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A Legal History of the EU's International Investment Policy

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Abstract

The article traces the evolution of the legal competences of the European Union (EU) in international investment regulation from the Spaak Report (1956) to the Lisbon Treaty (2009). It focuses on the question why and how the EU gradually acquired legal competences in this key domain of global economic governance. The analysis suggests that Commission entrepreneurship and spill-overs from other EU policies were the most important factors fuelling the extension of the EU's legal competences. The Member States, on the other hand, sought to prevent a competence transfer. European business – arguably the main stakeholder – was mostly uninterested or divided regarding the EU's role in international investment policy. The findings have implications for our perception of business lobbying in international investment policy and potentially for the legal interpretation and delimitation of the EU's new competences.

Keywords

European Union, Lisbon Treaty, European Integration, Commission entrepreneurship

1. Introduction

The entry into force of the Treaty of Lisbon on 1 December 2009 brought the regulation of foreign direct investment (FDI) under the scope of the Common Commercial Policy (CCP). The European Union (EU)[1] is now exclusively competent to regulate FDI. The Member States have by and large lost the necessary competences to pursue their own international investment policies. Hence, international investment policy-making now takes place at the EU level. International investment policy is here defined to encompass the regulation of investment liberalisation, post-establishment treatment standards and investment protection through international investment agreements (IIAs). The EU's role and competences in international investment policy have been a controversial topic for many decades. While the Commission persistently pushed for an extension of the EU's role and competences in this key domain of global economic governance since the 1970s, the Member States have constantly sought to resist such calls.

This article traces these debates and the evolution of the EU's legal competences in international investment policy-making from the Spaak Report (1956) until the Treaty of Lisbon (2009) in order to explain how and why the EU acquired the exclusive competence over FDI regulation. The analysis focuses on four factors, which are likely to have shaped the EU's competences in international

[1] For the sake of clarity, the article refers to today's EU and all its precursor organisations such as the European Economic Communities or the European Communities as EU. It is not assumed that these organizations had the same legal and political attributes as today's EU.

investment policy: 1) Commission preferences, 2) Member State preferences, 3) business preferences, and 4) spill-overs from other EU policies. It finds that policy entrepreneurship by the Commission as well as spill-overs were the main factors shaping the EU's legal competences in this domain. While business was little interested in debates on the distribution of competences, the Member States mostly opposed an extension of Union competences in this domain. This article is primarily of empirical ambition. From a political science perspective, the findings nonetheless clearly lend support to neo-functional and institutionalist thinking on European Integration.

The article uses analytical process tracing as its main method. It builds on archival research, secondary literature and 42 anonymised interviews with European and national officials as well as business representatives. The article reconstructs policy debates in the context of intergovernmental conferences (IGCs) and proceedings in front of the Court of Justice of the European Union (CJEU) to assess why the EU gradually acquired legal competences to regulate international investment flows. The article intends to make a threefold contribution. First, it closes an empirical gap in the literature on the EU's political and legal genesis as an actor in the international investment regime. Second, the article contributes to better delimit the exact scope of the EU's new exclusive competences by shedding some light on the rationale behind the competence transfer. Finally, it shows that business may be less of driver of international investment policy-making than conventionally thought.

2. First Steps – The EU and International Investment Regulation from the 1950s to the 1980s

It was only in the 1980s that international investment became an important economic phenomenon. Hence, it was only at that point that intense policy debates on the role and competences of the EU and the Member States in this domain started. It is, however, worth mentioning that European policy-makers touched twice on this issue in the early years of European Integration when preparing the Treaty of Rome and in discussions on Opinion 1/75 on the need to harmonise Member States' export policies.

2.1 The Treaty of Rome

The Treaty of Rome did not provide the EU with legal competences in the regulation of international investment flows. The preparatory debates and the so-called Spaak Report[2] of April 1956 nevertheless touched on the EU's role in regulating FDI flows. Intergovernmental discussions did not touch on the EU's role in this domain when evaluating the future CCP but the free movement of capital. According to the Spaak Report, the envisaged Common Market should inter alia provide for the free movement of capital. The report cautioned that the liberalisation of capital movements among the Member States would, however, require the establishment of a common external capital regime dealing with extra-EU

[2] Comité intergouvernemental créé par la conférence de Messine, MAE 120 f/56, 1956, <http://www.unizar.es/euroconstitucion/library/historic%20documents/Rome/preparation/Spaak%20report%20fr.pdf.> accessed on 4 June 2016.

capital flows including FDI. Otherwise a regulatory gap would emerge since capital could enter and leave the Common Market through Member States with liberal capital regimes and then flow into Member States with more protectionist capital regimes. As the Spaak Report stated:

> Le… obstacle, c'est la possibilité que les capitaux passent d'un pays vers un autre, non pour s'y investir mais pour échapper vers l'extérieur au bénéfice d'une inégalité dans la rigueur des contrôles. La liberté de la circulation des capitaux à l'intérieur du marché commun appelle donc dans les relations avec les pays tiers à une certaine attitude commune qui … au stade finale, aboutirait à une égale liberté ou à un dégrée de contrôle équivalent.[3]

The governments of Belgium, France, Germany, Italy, Luxemburg and the Netherlands convened between June 1956 and March 1957 to draft the Treaty of Rome. Despite the Spaak Report's recommendation to liberalise intra-EU capital movements, they adopted a cautious approach. Article 69 EEC[4] stated that the free movement of capital was only a subordinate treaty freedom. The liberalisation of capital movements should only proceed through secondary legislation and to the extent necessary for the functioning of the Common Market for goods and services.[5] In consequence, the need for a common external capital regime did not arise. As explained in Section 3.2, it was only with the demise of Keynesianism and the emergence of the neoliberal paradigm in the 1980s that the Member States started advancing the free movement of capital within the Common Market. Keynesianism postulated far-reaching state intervention in the economy and in particular control over cross-border capital flows to enable governments to use monetary policy and interest rates for macroeconomic steering. Only when policy-makers turned toward neo-liberalism in the 1980s, which foresaw the strengthening of market mechanisms for an efficient allocation of resources within and across economies, they showed willing to dismantle capital controls within the Common Market.

2.2 Opinion 1/75 – the Commission Pushes for a European BIT Program

The EU's role in the regulation of international investment policy became again the subject of debates in the 1970s. In late 1972 and 1975, the Commission published two draft regulations, which sought to establish a European export policy as an integral part of the CCP.[6] One draft regulation foresaw the

[3] ibid 93–94.

[4] Treaty Establishing the European Economic Communities (EEC) [1957] Eur-lex 11957E.

[5] Age Bakker, *The Liberalization of Capital Movements in Europe - The Monetary Committee and Financial Integration, 1958-1994* (Kluwer 1996) 42-44; Christoph Ohler, *Europäische Kapital- und Zahlungsverkehrsfreiheit: Kommentar zu den Artikeln 56 bis 60 EGV, der Geldwäscherichtlinie und Überweisungsrichtlinie* (Springer 2002) 1-3; Johan Usher, 'Capital Movements and the Treaty on European Union' (1992) 12 Yearbook of European Law 35–57.

[6] Deutscher Bundestag, *Unterrichtung durch die Bundesregierung "Vorschlag einer Verordnung (EWG) des Rates zur Errichtung einer Europäischen Ausfuhrbank"* (Drucksache 7/4882 1976); Leif Johannsen, 'Die

creation of a European investment guarantee agency. The investment guarantees should insure European investors against non-commercial investment risks in third countries. Access to common investment guarantees should be conditional on the existence or conclusion of bilateral investment treaties (BITs) between the EU and the concerned third countries.[7] The Commission's draft regulation referred to Article 113 EEC[8] as the competence basis for the creation of the EU investment guarantee agency and the conclusion of EU BITs.

