidently going beyond the initial explicit wording of the Treaty was not being refrained from until two decades later. Only then the

> *"end of the expansion of EC competence under the CCP, as well as the end of the period of judicial activism with regard to the EC's exclusive competence"*[52]

was marked.

The question whether the CCP would expand its scope to include matters related to foreign investment was finally settled, when the CJEC elaborated that the CCP's competence only included those aspects in the trade of services which are comparable to trades in goods.[53]

The Court thereby excluded an authority over issues related to the free movement of persons and their rights of establishment, both of which represent indispensable aspects for an investment venture.[54] In this context it explained that in accordance with Article 3 ECT the CCP and the movement of people were listed as two different "Community activities" and may consequently not be intermingled with one another.[55]

Opinion 2/92 and the Treaty of Amsterdam later reaffirmed the above said. Whereas the first stated that the decision whether or not to assign foreign investors national treatment

[50] Opinion 1/75.
[51] Opinion 1/78.
[52] Craig and De Búrca, EU law: text, cases, and materials, p. 321.
[53] Opinion 1/94, para 41-47.
[54] Ceyssens, Towards a Common Foreign Policy in Investment?, p. 260.
[55] Opinion 1/94 para 46; Ceyssens, Towards a Common Foreign Policy in Investment?, p. 260.

does not fall within the scope of the Community's CCP[56] the Treaty of Amsterdam confirmed Opinion 1/94 in principle, but opened the door for a possible future inclusion of intellectual property rights into the CCP.[57]

It is hence obvious that up to this moment the competence over investment issues was strictly separated from the powers enshrined in the CCP. Such competence was thus deprived of the Community's authority.

In this context, the entering into force of Treaty of Nice marks the first step towards a gradual inclusion of explicit investment related powers into the present European Union's competence[58] adding the notions of trade in services and commercial aspects of intellectual property.[59]

In fact, this competence covered particular fields of investment matters, e.g. for commercial presence in third countries according to the GATS definition.[60]

However, the newly added authority of the European Union to act in these domains remained rather limited in practice. This was due to the fact that inter alia unanimity voting as well as shared competences in certain sensitive sectors were upheld[61] which produced an almost incomprehensible and unsystematic system of competences.[62]

As a result, one can conclude that the express competences over foreign investment that existed prior to the Lisbon Treaty only had "little relevance for policies directed at investment in general".[63]

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[56] Opinion 2/92.
[57] Craig and De Búrca, EU law: text, cases, and materials, pp. 321 f.
[58] Mola, Which Role for the EU in the Development of International Investment Law?, Section 3.1.
[59] Article 133 V TEC.
[60] Dashwood, The General Law of E.C. External Relations, p. 281.
[61] Article 133 V, VI TEC; Mola, Which Role for the EU in the Development of International Investment Law?, Section 3.1, para 2.
[62] Annotation: For a critical debate over the Nice amendments of Article 133 TEC, refer to C. Herrmann, Common Commercial Policy after Nice: Sisyphus would have done a better job, Common Market Law Review 39, 2002, pp. 26-27.
[63] Ceyssens, Towards a Common Foreign Policy in Investment?, p. 261.

b) Implied Investment Competences

In spite of the just described rather limited express powers on investment related issues, there might have existed the possibility for the EU to as well draw such an implicit competence in conformity with the beforehand illustrated principle of parallelism elaborated by the Court's jurisdiction.

Normative powers, granting the Commission authority over investment related issues on the internal sphere, may thus also serve as a reasoning for acting on the outside.[64]

In this context, Articles 57, 43, 44 and 47 of the EC Treaty, all provisions conferring the European Community authority in the domains of free movement of capital and the freedom of establishment, merit a closer look in the following sections.

i) Article 57 TEC – Free Movement of Capital

Article 57 II of the TEC makes reference to all capital movements involving foreign direct investment that are conducted between any Member State and third countries.[65]

As for the lack of both an express mentioning to conclude international agreements and a specification on its adoption procedure, Article 57 was generally not listed among the explicit external competences of the Community.[66]

Despite these imprecisions on how to realize the enlisted objective, Article 57 nevertheless incontestably granted the EC an internal normative power; a power which, in accordance with the principle of parallelism, may in pursuance of the specific action be realized by measures on the external sphere.[67]

Whereas Opinion 2/92 affirmed that an external competence derives from Article 57 II, the question about the precise scope of the EC's competence has been left open.[68]

[64] Mola, Which Role for the EU in the Development of International Investment Law?, Section 3.1, para 3.
[65] Art. 57 II TEC (now Art. 64 II TFEU).
[66] Mola, Which Role for the EU in the Development of International Investment Law?, Section 3.1, para 4.
[67] Ibid.
[68] Opinion 2/92, paragraph V, points 6 and 7.

Following the approach of a systematic interpretation one might well infer that the scope of the notion of free movement of capital complies with the one listed in the preceding Article.[69] However, also Article 56 fails to clearly define the exact margin of "movement of capital", therefore ceding a more accurate elaboration of the term to future CJEC jurisdiction.

In tune with the non-exhaustive description of capital movement of Directive 88/361/EEC, the Court inter alia ruled that Article 56 shall be understood likewise as a prohibition of any restrictions made with regards to the obtainment of loans from persons established in other Member States,[70] the acquisition of immovable property in the territory of another Member State[71] as well as the creation of mortgages in foreign currencies.[72]

Considering the above listed jurisdiction, it appears as if the scope of the notion "movement of capital" and thus the margin of action conferred upon the Community in Article 57 only encompasses those investment related competences with regard to market access and pre-establishment phase of foreign investment, thus excluding disposition over post-establishment regulations.

Moreover, it has been a cause for debate whether this Community competence was of shared or exclusive nature. Whereas both views are reflected and find support among different authors in corresponding literature,[73] the more recent Union's and its Member States' practice on foreign investment related matters suggest to mirror a shared competence and find reference in the Court's jurisdiction likewise.[74]

[69] Article 56 TEC.
[70] Case 439/97, Sandoz..
[71] Case 302/97, Konle.
[72] Case 464/98, Westdeutsche Landesbank Girozentrale.
[73] Annotation: for an exclusive approach, see: Mola, Which Role for the EU in the Development of International Investment Law?, Section 3.1, para 4, for a view supporting a shared competence, refer to: Ceyssens, Towards a Common Foreign Policy in Investment?, pp. 260 ff.
[74] Case 205/06, Commission v. Austria, and Case 249/06, Commission v. Sweden, point 11, in connection with the corresponding Opinion of the Advocate General, especially point 28.

ii) Articles 43, 44 and 47 TEC – Freedom of establishment

Contrary to the previously illustrated Article 57, the Articles providing for the freedom of establishment offer clear instructions as to how and under what form any related acts are to be adopted, thus offering a reduced scope for interpretation and action.[75]

More than just a simple allocation of principles of national treatment as well as non-discrimination, it is argued that the freedom of establishment enshrined within the Community's ambits was intended to go even beyond this goal and to gradually liberalize the single market as well.[76]

Would this ultimate aim of the ever closer growing market therefore justify any action of the Community on the external sphere?

In this perspective it is once again appropriate to refer to consequent CJEC jurisdiction. Anew the possibility of internal exclusive competences giving rise to parallel ones on the external sphere was affirmed in principle. Nevertheless, for this to happen in the domain in question, measures would have to be adopted already on the internal sphere on the basis of Article 43.[77]

According to one of the Court's precedent submissions, though, the Community's measures so far adopted did not sufficiently cover all internal fields of activity to which a comparable international act would relate to.[78]

In a broader approach, it further explained that in order to attain exclusive external competence over the domain of establishment provided for on the internal side, complete intra-Community harmonization concerning the provisions on access to self-employed activity had to be attained first.[79]

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[75] Mola, Which Role for the EU in the Development of International Investment Law?, Section 3.1, para 4.
[76] Craig, de Búrca, EU law: text, cases, and materials, p. 779.
[77] Opinion 1/94, point VIII.
[78] Opinion 2/92, point V No. 6.
[79] Opinion 1/94, para 95-97.

As for the obvious lack of complete harmonization in this domain and the conclusion that the

> *"attainment of freedom of establishment and freedom to provide services for nationals of the Member States is not inextricably linked to the treatment to be afforded in the Community to nationals of non-member countries or in non-member countries to nationals of Member States of the Community"*[80]

the Court settled that the Community did not dispose of exclusive competence in all areas relating to the "freedom of establishment"[81], nor that its implied external powers embraced all matters of the service sector.[82]

After the Court's ruling, the competence over establishment according to the GATS definition was blended into the ambits of the CCP via the newly adopted TEC.[83] Nevertheless, neither actions relating to the industrial sector, nor ones regulating post-establishment provisions were provided with a solid legal basis. As a result these fields were yet again left outside the reach of Community action.[84]

c) Intermediate Conclusion

With regard to the practice of Foreign Investment Policy before the Treaty of Lisbon, it appears obvious that the Member States were taking up the position as chief players, leaving the European Community[85] only with marginal bits of competences in the above mentioned specific areas.[86]

Owing to its limited competences under the TEC, the Community has been deprived of a right to conclude genuine and all-encompassing bilateral investment treaties, valid for the whole territory, on its own.