The Member States met the draft regulations with great hesitation.[9] The Council criticised that the harmonisation of national export policy had priority over the creation of a complementary EU policy. The German government stressed that national export policies provided sufficient coverage to all European investment and export projects. The German Bundestag warned that the creation of a EU investment guarantee scheme would bear incalculable financial risks for German taxpayers. The French government sought to protect its competences and sovereignty. The EU was entitled to harmonise national policies, but did not hold the necessary competences to become a proper actor in this domain. In order to force the Member States to accept its draft regulations, the Commission had recourse to legal review in Opinion 1/75.[10] The Opinion examined and recognised the EU's legal competence to harmonise national export policies. The Opinion did not, however, provide a basis to push for a European BIT program.

3. The Treaty of Maastricht

Lasting in-depth debates on the EU's competences in international investment policy began with the Uruguay Round in the GATT and the IGC on the Maastricht Treaty. The Maastricht IGC touched on the EU's legal competences in international investment policy in the context of the negotiations on the Treaty chapters on the CCP and the free movement of capital. While the Commission was unsuccessful in its attempt to assert competences over international investment regulation in negotiations about the CCP, the EU accidentally acquired legal fringe competences regarding investment liberalisation under the revised chapter on capital movements.

3.1 The Commission Fails to 'Update' the Common Commercial Policy

Kompetenz der Europäischen Union für ausländische Direktinvestitionen nach dem Vertrag von Lissabon' (2009) 90 Beiträge zum Transnationalem Wirtschaftsrecht 5-6; Ignaz Seidl-Hohenveldern, *Versicherung nichtkommerzieller Risiken und die Europäische Gemeinschaft* (Carl Heymanns 1977) 54-59.

[7] Johannsen (n 6) 5-6; Seidl-Hohenveldern (n 6) 54-59.

[8] Treaty Establishing the European Economic Communities (n 4).

[9] For this and the following see Johannsen (n 6) 5-6 and Seidl-Hohenveldern (n 6) 56 -59.

[10] CJEU, Opinion 1/75, *Opinion of the Court of 11 November 1975 Given Pursuant to Article 228 (6) of the EEC Treaty* [1975] ECR 1355.

The Member States convened for the IGC on the Treaty of Maastricht between December 1991 and February 1992. In March 1991, the Commission published a report on the functioning of the EU discussing advisable modifications to the European Treaties.[11] With regard to the CCP, the Commission proposed a far-ranging reform. It suggested renaming the CCP into '*Common Policy of External Economic Relations'*. The new policy should encompass the regulation of trade in goods, services, export policy, intellectual property rights, capital movements, investments, establishment and competition through trade agreements and autonomous measures. The Commission explicitly emphasised that the EU would be competent to regulate investment liberalisation as well as investment protection. The Commission, moreover, underlined that the CCP already encompassed the regulation of these issues and that it merely sought to clarify but not to substantially broaden the scope of the EU's competences. The reform should ensure the effective 'representation of the union on the external scene and notably in dealings with international organizations'.[12] The Commission advanced a teleological interpretation of the CCP in its report, which was informed by the agenda of the on-going Uruguay Round. It perceived the CCP as the interface between the EU's Single Market and GATT negotiations. Hence, the scope of the CCP – as intermediary between the Single Market and the GATT regime – had to evolve in line with the agenda of GATT negotiations.[13]

The Member States did not receive the Commission's recommendations well. During the debates on the Commission's negotiating mandate for the Uruguay Round in September 1986, the Member States underlined that they had empowered the Commission to speak on all new trade issues including investment, but that this decision did not prejudge the competence question. The Member States were convinced that most new trade issues came under national or shared competence.[14] From the point of view of the Member States, the Commission denounced the gentlemen's agreement not to raise the competence question during the Uruguay Round and exploited its role as single voice in the GATT. The consecutively discussed draft treaties illustrate the Member States' opposition to the Commission's proposal and in particular to an extension of the CCP to international investment regulation. Already the first draft text of the Maastricht Treaty of 17 April 1991 did not contain most of the proposed amendments to the CCP articles including the reference to international investment regulation. The final text of the Maastricht Treaty indeed did not modify the CCP articles at all but preserved the wording of the Treaty of Rome.[15]

[11] On this and the following see Conference of the representatives of the governments of the Member States, CONF-UP 1788/91, 1991, 16, 28–29.

[12] ibid 28.

[13] Piet Eeckhout, *EU External Relations Law* (OUP 2011) 28.

[14] Robert Basedow, 'The EU's new International Investment Policy' (LSE Ethesis 2015) 114; Hugeo Paemen and Alexandra Bensch, *From the GATT to the WTO: The European Community in the Uruguay Round* (Leuven University Press 1995) 56.

[15] Eeckhout (n 13) 26-27; See Conference of the representatives of the governments of the Member States, CONF-UP 1845/91, 1991, 31; Conference of the representatives of the governments of the Member States,

The European business community was little involved in these debates. UNICE – today BusinessEurope – formally submitted its position paper to the IGC on 10 April 1991.[16] The paper is fairly vague on the CCP. It merely states that trade policy measures should be subject to qualified majority voting in the Council of Ministers to ensure swift and effective decision-making.[17] While the statement in principle called upon the Member States to adjust the scope of the CCP to the evolving GATT agenda, the absence of any concrete reference to services trade or investment suggests that European business did not attach great important to the CCP.

3.2 Competence by Spill-Over – A Common External Capital Regime and Investment Market Access

The Treaty of Maastricht did not reform the CCP. The Treaty of Maastricht, however, established a common external capital regime governing capital flows between the Member State and third countries. While this Treaty revision was not meant to affect the EU's role in international investment policy, it had a spill-over effect as it unintentionally provided the EU with a shared competence to regulate investment market access.

The creation of an external capital regime had become necessary due to the advances in the creation of a Common Market for capital in the 1980s. The demise of Keynesianism and rise of the neoliberal paradigm motivated the Commission to push for the finalisation of the Single Market by 1992. The Single Market Program intended to strengthen market mechanisms to promote the efficient allocation of scarce resources within the European economy. As part of its Single Market Program, it managed to convince the Member States to enact the milestone directive 88/361/EEC[18] in 1988, which instantaneously liberalised all capital movements within the Single Market.[19] Policy-makers soon realised that they had created a regulatory gap and that they needed to establish a common external capital regime. As predicted in the Spaak Report of 1956, capital entered and left the Common Market through Member States with liberal capital regimes thereby circumventing the capital regimes of more protectionist Member States.

CONF-UP 1850/91, 1991, 30; Conference of the representatives of the governments of the Member States, CONF-UP 1862/91, 1991, 31; Conference of the representatives of the governments of the Member States, CONF-UP-UEM 2017/91, 1991, 59.

[16] Conference of the representatives of the governments of the Member States, CONF-UP 1792/91, 1991, 9.

[17] ibid.

[18] Council Directive 88/361/EEC of 24 June 1988 for the Implementation of Article 67 of the Treaty [1988] OJ L 178.

[19] Bakker (n 5) 210-212.

Council debates on the creation of an external capital regime started in 1988 and came to an end with the adoption of the Maastricht Treaty. On insistence of the Commission, Belgium, Denmark, Germany, the Netherlands and Italy the Maastricht Treaty established an external capital regime based on the 'erga omnes' principle providing for free capital movement between Member States and third countries. Article 70 EC[20], however, stated that the EU – but not the individual Member States – could re-impose temporary capital restriction in the event of major economic and monetary turmoil in a Member State or in order to comply with international sanctions. The regulation of extra-EU capital movements thereby came under shared Union and Member State competence.[21]

While it had not been the intention of the Member States, the creation of an external capital regime inevitably gave the EU a role in regulating investment market access. Cross-border capital movements constitute an important component of market access, the establishment and subsequent operation of foreign affiliates. As the EU acquired a shared competence over cross-border capital movements, the EU equally acquired a shared competence of relevance in international investment policy.

4. Court Battles over the Scope of the Common Commercial Policy

During the IGC on the Maastricht Treaty, the Member States had brushed off the Commission's attempt to 'clarify' the allegedly highly comprehensive scope of the CCP. As the following section shows, the Commission remained determined to have the Member States recognise the EU's exclusive competence under the CCP to regulate all new trade issues of the Uruguay Round, including international investment. The Commission sought to enforce its views through legal review in Opinions 1/94 and 2/92. The Commission's strategic recourse to the CJEU was, however, only little successful as the Court was unwilling to override the opposition of the Member States.

4.1 Opinion 1/94 – The Commission Seeks to Revisit the Maastricht Failure

Opinion 1/94[22] was, in essence, a continuation of the IGC debates on the CCP. After eight years of negotiations, the GATT parties had finally concluded the Uruguay Round in April 1994. The outcome of these lengthy negotiations was the WTO Agreement, which encompassed in its annexes, inter alia, the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Intellectual Property Rights (TRIPs). As could be expected, the Commission and the Member States disagreed over the question of whether the scope of the CCP was sufficiently broad to enable the EU to conclude

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[20] Treaty establishing the European Community (EC) [1992] 35 OJ C224.

[21] Steffen Hindelang, *The Free Movement of Capital and Foreign Direct Investment: the Scope of Protection in EU law* (OUP 2009) 37-38. Usher (n 5) 42-43, 46-47.

[22] CJEU, Opinion 1/94, C*ompetence of the Community to Conclude International Agreements Concerning Services and the Protection of Intellectual Property - Article 228 (6) of the EC Treaty* [1994] ECR I-5267.

the WTO Agreement and its annexes alone or whether it had to be concluded as a mixed agreement. In April 1994, the Commission decided to refer this question to the CJEU.[23]

The Commission's submission to the CJEU made the claim that the EU was exclusively competent to conclude the WTO Agreement and its annexes. The Commission developed a twofold justification for its position. First, the CCP articles had to be interpreted in a teleological manner. In other words, the authors of the Treaties had conceived the CCP in 1956/57 in order to ensure the effective representation of the Union in trade negotiations and notably in GATT talks. Hence, the legal scope of the CCP had to evolve in line with the scope of GATT negotiations.[24] Second, the Commission added that the Union also held implied, exclusive, external competences regarding all issues covered in the WTO Agreement and its annexes under other Treaty chapters.[25] It needs mention that although the Commission's submission did not explicitly dwell on the Union's legal competences in international investment policy, it contained the implicit claim that the Union held comprehensive competences in this domain. The WTO Agreement and its annexes covered investment liberalisation (GATS) and post-establishment treatment (GATS, TRIMs & TRIPs Agreements), which accordingly had to fall under exclusive Union competence. It, moreover, implied that it was only a question of time before all aspects of international investment policy would come under exclusive Union competence.[26] The United States had strongly pushed for the establishment of a comprehensive investment framework under the GATT and then in the OECD since the 1980s. Free trade agreements (FTAs), moreover, gradually came to include ambitious investment chapters since the 1990s.

The Member States determinedly rejected the Commission's arguments. The submission of the Council of Ministers and the individual submissions of the United Kingdom, France, Spain, Greece, the Netherlands, Germany, and Denmark demanded a mixed ratification of the WTO Agreement and its annexes. The Council, moreover, harshly rebuked the Commission's attempt to revise the scope of the CCP through judicial review after its failure in the Maastricht IGC, arguing that:

> At the intergovernmental conference on Political Union, the Commission had proposed such an extension of Community competence. The concept of a common commercial policy was to be replaced by that of a common policy of external economic relations, comprising in particular 'economic and trade measures in respect of services, capital, intellectual property, investment, establishment and competition' with the possibility of extension of that ambit. This policy was to fall within the exclusive competence of the

[23] Eeckhout (n 13) 27; Panos Koutrakos, *EU International Relations Law* (Hart 2006) 41.

[24] Koutrakos (n 23) 40-41.

[25] Eeckhout (n 13) 87-89.

[26] Johannsen (n 6) 7; Basedow (n 14).

> Community …The Community was to be exclusively represented by the Commission in its relations with non-member countries and international organizations and at international conferences … The Commission is seeking in its request for an Opinion to have implemented by means of judicial interpretation, the proposals which were rejected at the intergovernmental conference on Political Union.[27]

The CJEU sided in its Opinion of November 1994 with the Member States. It found that the WTO Agreement and its annexes had to be concluded as a mixed agreement since the Union did not hold all necessary competences neither under the CCP nor under other Treaty chapters. The CJEU ruling did not examine in detail the Union's competences in international investment policy, but it advanced a literal, narrow interpretation of the CCP. The CJEU thus refuted the Commission's claim that the new trade issues, including international investment regulation, already came under the scope of the CCP. Second, the CJEU ruled that GATS mode III – roughly identical to service-related investments – did not come under the scope of the CCP.[28] Hence, investment liberalisation in general was unlikely to come under the CCP. Finally, the CJEU did not challenge the EU's competence to conclude the TRIMs Agreement. The TRIMs Agreement regulated trade-related post-establishment treatment standards. The CJEU's silence on this issue implied that the EU was, at least partly, competent under the CCP in this domain of international investment policy. In conclusion, Opinion 1/94 was a heavy-handed attempt by the Commission to extend the EU's legal competence to new trade issues including investment regulation despite Member State opposition.

4.2 Opinion 2/92 – The Commission Claims Competence over Post-Establishment Treatment

Shortly after delivering Opinion 1/94, the CJEU rendered Opinion 2/92[29] in March 1995. Opinion 2/92 is of great interest to the present study, because it essentially examined the EU's competence to regulate post-establishment treatment. It sought to identify the adequate competence basis for the EU's adhesion to the 'Third Revised Decision of the OECD on National Treatment'. The Third Revised Decision was a gentlemen's agreement among OECD countries, which stipulated that OECD countries should grant established investors from other OECD countries national treatment. The Commission and the Member States disagreed over the competence basis for the EU's adhesion to the Third Revised Decision.[30]

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[27] CJEU (n 22) I-15306.

[28] Eeckhout (n 13) 30; Johannsen (n 6) 7.

[29] CJEU, Opinion 2/92, *Competence of the Community or One of its Institutions to Participate in the Third Revised Decision of the OECD on National Treatment* [1995] ECR I-521.

[30] Christoph Vedder and Hans-Peter Folz, 'A Survey of Principal Decisions of the European Court of Justice Pertaining to International Law in 1995' (1997) 8 EJIL 508, 510-511.

The Commission claimed that the EU was exclusively competent to adhere to the Third Revised Decision.[31] First, the Commission argued that the Third Revised Decision was a trade policy measure since international investment was a modern form of trade substituting and complementing traditional trade in goods. The Third Revised Decision sought to increase investment and thus trade activity. This logic implied that all aspects of international investment policy – market access, post-establishment treatment and protection – had to be considered as trade policy measures under the CCP. Second, the Commission advanced once again its teleological CCP interpretation. Since the main purpose of the CCP arguably was to ensure the effective international representation of European interests and the Single Market at the international level, the scope of the CCP had to evolve in line with trade-related negotiations in the GATT or OECD. Finally, the Commission added that should the Court disagree with the previous arguments, the EU nevertheless held an implicit, exclusive, external competence to adhere to the Third Revised Decision under Article 57 EC (establishment) and Article 100 EC (approximation of legislation).