However, it would be misleading to conclude that the Community has been totally deprived to exert any influence on foreign investment matters at all as one has just seen.

[80] Opinion 1/94, para 86.
[81] Compare to: Mola, Which Role for the EU in the Development of International Investment Law?, Section 3.1, para 6.
[82] Annotation: As for this, the Community had to enter and conclude jointly with the Member States the GATS as a mixed agreement, Opinion 1/94, para 97; Mola, Which Role for the EU in the Development of International Investment Law?, Section 3.1, para 6.
[83] Griller, Weidel, External Economic Relations and Foreign Policy in the European Union, p. 96.
[84] Mola, Which Role for the EU in the Development of International Investment Law?, Section 3.1, para 7.
[85] Annotation: respectively from the Treaty of Maastricht onwards the "European Union".
[86] Eilmansberger, Bilateral Investment Treaties and EU Law, pp. 391 f.

Possessing at least some implied external powers in the domains of market access and the pre-establishment stage of foreign investment, the freedom of establishment and free movement of capital with regard to association agreements, as well as express ones notably concerning investments in the service sector, the Commission took its share of influence mostly via jointly implemented Mixed Agreements.[87]

In the end, this clutter of different competences in the Pre-Lisbon era made it difficult to precisely outline which specific powers belonged to whom. Consequently, this imprecision has turned the matter into a constant subject of dispute underlining the need for clarifications by the CJEU.[88]

As a corollary and consequence of the hitherto failed attempts of a multilateral approach[89], matters touching upon foreign investment have so far been settled by each Member State separately, leaving the market of the European Union today with more than 1.000 different Bilateral Investment Treaties, each one with a different definition of foreign direct investment.[90]

3) Situation Post-Lisbon

With the entering into force of the Lisbon Treaty on December 1st 2009, foreign direct investment was finally included within the ambits of the CCP, an objective the Commission has sought ever since the Intergovernmental Conference in 1996 relating to the Treaty of Amsterdam.[91]

Moreover, since a concurrent exercise of powers for matters included within the CCP is impossible,[92] the Union now enjoys exclusive competence over FDI as explicitly stated in Article 3 TFEU.

As a consequence, the Commission was finally legally authorized to pursue negotiations over investment agreements discretely, thus providing it with the possibility of stopping

[87] To name but a few: EU-Mexico Economic Partnership, Political Coordination and Cooperation Agreement, EU-South Africa Trade, Development and Cooperation Agreement, Euro-Mediterranean Association Agreement, EU-Chile Association Agreement, EU-Ukraine Partnership and Cooperation Agreement.
For further indications refer to: Ceyssens, Towards a Common Foreign Policy in Investment?, p. 268.
[88] Compare with: Eilmansberger, Bilateral Investment Treaties and EU Law, pp. 391 f.
[89] See Chapter B, Section I, 2).
[90] Kleimann, David, Taking Stock: EU Common Commercial Policy in the Lisbon Era, p. 9.
[91] Ceyssens, Towards a Common Foreign Policy in Investment?, p. 269.
[92] Opinion 1/75.

the muss of disparate Member State BITs and supplying the Union with the long awaited uniformity.[93]

At first sight, one might therefore easily be misled by the impression that a clear and strict repartition of power has finally been provided for by the Treaty of Lisbon.

Even though a Union's authority to progressively abolish "restrictions on international trade and on foreign direct investment"[94] has now been established, the Treaty unfortunately remains silent on the exact scope of the legally not defined term of foreign direct investment. As for the lack of a neat precision, nor any hint of reference to previously conducted trade agreements, once again a great margin for ambiguities is given, with the result of an anew unsettled distribution of competences.[95]

Rather than delivering a long-awaited transparent distribution of competences, the Treaty of Lisbon provides a great amount of uncertainty and many more questions with regard to what changes to expect in the field of FDI.

In this regard of uttermost interest remain the questions

I) whether the Member States have lost their privileges in the FDI sector (or respectively how much power they might have retained), and
II) what the legal status of the previously conducted set of over 1.000 various Member States BITs will be.[96]

In this perspective the question whether the term of FDI in the sense of Articles 206 and 207 TFEU follows a rather narrow or broad approach is of capital importance. More precisely that is to say whether only competence over the liberalization of investment (pre-establishment phase) was meant to be included, or whether it goes as far as to likewise embrace the competence over protectionist (post-establishment) measures.[97]

[93] Ceyssens, Towards a Common Foreign Policy in Investment?, p. 269.
[94] Article 206 TFEU (Article 131 TEC).
[95] Ceyssens, Towards a Common Foreign Policy in Investment?, p. 274; Kleimann, David, Taking Stock: EU Common Commercial Policy in the Lisbon Era, p. 9.
[96] Balan, The Common Commercial Policy under the Lisbon Treaty, p. 5.
[97] Kleimann, David, Taking Stock: EU Common Commercial Policy in the Lisbon Era, p. 9.

As for the ambiguous language of the Treaty, finding definite and absolute answers will certainly be delicate, if not impossible. Nevertheless, in Section I, 3a) this paper shall first try to provide a possible clarification of the term FDI as meant by Article 207 TFEU, thus enabling us to assess its probable amplitude.

The following Section I, 3b) will further discuss as to how far the newly provided competence will equip the Union to cover matters in the domain of pre-establishment, and whether it is broad enough to include post-establishment related matters as well.

Answers to these questions will hence possibly supply us with a better assessment of how the competences are likely to be portioned between the EU and its MS. Thereafter, an elaboration of the future of the different BITs valid amongst different MS shall be provided in Section II.

Furthermore, in Section III various paragraphs will be dedicated to the question of whether the Union's competence is to be guided solely by the ultimate goal of liberalizing investment, or whether, and if yes to what extent, this authority can as well be employed to govern investment in the public interest. Likewise, the interplay of the numerous actors relative to the FDI competence will be assessed and its consequences highlighted.

a) The new FDI Competence

As indicated beforehand, the Treaty of Lisbon fails to provide a viable definition for foreign direct investment in its Article 207 TFEU. Nevertheless, the notion of foreign investment, though different, noted in Article 57 TEC in connection with the definition expressed by Directive 88/361/EEC might serve as a possible base. It hereby describes direct investments as

> *"Investments of all kinds by natural persons or commercial, industrial or financial undertakings, and which serve to establish or to maintain lasting and direct links between the person providing the capital and the entrepreneur to whom or the undertaking to which the capital is made available in order to carry on an economic activity".*[98]

Compared and enhanced with the definitions of FDI by the OECD noted above, one can thus surmise that FDI in the sense of the CCP is most likely to embrace both the factor of

[98] Directive 88/361, Annex I.

durability as well as *influence* to be major components of a cross-boundary investment venture.[99]

Taking into account these two characteristics of a long-term relationship as well as the lasting interest in exerting management control on the host enterprise, it becomes obvious that portfolio investments as defined above[100] are likely not to be covered by CCP, as these specifically aim at the contrary, short-term relationships and primarily profit making.[101]

Nevertheless, in search of a preferably all-comprising agreement the great majority of BITs in use by the MS regulate at the same time both foreign direct investment as well as other investment related issues normally outside the scope of the definition just presented. Member States thus include every kind of asset invested into the agreement, regardless of the presence of the just mentioned components of *durability* and *influence*.[102]

As a first conclusion, we can note that with the inclusion of FDI into the scope of the EU's CCP the competence hereby transferred is not sufficiently broad as to completely cover all aspects of investment usually included in a BIT.[103] FDI in the sense of the CCP thus only covers a partial aspect of investment, whereas other issues for instance portfolio investment will remain in the custody of each Member States.

b) The Scope of the Term FDI

i) Literal Interpretation

Generally expressed, regulations on both pre- and post-establishment constitute essential parts for investment possibilities from abroad and are thus of crucial importance for every investor's consideration. As a consequence, in order to genuinely regulate investment,

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[99] Annotation: for a similar approach, compare to the definition provided by the IMF in its Balance of Payments and International Investment Position Manual.

[100] See definition provided above in Chapter B, Section I, 1).

[101] Krajewski, External Trade Law and the Constitution Treaty, p. 112 and further reference; Sornarajah , The International Law on Foreign Investment, pp. 8 ff.; Ceyssens, Towards a Common Foreign Policy in Investment?, p. 274.

[102] Shan and Zhang, The Treaty of Lisbon: Half way Towards a Common Investment Policy, p. 1058; Ceyssens, Towards a Common Foreign Policy in Investment?, p. 277; compare as well to model BITs of several Member States, such as Germany, the United Kingdom or France, which go beyond simply regulating FDI.