Several Member States refuted the Commission's position and justifications.[32] Their submissions complement in many regards missing information on detailed Member State positions from the IGC on the Maastricht Treaty. The Belgian, Greek, Spanish, French and British rejected the claim that the EU was competent to adhere to the Third Revised Decision under the CCP. Some Member States elaborated that international investment was not a modern form of trade. Other Member States added that the Third Revised Decision would not affect trade flows and could thus not be considered to be a trade policy measure. Belgium, Greece, France, the Netherlands and the United Kingdom added that Article 57 EC (establishment) was the more pertinent competence basis for the EU to adhere to the Third Revised Decision, but stressed that it only provided for a shared rather than implied exclusive external competence.

The CJEU ruled that the Member States and the EU were jointly competent to adhere to the Third Revised Decision. First, the CJEU ruled that the Third Revised Decision was in part a trade policy measure coming under CCP and exclusive Union competence as regards its effects on extra-EU trade and investment flows. This interpretation implied that national treatment and more broadly post-establishment treatment of foreign investors in extra-EU relations fell under exclusive Union competence. But the Member States nonetheless continued concluding hundreds of BITs with national treatment provisions in the following years. Second, it found that the Third Revised Decision was a measure affecting intra-EU trade and investment as regards the participation of foreign-owned enterprises in trade and investment within the internal market. Hence, the Third Revised Decision was subject to internal market rules coming under shared and/or national competence. Third, the CJEU

[31] For this and the following see CJEU (n 29) I-542-546.

[32] For this and the following see CJEU (n 29) I–542–549.

elaborated that the Third Revised Decision was a measure coming under the Common Transport Policy and shared competence as regards its effect on the transport sector.[33] To conclude, the Commission sought in Opinions 1/94 and 2/92 to have the CJEU recognise the EU's comprehensive competences in foreign economic relations including in investment regulation, but the CJEU was unwilling to override Member State opposition.

5. The Treaty of Amsterdam

The debates on the scope of the EU's legal competences in international investment policy continued in the IGC on the so-called Treaty of Amsterdam. The Council of Ministers asked the Commission to submit a report on necessary reforms of the EU and its Treaties. The Commission problematized once again the EU's legal competences in foreign economic relations, in general, and in international investment policy, in particular.[34]

The Commission's report of May 1995 criticised that the Maastricht Treaty had missed the chance to modernise and to extend the legal scope of the CCP.[35] The recent rulings of the CJEU had further narrowed the scope of the CCP. The standard agenda of international trade negotiations largely exceeded the EU's legal competences, which complicated EU-internal decision-making and harmed the EU's interests in the world economy. The Commission advised the Member States to extend the scope of the CCP so as to bring it in line with the standard agenda of international trade negotiations. The CCP should cover, in particular, the regulation of services trade, intellectual property rights and 'FDI'. FDI had become increasingly important for the world economy and had a trade complementing and substituting effect. The continuous conclusion of BITs between the Member States and third countries undermined the exercise of the EU's competences in the regulation of capital movements. It, moreover, frustrated the EU's trade policy interests as many third countries conditioned market access for goods and services on investment commitments and activity. Whereas other countries could easily deal with this issue linkage, the EU was paralysed.

The Commission explained its position regarding international investment policy in further detail in a communication, which it released only a few weeks before the publication of the above-mentioned report. The communication was entitled 'A level playing field for direct investment world-wide'.[36] It sought to influence EU-internal debates on the Treaty of Amsterdam as well as the negotiations on the Multilateral Agreement on Investment in the OECD. The Commission argued that neither the EU nor

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[33] ibid. See also Vedder and Folz (n 30) 510–511.

[34] European Commission, 'Report on the Operation of the Treaty on the European Union' (internal document) SEC (95) 731 final, 1-7.

[35] For this and the following see ibid 57-58.

[36] European Commission, 'A Level Playing Field for Direct Investment World-Wide' (Communication) COM (95) 42 final, 1-14.

the Member States possessed the necessary legal competences to negotiate NAFTA-like state-of-the-art international investment agreements covering investment liberalisation, post-establishment treatment and protection. European investors increasingly suffered from competitive disadvantages vis-à-vis Japanese and US investors. Hence, the EU and the Member States should pool their competences and jointly negotiate state-of-the-art BITs with third countries.

The Member States showed only marginal interest in a reform of the CCP during the IGC debates in 1996 and early 1997. Only the IGC submissions of Germany, Italy and Sweden mention the general intention to discuss the CCP.[37] Other Member States did not enumerate the CCP as a priority for IGC debates. Drawing on the above-examined Opinions 1/94 and 2/92, one may safely conclude that most Member States met the Commission's proposal to extend the scope of the CCP to investment regulation with considerable hesitation. Most Member States refuted demands to reform the CCP both in order to preserve their national competences and because they considered these issues to be unrelated to international trade.[38]

The Irish Council Presidency, which chaired the IGC in the second semester of 1996, nonetheless tried to take the Commission's recommendations to reform the CCP into account. Its first discussion paper of 5 December 1996 proposed to the Member States the permanent empowerment of the Commission to negotiate on investment, services trade and intellectual property rights in the WTO.[39] The Member States should remain competent to regulate these issues in domestic settings and to negotiate in other international fora like the OECD, IMF and World Bank. Despite this pragmatic approach, the Member States remained determined to protect their competences against European encroachment. The proposal of the Presidency was quickly discarded in IGC debates.[40] The Treaty of Amsterdam[41], which entered into force in 1999, did not reform the CCP.

6. The Treaty of Nice

[37] European Parliament, 'White Paper on the 1996 Intergovernmental Conference Volume II – Germany' (1996) <http://www.europarl.europa.eu/igc1996/pos-de_en.htm> accessed 30 March 2016. European Parliament, 'White Paper on the 1996 Intergovernmental Conference Volume II – Italy' (1996) <http://www.europarl.europa.eu/igc1996/pos-it_en.htm> accessed 30 March 2016. European Parliament, 'White Paper on the 1996 Intergovernmental Conference Volume II – Sweden' (1996) <http://www.europarl.europa.eu/igc1996/pos-sv_en.htm> accessed 30 March 2016.

[38] Johannsen (n 6) 8; CJEU (n 29) I–542-549.

[39] Conference of the representatives of the governments of the Member States, 'The European Union Today and Tomorrow – Adapting the European Union for the Benefit of its Peoples and Preparing it for the Future – a General Outline for a Draft Revision of the Treaties (CONF2500/96)', 1996.

[40] Johannsen (n 6) 8.

[41] Treaty Establishing the European Community (EC) [1997] 40 OJ C340.

The Treaty of Amsterdam was widely considered a failure. The Member States thus convened for the IGC on the Treaty of Nice between February 2000 and 2001 to enhance the democratic legitimacy and to prepare the EU for the Eastern Enlargement.

In early 2000, the Commission submitted to the Council of Ministers a report on advisable reforms of the EU.[42] It again emphasised the need to reform the CCP so as to avoid a policy-making deadlock in an enlarged EU. The Commission underlined that the CCP had to be extended toward the new trade issues, including international investment regulation, in order to ensure qualified majority voting on trade policy measures in the Council of Ministers. As investment, services trade and intellectual property rights had become standard agenda items of trade negotiations, modern trade agreements had to be concluded as mixed agreements requiring unanimity. The CCP had thus de facto devolved during the 1980s and 1990s from a policy domain governed by the 'community method' and qualified majority voting toward an intergovernmental policy. The Member States remained hesitant regarding the Commission's recommendations. A series of progress reports demonstrates how the proposed extension of the CCP to international investment regulation was gradually scrapped during the negotiating process.[43]

But despite the Member States' opposition to extend the EU's competence in the realm of international investment regulation, the Treaty of Nice, nevertheless, provided the EU with first exclusive legal competences under the CCP to regulate certain aspects of international investment activities. Again, unintended spill-overs came to play. Article 133 EC[45] brought the regulation of trade in services under the scope of the CCP. Soon after the conclusion of the IGC on the Treaty of Nice, academics[46] started discussing whether the notion of trade in services in the revised Treaty provisions was congruent with the notion of trade in services under the General Agreement on Trade in Services (GATS).[47] The GATS recognises the establishment of a commercial presence abroad, which is by and large synonymous with foreign investment activity, as one mode of services trade. The GATS schedules thus contain commitments on market access and post-establishment treatment of foreign investment of service providers. At first, academics denied the assumption that the regulation of

[42] For this and the following see European Commission, 'Adapting the Institutions to Make Success of Enlargement' (communication) COM (2000) 34 final, 25-27.

[43] Conference of the representatives of the governments of the Member States, 'Progress Report on the Intergovernmental Conference on Institutional Reform (CONFER 4790/00)' 2000, 39-42. Conference of the representatives of the governments of the Member States, 'Revised Summary - Intergovernmental Conference on Institutional Reform (CONFER 4810/00)' 2000, 23-28. Conference of the representatives of the governments of the Member States, 'Revised Summary - Intergovernmental Conference on Institutional Reform (CONFER 4815/00)' 2000, 34-37.

[45] Treaty Establishing the European Community (EC) (Nice consolidated version) [2002] OJ C325.

[46] Johannsen (n 6) 9.

[47] General Agreement on Trade in Services (GATS), <https://www.wto.org/english/docs_e/legal_e/26-gats.pdf> accessed 3 June 2016.

service-related investment now came under the CCP, as the Member States had refused to extend the CCP to investment regulation.[48] In the following time, however, the *opinio juris* formed that the Member States had intended to empower the EU to participate in GATS-like negotiations on services trade. The new competence thus had to encompass the regulation of service-related investment liberalisation and arguably post-establishment treatment.

7. The Treaty of Lisbon

The Treaty of Nice, much like the Treaty of Amsterdam, was considered a failure. It did not prepare the EU for the upcoming accession of 12 new Member States in 2004 and 2007. The European Council of Laeken in December 2001 therefore decided to embark on another attempt to reform the EU. It decided to use the so-called 'Convention method' to revise the European Treaties.[49] The 'convention method' considerably differed from the classic intergovernmental method of Treaty revisions. It sought to limit secret bargains among national technocrats and instead to promote transparent deliberations among elected politicians over necessary reforms and ultimately the creation of a European federal state.[50] As the following Section demonstrates, the procedural particularities of the Convention method decisively facilitated the Commission's long-standing policy entrepreneurship to extend the CCP to international investment regulation. The section first discusses how Commission entrepreneurship in conjunction with the procedural particularities of the Convention method led to the extension of the CCP to FDI regulation in a first draft treaty. It then assesses how the Member States unsuccessfully opposed these developments and how European business was divided over the merits of a EU international investment policy.

The so-called Convention on the Future of Europe met between 28 February 2002 and 20 July 2003 in order to elaborate the draft text for the Treaty Establishing a Constitution for Europe (Constitutional Treaty). The draft text was then sent to the Member States for final discussions and ratification. The Convention comprised 102 delegates from the Member State governments and parliaments, the European Parliament, the Commission and accession countries. A Praesidium of 12 delegates – led by former French President Valéry Giscard d'Estaing – chaired the Convention.[51]

7.1 Commission Entrepreneurship in the Open and Behind the Scenes of the Convention

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[48] For this and the following Koutrakos (n 23) 61-62; Marise Cremona, 'A Policy of Bits and Pieces? The Common Commercial Policy After Nice' in Alan Dashwood, Christoph Hillion, John Spencer and Angela Ward (eds), *Cambridge Yearbook of European Legal Studies (2001-2002)* (Hart 2003), 61, 68-70.

[49] Florence Deloche-Gaudez, 'The Convention on a Charter of Fundamental Rights: A Method for the Future?' Notre Europe Research Policy Paper (2001) 15; European Convention, 'The European Convention'(2003), <http://european-convention.eu.int> accessed 8 October 2013.

[50] Deloche-Gaudez (n 49).

[51] European Convention (n 49).

At the beginning, the main work was carried out in 11 working groups. The CCP came under the responsibility of Working Group VII on external action, whose delegates showed little interest in technical debates on the CCP but focused on the EU's Common Foreign, Security and Defence Policies, as it was the time of the Iraq War.[52] On 15 October 2002, the Commissioner for Trade Pascal Lamy nonetheless addressed Working Group VII in order to emphasise the need to reform the CCP. Lamy stressed that the EU had proved itself as an effective representative of European interests in foreign economic policy. The current scope of the CCP, however, undermined the effective representation of European interests in the world economy. International trade negotiations increasingly focused on the regulation of investment, services trade and intellectual property rights, which were subject to unanimity voting within the Council of Ministers making it easy for third countries to divide and paralyse an enlarged EU. Lamy urged the delegates to extend qualified majority voting to all modern trade policy issues in essence demanding an extension of the scope of the CCP inter alia to investment regulation.[53] Lamy's efforts were only partly successful. While the final report of Working Group VII took up some proposals, it did not recommend the extension of the CCP to international investment regulation.[54]

The Praesidium of the Convention convened on 23 April 2003.[55] The purpose of this meeting was to examine and to transpose the recommendations of Working Group VII into a draft chapter on 'external action'. With regard to the CCP, the Praesidium decided to divert from the recommendations of Working Group VII on an important point. The Praesidium proposed in its draft CCP articles to extend Union competences and qualified majority voting to the regulation of 'FDI'. The Praesidium justified its decision by reiterating the Commission's long-standing argument that investment flows complemented and substituted traditional trade. It was reported that John Bruton, delegate of the Irish Parliament and Praesidium member, had proposed the extension of the CCP to FDI regulation. He reportedly stressed that FDI disciplines had become a standard issue of multilateral trade negotiations in the WTO and in FTA negotiations making an extension of the CCP necessary to ensure the effective representation of the EU's interests. Giscard d'Estaing and the delegate of the Commission,

[52] For this and the following see European Convention, 'Intervention de M. Pascal Lamy, membre de la Commission Européenne, lors de la réunion du groupe de travail VII, le 15 octobre 2002 (working group VII - working document 10)' 2002, 3. Interview with Convention participant, Brussels, 12 October 2011.

[53] European Convention, 'Final Report of Working Group VII on External Action (CONV 459/02)' 2002, 5-7. Interview with Convention participant, Brussels, 12 October 2011.

[54] European Convention, 'Discussion Paper on External Action (CONV 161/02)'2002, 7-8.

[55] For this and the following see European Convention, 'Proposed Amendments to the Text of the Articles of the Treaty Establishing a Constitution for Europe - Common Commercial Policy' 2003 <http://european-convention.eu.int/EN/amendments/amendments3dd9.html?content=866&lang=EN> accessed 8 October 2013, 53-55; Johannsen (n 6) 9-10; Markus Krajewski, 'External Trade Law and the Constitutional Treaty: Towards a Federal and more Democratic Common Commercial Policy? (2005) 42 CMLR 91, 102-106.

Michel Barnier, enthusiastically supported the proposal and managed to convince the other Praesidium members.[56]

One may wonder why the Praesidium and reportedly Bruton were so dedicated to bringing 'FDI' regulation under the scope of the CCP and exclusive Union competence. First, Ireland is the only Member State, which never concluded an IIA and which opposed the FDI reference until the very end of the drafting process. Second, it remains unclear why the rather narrow and unpractical term 'FDI' rather than international investment was proposed. One reason may be that the term 'FDI' is more directly tied to traditional trade than 'international investment' and thereby less controversial in the context of the CCP. One may recall that the European Commission had unsuccessfully proposed during the IGC on the Treaty of Amsterdam to extend the CCP to 'FDI' rather than 'international investment' as a compromise proposal after the debacle of Opinion 1/94. It is not far-fetched to assume that the Commission may have asked Praesidium members behind the scenes to reemphasis the issue as 'neutral' actors. This reading of the outcome of the Praesidium meeting would point to a remarkable instance of Commission entrepreneurship to the end of finally creating an EU international investment policy.