[103] Compare to: Mola, Which Role for the EU in the Development of International Investment Law?, Section 5, para 1.

only the combination of both will allow the establishment of a stable investment climate and prevent de facto restrictions on FDI.[104]

As for this reason bilateral investment treaties unsurprisingly usually cover both the pre-establishment phase, as well as provisions concerning the following investor's protection.[105]

Referring to EU legislation, though, Article 206 TFEU only states that the

> "*Union shall contribute […] to […] the progressive abolition of restrictions on international trade and on foreign direct investment*".[106]

Based on a tight and literal interpretation of the wording in Article 206 TFEU, one might infer that the CCP explicitly only provides for a competence on the pre-establishment phase of investment, therefore not covering measures relating to post-entry issues.[107]

In other words this would reduce the Union's authority to the simple regulation of market access as well as to confer non-discrimination to investors; measures with regards to investors' protection needed to conclude a wholesome investment agreement, (i.e. to confer a certain standard of treatment after the entry into a market), on the other hand, would hence be beyond the reach of the Union.

ii) Contextual Interpretation

Other arguments seem to further support a narrow interpretation of the CCP's scope, too; a contextual analysis of the Articles 206 ff. TFEU clearly illustrates their immanent connection to trade and therefore to the exchange of goods in general.[108] Examining the direct environment of the Articles, one can thus easily advocate a more delimiting approach of the CCP, reducing its scope to the abolishment of restrictions on FDI that are not unlike to obstacles to trade in goods.[109] Following this contextual approach, the Union's mission would accordingly be limited to the mere liberalization of investment

[104] Ceyssens, Towards a Common Foreign Policy in Investment?, p. 277; UNCTAD World Investment Report 2003, pp. 86 f.
[105] Ceyssens, Towards a Common Foreign Policy in Investment?, p. 277.
[106] Article 206 TFEU (Article 131 TEC). Annotation: Italic type effected by the author.
[107] Compare to: Ceyssens, Towards a Common Foreign Policy in Investment?, p. 277.
[108] Shan and Zhang, The Treaty of Lisbon: Half way Towards a Common Investment Policy, p. 1060; Ceyssens, Towards a Common Foreign Policy in Investment?, p. 278.
[109] Krajewski, External Trade Law and the Constitution Treaty, pp. 113 f.; also compare to: Mola, Which Role for the EU in the Development of International Investment Law?, Section 3.2, para 3.

(i.e. primarily market access regulations and non-discrimination), whereas the post-establishment phase (i.e. protection of investors) would be wholly excluded.[110]

The contextual situation of the Articles, as well as the clear depiction as a "Common *Commercial* Policy", hence speak in favor of a restrictive interpretation. Such an interpretation would ultimately avoid a deepening of competences and the evolution into a "Common *Economic* Policy" covering more sensitive domains beyond trade.[111]

Further developing this narrow interpretation one can as well find reinforcing arguments by considering Article 207 VI TFEU, also referred to as the Parallelism Clause, in connection with the already mentioned CJEC developed principle of parallelism.[112] More precisely Article 207 VI TFEU states that:

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

In reflection of the aforesaid many scholars argue that the Treaty explicitly bars the European Union from usurping any mandate outside the CCP's context in order to prevent an "intrusion into the Member States' competences".[113]

In other words, the external powers may not be exercised in a way that would exceed the limits of internal Union competence for the same topic. Hence, the same restrictions apply for the exercise of CCP powers as for the complementary ones in the internal sphere.[114]

Consequently, it appears as if a clear and strict demarcation of responsibilities is being approved by this Article, consequently limiting the European Union's external powers to the CCP's immediate context, in this case a trade-related one.

Nevertheless, for the sake of uniformity the Principle of Parallelism may apply and confer an external competence to the European Union. This principle, though, only comes into play when the EU is equipped with a complementary one on the internal sphere. On

[110] Compare to: Ceyssens, Towards a Common Foreign Policy in Investment?, p. 278.
[111] Dimopoulos, The Common Commercial Policy after the Lisbon Treaty, p. 105; Eeckhout, External Relations of the European Union, p.57.
[112] Ceyssens, Towards a Common Foreign Policy in Investment?, pp. 279 ff.
[113] Ibid p. 280.
[114] Ibid p. 280.

the contrary, where no such internal competence exists, no conferral of powers onto the external sphere is possible.[115]

Examining the Treaty, one does indeed come across a couple of investment related internal competences that spark off corresponding ones on the outside, notably the freedom of establishment and the free movement of capital which are complemented by market access and non-discrimination policies on the outside.

As regards any further going competences, however, no internal competences are traceable that could serve as a legitimate base for extending the CCP's scope to neither the protection against expropriation nor the assignment of a Fair and Equitable Treatment (FET).[116]

Moreover, Article 345 TFEU explicitly confers the command over property to the single Member States.[117] Accordingly, the extension of competences onto measures that offer protection against unfair treatment and expropriation via the principle of parallelism would most probably generate a delimitation of the CCP's scope.[118]

Again, based on this contextual approach, only the liberalization phase of investment would fall into the CCP's scope thereby excluding the likewise important aspects of investor protection.[119]

Whether this path will turn out to be the one being pursued in the end remains yet to be seen and only displays one possible development amongst others.

iii) Dynamic Interpretation

Bearing in mind the above mentioned functional indivisibility of pre- and post-establishment phase, one might argue that regulation on post-entry is likewise needed to effectively tear down all sorts of restrictions on FDI, as measures in the post-entry phase can potentially hamper the access to a market as well.[120]

Hence, arguing from a dynamic point of view one might develop the approach that limiting the scope of the CCP to mere pre-establishment measures would fall short of its

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[115] See Chapter C, Section I, 1b).
[116] Ceyssens, Towards a Common Foreign Policy in Investment?, p. 281.
[117] Article 345 TFEU (Article 295 TEC).
[118] Maydell, The European Community`s Minimum Platform on Investment or the Trojan Horse of Investment Competence, pp. 73 ff.
[119] Shan and Zhang, The Treaty of Lisbon: Half way Towards a Common Investment Policy, p. 1062.
[120] Compare with: UNCTAD World Investment Report 2003, pp. 86 f., footnote 83; Ceyssens, Towards a Common Foreign Policy in Investment?, pp. 276 f.

proper wording to abolish restrictions on FDI. Only granting the leverage onto post-entry measures would suffice to improve the investment climate as a whole and to thus veritably destruct any obstacles to FDI whatsoever.

According the EU such amplified latitude would moreover be in tune with the overall past developments within the Union: whereas initial jurisprudence sharply demarcated the CCP's scope,[121] the notions of trade in services, commercial aspects of intellectual property and eventually FDI have gradually been included into the scope of the CCP.[122] There has thus been a shift of its focus from a merely exchange oriented policy towards a broader appreciation of cross border financial and economic activities at its whole, including investment.[123]

This dynamic interpretation moreover concurs with Opinion 1/78, arguing for an evolving and broad character of the CCP;[124] whereas at the time of the Community's birth in the 1950s the world economy was primarily centered on the trade of goods, time has gradually shifted the focus onto different aspects such as services, intellectual property as well as investment. For this reason, it is inept to restrain the CCP to its outdated ancient explicit context in which it was composed. Instead, it would be more appropriate to adapt the CCP to the new realities in order to successfully master today's challenges.[125]

This adoption would indeed speak in favor of an amplified scope of action for the EU in the future, endowing it with a holistic warrant over most of investment related issues, such as the protection of investors next to liberalization.

Thoroughly appreciating both sides' arguments, the dynamic approach appears to be the one preference should be yielded to, as most of the opposing arguments given loose their weightiness when analyzed more closely.

First of all, drawing on the principle of parallelism in order to negate any further going external mandate as for a lack of a complementary one on the inside, appears inconsistent with the principle itself. Comparing the current situation of the CCP with the above mentioned cases that gave rise to the principle of parallelism, we do come across one major difference: whereas the relevant cases always related to a situation where an existing internal power initiated an *implied* external competence, one does notice that

[121] Opinion 1/94.
[122] Compare to: Treaty of Nice, Treaty of Lisbon.
[123] Ceyssens, Towards a Common Foreign Policy in Investment?, p. 278.
[124] Opinion 1/78, also see Chapter C, Section I, 3b).
[125] Similar view: Pollet-Fort, Implications of the Lisbon Treaty on EU External Trade Policy, pp. 11 f.

within the CCP the EU already possesses an *express* competence over FDI. Since there is no doubt about the existence of an express power[126] (but moreover about the scope of an express power) it is thus inexact to take the principle of parallelism as an argument to limit the CCP's scope to those areas the Union possesses an internal power in.[127]

In this context, some scholars argue, the original purpose of the Clause of Parallelism enshrined in Article 207 VI is rather to

> *"prevent a situation where the exercise of the Union's CCP including FDI competence affects the fine balance of competence division between the Union and the Member States within the Union's internal order."*[128]

Secondly, Article 345 TFEU, conferring the command over property related questions to the MS, merits a closer look. Whereas it is explicitly stated that

> *"the Treaties shall in no way prejudice the rules in Member States governing the system of property ownership",*

it is noteworthy to highlight that this Article has always been subject to a narrow interpretation by the CJEU.[129] More precisely speaking, the Article was interpreted in the sense that whereas the competence to regulate *whether* and *when* expropriation takes place is indeed assigned to the MS, the precise conditions under which expropriations are carried out, however, shall not be included by this clause.[130]

As a consequence, it becomes obvious that the relevant sectors of property for investment ventures are not automatically excluded and understood by the narrowly interpreted Article 345 TFEU.[131]

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[126] Article 207 I TFEU (Article 133 I TEC).

[127] Wouters and De Meester, The European Union's External Relations after the Lisbon Treaty, p. 173 and more particularly footnote 133.

[128] Shan and Zhang, The Treaty of Lisbon: Half way Towards a Common Investment Policy, p. 1063,

[129] This article has continually been interpreted in a manner, that its scope only comprises the Member States' right to nationalize private property or to privatize public property. For example, see: Case 182/83, Fearon; or Case 6/64, Costa v. ENEL.

[130] Dimopoulos, The Common Commercial Policy after the Lisbon Treaty, p. 116.

[131] However, debate has persisted over the question whether this automatically allots the competence over the conditions of expropriation in investment related matters to the EU; arguing from a dynamic standpoint one can once again justify a competence of the European Union as a necessity for the objectives' attainment. For further indications, refer to: Dimopoulos, The Common Commercial Policy after the Lisbon Treaty, p. 116.

Lastly, the question whether the EU bears competence over the assignment of a FET can be neglected as FET *"has already become a rule of international law and is not determined by the laws of the host state."*[132]

Rather, having repeatedly been confirmed by international tribunals, the FET is an established principle in international customary law and thus enjoys independence from a nationally conceived standard of treatment.[133]

iv) Teleological Interpretation

Ultimately, examining the intention of the Treaty's drafters, thus pursuing a teleological consideration, may help shed some light on this more than dim context. Correctly assessing the drafters' intention might be considered difficult, if not impossible, as no clear official opinions about the scope of FDI seem to have been given in the immediate negotiating phase of the ToL;[134] however, the topic of FDI has been subject of intense discussions as early as during the intergovernmental conferences preparing the Treaties of Amsterdam and Nice.[135]

Eventually, it was the Treaty of Lisbon that was supposed to satisfy the growing demand for a more democratic, efficient and coherent Union on the world stage. As a result new reforms that were to rebalance institutional responsibilities, including those of the CCP, have been implemented.[136] It was precisely this better distribution and clear division of powers that was believed to provide the European Union with the ability to successfully confront the new challenges of the globalized world, ultimately leading to the seize of negotiations about including the FDI.[137]

Long before the actual entering into force of the Treaty of Lisbon a drift towards an expansion of the Union's competences is thus noticeable, all in the cause of a better adaption to a new and changed background. Still it remains arguable if this ought to automatically imply a broad interpretation of the newly integrated powers, as these

[132] Shan and Zhang, The Treaty of Lisbon: Half way Towards a Common Investment Policy, p. 1063.
[133] Dolzer and Schreuer, Principles of International Investment Law, p. 123.
[134] Shan and Zhang, The Treaty of Lisbon: Half way Towards a Common Investment Policy, pp. 1060 ff. with further indications.
[135] European Commission, Report on the operation of the Treaty on European Union, pp. 57 ff.; European Commission, Adaption of the institutions to make a success of enlargement, p. 27.
[136] Laeken Declaration on the Future of the Europe Union, Section I.; also refer to Pollet-Fort, Implications of the Lisbon Treaty on EU External Trade Policy, p. 5, Kleimann, Taking Stock: EU Common Commercial Policy in the Lisbon Era, p. 1.
[137] European Commission Staff Working Document, Global Europe: Competing the World, in particular p. 18.

indications only tell one part of the story possibly leaving the other, a maybe more restrictive half, untold.

Due to the highly sensitive character of the issue, the reluctance on the side of the Member States to let loose of the hold on FDI is consequently more than comprehensible. As seems to be always the case with the delegation of competences from the single MS to the EU, progress is done by little steps, gradually enlarging the EU's scope of action since an abrupt leap would most often overstretch the sensible ligaments of the highly competence-cautious participants.

Therefore, the European Union and its Treaties seek refuge in ambiguous language, offering a large leeway for possible interpretations and a sufficiently vast buffer that can moderately be expanded over time according to the community's readiness for progression.

c) Intermediate Conclusion

As seen, it is difficult to correctly estimate the scope the notion of foreign direct investment within the CCP is finally going to envelop. However, owing to the above stated reasons and a final consideration of all arguments, it appears more coherent to lobby for a broad evaluation of the delegated powers under Lisbon and to reject a strict and narrow interpretation, reducing the Union's competence to a simply speaking liberalization mandate.

Over all, a merely literal or contextual approach examining the Article in question will certainly fall short of the dimension of the whole issue; favoring a literally strict consideration of Article 207 TFEU, one would likewise have to admit that if the original intention had been to exclude a Union's competence over post-establishment, an explicit restriction to trade related aspects should have been included in the phrasing. This for instance has specifically been done in the field of intellectual property.[138] Given that such a mentioning has been abstained from, it is not convincing to endorse that the competence on FDI was meant to be restricted to merely commercial aspects.

As far as a contextual analysis is concerned, cramping the Union's mandate into a tight commercial corset without allowing it to breathe up in order to adapt to its new challenges would clearly amount to an antiquated and outmoded lecture of the Treaty.

[138] Compare with phrasing of Article 207 I TFEU (Article 133 TEC) in connection with: Shan and Zhang, The Treaty of Lisbon: Half way Towards a Common Investment Policy, p. 1060.

In addition, such a restrictive approach would neither be in line with internal Union developments[139] nor with examples form the international arena: Tagged as the *World Trade Organization*, initially charged with trade related matters, this organization evolved and outgrew its own traditional depiction over the course of time, now likewise potentially being capable of regulating other matters, including investment.[140]

Despite the obvious fact that the WTO cannot be compared with the EU on an institutional and operative basis,[141] it appears justified to confirm that the notion of trade redefined itself over the time and that the task of liberalizing it as defined at any earlier stage cannot be fully accomplished in today's time restricting oneself to only trade, regarding the growing importance of other factors.

But what does the term "restriction" really cover in a practical sense of the meaning? Among the major problems for prospective investors rank the lack of predictability with regard to measures taken by the host state.[142] Yet, clearly regulatory measures like the unexpected introduction of a significant income tax or a prospective disadvantageous regulatory environment in a host country can obviously impede investment. This in turn can constitute a veritable barrier to a possible capital flow. It appears obvious that measures taken in the post-establishment phase can well represent a restriction in the sense of Article 207 TFEU.

In light of the indicated reasons and the virtual impossibility to clearly divide the two intertwined halves of pre- and post-establishment in a practical perspective it would hence be nothing but consequent to attribute the Union's competence over protectionist measures, likewise.

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[139] See Opinion 1/78 as well as Chapter C, Section I, 3b).

[140] Similar view: Shan and Zhang, The Treaty of Lisbon: Half way Towards a Common Investment Policy, p. 1060; Wouters and De Meester, The European Union's External Relations after the Lisbon Treaty, p. 172 and refer to footnote 130. In essence the authors state that even though the attempt of negotiating an investment agreement failed during the Doha Round, no doubts about the its capability in doing so persists, despite its trade character.
Annotation: Despite the fact that the WTO cannot be compared with the EU on an institutional basis, especially observing that as contrary the EU MS Members of the WTO could at any time discontinue the negotiation round independently, it appears justified to confirm that the notion of trade redefined itself over the time.

[141] Annotation: especially considering that in contrast to the EU and its possible exclusive competence the WTO would not have any binding authority and its participants could at any time discontinue the negotiation round independently.

[142] UNCTAD, Trade and Development Board, p. 4; Ceyssens, Towards a Common Foreign Policy in Investment?, p. 277.

This balancing of different approaches notwithstanding, the question what competences will finally be understood by the term of FDI cannot be answered with complete concision, given that both the narrow and the broad interpretation are arguable. In this perspective, it is perhaps not exclusively important to assess what competences *currently* exist, but to further anticipate what competences *may* exist in the future.

Even if FDI might be subject to a narrow interpretation in the beginning, sufficient arguments exist to support a broad approach in the future. This approach would allow for the above mentioned gradual expansion.

It is likely (and in addition in line with the Union's history likewise[143]) that in the case of future conflicts the CJEU will sooner or later develop a handling of the legal question that will allow the European Union the broadest approach of FDI as possible; that is to say, one covering both pre-establishment as well as post-establishment.[144]

Concluding, a rather broad interpretation of the given article appears to be the most likely to be yielded to in the end, therefore equipping the EU with the extremely valuable capacity of regulating both the pre- and post-establishment phase of investment ventures.

II BITs in the future

1) General Complex of Problems

Before the taking effect of the Lisbon Treaty, competence over foreign investment was highly fragmented due to various implied powers the European Union possessed in certain sectors. Corollary, a complex system of at times shared and at other times autonomous Member State regulation evolved.[145]

Has this all but incomprehensible allocation of powers finally been brought to an end with the inclusion of Foreign Direct Investment into the scope of the CCP as of the 1st of December 2009?