7. 2 The Member State Delegates Seek the Deletion of the 'FDI' Reference

Following the drafting exercise of the Praesidium, the delegates of the Convention reconvened for plenary sessions to discuss the Praesidium's draft text of the 'external action' chapter. The delegates were highly interested in the draft chapter on 'external action'. They tabled some 1,000 amendments regarding the 'external action' chapter and 100 amendments regarding the CCP articles. Thirty-one amendments concerned the proposed extension of the CCP to FDI regulation. The amendments demanded the deletion of the FDI reference. The delegates of the British, French, German, Irish and Spanish governments tabled 10 amendments to that end and elaborated that investment promotion and protection should remain under national competence, were not part of trade policy and the purpose of the reference remained unclear.[57] A Convention observer recalled that only the delegate of the German government, Joschka Fischer, supposedly understood the implications of the FDI reference for Member States' international investment policies and their BIT programmes. The opposition of France, the United Kingdom and Ireland mostly reflected their intention to protect their competences

[56] Jan Ceyssens, 'Towards a Common Foreign Investment Policy? Foreign Investment in the European Constitution'(2005) 32 Legal Issues of Economic Integration 273; Sophie Meunier, 'Integration by Stealth – How the European Union Gained Competence over Foreign Direct Investment' (2014) EUI Working Papers RSCAS 2014/66; Interview with Convention participant, Brussels, 12 October 2011.

[57] European Convention, 'Proposed Amendments to the Text of the Articles of the Treaty Establishing a Constitution for Europe - Common Commercial Policy' 2003 <http://european-convention.eu.int/EN/amendments/amendments3dd9.html?content=866&lang=EN> accessed 8 October 2013.

and sovereignty against European encroachment. The Spanish delegate reportedly supported France so as to gain political capital in following discussions on voting rights in the Council of Ministers.[58]

The large number of amendments on the 'external action' chapter overwhelmed the Praesidium. The Praesidium thus demanded the delegates to prioritise and table at most one amendment each in a new round. This procedural decision de facto saved the FDI reference from deletion. The delegates considered themselves as founding fathers of a European federal state and were unwilling to invest their limited political capital in this historic moment on technical issues such as the FDI reference. Hence, no delegate – including the delegates of the Member State governments – prioritised the deletion of the FDI reference in the second round of amendments. The delegate of the German government, Joschka Fischer, for instance reportedly invested his political capital in the creation of the post of a European Minister of Foreign Affairs, which he hoped to fill one day, and ignored many technical demands from the capital.[59] The delegates ultimately adopted the draft text and sent it to the European Council for concluding intergovernmental negotiations and ratification on 18 July 2003. The observations suggest that the Convention method finally paved the way for the Commission's long-standing policy entrepreneurship to succeed and to extend the CCP to FDI regulation despite significant Member State opposition.

7.3 Business Preferences – Ambivalent and Divided

European business seemed generally little interested in the debates on a reform of the CCP. What is more, the preferences of European business were ambivalent and divided. Only UNICE – today BusinessEurope – voiced its support for an extension of the CCP to FDI regulation. On 28 February 2002, UNICE released, in its capacity as formal observer to the Convention, a position paper enumerating its views on the Constitutional Treaty. UNICE advised extending qualified majority voting, and thereby the scope of the CCP, to FDI regulation, stating:

> In the context of the next Inter-Governmental Conference, UNICE strongly supports an extension of qualified majority voting to issues of major importance to business, such as international negotiations and agreements on services, intellectual property rights and foreign direct investment.[60]

UNICE's firm statement in support of an extension of the scope of the CCP to FDI regulation is remarkable. Many national member federations seemed much less interested and partly even opposed

[58] Interview with Convention participant, Brussels, 12 October 2011.

[59] ibid.

[60] Union des Industries de la Communauté Européenne (UNICE), 'Commission White Paper on European Governance - UNICE position' 2002, 6.

the proposed extension of the CCP to FDI regulation. The Confederation of British Industries (CBI), for instance, published its own position paper, in which it stressed that the EU should indeed play a role in international investment policy. It elaborated, however, that the Member States should remain competent in the core domains of international investment policy like investment protection. It stated:

> There is a good case for the extension of Community competence and [qualified majority voting] to cover negotiations on foreign direct investment. However, certain areas, such as bilateral investment treaties, decisions on inward and outward investment, export promotion and export financing would need to be ring-fenced.[61]

German business was reportedly also critical.[62] The German Federation of Industries (BDI) expounded its hesitation in detail in a position paper, which it released later on the occasion of the discussions on the Commission's draft for the so-called 'grandfathering regulation'.[63] The BDI explained that German business worried that future IIAs negotiated by the EU might not attain the high level of investment protection of German BITs. German business also feared that the competence transfer might raise question marks over the continued validity of German BITs and thereby increase investment risks and costs. German business, moreover, lamented that trade and investment disciplines should not be included in the same agreements. Investment negotiations were about setting legal standards, whereas trade negotiations were about bargaining over market access concessions. The BDI manifestly worried that high investment protection and post-establishment treatment standards might be traded off for enhanced market access commitments. Finally, BDI and government officials interviewed for this study added that German business generally preferred keeping policy-making at the national level, because they perceived the EU's political landscape as opaque and difficult to navigate.[64]

Other major business federations, like the French Mouvement des Entreprises de France (Medef), the Italian Confindustria, the Spanish CEOE, the Polish Leviathan or the European Services Forum (ESF), took little interest in the debates on the CCP and its extension to FDI regulation. The Medef, for instance, participated in the Convention in its role as social partner in domestic collective wage bargaining. It almost exclusively focused on influencing debates on the Single Market and social policies and by and large ignored other policy areas. The Medef reportedly only took note of the debates on a reform of the CCP in regard to the proposed greater role of the European Parliament in

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[61] Confederation of British Industries (CBI), 'Delivering a more Competitive Europe: the CBI's View of the Convention on the Future of Europe' (not dated) 4.

[62] Christian Tietje, 'Gastbeitrag - Europa springt ein' Frankfurter Allgemeine Zeitung (29 January 2009).

[63] Bundesverband der Deutschen Industrie (BDI), 'Positionspapier: Internationale Investitionsförderverträge - Position der Deutschen Industrie zum Übergang der Kompetenzen auf die Europäische Union' (2010).

[64] Interview with business representative, Berlin, 16 February 2012. Interview with German government official, Berlin, 17 February 2012. Interview with business representative, Brussels, 26 January 2012.

this domain.[65] Confindustria and the CEOE reportedly were sympathetic to a greater role for the EU in foreign economic relations, because Italy and Spain were gradually losing in influence on the international political economy. They did not, however, lobby for a strengthening of the EU in this domain at the national or European level and did not hold specific preferences regarding the extension of the CCP to FDI regulation.[66] The Polish Leviathan also adopted a generally pro-European attitude during the Convention debates. Polish business sought to counterbalance the Eurosceptic attitude of the Polish government. The Leviathan did not, however, voice specific demands regarding the CCP. Many other policy areas were much more important to Polish business than international trade and investment regulation.[67] Finally, the ESF did not seek to influence the Convention debates on the CCP despite the investment intensiveness of international services trade. The ESF had been created in the mid-1990s in order to represent European service providers in EU-internal debates on WTO and FTA negotiations. Its institutional mandate did not allow lobbying on Treaty revisions. The ESF was only indirectly involved in the Convention debates through its membership of UNICE.[68]

How can one explain the quite determined position of UNICE in favour of a CCP reform and extension to FDI regulation in light of the ambivalent and divided preferences of its member federations? UNICE adopts its positions by consensus after consultation with its member federations. The UNICE position should have at least partly reflected the hesitation of the BDI and CBI and lack of interest of many other federations regarding an extension of the CCP to FDI regulation. It was reported that the UNICE Secretariat drafted the UNICE position paper and circulated it among its member federations prior to the Convention.[69] The member federations endorsed the CCP section without much discussion. It was only later in the process of drafting the Constitutional Treaty that certain member federations came to the conclusion – after having been alerted by their respective governments – that they actually preferred keeping international investment policy-making at the national level. These federations consequently tried to revise the official UNICE position regarding the extension of the CCP to FDI regulation. The UNICE Secretariat and other member federations were, however, unwilling to reopen discussions. The UNICE Secretariat understood that the shifting of international investment policy-making from the national to the European level would strengthen its position and influence vis-à-vis member federations. Other member federations realised that even though they had not proactively pushed for an extension of the CCP's scope to FDI regulation it was likely to benefit them.