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[143] Annotation: Compare to the CJEU developed principles that allowed for a successive broadening of the competences included in the Treaty, e.g.: Principle of parallelism.

[144] For a similar approach compare with: Shan and Zhang, The Treaty of Lisbon: Half way Towards a Common Investment Policy; Wouters and De Meester, The European Union's External Relations after the Lisbon Treaty; Dimopoulos, The Common Commercial Policy after the Lisbon Treaty. For scholars who support a rather narrow approach refer to: Mola, Which Role for the EU in the Development of International Investment Law?; Ceyssens, Towards a Common Foreign Policy in Investment?

[145] Pollet-Fort, Implications of the Lisbon Treaty on EU External Trade Policy, p. 3.

The previous analysis shows that in the field of investment as a whole not all relevant aspects have been included. By excluding portfolio investments one important component usually contained in International Investment Agreement falls outside the CCP's scope.[146] Only being entitled to settle questions related to FDI, the European Union misses a pertinent piece in its investment puzzle which impedes it to conclude all-encompassing agreements as wholesome as conventional BITs usually conducted by the MS. From this follows that in order to negotiate future overarching BITs (including all aspects related to investment) the European Union will have to cooperate with the MS, calling for future Mixed Agreements.

On the other hand, since the delegated authority over FDI has been given to the EU, neither will the MS be able to conclude BITs on their own. Accordingly, instead of creating a clear situation and centralization of authority, the predicament of a once again shared competence is established, with neither side being able to conclude a conventional and competitive agreement over investment without the cooperation of the other.[147]

Whether one is in favor of a broad interpretation of the new FDI competence as suggested above or a rather narrow one: in either case various competences provided for in the BITs conducted by MS with third countries now fall under the exclusive mandate of the European Union which indeed raises the question about the fate of these BITs.

It is thus relevant to shed light on the question whether the MS will be in the legitimate position to fulfill their obligations under their BITs or if they, by doing so, would contravene their responsibilities towards the EU.

The following paragraphs shall thus provide a brief survey of the questions of the future legal validity of the existing BITs and, more importantly, what obligations the single MS have with regards to the EU and their international partners.

[146] See Chapter B, Section II.

[147] Shan and Zhang, The Treaty of Lisbon: Half way Towards a Common Investment Policy, p. 1071; Ceyssens, Towards a Common Foreign Policy in Investment?, p. 287.

2) Fate of the existing BITs

Did the entering into force of the ToL and its inclusion of FDI implicate the simultaneous becoming void of the more than 1.200[148] concluded BITs that touch upon this new EU competence?

Anew, the ToL remains quiet on the lot of these agreements; remedy, however, can be found by applying the general rules of international law as well as by analogy of Article 351 TFEU.

Considering the factual independence of the two different legal jurisdictions it primarily appears questionable why the introduction of a novel legal provision on the European side should induce the termination of bilateral agreements concluded on the international arena.

This approach further complies with the general principles encompassed in the Vienna Convention of the Law of Treaties (VCLT); inferring from Article 30 IV (b) VCLT it becomes obvious that no successive treaty with a third party is able to automatically replace an existing agreement between two parties, despite their possibly congruent contents.[149]

Furthermore, the reason behind this retaining approach can be found within the Treaty itself: Article 351 TFEU (Ex-Article 307 TEC) provides that

> *"The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties."*

Even though not apparently corresponding to the question at hand, Article 351 TFEU may however be used in analogy so as to justify the persisting validity of the BITs. In this perspective, its pivotal core is the enshrined *pacta sunt servanda* principle which guarantees that obligations entered into shall be respected consequently and that the

[148] Compare with: Communication from the Commission, Towards a comprehensive European international investment policy, p. 4.

[149] Eilmansberger, Bilateral Investment Treaties and EU Law, pp. 397 f.

parties should not invoke provisions of their internal law as premise for failure of performance.[150]

The ultimate intention of Article 351 TFEU was thus to warrant a smooth processing of reciprocal rights *before* the entering into might effectuate a possible overlapping of powers.

In other words, the basic intention of Article 351 TFEU is to manifest a clear division that exists between agreements entered into *before* and those concluded *after* the European Union assumed competence in a specific domain from the MS, leaving the first act intact in essence, whereas the latter would contravene Union law.

Comparing the mentioned situation with the uncertainty over the fate of the BITs, the fundamental analogy between these two circumstances becomes evident: in equal measure the BITs in question were concluded at a point of time the European Union did not possess power over the relevant subject matters yet. In addition, nor has it been foreseeable that the EU would do so in the future. In this context, the mere fact that the agreement itself has been accomplished at a time when the state has already been part of the EU appears of minor importance.[151]

In spite of the different wording, it is correspondingly not too far-fetched to use Article 351 TFEU via analogy as a basis to justify the continued legal validity of the already existing BITs with third states.
As a result, a grandfathering clause is introduced which on grounds of legal certainty keeps the existing obligations in place until the adoption of newly negotiated investment agreements.[152]

Favoring the analogy of Article 351 TFEU, one, however, has to take into account the subsequent paragraph alike. The paragraph further states that:

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[150] Eilmansberger, Bilateral Investment Treaties and EU Law, pp. 397 f.; Ceyssens, Towards a Common Foreign Policy in Investment?, pp. 287 f.
[151] Eilmansberger, Bilateral Investment Treaties and EU Law, p. 398; Ceyssens, Towards a Common Foreign Policy in Investment?, pp. 287 f.
[152] Compare to: Pollet-Fort, Implications of the Lisbon Treaty on EU External Trade Policy, p. 3; Balan, The Common Commercial Policy under the Lisbon Treaty, p. 7.

"To the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established."

Undeniably, this provision commits the MS to eradicate any inconsistency that might arise between their existing BITs and prospective EU provisions regulating the same subject matter, thus incorporating the duty of loyal cooperation.[153]

In conclusion, despite the non-provision of a transitional period for the existing BITs on sides of the Treaty of Lisbon or other provisions in EU law it is obvious that the investment agreements conducted between MS and third parties have not implicitly been terminated. By virtue of the general principles of international law as well as by analogy of Article 351 TFEU the BITs will remain in force for the time being and will thus not contravene existing EU law. However, this situation applies only as long as the BITs in question comply with analog EU provisions. Consequently, the MS are obliged to remove any inconsistency that may spring from their proper BITs.[154]

In this perspective of great practical importance is the question by whom and under what circumstances such an inconsistency can be affirmed. According to the Commission's proposal in 2010 and the consecutive agreement with the Council in 2012, the European Commission will be the decisive player in deciding what Member State BITs will be considered compatible and which ones will need to be renegotiated. In particular, articles 5, 6 and 9, (regulating the particulars on the Commission's authorization of already existing agreements, the withdrawal of authorization and the authorization to open formal negotiation) provide that in case of conflict with EU law, already existing EU trade agreements with third countries or with the pursued EU investment policy and its general Common Commercial Policy, Member States can be obliged to renegotiate their existing BITs or respectively abstain from entering into new ones. [155]

Handing the Commission this authority, especially to decide what provisions of BITs are to be considered in opposition to its investment policy and CCP, is very much capable of compromising the sovereign goal of each and every BIT: ensuring legal certainty.

[153] Compare with: Case 216/01, Budvar, point 170; Case 205/06, Commission v. Austria, especially point 34 and Case 249/06, Commission v. Sweden, point 33.
[154] Balan, The Common Commercial Policy under the Lisbon Treaty, p. 7.
[155] Compare to: European Commission, Proposal for a Regulation (..).

Considering the possible volatility of policies and the very vague delimitation of this provision, which by force always underlies a subjective appreciation, depict this possible diminution of legal certainty for investors in the long term.[156]

The extent to which such an impairment of legal certainty will be probable at all and under what precise conditions the Commission appears to be likely and willing to detect such an inconsistency shall not be further discussed as doing so would clearly exceed the limit of this paper and furthermore require a proper and profound analysis.

However, it is obvious that the Commission is thereby given a very powerful position in navigating the investment provisions of the European Union and its Member States which appears to be only constrained by few and somewhat fuzzy limits.

III Practical Outlook on the new Competence

Having assessed the amplified powers the Union has gained with the Treaty of Lisbon, it is of relevance to equally evaluate to what extent the EU can make real use of its amplified portfolio of powers.

Firstly, it is questionable to what extent the new competence over investment will allow the Union to implement its broader policies beyond a purely economic interest. Is the European Union limited to use its powers in an exclusively liberalizing context with the ultimate goal of making the internal economy more market friendly? Or does the new investment competence imply a consideration and pursuance of non-economic factors, too, despite its economic positioning within the CCP?

Secondly, evaluating the new distribution of powers between the different actors involved in investment related decisions will help to shed more light on the question of how efficient and valuable future Union investment policy will de facto be and whether politicization will have to be expected with regards to investment questions.

[156] For a deeper appreciation of the topic, refer to Lavranos, Bilateral Investment Treaties (BITs) and EU Law.

1) Scope of Action

With respect to foreign direct investment it appears as if Article 206 TFEU only calls for the gradual dismantling of restrictions. As discussed and established above, a mere textual and contextual reading of Article 206 TFEU, though, is not satisfying and has hence to be rejected in favor of a broad reading.[157] Would, however, this broad reading go so far as to allow for the pursuance of objectives in the context of a larger public interest, going beyond economic variables?

More specifically, Opinion 1/78 explains that a Common Commercial Policy which is restricted to the mere consideration of trade related aspects "*would be destined to become nugatory in the course of time*".[158] Moreover, being based on "uniform principles" the Union's CCP is explicitly meant to exceed a sheer liberalization agenda so as to likewise render a wide consideration of aspects possible.[159]
In connection with Article 21 TEU one can infer that principles such as the fostering of human rights, environmental protection, democracy, good governance or sustainable development are to be taken into account when negotiating international agreements.[160]

This furthermore goes in line with the official opinion of the Commission expressing that

> *"Investment agreements should be consistent with the other policies of the Union and its Member States, including policies on the protection of the environment, decent work, health and safety at work, consumer protection, cultural diversity, development policy and competition policy."*[161]

Even though not being completely new to the political practice before, the Treaty of Lisbon provides for an explicit basis of the use of conditionality in ostensibly purely economic agreements, nevertheless pursuing broader objectives.[162]

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[157] See Chapter C, Section I, 3d), Opinion 1/94.
[158] Opinion 1/78, para 44.
[159] Compare with: Article 207 I TFEU (Ex-Article 133 TEC) in connection with Opinion 1/78, para 45.
More specifically, Opinion 1/78 approved the consideration of factors such as fair labor standards, technological assistance or tax policies, refer to: Opinion 1/78 para 52 and 56.
[160] Article 21 TEU in connection with Article 3 TEU, also refer to: Woolcock, The Treaty of Lisbon and the European Union as an actor in international trade, p. 13, Pollet-Fort, Implications of the Lisbon Treaty on EU
External Trade Policy, p. 14 with further indications.
[161] Communication from the Commission, Towards a comprehensive European international investment policy, p. 9.
[162] Cremona, A Constitutional Basis for Effective External Action?, p. 30.

This "legal dimension" of the named broader aims which shall guide any Union action can seemingly provide for reasoning ground to challenge conducted trade agreements as it seems.[163]

To what extent this implication might prove problematic will be discussed shortly in the following sections.

2) Role of the European Parliament

Besides including a number of additional competences into the Union's repertoire, the Treaty of Lisbon has likewise introduced various institutional changes, thus responding to the long-standing claims for an inter alia more democratic Union.[164]

In an attempt to tackle this deficit it was primarily the European Parliament that emerged as one of the Treaty's winners, subsequently being equipped with a strengthened voice in a number of additional domains.[165]

Before the entering into force of the Lisbon Treaty, the European Parliament merely enjoyed very limited powers. Whereas the Council and Commission operated as the main actors in the field of conducting and negotiating international trade agreements, the EP was basically left outside the bargaining table.[166] Being exempted from shaping and adopting agreements under the CCP, the Parliament's powers remained frail in an institutional perspective and were limited to non-binding resolutions that could merely exert political pressure. This exclusion of the EP understandably raised doubts about the democratic accountability of the CCP as a whole[167] ultimately pushing for the reforms. These were finally introduced by the Treaty of Lisbon.

Moreover, the ToL implicated a significant increase of power on behalf of the European Parliament. Whereas the authority to give a negotiation mandate on a specific subject remains exclusively with the Council, no prospective agreements will be adopted without

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[163] Pollet-Fort, Implications of the Lisbon Treaty on EU External Trade Policy, p. 8.
[164] Compare to: Laeken Declaration on the Future of the Europe Union.
[165] Kleimann, Taking Stock: EU Common Commercial Policy in the Lisbon Era, pp. 1 ff.
[166] Woolcock, The Treaty of Lisbon and the European Union as an actor in international trade, p. 11; Pollet-Fort, Implications of the Lisbon Treaty on EU External Trade Policy, p.3; Kleimann, Taking Stock: EU Common Commercial Policy in the Lisbon Era, pp. 3 ff.
[167] Pollet-Fort, Implications of the Lisbon Treaty on EU External Trade Policy, p. 10.

the prior consent of the European Parliament. The EP is thus provided with an enhanced status and influence with regards to the negotiation and results of trade agreements.[168]

It therefore becomes apparent that international agreements on FDI negotiated between the Commission and third countries will subsequently be subject to approval from the European Parliament as well.

Will the introduction of yet another player and the increased democratic legitimacy of CCP policies likewise result in the adoption of better results?

First and foremost, the concession of enhanced powers to the European Parliament was a long overdue and necessary step towards advocating democracy within the EU system. It will not only legitimize external action owing to the needed consent of the elected MEPs, but it will also make decisions more transparent and comprehensible (as for the now more disclosed discussions).[169] However, the EP's participation in the future assent of agreements related to FDI involves a number of effects that will have to be taken into account to assess the quality of the new competence.

Having been exempted from significant power with regard to external trade policy up till the ToL, it is yet to see how the EP will develop its influence and expertise in this regard in future negotiations and to see how large its real impact in comparison to the Council of Ministers and Commission will ultimately be.[170]

It is already certain that the EP will add new color to international agreements in the future. It is widely expected that the EP will constantly insist on the inclusion of paragraphs relating to e.g. social and human rights or environmental protection, thus enhancing the political dimension of trade agreements.[171] Doing this would definitely pave the way for an even more pronounced, and widely debated, conditionality. Since comparable investment agreements are generally concluded between two unequal parties, the possible weight of seemingly unilaterally dictated terms, which the less powerful

[168] In connection with: Article 218 VI (a) (Article 300 TEC); also refer to Woolcock, The Treaty of Lisbon and the European Union as an actor in international trade, p. 11; Kleimann, Taking Stock: EU Common Commercial Policy in the Lisbon Era, pp. 2 and 7.
[169] Cremona, A Constitutional Basis for Effective External Action?, p. 16 and Kleimann, Taking Stock: EU Common Commercial Policy in the Lisbon Era, pp. 2-7.
[170] Lavranos, Bilateral Investment Treaties (BITs) and EU Law, p. 19 and Woolcock, The Treaty of Lisbon and the European Union as an actor in international trade, p. 15.
[171] Brakeland and Brown, The Impact of the Lisbon Treaty on Trade Policy, p. 30 in connection with Pollet-Fort, Implications of the Lisbon Treaty on EU External Trade Policy, p. 15.

party is seldom in the condition to refuse, would certainly be enlarged.[172] Moreover, the EP has not fallen short of already demonstrating its willingness to persist on the inclusion, e.g. of human rights clauses.[173]

On the other hand, submitting international investment agreements to the EP's consent will probably make the decisions taken more vulnerable for populist debates and lobbyist influences.[174] Naturally being concerned with reelection, MEPs are more likely to pay pronounced attention to primarily short term economic concerns and support populist matters, thereby guaranteeing political support in the home constituency. As is concerned investment, most agreements will be centered on the reciprocal opening of markets. This being valid likewise for the EU market, MEPs are expected to be confronted sensitive pressure from powerful interest groups at home.[175] Minding these will certainly be recompensed with another term in office: most likely at the cost of a sagacious long term strategy for the EU economy, however.

In this context, the Commission conducted negotiations on the Free Trade Agreement with South Korea which can serve as a valuable example in the recent past. Whereas discussions already commenced in 2007, a final agreement was not reached until 2010. The agreement has therefore already been submitted to the new adoption procedure. With the planned elimination of the import duty and a consequently expected important rise in car imports, several European automobile producers started to lobby the European Parliament in search of a complete turndown of the agreement or inclusion of several safeguarding clauses.[176]

This, of course, accentuates the elevated scope of interference of particular and perhaps near term interests which future investment policies (or any other trade negotiations) might succumb. In general terms, the EP appears more inclinable to favor protectionist

[172] Kaushal, Revisiting History: How the Past Matters for the Present Backlash Against the Foreign Investment Regime, p. 506. See further indications.
[173] Bungenberg, Going Global? The EU Common Commercial Policy after Lisbon, p. 129, See further indications.
[174] Balan, The Common Commercial Policy under the Lisbon Treaty, p .8 and Kleimann, Taking Stock: EU Common Commercial Policy in the Lisbon Era, pp. 2 and 7;
[175] Kleimann, Taking Stock: EU Common Commercial Policy in the Lisbon Era, p. 21.
[176] For a more elaborate discussion on the topic, refer to: Kleimann, Taking Stock: EU Common Commercial Policy in the Lisbon Era, pp. 21-25.

measures than a gradual reciprocal opening of markets in the future, so as to respond to domestic concerns on job security, domestic protection and the like.[177]

Shifting the debate on agreements onto a more publicly available stage through the EP, on the other hand, minimizes the technocratic character comparable negotiations possessed beforehand. In connection with the mentioned propensity towards influence from special interest groups, the partially existing lack of expertise is a factor to take into account, when assessing the new EP's role and effectiveness of future investment agreements as a whole.[178]

The effects and disadvantages that parliamentary control and participation may have in terms of efficiency in comparison with technocratic decisions are, self evidently, not ones only the European Union, but ones that any other democratic system faces as well. It is evident that only via the participation of several actors a democratic discussion and exchange of different opinions as all-encompassing as possible can be safeguarded. Not challenging the correctness of including the EP into decision making processes with regards to international trade agreements in general, the changed amplitude of the Commission's discretion in negotiation in comparison to Pre-Lisbon, however, is noteworthy to underline in this respect.