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[65] Interview with business representative, Paris, 3 October 2013.

[66] Interviews with business representatives, Brussels, 27 September 2013.

[67] Interview with business representative, by email, 4 September 2013.

[68] Interview with business representative, Brussels, 25 September 2013.

[69] For this and the following see interview with business representative, Brussels, 26 January 2012.

7.4 The Intergovernmental Conferences on the Constitutional and Lisbon Treaties

At the end of the Convention in summer 2003, the Constitutional Treaty – and the extension of the CCP to FDI regulation – were not yet set in stone. The Member States still had to give their formal blessing to the draft text in an IGC, which in principle allowed for the deletion of disagreeable articles. The European Council formally received the draft text of the Constitutional Treaty on 18 July 2003. It took the following intergovernmental conference almost a year, until 18 June 2004, to reach final agreement on the Constitutional Treaty. The work of the IGC was so time-consuming for two reasons. First and foremost, the Convention had not resolved the most delicate disagreements over issues of high politics like national voting rights, the definition of the qualified majority for Council votes and the role and powers of the EU President and Minister of Foreign Affairs. Forging compromises on these issues proved to be a herculean task. Second, the Member States still disagreed over many technical provisions of the draft treaty. The Convention and its draft text, however, arguably possessed democratic legitimacy, which significantly limited the room for manoeuvre for possible modifications and intergovernmental trade-offs.[70]

The revised CCP articles were of little interest during the IGC on the Constitutional Treaty. While some new Member States reportedly welcomed the extension of the CCP to FDI regulation, Portugal, Ireland, Germany and France remained critical. Yet, this coalition was reportedly unwilling to invest political capital to change such a technicality in the democratically legitimate treaty text in this domain. It managed, however, to introduce a new clause providing for the unanimous adoption of FDI-related measures in the Council of Ministers.[71]

The Constitutional Treaty[72] was signed on 29 October 2004. The final wording of Articles III-314[73] and III-315[74] of the Constitutional Treaty on the CCP finally brought FDI regulation under the scope of the CCP and exclusive Union competence. The joy among European policy-makers over this 'milestone' in modern European history was albeit short-lived. In spring 2005, the French and Dutch

[70] Interview with Convention participant, Brussels, 12 October 2011.

[71] Krajewski (n 55) 104-106; Günther Krenzler and Christian Pitschas, 'Die Gemeinsame Handelspolitik nach dem Entwurf des Europäischen Verfassungsvertrags – ein Schritt in die richtige Richtung' (2005) 51 Recht der Internationalen Wirtschaft 801, 801–802; Interview with Convention participant, Brussels, 12 October 2011.

[72] Treaty Establishing a Constitution for Europe [2004] OJ C310

[73] Article III-314: "By establishing a customs union in accordance with Article III-151, the Union shall contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers."

[74] Article III-315: "The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action…"

public opted in referenda to reject the Constitutional Treaty. The negative outcomes of these votes in allegedly pro-European founding Member States made it politically impossible to further pursue the ratification of the Constitutional Treaty. After a reflection period, European policy-makers came to the conclusion that the EU had, nevertheless, to be reformed in order to keep it governable after the Eastern enlargement. They decided to hold another IGC on the so-called Reform Treaty – today known as the Treaty of Lisbon.

The intergovernmental conference on the Treaty of Lisbon was held between 23 July 2007 and 13 December 2007. The objective of the IGC was to preserve most technical revisions, while cutting back on the symbolic elements of the Constitutional Treaty. In consequence, the IGC decided not to reopen discussions on the – in relative terms – uncontroversial and technical CCP provisions. It was, moreover, reported that the leadership of DG Trade admonished its officials not to draw the attention of the Member States or NGOs to the FDI reference of the revised CCP articles. The Commission hoped that the IGC would not 'rediscover' the reference and simply nod it through.[75] And indeed, in the end Articles 206 and 207 TFEU[76] simply copied former Articles III-314 and III-315 of the Constitutional Treaty. The Treaty of Lisbon entered into force on 1 December 2009 and finally provided the EU with a firm legal competence to regulate FDI flows.

8. Conclusion and Outlook

The article traced the evolution of the EU's competence in international investment policy from the Treaty of Rome (1958) to the Treaty of Lisbon (2009). So why and how did the EU gradually acquire legal competences in this key domain of international economic governance?

8.1 An overview of the findings

The findings of the article lend strong support to neo-functionalist and institutionalist thinking on European integration.[77] The article shows that Commission entrepreneurship was decisive in extending the EU's competences in international investment policy. It persistently pushed the issue onto IGC agendas, had strategic recourse to the CJEU and pointed to the evolving trade agenda in order to build momentum for a competence extension. While strategic recourse to the CJEU proved little effective, the Commission's agenda-setting powers and reference to the evolving trade agenda in GATT/WTO and FTA negotiations left their imprint on policy-making debates. The argument did not *prima facie* convince the Member States, but the extending trade agenda kept the question of the EU's

[75] Interview with Convention participant, Brussels, 12 October 2011.

[76] Treaty on the Functioning of the European Union (TFEU) [2012] OJ C 321.

[77] Antje Wiener and Thomas Diez (eds), *European Integration Theory* (OUP 2009); Ben Rosamond, *Theories of European Integration* (Palgrave Macmillan 2000).

competences on IGC agendas until the Convention. In the Convention, the Praesidium finally took up the Commission's argument and made the decision to add an FDI reference to current Articles 206 and 207 TFEU. The reference ultimately remained in the Treaty text as national technocrats had only limited influence on the drafting process – unlike in classic IGCs – and high-ranking national politicians representing Member State governments showed unwilling to spend their political capital on the deletion of such technicalities from a democratically legitimate draft text. Instead they focused on questions of 'high politics' and the creation of a 'European federal state'. Functional as well as power considerations motivated the Commission's policy entrepreneurship. The intrinsic link between trade and investment indeed suggests that both phenomena should be dealt with under the CCP in order to ensure policy coherence and to avoid a distortion of the EU's foreign economic relations. The Commission, however, arguably also pushed strongly for an extension of the Union's competences to gain greater influence in a key domain of global economic governance. A second important factor contributing to the extension of the EU's competences in international investment policy were unintended spill-overs from other EU policies. By agreeing to the creation of an external capital regime under the Maastricht Treaty and to the extension of the CCP to services trade under the Treaty of Nice, the Member States unintentionally transferred to the EU fringe competences relevant for the regulation of investment liberalization and post-establishment treatment. In consequence, the EU had to legally play a role in these domains of international investment policy.

The Member States, on the other hand, did not push for a competence transfer. While they repeatedly empowered the Commission to negotiate on their behalf on investment disciplines in GATT, WTO and FTA negotiations,[78] they determinedly rebuked the Commission attempts to extend the Union's competences. The Member States' opposition arguably echoed the natural reflex to protect their sovereignty and national BIT programs against European encroachment. The Convention nevertheless led to the extension of the EU's competences, because – as mentioned above – the generalist politicians participating in the Convention unwillingly accepted the CCP extension so as to focus their attention on questions of high politics. European business, finally, seemed badly informed little interested or divided on the question whether the EU should be in charge of international investment policy. European business cannot be considered to have played a decisive role in the gradual extension of the EU's competences in international investment policy.