As stated, the involvement of Parliament will most likely lead to an increased number of different, notably non-economic, factors that need to be taken into account when negotiating with third countries and the EP will certainly make itself heard.[179] As a consequence, a prolonged and more complicated negotiation process[180] due to the intervention of an extra player is to be expected for upcoming investment agreements. Likewise, the pronounced meddling of possibly highly populist and maybe short-term interests appear possible.

However, at this point it remains yet to be seen what real significance non-economic factors will effectively capture in future investment negotiations and whether the Union's self-imposed aims of making the world a better place[181] may serve as a legal basis to challenge future investments agreements. On the other hand, it is likewise interesting to

[177] Kleimann, Taking Stock: EU Common Commercial Policy in the Lisbon Era, pp. 14; also: Woolcock, The Treaty of Lisbon and the European Union as an Actor in International Trade, p. 7.
[178] Kleimann, Taking Stock: EU Common Commercial Policy in the Lisbon Era, pp. 13.
[179] Lavranos, Bilateral Investment Treaties (BITs) and EU Law, p. 20.
[180] Woolcock, The Treaty of Lisbon and the European Union as an Actor in International Trade, p. 15; Kleimann, Taking Stock: EU Common Commercial Policy in the Lisbon Era, p. 5.
[181] Compare with: Article 3 para 5 TEU as well as with Article 21 TEU.

observe whether the enhanced EP's co-decision powers will lead to an increased volatility of a future EU investment policy, so as to make it less consistent and less credible for trading partners.[182]

3) Intermediate Conclusion

As for the above mentioned realities and factors, the broad discretion the Commission possessed before the Treaty of Lisbon with regard to international and as well investment agreements is significantly narrowed by the intervention of yet another key player that is intent to pay pronounced regard to notions formerly left outside the bargaining table. Accordingly, investment agreements can be expected to become more longsome and possibly less effective and powerful owing to the consistent search of compromises. The Union's aim to pursue a global investment strategy can hence be thrown off course once euro-skeptical currents get the upper hand in the European Parliament or powerful lobbyist groups manage to influence a large share of the MEPs into a specific direction.

However, this may not be precipitately interpreted as an obstacle towards future genuine investment agreements with third countries. More than in the past will the successful conduct of international agreements depend on the interaction of the several co-players and especially on the Commission's ability to fuse the different interests into a single coherent policy. Considering that uniting the varying voices of the MS has already in the past decades not been an easy task, doing so will even be more the case now, finding valuable solutions between 27 MS represented by the Council of Ministers and the EP.

IV Evaluation of the new Portfolio of Powers

1) Prospective Results of the new Competence

Including the competence over FDI in the ambits of the CCP was an important measure towards broadening the EU's powers and a further step to live up to its proper ambition of veritably becoming a global player.

The importance of capital movements is increasing continuously, and both inward and outward investments exert a decisive positive impact on growth and employment rates of

[182] Kleimann, Taking Stock: EU Common Commercial Policy in the Lisbon Era, p. 28.

virtually any economy.[183] In view of realizing its single market and securing its position in the world, the EU consequently implemented the required reforms.

However, the question remains whether the step carried out by the Treaty of Lisbon has been large enough to wholly equip the EU with all the means needed to face the upcoming global challenges.

As stated, the fact that every single MS conducts its own investment agreements has left the European Union with a myriad of different and differing BITs, most notably concerning the diverse procedures and standards, e.g. whether national treatment or the most favored nation principle shall be applied, that may vary according to different investment policies of the MS.[184]

This situation, and the application of different benchmarks across all 27 MS, has made the European Union a zone of "asymmetries and uncertainties" for external investors and moreover provided an unequal playing field for European investors going abroad.[185]

By streamlining investment policies, a single and equal framework will be provided for all EU investors in the future. This framework guarantees even conditions for any European enterprise and thus further pushes the European Union towards a genuine single market. On the other hand, harmonizing investment conditions valid for all 27 MS on the inside would rigorously reduce uncertainties that may have existed with investors from third countries. Taking into account the significance which factors such as certainty and transparency play in an investment venture, a single EU investment strategy is likely to enhance the attractiveness of the Union's territory for investments as a whole in the future.[186]

Decisive for any advantageous outcome of international agreements is, of course, the bargaining power the respective negotiators possess.[187] Rather than a homogenous and equivalent area of 27 MS, the European Union more resembles a zone of diverging economies in terms of their size and power. Most obviously, it was the economically less powerful MS which have been limited in their negotiation capacities and consequently

[183] See Chapter A, Section I, or Communication from the Commission, Towards a comprehensive European international investment policy, p. 3.
[184] Woolcock, The EU Approach to International Investment Policy after the Lisbon Treaty, pp. 31 ff.
[185] Hjämroth and Westerberg, The contribution of trade to a new EU growth strategy, p. 21 and Communication from the Commission, Towards a comprehensive European international investment policy, p.5.
[186] Hjämroth and Westerberg, The contribution of trade to a new EU growth strategy, pp. 21 f.
[187] Woolcock, The Treaty of Lisbon and the European Union as an Actor in International Trade, p. 3.

been hampered to conclude advantageous investment treaties. As a matter of course, primarily the economically strong MS have been active in conducting investment agreements, which is clearly reflected by the numbers of BITs concluded.[188]

However, it is likely that not only those economically less powerful MS will benefit from harmonized negotiations on a European level in the end. By concentrating each of the 27 economies' potencies and strengths, the bargaining power of the entire EU territory is likely to be maximized, which finally results in more beneficial investment agreements for all MS.[189]

Building on the existing BITs and inspired by the best standards available, the European Union is hence more likely to be in the position to guarantee a high quality of standards negotiated for EU investors and to better protect the competitive space available in the EU.[190]

Accordingly, a considerably increased recognition of the EU as an international player as well as an improved competitiveness of the entire EU zone can be expected as a result of future EU conducted negotiations,[191] which additionally meet some major trading partners' expectations to finally conduct one single agreement for the entire European Union.[192]

However, in view of the changing demands and new emerging competitors in the global economy it is of interest to give a brief outlook: is the EU, by including the FDI competence into its repertoire of powers, sufficiently fit to compete globally in the domain of investment? In this respect, the upcoming challenges and evolutions shall be presented in short.

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[188] Homepage of the World Bank, International Centre for Settlement of Investment Disputes. It appears that Germany is the global leader in negotiating BITs (147). Other economically strong EU MS like France (103) or the UK (102) dispose of comparably high numbers of BITs compared to an international average of about 30 BITs per country.

[189] Annotation: This indeed, despite some major Member States' ambitions to uphold their proper investment regimes thus providing their national companies with a comparative advantage vis-à-vis companies from MS without a strong bargaining capacity. Also compare to: Woolcock, The Treaty of Lisbon and the European Union as an Actor in International Trade, p. 10 and Hjämroth and Westerberg, The contribution of trade to a new EU growth strategy, pp. 21 f.

[190] Communication from the Commission, Towards a comprehensive European international investment policy, pp. 5 f.

[191] Woolcock, The Treaty of Lisbon and the European Union as an Actor in International Trade, p. 14 and Hjämroth and Westerberg, The contribution of trade to a new EU growth strategy, p. 21.

[192] Annotation: Amongst others, Canada explicitly mentioned its interest in conducting one single agreement on investment valid for the whole European Union and covering all pertinent aspects on investment. Compare to: Communication from the Commission, Towards a comprehensive European international investment policy, p. 7.

2) New Emerging Powers

As indicated, BITs have generally been negotiated between two mostly unequal negotiation partners in the past, developing countries on the one hand and industrialized ones on the other. Instead of establishing a genuine and fair ground for negotiation between two partners on equal footing, however, the latter have in general not been negligent to make use of their economic position of power so as to bargain most often only unilaterally beneficial investment treaties. Not being in the position to alter the terms of the agreement, but at the same time intensely dependent on an amplified flow of investment and fresh capital, developing countries were generally in no other position but to agree on the imposed conditions.[193]

The lack of bargaining power of the other side has consequently presented a major trump for developed countries such as the EU Member States, resulting in an overall set of profitable agreements.

However, the ancient mere opposition of a developing country as the only possible spring of new capital on the one side of a negotiating table dictating the terms of an agreement to the other side does not seem to reflect the current situation. Over the past decades, emerging economies have gained ground as important investors on the world markets as well as lucrative investment destinations.[194] In 2010, investment inflows into developing and transitional economies rose by 12%. For the first time, these investments constituted more than half of the global investment volume and surpassed investments in developed economies.[195]

These figures reflect the overall gradual shift of international production to the named countries and highlight the growing importance of other emerging players on the international sphere. Likewise, a growing number of formerly developing countries have established themselves as important sources of investments to other countries, including developed countries,[196] thereby rivaling the traditional origin countries of investment.

[193] For a more in depth-analysis of, inter alia, the force of conditionality exerted by developed countries onto developing countries, refer to Kaushal, Revisiting History: How the Past Matters for the Present Backlash Against the Foreign Investment Regime. With respect to the aforementioned, especially refer to pp. 506 f.
[194] UNCTAD World Investment Report 2011, p. 8.
[195] UNCTAD World Investment Report 2011, p. 3.
[196] UNCTAD World Investment Report 2011, pp. 6 f.

Whereas usually having played a minor role in originating FDI outward flows, six developing countries currently rank among the top 20 investors, notably Brazil, Russia, India and China, also commonly referred to as the "BRIC" countries.[197]

In this respect, the case of China merits a more precise consideration, especially in the light of the soon upcoming EU-China investment discussions. Constituting the most important and fastest growing example of all the four primary emerging countries, China's aggrandizing power will also have considerable consequences with regards to the EU's future investment policy.

With a gradually increasing total investment volume over the past years and a current one accounting for 68 billion US Dollar in 2010, China ranked fifth in terms of global FDI outflows, thus constituting the major outflow source of capital from a non-developed country.[198] Moreover, this trend and China's interest in investing abroad is most likely to further prevail within the years to come, considering the continuous growth of the Chinese economy and its consequential demand for resources and other valuable assets.[199] In spite of the aforementioned number, actual investment flows might be considerably higher, taking into account China's use of its major financial hub and port to the world Hong Kong. In view of diverse financial and legal incentives such as tax advantages or an enhanced property protection, several Chinese enterprises use their subsidiaries in Hong Kong to launch their investment projects in the world, thus not being included into Chinese FDI accounts.[200]

Consequently, the numbers of genuine outward investment flows originating in China might even be considerably higher than official statistics lead one to assume.[201]

More than just being interested in a mere profit maximization, however, the exchange of technology as well as the acquisition or participation of already established companies, so as to thus more effectively promote Chinese products, represent other investment

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[197] Ibid pp.7ff.
[198] Ibid p. 9.
[199] World investment prospects to 2011, p. 130.
[200] Round Tripping, pp. 3 f., Xiao, People's Republic of China's Round-Tripping FDI, p. 11.
[201] Exact numbers of investment volumes being round tripped are difficult, if not impossible, to assess. However, various indications, such as net errors and omissions in balance of payments, suggest a considerable portion of capital flight that escapes official FDI statistics. For an in depth analysis of the probable assessment of Chinese FDI and its implications in round tripping investment capitals via Hong Kong, the lecture of especially the following authors is strongly recommended: Graham and Wada, Foreign Direct Investment in China: Effects on Growth and Economic Performance; Breslin, Shaun, Foreign Direct Investment In China: What the Figures Don't Tell Us, as well as: Keong and others, Foreign Direct Investment to China and Southeast Asia: Has ASEAN been losing out?, p. 100.

incentives for China and emerging countries in general. Likewise, in terms of investment flows, China continues and will continue to be a major destination for foreign investments, considering also cheap labor and production costs, despite the slight rise in employment costs over the past years.[202]

Considering the above mentioned realities, it becomes obvious that China will not only remain a fruitful harbor for European investments, but that European economies will further have to expect a possible rise of investments. This very brief and simplified depiction of the economic development which China currently undergoes, however, is moreover exemplary for other emerging markets as well. This highlights the increasing importance that such investment agreements with emerging countries will capture for the European Union in the next decades.

The evolution of these emerging countries into potential primary investor countries, shown by "recent high-profile acquisitions in developed countries"[203] and the rise of Multinational Companies, therefore requires more than ever an effective management of investment related questions, as the developed countries' and as such the EU's relative bargaining power will increasingly shrink.

Against this background, the following conclusion shall recapitulate and assess whether the aforementioned modifications initiated by the ToL have sufficiently equipped the EU with the tools to keep its economic household in order.

[202] World investment prospects to 2011, pp. 11 and 45 and UNCTAD World Investment Report 2011, p. 9.
[203] World investment prospects to 2011, p. 14.

D Final Conclusion

The entering into force of the Treaty of Lisbon marks a corner stone in EU history. Alongside establishing the EU as an international legal personality, it entailed a number of important amendments urgently needed to groom the Union for a new, changed global context.

In an economic context, the introduction of FDI plays a crucial role for the European Union and its Member States. Given the mentioned and yet to augment importance of foreign investments on the global scale, the inclusion of the FDI competence into the EU's ambits was an important move towards making the territory of the 27 Member States more competitive. A progressively to be established uniform investment standard will not only provide EU investors with an equal playing field through a strengthened market access and better protection abroad; likewise, the increased policy coherence will supposedly render the European Union as the world's biggest market even more attractive for foreign investments.

As regards the extent of the newly introduced FDI competence, it shows that a progressive interpretation should be yielded priority to; one that does not halt itself at the mere liberalization phase, but one that includes the post-establishment phase likewise, thus giving rise to an authority over regulatory measures, inter alia touching upon investor protection and standards of treatment. As discussed, only such a sufficiently broad interpretation will meet not only proper sense of Article 207 TFEU, but moreover the entire context of trade in a sophisticated meaning allowing for an almost wholesome handling of investment.[204]

Owing to the now pooled bargaining powers of 27 countries and inspired by the best standards available, the Commission is likely to negotiate more advantageous results, especially benefitting the economically less powerful states.

However, as regulations on portfolio investments would clearly delimit the scope of Article 207 TFEU, the European Union is once again deprived of the possibility to negotiate wholesome agreements with third countries. This implies that in order to conduct IIAs covering all investment related aspects, the European Union will still have to rely on the single MS' participation.

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[204] Annotation: “Almost“, as portfolio investments, according to the current overwhelming opinion as discussed above, fall outside the CCP’s scope.

This conclusion applies at least for the current situation. Meanwhile, the concept of strictly separating direct and indirect investments appears to be increasingly questioned, as for the practical difficulty to do so. An eventual transformation of this concept's logic might therefore possibly effectuate an extension of the EU's investment competence and therefore likewise its power in the future.[205]

Regarding the elaboration of international agreements, the multitude of players involved will certainly result in complex and more longsome decision making processes. The inclusion of the European Parliament and its aforementioned probable impacts might turn out to have a decisive influence on future IIAs.

However, this circumstance may not precipitately be understood as an obstacle to achieving valuable investment agreements; all will indeed depend on the Commission's ability to surmount possible existing dissents. In this respect, its role as mediator and gluing force between diverging interests within the European Union will capture even more significance.

The most important question mark to be lifted, however, is that behind the question whether the new FDI competence finally equipped the EU with the power needed to compete in a changed global setting.

As described beforehand, new major players enter the global stage and are most likely to gain more economic weight in the course of the next decades. In this light, the rapidly expanding markets will progressively challenge the position of today's largest economic players, leading to a relative loss of bargaining power of the major developed countries. Uniting the strength of all 27 Member States' economies was hence the appropriate measure to counterbalance to the greatest possible extent this unfavorable drift. Whether the measures taken were sufficient to wholly maintain the EU's as the biggest market force, remains more than doubtful however.

[205] In this light, increasingly more voices within the Commission, especially within DG Trade, push for a future inclusion of the portfolio competence.
This attempt is not entirely without a firm justification, as the division of foreign investment matters into two competences is causing unnecessary practical obstacles. Given the increasing importance of investment ventures, rethinking the classical concepts of investment will therefore certainly merit pronounced attention in the future. Having said this, the 2008 conducted New Zealand – China FTA which uses a broad understanding of investment might become trend setting in the future (See Chapter 11, Section 1: "investment means every kind of asset").

As shown, the outcome of any investment negotiation process is decisively affected by the reciprocal concessions on market access that either side is able to make. Considering that the EU already ranks amongst one of the most open market entities (in contrast to many of the emerging markets) the EU appears to only possess little to offer in this respect.

Moreover, the restrained autonomy of the Commission in discussions as well as the (at least for the time being) exclusion of a portfolio investment conference, additionally reduce the Union's stock of bids considerably. Consequently, this overall restrained room for maneuver entails that the finally gained leverage effect will not be sufficiently large to compensate the growth of other emerging actors.

Examining the current situation at its whole, it is evident that the introduced investment competence will only represent a small puzzle piece in the EU's overall quest for global power. By incorporating the FDI competence, the EU finally disposes of the capability to gradually harmonize the strongly fragmented investment picture in Europe. However, it appears as if the new competence fails to provide a wholesome solution; for the mentioned substantial practical limitations and the yet overall prevailing uncertainties, the European Union has under the present state only made half a step towards becoming a veritable actor in global foreign investment.

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