8.2 Implication – Bureaucrats Rather than Business Drive International Investment Policy-Making

What are the implications of these findings for policy-makers and current debates on the EU's international investment policy? The article casts doubts over the widely held assumption that European business is the main driver of international investment policy-making in general and its

[78] Basedow (n 14).

integration at the EU-level in particular.[79] The article shows that European business lobbying cannot account for the extension of the CCP to FDI regulation. Research on the role of European business in international investment negotiations between the EU and third countries – such as during the Uruguay and Doha Round, on the Energy Charter Treaty or Multilateral Agreement on Investment – lends further support to this finding. Apart from investment liberalization, European business rarely voiced demands in these major international investment negotiations. Instead of businesses, national and European bureaucrats have been shaping international investment policy-making in the EU and in the Member States.[80]

As political economy models account for business mobilisation and lobbying efforts on the basis of welfare impacts of policy measures, the finding implies that international investment policy and agreements may have only a limited impact on business operations, profits and welfare. The study thereby ties into a growing economic literature, which critically assesses the costs and benefits of international investment policy and agreements for states and national economies.[81] Ultimately, the finding also has ramifications for current debates on reforming international investment policy and in particular investment protection and investor- state dispute settlement (ISDS). As business seems to take little interest in these issues – with the notable exception of the highly politicised debates on the Transatlantic Trade and Investment Partnership (TTIP) – policy-makers may be much freer in reforming ISDS than often claimed in debates on TTIP. A reform of ISDS may not have significant negative effects on international investment activities, the operation of foreign affiliates and ultimately welfare as often warned.

8.3 Outlook – The CJEU as a Political Actor Entering the Competence Struggle

The findings of the article are furthermore of relevance as the struggle over the EU's competences in international investment policy is not over yet. The Member States and the Commission cannot agree on a joint reading of the EU's new competences under Articles 206 and 207 TFEU. Whereas some Member States endorse a narrow interpretation of the EU's new competences, the Commission advances a broad interpretation.[82] The breadth of the EU's new competences may significantly affect the EU and the Member States' capacity to act in the international investment regime. To resolve this

[79] See for instance Corporate Europe Observatory, 'TTIP: Debunking the Business Propaganda over Investor Rights' (2014) <http://corporateeurope.org/international-trade/2014/07/ttip-debunking-business-propaganda-over-investor-rights> accessed 30 March 2016; George Monibot, 'This Transatlantic Trade Deal is a full-front Assault on Democracy' The Guardian (4 November 2013); Christoph Pauly and Anne Seith, 'Zahltag für die Geier' Der Spiegel (10 March 2014).

[80] Basedow (n 14).

[81] Liesbeth Colen, Damiaan Persyn and Andrea Guariso, 'What Type of FDI is Attracted by Bilateral Investment Treaties' (2014) LICOS Discussion Paper 346/2014; Eric Neumayer and Laura Spess, 'Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?' (2005) 33 World Development 1567.

[82] For a comprehensive discussion of diverging interpretations and their merits see Angelos Dimopoulos, *EU Foreign Investment Law* (OUP 2011).

simmering dispute, the Commission has recently asked the CJEU to delimit the scope of the EU's new competences in relation to the EU-Singapore FTA.[83] Against the background of this article, the Commission's recourse to the CJEU appears as yet another step to consolidate the EU's role in international investment policy. While this study does not seek to discuss the various methods to interpret European law and possible justifications for a narrow or broad interpretation of the EU's new competences in international investment policy, it sheds extensive light on the *travaux préparatoires.* It shows that the authors of the European Treaties hardly intended to provide the EU with a firm legal competence in international investment policy. Hence, a historically-grounded interpretation of the new competence should lead to a narrow and literal interpretation of the EU's new competences, which may limit the EU's political room for manoeuvre in the international investment regime. An extensive literature discusses possible interpretations and delimitations in further detail.[84]

In the context of the present study, it is more important to assess the political role of the CJEU in this – potentially – final stage of the competence struggle between the Commission and the Member States. It is commonplace in the political science literature[85] that the CJEU is not only a neutral arbitrator of European law but a political actor. The CJEU generally champions integration-friendly interpretations of European law and seeks to protect its unique position and powers in the European legal order. With regard to the EU's newly gained competence over FDI regulation, the CJEU may be torn between these two objectives. It may favour an extensive integration-friendly interpretation of the new Union competence covering all aspects of investment liberalization, post-establishment treatment and investment protection to consolidate the EU's role as an effective representative of the Member States in the international trade and investment regime.

On the other hand, the CJEU may champion a restrictive interpretation to circumscribe the EU's role in investment protection, ISDS proceedings and before a future international investment court. The CJEU may be weary of the Commission's aspirations to turn the EU into a major player in the global investment regime. Investment protection and ISDS challenge the CJEU's monopoly to interpret European law in a binding manner, as arbitrators may have to interpret European law in ISDS proceedings. The CJEU is known to be critical and to circumscribe policy measures, which may

[83] European Commission, 'Singapore: The Commission to Request a Court of Justice Opinion on Trade Deal' (2014) <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1185> accessed 30 March 2016.

[84] See for instance Dimopoulos (n 82), Federico Ortino and Piet Eeckhout, 'Towards an EU Policy on Foreign Direct Investment', in Andrea Biondi et al. (eds), *EU Law after Lisbon* (OUP 2012) 312-327; Thomas Eilmansberger, 'Bilateral Investment Treaties and EU Law' (2009) 46 CMLR, 383.

[85] Karen Alter, *Establishing the Supremacy of European Law* (OUP 2001); Mark Pollack, *The Engines of European Integration: Delegation, Agency and Agenda setting in the EU* (OUP 2003); Wiener and Diez (n 77).

undermine its monopoly. Opinion 2/13[86] of the CJEU about the legality of the draft accession agreement between EU and Council of Europe regarding the EU's accession to the European Convention on Human Rights (ECHR) illustrates this case. While Article 6(2) of the Treaty on the European Union[87] states that the EU shall accede to the ECHR, the CJEU found that the EU could not enter into the agreement and accede to the ECHR unless the European Court of Human Rights was forbidden from resolving disputes among Member States of the EU. Observers commented that Opinion 2/13 was a manifestation of judicial vanity.[88] As similar situations may arise under IIAs and ISDS, it remains to be seen how the CJEU will interpret and delimit the EU's new competences and how this may shape the EU's ability to effectively represent European interests in the world economy.

[86] CJEU, Opinion 2/13, Draft International Agreement — Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms — Compatibility of the Draft Agreement with the EU and TFEU Treaties [2014] ECLI:EU:C:2014:2454.

[87] Treaty of the European Union (TEU) [2012] OJ C 326.

[88] Walther Michl, 'The EU as a Member to the ECHR: Thou Shalt not Have any Courts Before Me', Verfassungsblog (23 December 2014), <http://verfassungsblog.de/thou-shalt-no-courts/> accessed 3 June 2016; Catherine Barnard, 'Opinion 2/93 on EU Accession to the ECHR: Looking for the Silver Lining', EU Law Analysis Blog (16 Februar 2016), <http://eulawanalysis.blogspot.fr/2015/02/opinion-213-on-eu-accession-to-echr.html> accessed 3 June 2016. Paul Gragl, 'The Reasonableness of Jealousy: Opinion 2/13 and EU Accession to the ECHR' in Wolfgang Benedek et al. (eds), *European Yearbook on Human Rights 2015* (Neuer Wissenschaftlicher Verlag, 2015), 27.